

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

CRIMINAL APPEAL NO. 69 OF 2021

*(Originating from Criminal Case No. 154 of 2020 the District Court of
Shinyanga)*

NGUSA JOHN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

16th May, & 17th June 2022

MKWIZU,J:

At the District Court of Shinyanga the appellant was arraigned for Stealing by agent c/s 273 (b) of the Penal Code (Cap. 16 R.E. 2002). Prosecution evidence was to the effect that appellant Ngusa John, a sales agent of Jambo Food Products Limited was on 28/9/2019 at Ibadakuli Jambo area within Shinyanga Municipality entrusted by one Ali Halfan, the Director of Jambo various Food products valued at 25,759,200/= for sale with instruction to deposit the sale produce to the complainant's account. He instead deposited into the complainant's account 6,978,000 cash remaining with a total of 18,781,200/- uncleared. The matter was reported to the police leading to the arrest of the appellant. Juma Shabani, Mseti Willian, Zakayo Gunda and Ally Khalfan PW1 to Pw4 respectively testified in the prosecution's favour

In his defence appellant admitted working with Jambo Food products as a sales officer and that he only delayed the payment process in August

2019 but by 25/10/2019 he had deposited 17,078,000 followed by his arrest on 15/11/2019, arraigned before the Primary Court on 18/11/2019 the charges which were later on 3/12/2019 withdrawn by the complainant after they had settled the matter.

At the end of the trial, appellant was convicted and sentenced to three (3) years Jail term with an order of compensating the complainant the stolen amount of 18,781,200/=

Appellant was irritated by both conviction and sentence. He appealed to this court on eight (8) grounds raising three main issues, ***the incompetent/defective charge sheet, improper evaluation of evidence by the trial court and failure by the prosecution to prove the offence.***

The appeal was orally heard. The appellant was in person / unrepresented while the respondent/Republic had the services of Ms. Shani, State Attorney. Submitting in support of the appeal, Appellant prayed for the consideration of his grounds of appeal in his favour. Appellant's contention was that, prosecution failed to adduce evidence establishing that he was entrusted the alleged goods. He said all the exhibits tendered in court lacks his signature and therefore it is doubtful whether he was real entrusted the goods or not.

In response, the State Attorney argued grounds 1,2,4 and 5 together that prosecution managed to prove the offence beyond reasonable doubt. When probed by the court to explain on the withdrawn

charges against the appellant both at the Primary court by the complainant and at the District Court by DPP, the State Attorney conceded to the claimed withdrawals but quickly added that the letter presented at the primary court does not show any connection of the withdrawn offence with the one at hand. And that the second charge similar to the present charge was withdrawn by the DPP on directives that the filing of the second charge is subject to the availability of evidence against the appellant

Submitting on the rest of the grounds, the learned State Attorney said the charge sheet is not defective as the contents of section 273 remained the same in both 2002 amendment and 2019 revised Edition.

I will begin with the grounds challenging the competence of the charge featuring in grounds 3 and 8 of appeal that:

"3. That, the trial magistrate misdirected and misled herself when conducted trial in court, convicted and sentenced the appellant using inapplicable citation of the law i.e section 273(b) of the penal Code Cap 16 RE 2002 instead of using section 273(b) of the penal Code Cap 16 Re 2019.

8. That, the learned trial Magistrate erred in law and in 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 V Rep, Criminal Appeal No 210/2019HC (T) Mwanza(pg 11-12 of the judgement)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”

The two points are discernible from the two grounds above, the first is the wrong citation in respect of the Revised edition on which the offence was pegged. Though it is true that the prosecution cited in the statement of offence a wrong Revised Edition, that is revised edition of 2002 instead of the Revised edition of 2019, the truth is the said citation caused no injustice to the appellant because, in both editions, the contents of section 273 (b) remained the same. There is nothing the appellant would have gained had the correct revised edition cited. This point is for that reason without value. It is disregarded.

The second point is on non-citation of section 265 of the Penal Code. Appellant did not submit on this point. The State Attorney’s argument on this point was brief that the charge sheet is not defective. However, being a legal point, the court is bound to determine the same.

Appellant ground is to the effect that section 273 (b) of the penal code ought to have been cited together with sections 265 of the penal Code. I have deeply considered the two sections. While section 265 of the penal code gives a general description of stealing with a general punishment, section 273(b) of Penal Code (Cap 16 R.E 2002) on the other hand is a specific section in respect to stealing by agent with a definite penal sanction in case one is found responsible. I find no prejudice to the appellant caused by the said omission. After all, the particulars of the

offence in the charge sheet are so informative describing the appellants accusations with clarity to the effect that:

"PARTICULARS OF OFFENCE

NGUSA S/O JOHN on 28th day of September 2019 at Ibadakuli Jambo area within Shinyanga Municipality in Shinyanga Region being a sales agent of Jambo Food Products Co. LTD stole goods (Jambo drink products) to wit; Jambo drinking water 1.5LTRS 920 cartons @ Tshs 3,800/- *total valued at Tshs.3,496,000/=*, Jambo Embe Boribo 300 ML (12 PCS) 224 Cartons @4,500/- *total Valued at Tshs. 1,008,000/=*, Jambo Orange 300ML (12 PCS) 224 cartons @4,500/- *total valued at Tshs. 1,008,000/=* Malta Coffee 300ML (12PCS) 448 cartons @ 4,500/- *total valued at Tshs.2,016,000/=* Mlta Apple 300MLS (12PCS) 448 cartons @4,500/- *total valued at Tshs 2,016,000/=*, Jambo Coconut Pine 300ML (12 PCS)672 cartons @4,500/- *total valued at Tshs. 3,024,000/=*, Jambo Pineapple Extra 300ML (12PCS) 672 cartons @ 4,500/- *total valued at Tshs. 3.024,000/=*, Jambo Vito 300ML (12PCS) 672 cartons @ 4,500/- *total valued at Tshs.3,024,000/=*, Jambo Matunda Mix 300ML (12PCS) 224 cartons @ 4,500/- *total valued at Tshs. 1,008,000/=*, Jambo Lemon 300ML (12PCS) 672 cartons @4,500/- *total valued at Tshs. 3,024,00/=*, Jambo Drinking Water 0.5LTS 264 cartons @ 3,300/- *total valued at 871,200/=*, and Jambo Power 300ML (12PCS) 448 cartons @5000/- *total valued at Tshs. 2.240,000/=*, which was entrusted to him by the Director of

Jambo Food Products Co. LTD for sale instead, he used the sum of Tshs. 18,781,200/= for his own benefit out of *Tshs 25,759,200/=* the total value of goods he was entrusted to him."

I have also gone through the decision of **Zawadi Huruma@ Mbilinyi and Another V Rep** (Supra) cited by the appellant. The facts in that case are distinguishable. In that case, appellant was charged with stealing by agent under section 271 of the penal code instead section 273 (b). Remarking on the status of the charge sheet in that case, my sister Mgeyekwa J, said:

*"It is unfortunate that the charge sheet stands informative and descriptive **but discloses no punishment for what is alleged to be the offence of stealing by agent.** I understand the concern of the learned Senior State Attorney that the facts and particulars are well elaborated **but the same are related to an offence of Stealing by Agent while the cited section is in relation to Stealing by Servant; these are two different offences.**"*

The appellant in this case was properly charged and knew the nature of the offence and consequence of the charge charges against him. I do not find merit in these two grounds of appeal.

I will now re-evaluate the evidence to test whether prosecution case was proved to the required standards. I am on this guided by the cardinal principle that the first appeal is in the form of a re-hearing expressed in **Siza Patrice V. R**, Cr. Appeal No 19/2010, that:-

"We understand that it is settled law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary"

I have revisited the evidence on the records. Prosecution in this case had four witnesses. PW2's evidence was to the effect that he received the loading slip from the Director ordering him to issue the itemised goods therein to the appellant. PW1, is one Juma Shabani, a security officer of Jambo Food Products Company Ltd who supervised the loading of the goods in the vehicle with Registration No T 725 DRA driven by Zakayo Gunda (PW3). These two witnesses did according to their evidence signed the loading slip and gate pass in respect of the consignment in dispute. And on top of that PW3, the driver signed the delivery note and invoices before he transported the goods with the appellant to Bukoba. The evidence is also to the effect that appellant was required to deposit the sale produce to the complainant's company account, but he instead deposited 6,978,000 only out of 25,700,000/=.

Appellant's evidence is essentially an admission of the prosecution's allegations that he was a sales officer for Jambo Foods Products Company limited, acknowledging receipt of the consignment and the failure to effect payment. His evidence at page 32 of the records reads:

"I was employed by Jambo food products on 20/02/2018 and started receiving products by using a vehicle make Fuso. ...I was working faithfully, and complainant entrusted me with more products.... selling to Tinde, Isaka, Runzewe Nyakanazi, Biharamulo Muleba and Mtukula. I encountered various

challenges such as the customers were taking products on credit, and few were paying cash ... the credit caused my delay in reconciliation..."

The complaint in grounds 1, 4 and 6 of the appeal are an afterthought as this piece of appellant's evidence supports the prosecution's evidence on the position held by the appellant in the complainant's company and that he was entrusted the goods in question and failed to pay for the same.

At some point in his defence appellant alleged to have deposited the sum of 17,078,000/= in the complainant's account but no bank slips were tendered to verify the claim. Defending the refusal of the trial court's rejection of admission of the copies of the bank receipts appellant said the originals were submitted to the complainant's office. This evidence contradicts his own evidence. Appellant informed the court that, his request for an additional goods was refused by the complainant's manager due to lack of evidence of payment. The disturbing question is, why did the appellant not submit the said Bank slip to the complainant's officials at that point to clear the debt? Had it been truly that appellant had the bank slips with him at the time of his arrest, he could not have allowed himself to be charged with this offence. The 2 and 5 grounds of appeal are also without merit because even without a duly signed delivery notes, loading slip and the gate pass, appellant's evidence above is sufficient to prove the alleged entrustment.

As stated above, appellant stand charged of stealing by agent under section 273(b) of the penal code where for an Appellant to be convicted, the prosecution must demonstrate that appellant came into possession

of the alleged stolen property as an Agent of either the real owner or special owner; that the stolen properties are capable of being stolen and that the taking of them was without the owner's consent. It is certain that appellant was an agent of the complainant, the goods came into his possession in the ordinary course of his duty as a sales agent and that he failed to deposit the proceeds of the sale as and when required and that the non-payment of the money by the appellant was without the owners consent. I for the above reasons find the appellant conviction valid.

There is yet an enthralling part of the story which I wish to analyse before I pen off. The appellant did assert settlement of the debt with the complainant through his officer named Crissant Msipi resulted into the withdrawal of a criminal matter that was preferred against him before Shinyanga Urban primary court in Criminal case no 295 of 2019 followed by the DPP's withdrawal of the charged against him before the trial court. This is the essence of ground 7 of the appeal by the appellant. The learned State Attorney admitted to the alleged withdrawals, the first before the primary court but argued that there is no evidence if the withdrawal had any relation to the matter at hand. On the second withdrawal of the charge by the DPP, the learned State Attorney said, the withdrawal was subject to the filing of a fresh charge upon availability of evidence against the appellant.

I have, under section 59 of the Evidence Act, (Cap 6 RE 2019) taken judicial notice of the Courts proceedings in Criminal Case No 295 of 2019 (in Shinyanga Urban Primary Court) between the appellant and Crissant

Misipi. While the charge in that case was for the offence of obtaining money by false pretence contrary to section 302 of the penal code committed on 25/10/2019 with stolen goods worth 22,265, 700/= , the charges in this case is for stealing by agent on 28/11/2019 and the alleged products are valued at 25,700,000/= .It is certain therefore that, the two offences are dissimilar arising from different transactions and that the settlement in criminal case No 295 of 2019 could not have anyhow affected the matter at hand.

The court is for the foregoing reasons finds the appeal devoid of merit. It is thus, dismissed on its entirety.

DATED at **Shinyanga** this 17th day of **JUNE** 2022.


E.Y. MKWIZU

JUDGE

17/06/2022

COURT: Right of appeal explained.


E.Y. MKWIZU

JUDGE