

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

CRIMINAL APPEAL NO. 51 OF 2023

(Originating from Nyasa District Court in Criminal Case No. 38 of 2021)

JOYCE GEORGE MAPUNDA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 17/01/2024

Date of Judgment: 15/02/2024

U. E. Madeha, J.

To begin with, the Appellant who is none other than; Joyce George Mapunda, was arraigned before the District Court of Nyasa for thirty-four (34) counts of stealing contrary to sections 258 (1) and 265 of the *Penal Code* (Cap. 16, R. E. 2019). It was alleged by the prosecution side that on divert dates between July, 2021 and October, 2021, without any colour of right, the Appellant transferred TZS. 1,775,000.00 from the bank account of Hilda Evalisto Mluvidz, who was the complainant into her mobile phone.

It is important to note that, the evidence given by the prosecution side before the trial Court shows that the Appellant and the complainant were friends and when the complainant went to the bank to open a bank account, they were together and the Appellant managed to get the complainant's bank account number and the passwords without acknowledging the complainant. Then the Appellant connected the complainant's bank account number with her Sim Banking account and started using it by transferring the money from the complainant's bank account to her phone number. That on divert dates the Appellant managed to transfer TZS. 1,775,000.00 (one million, seven hundred and seventy-five Tanzanian shillings). The evidence also shows that the mobile phone number that was used to transfer the money was registered in the names of unknown person. The mobile phone numbers (simcards), bank card, bank statements and a mobile phone make Itel were among the exhibits tendered by the prosecution during trial.

In his defence the Appellant told the trial Court that the complainant was asking for the complainant's phone number and used to transfer money. The Appellant added that she was surprised to find she was charged with thirty-four (34) counts of stealing. The Appellant's witness (DW2), who is an agent of Tigo-Pesa, M-Pesa, Halo-Pesa told

the trial Court that the Appellant and the complainant used to go to his shop in order to withdraw money from their phone.

In its decision, the trial Court found the prosecution to have proved the charges against the Appellant and the Appellant was found guilty, convicted and sentenced serve to five years in prison. She was also ordered to refund the stolen amount of one million seven hundred and seventy-five thousand shillings (TZS. 1,775,000.00) and pay the compensation of five million Tanzanian shillings (TZS. 5,000,000.00) to the complainant for the loss she incurred.

Dissatisfied with conviction, the sentence and the orders given by the trial Court, the Appellant preferred this appeal on the following grounds:

- i. That, the trial Court erred in law to convict the Appellant while the prosecution failed to prove the case beyond reasonable doubts.*
- ii. That, the trial Court erred in law and in fact to convict and sentence the Appellant without taking into consideration the defence evidence.*
- iii. That, the trial Court misdirected itself by sentencing the Appellant to serve five (05) years imprisonment, to refund TZS. 1,775,000.00 and pay a compensation of TZS. 5,000,000.00 without considering the economic position of both the appellant and the complainant.*

- iv. *That the Trial Court erred in fact to convict and sentence the appellant to serve five (05) years imprisonment, refund the complainant TZS. 1,775,000.00 and pay a compensation of Tanzanian shillings five million (5,000,000) without taking into consideration the fact that she was the first offender and suffering from epilepsy.*

When the appeal was called for the hearing, the Appellant appeared in person while the Republic/Respondent was represented by Mr. Gaston Mapunda, the learned State Attorney.

Submitting in support of the appeal, the Appellant argued all the grounds of appeal together. She averred that she never stole the money from the complainant's bank account and the complainant used her phone to transfer the money from the bank account to her phone. She added that the trial Court failed to consider her defence that the complainant asked for her phone to be used to withdraw the money from the bank account since her phone number has a debt from Vodacom (Songesha). She went on stating that she was surprised when she was told that she did steal the money from the complainant's bank account.

On the order for the refund of TZS. 1,775,000.00 and payment of TZS 5,000,000.00 to the complainant as compensation, she averred that the trial Court failed to consider the economic reality of both the

Appellant and the Complainant. He argued that both of them have poor economic situation and she cannot manage to pay such amount of money to the complainant.

The Appellant submitted further that, the trial Court failed to consider her mitigating factors that she had a dependent family and she is suffering from epilepsy.

On the contrary Mr. Gaston Mapunda, the learned State Attorney who appeared for the Respondent, supported the conviction, sentence and the orders given by the trial Court. Submitted on the first ground of appeal he stated that the Appellant was charged with thirty-four (34) counts for the offence of stealing money from the bank account of the complainant and all counts were proved by the Republic without reasonable doubt. He averred that the four witnesses called by the Respondent and the exhibits tendered during trial before the trial Court clearly demonstrated how the Appellant committed the offences by transferring the money from the complainant's bank account to her phone numbers (exhibits PE5, PE6, PE7 and PE8), which were found to be in the hands of the Appellant. He added that even the Appellant admitted that she was in use of those numbers despite the fact that they were registered in the name of another people.

Confronting the submissions made by the Appellant, Mr. Mapunda argued that, the Appellant's averments that the prosecution witnesses never told the truth are not correct since she never cross examined them to clash their testimonies during trial. He was of the view that failure to cross examine witnesses is tantamount to accepting its truth. To bolster his stand, he referred this Court to the case of **Karimu Juary @ Kesi vs. The Republic**, Criminal Appeal No. 412 of 2018 (unreported).

He went on stating that, proving the offence of stealing the prosecution must prove that there was movement of the stolen property from one place to another (asportation) and in this appeal PW2, PW4 and exhibit PE2, which is a bank statement clearly shows that there was asportation of the stolen money from the complainant's bank account to the Appellant's phone number. He contended that, the available evidence shows that the prosecution proved the case against the Appellant and the first ground of appeal has no merit.

Submitting on the second ground of appeal that the trial Court erred in law and facts to convict the Appellant without considering the defence case, Mr. Mapunda told this Court that, the Appellant's arguments has no stand since the defence testimonies were considered

by the trial Court. He referred this Court at page 11 to page 17 of the typed judgment of the trial Court to find how the defence evidence was considered by the trial Court. he added that the trial Court found the defence evidence to be weak since in her testimonies the Appellant accepted to be the owner of the three mobile phone numbers which were used to transfer the money from the complainant's bank account. He was of the view that the Appellant's testimony supported the prosecution evidence and the averment that the defence evidence was not considered has no stance and he prayed for the second ground of appeal to be dismissed.

In respect to the third ground of appeal, that the Appellant was double jeopardized since she was sentenced to serve five years in prison, pay compensation of five million (5,000,000) Tanzania shillings and refund the complainant TZS. 1,775,000.00, Mr. Mapunda supported the trial Courts sentence and its orders since the trial Court was guided by the law in sentencing and giving the other orders of refunding the money and paying compensation. He added that the trial Court was guided by section 31 of the *Penal Code* (supra) and section 348 of the *Criminal Procedure Act* (Cap. 20, R. E 2022) and he prayed for this ground of appeal to be dismissed too.

On the fourth ground of appeal that; the Appellant's mitigating factors were not considered, Mr. Mapunda submitted that, looking at page 19 of the trial Court's typed judgement, it shows clearly that the Appellant prayed for the mercy of the Court to be given lenient sentence for the reason that she has parents and children who depend on her and she is suffering from epilepsy and the trial Court considered them in its judgment. Lastly, Mr. Mapunda prayed for this Court to dismiss this appeal and the decision of the trial Court be upheld.

Having heard the Respondent's State Attorney submissions, the Appellant had nothing to rejoin rather than praying for this Court to allow the appeal and set her free.

As far as I am concerned, having gone through the grounds of appeal, I find the main issue is whether the prosecution proved the case beyond reasonable doubt that the Appellant transferred the complainant's money without the owner's consent. For the offence of theft to be proved, the Appellant must take something that belongs to the complainant without his/her consent.

In proving cyber-crimes, there must be sufficient and credible evidence to support the charges. The evidence must include digital evidence, witness statements or other relevant documents. Also, the

prosecution must prove the intent to commit the offence. In cases of stealing through cyber stamping, the prosecution side must prove that the accused has knowledge in carrying out the act. But in the instant case the evidence shows that the Appellant and the complainant used to go together to withdraw the money and its difficult for one to find that there was intent. Thus, the prosecution failed to prove intent since the complainant was together with the Appellant.

In this case, the evidence given before the trial Court reveals that the Appellant and the complainant were close friends and when the money were transferred from the complainant's bank account, they were together and the complainant gave the password to the Appellant to be used in their transactions. This indicates that there was consent. In such circumstances, one cannot find that the offence of theft was proved. Therefore, if the trial Court would have properly considered the evidence given by the Appellant it wouldn't have convicted her for the offence of theft. The complaint had nothing to prove against the Appellant rather than accusing the Appellant unnecessarily and wasting the precious time of the Court.

In my view, I find the prosecution failed to prove the offence of theft beyond reasonable doubt that the Appellant did steal the alleged

money from the complaint's bank account. Finally, I allow this appeal by setting aside conviction, sentence and orders for compensation and refund of the money alleged to be stolen. The Appellant to be set free. Order accordingly.

DATED and DELIVERED at **SONGEA** this 15th day of February, 2024.




U. E. MADEHA

JUDGE

15/02/2024

COURT: This judgment is delivered in the presence of the Appellant and Mr. Gaston Mapunda, the learned State Attorney for the Respondent. Right of appeal is explained.




U. E. MADEHA

JUDGE

15/02/2024