

**IN THE HIGH COURT OF TANZANIA  
AT MTWARA**

**PC. CRIMINAL APPEAL NO.1 OF 2007**

**FROM CRIMINAL APPEAL NO. 69 OF 2006  
OF MASASI DISTRICT COURT  
ORIGINAL CRIMINAL CASE NO.256 OF 2006  
OF LISEKESE PRIMARY COURT**

**ZAINABU SELEMANI ..... APPELLANT  
VERSUS  
ZAITUNI RAJABU ..... RESPONDENT**

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**DATE OF LAST ORDER – 05/7/2007  
DATE OF JUDGMENT – 01/8/2007**

**JUDGMENT**

**MJEMMAS, J.**

The appellant one Zainabu Selemani filed a complaint/criminal case no.656 of 2006 at Lisekese Primary Court against Sharafi Abdul and Zaituni Rajabu who happened to be husband and wife. The charge against them was stealing contrary to section 265 of the Penal Code.

It was alleged by the appellant/complainant that on 21/8/2006 she entrusted Zaituni Rajabu with TShs.165,000/= to keep it in safe custody. In the evening of the same day, the

complainant asked to be given TSh.1,000/= out of TSh.165,000/= which she was given. Later on, when the complainant asked for her money Zaituni Rajabu could not provide the same. At the end of the trial the husband, that is Sharafi Abdul was acquitted and his wife Zaituni Rajabu was convicted of theft and sentenced to twelve months imprisonment. She was also ordered to refund to the complainant TSh.164,000/= when she completes serving her prison sentence.

The accused person, Zaituni Rajabu was aggrieved and hence appealed to the District Court – of Masasi District. The District Magistrate upheld the appeal, quashed the conviction of the appellant/accused and set aside the sentence imposed. The main reason given by the District Magistrate is that the proper charge against the accused person was stealing by agent contrary to section 273(b) of the Penal Code. He further said that the offence of stealing by agent c/s 273(b) of the Penal Code is triable only by the District Magistrate, Residents Magistrates Court and the High Court. Thus the trial Primary Court had no jurisdiction to try the case.

The complainant/appellant was aggrieved and hence the present appeal. The appellant has filed four grounds of

appeal in her petition of appeal. The grounds are (As written by the appellant)

1. That the act of the appellate court not hearing parties to appeal have prejudiced the constitutional right of the appellant of being heard.
2. That, had the learned District Magistrate carefully observed the rule of justice and since his decision touched the right of appellant to compensation, he would have seen the importance of hearing the parties to the appeal.
3. That, the learned District Magistrate was wrong when he quashed the proceedings of the trial court on the grounds (sic) that the respondent had to be charged on the offence of stealing by agent rather than stealing without knowing that alone had not prejudiced the right of the respondent in law is curable (see definition c/s 258 of the Penal Code).
4. That the learned District Magistrate mishandled the appeal before him thus arriving at unjust decision.

At the hearing of this appeal the appellant appeared in person unrepresented while the respondent was absent. The respondent was also not present on 5/6/2007 when this appeal was mentioned with a view to fixing a hearing date although she was duly served. I therefore proceeded to hear the appeal in her absence because had she respected the court summons of 17<sup>th</sup> April, 2007 which was duly served to

her she would have known what was going on but she neglected it and did not make any follow up (if at all she had good cause for not appearing on the day mentioned in the summons).

I am going to deal with grounds of appeal number one and two together because they basically refer to the same point, namely the right to be heard.

Appeals from Primary Courts to District Courts are governed by Part III of the Magistrates' Courts Act, No.2 of 1984. Sections 20(1)(a) and 21(3) of the said Act No.2 of 1984 provide for a right of appeal from Primary Court to District Court by a convicted person, complainant or Director of Public Prosecutions.

In addition Section 34(1) of Act No.2 of 1984 provides:

“Save where an appeal is summarily rejected by the High Court and subject to any rules of court relating to substituted service, a court to which an appeal lies under this Part shall cause notice of the time and place at which the appeal will be heard to be given –

- (a) to the parties or their advocates;
- (b) in all proceedings of a criminal nature in the High Court, or in any such

proceedings in the district court in which he is an appellant or has served notice that he wishes to be heard, to the Director of Public Prosecutions. Provided that ..... (Not relevant)

And subsection (2) of the same section provides that:

“An appellant or other party, whether in custody or not, shall be entitled to be present at the hearing of an appeal under this Part.  
Provided that –  
(Not relevant)

I think on the basis of the foregoing provisions of the law the appellant was entitled to be notified and be present at the hearing of the appeal before the District Court unless she indicated otherwise. I therefore uphold that ground of appeal and I wish to emphasise that an appeal is, in many respects a re-determination of the decision of the trial court therefore it is important that rules of fair hearing must be adhered to. It is no wonder that the Legislature enacted for the right of appeal from Primary Court to District Court by an accused person, complainant or the Director of Public Prosecutions.

On the third and fourth grounds of appeal I think the Magistrate was right in holding that the appropriate charge should have been stealing by agent. I, however, think that,

after the District Magistrate had found that the proper charge should have been stealing by agent, an offence which cannot be tried by a Primary Court, he should have exercised his powers under section 21(1)(c) of the Magistrates' Courts Act, 1984 and order the case to be heard de novo before a District Court which has jurisdiction to hear such a case (unless he had good reasons not to do so).

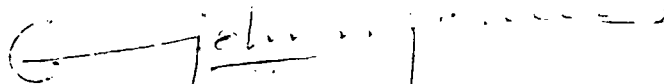
For the reasons stated above I quash the proceedings of both the District and Primary Courts and order that the case be heard de novo before the District Court. This order is hereby certified to the Primary Court through the District Court with a view to making the necessary orders which are comfortable to this order.

The appeal therefore succeeds.

Ordered accordingly.

GIVEN AT MTWARA THIS 01/8/2007



  
G.J.K. Mjemmas,  
Judge  
1/8/2007

Date: 1/8/2007

Coram: Hon. G.J.K. Mjemmas, J.


Appellant: Absent

Respondent: Absent

Court: This matter is coming up for judgment.

Order: Judgment delivered today 1/8/2007 in the absence of the parties.



  
G.J.K. Mjemmas,  
Judge  
1/8/2007