

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**PC. CRIMINAL APPEAL NO. 2 OF 2021**

(C/O PC Criminal Appeal No.1 of 2021 Mpanda District Court, Original Criminal Case No.

58 of 2021 – Mpanda Urban Court)

(Gosper B. Luoga, RM)

**JOHNSON SALALA ..... APPELLANT**

**VERSUS**

**KHAMIS HASSANI ..... RESPONDENT**

Date: 30/11/2021 & 17/01/2022

**EX-PARTE JUDGMENT**

**Nkwabi, J.:**

With one ground of appeal, the appellant is challenging the decision of the District Court for failure to order the crusher, the subject of the criminal proceedings, be restored to the appellant. In the trial court, the appellant unsuccessfully prosecuted the respondent for theft of the crusher contrary to section 265 of the Penal code Cape 16. The charge was dismissed since the appellant failed to prove the case to the required standard. Following the dismissal of the charge, the appellant was advised to pursue a civil action.



Aggrieved with the decision of the trial court he successfully appealed to the District Court which overturned the decision of the trial Primary Court with this comment:

*It is my opinion that the value of the said crusher had raised after having been fixed new engine and the said 'golori'. Also the Respondent was duty bound to follow an open and just procedure in rescinding his properties by being handed over freely by the Appellant before witnesses. Now since the Procedure was not followed and since the Appellant was not present the act of the Respondent as said before cannot follow under section 18 of the Penal Code Cap 16 RE 2002. I find that the Respondent stole it.*

...

After finding the respondent guilty of theft, without convicting him, of course, the learned first appellate Resident Magistrate went on to sentence the respondent to a term of 12 months "jail" conditional discharge with condition that he should not commit similar offence during the stated time. He went further and imposed on the respondent a compensation order at T. shs 1,500,000/= to be paid within 30 days from the date of the judgment.

Though unwarranted, as they could be, the orders saddened the appellant for failure to include an order of restoration of the crusher as indicated above.

The backdrop of the case is that the appellant purchased the crusher on 09/10/2020 from the respondent at the tune of T.shs 4,050,000/= to be paid at two instalments among other terms. Final payment ought to be on 10/12/2020. The appellant defaulted, giving birth to a supplementary contract executed on 13/12/2020 in which the appellant ought to have paid the balance by 16/12/2020 and if the appellant would default, he ought to return the crusher in the condition it was at the time of taking it.

In the trial court the appellant testified that when he failed to pay the last instalment after the respondent refused to receive lesser amount and a motorcycle, the respondent went and stole the crusher on 14/12/2020. The appellant's worker told the respondent to wait for the appellant. When the incidence happened, he was in a forest at Lyamkembe. When he came back, the matter was reported to the police and later the criminal case was opened in court. In cross-examination, his reply, which I find to make the appellant

unreliable/liar witness for he contradicted himself on a vital matter when he replied:

*Anasema hajawahi kuandika hati kwamba kama atashindwa kulipa pesa zilizokuwa zimebaki atarudisha karasha kwa mshitakiwa. Anasema kuna hati aliandika mbele ya mwanasheria kwamba kama SM1 angeshindwa kumalizia kulipa pesa zilizobaki za kununulia karasha hadi tarehe 16/12/2020 angemrudishia mshitakiwa karasha*

In his defence in the trial court, the respondent asserted that the appellant failed to pay the last instalment and he was nowhere to be seen and there was no even phone communication. On 17/12/2020 he was advised by the advocate to take his crusher. He went to take the crusher on 22/12/2020. He was allowed to take the crusher. He was arrested on 29/12/2020 for the alleged theft. He also stated that when he went to take the crusher, there was no second engine, and the crusher had no sand. I hasten to state that the defence of the respondent seems to be cogent.

At the hearing of the appeal, the appellant appeared in person. The respondent did not appear. There is proof of service to the effect that the respondent refused to receive the summons. Therefore, the hearing proceeded in his absence. The appellant implored upon this court for justice as the crusher ought to be restored to him.

On my scrutiny, the appellant admitted that he has not completed the part of the contract on his side as he has not paid the last installment. This approach of mine to probe the appellant, I think, is supported by what the Court of Appeal of Tanzania did in **Omary Yusuph v Albert Munuo Civil Appeal No. 12 of 2018** CAT:

*Before the commencement of the hearing, we wanted to satisfy ourselves on the propriety or otherwise of the proceedings before the Ward Tribunal instituted by Halima Omari against the respondent. ...*

The respondent stole the crusher from his site, the appellant submitted before me. He added he had asked the respondent to extend the duration of the contract which he did but the respondent came to take the crusher prior to the such extension. The appellant pleaded for justice.

With respect to the appellant, this matter ought to be filed in the civil court to get a remedy if he has suffered a civil wrong. The matter arises from contractual relationship which seems to have collapsed at his failure to honour his obligations on the contract. To date, he has not paid the last instalment. I have no best advice other than that he got from the trial court that he ought to have pursued a civil case to get his right, if any. It is inconceivable that a criminal court should interpret and determine matters arising from a contract and determine such matters because those are a domain of a civil court.

That determines the appeal. However, I have to go further and consider the decision of the district court. This is having regard to bona fide claim of right. The appellant had clearly and admitted default in payment. There is a term in the supplementary contract that the appellant would return the crusher if he fails to honour the supplementary contract. It is through this that the respondent took his crusher had in his view, he was entitled to do so. In the case of **Laurian Kabobwe v. R., [1968] HCD No. 147** where Hamlyn, J., as he then was, set aside the conviction of the accused who was convicted of stealing bananas under section 265 of the Penal Code. In that case the

sole dispute was whether the accused or the complainant was the owner of the shamba from which the bananas were taken. Section 258 of the Penal Code states: "A person who fraudulently and without claim of right takes anything capable of being stolen... is said to steal that thing." His lordship held:

*It is not theft to take goods under a genuine claim of right: "It is immaterial whether such claim is properly based in law, as long as (the accused) believes it to be good."*

In the present case under my consideration the respondent, seems to have been under a bona fide claim of right to take back the crusher after the appellant failed to honour the supplementary contract. The appellant too claims to have been in the forest. This is a clumsy claim since he knew that he had a looming deadline to pay. How could he vanish just like that? I have found him to be a liar, so is his claim that he had T.shs 1,000,000/= but the respondent refused to receive the same. Even if he refused to take the same, that does not make him a criminal in the circumstances of this case.

Another factor that proves beyond reasonable doubt that the appellant is a big liar is the fact that though he claims that the offence of theft was

committed on 10/10/2020 as per the first charge sheet that was admitted in court on 19/01/2021, I will be forgiven if that was a slip of the pen by the drafter of the charge sheet. Nevertheless, the respondent was arraigned before the trial court on 19/01/2021 and the case was assigned criminal case number 58/2021. In a new charge sheet that was admitted in court on 20/01/2021 it was alleged that the offence was committed on 14/12/2020. Why would it take so long to arraign the respondent in court, if it is accepted that the offence was committed on 14/12/2020 up to 19/01/2021? There is no any explanation. It is even unclear when the appellant came back from his alleged forest and reported the matter to the police. In the circumstances, the respondent was entitled to the benefit of doubt.

If I decide otherwise, the respondent and any other person would be left wondering why the law has parted with common sense, as was observed by his Lordship Samatta, J., as he then was, in **Samweli Msivangala v. R. [1980] TLR 319** at page 320. If that were the case, no one would respect the law.



Before S.G. Matemu resident Magistrate, on 11/02/2021, the appellant was recorded under oath in evidence to say:

*Baada ya hapo tulienda polisi na mshitakiwa alikamatwa, na polisi nilimwambia mshitakiwa anirudishie mashine **najua ananidai nitalipa muda ukifika*** (emphasis mine).

So, it means that the appellant had returned from his alleged forest even before 16/12/2020 because 16/12/2020 was the last date for his repayment of the last instalment as per the supplementary contract. Else, his alleged being in the forest was a lie and an afterthought. It is trite law that it is better to err to acquit than to convict. That underscores the seriousness of the business of the court in criminal trials.

That said, I uphold the decision of the trial court in dismissing the charge and acquitting the respondent. The respondent being found not guilty, the sentence by the District Court cannot stand as it is not founded on law. It is clearly based on misapprehension not only of the evidence on the record but also the law. The sentence and the order for compensation are set aside.

The culmination of the above deliberation, the appeal is dismissed in its entirety.

It is so ordered.

**DATED** and Signed at **SUMBAWANGA** this 17<sup>th</sup> day of January, 2022



  
**J. F. Nkwabi**  
**JUDGE**

**Court:** Judgment delivered in chambers this 17<sup>th</sup> day of January 2022 in the absence of both parties, though the appellant was aware that the matter would come for judgment today as on the hearing day he appeared and argued his appeal.



  
**J.F. Nkwabi**  
**JUDGE**

**Court:** Right of appeal is explained.



  
**J.F. Nkwabi**  
**JUDGE**  
**17/01/2022**