

**IN THE HIGH COURT OF TANZANIA**  
**AT MOSHI**  
**(DC) CRIMINAL APPEAL NO. 75 OF 2005**  
**(ORIGINAL DC MOSHI CR. CASE NO. 526/2005)**  
**ROBERT LEO KWEKA ..... APPELLANT**  
**VERSUS**  
**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**HON. JUNDU, J.**

In the trial court, the Appellant was charged and convicted with Stealing by Agent c/s 273 (b) of the Penal Code, Cap. 16, Vol. 1 of the laws. The particulars of the offence were that the Appellant on or between 13<sup>th</sup> November, 2002 and 22<sup>nd</sup> day of May, 2005 at Umbwe Parish Kibosho within Moshi Rural District Kilimanjaro Region, did steal cash money T.shs. 254,660/= the property of Umbwe Parish which was entrusted to him by Elizabeth d/o Mark Mushi being a shop capital. He was found guilty of the charged offence, convicted and sentenced to six (6) years imprisonment.

The record shows that the Appellant was convicted by the trial magistrate on his own plea of guilty which he pleaded on the day when the charge was read over and explained to him. The case was mentioned for the first time on 16/6/2002 and it was when the charge was read over to the Appellant and he pleaded or replied "It is true" which made the trial magistrate to enter or record "a plea of guilty". Thereafter, the Public Prosecutor read the facts of the case to the Appellant (the accused then). Then the trial magistrate made his findings that since the Appellant had pleaded guilty to the charge, then he found him guilty of the charged offence and convicted him accordingly on his own plea of guilty. Thereafter, he sentenced him to six (6) years imprisonment.

Having been aggrieved by conviction and sentence, the Appellant has appealed to this court listing five (5) grounds of appeal in his Petition of Appeal. Based on the stated grounds of appeal the Appellant has prayed to this court to quash and set aside conviction and sentence imposed on him by the trial magistrate and to order his release from the prison forthwith.

The Appellant being a layman, on the day of hearing of the appeal simply prayed to adopt his grounds of appeal as his arguments in this court in pursuance of his appeal. On the other hand,

Miss Mlay, the learned State Attorney who represented the Republic did not support conviction and sentence for reasons that I shall shortly explain.

The first issue which Miss Mlay, learned State Attorney raised was whether the plea of guilty that was entered by the trial magistrate and upon which he convicted the Appellant was unequivocal plea. Miss Mlay, explained and I quite agree with her explanation that the practice in the trial courts in the event that an accused has pleaded guilty and the plea of guilty has been so entered by the trial magistrate, the latter will call upon the public prosecutor to read over and explained the facts of the case to the accused person. The record shows that this was perfectly done by the trial court. However, Miss Mlay contended further that the trial magistrate was to have asked the Appellant who was the accused then whether he admits the said facts as being correct. Miss Mlay contends and I quite agree with her that the trial magistrate as far as the record of the trial court is concerned did not do so. This shortfall on the part of the trial magistrate made the plea of guilty that he had entered in respect of the Appellant equivocal as submitted by Miss Mlay, learned State Attorney.

There is a chain of authority on this point. To mention but a few of such authorities. This court in the case of Kenneth Manda Vs R. [1993] TLR 107 stated

“An accused person can only be convicted on his own plea of guilty if it is ascertained that he has accepted as correct facts which constitutes the ingredients of the offence charged.”

The above authority was cited to this court by Miss Mlay which in my considered view fits squarely the shortfall done by the trial magistrate in the case under this appeal. Further, in R.V. Waziri s/o Musa, 2 TLR (R) 30 this court (Mahom, J.) stated

“In those cases in which the truth of a charge is admitted ---- has been interpreted as meaning that if a person admits the truth of a charge his plea should be entered as one of guilty and conviction thereupon recorded. In my view, however, such an interpretation is too strict. Before recording a conviction a magistrate should hear and record the facts furnished by the prosecutor. The accused should then be asked if he agrees with them, if he does and the magistrate is satisfied that the accused's answer to the charge should

having regard to facts be entered as a plea of guilty then it should be so entered and a conviction recorded”

In the present case under this appeal, the record does not show that the trial magistrate asked the Appellant whether he agreed with the facts of the case as read over to him by the Public Prosecutor. In the case of Yonasoni Egalu and others V. R, 9 E.A.C.S 65, the Court of Appeal for Eastern Africa stated as follows

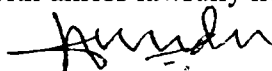
“In any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every element of it unequivocally”.

As we have seen, the facts of the case in the trial court were read over to the Appellant by the public prosecutor, but the trial magistrate, thereafter did not ask the Appellant whether or not he admitted them. Based on the above cited authorities, I quite agree with the submission of Miss Mlay that the plea of guilty that was entered by the trial magistrate in respect of the Appellant was equivocal.

The second issue which in actual fact cuts across all the five grounds of appeal listed by the Appellant is whether the admission of loss on the part of the Appellant could amount to a charge of stealing by Agent c/s 273 (b) of the Penal Code, Cap. 16, Vol. 1 of the laws. The Appellant in his petition of appeal and Miss Mlay in his submission contend that the facts as read by the public prosecutor in the trial court revealed a loss of money that occurred in the ordinary course of business by the Appellant in the shop business that he was doing in his employment rather than Stealing by Agent. This is much more so because having discovered the loss, the Appellant was called upon to refund the said loss and he was so doing until he was sent to court. In my considered view, the proof of the charge of Stealing by Agent c/s 273 (b) of the Penal Code, Cap. 16 in this specific case depended on the Appellant if he had admitted that the facts of the case were correct as he would have been taken to have admitted the ingredients or the elements of the said offence. But as we have already seen that admission was lacking because the trial magistrate did

not call upon the Appellant to admit to the facts of the case whether they were correct or not. I am, therefore, persuaded that what was spoken in the trial court was a mere loss of money on the part of the Appellant in his ordinary course of shop business for which he had already agreed or undertaken to repay or refund the same and he was actually refunding to his employer, that is Umbwe Parish.

In the upshot, the appeal is meritorious. I hereby allow it. I hereby quash and set aside the conviction and sentence imposed on the Appellant by the trial magistrate. The Appellant is hereby set free or released from the prison forthwith unless lawfully held under the law. It is so ordered.

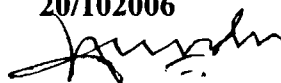


**F.A.R. JUNDU**

**JUDGE**

**20/10/2006**

Right of Appeal Explained.



**F.A.R. JUNDU**

**JUDGE**

**20/10/2006**

20.10.2006

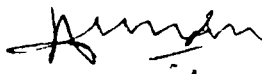
Coram: F.A.R. Jundu, J.

For the Appellant: present

For the Respondent: Miss Rugaihuruzi, State Attorney

C/C: Muyungi

**Court:** Judgment delivered in the presence of the Appellant and in the presence of Miss Rugaihuruzi, learned State Attorney for the Respondent/Republic.



**F.A.R. JUNDU**

**JUDGE**

**20/10/2006**

**AT MOSHI**