

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB – REGISTRY

AT MBEYA

DC. CRIMINAL APPEAL NO. 174 OF 2023

*(Originating from Criminal Case No. 37 of 2023 in the district court of Momba at
Chapwa)*

SHUKRAN WILLIAM MWASAGAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of hearing: 29/4/2024

Date of judgment: 24/6/2024

NONGWA, J.

The appellant Shukrani William Mwasaga was charged and sentenced to four years' imprisonment with the offence of stealing by agent contrary section 273(b) of the Penal Code [Cap. 16 R: E 2022] by the district court of Momba. It was alleged that on 21st day of December 2022 about 12:00 at Migombani area Tunduma Township within Momba district in Songwe region the appellant did steal one tricycle with registration No. MC. 366DEW make TVS king red in colour valued at Tsh.

8,500,000/= the property of Tito Nazareth which entrusted to him by Daud Yona Mteba to use for business purpose and return it to the said Daud Yona Mteba. The accused denied the charge.

For prosecution, two witnesses testified. Tito Nazareth Chaula (PW1) testified that on 20th December 2022 at 03:00 pm while with Daud (PW2) he handed a tricycle to the appellant who thereafter disappeared for three days. The matter was reported to police and managed to apprehend the appellant at Meta – Mbeya. Daudi Yona (PW2) supported the evidence of PW1 that the appellant was given a tricycle to work for it by carrying passengers.

In defence the appellant testified that on 20th January while asleep was awoken by some people in civilian but introduced to be police. He was arrested and taken to Tunduma Police station, where he was interrogated and Yohana mentioned him to have given a tricycle. He was taken to Mbeya, searched and nothing found. Further that there was no proof that he was given a tricycle and its ownership was not proved. eventually was charged in court.

Upon full trial, the appellant was convicted and sentenced as aforementioned. The decision aggrieved the appellant who has filed petition of appeal on three grounds; **one**, that the trial magistrate erred

in law and fact by convicting and sentencing the appellant on mere evidence of PW1 who testified to have owned tricycle which was handed to the appellant while there was no evidence brought before the trial court as exhibit to prove that he owned the same or handed the said tricycle to the appellant; **two**, that the trial magistrate erred in law and fact for convicting and sentencing the appellant while failed to evaluate properly the evidence of prosecution from PW1 and PW2 who are friends with no independent testimony to corroborate their assertion; and **three**, that the trial magistrate erred in law and fact to hold that the offence was proved beyond reasonable doubt while no strong evidence was adduced or exhibit tendered to establish and prove the case.

At the hearing of appeal, the appellant appeared in person whereas the respondent Republic was represented by Ms. Prosista Paul, State Attorney. When the appellant was called to submit on his grounds of appeal adopted them as part of submission and prayed the appeal to be allowed.

The respondent resisted the appeal, the first and third grounds were disposed conjointly and the second ground separately. Submitting on the conjointly grounds that there was no evidence to prove that the appellant was given the tricycle (bajaji), state attorney stated that PW1 and PW2

testified that on 20/12/2022 the appellant was given the tricycle to drive and return it to them. That based on trust the handing over was not put in writing because he was a co-driver and the court believed these two witnesses.

Arguing ground two that there was no independent witness, it was submission of the state attorney that under section 143 of TEA, no number of witnesses is required for the prosecution case to be proved what is important is the evidence to be believed by the court. That, weight of evidence is based on the fact that there was no element of the case being fabricated against him, they had no conflict, or any quarrel between them, even the *bajaji* was not found at least to say the *bajaji* is there and that the case is being fabricated and that exhibit was not tendered because the said *bajaji* was nowhere to be found. The state attorney was resolute that the prosecution proved their case beyond reasonable doubt and therefore prayed the appeal to be dismissed.

Rejoining, the appellant argued that the prosecution did not bring any evidence that they had that *bajaji*, no document showing they bought the said *bajaji*. That at police was not taken my statement, was directly taken to court. Re-stated his prayer to allow the appeal.

Having considered the record and submission of parties, the issue for my determination is whether the prosecution proved the case beyond reasonable doubt. The charge of stealing by agent is created under section 273 (a-e) of the Penal Code, it provides

'Where the thing stolen is any of the following things, 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;
the offender is liable to imprisonment for ten years.'

In current case the appellant was charged under paragraph (b) of section 273. In order to prove that offence, the prosecution had to prove that he was in possession of the stolen property after being entrusted to him by the real or special owner. It is important to note that stealing by agent is the specie of the offence of theft under section 258(1)(2)(a) of the penal code, thus elements of theft must be established. See **Meck Malegesi & Another vs Republic**, Criminal Appeal No. 128 of 2011 [2013] TZCA 410 (31 July 2013; TanzLII).

In this this case particulars of offence reads;

'PARTICULRS OF OFFENCE

That SHUKRANI S/O WILLIAM MWASAGA charged on 21st day of December 2022 about 12:00 at Migombani area Tunduma Township within momba district in Songwe region the appellant did steal one tricycle with registration No. MC.366DEW make TVS king red in colour valued at Tsh. 8,500,000/= the property of Tito Nazareth which entrusted to him by Daud Yona Mteba to use for business purpose and return it to the said Daud Yona Mteba.'

From the above the prosecution was required to prove one, that Tito Nazareth was a special owner of the tricycle and two, tricycle was entrusted to the accused for whatever purpose. I have perused evidence of the prosecution and noted that it only tried to establish that the tricycle was given to the appellant. Other particulars of the offence as stated in the charge was not established at all. For instance, while in the charge it was alleged that tricycle was entrusted to Tito Nazareth by the owner one Yona Daud Mteba, there was no any evidence establishing that fact. Further the prosecution 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 as required by the law. That is to say the prosecution did not establish the entrustment of the property to the appellant and principal agent relationship between the appellant

and PW1. I seek inspiration in the case of **Christian Mbunda vs Republic** [1983] TLR 340 (HC) where the court stated;

'... for the 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 real owner or special owner.'

Failure to establish principal agent relationship the case of stealing by agent cannot be said to have been proved as the case here. There was no evidence of entrustment to the appellant.

From the way the case was conducted in the trial court it has forced me to make this remark, under scrutiny was a tricycle commonly called Bajaji which was estimated to the tune of Tsh. 8,5000,000/= which implies that someone put his or her efforts by toiling and serving little he got so that at the end gets a commercial property to generate the income. At the end he or she lost it in hands of some untrustworthy person who gained from nothing. The case was prosecuted by the public prosecutor but there is no evidence as to whether the case was investigated and eventually on corrected evidence found fit to be sent to court. In the case of **Chacha Matiko @ Magige vs Republic**, Criminal Appeal No. 295 of 2020 [2022] TZCA 414 (12 July 2022; TanzLII) the court remarked;

'... we have noted with great concern and disappointment that despite the fact that the case was on a serious offence which attracts the capital punishment, it was not shown that the case was subjected to any investigations by the police hence poorly prosecuted.

Reading the charge in the appeal at hand which was well crafted, one will wonder why evidence was not led to establish what was stated in the charge. This case was casually investigated which has contributed greatly on failure of prosecution to prosecute the accused.

In the upshot, and for the above reasons, the case was not proved beyond reasonable doubt. I hereby quash the conviction and set aside the sentence imposed on the appellant. I order that the appellant be set at liberty forthwith unless otherwise held for any other lawful cause.



A handwritten signature in blue ink, appearing to read 'V.M. Nongwa', is written over a horizontal line.

V.M. NONGWA

JUDGE

24/6/2024

DATED and DELIVERED at MBEYA this 24th day of June 2024 in presence of the appellant himself and Ms. Veneranda Paul State Attorney for the respondent.

A handwritten signature in blue ink, appearing to read 'V.M. Nongwa', with a long horizontal stroke extending to the left.

V.M. NONGWA
JUDGE