

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(SONGEA DISTRICT REGISTRY)
DC CRIMINAL APPEAL NO 02/2021
(Originating from the District Court of Mbinga at Mbinga Criminal Case
No.112/2020)

MARTIN KUMBURU APPEALANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Date of Last Order: 21/04/2021

Date of Judgment: 12/05/2021

BEFORE: S.C. MOSHI, J.

The appellant was arraigned before the District court of Mbinga at Mbinga for the offence of Stealing by Agent contrary to section 258(1) and 273(b) of the Penal Code Cap. 16 R.E. 2019. It was alleged that on 9th day of July 2020 at Lupilo village within Mbinga District in Ruvuma Region the appellant did steal T.shs 2,600,000/= which was entrusted to him by Kolman Mbunda to buy him 65 bags of maize the property of Diocese of Mbinga, however he used the money for his own benefit. After a full trial, the appellant was found guilty and he was convicted accordingly. Consequently, he was sentenced to six months imprisonment. He was also ordered to pay 2,600,000/= to the victim after

the completion of serving his sentence. Aggrieved by the conviction and sentence he has appealed to this court on the following grounds: -

- 1) That, the learned Magistrate erred in law and fact to convict the appellant for offence which was not proved beyond all reasonable doubt as required by law due to the fact that during the handling of the money there were no village officers witnessed(sic) the transaction even there was no receipt produced before the court of law to prove the same which is against law of contract of sales of goods.*
- 2) That, the learned trial magistrate erred in law and fact to rely on the evidence of the prosecution without considering the defense evidence adduced before the court of law that this case was fabrication due to the denial of the appellant to lend the bags of maize to the respondent and all public witness were relatives and have personal interest on the case.*
- 3) That, the trial magistrate erred in law and fact to rely on the evidence of the respondent without considering that the maize in conflict was family maize and no communication was made to the appellant spouse concerning the agreement of selling the bags of maize and research to the same was not made to obtain the consent of the spouse.*

At the hearing of the appeal the Republic was represented by Mr. Frank Chonja, State Attorney whereas the appellant was unrepresented.

The appellant had nothing to add to the grounds of appeal.

Mr. Frank Chonja, opposed the appeal by submitting that the prosecution proved the case beyond a reasonable doubt as four witnesses testified for republic. All witnesses stated that the appellant received T.shs 2,600,000/= from PW1 however he didn't deliver 65 bags of maize to PW1 as agreed. He said that, the law doesn't require village officers to witness an agreement or a sale transaction. He also said that, the fact that there is no receipt does not mean that there was no agreement as the agreement may be oral or in written form; in this case the agreement was oral.

On the second ground, Mr. Frank stated that, it is meritless too because the copy of judgement shows that the court considered defence evidence but the court found that prosecution's evidence was heavier. That is why it convicted him. On the issue that the witnesses were relatives having interest with the case; he said that this argument is baseless in view of Tanzania Evidence Act, under section 97 (1) which provides for competency of witnesses. He argued that the witnesses were competent to testify that is why the court believed their evidence. He argued further that, if the appellant had this concern, he was supposed to raise it during the trial not at appellate stage.

Submitting on the third ground, Mr. Frank stated that, this ground also has no merit as spouse consent is not a requirement when the transaction involve properties unless it is a mortgage or sale of a family land. He said that, this is a criminal case; this ground too was supposed to be raised during the trial.

On the other note, Mr. Frank submitted that he noted an irregularity in the charge sheet. It is shown that, the appellant was charged with stealing by agent contrary to section 258 (1) and 273 (b) however he was not charged with section 265 of the Penal Code, Cap. 16 R.E 2019. He said that, therefore the charge didn't disclose the offence. He said that, however, the defect can be cured under section 388(1) of the Criminal Procedure Act, Cap. 20 R.E 2019 especially if the particulars disclose the offence. He supported the argument by citing the case of **Mathias Venance Naboth vs. R**, Criminal Appeal No. 275 of 2006, Court of Appeal sitting at Mbeya (Unreported)

I have decided to deal with the anomaly which was pointed out by Mr. Frank Chonja as the same suffices to dispose off the appeal.

The charge sheet shows that the statement of offence is stealing by Agent contrary to section 258(1) and 273(b) of the Penal Code, Cap. 16 R.E 2019. I find it important to reproduce the sections for easy of reference.

Section 258(1) provides that: -

- (1) *A person who fraudulently and without a claim of right takes anything capable of being stolen, or fraudulently convert to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing. And,*

Section 273(b) provides that:-

"273. If the thing was stolen is any of the following things, that is to:-

(b) a 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 charge sheet under consideration was framed as follows: -

STATEMENT OF THE OFFENCE

Stealing by agent contrary to Sections 258(1) and 273(b) of the Penal Code, Cap. 16 R.E 2019.

PARTICULARS OF THE OFFENCE

MARTIN KUMBURU on 9th day of July, 2020 at Lupilo village within Mbinga District in Ruvuma Region, did steal T.shs. 2,600,000/= which come to him after being entrusted by KOLMBAN MBUNDA to buy him 65 bags of maize the property of

rendered the charge sheet defective. In the case of **Mathias Venance Naboth vs. R (supra)** particularly at page 9, it was held that non inclusion of section 265 of the Penal Code Cap 16 R.E 2019 cannot be cured under section 388(1) of the Criminal Procedure Act Cap. 20 R.E 2019. Similarly, in this case the charge does not disclose the offence at all; hence nothing can be cured.

Likewise, in the case of **Isumba Huka vs. R**, Criminal Appeal No. 113 of 2012, Court of Appeal at Mwanza (Unreported), the Court of Appeal held that the charge sheet which is incurably defective, whatever followed thereafter cannot sustain.

That said, I allow the appeal, quash the conviction and set aside the sentence and compensation order of T.shs. 2,600,000/=. The appellant has to be released from prison forthwith unless he is held for other lawful purposes.

Order accordingly.

Right to appeal explained.




S.C. MOSHI

JUDGE

12/05/2021

