

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)**

**AT MWANZA
HC CRIMINAL APPEAL No. 210 OF 2019**

*(Original Criminal case No.23 of 2019 of the District Court of Nyamagana at
Mwanza)*

ZAWADI S/O HURUMA @ MBILINYI

DAUDU S/O HURUMA @ MBILINYI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Last Order: 25.03.2020

Judgment: 02.04.2020

A Z. MGEYEKWA, J

In the District Court of Nyamagana, the appellant ZAWADI S/O HURUMA @ MBILINYI was charged, tried and convicted with the offence of stealing by agent contrary to Section 258 (1) and 271 of the Penal Code Cap 16 RE 2002 and was sentenced to serve a term of seven years. Being

aggrieved by the decision of the District Court, the appellant appealed to this court against both conviction and sentence.

The brief facts which lead to the conviction of the appellant are briefly that, it is alleged by the prosecution that on 22nd November, 2018 at Nyakato area within Nyamagana District in the City and Region of Mwanza the appellant stole Tshs. 8,000,000/= the property of Peter S/O Mitera @ Chacha. This was the money that he was entrusted by John Nyamkoro @ Mwita for the purpose to purchase and delivering maize to the said Peter S/O Mitera @ Chacha.

In her defence, the appellant denied any involvement in the alleged theft of PW1 money as such he maintained his innocence.

As I have already recounted, the trial court held that the prosecution case was proved beyond reasonable doubts, hence the appellant was convicted and sentenced for four years imprisonment.

The appellant listed nine grounds of appeal in her petition of appeal. The said grounds can be summarized as follows:-

- 1. That, the learned trial Magistrate had gravely overlooked himself in points of law and facts to commit the appellant guilty as charged merely basing on a single witness testimony of PW1 which was not legally supported by*

the independent witness or any transaction documented exhibit to that effect before convicting the appellant.

- 2. That, the exhibit P1 and P2 both of them did not connect the appellant with the crime of stealing by Agent as there was no any person from the said bank who came before the Court to verify the Bank slip from the NMB – Bank.*
- 3. That, the learned trial Magistrate erred in the law and in facts when he failed to resolve/ determine the allegation of PW2 for the appellant to change his name.*
- 4. That, the learned trial Magistrate erred in the law and in fact for basing on the variance defective charge according to the Mandatory provision of law.*
- 5. That, the trial Magistrate erred in the law and in fact when he admitted that cautioned statement (Exhibit P3) without warning the appellant of his right for admitting the cautioned statement, while the enquire was not yet conducted before the Court.*
- 6. That, there is exaggeration of complaints as to the claimed transaction of payments, i.e 1st, 2nd and 3^d installments which deviance the prosecution case/incredibility upon theft offence.*
- 7. That, the trial Court misdirected itself for it failed to determine that the issue of drawing money from the appellant account by other person was wrongly processed by the Court/as was made out of the appellant account's knowledge.*
- 8. That the Court below tried the case illegally as it had no mandatory to proceed as it was out of jurisdiction; according to the mandatory provision*

of law there was no any application certificate from the DPP to transfer the case from NJOMBE where the crime occurred to MWANZA for trial.

9. That, the prosecution side failed to prove his case beyond reasonable doubt for failure to call the key witness i.e VEO in order to adduce/ testify his evidence before the Court at an independent witness.

At the hearing of the appeal the appellant appeared in person, unrepresented whereas the Republic had the service of Ms. Fyeregete, learned Senior State Attorney.

When I asked the appellant to address me on his grounds of appeal, the appellant prays this court to adopt his grounds of appeal. He went on submitting that he was dissatisfied the decision of the lower court thus he prays this court to set him free for the reason that he is innocent.

In response to the appeal, the learned Senior State Attorney in essence supported the conviction and sentence on the following grounds.

Submitting for the first ground of appeal, Ms. Fyeregete stated that the trial court evaluated the evidence on record, PW1 narrated that he knew the appellant as David and later he knew him by other name, Zawadi. She stated further that PW1 entrusted the appellant with money and maize he gave the appellant Tshs. 4,000,000/= then he demanded Tshs.

1,050,000/= to buy maize. PW1 tried to trace the appellant through his mobile phone but the appellant was not reachable. The learned State Attorney further stated that PW1 went to the appellant's house, he saw his wife who informed PW1 that his husband is not around.

It was Ms. Fyeregete's further submission that PW2 tendered Exh. PE1 and Exh. PE2 whereas, the trial court considered the evidence of PW2 and the deposited bank slip which revealed that the money was deposited in the appellant's account.

As to the 2nd ground of appeal, Ms. Fyeregete argued that PW2 is the one who processed the bank slip and the same were in his possession therefore there was no need to summon a bank officer to testify in court. She went on stating that the appellant did not cross examine PW2 that means he admitted therefore she urged this court to disregard this ground of appeal.

Concerning the 3rd ground of appeal, Ms. Fyeregete argued that the monie were deposited in the appellant's bank account the same reveals that the two knew each other before and knew him by all his two names, she urged this court to disregard this ground of appeal.

On the 4th ground of appeal, Ms. Fyeregete submitted that the charge sheet is correct and the cited section 258 (1) and 271 of the Penal Code constitute the offence therefore the charge sheet is not defective and in case the charge is defective then the same is not fatal so long as the facts are clearly stated and the particulars of the offence are well elaborated to enable the appellant to understand the offence which he stand charged with. She added that the same is curable under section 388 of the Criminal Procedure Code

Arguing for the 5th ground of appeal, Ms Fyeregete submitted that the appellant allowed the court to proceed with hearing without conducting an inquiry therefore this ground is demerit.

Submitting for the 6th ground of appeal, the learned State Attorney insisted that the appellant was paid, the monies were deposited in his bank account and he used the said monies for his own personal use instead of buying maize thus the victim had to report the matter to the police station.

On the 7th ground of appeal, Ms. Fyeregete refuted that the appellant had no any knowledge that the monies were deposited in his account while

the evidence on records shows that the monies were deposited in his bank account, otherwise he could report the matter to the police station.

As for the eighth ground of appeal, Ms. Fyeregete argued that the District Court of Nyamagana had jurisdiction to entertain the case because the complainant resided in Mwanza although the incident occurred in Njombe therefore the District Court of Nyamagana did not fault itself to determine the case at hand. She urged this ground to be dismissed.

The learned Senior State Attorney ended by submitting that the prosecution did not prove the case for failure to summon the Village Executive Officer as per section 143 of the Law of Evidence the prosecution is not bound by numbers of witnesses thus it was not necessary to call the VEO since PW2 has explained well that the appellant was entrusted with PW1 money therefore the case was proved beyond reasonable doubt.

In his rejoinder, the appellant had nothing new to add than to say that he was tortured and was forced to sign the papers at the Police Station. He prays this court to set him free.

After listening carefully to the submission by the appellant and the learned State Attorney, I have come to the conclusion that the only issue for determination is ***whether or not the prosecution proved the case beyond any reasonable doubt.***

I will address the 4th ground of appeal to find out if the charge was defective. In my view this ground of appeal suffices to dispose of the appeal in its entirety for the reasons I endeavour to assign in the course.

The beginning point is the charge sheet under focus. I wish to reproduce it hereunder for easy of reference:-

1ST COUNT

STATEMENT OF THE OFFENCE

STEALING BY AGENT Contrary to section 258 (1) and 271 of the Penal Code Cap. 16 [R.E 2002].

PARTICULARS OF OFFENCE

ZAWADI S/O HURUMA @ MBILINYI or DAUD S/O HURUMA @ MBILINYI on 22nd November, 2018 at Nyakato area within Nyamagana District in the City and Region of Mwanza the appellant stole Tshs. 8,000,000/= the

property of PETER S/O MITERA @ CHACHA. This was the money that he was entrusted by JOHN NYAMKORO @ MWITA for the purpose to purchase and delivering maize to the said PETER S/O MITERA @ CHACHA.

2ND COUNT

STATEMENT OF THE OFFENCE

STEALING BY AGENT Contrary to section 258 (1) and 271 of the Penal Code Cap. 16 [R.E 2002].

PARTICULARS OF OFFENCE

ZAWADI S/O HURUMA @ MBILINYI or DAUD S/O HURUMA @ MBILINYI on 22nd November, 2018 at Nyakato area within Nyamagana District in the City and Region of Mwanza the appellant stole Tshs. 1,050,000,000/= the property of PETER S/O MITERA @ CHACHA. This was the money that he was entrusted by JOHN NYAMKORO @ MWITA for the purpose to purchase and delivering maize to the said PETER S/O MITERA @ CHACHA.

I have gone through the charge sheet and I have found that in both chargers, the appellant was charged and convicted for STEALING BY AGENT contrary to Section 271 of the Penal Code, Cap.16 [R.E 2019] and

according to the particulars of the offence the appellant was entrusted with Tshs. 8,000,000/= and then he was entrusted with Tshs, 1,050,000/= the property of Peter S/O Mtena @ Chacha. However, the offence to which the appellant was charged varied with the testimony which was based upon to convict the appellant. In the record, the prosecution witnesses testified that the appellant was an agent of selling maize. According to PW1, he stated that he entrusted the appellant with money to buy maize in Njombe. PW1 evidence is corroborated by PW2. If that is the case the appellant could not be in a position to commit the offence of stealing by Servant, I am saying so because section 271 is in relation to an offence of Stealing by a Servant. I find it needy to reproduce the sections for easy reference. Section 271 provides that:-

" 271. If the offender is a clerk or servant and the thing stolen is the property of his employer or came into the possession of the offender on the account of his employer, he is liable to imprisonment for ten years".

Based on the above provision of the law, I am inclined to agree with the submission by the learned Senior State Attorney that the charge was correct, according to the evidence on record the appellant ought to have

been charged with the offence of Stealing by an Agent contrary to section 273 (b) of the Penal Code and not Stealing by Agent contrary to section 271 of the Penal Code Cap.16 [2019] since this section relates to the offence of Stealing by Servant.

It is unfortunate that the charge sheet stands informative and descriptive but discloses no punishment for what is alleged to be the offence of stealing by agent. I understand the concern of the learned Senior State Attorney that the facts and particulars are well elaborated but the same are related to an offence of Stealing by Agent while the cited section is in relation to Stealing by Servant; these are two different offences.

Additionally, I find it proper that the offence requires to be read together with proper section which describes the nature of the offence of theft or stealing and that be section 265 of the Penal Code Cap.16 [RE. 2019]. Section 265 of the Penal Code reads:-

"Any person who steals anything capable of being stolen commits an offence of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years."

Moreover, I have noted that section 265 was not cited in the charge sheet, the issue is whether the accused was in law properly charged and knew the nature of the offence and consequence of the charge before the law. From the above provision, I can say the offence was not described. Section 135 of the Criminal Procedure Act provides a mandatory requirement to describe the offence and make reference to the appropriate sections of the law of the offence that is section 265 of the Penal Code. Failure to combine both sections made the charge sheet defective. I find it apposite relying on the principle authoritatively stated in the case of **Isumba Huka v The Republic** Crim. Appeal No. 113 Of 2012 Court of Appeal of Tanzania that the charge sheet which is incurably defective, then whatever followed thereafter cannot sustain.

Therefore since the defects in the proceeding were out of the appellant control, he cannot be punished by an error of the trial court. For the interest of justice, guided by holding in **Simon Kitalika v Republic** Criminal Appeal No. 468 OF 2016, it is clear that, where a charge is fatally defective, it will be an exercise in futility to order a retrial and this is because, as stated further by the Court in **Mayala Njigailele v Republic**

Criminal Appeal No. 490 of 2015 (unreported) that a retrial is normally ordered on assumption that the charge is properly before the court.

In view of what I have find above, I proceed to quash the conviction and set aside the sentences which was meted out against the appellant, and direct his immediate release from prison unless he is continually held for some other lawful cause.

Order accordingly.

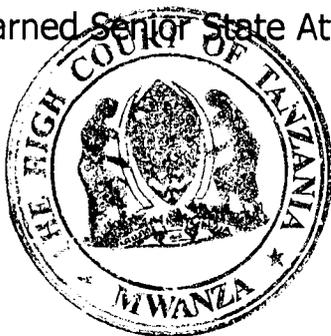
DATED at Mwanza this 2nd April, 2020.


A.Z.MGEYEKWA

JUDGE

02.04.2020

Judgment delivered on 2nd April, 2020 in the presence of Ms. Fyeregete, learned Senior State Attorney and the appellant.




A.Z.MGEYEKWA

JUDGE

02.04.2020

Right to appeal full explained.