

TANZANIA / JUDGMENT

JUDGEMENT MBARAKA AMANI

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1 January 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB REGISTRY AT BUKOBA CRIMINAL APPEAL NO.9614 OF 2024 (Arising from criminal Case No.82 of 2023 of the District Court for Bukoba) MBARAKA IMANIAPPELLANT
VERSUS REPUBLICRESPONDENT JUDGEMENT OF
THE COURT Date of the last order: 18/10/2024 Date of Judgement: 27/12/2024 BEFORE: G.P. MALATA, J The appellant, Mbaraka Imani stood arraign for stealing by agent contrary to section 273 (b) and 258 (1), (2) (a) of the Penal Code Cap.16 R.E.2022. The particulars are to the effect that, on 23/06/2022 at Omkishenye area within Bukoba Municipality in Kagera Region did steal a motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665 valued at two million shillings (TZS. 2,000,000/=) Page 1 of 13 entrusted to him by Blasio Laurian Nkangweki for temporary use but failed to return it back to the owner. Upon hearing the case, the trial court found him guilty, thus entered convicted and imposed sentence of three years imprisonment. Aggrieved thereof, the appellant appealed to this court armed with six (6) grounds. These are;

1. That, the presiding magistrate erred in law and facts and facts to convict by convicting the appellant without considering his defence.
2. That, the trial magistrate did wrong to reach decision by relying on fabricated evidence whereby PW1, PW2 and PW3 being eyewitness claim to be present during the said motorbike handled over to the accused while no any documentary produced in court to support the same.
3. That, the prosecution evidence still silence as how comes the appellant could be entrusted by the victim within two days since they knew each other.
4. That, the complained failed to prove the issue of contract between the appellant and himself that failure to do so increase doubt to the fabricated of the case. Page 2 of 13
5. That, the trial magistrate erred in law and facts to convicted and sentence the appellant while the motorbike with Registration No.MC 332 CQQ make Bajaj Boxer was not tendered in court to prove the allegation.

6. That, the trial magistrate erred in law and facts to reach decision while the offence of stealing by agent was not proved beyond reasonable doubt. On 02/09/2024, this case came for hearing, the respondent appeared through Ms. Alice Mutungi learned State Attorney whereas the appellant appeared in person. Submitting in support of the first ground, the appellant submitted that, the trial court did not consider the defence evidence thus convicting the appellant based on weak evidence by the prosecution case. As to second, third, fourth, fifth and sixth grounds, the appellant submitted that, evidence by PW1, PW2 and PW3 did not prove the case beyond reasonable doubt. That the prosecution witnesses did not tender any document proving existence of contractual relationship between the appellant and complainant. As to the fifth ground, the appellant submitted that, the prosecution side did not tender the alleged stolen motorcycle as an exhibit in court. The trial court convicted the appellant without proof of existence of motorcycle. The appellant ended praying to the court to allow the appeal, quash conviction and set aside sentence imposed by trial court. Page 3 of 13 In reply to the appeal Ms. Alice Mutungi learned State Attorney strongly opposed the appeal and stated that the prosecution side proved the offence against the appellant beyond reasonable doubt. In support thereof, Ms. Alice Mutungi learned State Attorney submitted that, the appellant was charged for stealing by agent contrary to section 273 (b) and 258
- (1) and (2) (a) of Penal Code, Cap.16 R.E.2022. That, section 258 establishes offence of theft. The ingredients of offence are; one, lack of claim of right over the property, two, property capable of being stolen three, asportation. section 273 provides for matters of entrusting the property to the offender who in return decides steal it knowingly that, it was just entrusted to him and it do not belong to him. In other words, the element of the offence is entrusting the property to the offender who in return converts it to be his property. Ms. Alice Mutungi learned State Attorney submitted that, PW1, testified on the relationship with the appellant, that he knows the appellant that they entered into contract of leasing motorcycle for business. The motorcycle is registered as MC.332 CQQ Bajaj Box red in colour. the value of the said motorcycle is TZS 2,000,000. That, he bought the same from Sadat Siraji Rweyemamu who gave him all the purchase documents. Page 4 of 13 He tendered motorcycle registration card and admitted as exhibit P1 page 10. the contract between PW1 and appellant was entered on 18/06/2022 on condition that, the appellant will be paying TZS 7000 per day for using the PW1's motorcycle. That, there was oral contract between PW1 and appellant witnessed by one Ally Ishengoma PW2. PW1 and PW2 spoke similar version of evidence. PW4 also testified the same at page 20. Section 10 of the Law of contract Act explains the kind of documents which can legally recognized as contract. PW1 proved ownership of the said motorcycle through oral evidence and tendered Motorcycle Registration Card is bearing the name of Sadati Siraji Rweyemamu and not PW1. The purchase agreement between Sadati Siraji Rweyemamu and PW1 was not tendered. The Motorcycle was not tendered as an exhibit in court by the prosecution side, as it had never been seized by police officers at time. If it was not seized then it cannot be tendered. PW1, PW2 and PW4 testified that, the item in question was stolen. Finally, Ms. Alice Mutungi

learned State Attorney referred this court to the case of Leonard Joseph@ Nyanda Vs R Crim. Appeal No.186/2017 at page 16 paragraph 2 and prayed that, the appeal be dismissed for want of merits. Having assembled the submission for and against the appeal and read the proceedings, this court has assembled that; one, the appellant was arraigned for Page 5 of 13 the offence of stealing by Agent contrary to sections 258 (1), (2) (a) and 273 (b) of the Penal Code Cap.16 R.E.2022, two, there is no written agreement tendered by republic establishing principal and agent relationship between the appellant and PW1, one Blasio Laurian Nkangweki, the alleged owner of the motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665 save for oral testimony, three, the motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665, Exhibit 1 is in the name of one Sadati Siraji Rweyememu and not Blasio Laurian Nkangweki, (the complaint), four, there is no purchase agreement or transfer documents of the motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665 between Blasio Laurian Nkangweki and Sadati Siraji Rweyememu ever been tendered in court proving the sale and or transfer, five, Sadati Siraji Rweyememu the owner appearing on the said Motorcycle Registration Card was not called to testify and confirm if the alleged sale and transfer of ownership really exists between himself and Blasio Laurian Nkangweki and six, the Motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665 alleged to have been stolen by the appellant was not tendered as an exhibit in court. Page 6 of 13 To start with, section 273(b) of the Penal Code depicts that; Where the thing stolen is any of the following things, that is to say-

- (a) Not applicable;
- (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; Section 258 (1) and (2) (a) of the Penal Code states that;
 - (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.
 - (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say-
 - (a) an intent permanently to deprive the general or special owner of the thing of it; The above charging provisions for the offence of stealing by agent demand for proof and existence of; first, a thing capable of being stolen, second, special Page 7 of 13 owner of the property in question, third, principal, fourth, agent, fifth, principal and agent relationship, sixth, agent entrusted with property by the special owner, the principal, seventh, stealing by agent of

property entrusted by the principal, eighth, permanent intention of depriving a thing from the special owner by the agent, and ninth, agent with no claim of right over the entrusted property. The onus of proving that, the nine elements stated herein above exist lies on the prosecution of which they have to do so beyond reasonable doubts. Additionally, the accused has no duty to prove his innocence, his duty is just to create doubts on the prosecution evidence. Section 3(2)(a) The Evidence Act, Cap.6 R.E.2022 cement on the position by stating that; “(2) A fact is said to be proved when-

- (a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;” In the case of Republic vs Filemon Ezekiel Mmanyi and Another, Economic Case No. 05 of 2021 (HC) this court stated that: “It is prudent to underscore that, the prosecution side is shouldered with a burden to prove their case on the standard stipulated under section 3(2)(a) of the Evidence Act [Cap. 6 R.E. 2019] which is beyond reasonable doubt. Page 8 of 13 generally, and always, such duty lies with the prosecution except where any statute or other law provides otherwise. The above stated principles have been cemented by many courts of appeal decisions, to cite a few, in the case Nkanga Daud Nkanga vs Republic, (Criminal Appeal No. 316 of 2013) [2014] TZCA 213 where the court of appeal stated that: “It is the principle of law that, the burden of proof in criminal cases rests squarely on the shoulders of the prosecution side unless the law otherwise directs, and that the accused has no duty of proving his innocence.” In the case of Richard Otieno @ Gullo vs Republic, (Criminal Appeal No. 367 of 2018) [2021] TZCA 120, it was held that: “It is trite that, in every criminal trial, it is the duty of the prosecution to prove the charge beyond reasonable doubt and it never shifts to the defence. It was therefore the duty of the prosecution to prove every aspect of its case beyond doubt and the appellant's defence was only to raise doubt on that evidence. See also the Courts decision in the cases George Mwanyingili v. R, Criminal Appeal No. 335 of 2016 and Mohamed Haji AM v. R, Criminal Appeal No. 225 of 2018 (both unreported).” Also, in Christian Kale and Rwekaza Benard [1992] TLR 302 it was observed that: - Page 9 of 13 “An accused ought not to be convicted on the weakness of his defence but on the strength of the prosecution.” On the strength of above principles, it is evident therefore that, the nine elements assembled from sections 258 (1), (2) (a) and 273 (b) of the Penal Code Cap.16 R.E.2022 must get proof from the prosecution side beyond reasonable doubt. It is evident that, the prosecution side did not tender evidence proving that; one, the PW1 is the special owner of the Motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665. The Motorcycle Registration Card, Exhibit P1 depict that, the registered owner of the said motorcycle is one Sadati Siraji Rweyememu and not PW1, two, alleged ownership of the Motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665 by Blasio Laurian Nkangweki, PW1 is with no tangible evidence let alone attempt. The prosecution side did not tender sale agreement or transfer deed of the said motorcycle from Sadati Siraji Rweyememu to Blasio Laurian Nkangweki, three, the registered owner of the said motorcycle one Sadati Siraji Rweyememu as per

Exhibit P1 was not called as prosecution's witness to confirm any of the alleged fact for the reasons best known to the prosecution side, four, there is no evidence as to existence of principal and agent relationship between the appellant and PW1 based on fact that, PW1 is not a special owner of the afore Page 10 of 13 stated motorcycle and that, there was no contract establishing such relationship, five, Motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665 alleged to have been stolen by appellant was not tendered as an exhibit. In view thereof, this court has failed to assemble any evidence proving that, the Motorcycle with registration number MC332 CQQ make Bajaj Boxer, chassis number MD2A18AYXWM22695 and engine number DUZWLM67665 has at any point in time fall in the hands of the appellant in the absence of tangible evidence. Further, since Exhibit P1 indicates that, the ownership has never changed from Sadati Siraji Rweyememu to Blasio Laurian Nkangweki, then PW1, Blasio Laurian Nkangweki is unable to create principal and agent relationship with the appellant for lack of proof of ownership or any mandate over the said motorcycle. In determining an appeal, the first appellate court is required to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrived at independent decision. This court can either side with the trial court's decision or differ therefrom. The above legal position is gathered from the case of Salumu Muhando vs. Republic [1993] TLR 170, Siza Patrice vs R, Criminal Appeal no. 19 of 2010, CAT, unreported, Alex Kapinga and Page 11 of 13 30 others vs R, Criminal Appeal no. 252 of 2008, CAT, unreported. In the case of Siza Patrice (supra), the court held that; "We understand that, it is settled law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re- evaluate the enter evidence in an objective manner and arrive at its own findings of fact, if necessary." Having discharged the above legal obligations as first appellate court, it has been proven that, the prosecution side failed to prove the offence of stealing by agent beyond reasonable doubt based on the afore stated reasons. In the event therefore, this court hereby allow the appeal, quash conviction and set aside sentence imposed by the trial court. Moreover, it is ordered that, the appellant be released forthwith unless held in custody for any other lawful cause. IT IS SO ORDERED. DATED at BUKOBA this 23rd December, 2024 G.P. MALATA JUDGE Page 12 of 13 27/12/2024 JUDGEMENT delivered at BUKOBA this 27rd December, 2024 G.P. MALATA JUDGE 27/12/2024 Page 13 of 13

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Prepared on 14 October 2026 · Esheria