

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

DC.CRIMINAL APPEAL NO. 22 OF 2022

(Originating from the District Court of Namtumbo in Criminal Case No.101 of 2021)

AMANI ALLY @ JUMA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 07/09/2022

Date of Judgement: 20/09/2022

U.E MADEHA, J.

Before the District Court of Namtumbo the Appellant herein was charged, tried, and convicted of the offence of stealing by agent contrary to *section 273 (b) of the Penal Code [Cap 16 Revised Edition 2019]*. The prosecution account was that; on the 18th October 2021 at Suluti village within Namtumbo District in Ruvuma region did stole a motorcycle with registration number MC 520 BTY make Haojue chasis number LC6PCJK22H0025564 and engine number 156FMI-5AD2F24899 valued at one million and three hundred (1,300,000) Tanzanian shillings which were entrusted to him by Majid s/o Hamis Ponera for storage but he refused to return it back to the owner who is the said Majid Hamisi Ponera.

In a bid to prove the case, the prosecution lined up two witnesses and tendered four documentary exhibits. Whilst the Appellant relied on his evidence to fend his innocence. However, after a full trial, the Trial Court found the Appellant guilty as charged. Consequently, he was convicted and sentenced to one-year conditional discharge alongside with payment of tsh.1,300,000/= as compensation to the Complainant.

Displeased with such findings the Appellant has preferred the present appeal. Through his petition of appeal, the Appellant has fronted the following six (06) grounds as his main points of grievance.

- 1. That, the Trial Court erred in law and facts for convicting the Appellant while the Respondent failed to call key witness who could have cleared doubts casted by prosecution witness, hence adverse inference could have been drawn in favor of the Appellant.*
- 2. That, the Trial Court erred in law and fact for ordering conviction and sentence against the Appellant without considering that the ingredients in proving the offence of stealing by agent were not proved beyond reasonable doubt.*
- 3. That, Trial Court erred in law and fact by ordering the Appellant to pay back tsh. 1,300,000/= to Majidu Hamis Ponera (Claimant)*

although it was not proved by the Said Majidu Hamis Ponera that the said motorcycle amounted to tsh.1,300,000/=.

- 4. That, the Trial Court erred in law and fact for convicting the Appellant while relying on the case Georgina Masala v. Republic Criminal Appeal No. 128 of 2014 and the principle of circumstantial evidence contrary to the law.*
- 5. That the Trial Court erred in law and in fact by convicting the Appellant contrary to the law.*
- 6. That the Trial Court erred in law and in fact by convicting and sentencing the Appellant by relying on the Exhibit 1,2,3 and 4 were improperly tendered contrary to the law.*

Nonetheless, the brief facts of the matter as presented in the Trial Court records are that: PW1 claimed that he was allowed by his uncle (the Appellant) to park his motorcycle in his garage. In that regard, he parked his motorcycle therein. The following morning, PW1 did not see his motorcycle. He had bought the motorcycle with registration number MC520 BYT-Haojue from Yasin Mkilikiti who had also bought it from Erasmo Swai. He owned the motorcycle card which contained the name of Erasmo Kristo Swai but tendered a letter which is the sale agreement between him and Yasin Mkilikiti.

On 01/09/2022 when the appeal was called for hearing before me, the Appellant was represented by two Learned Advocates: Mr. Lazaro Simba and Ms. Neema Nyagawa. On the other hand, the Respondent enjoyed the services of two Learned State Attorneys: Mr. Vernance Nkonongo and Ms. Generoza Montana.

Ms. Neema stated that she will argue for the first (1st), second (2nd) and third (3rd) grounds whilst Mr. Lazaro will argue on the fourth (4th), fifth (5th) and sixth (6th) grounds of appeal. She chose to begin with the second ground of appeal that the conviction and sentence did not consider the ingredients of the offence of stealing by an agent. To back up her proposition she asked the Court to refer to *section 3(2)(a) of the Evidence Act [Cap 6 Revised Edition 2019]* which requires all criminal offences to be proved beyond a reasonable doubt.

Ms. Neema proceeded to explain the ingredients of the offence of stealing by an agent. That, the first ingredient is that; the property stolen must have been entrusted to the accused. She argued that, by going through the Trial Court proceeding the Republic failed to prove the offence because there is no evidence that shows that the Appellant was given a motorcycle to preserve. She clarified that there is no place according to the witness which indicates that the motorcycle was

handed over to the Appellant and not to someone else. Moreover, she asserted that when the Appellant gave his testimony, they failed to cross-examine him on that aspect something which proves that they totally agreed with the Appellant's explanation. To amplify her point, she referred this Court to the case of **Republic v. Frank Charles Fataki**, Criminal Session No. 26 of 2018, High Court of Tanzania at Arusha (unreported) wherein it was stated that:

"The failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the evidence."

Ms. Neema further explained the second (2nd) element which is; that the property must be stolen by the person who was entrusted to keep it which must be the accused. She argued that neither PW1's nor PW2 elaborated about how the motorcycle was stolen. She cited the case of **Agness Nyamuhanga v. Republic**, Criminal Appeal No. 341 of 2018, Court of Appeal at Shinyanga (unreported) where the Court explained the two (02) ingredients of the offence and reached to a conclusion that the same was not proven by the prosecution.

As for the third (3rd) ground of appeal, Ms. Neema submitted that the Trial Court erred in law and facts by ordering that the Appellant to pay the Respondent a compensation to the tune of one million and three

hundred (1,300,000) Tanzanian shillings while the case was not proven beyond reasonable doubt. She contended that according to the proceedings of the trial court, the said motorcycle was valued one million and three hundred (1,300,000) Tanzanian shillings. However, the prosecution failed to prove the value of the motorcycle.

In addressing the fourth ground of appeal, which states that the Trial Court erred in law and fact by convicting and sentencing the Appellant by relying on Exhibits 1,2,3, and 4 which were improperly tendered contrary to the law. Ms. Neema submitted that the prosecution side failed to read the exhibit tendered in court. She further averred that they tendered the letter termed as exhibit P2, which does not prove the ownership of the alleged property.

Ms. Neema argued that the remedy as per different case law was to expunge them from the Court records as seen in the case of **Robison Mwangisi v. Republic** [2003] TLR and in the case of **Robert P Maganga and Daudi Charles Ndaki v. Republic**, Criminal Appeal No. 514 of 2016, Court of Appeal Tanzania sitting at Tabora where the Court stated as follows: -

"The statement would then be tendered in Court as exhibit P6 since the witness did not readout the whole

statement it is hard to say the appellant become aware of what was written in exhibits and cross-examining on its effective”

In light of the foregoing, the Counsel argued that the exhibits as tendered by the prosecution did not follow the procedure. Notably, she prayed that such exhibits be expunged as the Court did in the case of **Robert P. Mayunga and Another v. The Republic**, Criminal Appeal No.514 of 2016, Court of Appeal of Tanzania (unreported).

Mr. Lazaro Simba on his side stated that he will submit on the 1st, 5th and 6th ground. On the first ground which states that the prosecution failed to call important witnesses. He submitted that page 15 of the typed proceeding shows that when PW1 was keeping the motorcycle he informed his anty and his mother. To cement his point Mr. Lazaro referred this Court to the case of **Azizi Abdallah v. Republic** [1991] TLR 72 whereby in this case, the prosecution failed to bring before the Court key witnesses. As a result, the Court had to draw an adverse inference in favour of the Appellant.

Regarding the fifth and sixth grounds of appeal that the Trial Court erred in law and fact to convict the Appellant while relying on circumstantial evidence. Mr. Lazaro submitted that there was no enough evidence to enter the conviction. To support his argument the Counsel

humbly prayed to cite the case of **Simoni Msike v. Republic**, 1958 EA 715, wherein at page 715- 718 where it was observed that:

"In a case depending on conclusively upon circumstantial evidence the Court must before deciding upon conviction finds that the inculpatory parts are incapable with the innocence of accused and incapable of explanation upon any other reasonable hypothesis than that of guilty."

On the strength of the above submission Mr. Lazaro prayed that this Court be pleased to allow the appeal, set aside the conviction and sentence and hence free the Appellant.

Submitting in reply, Ms. Generoza declared that they support the appeal for one (01) reason which is; that the charge against the Appellant was not proved beyond reasonable doubt. She contended that to prove the offence of stealing by an agent the prosecution was eventually supposed to prove entrustment of the stolen property but in this case, there is no evidence that shows the same.

She further averred that as per 15 of the typed proceedings PW1 testified that he preserved the motorcycle at the Appellant's home one day after it got stolen. At the same time, he testified that the Appellant questioned him if he kept his motorcycle. That implies that he stored his

motorcycle without the Appellant's (owner of the house) consent. Eventually, she claimed that the element of entrustment was not proved.

She referred this Court to the case of **James Mkalangale and Anna Luther Mkongo v. Republic**, Criminal Appeal No. 32 of 2019 Court of Appeal Tanzania at Moshi (unreported) where the Court stressed on the importance of proving the elements of entrustment to the Appellant. That, failure to prove such ingredient it cannot be said that one committed the stealing agent offence. In the end, she prayed that the Court be pleased to allow the Appellant's appeal.

In relation to the foregoing submission of the Learned State Attorney, the Appellant had nothing to rejoin.

Having gone through the grounds of appeal, the submissions from both sides and the Trial Court record, I find the most important issue for determination in this appeal is whether the case against the Appellant was proved beyond reasonable doubt. Notably, in proving the offence of stealing by agent the prosecution is duty bound to primarily prove the element of entrustment followed by stealing as discussed by Counsel in their respective submission.

In order to appreciate the afore assertion, I have hereunder endeavored to reproduce the *section 273 (b) of the Penal Code (supra)* which creates the offence of stealing by agent. It reads;

*"If the thing stolen is any of the following, that is to say- (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.**"*

In line with the above provision and as properly submitted by the two sides, the evidence as presented before the Namtumbo District Court was not sufficient as it failed to disclose the whole aspect of agency and entrustment of the property to the Appellant and for either reason to retain in safe custody or to apply, pay or deliver it or any part of its proceeds, for any purpose or to any person.

Apparently, the prosecution evidence revealed that the PW1 habitually parked his motorcycle at the Appellant's home place. At page 18 of the typed proceeding, it is evident that PW1 testified that on the fateful day of the alleged incidence he parked his motorcycle at the Appellant's house after being advised by another person to do so (his

grandfather). Thus, it appears that PW1 did so at his own peril, but in real sense there was no principal-agency relationship between them.

Furthermore, there is no direct evidence that the Appellant did stole PW1's property. Neither PW1 himself nor PW2 did testify that it was indeed the Appellant who stole the motorcycle. As seen at page 20 of the typed proceeding where PW2 stated that the Appellant admitted before him that PW1's motorcycle was in his house but later it was not found. Also, as per PW1 testimony as seen in page 15 of the typed proceedings, it came as a surprise to both of them that his motorcycle was missing.

Such piece of evidence does not show proof of the ingredient of the offence of stealing by agent c/s 273 (b) of the Penal Code (supra). As the law indicates, stealing c/s 265 and stealing by agent c/s 273(b) of the Penal Code (supra) are sections that both deal with the offence of stealing; in other words, stealing is a common fact in both sections. However, section 273(b) contains an additional factor element namely, 'entrustment of property in question for a particular purpose.

In the case of **Christian Mbunda v. Republic**, [1983] TLR 344, the Court speaking through Justice Msumi (as he then was) held that;

"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."

Commensurate to the above holding, I reiterate my finding that the prosecution did not establish the element of entrustment of the property to the Appellant. I say so because the prosecution was mandated to establish principal-agent relationship in that there should a proof that PW1's property was entrusted to the Appellant for a certain purpose and that the Appellant mishandled the said property contrary to the instructions of PW1. In the instant case, there is no such proof. It is evident that the PW1 had a mere tendency of parking his property to his uncle (Appellant).

As a matter of fact, the prosecution must establish a prima facie case. This is important because if no prima facie case is established, the Court could always give an accused person the benefit of the doubt and acquit him. Reference may be made to the case of **The Director of Public Prosecutions V Morgan Maliki and Nyasa Makorii**, Criminal Appeal No 133 of 2013 (unreported), the Court stated that:

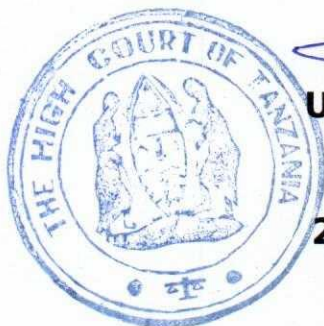
"A prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence

which he is charged or kindred cognate minor offence... the prosecution is expected to have proved all the ingredients of the offence or minor cognate are thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defense so as to fill it in, as this would amount to shifting the burden of proof".

In all fairness, under the prevailing circumstances of this case, this Court holds that the guilt of the Appellant was not proved beyond reasonable doubt as conceded by both parties. The prosecution evidence was scant to convict the Appellant.

In the upshot, this appeal is hereby allowed. In effect, I proceed to reverse the findings of the District Court, quash the conviction and set aside the sentence meted out against the Appellant. It is so ordered.

DATED at SONGEA this 20th Day of September 2022




U.E. MADEHA

JUDGE

20/09/2022