

**IN THE HIIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**PC. CRIMINAL APPEAL NO. 16 OF 2017**

**JITTU ALLY ..... APPLICANT**

**VERSUS**

**HANIF ADAM ..... RESPONDENT**

*19/04/2018 & 27/4/2018*

**JUDGMENT**

**I.P.KITUSI, J.**

Jittu Ally, the appellant, was charged for theft contrary to section 265 of the Penal Code, before the Primary Court of Mbagala within Temeke District. It was alleged that he stole a total of shs 3, 500,000/= from Hanif Adam, the respondent. The appellant was found guilty and convicted of the offence. He was sentenced to one year community service and ordered to pay the money (Shs 3,500,000/=) to the respondent.

The appellant challenged the decision at the District court of Temeke raising among the three grounds that the trial court erred in treating a civil matter based on contract as a criminal case. The appellate District Court accepted this ground as meritorious and cited provisions of the Law of Contract Act Cap 345 observing that the respondent should have filed a Civil suit. However the appellate District Court sustained the order for compensation, and in my view

that is what this appeal intends to challenge in this two ground Petition of Appeal as follows;

*" 1. That the court below erred in law by sustaining the order for recovery of debt made by the court below after sustaining the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal.*

*2. That in view of the proceedings dated 9/11/2016 of 30/11/2016, the court below erred in law by falsifying the proceedings by mentioning pleadings filed by both parties instead of mentioning defaulting the proceedings."*

I have not been able to decipher what the appellant intends to raise in the second ground of appeal and having considered the relevant facts of the case and the decision of the District Court, I am satisfied that the issue for determination lies in the first ground of appeal.

Briefly the background of the matter is that the appellant obtained a loan of shs 3, 500,000/= from the respondent which he defaulted in payment. The respondent went to Mbagala Primary Court where he filed against the appellant a charge of theft contrary to section 265 of the Penal

Code. The trial court's conviction and sentence were challenged by the appeal before the District court as aforesaid.

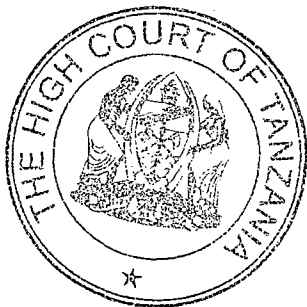
During the hearing of this appeal the appellant briefly submitted that he did not steal from the respondent and that the latter preferred a Criminal Case to a Civil Case. On his part the respondent could not really head or tail the matter. In one breathe he agreed with the appellant that it was a civil matter but then submitted that the court was correct in convicting him with the offence of stealing.

With respect theft as defined under section 258 of the Penal Code is established where there is an intent to permanently deprive the owner of the thing. See also the recent decision of this court (Twaib, J) in **Peter Paul Joseph V. Republic**, Criminal Appeal No. 121 of 2016, High Court at Mtwara, (unreported). In the case at hand there was no proof of that intent therefore the appellate District court was right in allowing the appeal and observing that the matter was civil in nature.

The issue for determination is whether having quashed the conviction of theft the appellate District Court was correct in upholding the order of compensation. With respect to the learned Resident Magistrate, compensation is a form of punishment provided for under section 25(f) of the Penal Code, Cap 16. I hardly need to remind the learned magistrate that sentencing follows conviction as provided under section 39 of the Primary Court Criminal Procedure Code, Third Scheduled to the Magistrate Court Act, Cap 11;

*"After conviction the court shall consider the question of sentence and may hear such evidence, on oath or affirmation as it thinks necessary to assist it to determine the sentence to be passed."*

I do not see in section 21 of the Magistrates' Courts Act Cap 11 anything which provides for the District Court's appellate powers of sustaining a sentence against a person whose conviction it has quashed. Consequently I agree with the appellant that the learned Resident Magistrate erred in law, for which reason I quash the judgment as far as it relates to the order of compensation or recovery, and set it aside. The appeal is hereby allowed. Let the parties pursue their rights in a civil court.



  
**I.P. KITUSI**  
**JUDGE**  
**27/4/2018**

**27/4/2018**

Coram : HON. MAGUTU –DR

For the Appellant : Present

For the Respondent : Present

Cc: MWANGOKA

Court: The judgment delivered on 27/4/2018 in presence of the parties.

**A.A.MAGUTU**

**DR**

**27/4/2018**

Right of Appeal full explained.

**A.A.MAGUTU**

**DR**

**27/4/2018**