

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 91 OF 2021**

*(Originating from Criminal Case No. 575/2019, Kinondoni District Court)*

**GODBLESS WARIANKIRA LEMA.....APPELLANT**

***VERSUS***

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*12.07.2018-27.08.2021*

**E.B. LUVANDA, J.**

Godbless Wariankira Lema the appellant herein was convicted and sentenced to seven years imprisonment for an offence of stealing by agent contrary to sections 258(1) and (2)(a),(b),(c),(d) and (e) and 273(b) Penal Code Cap 16 R.E 2002. Aggrieved, the appellant presented six grounds of appeal; one, the learned principal resident magistrate grossly erred in law and fact by upholding the conviction and sentence against the appellant by entertaining, trying and determining the matter as criminal case while it is pure civil matter; two, the presiding principal resident magistrate grossly erred in law and facts by upholding the conviction and

sentence against the appellant without considering that the ingredients in proving the offence of stealing by agent were not proved beyond reasonable doubt; three, the presiding principal resident magistrate grossly erred in law and facts by upholding the conviction and sentence against the appellant based on contradictory evidence of PW1 and PW2; four, the district court grossly erred in law and facts by upholding the conviction and sentence against the appellant by relying on caution statement which was improperly recorded and obtained; five, the district court grossly erred in law and facts by ordering the payment of compensation to the tune of Tsh 27,008,000/= against the appellant herein without proof thereof; six, the presiding principal resident magistrate grossly erred in law and facts by upholding the conviction and sentence against the appellant based on defective charge sheet.

Mr. Hardson B. Mchau learned Counsel filed written submission for all six grounds of appeal, Ms Florida Weslaus learned State Attorney for the respondent, supported the appeal and presented her argument in respect of ground number six only.

I will start with ground number six. Both the learned Counsel for appellant and the learned State Attorney were of the view that the charge sheet was incurably defective, on account of failure or omission to cite section 265

Penal Code, Cap 16 R.E. 2019, which according to them vitiate the whole trial for reason that the appellant was not properly charged. To buff up their argument, they both purported to cite the decision of this Court, speaking through Honorable Mgeyekwa, J: **Christopher Kyalo @ Muthama vs Republic**, Criminal Appeal No. 10 of 2020, High Court Mwanza (unreported), cited by the learned Counsel for the appellant and **Zawadi Huruma @ Mbilinyi and another vs Republic**, Criminal Appeal No. 210 of 2019, High Court Mwanza (unreported) cited by the learned State Attorney.

In the instant matter, the appellant was indicted and prosecuted for stealing by agent contrary to sections 258(1) and (2)(a),(b),(c),(d) and (e) and 273(b) Penal Code Cap 16 R.E 2002, where the former provision define as to what amount to theft and the latter is a penal provision which depict the actual and specific act committed by the appellant and below there is a penal for that act or offence committed. Now, in the circumstances, the provision of the alleged section 265 Cap 16 (supra), which is all about general punishment for theft, will serve which purpose. Happily, this is not a novel idea, because it was made clear by the Court of Appeal which is the apex Court in our land, in the case of **Meck Maleges And Mazura Ndaro Versus The Republic**, Criminal Appeal No. 128 Of

2011, Court of Appeal at Mwanza (unreported), at page 8, His Lordship Honorable Juma, Chief Justice made the following obiter dictum, I quote,

*"The component of stealing or theft is an integral part of the two offences of stealing by public servant. It is also integral to the offence of stealing by agent for which the appellants were tried and convicted. In order to prove, as against the appellants, the offence of stealing by agent; the prosecution was required to bring its case within the ingredients of the offence of theft under section 258 (1) and (2) (a) of the Penal Code"*

It is to be noted that in **Meck Maleges** (supra), at the outset, first paragraph on the front page, the apex Court reveal the appellants therein were charged under section 273 (b) of the Penal Code, Cap. 16 solo. Importantly, at page 7 last paragraph and page 8 first paragraph, the apex Court ruled that since the appellants therein came by the water pump by virtue of their employment as public servants, they should have been charged with offence of stealing by servants contrary to section 271 of the Penal Code instead of stealing by agent contrary to section 273 (b). This was more serious so to speak, but the Court of Appeal, did not say that it was fatal and incurable, nor rushed to vitiate the trial on that technical ground alone, rather proceeded to determine the matter or appeal on merit.

Unfortunate the learned Counsel and learned State Attorney, cited the two cases of this Court above as if were binding to me. They did not indicate that it was for reference or persuasive purpose. That said, ground number six succumb to a natural death.

Generally speaking, this is a straight forward case, PW1 (Tabu Issa Ally) explained that on 4/5/2019 she entrusted to the appellant a consignment of sardines from Mwanza, weighing 12,276 kilograms valued Tsh. 27,008,000/=. It was expected the appellant to deliver the said consignment to a factory Kitunda kwa Matinde Company Limited and remit back the proceeds of sale to PW1. Instead the appellant diverted the same to his own business, to wit a sum of Tsh 23,255,000 which was paid by PW2 (Ally Omari Chokai), the purchaser. The appellant did not bother to cross examine on these facts, which suggest his concession. Similarly, on defence, the appellant conceded to have received from PW2 a sum of Tsh 23,255,400 deposited into his account. An explanation by the appellant that he deposited a sum of Tsh 10,000,000 into the account of PW1 on 21/5/2019 is a concoct, as did not tender a pay in slip to substantiate it. Secondly, the appellant admitted to had issued a fake cheque worth Tsh 27,000,800/= on 29/7/2019, which defeat his plea that he deposited a sum of Tsh 10,000,000 into the complainant account. Had the appellant paid

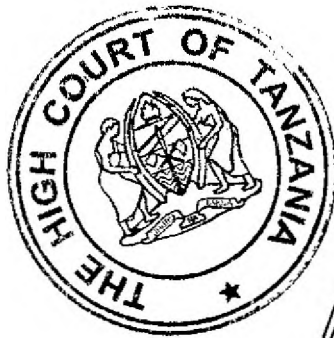
the said sum, for sure he could not plot a deal or mission for the trait of indulging in disreputable pranks of issuance of fake cheque afterward. As such, an argument by the learned Counsel for appellant that a charge for stealing by agent was not proved beyond reasonable doubt or that the prosecution evidence was contradictory, is unmerited and the trial court is faulted for nothing.

However, taking into account the general circumstances of the matter and evidence presented, which suggest that the complainant (PW1) suffered material loss in her business therefore her interest is to have her money paid back, as she stated that the appellant have been promising to pay her in vain. And in view of the fact that the appellant had made commitment to pay by installments. To my view an order for compensation of Tsh 27,008,000 made by the trial court will suffice to meet the end of justice, in lieu of incarceration.

I therefore alter and substitute a custodial sentence of seven years imprisonment with an order for compensation. The appellant to pay the complaint PW1 (Tabu Issa Ally) a sum of Tsh 27,008,000 adjudged by the trial court in substitute of custodial sentence of seven years imposed by the trial court. It is made under section 366(1)(a)(iii) and (b) Criminal Procedure Act, Cap 20 R.E. 2019 and section 31 Cap 16 (supra)

This will entitle the appellant to be released from prison.

Appeal partly allowed.



E/B. LUVANDA

**JUDGE**

27/08/2021