

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

**CRIMINAL APPEAL NO. 56 OF 2022**

*(Originating from Criminal Application No. 2/2021 at Shinyanga District Court; U.S.  
Swallo, PRM)*

**MAXIMILLIAN DONALD @ NDOSHI.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGEMENT**

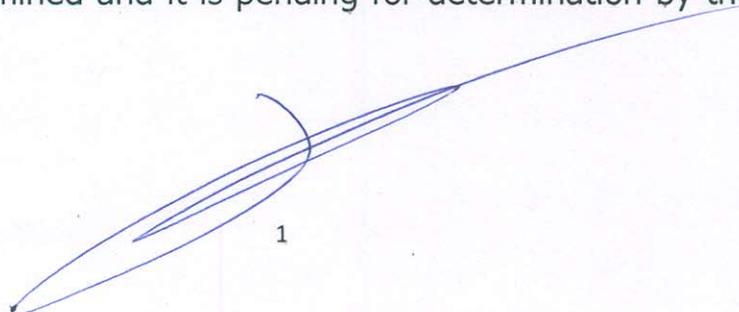
*16<sup>th</sup> August & 11<sup>th</sup> October, 2022*

**A. MATUMA, J.:**

In this appeal, the Appellant was charged and convicted with the offence of Stealing by Agent contrary to section 273 (b) of the Penal Code, Cap.16, R.E 2019. Following a full trial, the District Court of Shinyanga (U. S. Swallo, PRM) convicted the Appellant and sentenced him to serve four years imprisonment on each count and to compensate the complainant **Tshs. 200,975,310/=**.

The appellant appealed to this court which dismissed the appeal but reduced the amount of compensation.

The Appellant further appealed to the court of appeal. His appeal is yet to be determined and it is pending for determination by the court of appeal.



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The Respondent made an application before the trial court for warrant of levy so that the Appellant's house is attached and sold for execution of the compensation ordered by the court. The warrant was issued as sought which aggrieved the appellant hence this appeal.

When this appeal came for hearing on 16<sup>th</sup> day of August, 2022, the court required the parties to address on the issue as to ***whether the application before the trial court which is subject to this appeal was properly drafted to warrant proper hearing for the orders sought.*** This issue was drawn from the complaints of the appellant in the three grounds of appeal presented before me for hearing.

The Appellant who was present was also represented by M/S Rose Ndege learned Advocate whereas the Respondent Republic was represented by Mr. Nestory Mwenda learned State Attorney.

Brief facts of the case are as follows: It was alleged that the Appellant was employed as sales agent of Jambo Food Products Co. Ltd in Kagera Region and that, between 17<sup>th</sup> day of April, 2019 and 19<sup>th</sup> day of April, 2019 he stole various types of soft drinks valued at Tshs. 200,975,310/= which he was entrusted for sale and remit the proceeds thereof to his employer. The District Court of Shinyanga was satisfied that the prosecution case was proved beyond any reasonable doubts and thus convicted the Appellant and sentenced him to serve four years imprisonment in respect of each count and to compensate the complainant Tshs. 200,975,310/=. The imprisonment sentences were ordered to run concurrently.

Thereafter, the Respondent/Republic filed Criminal Application No. 2 of 2021 to the convicting court **for a warrant for levy of fine** under Section 328 (1) of the Criminal Procedure Act Cap. 20 R.E 2019. By that time the Appellant had already lodged his appeal to this Court against the conviction and sentence. That necessitated rightly so in my view a stay of hearing of such Application for warrant of levy of fine pending the hearing and determination of the appeal in this Court.

The High Court after hearing the appeal (Criminal Appeal no. 81 of 2020) dismissed it serve for minor changes of the amount to be paid as compensation to the complainant from the former decreed amount into only **Tshs. 167,000,000/=**. The Appellant quickly lodged a notice to further appeal to the court of Appeal and prayed that the Application for warrant of levy be further stayed pending determination of his appeal to the Court of Appeal. This time his application was refused and the hearing of the Application thus continued and finally granted in which the Appellant's house located at Dome Ndebezi street within Shinyanga municipality was ordered to be attached and sold in execution of a warrant for levy.

The appellant was aggrieved hence this appeal with three grounds whose complaints are to the effect that the District court erred to entertain the application while it had no jurisdiction, that it was wrong for the said court to refuse staying the application pending hearing and determination of the appellant's appeal before the Court of Appeal, and that the appellant's house was wrongly attached as a movable property.

Now back to the issue at hand, the Respondent's application for warrant of levy of fine was made by chamber summons and supported by affidavit of one **F55 D/CPL SWALO** a Police Officer of Shinyanga Police Station. The prayer in the Chamber summons reads;

- 1. That this Honourable Court be pleased to issue warrant for levy of fine.*
- 2. Any other orders the Honourable court deems proper to grant in the circumstances of the Application.*

The affidavit in support thereof has six paragraphs out of which five are addressing the historical background of the matter as to how the appellant was charged, tried and convicted, how he was ordered to pay compensation to the complainant at the tune of Tshs. 200,975,310 and how the Appellant failed to pay such compensation. The sixth paragraph is deposed that;

*"That I have managed to trace the movable property of the respondent and found one house situated at Dome Street within Ndembezi area within Shinyanga Municipal in Shinyanga Region owned by him".*

It is from such a prayer in the Chamber summons and the facts deposed in the affidavit supra along with the grounds of appeal I wanted the parties to address this court on whether the application was properly drafted to warrant a hearing on the orders sought i.e what was the prayer exactly before the District Court.

Mr. Nestory Mwenda learned State Attorney quickly pointed out that the Chamber summons was insufficiently drafted as it did not reflect the property against which the warrant for levy is sought so as

to enable the opponent party to know which property is subjected to the application. He further submitted that even the supporting affidavit had omission of facts as it did not reflect the intent of the application before the court. He finally prayed that the appeal be allowed but they be given leave to refile the same subject to the outcome of the Appellant's appeal in the Court of Appeal.

M/S Rose Ndege learned advocate for the Appellant had no more than joining hands with the learned State Attorney. She as well prayed for the Appeal to be allowed.

On my party I entirely agree with both parties that the respondent's application before the District Court was not properly drafted to warrant a just hearing and just decision. As rightly submitted by the learned State Attorney, the Chamber summons did not reflect against which property the application for warrant of levy was brought. It had a general prayer that **the warrant for levy of fine** be issued. That was not enough to enable the appellant to prepare the focused defence as rightly argued by Mr. Nestory learned State Attorney. The Chamber summons ought to have described the property against which the warrant for levy was being sought.

The provisions of section 328 (1) of the CPA upon which the application was made are very clear to the effect that the property against which the warrant for its attachment and sale is sought must be described so that the person against whom the application is made can show cause. It provides;

*"Where a court orders money to be paid by an accused person or by a prosecutor or complainant for fine, penalty,*

*compensation, costs, expenses or otherwise, **the money may be levied on the movable and immovable property** of the person ordered to pay the same **by distress and the sale under warrant but if he shows sufficient movable property to satisfy the order his immovable property shall not be sold**".*

The wordings used in the provision supra that; *"the money may be levied **on the movable and immovable property** of the person ordered to pay the same **by distress and the sale**"* implies that the property be it movable or immovable against which the warrant is sought must be described in the application. And those which states in the same provision that; *"**but if he shows sufficient movable property to satisfy the order his immovable property shall not be sold**"* implies that once the property is described the person against whose property the warrant is sought may be able to show cause why such described property should not be sold.

In the instant matter the chamber summons is totally quiet in respect of the property which was intended in the application. Through it the appellant was not made aware of his property against which the warrant was being sought and thus he was not sufficiently made to prepare a focused defence. Even the trial court could have not entertained such general application without confining to the relevant property against which the application was made.

Even the supporting affidavit which at least names the Appellant's house at Dome Ndembezi street had omissions of necessary facts to be discussed and decided upon. Those words at paragraph 6 of the

affidavit; *"That I have managed to trace the movable property of the respondent and found one house situated at Dome Street within Ndembezi area within Shinyanga Municipal in Shinyanga Region owned by him"* are as well insufficient to make both parties and the court know what was to be done in respect of such properties. The Deponent states that he has managed to trace the movable property of the appellant herein and also found one house at Dome street owned by him. So what! It was like the deponent stating his discoveries of the appellant's properties. What then was the court to do with such discovery? It from such insufficiency, the learned state attorney argued that their affidavit had omission of facts. I agree with him. The affidavit should have further deposed on what is to be done in respect of the discovered properties.

Not only that but also as the affidavit states that there were movable properties and the house owned by the appellant, the law is clear as quoted above that if movable properties suffices to levy the amount the immovable property shall not be sold. In that respect the movable properties found by the deponent should have been sufficiently described so that it is determined whether them alone could not satisfy the ordered compensation.

Not only that but also the application was made in respect of warrant for levy of fine. But the judgment from which the application emanates did not order any payment of fine. It ordered payment of compensation. So the warrant should have been sought for levy of compensation and not fine. The warrant for levy in accordance to section 328 (1) of the CPA supra can be issued in respect of fine, compensations, costs, penalty, expenses or otherwise. In that regard

the prayer for warrant must specify in respect of which category the warrant is sought. Such category must be the same which was ordered in the judgment or order of the court.

Under the herein observations, it is obvious that the application in the District Court was not properly drafted and the Honourable Magistrate in the District Court was misled to entertain the respondent's prayers which was modified during the submission of the applicant thereat. The Application ought to have been rejected so that the respondent herein would go back to redraft the same.

Having so observed, I allow this appeal. I quash the ruling of the District Court and set aside the Warrant for Levy of fine issued thereof. The respondent herein is at liberty to reinstitute a fresh application subject to the outcome of the appeal of the Appellant which is pending in the Court of Appeal.



**A. MATUMA**

**JUDGE**

**11/10/2022**

**DATED at SHINYANGA** this 23<sup>th</sup> day of November, 2022.

**A. MATUMA**

**JUDGE**

**11/10/2022**