

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.81 OF 2019

(Original Masasi District Court Criminal Case No.82/2018)

BETWEEN

DONALD DICKSON @KISHOKA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

13 May & 8 June, 2020

JUDGMENT

DYANSOBERA, J.:

The appellant was charged in the District Court of Masasi with the offence of stealing by agent contrary to section 273(b) of the Penal Code, [CAP 16 R.E. 2002]. It was alleged that on 16th day of September, 2012 at about 1600 hours at Lilala village within Masasi District in Mtwara Region did steal one motorcycle make Sanlg Reg. No. T.145 CAB worthy Tshs.1, 970,000/= the property of one FINTAN MORRIS which was entrusted to him to use it as a means of transport but instead of doing so he converted it for his own

benefits. At the end of the day, the appellant was convicted and sentenced to three (3) years imprisonment. Dissatisfied with the conviction and sentence, he has appealed to this court.

The factual background of the matter can be briefly stated. On 16.9.2012 at 0400 hours the appellant approached PW1 one Phintan Moris in the presence of Gerald Mchongoma (PW 2), asked for and was given the motorcycle so that he went to Chiwale village to buy wheat flour. The appellant never returned it; instead; disappeared with it. PW 1, upon realizing that he was gyped reported to the police and was given an RB. On 1st August, 2018 PW 1 received a phone call from John Sanje (PW 4) informing him that the appellant was seen at Mkuti market. PW 4 also reported to the police who arrested the appellant and took him to Masasi Police Station. When interviewed by PW 5 one E8754 DCP Aloyce, the appellant admitted to have borrowed the motor cycle from PW 1 for the purposes of buying wheat flour in the nearby village. PW 5 recorded the appellant's police statement which he tendered in court and was admitted as exhibit P3.

As evidence of ownership of the motor cycle, PW 1 produced in court the motor cycle registration card (Exhibit P1) and a profoma invoice (Exhibit P2).

In his defence the appellant admitted to have hired the said motor cycle but contended that it was stolen by someone and was afraid of telling PW 1 of his being robbed and requested to pay PW 1 for the stolen motor cycle by instalment.

The trial District Court was satisfied that the charged offence was proved beyond reasonable doubt, convicted the appellant and sentenced him accordingly.

In his endeavour to impugn the trial court's decision, the appellant had come to this court armed with the following grounds of appeal:-

- 1. THAT, the learned trial magistrate erred in the law point(sic) and fact when admitted the evidence of PW1,2 and 3 by believing that the appellant was stolen(sic) the said motorcycle as an agent without taking into account that the appellant was not an agent as claimed by the charge sheet from the Republic.*
- 2. THAT the trial magistrate was erred in low point (sic) and fact when failed to evaluate the evidence on record that the appellant was not a thief*

but there was an agreement between Pw1, and the appellant even if the appellant was delayed to return back the motorcycle.

3. THAT the learned trial Magistrate was erred the law point (sic) and fact when the convicted the appellant relying on section 273(b) of the penal code cap 16 RE 2002. Whenever the evidence of on (sic) record revealed that the said charge was under 265(sic) of the penal code cap16 RE 2002. Hon. Judge was the duty of trial magistrate to convicted (sic) the appellant not more than two years since the said criminal was like an ordinary thefts the penal code (sic)

4. THAT the learned trial magistrate was erred the law point (sic) and fact when he disregarded the defense of the appellant and the said sentence was excessive according to the MCA cap RE 2002(sic)

5. THAT The magistrate was erred The law point (sic) and fact were said Pw1,Pw2 and Pw3 corroborated with caution statement of the accused person or appellant relying and depending on the evidence of Pw5(Police officer and exhibit P3 caution statement allegedly) to be recorded while at police Station if without take into consideration that the did (sic) exhibit was improperly received in court due to the fact that up(sic) said exhibit was obtained contrary by the law since the appellant was threatened and

*forced to sign the alleged exhibit. A part from that the PW5 did not sent the appellant to the justice of peace so that the record extra judicial statement and tender it in as exhibit. Please my lord refer in the case of **Bushiri Mashaka and 3 others VS fat at Dar es Salaam main Registry in Criminal Appeal No.1991**(unreported).The Court held that "if the accused person confessed while at Police Station the safest way to adopt was to let, him to repeat his or her confession before the justice of Peace "Also the case of **R. V Hassan Jumanne (1983)** TLR No.432.It was emphasized that "A confession mad(sic) in Police Station whether Voluntary or involuntary cannot alone be the basis of conviction."*

6.That the charge of stealing by agent was not proved by the prosecution sidr (sic)as required by the law.

Before me, on 13.5.2020 the appellant appeared in person, unrepresented whereas the respondent Republic enjoyed the services of Ms. Caroline Matemu, learned State Attorney. The appellant informed the court that he had filed six grounds of appeal and prayed to rejoin after the learned State Attorney had responded to his grounds of appeal.

Ms. Caroline Matemú, State Attorney, submitted that the appellant was facing a charge of stealing by agent the evidence sufficiently proved the case beyond reasonable doubt. The learned State Attorney contended that PW1 detailed how the appellant took the motorcycle for good and that evidence was supported by the evidence of PW2 and PW3. The learned State Attorney further argued that, the appellant never took back the motorcycle nor gave any explanation rather disappeared and it is after six years when was arrested. Additionally, Ms. Caroline Matemú submitted that, the appellant does not deny to have taken the motorcycle or did not deny to have failed to return it back rather he claims to be robbed and did not report matter to PW1. Further, that the appellant stayed with motorcycle for six years and did not return it until when he was apprehended. Learned State Attorney concluded that the offence of stealing by agent was proved, the sentence was normal and by no means excessive.

In rejoining, the appellant responded that he did not commit the act that is why he has appealed. He pressed that no justice was done to him. He ended his submission by stating, "you are my defend... (matatazi wangu)" insinuating that the trial did not do justice to him.

Having gone through the grounds of appeal, the submissions from both sides and the trial court's record, I find the most important issue calling for determination in this appeal is, whether the case against the appellant was proved beyond reasonable doubt. As the record shows, the appellant was incarcerated on contravening the provisions of section 273 (b) of the Penal Code, Cap 16 R.E. 2002 on the offence of stealing by agent. It is provided thereunder:-

"273.

If the thing stolen is any of the following things, that is to say—

*(b) Property which has been **entrusted to the offender** either alone or jointly **with any other person for him to retain in safe custody or to apply, pay or deliver it or any part of it or any of its proceeds for any purpose or to any person**"*

Glancing from the above and as properly submitted by the two sides, the evidence brought by the prosecution failed to disclose the whole aspect of agency and entrustment of the property to the appellant and for either reason to retain in safe custody or to apply, pay or deliver it or any part of

its proceeds, for any purpose or to any person. The prosecution evidence reveals that the appellant took the motorcycle from PW1 for the purpose of using it to carry wheat flour from the nearby village called Chiwale. So far, the evidence of PW1, PW2 and PW3 shows that on 16/9/2012 the appellant hired the motorcycle of PW1 make Sanlg with registration No.T.145 CAB worth Tshs.1,970,000/= for the purpose of carrying wheat flour in a nearby village. This piece of evidence does not show the proof of the ingredients of the offence of stealing by agent as provided by section 273(b) of the Penal Code (supra). As the law clearly depicts, stealing c/s 265 and stealing by agent c/s 273(b) of the Penal Code, are sections which both deal with the offence of stealing; in other words, stealing is a "particular" common to both sections. However, section 273(b) contains an additional "particular" namely, the fact of entrustment of the property in question for a particular purpose.

In the case of **Christian Mbunda v. R**, [1983] TLR 344 Hon. Justice Msumi, J. (as he then was) held that: -

"for an appellant to be convicted under Section 273 (b) the prosecution must prove, inter alia, that he came into possession of the alleged stolen property as an agent of either the real owner or special owner".

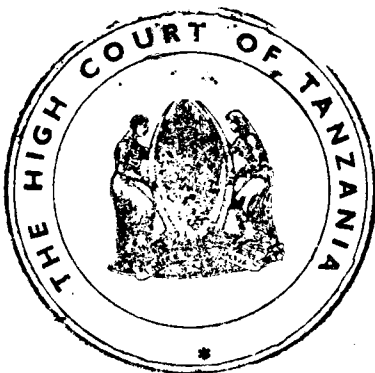
In the light of the above cited case the prosecution did not establish the entrustment of the property to the appellant and agency relationship between the appellant and PW1 but what is seen on record is hire agreement between PW1 and the appellant as far as witnessed by PW2 and PW3 .In addition to that, the prosecution was mandated to establish principal agent relationship in that there should be a proof that PW1's property was entrusted on the appellant for certain purpose and that appellant mishandled the said property contrary to the instruction by the PW1.It apparent that the evidence adduced by the prosecution side before the trial court did not cover the offence of stealing by agent.

Before I pen down, I have to sound a note of remark on what should be done when an exhibit has been admitted in court. The procedure for admission of a confession is regulated by the Evidence Act, [Cap 6 R.E. 2002] and case law. Therefore, like any other documentary evidence whenever it is intended to be introduced in evidence, it must be initially cleared for admission and then admitted before it can be read out (See **Walii Abdallah Kibutwa and Two Others v. R**, Criminal Appeal No. 181 of 2006 (unreported). Failure to read the contents of

the caution statement after it is admitted in the evidence is a fatal irregularity.(See **Lack Kilingani v. Republic**, Criminal Appeal No.405 of 2015. In the case under scrutiny, at page 7 and 8 of the record, the cautioned statement was irregularly admitted though was marked as Exhibit P3 as after it was admitted in evidence, the contents were not read out to the appellant. This was a fatal irregularity.

From the foregoing reasons, I am satisfied that the case against the appellant was not proved to the required standard. There was merely a hire contract which the appellant breached. The remedy was not to go to a criminal court but to pursue the relief by way of civil suit.

The end result is that I allow the appeal, quash the conviction and set aside the sentence meted out against the appellant. I order the appellant's immediate release from prison unless he is otherwise being continually held for some other lawful causes.

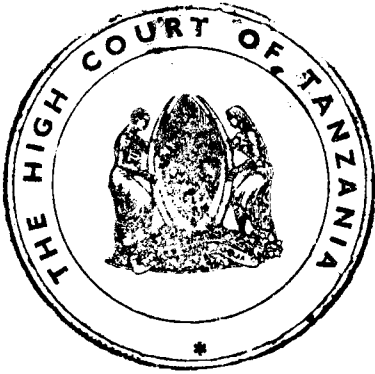




W.P. Dyansobera

JUDGE

8.6.2020

This judgment is delivered under my hand and the seal of this Court on this 8th day of June, 2020 in the presence of Mr. Paul Kimweri, Senior State Attorney for the respondent and in the presence of the appellant




W.P. Dyansobera

JUDGE