

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
AT DODOMA  
(APPELLATE JURISDICTION)**

**DC CRIMINAL APPEAL NO. 34 OF 2020**

(Original Criminal Case No. 37 of 2019 of the District Court of Bahi at Bahi)

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT**

**VERSUS**

**NYERERE NHONYA ..... RESPONDENT**

*1/6/2022 & 16/6/2022*

**JUDGMENT**

**MASAJU, J**

The Appellant, the Director of Public Prosecutions, unsuccessfully prosecuted the Respondent, Nyerere Nhonya, in the District court of Bahi at Bahi for the offence of Stealing by Agent contrary to section 273 (b) of the Penal Code [Cap 16 RE 2002]. The Respondent was acquitted by the trial Court hence the appeal in the Court.

The Appellant's Petition of Appeal is made up of two (2) grounds of Appeal thus;

- 1. That, the trial Court erred in law and fact by holding that the prosecution evidence is at variance with the charge sheet.*

2. That, the trial Court erred in law and fact by holding that the prosecution failed to prove its case beyond reasonable doubt.

*WHEREFORE: The Appellant prays to this Honourable Court to allow this appeal, set aside the order of acquittal in ... thereof convict the Respondent and sentence him accordingly"*

When the appeal was heard in the Court on the 12<sup>th</sup> day of May 2022 the Appellant, DPP was represented by Ms. Bernadeta Thomas, the learned State Attorney while the Respondent was in service of Mr. Godfrey Wasonga, the learned counsel.

Submitting in support of the appeal the Appellant argued that she concede that there was no Principal – Agent relationship between the Respondent and the victim of crime in terms of section 273 of the Penal Code [Cap 16] but there was a sale contract of cattle as per Mchuno Kandala (PW1), Anatory Chinoningwa (PW2), Mlewa Saning's (PW3) and Mbayana Kaundala Saning'a (PW4) testimony before the trial Court. That according to the sale agreement, the Respondent received 20 heads of cattle at the price of TZS 13,000,000/= which was not paid by Respondent of the offence of Stealing pursuant to section 300(1) of the Criminal Procedure Act [Cap 20].

That, the trial court also found out that the Respondent acted fraudulently in terms of **Christian Mbunda V.R [1982] TLR 340**. That, **Tambi Omari V. The Republic (HC) Criminal Appeal No. 78 of 2018, Shinyanga Registry** is instructive of the application of section 300(1) of the Criminal Procedure Act [Cap 16].

The Appellant prayed the Court to allow the appeal and the Respondent be found guilty and be convicted of stealing accordingly pursuant to section 300(1) of the Criminal Procedure Act [Cap 20].

On his part, the Respondent contested the appeal by submitting against the 2<sup>nd</sup> ground of appeal that since the Appellant concedes that there was a sale agreement save that the Respondent had not paid for the cattle, the remedy against the defaulting party to the sale agreement would be civil action and not criminal prosecution.

As regard to the provisions of section 300(1) of the Criminal Procedure Act [Cap 20] in order to convict the Respondent, the said sections could not be deployed by the trial Court to convict the Respondent of stealing for there was no any other several particulars which constitute minor offence as the said section requires. That, cattle theft proposed by the trial Court was not minor offence to stealing by agent. The Respondent prayed the Court to dismiss the appeal in its entirety for want of merit.

That is what was shared by the parties in support of, and against the appeal in the Court.

There is no dispute that PW1 sold 20 heads of cattle to the Respondent on the oral agreement that the Respondent would make payment of TZS 650,000/= for each cow making a total of TZS 13,000,000/= where both parties agreed that the amount would be paid on the 24<sup>th</sup> day of December, 2018 according to the evidence by PW1, PW2 and PW3. That being the case, there is also no dispute that PW1 and the Respondent had entered a sale agreement for the sale of

the 20 heads of cows. According to the evidence by the prosecution side in the trial Court, the Respondent was not working under the capacity of the PW1 as his agent hence there was no Agent- Principal relationship between them. Thus, PW1 ought to have instituted civil proceedings against the Respondent, if any, for breach of contract and not criminal prosecution.

Besides that, section 273(b) of the Penal Code [Cap 16] which the Respondent was charged with provides thus;

*"273. Where the thing stolen is any of the following things, that is to say*

*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".*

In the instant case, the facts/statement of offence and the testimony by prosecution witnesses in the trial court does not constitute the particulars of the offence as per the provision of the law. The 20 heads of cattle were not entrusted to the Respondent by PW1 but were sold to him on credit therefore the said facts does not constitute the offence the Appellant was charged with.

That said, the appeal is hereby dismissed for want of merit. A party to the sale Agreement in issue between him and the Respondent, if still interested in recovering the contractual price money, if any, may

institute civil proceedings against the Respondent in a court of law vested with jurisdiction to try the matter.



  
GEORGE M. MASAJU

**JUDGE**

16/6/2022.