

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA fCORAM: NDIKA. J.A., KITUSI. J.A.. And MASHAKA, J.A.^ CRIMINAL APPEAL NO. 383 OF 2022 ZEPHANIA GEMUWAY..... APPELLANT VERSUS REPUBLIC..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Arusha) (Phillip, J.) dated the 19th day of July, 2022 in Criminal Appeal No. 85 of 2022 JUDGMENT OF THE COURT 29th November & 11th December, 2024 NDIKA. J.A.: On appeal is the judgment of the High Court of Tanzania at Arusha dated 19th July, 2022 affirming the conviction of the appellant, Zephania Gemuway, for stealing by agent and the consequential sentence of five years' imprisonment and the order to pay the complainant TZS. 2,000,000.00 as compensation for the material loss suffered. The prosecution's case at trial was that the appellant stole four head of cattle valued at TZS. 2,000,000.00 at Endamilay village within Mbulu District in Manyara Region. The cattle were the property of Simon s/o Benedict, the complainant, and had been entrusted to the appellant for his own temporary use and safe custody. However, the appellant stole the livestock. The complainant and his wife, Christina Joseph (PW2), live in a pastoral community in Qaroda, Mbulu, the appellant being one of the neighbours. According to them, they entrusted a black and white dairy cow to the appellant on 5th January, 2018 at his request for milking consistent with local customs and traditions. Over time, the cow bred three calves. On 5th July, 2021, the complainant went to the appellant's home demanding to be given the calves. The appellant initially rebuffed the demand but later he refused to surrender all the four head of cattle. The matter was initially referred to the village functionaries and later to the village elders but all efforts to mediate the dispute ended in vain, following the appellant's refusal to appear before the elders. PW3 Daniel Bura, also a resident of Qaroda, averred that the appellant admitted to him to have taken the cow from the complainant. He recalled having attended the elders' meeting where the appellant was a no-show. Another neighbour, PW4 Yacobo Awe, gave a testimony like that of PW3. At the trial, he was firm that he was aware of the cattle in dispute and that they remained in the appellant's possession. The appellant refuted the accusation against him, asserting that being a pastoralist with a sizeable herd of livestock in Chamwino in Dodoma Region he did not have to borrow a cow from the complainant. He suggested that the charge against him arose due to persisting squabbles between him and the complainant and his wife. He also cited an existing disagreement between him and PW4 but said that all was well between him and PW3. The appellant's wife, Maria Boay (DW2), and his sister, Yasinta Gemuway (DW3), supported his case that he did not take any cow

from the complainant. The District Court of Mbulu at Mbulu was impressed by the prosecution's case. It found that the appellant took the cow but later refused to surrender it along with its three calves, which he hid from everybody. On that basis, the trial court found the charged offence sufficiently proved, as laid under section 273 (b) of the Penal Code, Cap. 16. It thus convicted and sentenced him as previously stated, and, in addition, ordered him to pay the complainant TZS. 2,000,000.00 as compensation for the loss of the livestock. Having vainly appealed to the High Court, the appellant further appeals to this Court on three grounds, which, for clarity, we have rephrased as follows:

1. That the courts below did not give due consideration to his defence.
2. That the courts below erred in law by simultaneously imprisoning and fining the appellant, which amounted to double punishment for the same offence.
3. That the courts below failed to consider that there existed an oral agreement between the appellant and the complainant indicating that they trusted each other and that it was for them to mediate and resolve their disagreement. The appellant pursued the appeal as a self-represented litigant. The appeal was opposed by Mr. Benedict Kivuma Kapela, learned Senior State Attorney, and Ms. Anifa Athumani Ali, learned State Attorney, on behalf of the respondent. We commence with the third ground of appeal, which, in our opinion, presents no difficulty. Mr. Kapela urged us not to consider it, arguing that it is a new complaint that was not addressed by the first appellate court, in addition to raising a strictly factual argument. We are entirely in agreement with him. In fact, it is well-established that this Court is barred from considering solely factual matters on second appeal that were not raised or resolved by the High Court sitting on appeal, in accordance with section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141. The Court has repeatedly reaffirmed this position in its decisions; for example, *Hassan Bundala @ Swaga v. Republic* [2015] TZCA 261; *Kipara Hamisi Misagaa @ Bigi v. Republic*

[2018] TZCA 494; *Florence Athanas @ Baba Ali & Another v. Republic*

[2019] TZCA 270; *Festo Domician v. Republic* [2019] TZCA 406; and *Lista Chalo v. Republic* [2020] TZCA 23. We believe that the contention that the courts below disregarded the alleged oral agreement between the appellant and the complainant, which could have mediated and resolved their disagreement, is a purely factual matter that we are unable to consider and determine. On top of it, this matter was neither brought to the attention of the first appellate court nor was it determined at that stage. Consequently, we decline to consider the third ground of appeal. We advert to the first ground of appeal. It argues that the appellant's defence was not given the appropriate consideration by the lower courts. Initially, it is important to underscore that the appellant did not provide any submission to substantiate this assertion. Mr. Kapela acknowledged that the appellant's defence was not considered by the trial court. Nevertheless, he argued that the intermediate court had legitimately assumed the role of the trial court by evaluating the defence and rejecting it, in part because it was supported by DW2 and DW3, the appellant's wife and sister,

respectively, who had a vested interest in protecting him from imminent imprisonment. At first, we agree with Mr. Kapela's assertion that the first appellate court attempted to assume the role of the trial court to evaluate and determine the appellant's defence, which had been entirely disregarded at the first instance. However, we are concerned that the intermediate court's rejection of the evidence of DW2 and DW3 was erroneously based on the assumption that they had a vested interest due to their status as close family members. In the case of *Mustafa Ramadhani Kihyo v. Republic* [2006] T.L.R. 323, the Court declared that the testimony of relatives is credible and that there is no rule of practice or law that relatives' evidence be discredited, unless there is a valid reason to do so. Furthermore, the Court emphasised in *Goodluck Kyando v. Republic* [2006] T.L.R. 363, that every witness is entitled to credibility and must be believed unless there are good and cogent reasons to discredit him or her. I We have examined the appellant's defence considering the circumstances of the case. As previously mentioned, his defence, as espoused by his wife and sister, was essentially a denial of the accusation against him. He claimed that he did not require the complainant to lend him a cow, as he maintained a substantial livestock herd in Chamwino, Dodoma. He also expressed his regret that the charge against him was the result of ongoing disputes between him and the complainant and his wife. In our opinion, the above defence was a fabrication. First and foremost, it is a self-serving, unembellished denial of liability that must be viewed with disdain by any court of justice. Secondly, we are curious as to why he did not cross-examine any of the individuals involved in the charge against him on the alleged grudges, particularly if it was fabricated by the complainant and his wife, with the support of PW4, who had a personal vendetta. In *Boay s/o Bura v. Republic* [2024] TZCA 717, citing *Nyerere Nyague v. Republic* [2012] TZCA 103, the Court reiterated the normative position that: "... the omission or neglect to challenge the evidence- in-chief o f a witness on a material or essentialpoint through cross-examination would imply an acceptance o f that evidence as truthful, subject to its being challenged as inherently implausible or probably untrue." [Emphasis added] The testimonies of the complainant, his wife, and PW4 do not appear to be manifestly implausible or untrue to displace the presumption over their truthfulness. Moreover, in reality, their evidence is consistent with that of PW3, with whom the appellant acknowledged that he had maintained cordial relationships. PW3 was unwavering in his conviction that the appellant had admitted to him that he had borrowed the cow in question, which subsequently produced three progenies. He also corroborated that the appellant converted the cattle into his property and declined to attend the village elders' meeting to resolve the impasse between him and the complainant Based on this, the first ground must fail. Given the above considerations, we are persuaded that the appellant was properly convicted of theft by agent for converting the cattle entrusted to him for temporary use. In our opinion, he committed the offence on 5th July, 2021, by denying the complainant's demand for the cattle, so permanently depriving him of its use and possession. Likewise, the appellant did not present any argument to substantiate his claim of double jeopardy, which is the second ground of appeal. This claim asserts that he was punished twice for the same offence. For his part, Mr. Kapela submitted that the grievance

at hand was plainly misconceived. According to him, the appellant was not punished twice for the same offence. The only criminal penalty imposed on him following his conviction was the term of five years' imprisonment. He stressed that aside from the compensation order not being a purely penal measure, it was properly and lawfully levied. He added that although the trial court referenced section 348A (1) of the Criminal Procedure Act, Cap. 20 ("the CPA") as the basis of its order, the appropriate provision is section 348 (1) of the CPA. He thus moved us to find the trial court's reference a mere slip of the pen. At the outset, we agree with Mr. Kapela that even though the trial court cited section 348A (1) of the CPA as the enabling provision, it must be presumed that it acted under section 348 (1) of the CPA, which stipulates as follows: "348. -(1) Where an accused person is convicted by any court of any offence not punishable with death and it appears from the evidence that some other person\ whether or not he is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation, in kind or in money, as the court deems fair and reasonable." [Emphasis added] In our opinion, the preceding provision is uncomplicated. It grants any trial court the authority to dictate, where appropriate, that the convicted individual must provide compensation, either in cash or in kind, that it considers to be equitable and reasonable, in addition to any other lawful punishment. The order may be issued upon the fulfilment of three conditions. Initially, the accused individual must have been found guilty of an offence that is not punishable by death. Secondly, the court must be persuaded by the evidence on record that the offence committed has resulted in material loss or personal injury to another individual, whether they are the prosecutor or a witness in the case. Thirdly, the affected individual must be able to recover substantial compensation through a civil suit. It is unmistakable that the offence at issue in this case is theft by agent, a crime that is not punishable by death as it is subject to a maximum of ten years of imprisonment. In relation to the second and third conditions, it is important to acknowledge that the trial court somewhat erroneously assumed, without any meaningful elaboration, that material loss had been suffered and that it was recoverable. Nonetheless, we are of the opinion that the said loss and the justiciability of the compensation order are unquestionable. Certainly, a civil action could have been brought against the appellant for the tort of conversion. Aptly, in CRDB (1996) Ltd v. Boniface Chimya

[2003] T.L.R. 413, the Court defined this tort as follows: "Broadly stated, conversion is an act or series of acts of wilful interference without lawful justification with any property in a manner which is inconsistent with the right of another person whereby that other person is deprived of the use and possession of the property - See [Heuston and Buckley in Salmond & Heuston on the Law of Torts, 21st Edition] at page 897. In order to establish the act of interference with the property on the part of the defendant the general principle is that it should be shown that demand was made for the release of the property

but the defendant refused to comply. Without such indication of refusal to hand over the property to the plaintiff upon demand to do so, adverse detention of the property may not be proved. "[Emphasis added] See also Kalyango Construction & Building Contractors Limited v. China Chongqing International Construction Corporation (CICO)

[2012] TZCA 7. In the present instance, as found by the courts below, the appellant took the complainant's cow for temporary use. Subsequently, the cow produced three offspring. The appellant declined to relinquish the cattle when the complainant requested it on 5th July, 2021. On this basis, it cannot be seriously questioned that the appellant's refusal to surrender the cattle constituted an intentional interference with the complainant's property without any lawful justification in a manner that is inconsistent with his title to it, thereby depriving him perpetually of its use and possession. We are, therefore, satisfied that the impugned order of compensation, which was correctly and justifiably issued based on the undisputed value of the converted cattle at TZS. 2,000,000.00, was properly made. The second ground of appeal equally fails. Ultimately, we conclude that the appeal is without merit. We dismiss it in its totality. DATED at ARUSHA this 10th day of December, 2024 G. A. M. NDIKA JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL L. L. MASHAKA JUSTICE OF APPEAL Judgment delivered this 11th day of December, 2024 in the absence of Appellant but in the presence of Ms. Tobiasta Chang'a, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

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