

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MTWARA DISTRICT ZONE**

**AT MTWARA**

**CRIMINAL APPEAL CASE NO 60 OF 2022**

(Originating from Kilwa District Court in Criminal Case No 63 of 2022  
at Kilwa Masoko)

**EMMANUEL MABULA NGELELA ..... APPELLANT**

***VERSUS***

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

**JUDGEMENT**

*15/05/2023 & 26/6/2023*

**LALTAIKA, J.**

It was on the **21<sup>st</sup> day of July 2022** when the District Court of Kilwa at Masoko (the trial court) in Criminal Case No 63 of 2022 sentenced the appellant herein **EMMANUEL MABULA NGELELA** (then accused) to serve three years in prison and, after completion of the prison sentence, pay TZS 7.5 million to the complainant. Earlier, the appellant and another were arraigned in the trial court charged with **Stealing by Agent c/s 273B of the Penal Code Cap 16**.

Having been convinced that the prosecution had left no stone unturned in proving their case, beyond reasonable doubt, the learned trial

Magistrate **A.M. Mkasela** convicted the appellant as charged and sentenced him as described above. The appellant is dissatisfied with both conviction and sentence, hence this appeal. The appeal is based on five grounds of appeal as reproduced below:

1. *That, the appellant pleaded not guilty to the offence charged, because he did not commit the alleged offence in question as it was fabricated on him by the prosecution side.*
2. *That, the trial court erred in law and in fact in convicting and sentencing the appellant because there was no proper and sufficient evidence adduced by the prosecution side before the trial court which can support the offence of stealing by Agent leveled against the appellant which would ground the conviction against the appellant.*
3. *That, the trial court erred in law and in fact in convicting and sentencing the appellant because the prosecution side failed to supply any Exhibit before the trial court to confirm that PW2 had ever handed over money to the appellant, if they promised before the court that they will bring it as provided under copy of proceeding page number Eight, sadly until the judgment comes out, they have not brought any Exhibit.*
4. *That, the trial court erred in law and in fact to convicting and sentencing the appellant because the prosecution side failed to prove its case beyond reasonable doubt and unfortunately the trial court convicted and sentenced the appellant on the weakness of evidence of defence side rather than on the strength of the evidence of prosecution side.*
5. *That, the trial court erred in law and in fact to convicting and sentencing the appellant basin on standard of proof on probability which is used in civil cases instead of basing on the proof of the case beyond reasonable doubts which is used in criminal cases.*

The factual and contextual backdrop leading to this appeal is not difficult to comprehend. The appellant herein and his co-accused one **MAGUTA MAIGE MAKALE** residents of Zinga Village within Kilwa District and Lindi Region were entrusted by one MOHAMED ABDALLAH NDEMBO TZS 7,500,000/= to purchase 30 cows @250,000/=. However, the appellant and his co-accused did not purchase the cows, alleged the prosecution, but rather used the money for their personal use.

When the appeal was called on for hearing on 15/05/2023 the respondent Republic appeared through Mr. Gideon Magesa and Ms.

Atuganile Nsajigwa, learned State Attorneys. The appellant, on his part, appeared under custody while enjoying the legal services of Mr. Rainery Songea, learned Advocate. Both learned counsel made oral submissions, the summary of which appears below.

Having taken the podium, Mr. Songea stated that although his client had lodged five grounds of appeal, he would argue all at once under the complaints that the case was not proved beyond reasonable doubt. The learned Counsel stated further that as per the impugned judgement of the trial court **dated 21/7/22**, there was one accused person. However, looking deeper into the lower court's records, Mr. Songea reasoned, accused persons were two, the appellant and one Maguta Maige Makale.

It was Mr. Songea's forceful submission that when the defence case commenced, there was violation of the basic right to be heard. On page 21 and 22 of the proceedings, the learned counsel stated, *the* Maguta Maige Makale was the first to provide his defence and the present appellant was not allowed to cross-examine him. Mr. Songea was quick to point out that such an omission was a fatal unprocedural irregularity.

Expounding, Mr. Songea averred that since the appellant and his co-accused had no representation, they were entitled to cross-examine each other. The stated omission, reasoned the learned counsel, was tantamount to violation of the right to be heard warranting nullification of the proceedings of the lower court. To buttress his argument, Mr. Songea referred this Court to the Court of Appeal decision in the case of **HUSSEIN**

**IDDI AND ANOTHER V. DIRECTOR OF PUBLIC PROSECUTIONS  
Crim App No. 16 of 2020 (unreported).**

Moving on to **the second complaint** by his client, Mr. Songea stated that the appellant and another were arraigned in the trial court charged with stealing by agent c/s 273B of the Penal Code Cap 16. He emphasized that the quoted provision cannot stand alone without being backed up by either section 265 or 258 of the Penal Code. The learned counsel averred that the case law authority obtained in this jurisdiction is to the effect that in the absence of such other provisions in the charge sheet the offence cannot stand. The cases of **JORAM LANGSON MKISI V. R. Crim App 192 of 2019 (Unreported)** and **MECK MALEGESE AND ANOTHER V. R. Crim App 228 of 2011 (Unreported)** were cited to support the contention.

Premised on the above case law authority, the learned Counsel argued further that since even the charge sheet was defective and also the omission of the fair trial, it could not be said that the offence was proved beyond reasonable doubt. Going through the evidence adduced in the trial court, Mr. Songea averred, there is variation between the evidence of PW1 and PW2.

Whereas PW1 on page 11 stated that the first accused was given TZS 7,500,000 to buy 31 cows, Mr. Songea argued forcefully, the charge sheet provided that PW1 had been given TZS 7.5 million for purchase of 30 heads of cows. PW2, as recorded on page 14 of the lower court's

proceedings, had stated that the amount was TZS 7,750,000 for buying 31 cows.

Citing section **110 of the Law of Evidence Act**, the learned Counsel argued that what was expected of the prosecution was to prove the contents of the charge sheet. On the variance with PW2's evidence, Mr. Songea averred, the prosecution did not discharge the duty of proving the offence beyond reasonable doubt effectively. He explained that since there was a contradiction on the number of cows and the amount of money, the court should have decided in favour of the appellant.

On the **third complaint**, Mr. Songea averred that the impugned judgement indicated no analysis on how the trial Magistrate arrived at the decision that the case against the appellant was proved. On page 12 of the judgment, Mr. Songea argued, the magistrate stated: "the second accused's defence, cannot exempt him from criminal liability as it is just a mere denial to the offence." In that regard, reasoned the learned Counsel, the magistrate was shifting the burden from the prosecution to the accused contrary to section 3(2)(a) of the Evidence Act Cap 6 R.E. 2022.

On the **fourth complaint**, Mr. Songea averred that in his reasoned opinion, the instant matter was supposed to be treated as a **Civil Case**. The learned Counsel argued that parties had given each other money for buying cows, one of them did not honor his side of the promise, it is obvious that theirs was a civil case, Mr. Songea emphasized. The learned counsel cited the Court of Appeal decision IN **MTWA MICHAEL KATUSA V. R. Crim App. 577 of 2015 (Unreported)** and this court's decision in

**RAHIM MOHAMED MBUNGO @TONGOLANGA V. R.** Crim App 23 of 22 HCT Mtwara (Unreported) to buttress his argument.

In conclusion, Mr. Songea stated that based on the above shortcomings, he was fortified that the case was not proved beyond reasonable doubt. Had the trial court made a proper analysis of the evidence as per the charge sheet, argued Mr. Songea emphatically, it would have been decided differently. The learned Counsel prayed that the appeal be allowed and the order for payment of 7.5 million be nullified and the appellant be set free.

As the turn for the respondent Republic came, **Mr. Magesa** stated that his learned colleague Ms. Nsajigwa would come first to enlighten the court, based on facts that could be gleaned from the lower court's records, on what had transpired leading to the matter at hand. Needless to say, that such an arrangement proved very helpful.

**Ms. Nsajigwa** stated that the appellant had been entrusted with TZS 7,750,000 and the money was for buying cows for the complainant. He bought the cows, Ms. Nsajigwa narrated, but failed to take them across the river, Ruvu, to the person who had sent him, on allegation that it was unsafe to cross the river during high tide. He decided to sell the cows in anticipation that he would buy other cows and when the river subsided, he would take them across. The appellant's failure to explain why he did not buy other cows, stated Ms. Nsajigwa, is proof that he wanted to do away with the money, hence the offence.

Addressing the **first complaint** raised by his learned brother, **Mr. Magesa** conceded that the trial court had indeed omitted the name of the second accused but opined that it was a slip of the pen. He argued that such an omission did not cause injustice on the side of the appellant and could be saved by section 388 of the **Criminal Procedure Act** (*Supra*). The learned State Attorney firmly believes that the impugned judgement was meant for both accused persons as indicated on the 2<sup>nd</sup> paragraph of the impugned judgement.

**On the second complaint on cross-examination, Mr. Magesa conceded.** However, he was quick to pray to be guided by original proceedings. Should it still be the case that the accused persons were not allowed to cross-examine each other, Mr. Magesa reasoned, the appeal warranted to be reverted back to the trial court for continuation of trial from the defence stage.

**On the third complaint,** namely defectiveness of the charge sheet, Mr. Magesa avowed that the charge sheet was not defective. He quickly flipped through the pages of the Criminal Procedure Code Cap 20 RE 2022 (the CPA). Referring to the second schedule to the CPA the model for charging the offence of stealing by agent was the same as it appeared in the charge sheet. With that dramatic action, the learned State Attorney gave a signal that he rested his case on that particular argument.

Mr. Magesa argued that the cases cited by his learned brother to support his argument particularly **JORAM LANGSON MKISI V. R. (supra)** were distinguishable. In the cited case, Mr. Magesa reasoned,

there was omission in citing a subsection. He emphasized that each subsection of section 273 creates a different offence. However, the particulars of the offence never showed that the appellant was entrusted with the exhibit for purposes of doing business whereas in the instant matter, the particulars are clear, avowed the learned State Attorney.

**On the fourth complaint that this was a civil case, Mr. Magesa** strongly disagrees. The learned State Attorney argued that evidence shows that the money was given to the appellant, and he did not challenge it during cross-examination. The money was for buying 30 cows and the cows never arrived at the buyer. The amount of money was used by the appellant for his own purposes. Based on such facts, Mr. Magesa reasoned, a criminal offence was established. The learned State Attorney emphasized that law was clear that civil fora or avenues cannot oust criminal liability. He concluded by an averment that the **RAHIM MOHAMED MBUNGO's case** referred by Mr. Songea was distinguishable to the instant matter. He prayed that the appeal be dismissed for lack of merit.

In rejoinder, Mr. **Songea** reiterated his submission in chief, providing clarification on a few aspects. On the chargesheet he emphasized that it indicated the appellant received 7.5 million shillings for 30 cows and that was what the prosecution was supposed to prove. Nevertheless, reasoned Mr. Songea, some witnesses mentioned a different amount and to save the day, the prosecution could have amended the charge sheet. Since this was not done and all Prosecution Witnesses contradicted each other, PW1



stated that he gave them 7.5 million, PW2 page 14 7,750,000 PW3 7,750,000, it could not be said that the offence was proved beyond reasonable doubt.

It was Mr. Songea's submission further that as per the impugned judgement, his client was ordered to pay back 7,750,000/= on top of the prison sentence of 3 years. He emphasized that such amount did not appear on the charge sheet. The learned Advocate strongly maintained that the matter was a civil case because parties had given each other money for buying cows. He concluded by stating that he had skipped through the trial court's records and found that although on page 1 there was one accused, on page 3 an amendment to the charge sheet brought both the appellant and the second accused person. He opined that an order for **retrial** was not practical in the absence of both accused persons.

I have dispassionately considered the rival submissions and carefully examined the trial court's records. My attempts to understand the facts as can be gleaned from the records shows that this is an interesting case. It involves cows, contracts, crimes, and the never-ending struggles of mankind to navigate through rivers and other natural forces. More importantly, it involves two cultures attempting to influence each other.

The complainant in this case Ally Mohamed Mkalimoto (PW1) had been a peasant throughout his life. However, after observing the lifestyles of cattle herders (pastoralists) who had migrated to his district from distant lands he started keeping some goats. He sought advice from his childhood friend Mohamedi Abdallah Ndembo (PW2) a resident of Kitomanga Village

in Kilwa and fellow villager Bakari Said Mnonga (PW3) on how to get cows to keep.

Incidentally, PW2 and PW3 had some connections with pastoralists including the appellant, a resident of Mkwajuni Kitomanga area. The duo used their connections to look for cows to buy for PW1 by visiting several auctions (*minada*) but in vain. After some discussion, a decision was made to entrust the appellant and his co-accused the task of buying the cows from Kisaki in Morogoro. Thus, PW2 and PW3 counted the money and handled over TZS 7,750,000/= to the appellant. The appellant promised PW2 and PW3 that he would bring the cows at Kitomanga after a week.

To cut the long story short, it appears that the cows were indeed bought in Morogoro and driven by PW4 to the edge of the mighty Ruvu river. For safety purposes, PW4 was advised not to cross the river until the water subsided. While waiting for calmness, the appellant who had hired him appeared with a different idea: to sell the cattle in anticipation of buying other heads from a nearby *mnada*. The cows were sold to locals of Ruvu.

The appellant went to Nyambogo and bought 22 cows with which he managed to cross the river. It appears that at this time, PW1 got worried. He contacted the appellant and advised him to drive the cows to Ikwiriri to be easily transported to him. No sooner had the two lost communication that PW1 reported the matter to Kilwa Masoko Police Station. The appellant and the first accused were arrested and charged as alluded to above.

The above contextual backdrop leaves me without any doubt that this was a civil matter based on contractual agreement. It is very unfortunate that the trial court succumbed to the overcriminalization drive cited as one of the source of prison congestion in Africa. Going forward, the rule of the game is, if a matter is inclined towards a civil dispute, it probably is. Any scenario in which a struggle is required to establish *mens rea* to support the *actus reus* should be left to the civil courts to determine.

I find it very difficult to establish the *mens rea* of stealing in the matter at hand. These villagers had trusted one another. The money exchanged hands freely and there was a *meeting of the minds* on the expected output namely heads of cows. The fact that an overflowing river necessitated selling of the original heads in anticipation of buying other cows at a much safer auction points to the fact that parties had the best of intentions to fulfil their promises even at the expense of flexibly navigating the mighty Ruvu.

The offence of stealing by agent belongs to the genus and species of the offence of stealing. In order to prove the offence of stealing by agent; the prosecution was required to bring its case within the ingredients of the offence of theft under section 258 (1) and (2) (a) of the Penal Code [Cap. 16 R.E. 2022]. In doing so, the prosecution evidence should have proved the intention to steal by agent (*animus furandi*). As alluded to above, I find difficult to establish as the appellant and another had, all along, exhibited exerted efforts to fulfil their part of the agreement albeit with some

deviations. The complainant should have been advised to pursue his claims through civil litigation.

Before I windup, I am inclined to state that I have gone through the cases cited by Mr. Songea to support his argument namely **MTWA MICHAEL KATUSA V. R. (Supra)** and this court's decision in **RAHIM MOHAMED MBUNGO @TONGOLANGA V. R.** Crim App 23 of 22 HCT Mtwara (Unreported). I am satisfied that with minor variation due to the peculiarity of each case, they all add to the emerging jurisprudence of this court to discourage application of the criminal law to purely social, contractual and at times, purely personal matters such as debts.

To show that the mindset of members of our larger society is fixated towards criminalization, an artist called **YONA CHILOLO** has composed a song depicting this way of thinking. In that song with over 1.2 million viewers on YouTube within 24 months, the artist's prayer to God is, among other things, to give him a lot of money so he can lend it to his adversaries. Should the "wazushi" fail to pay him back, he would take them to the police. The aim of taking them to the police, Mr. Chilolo suggests, is not "to jail them" but to teach them a lesson. The verse goes like this:

*"Nipe pesa nyingi nyingi niwakopeshe  
wazushi, Wakinikopa wasipolipa  
niwapeleke polisi*

*Sintawafunga ila nataka waijue kanuni:  
kutoka chini Kwenda juu siyo kazi rahisi,*

*Kutoka juu kushuka chini hilo ni jambo  
jepesi..."*

That is a great song from Yona Chilolo. As an artist he is a mirror of the larger Tanzanian society that is to say, he is "*kioo cha jamii*." The song is great. It carries a profound message. However, the police should be left to deal with public wrongs such as robbery, armed robbery, rape, and the list goes on. Our criminal statute books do not contain any entry coming closer to "*Wakinikopa Wasipolipa Niwapeleke Polisi*". Those are contractual issues.

Civic education campaigns should be widened to point out that in addition to criminal liability some actions are civil and/or tortious in nature. The police should also learn to say No to purely personal issues that are clothed with a criminal coat. Scholars have pointed out that the main advantage of allowing prosecution of civil matters is that powerful members of the society may easily turn to criminalization as a tool to wreak havoc on the less fortunate

In the upshot, I allow the appeal. I quash the conviction and set aside the sentence as well as the order of compensation to the tune of TZS 7,750,000/= . The appellant **EMMANUEL MABULA NGELELA** should be released from jail forthwith unless he is being held for any other lawful cause(s).

It is so ordered.

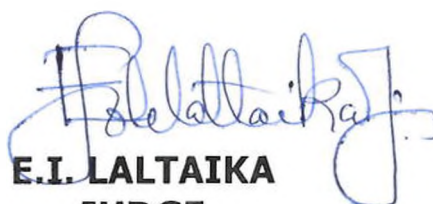


  
**E.I. LALTAIKA**  
**JUDGE**  
**26.06.2023**

**Court**

This judgement is delivered under my hand and the seal of this court this 26<sup>th</sup> day of June 2023 in the presence of Melchior Hurubano, Atuganile Nsajigwa and Steven Kondoro learned State Attorneys for the respondent Republic, Mr. Issa Chiputula, learned Advocate for the appellant and the appellant.



  
**E.I. LALTAIKA**  
**JUDGE**  
**26.06.2023**

**Court**

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



  
**E.I. LALTAIKA**  
**JUDGE**  
**26.06.2023**