IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO.90 OF 2021

(Arising from the decision in Criminal Case No. 62/2020 before Shinyanga District Court dated 18th August 2021)

IDD SAMWEL.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

MKWIZU, J:

IDD SAMWEL the appellant herein was tried and convicted by the trial District Court for an offence of stealing by agent contrary 273(b) of the Penal Code (Cap 16 R. E 2019). The story behind the indictment goes thus: Complainant a teacher by professional met the appellant, a passenger motor vehicle driver in 2015 and they together began their intimacy relationship. Sometimes in 2017, complainant entrusted the appellant with 7000,000 for the purchase of a commercial vehicle.

According to PW1's evidence, the appellant purchased the car with registration No T161 DCQ Toyota Noah white in colour (exhibit P2) on agreement that it would have earned them 30,000/ per day. This was in December 2017. The appellant could not keep the promise and failed to handle the vehicle registration card to the complainant when required. PW1 became suspicious, she reported the matter to the police. Appellant was arrested and charged with stealing by agent contrary to section 273(b) of the penal code.

Prosecution witness No 2 is one Sita Miano Sahani , the original owner of the vehicle in question. He informed the court that he on 30/6/2017 at Kagongwa area in Kahama sold the vehicle with Reg, No T161 DCI, Toyota Noah, Silver in colour to the appellant at a purchase price of 7000,000/= and handled him a vehicle Registration card and other vehicle items.

In his defence, appellant disassociated himself from the accusations levered against him. He insisted that the vehicle belongs to his uncle and that he bought it on 30/7/2017 at a purchase price of 7000,000/= the money which was raised partly by his uncle and partly his mother.

At the end of the trial, the trial magistrate was satisfied that the prosecution has proved their case beyond reasonable doubts. It convicted the appellant and accordingly sentenced him to four years jail term and the vehicle was handled to the complainant.

Discontented, appellant has filed this appeal with a total of four (4) grounds of appeal that:

1. ***That,*** *the learned trial magistrate erred in law and fact for basing on the variance defective charge according to the mandatory provision of law. This was elaborated in the case* ***of Zawadi Huruma @ Mbilinyi and another Vs. Respondent Criminal Appeal No. 210/2019*** *High Court of Tanzania, Mwanza (page 11-12 of the judgment) the court held that "Noted that section 265 was not cited in the charge sheet.....failure to combine both sections made the charge sheet defective"*
2. ***That,*** *the trial magistrate erred in law and fact to entertain this case as a criminal case since the whole case is civil in nature.*

3. ***That,*** *the trial court erred in law to accept the evidence adduced by PW1 and PW3 which was contradictory evidence about the name of the owner of the car (who sell the car) and the name registered by TRA on the card of the car, (see page 2 and 3 of the copy of judgment).*
4. ***That,*** *the trial court totally misapprehending the nature and quality of the prosecution evidence against appellant which did not prove the charge beyond reasonable doubt thus ends to the wrong decision.*

At the hearing, appellant was in person without legal representation while Ms Shani the learned State Attorney assisted the respondent/Republic. Arguing the appeal, appellant was brief. He only asked the court to consider his grounds of appeal without more.

On her side the learned State Attorney was in opposition of the appeal. She submitted that; the prosecution managed to prove the case beyond reasonable doubt. The victim evidence was straight on how she handled the seven million Tanzania shillings to the appellant for the purchase of the alleged vehicle and that the matter is a pure criminal issue and not civil matter as asserted by the appellant. She finally prayed for the dismissal of the appeal.

Having heard the parties' submissions and considering the records, I will proceed to determine the appeal on merit starting with the first ground of appeal challenging the perfection of the charge sheet for failure to cite section 265 of the penal code in the charge sheet. As stated, earlier Appellant did not submit on this point and the State Attorney's submissions are also silent on this aspect of the appeal. But being a legal point, the court will proceed to determine its legitimacy.

Appellant is charged with stealing by agent contrary to section 273 (b) of the penal code. There is no reference to section 265 of the penal code as far as the charge sheet in respect of this offence is concerned. Section 273 (b) reads:

> *"273. Where the thing stolen is any of the following things, that is to say-*
>
> *(a) N/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"*

And section 265 of the penal code provides:

> *"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."*

The two sections are dissimilar. Section 265 is a general provision in relation to stealing with a general punishment while section 273(b) of Penal Code (Cap 16 R.E 2019) deals specifically with stealing by agent

with a specific penal sanction in case one is found responsible. Thus, the choice of not including section 265 of the penal code in the charge sheet has no effect to the charge as the cited section is self-explanatory.

Next question is whether the appellant stole the 7000,000/=Tanzania shilingi entrusted to him by the complainant(PW1) for purposes of purchasing a motor vehicle for commercial purposes. It is a settled law that, to ground conviction under section 273(b) of the penal code, the prosecution must demonstrate that the stolen property was entrusted to the appellant to performing the acts instructed by the principal but unlawfully converts it to his own use, whether the intention to do so was conceived at or after the receipt of the property. See for instance the decision in **Paschal Mwita & 2 other V R,** 1993 TLR 295 CA: **R v Nanji Sunderji** [1935] 2 EACA 130 and **Christian Mbunda V. Republic** (1983) TLR 340.

I had time to examine all the witnesses carefully. PW1 appeared credible. Her evidence was clear that, she in December 2017 entrusted cash T /shillings 7000,000/= to the appellant for a purchase of a business vehicle at Kagongwa on agreement that the vehicle would generate 30, 000/= Tsh per day to be summited to the complainant .Appellant bought the vehicle and showed it to her but failed to honour the agreement of payment of 30,000 per day as agreed . The purchase of the motor vehicle in question was supported by PW2, the original owner of the motor vehicle with registration No T 161DCQ Toyota Noah who confirmed to have sold the said vehicle to the appellant at a purchase price of 7000,000/=.

The prosecution evidence is also clear on the source of the fund by the principal, PW1. A CRDB Bank Loan Facility letter in favour of the complainant- KANDITA AARON ROBI together with the Bank statement to prove that the said amount was borrowed from CRDB Bank for that purpose were tendered in court as exhibit 1. This evidence was left unchallenged by the appellant. In fact, the complainant was honest enough to state during cross examination that she was in an extra marital affairs with appellant culminated into the alleged trust.

On the other hand, the defence evidence is full of lies and contradictions. In his defence, accused gave a theatrically opposed story on the alleged intimacy relationship with the complainant, source of the vehicle and its ownership. He opened his defence by denying knowing the complainant stating that ***"the woman who said she gave me some money is not known to me"***

The appellants stance however changed during cross examination. He with accuracy named the complainant as Madam Kandite, his neighbour and therefore a person he knew for long time. His defence on this point reads:

> *"The woman's name is madam Kandite she said we are neighbours. I am residing with my grandfather then the victim is our neighbour she is a person whom I knew for long time....I had no relation with her, I just knew that she is residing at a certain house...*
>
> *...I knew she was married as I saw a man entering her house. When they go to toilet it is easy to see them. I saw their*

children look like their father and they call him father. That is why I say she is married .."

The reliability of the appellants defence is doubtful because had the appellants been honest, he could have disclosed from the beginning of his defence knowledge of the complainant. The lie in his main defence raises doubt to his credibility. In **Masumbuko S/O Matata @ Madata and Two Others Vs Republic**, Criminal Appeals No. 318, 319 and 320 OF 2009, (Unreported) the Court held that, lies of an accused can be used to corroborate evidence against him. And dealing with a similar situation the Eastern Africa Court of Appeal has this to say in **R v Erunasoni Sokoni s/o Eria and Another** [1947] 14 EACA 74.

"Although lies and evasions on the part of an accused do not in themselves prove the facts alleged against him, they may, if on material issues, be taken into account along with other matters and the evidence as a whole when considering his guilt."

On top of that, while the appellant's main defence is silence on the ownership of the vehicle in question and the source of fund for its purchase, his answers during cross examination though contradictory on who is the proper owner of the said vehicle, but gave an elaboration on the issue of ownership. His evidence on the trial courts records reads:

"I was given the money by my parents; it was my uncle and my mother who gave money to me. The said car belongs to them...the said car belongs to my uncle.... My uncle gave me 5 million, my mother gave me 2 million.

...my uncle gave my mother 5 million. I can't recall the date she was given"

If this is the true position of the matter, why didn't the appellant disclose the fact in his defence just to come with such a clarification during cross examination? I find this piece of the evidence untruthful.

Appellants conduct also raises doubt to his credibility. According to Pw2, appellant was handled together with the vehicle during the alleged purchase, the Original Vehicle registration Card. And PW3, informed the court that appellant refused to surrender the original Vehicle registration card promising to tender it in court during trial, but he never tendered it in court. PW3's evidence was partly recorded thus:

> *"Original card is with the accused person. He refused to give it to me. He claimed that he will bring it to the court. He gave me a copy"*

When invited to cross examine these two witnesses, appellant had no question meaning that he accepted their evidence. The Court in **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 (unreported) stated that: -

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."*

The appellant's conduct above is in my view supportive of his guilty conscious.

I am aware that appellant bears no duty to proving his innocence. His duty is only to raise reasonable doubt on the prosecution case. The duty to prove the accused's criminal responsibility beyond reasonable doubt is on the prosecution. However, given the nature of the accusations against

the appellant and the avowals of ownership and /or the way he obtained the fund for the purchase of the alleged vehicle in his defence, one would reasonably expect the appellant to call the said ***uncle*** and **mother *who allegedly contributed to the purchase of the vehicle*** to support his assertion. But this wasn't the case. Sometimes in his defence appellant was recorded to have said:

> " *my mother is here she knows where she get(sic) the money...my mother is here and she is my witness...*"

This evidence signals the presence of his mother in court at that particular time. Surprisingly however, the appellant closed his defence immediately after his defence without even calling her mother who was in court to testify in his support. In **Sijali Juma Kocho V R**, (1994) TLR ,206 (CA), the appellant had raised a defence of alibi well in advance claiming to have slept at his uncles home on the material night but failed to call his uncle to support his story. In discounting that evidence Court of Appeal held

> *"Admittedly he was under no legal obligation to prove the alibi but in the face of the allegations made against him,* ***one would reasonably expect him to call the said uncle to bear him out. However, the appellant declined to do so despite suggestions to him in cross-examination****. In these circumstances, therefore no weight can be attached to his alibi, and the trial learned Trial Judge rightly discounted it."*

Though in the above case, the Court was dealing with the evidence presented in support of alibi, I find the principle squally fitting the

circumstances of this case. The appellants defence without the support of his mother and/or his uncle remained weak, not injurious to the prosecution case.

In the result, the conviction was justified, and I find no ground to interfere with the trial court's verdict. The appeal is for that reason dismissed on its entirety.

Order accordingly.

DATED at **SHINYANGA** this 24th day of June 2022.

E.Y. MKWIZU
JUDGE
24/6/2022

Court: Right of Appeal explained.

E.Y. MKWIZU
JUDGE
24/6/2022