

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

CRIMINAL APPEAL NO 23 OF 2022

*(Originating from Criminal Case No 15 of 2020 in the District Court of Lindi
at Lindi)*

RAHIMU MOHAMEDI MBUNGO @TONGOLANGAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

17/8/2022 and 03/10/2022

LALTAIKA, J.

On the 20th of March 2020, the appellant herein **RAHIMU MOHAMEDI MBUNGO @TONGOLANGA** was arraigned in the District Court of Lindi at Lindi charged with Stealing by Agent Contrary to Section 273(b) of the Penal Code Cap 16 RE 2019. It was alleged by the prosecution that the appellant had stolen a motorcycle property of one Ally Mohamed Alinisi. When the charge was read over to the accused, he pleaded not guilty necessitating a full trial.

To build their case with anticipation to prove the same beyond reasonable doubts as required by law, the prosecution marshalled in a total of four witnesses and tendered two exhibits. The trial lasted for slightly more than three months. On the 30th of June 2020, the trial magistrate Hon. M.A. Batolaine SRM, having been convinced that the prosecution had left no stone

unturned in proving their case, convicted the appellant as charged and sentenced him to serve five years in prison and pay compensation at the tune of 2,300, 000 TZS.

Aggrieved by both conviction and the sentence, the appellant has appealed to this court by way of a petition of appeal. He has fronted a total of 6 grounds. I see no compelling reason to reproduce them here.

When this appeal was called on for hearing on the 17th of August 2022, the appellant appeared in person unrepresented by counsel. The respondent republic, on the other hand, was ably represented by Mr. Wilbroad Ndunguru, Senior State Attorney.

The appellant reminded this court that he had filed his ground of appeal and prayed that the same are considered as a part and parcel of his detailed submission. With such a brief introduction, the appellant prayed that the learned Senior State attorney be allowed to submit so he could rejoin on specific arguments raised.

Mr. Ndunguru, the learned Senior State Attorney announced on the outset that he was objecting the appeal. Mr. Ndunguru prayed to consolidate the 1st, 3rd, 4th and 5th grounds of appeal arguing that they all faulted proof of the prosecution case beyond reasonable doubt. The learned Senior State Attorney went to share his outline that he intended to argue the 2nd and 6th grounds separately. There being no objection, the learned Senior State Attorney took the podium.

Submitting on the consolidated grounds 1, 3,4 and 5, Mr. Ndunguru averred that [in a stealing by servant offence] the prosecution is tasked to

prove two things: 1st stealing and 2nd agency relationship between the appellant and the victim.

It is Mr. Ndunguru's submission that PW2 (Ali Mohamed Alinisi) had testified as depicted on page 14-17 of the trial court's proceedings how he was related to the appellant as the rider (boda boda) of the motorcycle No MC383 CDA SANLG. Expounding on such a relationship, Mr. Ndunguru averred further that the appellant had rented the motorbike to take him to several places whereupon he built trust with PW2 because he would return the motorbike as required. However, on the 14th day of January 2020 in the night hours, the appellant rented the motorcycle once again, but he never went back. As a result, the victim reported to the Lindi Police Station 15/1/2020 and the search for the appellant started.

It is Mr. Ndunguru's submission further that on the 22nd of January 2020, the appellant was arrested at the Lindi Main Bus Station and taken to Lindi Police Station and later arraigned in court.

It is Mr. Ndunguru's submission further that PW2 was the one who was entrusted with the motorcycle by PW1 (Yusuf Hussein Abdallah).

It is Mr. Ndunguru's submission that the stealing took place when the appellant was trusted to temporarily use the motorcycle. Mr. Ndunguru is of a firm opinion the evidence adduced sufficiently established the offence of Stealing by Agent Contrary to section 273(b) of the Penal Code (supra).

It is Mr. Ndunguru's submission that several cases of this court and the Court of Appeal have interpreted the section. He invited this court to the cases of **Christian Mbunda v. R. [1983] TLR 340** and **R. v. Nanji**

Sunderji (1935)2 EACA 130. The learned Senior State Attorney insisted that PW2 was the special owner and that the item was stolen under his custody. To that end, Mr. Ndunguru concluded that he was fortified that the offence was proved beyond reasonable doubt as required by law.

On the complaint by the appellant that he was not arrested with any exhibit, Mr. Ndunguru conceded but was quick to point out that such an omission was immaterial. What matters, the learned Senior State Attorney averred, is that the appellant took the motorcycle and the same was never found until the date of his conviction. With such a forceful averment, the learned Senior State Attorney prayed that the 1st, 3rd, 4th and 5th grounds of appeal be dismissed.

Moving on to the 2nd ground where the appellant had faulted admissibility of exhibits in court namely Exhibit P1 (purchase receipt of the motorcycle) and P2 registration card of the said motorcycle, Mr. Ndunguru submitted that as per the court records, the exhibits were tendered by PW1 Yusuf Hussein Abdallah. It is Mr. Ndunguru's submission that such exhibits could have been tendered by the real owner, but he never appeared in court because he was in Dar es Salaam while the trial took place in Lindi.

Without citing any authority, Mr. Ndunguru averred that in law, anyone who is conversant with an exhibit is entitled to tender it in court. The learned Senior State Attorney insisted that the law was complied with in admission of the exhibits P1 and P2 hence prayed that the ground of appeal be dismissed for being baseless.

Arguing on the last ground namely ground number six on credibility of witnesses, Mr. Ndunguru forcefully submitted that PW2's evidence was credible and the same was corroborated by the evidence of PW3 (Karim Bakari).

It is Mr. Ndunguru's submission that it had been established through the evidence adduced, that the victim and appellant had built a relationship and the latter was identified by the former. The learned Senior State Attorney submitted further that such identification was corroborated by PW3 who had also identified the appellant.

It is Mr. Ndunguru's submission further that identification is the main issue in this case, without which the appellant could not be arrested, nor could the victim assist the police to search for him. The learned Senior State Attorney drew the attention of this court to page 17 of the lower court's proceedings where the victim allegedly identified the appellant by name as well as by his physical appearance. Mr. Ndunguru concluded that the ground on credibility of witnesses was baseless and argued this court to dismiss the appeal in whole, uphold the meted sentence and order for compensation.

In rejoinder, the appellant pleaded his innocent by distancing himself from the offence committed. He went on and lamented that the trial court had failed to summon the rightful owner of the alleged stolen motorcycle. The appellant pointed out to disparity on the date the alleged stolen motorcycle was bought concluding that since a motorcycle comes first then the registration card and court records indicated that the witness had

acquired the card before the motorcycle, he firmly believed that there was no motorcycle that was stolen.

It is the appellant's submission that the trial court abused his ignorance of the law as his weakness. He is convinced that the investigation of the instant matter was of the weakest type hence there was no sufficient evidence to warrant conviction. To this end the appellant prayed that this court acquits him from the prison sentence.

I have dispassionately considered the rival submissions by both parties. The main issue for my determination is whether the appeal is meritorious. To achieve this, I will start my deliberations on the first consolidated grounds of appeal centered on proof of the offence of stealing by agent.

As recounted, the learned counsel for the respondent Mr. Ndunguru forcefully submitted on the elements of the offence. He has impressively linked up the facts to the offence allegedly committed by the appellant. Nevertheless, and with all due respect to the Senior State Attorney there is a very thin line between the offence of Stealing by Agent and civil wrongs. That thin line is criminal intent known in technical language as *mens rea*.

This court (Feleshi J. as then he was) in the case of **Kelvin Richard Mkulila v. R.** DC Cr. Appeal No. 20 of 2017 HCT, Iringa (Unreported) emphasized that in the absence of the intention to steal by agent (*animus furandi*) the offence of stealing by agent cannot stand. In the case at hand, the learned Senior State Attorney narrated the link between the appellant and the alleged victim to the effect that the two had built trust. The trust was born out of the appellant's act of returning the motorcycle several times

he was entrusted with using the same. The learned Senior State Attorney was supposed to go an extra mile to prove to this court specific intention by the appellant to commit the offence.

There is no doubt that the offence of Stealing by Agent belongs to the genus and species of the offences of theft (See **Christian Mbunda v. Republic** [1983] TLR 340). It goes without saying therefore that, like other crimes, there cannot be proof beyond reasonable doubt in the absence of proving criminal intent.

It is probably worth emphasizing that criminal courts should be left to deal with crimes. Other disputes arising from civil relationships such as contract (including implied contracts) should be dealt with as civil claims. See **Kelvin Richard Mkulila v. R** (Supra).

As I am going to do shortly, this court in the case of **Saverina Exavery v. Republic** Cr. Appeal No 9 of 2019 HCT, Bukoba (Kairo J as she then was) advised parties to invoke civil channels to solve the dispute that was hitherto brought to court as an offence of stealing by agent.

Premised on the above discussion, I am fortified that the prosecution has failed to prove the case beyond reasonable doubt. This is because the essential element of the intention to steal by agent (*animus furandi*) has not been established.

To this end, I hereby allow this appeal. I quash the conviction and set aside the sentence of five years imprisonment as well as the order of compensation to the tune of TZS 2,300, 000.

The appellant should be released from jail forthwith unless he is being held for any other lawful cause(s)/reason(s).

It is so ordered.



E.I. LALTAIKA

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE
3.10.2022**

Court

This judgement is delivered under my hands and the seal of this Court today the 3rd day of October 2022 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney and the appellant.



E.I. LALTAIKA

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE
3.10.2022**

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.



E.I. LALTAIKA

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE
3.10.2022**