

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA**

DC CRIMINAL APPEAL NO. 197 OF 2020

(Arising from the order of the High Court of the United Republic of Tanzania at Dodoma in Misc. Criminal Application No. 81 of 2020 dated 2nd December 2020, Originating from the decision of Resident Magistrate Court for Singida at Singida in Criminal Case No. 34 of 2019 dated 12th March 2020).

JOSHUA KISAVA..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

1/6/2022 & 16/6/2022

JUDGMENT

MASAJU, J

The Appellant, John Kisava, was tried and convicted of the offence of Stealing by Agent contrary to sections 265 and 273(b) of the Penal Code [Cap. 16] in the Resident Magistrates Court of Singida at Singida. He was sentenced to three (3) years imprisonment. Aggrieved with the decision, the Appellant has come to the Court by way of an Appeal. The Appellant's Petition of appeal is made up of nine (9) grounds of Appeal in which he essentially argues that the prosecution case against him was not proved beyond reasonable doubt.

When the appeal was heard in the Court, the Appellant was represented by Ms. Magreth Mbasha, the learned counsel while the

Respondent Republic was represented by Ms. Bernadeta Thomas, the learned State Attorney.

The Appellant consolidated the 1st, 2nd, 3rd, 4th, 5th, 8th, and 9th ground of appeal. The 6th and 7th grounds were argued separately.

The Appellant submitted on the 6th ground of appeal that the trial magistrate erred in law and fact in convicting the Appellant relying on a defective charge. That, there was variance between the charge sheet and the evidence adduced in support thereof. That, according to Sege Mwampulo (PW1) the Appellant was inspected on the 14th day of December, 2018 and found with a deficit of TZS 84,000/= only but according to the charge sheet the Appellant had allegedly stolen TZS 13,800,000/= cash. That, PW1 also testified to have been informed of the alleged theft of TZS 13,000,000/= on the 19th day of January, 2019. That, there was no certainty of the date when the alleged money was stolen. That, there was no evidence that the money lost was cash since the Appellant's duty was transferring credit to TIGO agents. The Appellant cited **Issa Mwanjiku@White V.R (CAT) Criminal Appeal No. 175 of 2018, Dar es salaam Registry** (unreported). That the principle expounded therein should be applied by quashing the conviction with no order for re-trial.

The Appellant submitted on the 7th ground of appeal that, the alleged letter by the Appellant (Prosecution Exhibit P1) and printed messages (Exhibit P2) were admitted in evidence but were not read over to the trial Court, thereby depriving the Appellant the right to know its contents for his defence. That, the said exhibits should be expunged by virtue of **Issa Hassan Uki V.R (CAT) Criminal Appeal No. 129 of 2017, Mtwara Registry**.

As regards to the consolidated grounds of appeal, the Appellant submitted that, the prosecution case against the Appellant was not proved beyond reasonable doubt. That, the Appellant did not confess the crime but he admitted loss thereof.

On her part, the Respondent contested the appeal by submitting against the consolidated grounds of appeal that, the charge sheet was not defective merely by carrying section 265 and 273(b) of the Penal Code [Cap 16]. That, section 265 of the Penal Code is just a general punishment for theft offences, it does not create offence. That, its inclusion in the statement of offence did not occasion any injustice to the Appellant for the sentence of 3 years imprisonment did not exceed the 7 years imprisonment punishment provided for under sections 273 and 365 of the Penal Code [Cap 16] respectively.

The Respondent contested the 6th ground of appeal by submitting that there was no variance between the charge sheet and the evidence adduced thereto was categorical on how the Appellant was responsible for the loss of TZS 13,800,000/=. That, the loss of TZS 84,000/= was just part of the loss.

As regards the 7th ground, the prosecution exhibit P2 (Cautioned Statement) was not read out in the trial Court. That, exhibits P1 and P2 which were not read should be expunged from the record. That, even if the said exhibits are expunged, the oral testimony by witnesses still implicate the Appellant with the crime. The Respondent prayed the Court to dismiss the appeal accordingly.

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

In the trial Court it was alleged that the Appellant was employed by Tigo (T) Ltd working as an agent at Singida Office. That, he was entrusted with the company money and credit to supply the same to Tigo Pesa agents in Singida Region. That, on the 14th day of December, 2018 the Appellant stole the money TZS 13,800,000/= and used it for his own use. That, the Appellant confessed at the police station to have stolen the money and used the same for school fees and agriculture. Sege Mwampulo (PW1) the Financial Administrator of Tigo (T) Ltd testified in the trial Court and also tendered a letter (exhibit P1) allegedly wrote by the Appellant acknowledged/confessing stealing the money. PW1 also tendered a print out of WhatsApp messages allegedly written by the Appellant (Exhibit P2). The two exhibits P1 and P2 were not read out in the trial Court right after its admission as well conceded by the Respondent hence the Appellant's right of defence specifically on the said exhibits was prejudiced. Thus, the remedy thereof is to expunge exhibits P1 and P2 from the record of prosecution's case. The impugned exhibits are hereby severally expunged from the record accordingly. T 5365 DC Fidelis (PW2) testified as an investigator who interrogated and recorded the Appellant's Cautioned Statement (Exhibit P3) in which the Appellant allegedly confessed to have committed the crime. In the said cautioned statement it can be seen clearly that the Appellant did not confess the crime but rather admitted to have incurred a loss of TZS 13,800,000/= in the due course of working claiming PW1 to have been aware of the loss.

In his defence, the Appellant testified to have incurred loss in the due course of his work claiming that some of the loss was occasioned by Abubakari Salum who was his assistant in supply of cash float to agents. The

Appellant alleged that Abubakari Salum had fled away and that he reported the matter to the police station and he tendered an RB (Exhibit D1) to that effect. The Appellant also alleged that he sent some of the money to PW1 and hoped he would pay back but he did not. That, PW1 came from head quarters to inquire on the loss and they sat with the Appellant's administrator, Christopher Mgaya and Sege Mwampulo (PW1) at their office, Singida Branch trying to solve the matter amicably including getting the money from PW1 but surprisingly PW1 reported the matter to police.

The Court is left with doubt as to why the Appellant's immediate boss, Christopher Mgaya whom the Appellant was reporting to never testified in the trial Court. The Court is also left with doubt as to why the prosecution never bothered to clarify or contradict the Appellant's allegations that some of the money were lost in the capacity of one Abubakari Salum as claimed by the Appellant.


However, there is no proof from the prosecution side that the Appellant stole his principal's entrusted money and used the same in his personal use, that is, paying school fees and in agriculture as alleged in the trial Court but rather he incurred loss in the due course of his work, hence the endeavor for amicable settlement between the Appellant and the company. In law admission of a loss is different from stealing. The Appellant could be liable for Causing Pecuniary Loss to a Specified Authority contrary to section 284A of the Penal Code, [Cap 16 RE 2019] if TIGO Company qualified for a specified authority as such. In the instant case the Appellant cannot be liable for Causing Pecuniary Loss to a Specified Authority because the said offence, if any, was not cognate to the offence of Stealing the Appellant had been charged with. So, the provisions of section 300 of the Criminal Procedure

Act, [Cap 2019] cannot be invoked upon to find the appellant liable for Causing Pecuniary Loss to a Specified Authority, if any, contrary to section 284A of the Penal Code, [Cap 16 RE 2019].

That said, the prosecution case against the Appellant was not proved to the required standard of proof that is beyond all reasonable doubt. The meritorious appeal is hereby allowed accordingly. The conviction, sentence and orders thereof by the trial Court are hereby quashed and set aside respectively.

The victim of the alleged pecuniary loss interested in recovering the money, if any, may institute civil proceedings against the Appellant accordingly.




GEORGE M. MASAJU

JUDGE

16/6/2022