

TANZANIA / JUDGMENT

20160511 TZCA Dodoma

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IN THE HIGH COURT OF TANZANIA At DODOMA DC. CRIMINAL APPEAL NO. 71 /2015 (Arising from Criminal Appeal No. 108/2013 at Mpwapwa District) ZUENA JUMA MADUMA ... APPELLANT VERSUS THE REPUBLIC ... RESPONDENT

JUDGMENT

08/04/2016 & 11/05/2016 H. H. KALOMBOLA,J.: ZUENA D/O JUMA MADUMA was convicted and sentenced by the District Court of Mpwapwa, in Criminal Case No. 108/2013 for the offence of Stealing by agent Contrary to Section 273. (c) of the Penal Code, Cap 16 R.E. 2002. She was sentenced to serve 7 years in jail and .was ordered after imprisonment to pay Tshs. 3,066,000/= to PW2. She is .aggrieved, herein below are grounds of appeal:- 1

1. That, the Trial Court erred in Law and fact for relaying on the defective charge sheet.
2. That, the Trial Court erred in Law and fact for relaying on the weak evidence tendered by the Respondent against the strong evidence tendered by the appellant herein.
3. That, the Trial Court erred in Law and fact by deciding the matter without having jurisdiction because the matter is purely over land dispute. When the matter came up for hearing Mr. Matumbwi argued on the first ground of appeal, the District Court erred in convicting the appellant while the charge was defective. That the offence on the charge sheet was against Section 273 (c) of the Penal Code whereas in the end, she was not convicted as per the charged offence, she was convicted under Section 265 of the Penal Code. She was not even given opportunity to give her defence or cross examination in respect of the offence she was convicted on. He referred in support of the argument Section 132 of the Criminal Procedure Act which provides, a charge must be specific and contain particulars of offence. Therefore the Judgment was not correct (see page 8 of the Judgment). 2 On the 2nd ground, the trial Court failed to give weight on the strong evidence adduced by the appellant and rely on . . . weak evidence of the respondent. Tanesco did not complain the compensation money was paid to a wrong person. That .. the appellant was legally paid. Regarding the 3rd ground, it is submitted the trial Court had no jurisdiction to this matter as it involved land .. The subject matter is over the money which Tanesco paid as compensation after survey. There was thus need to know who was the owner of the area, before Court decided on this

case. Whether the appellant was the owner. He asked this Court to quash the decision of the trial Court. Ms. Kezilahabi represented the respondent/Republic submitted, the prosecution side failed to prove the offence under Section 273 (c) of the Penal Code but succeeded in proving an offence under Section 265 of the Penal Code. That the Trial Court in so doing was correct, it has power under Section 300 (1) and (2) of the Criminal Procedure Act. On the 2nd ground, the witnesses before the trial Court proved the appellant committed an offence of Stealing. She received the money and fail to hand the same to PW 2 who was the intended person. The appellant's defence had no weight, hence the conviction. 3 As to the 3rd ground, they do not support it; this is not a case of Civil nature as the issue here is about theft. The appellant received the money and refuse to hand the money to the owner. Therefore this case is purely that of Criminal in nature. They asked for dismissal of the appeal. In rejoinder, Mr. Matimbwi said, the appellant was not convicted of cognate offence the record does not reflect so. What is found in the record is substitution of the charge at final stage, i.e. at the Judgment of the Court. For this reason, the appellant ought to have been given opportunity to give her defence (see a Handbook for Public Prosecution by Chipeta, at page 39, 3rd paragraph, 41st line). In the present case, the charge against the appellant was altered (see page 8 of the Judgment). He insisted the appeal be allowed: Looking at the charge before the trial court, it is a fact, the appellant faced a charge of Stealing by Agent Contrary to Section 273 (c) of the Penal Code. In regard to the 1st ground of appeal, the Counsel for the appellant invited this Court to find, the trial Court convicted the appellant on a wrong charge. He asked the Court in that respect to visit the 8th page of the trial Court Judgment. In so doing this Court found on the 8th page 2nd paragraph and lost paragraph the trial Court observed, I quote. "In my findings I also observed that the charge sheet misleading the fact of the case and the charge sheet partly says that the amount of Tshs. 3,066,000/= was entrusted to the accused person by TANESCO for the purpose of delivery the same to one Philipa Nduluchilo but used the same for her own benefit. I cannot agree on it. What has been transpired is that the TANESCO Co. pay the amount of Tshs. 3,066,000/= to, the accused person as the owner of the house. However no evidence from the TANESCO that they paid the accused on behalf. I therefore satisfied that the charge sheet was wrongly drafted against the accused person in terms of Section 273 (c) of the Penal Code (CAP 16 R.E. 2002)". In fact I am satisfied that the facts prove the offence of theft against the accused person and in alternative charge I find the accused person accordingly in terms of Section 265 of Penal Code (Cop 16 R. E. 2002). Say of the 1st ground of appeal and from what was submitted by the counsel for the appellant, the trial Magistrate himself in the 2nd paragraph of page 8 to the Judgment, said the charge sheet misled the facts of the case he thus did not believe the amount in dispute was entrusted to the appellant in order to deliver same to one Philipo Nduluchila. In other words it means, there was no evidence which was brought by prosecution to prove a charge which faced the accused. The trial Magistrate went further to disclose in the 2nd paragraph TANESCO paid the said amount to the appellant as the owner of the house, and not that he was paid on behalf of. This means the trial Magistrate found the appellant did not commit the offence under Section 273 (c) of the Penal Code. Since this was his finding it was not correct for him

to proceed in creating an alternative charge of theft as it is seen in the last paragraph. Was he a prosecutor? There is no an alternative charge of theft on the charge sheet why did the Magistrate crated it? In case he found the offence was not proved and if the charge did not disclose the offence as it is suggested in his judgment, at page 8, he ought to hove said so in the decision and acquit the accused. From the fact that the 1st ground of appeal has been proved in the Judgment of the trial Court, by the trial Magistrate himself, it is the finding of this Court the appeal hos merit, the appellant was convicted and sentenced on on offence he was not charged. There was no proof the appellant committed the offence under Section 273 (c) of the Penal Code. The 6 decision by the District · Court was not correct as submitted by · the respondent/ Republic. For the above reasons appeal is allowed, Judgment of the District Court of Mpwapwa 1s hereby quashed so as the conviction. The compensation order is set aside. The accused be released from jail forthwith unless otherwise held for some Lawful order. It is ordered. ~ . H. KALOMBOLA) JUDGE . 11/05/2016 7

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