IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 443 OF 2017

SOPHIA EMMANUEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Shinyanga)

(Makani, J.)

Dated the 8th day of September, 2017

in

Criminal Appeal No. 66 of 2017

.....

JUDGMENT OF THE COURT

18th & 27th August, 2021

LEVIRA, J.A.

Sophia Emmanuel, the appellant, was a member of Peace and Love Group created in 2012 for the purpose of benefiting its members; in that, members could deposit and borrow money when need arise from their contributions. Leaders of the group were elected by members and these were, Chairperson, Secretary and Accountant. The appellant happened to be an accountant of the said group. However, to the disappointment of other members of the group, it was alleged that she stole TZS. 21,423,500/= the property of the said group. She was reported to the police and later arraigned before the District Court of

Kahama at Kahama (the trial court) facing two counts charged in alternative; to wit, stealing contrary to section 265 and stealing by agent contrary to section 273 (b) both of the Penal Code, Cap 16 R.E. 2002 [now R.E. 2019] (the Penal Code).

The prosecution side called a total number of eight (8) witnesses, but in making its findings the trial court relied on the evidence of four witnesses who were referred to as key witnesses; these were, Melanesian Maximillian (PW1), Bonia Peter (PW2), Grolia Matala (PW3) and Deogratias Luhamba (PW6).

It is on record that the appellant as an accountant of Peace and Love Group as introduced above, had a role of supervising the management of money within the group. According to PW1, the group chairlady, they used to keep the group money in a steel box under the custodianship of the appellant and the said box had three keys which were normally kept by 3 keykeepers who were also members of the said group; these were, Telesia Ntelya, Sana Toboka and Prisca Lukas.

PW1, testified further that, the group members had a routine of meeting and whenever they meet, the accountant (appellant) had to bring the steel box, the money had to be counted and every member

had a right to purchase not more than 5 shares of which each had TZS. 5,000/=value. After collecting, all money was kept in the steel box in the presence of all members and the allotted shares had to be counted and the amount is pronounced to all members. Finally, the keykeepers close the box and the same is handed to the accountant who must sign an acknowledgement form and the accountant was left with the steel box with money until next meeting. On 8th April, 2016 when they met the money collected was TZS. 21,423, 500/= and the same was left with the appellant. However, the appellant absconded several meetings until on 14th May, 2016 when members of the group were assisted by her employer, the Town Council Director (Deogratias Luhamba (PW6)) to trace her. Ultimately, she arrived at the meeting with PW6 and she was ordered to bring the steel box. To their surprise, when the said box was opened, only TZS. 3,500/= was found therein. Upon being asked where was the money (TZS. 21, 423, 500/=), she tried to escape but was stopped by group members. According to PW1, the group members noticed that the steel box has been tempered with and it was covered by welding and painted to hide the tempering.

The evidence of PW1 was corroborated with that of other group members; including, PW2 and PW3; as well as PW6 who confirmed to

be involved in tracing the appellant. It is also worth noting that although PW1 and PW2 stated that the steel box was tempered with, when cross examined, PW2 said she does not know anything about welding. On her side, PW3 testified that the said box was not inspected before being opened.

The defence side had four witnesses including the appellant who testified as DW4. In her defence, DW4 denied to have stolen the group money. Instead, she testified that the alleged stolen money was taken by the group chairlady (PW1) who used to collect the steel box from her house even in her absence as leaders were allowed to collect the steel box. DW4 testified further that she authorized her child to give the leaders of the group the said steel box whenever they requested. Joseph Godfrey (DW1), who is DW4's child confirmed the testimony of his mother, when he testified that PW1 used to go and pick the steel box in his mother's absence although he did not know why she used to take it. The fact that PW1 used to collect the said box from DW4 was also confirmed by Stella Emmanuel (DW2) who was also a member of Peace and Love Group.

Upon a full trial, the appellant was convicted of stealing by agent and sentenced to three (3) years imprisonment and to compensate the victims TZS. 21,423,500/=. We take note at the outset that the trial court did not make any finding in respect of the first count and this is the essence of the appellants second ground of appeal as it shall shortly be disused herein.

Aggrieved by the conviction and sentence, the appellant appealed to the High Court of Tanzania at Shinyanga (the first appellate court) vide (DC) Criminal Appeal No. 66 of 2017, subject of the current appeal. Having considered all the grounds of appeal presented before her, the learned Judge of the first appellate court was satisfied that the prosecution side proved its case beyond reasonable doubt. Therefore, she did not find any reason to interfere with the decision of the trial court. Still aggrieved, the appellant has knocked the door of this Court protesting her innocence despite the fact that she completed serving her sentence on 28th September, 2018.

Before us the appellant has argued three grounds of appeal which we take liberty to reproduce hereunder: -

1. The Honourable Judge of the High Court wrongly rejected the appellant's ground that the trial court was biased against the appellant and under the circumstances of this case she was denied a fair trial.
2. That the Honourable Judge erred in law in holding that the judgment of the District Court complied with the mandatory provision of S.312 of the Criminal Procedure Act, chapter 20 RE 2002.
3. That the appellant was convicted on very shacky evidence that failed to prove the charge of stealing Tsh.21,423,500/= by agent.

It is noteworthy that initially the appellant presented five grounds of appeal in the Memorandum of Appeal. However, at the hearing his advocate Mr. Kamaliza Kamoga Kayaga abandoned the first, second and fifth grounds of appeal and in lieu thereof, added one new ground having sought and obtained leave of the Court. The new ground which is the first in the list above was argued as the main ground and the rest in alternative. The respondent Republic was represented by Ms. Salome Mbughuni, learned Senior State Attorney assisted by Ms. Wampumbulya Shani, learned State Attorney.

Submitting on the first ground, Mr. Kayaga stated that the trial court magistrate was biased in two aspects; first, he made a statement in his ruling on the case to answer which suggested that, he had already made up his mind that the appellant was a thief when he referred to her to be among the *"potential thieves"* as reflected at page 64 of the record of appeal. He argued that since the case was yet to be concluded, it was wrong for the trial magistrate to come up with such conclusion. Instead, he said, the trial magistrate was required in terms of section 231(1) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA) to give a ruling on whether or not the prosecution had established a *prima facie* case against the appellant. According to him, the appellant was condemned unheard and the weight of those words made by the trial magistrate is huge. He went on to state that the appellant complained about those words before the High Court on the first appeal but, the presiding judge did not consider her complaint.

Also, with regard to the first ground he submitted that the trial magistrate made a finding on the appellant's demeanor in the judgment instead of doing so in the proceedings during hearing at the time of giving evidence contrary to the requirements of the law under section 212 of the CPA. He emphasized that if the trial magistrate observed

anything from the appellant, he could record it instantly and not to wait for the time of composing the judgment; which he said, shows bias resulting to unfair trial. He referred us to page 167 of the record of appeal where the trial magistrate indicated that he observed the accused behavior during the testimony all the time and that her demeanor attracted evil element.

Mr. Kayaga contended that the issue regarding contravention of section 212 of the CPA was brought to the attention of the first appellate judge but her response at page 206 of the record of appeal in her judgment was that, the trial magistrate's remark about the appellant's demeanor in the judgment was not the basis of proof against the appellant. He argued that this response was not correct taking into consideration that the trial magistrate had already concluded that he was dealing with a "*potential thief*" instead of a suspect. He thus implored us to find that the trial court was duty bound to make sure that the trial was fairly conducted but it failed. In the result, we should proceed to nullify the proceedings of trial and the first appellate courts, quash conviction, set aside the appellant's sentence and order of compensation as there is no sufficient evidence on record for us to order retrial.

In alternative, Mr. Kayaga submitted that if the Court will find that the first ground of appeal is not maintainable, then we should consider the second and third grounds of appeal.

In respect of the second ground as introduced above, Mr. Kayaga submitted that the Judge of the first appellate court erred in holding that the judgment of the trial court complied with the requirements of section 312 of the CPA while the appellant was not acquitted on the offence of theft (the first count). He referred us to page 168 of the record of appeal where the trial magistrate indicated that he found the appellant guilty of the second count of stealing by agent and convicted her forthwith but did not make a finding in respect of the first count.

As regards the third ground, it was Mr. Kayaga's submission that the appellant was unfairly convicted on a shaky prosecution evidence. According to him, since there were three keykeepers of the steel box used to keep money of Peace and Love Group who were not called to testify, it was wrong to hold the appellant responsible for the offence of stealing by agent. He referred us to page 21 of the record of appeal where when cross-examined by the advocate for the appellant, PW1 responded that the keykeepers were not interested and they were not

called to testify during trial; this he said, was a weakness in the prosecution evidence. According to Mr. Kayaga, since crucial witnesses who are steel box keykeepers were not called to testify despite their responsibility in ensuring that the Group money is safe, the Court should draw adverse inference against the prosecution and hold that the prosecution failed to prove their case against the appellant beyond reasonable doubt. He concluded that the prosecution evidence was weak and could not lead to conviction of the appellant with the offence of stealing by agent. Therefore, he urged us to allow the appeal.

In reply, Ms. Shani opposed the appeal. Responding on the first ground of appeal, she submitted that the trial court's ruling on a case to answer did not show any bias except that the style used was not common. She went on arguing that if the trial magistrate had any bias, it is obvious that he could convict and sentence the appellant straight away without according him a right to defend his case. But the fact that she was given that right under section 231 of the CPA, is a clear indication that there was no bias, she added. Besides, she said, the ruling on a case to answer was based on prosecution evidence and thus nothing indicates that the appellant suffered unfair trial.

Regarding the issue of demeanor of the appellant, she agreed that section 212 of the CPA requires demeanor of the witness to be recorded in the proceedings and not in the judgment. However, she argued that by recording observations on the appellant's demeanor in the judgment, it does not show that the trial magistrate was biased. After all, she said, the first appellate judge did not see any problem when determining this issue as it can be seen in her judgment. She thus urged us to order for a retrial should we find merit in the first ground of appeal.

As far as the second ground of appeal is concerned, Ms. Shani had no reservations; she supported it straight away stating that, it is true that the trial magistrate did not conclude in respect of the first count of stealing. She thus prayed for the Count to remit the case file to the trial court for it to either acquit or convict the appellant.

In respect of the third ground of appeal, Ms. Shani submitted firmly that the case against the appellant was proved beyond reasonable doubt. Elaborating on her stance, she stated that the prosecution witnesses proved that the appellant was entrusted with the money and she was supposed to keep it safe. However, the conduct of the appellant of not picking the phone having been traced by group members on the

day of meeting clearly showed that she committed the offence with which she was charged. Ms. Shani referred us to page 48 of the record of appeal and argued that the appellant admitted before PW6 that she took the money together with other two keykeepers and they divided it among themselves. In addition, she referred us to page 49 of the record of appeal and argued that when PW6 was cross examined by the counsel for the appellant he proved that the appellant stole the money in question as he said the appellant approached him and requested him to settle their matter out of court. In this respect, she cited the case **Jacob Mayani v. Republic,** Criminal Appeal No. 558 of 2016 (unreported).

Basing on her submission, Ms. Shani concluded that the prosecution proved their case beyond reasonable doubt against the appellant even without calling those three keykeepers as witnesses to testify.

In rejoinder, Mr. Kayaga reiterated his submission in chief while insisting that, the trial magistrate was biased and the case against the appellant was not proved beyond reasonable doubt. Therefore, he prayed for the appeal to be allowed, proceedings of both lower courts be nullified, conviction quashed and the sentence set aside.

We have dispassionately considered the submissions by the counsel for the parties, grounds of appeal and the entire record of appeal. We take note that the first ground was argued as the main ground of appeal and the rest two grounds in alternative. However, we think, the circumstances of the current case demand determination of all the three grounds of appeal and for that reason we shall determine all of them starting with the second; then, the first, and we shall conclude with the third ground. We are mindful of the settled position that as the second appellate court, we are only supposed to deal with questions of law. However, as stated in **Michael Elias v. Republic,** Criminal Appeal No. 243 of 2007 (unreported) the above settled position is based on the assumption that the finding of facts by courts below was based on correct appreciation of evidence in the record otherwise the Court may interfere with those findings in the interest of justice. See also, **Elisha Edward v. Republic**, Criminal Appeal No. 33 of 2018 (unreported).

As regards the second ground of appeal, basically, both parties are at one that the trial court did not acquit the appellant on the first count of stealing as required by law under section 312 of the CPA. This section provides that: -

"312.- (1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.

(2) In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty.

(4) Where at any stage of the trial, a court acquits an accused person, it shall require him to give his permanent address for service in case there is an appeal against his acquittal and the court shall record or cause it to be recorded."

We had opportunity to peruse the entire record of appeal and we agree with the counsel for the parties that, the appellant was neither acquitted nor convicted in respect of the first count of stealing as

required by the above law. It is important to note that since the second count was in the alternative, the trial court had no basis for considering it before first finding the accused/ appellant not guilty of the first offence. However, assuming the second count was properly determined, still, having considered the circumstances of this case, we decline the invitation by Ms. Shani that we should return the case file to the trial court to give an appropriate order. The reasons for our decision will come into light shortly as we determine other grounds of appeal.

In the first ground of appeal, the main issue calling for our determination is whether the trial court was biased in conducting the proceedings and its decision against the appellant. The appellant's complaint in this ground is twofold. First, that it was wrong for the trial magistrate to conclude that the appellant is among *"potential thieves"* before giving her the right to defend her case. Second, the trial magistrate contravened section 212 of the CPA when he commented about the appellant's demeanor in the judgment instead of doing so in the proceedings while recording witness's evidence.

In respect of the first limb, **Article 13 (6)(b)** of the Constitution of the United Republic of Tanzania, 1977 (as amended)

provides for the presumption of innocence that no one is guilty until proved so. It reads: -

> *"(b) no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence."*

This Article is geared to ensure that the right of an accused person who is facing trial to be presumed innocent until it is proved otherwise is preserved. However, that was not the case in the current appeal as the trial court formed an opinion and came to the conclusion that the appellant was among *"potential thieves"* as contended by Mr. Kayaga. The record of appeal speaks louder at page 64 where the trial magistrate while giving the ruling on whether or not the appellant had a case to answer, stated as follows: -

> *"These facts do attracts (sic) the so called a case to answer against the accused person thus* ***she is among the potential thieves****. For such facts of which do point out allegations against the accused person and relevant to the particulars of the charge do attracts the so called a case to answer. It is the opinion of this Court that accused must defend against."*

To confirm his predetermination of the appellant's guilt, in the judgment the trial magistrate stated the following words reflected at page 167 of the record of appeal: -

> *"Basically, this court observed that the accused person was very important person in the group* ***I wouldn't except her to miss from attending the meeting while knowing that was the one who had a big pocket, such act in itself do attracts the so-called evil element as alleged.*** *I am of the settled mind that the money TZS 21,423,500/= was lastly handled over to the accused"....* [Emphasis added].

The above excerpt clearly indicates that the trial magistrate was concluding what he had earlier on stated that the appellant was among the *"potential thieves,"* which was not right as he did not examine the reasons for nonattendance advanced by the appellant against the prosecution evidence. We are guided by the decision of the Court in **Bundala Mayala v. Republic,** Criminal Appeal No. 148 of 2015 (unreported), where when the Court was dealing with almost a similar situation it had the following to say: -

"There can be no dispute that before the appellant was called upon to give his defence, the trial court made findings of fact, as captured in the passage quoted above... With respect, such findings were expected to be found in a judgment, rather than in a ruling of a case to answer. This is because disputed findings of fact can only be legitimately established after a proper evaluation of both the prosecution and the defence case. (See ***HUSSEIN IDD AND ANOTHER v R*** *(1968) TLR 166). Since at that stage the trial court had only heard the prosecution case, it could not have established or made any findings of fact. This is, a rule of the thumb, which every presiding judge or magistrate ought to know. It has its roots in the rules of natural justice, which is the backbone of any fair trial."*

[See also, **Kabula Luhende v.Republic,** Criminal Appeal No. 281 of 2014 - unreported].

In the second limb of the appellant's complaint in this ground of appeal, both parties are at one that demeanor of the witness or

appellant was supposed to be recorded in the proceedings at the time of recording evidence and not in the judgment as it was so recorded in the current case. The only difference is that Ms. Shani argued that the act of recording demeanor of the witness in the judgment did not show that the trial magistrate was biased and the High Court did not find any problem about that act. Section 212 of the CPA provides that: -

> *"212. When a magistrate has recorded the evidence of a witness, he shall also record such remarks, if any, as he thinks material respecting the demeanour of the witness whilst under examination."*

The above provision provides for the procedure to be followed while recording evidence. This means that, it is only during hearing of the case that the witness may have an opportunity to respond on any issue or observation raised against him or her by the trial court. At times the court may misinterpret a certain behavior or reaction of an accused during hearing and the only opportune time to seek for clarification is at that particular time and not otherwise. When the court sits to compose judgment, parties are not there and therefore there is a great danger of arriving at an erroneous conclusion which may end up affecting a party to the case. The procedure stipulated in the above provision must be adhered to so as to ensure that the court arrives at a fair and just

decision. It is settled position that rules of procedure are handmaid of justice as it is stated in a number of Court's decisions; including, **General Marketing Co. Ltd. v. A.A. Shariff** (1980) T.L.R. 61; **D.T. Dobie (Tanzania) Ltd. v. Phantom Modern Transport (1985) Ltd.,** Civil Application No. 141 of 2001 quoted in **The National Housing Corporation v. Etienes Hotel,** Civil Application No. 10 of 2005 and **Attorney General, Zanzibar v. Alghubra Marine Services LTD.,** Civil Appeal No. 175 of 2017 (all unreported). In **General Marketing Co. Ltd.** (supra) the Court stated that: -

> *"Rules of procedure are handmaids of justice and should not be used to defeat justice."*

In the current case in concluding that the appellant committed the alleged offence, the trial magistrate commented about his demeanor in the judgment by using the following words: -

> *"Be that it may I had an opportunity to observe the accused's behavior during the testimony all the time had aversive eyes and was not settled at all,* ***her demeanor do (sic) attract the so-called evil element. The way she appeared in the accused's dock it is obvious that did steal by agent as charged."***

Having recalled the appellant's demeanor as it appears above, the trial magistrate immediately concluded that ***"it is obvious that did steal by agent as charged."*** Without any scintilla of doubt, we find that it was wrong for the trial magistrate to base on the appellant's demeanor instead of evidence to conclude that she stole by agent as charged. With respect, we are as well unable to agree with the first appellate judge response on the issue of the appellant's demeanor being recorded in the judgment. At any rate, a party or her counsel cannot be blamed by not questioning the court unless, the court exposes its observation to the parties. At page 206 of the record of appeal the first appellate judge had the following to say concerning the procedural irregularity committed by the trial magistrate in recording the appellant's demeanor: -

> *"I would, however, wish to state that the mention of demeanor in the judgment did not amount to bias but rather an observation, which though noted during trial,* ***then counsel for the appellant had every right to raise them so they could be recorded.*** *Further, in my view,* ***the remark of demeanor in judgment by the trial magistrate was not the bias of proof against the appellant.*** *The prosecution side did*

have other evidence against the appellant including her conduct, which was self-explanatory." [Emphasis added].

It should be noted that the assessment of demeanor is a domain of the trial court and not parties. We have thoroughly gone through the record of the trial court, there is no where the trial magistrate recorded the demeanor of the appellant except in the judgment. The question that follows is when and how her counsel could raise any issue regarding the assessed demeanor during trial which was not communicated to the parties? Certainly, it is impossible! We say so because the appellant or her counsel could not presume what the trial magistrate had in mind concerning the appellant's behavior for him to raise any issue in advance as the first appellate judge would wish it to be.

Following what we have endeavored to discuss above, it is our finding that it cannot be safely concluded that the trial magistrate was free from bias while composing his judgment. For that reason, we hold that the first ground of appeal is merited. Ordinarily, we would have quashed the proceedings of the trial court and order a retrial. However, in view of the arguments of the parties in the following ground on

sufficiency of evidence, we think, we need to evaluate the evidence on record.

We now proceed to consider the third ground of appeal. In this ground the appellant's main complaint which is opposed by the respondent is that, the charge against her was not proved beyond reasonable doubt. It is common knowledge that the standard of proof in criminal cases is beyond reasonable doubt and the burden of proof lies with the prosecution side - See **Mohamed Said Matula v. Republic** (1995) T.L.R. 3; **Omary Said @ Habibu & Another v. Republic,** Criminal Appeal No. 302 of 2014 and **Awadhi Abrahamani Waziri v. Republic,** Criminal Appeal No. 303 of 2014 (both unreported).

As stated earlier on, to prove the charge against the appellant in this case, the prosecution called a total of eight (8) witnesses. Therefore, we shall proceed to determine whether they managed to prove the case against the appellant to the required standard.

In the present case there is no doubt that the appellant was an accountant of the Peace and Love Group. Also, it is not in dispute that she was a custodian of the steel box which was being used by the members of the said group to keep their money, and the said box had

three keys which were kept by other three group members who are: Telesia Ntelya, Sana Toboka and Prisca Lukas. However, the said three key keepers were not called as witnesses during trial and the reason being that they were not interested according to PW1.

Besides, at page 48 of the record of appeal PW6 stated during cross-examination that the appellant told him that the alleged stolen money was taken by herself and other two key keepers. Here are his words: -

> *"Sophia admitted, she further said to me that Sophia and other two friends who are key keepers did divide the said money, it was unlawful."* [Emphasis added].

In her defence at page 78 of the record of appeal, the appellant stated as follows: -

> *"The said box was allowed to be handled to the group members in my absence. Leaders were allowed to collect the steel box, the chairlady used to take it. In the last minutes I instructed my child by name Joseph Godfrey to handle the box to the chairlady."*

The appellant was not cross-examined in respect of what she said above. We also note that PW1 testified that the steel box used to keep money was tempered with. At page 21 of the record of appeal, PW1 stated that: -

> *"Before being opened it was not inspected. She confessed before human resource that* ***she did cut by using welding machine.***"

At page 30 of the record of appeal, PW2 who was also a group member when cross-examined, she said: -

> *"I know nothing about welding .... Before opening the box was* ***not yet inspected.*** *It was intact with all padlock .... We had no any information of losing keys."*[Emphasis added].

Having glanced at the evidence on record, we think, in the circumstances of this case there were some doubts which the prosecution was required to clear. For instance, PW1, the chairlady stated that the box was tempered with, but all the three key keepers were not called to prove this. PW2 who was also a member of Peace and Love Group was not aware of the tempering by welding claimed by PW1 despite the fact that both acknowledge that normally the said box

used to be opened by key keepers in the presence of all members including her.

The appellant claimed that PW1 used to collect the said box from her as leaders were allowed to do so, but was not cross-examined on this evidence. Yet, the key keepers were not called to testify in this regard. We think it was necessary for them to be called to testify as to whether indeed leaders were allowed to do so and whether PW1 used to consult them so that they could open the box for her. Logically, it could not be expected that PW1 just collected the closed box, stay with it and later return it intact to the appellant unless there is a truth which presumably, the prosecution was trying to hide. The trial court, under such circumstances was entitled to draw an adverse inference as it was stated in **Aziz Abdallah v. Republic** [1991] T.L.R. 71, but that was not the case. [See also - **Soda Busiga @ Shija v. Republic,** Criminal Appeal No. 53 of 2012; **Tano John v. Republic,** Criminal Appeal No. 372 of 2014; **Ally Patrick Sanga v. Republic,** Criminal Appeal No. 341 of 2017 and **Baya Lusana v. Republic,** Criminal Appeal No. 593 of 2017 (all unreported]. In **Rex v. Uberle** (1938) 5 EACA 58 the Court of Appeal for Eastern Africa held that: -

"The Court is entitled to presume that evidence which could be but is not produced would if produced be unfavourable to the person who withholds it."

We are mindful of the position of the law under section 143 of the Evidence Act Cap 6 R.E. 2019 (the Evidence Act) that, no particular number of witnesses shall in any case be required for the proof of any fact. However, in the circumstances of the current case we are satisfied that it was crucial for the prosecution to summon the three key keepers to strengthen their case; otherwise, it cannot be safely concluded that the prosecution proved its case against the appellant beyond reasonable doubt.

Basing on our re-evaluation of evidence above, we interfere with the concurrent findings of facts of the trial and first appellate courts and hold that the prosecution did not lead sufficient evidence to prove that the appellant committed offences of either theft or stealing by agent. For this reason, we do not think it is appropriate to order a remission of the file to the trial court for it to enter either conviction or acquittal in respect of the first count because she was unfairly tried and there is insufficient evidence to warrant us in the interest of justice to order a retrial.

Consequently, we allow the appeal, nullify the proceedings, quash conviction and set aside compensation order having in mind that the appellant has completed serving her sentence.

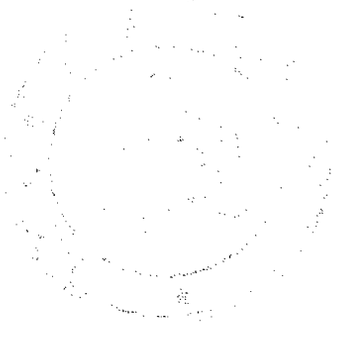
DATED at **SHINYANGA** this 27th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 27th day of August, 2021 in the presence of Mr. Kamaliza Kamoga Kayaga, learned counsel for the appellant and Mr. Jukael Reuben Jairo, learned State Attorney for the respondent/Republic is hereby certified the true copy original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL