

IN THE HIGH COURT OF TANZANIA
AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 10 OF 2016

*(Original Criminal Case No. 189 of 2013 of the District Court of
Dodoma District at Dodoma)*

SAID ABDIAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

13/7 & 22/9/2016

KWARIKO, J;

Appellant herein was arraigned before the District Court of Dodoma with three counts of Stealing by Agent contrary to section 273 of the Penal Code [CAP 16 R.E. 2002]. It was alleged that on unknown date in July, 2012 appellant stole Shs. 16,000,000/= entrusted to him by GWANDI HUSSEIN for generating and maintaining two sunflower and groundnut oil producing machines, two sunflower oil producing machines valued at Tshs. 26,100,000/= property of HUSSEIN GWANDI and Tshs. 4,500,000/= for grinding groundnuts entrusted to him by GWANDI HUSSEIN.

When appellant denied the charge the prosecution brought a total of four witnesses to prove the same. The evidence by prosecution can be summarized as hereunder. The complainant GWANDI HUSSEIN, PW1 evidenced that he knew appellant since 2005 and had been doing crops business together where appellant used to be given money to buy crops in Kibaigwa area. This business went on for four years when in 2009 PW1 bought groundnut grinding machine and handed it to the appellant. The proceeds generated in that business was being shared equally between the two. That, in 2011 PW1 bought another machine and in 2012 upon appellant's advise PW1 bought sunflower grinding machine both being installed at Kibaigwa. PW1 went on to evidence that in May, 2012 he gave Shs. 17,000,000/= wherein Tshs. 5,000,000/= was from maize business the appellant had generated and two sunflower machines were bought. Tshs. 5,000,000/= were used for site preparation.

Further, PW1 testified that it was agreed that one machine could be given to the appellant should the business flourish. That, in August, 2013 the appellant demanded money to run the business whereas PW1 secured loan of Tshs. 16,000,000/= from a third party for that purpose and appellant promised to refund it in March, 2013.

In March, 2013 the appellant said he had no money and asked to be excused until 20/4/2013. On that date the appellant promised in the presence of PW1, PW2, SIMON CHIGOMA KAMANDO and PW3, JUMA OMARY that he had really received the money Tshs. 16,000,000/= and that he could refund it. The appellant did not honour his promise on 20/5/2013

and he could not be traced on 20/6/2013 and when PW1 followed him in August, 2013 he was not there and the machines were not found.

Therefore, it was due to communication breakdown that PW1 decided to report the matter to police where PW4, No. E 3915 D/CPL VEDASTUS was assigned to investigate the matter. PW4 said he found one machines at Kibaigwa and the appellant informed him that one of the machines belonged to him while another belonged to PW1 and admitted liability of Tshs. 7,500,000/=.

In his defence the appellant said he knew PW1 since 2005 but they started groundnuts business in 2007 and in 2008 PW1 bought grinding machine which was fixed in his (appellant's) business place. PW1 took the machine in January, 2012. That, he was the one who used to supervise the whole business operation to the extent of raising capital of Tshs. 26,000,000/=. He also admitted that groundnuts proceeds were shared equally.

The appellant further evidenced that they bought two machines to process sunflower but each contributed shs. 8,500,000/= obtained from groundnuts business. That, he used to send business proceeds to PW1 through bank as per exhibit D1.

At the end of the trial the appellant was acquitted in the second and third counts and convicted in the first count and was sentenced to a conditional discharge of twelve (12) months and an order of compensation

of Tshs. 16,000,000/= to the complainant was made. There is no record that the appellant has paid the compensation.

Having been aggrieved by the trial court's decision the appellant filed this appeal through National Attorneys.

In his amended petition of appeal appellant raised the following three grounds of appeal;

- 1. That, the learned Trial Magistrate erred in law and fact for convicting the Appellant on a criminal charge which was at variance with evidence.*
- 2. That, the learned Trial Magistrate misdirected himself in law and fact in failing to consider the weight of Appellant's evidence.*
- 3. That, the learned Trial Magistrate erred in law and in fact in his finding that the ingredients of the offence charged were proved.*

At the hearing of the appeal Mr. Malimi learned advocate argued the same on behalf of the appellant where Mr. Sarara learned State Attorney appeared for the respondent Republic and opposed this appeal. The submissions by Counsel for the parties will be referred, if need arises, in the course of this judgment.

The issue to decide now is whether the appeal has merit.

As regards the first ground of appeal this court is in agreement with the appellant's counsel that whereas appellant was alleged to have stolen money and machines but the evidence on record did not prove the ingredients of stealing. What has been seen in the evidence is that PW1 and the appellant had been doing business together on their agreed oral terms and if there were any problems in that agreement it did not create any criminal liability.

This is so because both PW1 and appellant evidenced that during the time groundnuts business was in progress they used to share the proceeds equally between the two and when they found the business flourished they moved ahead to sunflower business and bought machines to process the same. There is no evidence on record by PW1 to show that the appellant was mere agent to do his business worth millions of shillings.

Further, although the charge said that appellant stolen machines but in his evidence PW1 said the machines were not removed from Kibaigwa area where they had been installed.

For the foregoing, it is this court's considered view as rightly argued on behalf of the appellant that PW1 and the appellant's matter is business relationship gone sour which cannot be resolved in criminal court but in civil court so that evidence in relation to the calculations of the business can be tabled by each party for the court to decide each one's rights and obligations. Therefore, as rightly complained in this ground of appeal the charge against the appellant is at variance with the evidence presented to prove the same. The law says that in the absence of an amendment of the

charge the prosecution is bound by the particulars it sets out to prove (see also *UGANDA V. WARAGA* [1964] EA 366). Thus, in this case while the prosecution alleged stealing by agent the evidence on record show that the appellant and complainant were business partners whose problems or misunderstandings cannot be rightly solved in criminal court but in civil court. This ground of appeal has merit.

In the second ground of appeal this court is again in full agreement with the submission made on behalf of the appellant that the trial court did not at all consider defence evidence. The record shows that after summarizing evidence from both sides the trial Magistrate only praised the prosecution evidence and convicted the appellant. This was contrary to law and in violation of one of the principles of natural justice which says that no one is supposed to be condemned unheard. In this case the appellant was not heard before adjudged when he was convicted without his defence case was being considered. To be unheard also is to contravene our constitutional provision envisaged under *Article 13 (6) (a) of the United Republic of Tanzania Constitution, 1977*.

Thus, had the trial Magistrate considered appellant's defence evidence he could have found that there was no criminal acts on the part of the appellant but only civil matters which ought to be dealt with as shown in the preceding ground of appeal. Consequently, non-consideration of defence evidence was fatal to the decision as was said by the Court of Appeal of Tanzania in the case of *HUSSEIN IDD & ANOTHER V. R* [1986] T.L.R 166, that;

"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence".

The second ground of appeal thus succeeds.

Thirdly, as already pointed out earlier the evidence on record does not prove that there were criminal acts on the part of the appellant. Hence, to prove criminal responsibility the prosecution ought to prove ingredients of theft as rightly complained in the third ground of appeal. Theft is defined under section 258 (1) of the Penal Code (supra) that;

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.

In this case the prosecution did not prove that appellant stole anything from PW1. This ground of appeal also has merit.

Lastly, coupled with the foregoing, the prosecution did not even specify which sub-section from (a) to (e) under section 273 of the Penal Code (supra) the appellant's criminal action relates. It is the law that where provision of law is divided into sub-sections, specific one in relation to subject matter should be shown, otherwise it is failure by the prosecution to properly inform accused of the charge so that he can sufficiently

marshal his defence. (see also *MATHAYO KINGU V. R, Criminal Appeal No. 589 of 2015, Court of Appeal of Tanzania at Dodoma (unreported)*).

Be as it may, for the foregoing, this court is settled in mind that the prosecution case at the trial was not proved beyond reasonable doubt as required in law and hence the appeal has merit and is allowed, conviction quashed and sentence and order of compensation set aside.

It is ordered accordingly.

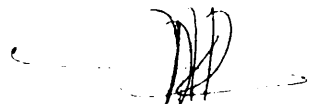


M.A. KWARIKO

JUDGE

22/9/2016

Judgment delivered in court today in the presence of the Appellant and Ms. Magili learned State Attorney for the Respondent Republic. Mr. Nyembe Court Clerk present.



M.A. KWARIKO

JUDGE

22/9/2016

Court: Right of Appeal Explained.



M.A. KWARIKO

JUDGE

22/9/2016