

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF BUKOBA  
AT BUKOBA**

**(PC) CRIMINAL APPEAL NO. 14 OF 2021**

*(Arising from Criminal Appeal No. 21 of 2020 of Bukoba District Court, Originating from Criminal Case No. 276 of 2020 of the Urban Primary Court at Bukoba)*

**DAVID MICHAEL.....APPELLANT**

***VERSUS***

**JONES JOHN.....RESPONDENT**

**JUDGEMENT**

*1<sup>st</sup> July & 22<sup>nd</sup> July 2022*

***Kilekamajenga, J.***

The respondent and another person were charged with the offence of stealing contrary to section 265 of the Penal Code, Cap. 16 RE 2019 in the Urban Primary Court of Bukoba. It is alleged that, on 4<sup>th</sup> February 2020, the police searched the warehouse of the respondent and found twenty one (21) bags of cement with the quality of 42.5 plus suspected to have been stolen from the appellant. The appellant is a contractor working with a company called JASCO which was commissioned to construct roads within Bukoba Municipality. After the trial, the Primary Court was convinced that the appellant proved his case beyond reasonable doubt against the respondent. The Primary Court convicted and sentenced the respondent to pay a fine of Tshs. 300,000/= or else serve a prison term of six months.



The respondent was aggrieved with the decision of the Primary Court hence appealed to the District Court of Bukoba which quashed the decision of the Primary Court on the reason that the doctrine of recent possession was not properly applied. The appellant moved this Honourable Court of justice challenging the decision of the District Court. He was armed with four grounds of appeal coached thus:

- 1. That, the appellate magistrate misdirected himself for not properly considering the crucial elements in applicability of the doctrine of recent possession over the stolen properties (exhibits in court) found in possession of the respondent.*
- 2. That, the appellate magistrate erred in law and fact for failure to evaluate and analyse the prosecution evidence adduced before the trial court.*
- 3. That, the appellate magistrate erred in law and fact in quashing the trial court decision after wrongly reasoned the way the appellant was supposed to testify before the trial court.*
- 4. That, the appellate magistrate erred in law and fact in quashing the trial court decision basing on the law of proof that (sic) stolen bags of cement (exhibits in court) belongs to the appellant, while the prosecution adduced strong evidence which proved the case against the respondent beyond reasonable doubt hence the respondent was found guilty and convicted.*

The appeal finally came for hearing; the appellant was absent but well represented by the learned advocate, Mr. Robert Neophitius whereas the respondent appeared in person and without legal representation. In his oral submission, the counsel for the appellant dropped the third and fourth grounds and submitted on the first and second grounds of appeal. On the first ground, he

argued that the evidence of PW1 was supported with the evidence of PW3; the stolen properties were identified and the certificate of seizure was prepared. The evidence shows that the stolen properties were found in the respondent's warehouse. The properties were seventeen bags of Twiga cement with the quality of 42.5 plus and four bags of Dangote cements with the same amount of quality. The properties were stolen from the appellant. The respondent was accused of stealing the bags of cement from the appellant. In analysing the doctrine of recent possession, the counsel referred the court to the case of **Mustapha Maulid Rashid v. R. Criminal Appeal No. 241 of 2014**, CAT at Mtwara (unreported) which adopted the case of **Juma Marwa v. R, Criminal Appeal No. 71 of 2001**. In the instant case, the respondent failed to explain where he got the bags of cement with that quality.

On the second ground, the counsel argued that, the first appellant court failed to evaluate the evidence adduced during the trial hence its decision affected the appellant. He urged the court to allow the appeal and uphold the decision of the Primary Court.

When invited to respond, the respondent submitted that, in his warehouse, there were many bags of cement with the quality of 42.5 plus because such cement is available in every store. He bought the Twiga cement from Taxes shop and Dangote cement from Omujumba store. He insisted that, he still have the cement with the same quality in his warehouse. In his view, the appellant failed

to prove his case as there was no identical number for identifying such bags of cement. Also, the appellant failed to prove where the cement were stolen from and therefore, the case was maliciously framed against him.

In the rejoinder submission, the counsel for the appellant insisted that, the bags of cement had a special mark for identification and that the stolen bags of cement were found in the respondent's store.

In this case, after considering the submission from the counsel for the appellant and respondent, the most pertinent issue is whether the appellant proved his case. As stated earlier, the respondent was charged with the offence of theft contrary to **section 265 of the Penal Code**. For the purposes of the discussion, I wish to reproduce the section thus:

*'265. Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years.'*

Though, the above provision of the law is more on the punishment for theft, the elements of theft are clearly stated under **section 258 of the Penal Code** thus:

*'258.-(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of*

*any person other than the general or special owner thereof anything capable of being stolen, steals that thing.'*

Therefore, for the offence of theft to be proved, the following elements must be established. **First**, there must be taking away of the property from the possession of the owner (asportation) or converting of such property; **second**, such property must be capable of being stolen; **third**, the person taking the property must have an ill motive (fraudulent) of permanently depriving the owner the rights over that property; **fourth**, the stolen property must be owned. In other words, there must be proof of ownership over the stolen property.

In the case at hand, it is alleged that, the respondent was found in possession of twenty one bags of cement belonging to the appellant. However, in his defence, the respondent argued that, the Twiga and Dangote cement with quality of 42.5 plus is available in almost every store and that the appellant failed to prove whether the same bags of cement were actually stolen from the appellant. I should set it clear that, this is a criminal case that demands a higher standard of proof of beyond reasonable doubt. In my view, the appellant failed to prove whether such bags of cements were stolen from him. He further failed to show whether he is the only person who can possess the cement of such quality in the whole town of Bukoba. As correctly argued by the respondent, the Twiga or Dangote cement with the quality of 42.5 plus is available in almost every hardware store. The respondent, just like the appellant who procured the same

cement for construction, he also possessed them for business as he sells cement in his shop. The evidence adduced during the trial did not show whether the alleged cement has a special mark giving sole ownership to the appellant. Even before venturing into the doctrine of recent possession, I find flimsy evidence to support the conviction against the respondent for the offence of theft. The major gap not covered with the appellant's evidence is whether the respondent had no access nor ability to procure Twiga or Dangote cement from other major stores and keep it in his store. In my view, the respondent shed doubt on the appellant's case when he stated that he purchased the cement from other stores. So far, Texas which seems to be a major store in Bukoba admitted to selling such kind cement to different customers. I find no merit in the appeal and hereby dismiss it and uphold the decision of the District Court. I further order the appellant to return the 21 bags of cement with the quality of 42.5 plus to the respondent. It is so ordered.

Dated at Bukoba this 22<sup>nd</sup> Day of July 2022.

  
**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**22/07/2022**

**Court:**

Judgement delivered this 22<sup>nd</sup> July 2022 in the presence of the respondent but in absence of the appellant.



**Ntemi N. Kilekamajenga.**

**JUDGE**

**22/07/2022**

