

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

**CRIMINAL APPEAL NO. 57 OF 2022**

**BERTHA DANIEL.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

[Appeal from the Decision of District Court of Kahama at Kahama.]

**(Hon. E.P. Kente RM)**

dated the 17<sup>th</sup> day of May, 2022  
in  
**Criminal Case No. 87 of 2022**

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**JUDGMENT**

17<sup>th</sup> & 24<sup>th</sup> August, 2022.

**S.M. KULITA, J.**

Bertha Daniel, referred to as the Appellant in this appeal, was charged in the District Court of Kahama for *Stealing by Agent* contrary to the provisions of section 273 (b) and 258 (1) of the Penal Code [Cap. 16 RE 2019]. It is in the particulars of offence that, on the 16<sup>th</sup> day of February, 2022 at Nyandekwa area in Kahama District the appellant did

steal Tshs. 900,000/= which was entrusted to her by Baraka Ndohele (PW1) for her to sell two cows to him.

In a nutshell the prosecution case as unfolded by its witnesses is that, on the 19<sup>th</sup> day of February, 2022 the appellant phoned PW1 asking to be given Tshs. 900,000/= as she was urgently in need of it. PW1 added that, in return, the appellant had promised to give him cattle. As PW1 was on journey, he asked PW2 to give that amount to the Appellant. PW2 testified to have given the same amount to PW3, who is a daughter of the appellant, to handle it to the appellant. PW3 testified to have handled the same to the appellant. PW3 added that, later the appellant changed her mind, as she refused to handle the said cattle to the appellant nor to pay back the money she had received. On her party the appellant lamented to have not received the said money.

At the conclusion of the trial, the appellant was accordingly found guilty, and upon conviction, a four years' imprisonment sentence, was met to her. This was on 6<sup>th</sup> of May, 2022.

Aggrieved with that decision, the Appellant preferred the instant appeal on five grounds which may be summarized as follows; **One**, that the case was not proved beyond reasonable doubts, **two**, the trial court relied on hearsay evidence to convict the appellant, **three**, the trial court

erred to sentence the appellant excessively, **four**, the trial court erred to convict the appellant without giving weight on the defense case.

The appeal was heard on 24<sup>th</sup> of August, 2022. On that date, Ms. Gloria Ikanda, Advocate appeared for the Appellant whereas the Respondent, Republic had the service of Ms. Gloria Ndoni, learned State Attorney who resisted the appeal.

In her submissions Ms. Gloria Ikanda was of views that, all grounds of appeal tend to prove that the case was not proved beyond reasonable doubts. She stated that, as there was no proof as to whether the appellant was handled the money in question, then it follows therefore that the prosecution case was not proved at the required standard.

In her reply Ms. Gloria Ndoni conceded to the fact that, all grounds of appeal tend to prove that the case was not proved beyond reasonable doubts. Yet, she was of views that, the case at the District Court was proved beyond all reasonable doubts. She cited the case of **Christina Mbunda v. Republic (1983) TLR 340** to bolster her assertion.

I have taken into consideration both parties' submissions, the referred authorities, available records and the rival issues as well. From

them I am going to determine as to whether the case was proved at the required standard.

It is undisputed fact that, the appellant was charged with the offence of Stealing by Agent contrary to **section 273(b) of the Penal Code [Cap 16 RE 2019]**. The same reads as follows: -

*"Where the thing stolen in 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 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".*

According to the quoted provision of the law above, it thus goes that, for the appellant to be convicted of *Stealing by Agent*, the prosecution side ought to have proved that, the appellant was entrusted with Tshs. 900,000/= for her to either retain in custody or to apply or pay or deliver it or its proceeds to any other person.

Further, the prosecution ought to have proved that the appellant was an agent of the owner of the said money in question. See, **CHRISTIAN MBUNDA V. REPUBLIC** (Supra) which was also cited by the respondent. In that said case it was held;

*"... for an Appellant to be convicted under Section 273  
(b) the prosecution must prove, inter-alia that he came  
into possession of the alleged stolen property as an  
Agent of either the real owner or special owner".*

The records show that, the prosecution did not prove that the appellant came into possession of the alleged amount of money as an agent of the complainant. The prosecution evidence tended to prove that the complainant bought cattle from the appellant by paying the money in question through PW3, while the appellant did not give the same cattle in return. It appears therefore that, the prosecution evidence was trying to prove that there was a sale agreement which was not honored by the appellant or they were trying to prove another offence rather than Stealing by Agent.

In the upshot, the evidence adduced by the prosecution side was not rooted on the offence of Stealing by Agent. It is a common and well known principle in our criminal jurisprudence that: -

*"in criminal matters the burden of proof always lies on the prosecution and it should be beyond reasonable doubt."*

The said principle can be found in the case of **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda V. Republic [2006] TLR 395.**

Conclusively, there being no evidence on the ingredients forming the offence of Stealing by Agent, the trial court was wrong to have convicted the appellant on it.

Having so found, there is no need to go into the rest aspects raised by the Appellant on the remaining grounds of appeal. In view thereof the conviction and sentence imposed against the Appellant is set aside, consequently the Appellant should be released forthwith unless held by some other lawful course. The order for repayment of Tshs. 900,000/= to the complainant is also set aside.

In upshot the appeal is found to be meritorious, hence allowed.



**S.M. KULITA**

**JUDGE**

**24/08/2022**

**DATED** at **SHINYANGA** this 24<sup>th</sup> day of August, 2022.



  
**S.M. KULITA**  
**JUDGE**  
**24/08/2022**