

TANZANIA / JUDGMENT

JUDGMENT OF MICHAEL KABANGE final

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29 November 2022

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA DC. CRIMINAL APPEAL NO. 18622 OF 2024 CASE REFERENCE NO.
202407072000018622 (Originating from Criminal Case No. 44 of 2023 in the district court of
Mbarali at Rujewa) MICHAEL MATHIAS @KABANGE APPELLANT
VERSUS REPUBLIC RESPONDENT

JUDGMENT

10th February & 24th March 2025 NONGWA, J. In Criminal Case No. 44 of 2023, the appellant Michael Mathias @ Kabange stood charged with the offence of stealing by agent contrary to section 273(b) and 265 of the Penal Code, [Cap 16 R: E 2022]. It was alleged that on 29th day of November 2022 at Ubaruku village within Mbarali district in Mbeya region wilfully and unlawfully did steal 26,700,000/= which was instructed to rent farm of 60 hectors and Tsh. 4,000,000/= for raising capital all valued Tsh. 30,700,000/= from one Daudi Aizack @Behire. He denied. 1 The prosecution paraded nine witnesses Daud Isack@Behire (PW2), Nelson Sikilo (PW2), Shadrack Bryson Mnywele (PW3), Veronica Kiwanga (PW4) ASP. Thomas James Mwenda (PW5), Amos Philip (PW6), fF1009 DC Athuman (PW7), J.190 PC Joffrey (PW8) and G.9928 D/CPL Didas (PW9). They tendered two exhibits, seized money (exhibit P1), certificate of seizure (exhibit P2). In defence the appellant testified as DW1 and in support summoned Mésaus Daniel Kabange (DW1), Zuberi Mohamed Lissu (DW3) and Ulimbaga Angumbwike Mwamsiku (DW4). He tendered two documentary exhibits, fund transfer request and bank statement (exhibit D1 and D2 respectively). Briefly, it was the prosecution evidence that on 28/11/2022 the appellant informed PW1 that Dadi Karim Tajoo had 60 acres rented from Highland estate but was unable to cultivate due to his business schedule. Each acre was to be hired for 445,000/= making the total of Tsh. 26, 700,000/=. On 29/11/2022, PW1 called PW2 and one Kumbusho Homange who did not testify to witness the handing of Tsh. 30,700,000/= to the appellant for hiring farms. After handing the money, the quartet went to Highland estates, the appellant entered the office leaving others in the car. After his return was asked about receipts and told them there was no network. On 9th December 2022, the 2 appellant shown PW1 and PW3 farm 1-7(a), plots Nos. 8,9,10,1(7(b) and 16 making total of 10 plots. When Shamba boy were sent to prepare the farms, they found another person, when they asked, were told Ismail Tajoo sent them. The family meeting was called in attendance was PW4 who said, the appellant promised to pay back the money. The matter was reported to police and was investigated by PW9. The appellant was arrested at Kahama by PW5

who also mounted a search witnessed by PW6 in which the amount of Tsh 1,580,000/= was seized. The appellant was returned to Rujewa Police station by PW7 together with money seized. In defence the appellant distanced from the offence. He denied to have received Tsh 30,700,000/= from PW1 as no exhibit was tendered to prove the same. He admitted that on unknown date of November 2022 together with the victim went to highland estate to hire farms and were offered ten acres for payment of 4,450,000/= and were issued with receipts and contract for hiring. He said police took from him Tsh 14,210,000/=. Evidence of DW2 was on payment of Tsh. 10,000,000/= for bailing out the appellant while that of DW3 and DW4 was that DW2 withdrew money. Fund transfer form and bank statement were tendered as exhibit D1 and D2 respectively. 3 At the conclusion of trial, the appellant was found guilty. Consequently, convicted and sentenced to three years. He was also ordered to return Tsh. 29,120,000/= to the victim, PW1. Unhappy with the whole judgment, has filed petition of appeal on two grounds, one that in the circumstances and facts of the case, the trial district court should have conducted civil proceedings against the appellant; and two, that the trial district court did not prove culpability of the appellant to the required standard. When the appeal came up for hearing the appellant appeared unrepresented whereas the respondent Republic was represented by Mr. Lordgard Eliamani, State Attorney. The appeal was disposed by filing written submission. In his submission the appellant informed the court was abandoning ground one. For the reason that will be apparently soon, I will not reproduce it here but parties submitted in detail in support and against the appeal. When it was turn of the court to compose the judgment, upon coming across the charge, I noted some pertinent issue. I thus reopened proceeding to afford an opportunity parties to address on the propriety of the charge which was preferred against the appellant. 4 Submitting in the point the appellant stated had nothing to state, left to court to decide. The state attorney Mr. Augustino Magesa responded by submitting that he discovered that in the charge sheet there is no section 258 (1) of the Penal Code, However, since section 265 of the Penal Code is there, he was of the position that it is enough for the appellant to know what offence he stood charged, that is theft. Having heard parties, the charge which was laid on the door of the appellant is reproduced; 'CHARGE STATEMENT OF OFFENCE STEALING BY AGENT; c/s 273 (b) and 265 of the Penal Code [CAP. 16, R.E. 2022]. PARTICULARS OF OFFENCE That MICHAEL S/O MATHIAS @KABANGE charged on 29th day of November 2022 at Ubaruku Village within Mbarali district in Mbeya region willfully and unlawfully did steal 26,700,000/= which have been entrusted to rent farm of 60 hectares and Tsh.4,000,000= for raise your capital all valued at Tsh.30,700,000/= from one DAUD S/O AIZACK@BEHIRE.' 5 From the above charge, it has to be noted section 265 is the punishment provision for offence of theft, however stealing by agent under section 273 has its own sentence which is imprisonment of ten years. Section 273(b) provides; '273. Where the thing stolen is any of the following things, that is to say-

- (a) N/A
- (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 above provisions do not create an offence of stealing but rather it merely describes the circumstances under which stealing by

an agent is said to occur. What I gather under section 273(b), is that stealing by agent is a component and specie of theft, thus to bring into play the provision, elements of theft must be established first and connect the circumstances under which the offence was committed. Thus, section 273(b) cannot stand alone as a charging section for the reason that it does not contain the essential elements for an offence of stealing to occur. In *Severin Wilbard vs Republic*, Criminal Appeal No. 741 of 2023 [2025] TZCA 227 (17 March 2025; TanzLII) the court stated; 'It should be known that the offence of stealing by agent is a specie whose genus is stealing constituted under section 258 of the Penal Code. What makes stealing by agent a separate subset is only the circumstance under which the offence of stealing is committed. That being the case therefore, in order for any charge to be drawn under section 273(b), the prosecutor must bear in mind the ingredients of section 258(1) of the Penal Code which should be established first. These are asportation or conversion without Bonafide claim of right, but also the act must be done with intent to defraud the owner (fraudulent intent). The prosecution should consider the available facts of the complaint to see whether a crime can be figured out of those facts of the complaint. It is after proving stealing, when they can consider different circumstances under which the offence was committed and for the purpose of the section, the accused must be an agent of the complainant, the property was entrusted to him by virtue of his position and that while holding the said position, he stole the property or the proceeds so entrusted by the complainant.' In the particulars of the offence there is element of theft, that is wilfully and unlawfully stealing of Tsh. 26,700,000/= however, the provision creating the offence of theft is not cited in the statement of offence. Faced with similar scenario in similar situation was discussed in *John Bruno Kimario vs Republic*, Criminal Appeal No. 182 of 2022

[2025] TZCA 237 (18 March 2025; TanzLII) and the court held; 'We hasten to state at this point that, since the prosecution cited section 273(b) of the Code alone leaving behind section 258 (1) of the Code the charge against the appellant was improper and therefore, it could not lead to the impugned conviction and sentence.' The charge under which the appellant was charged do not contain section 258(1) of the Penal Code making it defective. There is another important element lacking in the charge, status of the appellant to the complainant is not known. It is known that to bring into play section 273(b) it must be proved to have been committed by an agent in whose custody the property or proceeds were entrusted by virtue of his status or position of being an agent, to deal with it according to the instructions of the principal. That element is lacking in this appeal. In the end, the charge upon which the appellant was convicted and sentenced was defective. I therefore, invoke section 373(1)(a) of the Criminal Procedure Act, [Cap R: E 2022] nullify the proceedings and judgments of the trial court. I further quash the conviction and set aside the sentence as well as the order to return Tshs. 29,210,000/= to PW1. 8 On the totality of the circumstances of this matter as discussed above, I order his release from the sentence he is currently serving and leave it to the discretion of the Director of Public Prosecutions to decide whether to mount a fresh prosecution against the appellant according to law. V.M NONGWA JUDGE 24/3/2025 Dated and Delivered at Mbeya this 24th

March 2025 in presence of the Appellant and the Mr. Augustino Magesa learned State Attorney for the Respondent. V.M NONGWA JUDGE 9

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Prepared on 14 October 2026 · Esheria