

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 161 OF 2020

BETWEEN

JUMA ABDALLAH KAOMBWE \_\_\_\_\_ APPELLANT

VERSUS

THE REPUBLIC \_\_\_\_\_ RESPONDENT

*(Arising from the decision and orders of the district court of Tarime at Tarime, Hon. Mugendi RM, in criminal case no 120 of 2019 dated 07.08.2020)*

RULING

*26<sup>th</sup> January & 5<sup>th</sup> February 2021*

**GALEBA, J.**

In this appeal, the appellant, **Mr. Juma Abdallah Kaombwe** a resident of Tabora entered into an unwritten agreement of supplying new sisal sacks to **Mr. Emmanuel Kituti Nsongo** a resident of Sirari in Tarime Northern Tanzania. On one occasion, on 21.07.2018 **Mr. Nsongo** deposited Tshs. 18,750,000/= on **Mr. Kaombwe's** account in consideration for the latter to supply 270 sisal sacks. The duo, had been doing the business on trust for some time and even past, July 2018, the parties did business, especially in September and December 2018. On all occasions **Mr. Nsongo** would send money as per his requirement and **Mr. Kaombwe** would supply the goods. According to **Mr. Nsongo** the

consignment of 270 sisal sacks corresponding to the 21.07.2018 payment of Tshs. 18,750,000/= was neither supplied nor delivered. He reported to the police and Mr. **Kaombwe** was arrested and charged of the offence of stealing by agent under section 273(b) of the **Penal Code [Cap 16 RE 2019]** (the Penal Code). Although **Mr. Kaombwe**, pleaded to have supplied the goods, but the trial ended in his conviction and a sentenced of two (2) years imprisonment, although later he was sentenced to render community service for the same period under the **Community Service Act No. 6 of 2002**.

In this appeal, **Mr. Kaombwe** is appealing against his conviction and the sentence. To do that he mounted 9 substantive grounds of appeal for determination. However, because of the reasons that will be clearer in a moment, we will not indulge in the grounds first.

When this appeal was called for hearing on 26.01.2021, I asked Mr. Frank Nchanila, the learned state attorney who was appearing for the respondent, whether the criminal prosecution and proceedings in the district court were meritorious in the first place because for the appeal to be competent the proceedings from which the judgment emanated must

have been competent. I asked him whether the matter was not squarely fitting within business law or the law of contract categories.

Mr. Nchanila submitted that because the complainant proved that goods were not supplied and delivered, then ***mens rea*** for the offence of stealing by agent was proved, and that the appellant stole the money that was deposited in his account. He submitted that the matter fell within the domain of criminal law and the prosecution was deserved. As the appellant was a layman, he had nothing to put across for or against the point raised, except to swear that he was not a thief.

I have given Mr. Nchanila's submission sufficient thought and consideration, however, I am afraid, this court cannot support his line of reasoning. In this case, **Mr. Nsongo**, the complainant, testified that in their dealing he would send **Mr. Kaombwe** money and the latter would send him empty sisal sacks in consideration thereof. This evidence tallies and agrees well with that of **Mr. Kaombwe** that amongst the deals concluded by them harmoniously include those of February, June, July, September and December 2018. Even in January 2019, according to **Mr. Kaombwe** the two concluded a deal only that while in his shop in February 2019 he was arrested for the July 2018 transaction which for one

reason or the other might not have ferried to Sirari as contracted. **Mr. Kaombwe's** evidence was that the amount of goods that are unsupplied are only 86 bundles of empty sisal sacks. Failure to supply goods or services after the supplier has been paid the purchase price by the buyer is called, in law breach of contract and not a crime.

Section 273(b) of the Penal Code provides that;

***"273. Stealing by agents, etc***

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

***(a) n/a;***

***(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;***

***the offender is liable to imprisonment for ten years."***

The important point to gather from the above provision is that, the suspect must be entrusted with a thing subject of the theft as an agent for a third party principal. The provision does not apply where one is paid money as purchase price for goods or services he has to supply, which is a civil liability. In the case of **Christian Mbunda v. R, [1983] TLR 344**, this court Hon 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".***

See also **Donald Dickson Kishoka v the Republic**, Criminal Appeal no 81 of 2019 (HC Mtwara unreported). In our case, in the district court I did not find any evidence showing that **Mr. Kaombwe** was an agent of anybody. He was a principal party to the agreement of sale of sisal sacks to **Mr, Nsongo**.

It is the holding of this court that remedies and reliefs available in business and commerce related conflicts reside in the realm, not of criminal courts, but of civil courts with competent jurisdiction to handle such litigations. Criminal courts were not established to enforce breach of contract, civil courts were. The relationship between **Mr. Kaombwe** and **Mr, Nsongo** was contractual. I do not agree with Mr. Nchanila that failure to pay the purchase price was *means rea*. It was not; rather it was breach of contract.

What happened between the parties is further not criminal because **Mr, Nsongo** did not entrust **Mr. Kaombwe** with anything as an agent as required by section 273(b) of the Penal Code as interpreted by this court in

**Christian Mbunda v. R** (supra). In the circumstances there is no criminal act which was committed by the appellant. It follows therefore that the prosecution of **Mr. Kaombwe** was a misfortune and his trial, a disgrace.

Based on the above reasons, this court orders that;

1. The entire trial, the proceedings, findings, conviction and all that transpired in the district court of Tarime in criminal case no 120 of 2019 including a sentence of two years imprisonment or community service are hereby nullified.
2. **Mr. Juma Abdallah Kaombwe** is hereby acquitted and accordingly he should not continue to serve any sentence be it imprisonment or community service.
3. This appeal is incompetent for emanating from incompetent proceedings. The same is struck out.

DATED at MUSOMA this 5<sup>th</sup> February 2021.



Z. N. Galeba  
**JUDGE**  
**05.02.2021**

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