IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC.CRIMINAL APPEAL NO. 86 OF 2022

(Originating from Criminal Case No. 34 of 2022 of Iramba District Court)

ADAM BAKARI JOMO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

16th November, 2023.

HASSAN, J.:

The appellant Adam s/o Bakari Jomo was charged with the offences of theft contrary to section 258 (1) and section 265 of the Penal Code, [Cap. 16 R.E 2019]. The particular of the offence given in the charge sheet was that the accused person Adam Bakari Jomo on 14th day of August, 2021 at about 8:00 hours there at Mwangeza village and Ward, Kirumi Division, within Mkalama District in Singida Region, wilfully and unlawfully did steal 110 burlaps /bags of sunflowers valued at Tshs. 11,000,000/= and 37 burlaps/bags of maize valued at T. shs. 1,850,000/= all together total led at the amount of Tshs. 12,850,000/=, the property of one Abdallah s/o Samweli @ Mangushi.

After full trial, the accused was convicted for the offence of stealing by agent contrary to section 273 (b) of the Penal Code, [Cap. 16 R.E 2019] and sentenced to serve conditional discharge for a period of twelve (12) months (6) upon condition that he should not commit any offence during period of conditional discharge; and also ordered to return 60 bags of sunflower or sum of Tshs. 6,000,000/= to Abdallah Samwel @ Mangushi. Pained by the decision of the trial court, the respondent lodged the instant appeal yielding the following grounds:

1. *That, the trial court erred in law and in fact, by treating the matter as criminal offence while the same was civil in nature and consequently convicted and sentence the accused.*
2. *That, the trial court erred in law and in facts for finding guilty, convict and sentence the appellant by denying the applicant's evidence of payment the debt due before the District Magistrate to the victim.*
3. *That, the trial court erred in law and in fact by finding guilty, convicting and sentencing the appellants while the respondent's failure to prove the case beyond reasonable doubt.*

4. *That, the trial court erred in law and in fact for failure to analyse, examine and evaluate property the evidence adduced by the party hence reach the erroneous decision.*
5. *That, the trial court erred in law and in fact for finding guilty, convicting and sentencing the appellant while the matter was not reported immediately after the commission of offence.*

Before the court, the lay appellant appeared in person unrepresented by counsel, whereas on the other side Ms. Prisca Kipagile, learned State Attorney acted for the respondent Republic.

During hearing, before the appellant was invited to present his appeal, prosecution begged to address the court and on that, Ms. Kipagile, learned State Attorney readily supported the appeal. To implore on what was faulted, she admitted the appeal has to be allowed due to the following reasons:

Firstly, the appellant was not properly availed with his right of defence given under section 231 (1) (a) of the CPA. Looking at page 23 of the proceedings, the trial Magistrate had only paraphrased that "the appellant *had been given his* right of defence" instead of explaining to the

accused the actual dictate of section 231 (1) (a) of the CPA, and then record the answer given by the accused on how he will afford his defence.

Secondly, that the trial Magistrate flawed to convict the accused person with the offence of stealing by agent contrary to section 273 (b) of the Penal Code, instead of the offence of theft contrary to section 258 (1) and 265 of the Penal Code which the accused stood charged, and pleaded thereto. She denoted that looking at page 9 of the judgment, the accused was convicted for the offence of stealing by agent.

Thirdly, that the cautioned statement which was admitted in evidence and marked as exhibit PE1 was not read over loudly to the court as it can be seen at page 20 of the proceedings. For that note, Ms. Kipagile contended that the exhibit ought to be expunged.

Concluding her short submission, she prayed the court to allow the appeal, quash conviction and set aside the sentence.

On the other hand, the appellant apart from supporting what was submitted by prosecution Attorney, he added by refusing that he did not steal bags of sunflower and maize. He also submitted that victim (Abdallah Samwel) did not see him stealing those items and that he did not discuss anything about business on the material date. He concluded that he was alleged to steal on 14/08/2021 but charge was filed on 09/04/2022, thus,

he contended that where and why it took that long before charge was filed to the court.

On my part, going through the submissions, and the record of trial court, I find it apparent that, what was submitted by the learned State Attorney truly reflect what was transpired by the trial Magistrate. Thus, owing to such circumstance, there is nothing to disagree from her assertion. Indeed, the trial Magistrate had flawed in disposing this case.

For instance, to start with the issue that, the cautioned statement was not read over loudly soon after being admitted in evidence. Looking at page 20 of the proceedings, the trial Magistrate after admitting the cautioned statement record as follow:

> *"The cautioned statement of the accused is admitted to be exhibit PE1, I order the witness DC Hizza to read loudly to the accused the content of the cautioned statement of the accused."*

After that *DC Hizza* (Pw5) ended there to give his evidence. Thus, there is no record showing that the said exhibit was read over in compliance to the order of the court. It is now settled that where a document is admitted as exhibit, it must be read over to the accused person. The essence of this procedure is to enable the accused to understand nature of evidence

given against him. He can be in a good position of cross-examining the respective witness and or prepare his defence only if the document is read over to him. The effect of failure to read over document after its admission was stated in the case of **Florence Athanas @ Baba Ali and Another v. The Republic,** Criminal Appeal No. 438 of 2016, CAT at Mbeya (unreported), seeing exhibit was not read over to the accused the Court of Appeal held that:

> *"The failure occasioned a miscarriage of justice to the appellants since they were deprived to understand the substance of the admitted documents."*

Thus, the content thereto was not revealed and made clear to the appellant, and for that omission it led to the failure justice. For the aforesaid reasons, the cautioned statement (Exhibit PE1) cannot be relied upon and should be expunged from the record, and I hereby do expunge the same.

Moving on the second issue, that is, the accused was wrongly convicted for alternative conviction. Eyeing from the records, the accused was initially arraigned with the offence of theft contrary to section 258 (1) and section 265 of the Penal Code, [Cap. 16 R.E 2019] as per admitted

charge sheet, he also pleaded not guilty for the same charge. Thereafter, evidence for both sides were gathered, the court entered an alternative conviction for the offence of stealing by agent contrary to section 273 of the Penal Code, [Cap. 16 R.E 2019], instead of theft.

At this juncture the vital question to be answered is whether a conviction for stealing by agent can be entered on a charge of theft contrary to section 258 (1) and section 265 of the Penal Code, [Cap. 16 R.E 2019]. In essence, position of law is clear that alternative conviction can be entered for a minor and cognate offence. See for example in **Godfrey Mwasumbi & Rashidi Shabani v. Republic, Criminal Appeal No. 29 of 2015 (unreported)** where the court of appeal held that:

> *"When a person is charged with an offence and the fact are proved which reduce it to minor offence, he may be convicted of the minor offence, although he was not charged."*

In the similar ventures, see also **Robert Ndecho & Another v. Republic (1951) 18 EACA at Page 174**; where it was held that:

"The above is the position of the law. However, case law has construed that provision and stated that an accused person in order to be convicted of a lesser or minor offence, the offence should be on the face of it, a minor and cognate in character to the greater offence to which the accused person was initially charged with."

In the result, looking on the records in the instant case, I have observed as rightly submitted by learned State Attorney Kipagile, the accused person was initially charged with the offence theft contrary to section 258 (1) and section 265 of the Penal Code, [Cap. 16 R.E 2019] as per charge sheet, but, after trial, he was convicted and sentenced for the offence of stealing by agent contrary to section 278 (b) of the Penal Code.

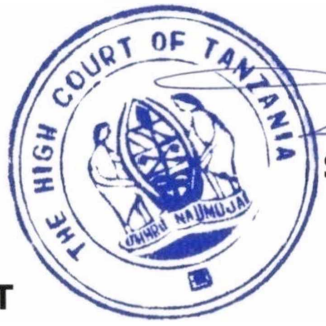
Thus, based from the above authorities, in order to answer the main question as to whether a conviction for stealing by agent can be entered on a charge of theft, two mini questions come up. One, is the offence of stealing by agent a lesser and minor offence then the offence of theft? Two, is the offence of stealing by agent cognate to the offence of theft? In my considered view, the answers to both questions are in negative. For instance, in case of gravity of sentence, the offence of stealing by agent carries maximum sentence of ten (10) years

imprisonment while theft carries seven (7) years imprisonment. That means, the offence of stealing by agent is not lesser and minor to the offence of theft and thus, the conviction cannot stand.

To this end, since this irregularity alone can dispose the appeal, I see no need to proceed with further analysis of the remaining point. That said, I hereby allow the appeal, quash conviction and set aside the sentence and orders arrived by the trial court.

It is ordered.

DATED at **DODOMA** this 16th day of November, 2023.

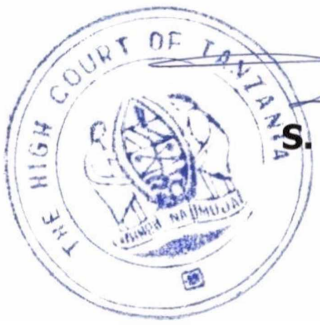


S. H. HASSAN

JUDGE

COURT

Judgment read over in the presence of parties who were linked with court through video conferencing facility from IJC- Dodoma to Kondoa District Court.



S. H. HASSAN

JUDGE