

IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 141 OF 2021

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

SHISHIR SHYAMSINGH RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Kigoma)**

(Matuma, J.)

Dated the 24th day of February, 2021

in

DC. Criminal Appeal No. 54 of 2020

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JUDGMENT OF THE COURT

7th & 16th June, 2022

WAMBALI, J.A.:

The District Court of Kigoma at Kigoma which was presided over by the Principal Resident Magistrate, convicted the respondent, Shishir Shyamsingh, who was the Branch Manager in Kigoma Region of Tanzania Commodities Company Limited of the offence of stealing contrary to sections 258(1) and 265 of the Penal Code R. E. 2019 (the Penal Code). Ultimately, it sentenced the respondent to serve a term of imprisonment of 20 months. The conviction and sentence was arrived

at following the allegation in the charge sheet to the effect that on 27th January, 2020 at Kigoma Town within the District and Region of Kigoma, the respondent stole cash money, TZS.30,000,000.00 the property of Mohamed Enterprises (T) Limited.

Basically, the prosecution case was pegged on six witnesses, namely, Raxit Vyas (PW1), Kilahumba Kivumu (PW2), Andrew Stephen Mafuru (PW3), Edson Raphael Ambros (PW4), PF. 18521 Insp. Fortunatus Ntungwa (PW5) and Anthony Mgenge (PW6). Five exhibits were also tendered and admitted by the trial court. These are; Cash Book (exhibit P1), Bank Statement of account No. 01J1026983300 of March 2020(exhibit P2), cash deposit at CRDB Bank (exhibit P3), Bank Statement of account No. 01J1026983300 of 26th March, 2020 (exhibit P4) and Audit Report (exhibit P5).

Briefly, the substance of the prosecution case was that, the respondent handed over as a manager of Kigoma Branch office to PW1 on 19th February, 2020 in which the handover report was duly signed in the presence of Javoid Ally (Branch Coordinator) and Juma Shaban (the cashier). It was the evidence of PW1 that later in the course of executing his work at Kigoma Branch he discovered that though on 27th January, 2020 the respondent received cash money TZS.33,984,000.00

from PW2 being sales proceeds of the wheat flour supplied to him, only TZS 3,984,000.00 was deposited into the bank. According to his testimony, TZS.30,00,00.00 was not shown in the cash book of the company. Following the discovery PW1 reported the incident to the authority in Dar es salaam who directed him to report to the police. In his evidence, PW2 testified that on 27th January, 2020 he handed the respondent TZS.30,000,000.00 when he visited his shop in the presence of PW4 who unhesitantly supported the said testimony. PW3 an auditor who conducted the audit came up with the finding that there was deficit of TZS.30,000,000.00 in the cash book bank statement and customer report. Similarly, PW5 who was assigned a case file for investigation, testified that the said amount of money which was paid by PW2 and handed over to the respondent was not banked as there was no entry in the cash book on the date though the respondent received the same from PW2. In PW5's view, that implied that the respondent converted the money to his own use and thus he had to face trial on the offence of stealing. On his part, PW6 who initially arrived at Kigoma on 19th February, 2020 to audit the Kigoma Branch with the aim of foreseeing the handover between PW1 and the respondent testified that during the hand over there was a shortage of TZS.28,757,200.00.

In his defence, the respondent agrees that the handing over between him and PW1 was done on 19th February, 2020 and that it was revealed that there was an outstanding balance of TZS.32,000,000.00 as the "Total Sales Man Outstanding" and the difference of TZS.2,500,000.00 from the cash book. He categorically admitted that he received TZS.30,000,000.00 from PW2. He explained that upon receiving the said amount he gave TZS.2,000,000.00 to the cashier for office expenses and deposited TZS.28,000,000.00 in the company's bank account. He denied to have been aware of the audit report conducted by PW3 after that of 19th February, 2020 during the hand over. He also tendered the audit report of Kigoma Branch dated 19th February, 2020 which was admitted as exhibit D1.

The trial court considered the evidence of the parties on record and in the end, it affirmatively concluded that there was no piece of evidence to prove that the respondent deposited the money he received from PW2 into the company account. It was also convinced that if the money was used for other expenses, an approval had to be obtained and therefore found the accused to have converted the said amount to his own use. Consequently, the appellant was convicted and sentenced as alluded to above.

The respondent successfully appealed to the High Court in DC. Criminal Appeal No. 54 of 2020, whose decision is the subject of the instant appeal by the Director of Public Prosecutions, the appellant. In his judgment the first appellate judge re-evaluated the evidence of both parties on record and reasoned that the evidence of the prosecution, particularly of PW3 who tried to explain that the amount of TZS.28,000.000.00 did not show the name of PW2 in the bank statement (exhibit P2) or the person who deposited and therefore it was cash sales and not part of the debt collected from PW2, ought not to have been believed on the strength of the fact that the said testimony was nothing but speculative and conjecture. On the contrary, he found that the explanation by the respondent ought to have been credited and accepted as there was no strong evidence to rebut it. He further found that even if there were internal measures on how the received money should be banked or spent, the same were not tendered in court by the prosecution.

In the circumstances, the first appellate judge who essentially decided the appeal based on the first ground of appeal predicated on the complaint that the case for the prosecution was not proved beyond reasonable doubt stated as follows:

"A mere omission by the appellant to indicate the name of Kihalumba should have not been taken to rebut that such amount was from him. There should have been independent strong evidence to establish the source of such amount if the appellant was to be disbelieved...

In the circumstances, I agree with Mr. Othman Katuli, learned advocate for the appellant and hold that the TZS.28,000,000.00 deposited by the appellant into the victims company's account were part of TZS.30,000,000/= he collected from PW2 as per his own positive evidence at page 42 of the proceedings...

This piece of defence evidence cannot be rejected lightly merely because at the time of deposit, the name of PW2 was not endorsed provided that it is not in dispute that such amount was in fact banked. It would have been successful (sic) challenged had there been positive evidence to the contrary as to where did it exactly come from (its source) be it from mathematical evidence or direct evidence, be it oral or documentary. In the absence of such evidence, the explanation by the appellant regarding the source of that money prevails.

Again, I am satisfied with the defence evidence that the Tshs.2,000,000/= was spent on official expenses

as it was testified by the appellant himself ... This is because he was not cross examined on that fact."

It is noteworthy that the findings and conclusion of the first appellate court prompted the appellant to access the Court on a memorandum of appeal comprising four grounds of appeal. However, before we commenced the hearing of the appeal, the appellant's counsel dropped three of them and argued the fourth ground which is to the effect that; "the High Court judge erred in law and fact in holding that the prosecution failed to prove its case beyond reasonable doubts".

At the hearing of the appeal, Mr. Shabani Juma Massanja assisted by Mr. Raymond Desiderius Kimbe, learned Senior State Attorney and State Attorney respectively entered appearance for the appellant. On the adversary side, the respondent had the services of Mr. Daniel Rumenyela, learned advocate.

Arguing in support of the appeal, Mr. Massanja started by intimating to the Court that the only reason for which the High Court allowed the respondent's appeal and overturned the trial court's findings and conviction of the respondent was based on the reasoning that the prosecution evidence failed short of showing the source of the entries in the cash book to prove that TZS.28,000,000.00 which were spotted in

the Bank Statement of the company's account came from the cash sales.

He faulted the first appellate judge for holding that the said amount of money which were deposited by the respondent into the complainant's account were those collected from PW2.

In his submission, the first appellate judge was also wrong to hold that to prove a charge of theft which was preferred by the appellant against the respondent, it was necessary for the prosecution to have proved by vivid evidence the quantity of goods sold and their value for the court to draw inference that TZS.28,000,000.00 were the proceeds of cash sales and not money collected from PW2.

The learned Senior State Attorney urged us to accept the submission that according to the cash book (exhibit P3) which was tendered by PW3, it is shown that the contested amount of TZS.28,000,000.00, was taken by the respondent from the Kigoma Branch main cash account on 27th January, 2020. He thus submitted that it is the same amount which was later on the same day deposited by the respondent into account No. 01J1026983300. In this regard, Mr. Massanja submitted that according to the evidence on record the prosecution fully satisfied the trial court that the respondent stole the money much as what was deposited into the company's Bank account

on 27th January, 2020 was proceeds of sales and not part of the money handed to the respondent by PW2.

In the end, Mr. Massanja submitted that the first appellate judge wrongly reversed the trial court's findings that the appellant is guilty of the offence of stealing. He therefore prayed that, this appeal be allowed, resulting in the finding that the prosecution proved the case beyond reasonable doubt to ground the conviction and sentence of the appellant meted by the trial court.

Responding, Mr. Rumenyela supported the decision of the High Court on the contention that according to the evidence in the record of appeal, the prosecution did not prove that the respondent is guilty of the offence of stealing TZS.30,000,000.00 as per the charge sheet. He submitted further that the evidence of both PW3 and PW6 closely dealt with the audit of the suspected theft and produced the audit report but failed completely to show that the respondent stole the money. Besides, he argued, at the trial during cross-examination, PW3 admitted that his evidence was about the hand over and that he knew nothing about the theft as reflected at page 42 of the record of appeal. Mr. Rumenyela added that according to the evidence on record, the respondent demonstrated that the money he received from PW2, part of it was

spent for office expenses, that is, TZS,2,000,000.00 and the rest being TZS 28,000,000.00 was deposited into the company's bank account on the same date 27/1/2020. Therefore, if the appellant allegedly still contested the source of that amount, the prosecution would have come up with impeccable evidence at the trial that the said amount was not deposited into the company's Bank account by the respondent. He argued the respondent went beyond his duty to tender the bank pay in slip to support his assertion but it was not admitted. Therefore, the prosecution would have come up with strong evidence to show that the said amount was deposited by someone else, which they failed, he argued. Besides, he argued that it was not for the respondent to tender the receipt since the bank statement clearly showed that the company account was credited with the said money.

The learned advocate submitted further that the audit report exhibit P5 is also questionable as though it is PW6 who audited the account on 19th February, 2020 as he was in Kigoma during the handing over, it is surprising that it is shown to have been prepared and signed by PW3 who tendered it, while he was not involved in the audit. This, in his view, casts doubt on the authenticity of its contents and therefore,

the trial court would not have given weight to the evidence of PW3 and the exhibit during the evaluation of the evidence.

In the circumstances, Mr. Rumenyela concluded by urging the Court to dismiss the appeal for lacking merit as the first appellate judge properly upset the trial court's findings, conviction and sentence of the respondent.

At this point, we are of the view that the crucial issue for determination in this appeal is whether the prosecution proved the case against the appellant beyond reasonable doubt.

It is settled law that for the offence of stealing to be established, the prosecution should prove that; one, there was movable property ; two, the movable property under discussion is in possession of a person other than the accused; three, there was an intention to move and take that movable property; four, the accused moved and took out the possession of the possessor; five, the accused did it dishonestly to himself or wrongful gain to himself or wrongful loss to another; and six, the property was moved and took out without the consent from the possessor.

Therefore, to prove the offence of stealing the prosecution is required to show that all the elements/ ingredients of the offence are established. For clarity, section 258(1) of the Penal Code provides:

"A person who fraudulently and without claim of right takes anything capable of being stolen; fraudulently converts to use of any person other than the general or specific owner thereof anything capable of being stolen, is said to steal that thing."

It is in this regard that under section 258(2) of the Penal Code it is explicitly provided that the taking or conversion of something capable of being stolen must be done fraudulently (dishonestly). To this end, in order to convict an accused of the offence of stealing, it must be proved that the act was done fraudulently and without claim of right.

In the case at hand, according to the particulars of the offence, the prosecution was required to prove at the trial that the respondent stole TZS.30,000,000.00 as alleged fraudulently and without claim of right.

We have closely examined the evidence for both sides in the record of appeal, and like the first appellate judge, we entertain no doubt that the prosecution failed to prove the charge to the required

standard. It is not disputed by both sides that according to the evidence on record, the respondent on 27th January, 2020, received from PW2 TZS.30,000,000.00. In his defence, the respondent testified that upon receipt of the said amount, he gave the cashier TZS.2,000,000.00 for expenses and banked the rest, that is TZS.28,000,000.00. It is also on record that the prosecution did not contest the former amount which was spent for office use as rightly found by the first appellate judge. On the contrary, the prosecution put up an argument that though the rest of the amount which was banked in the company's account on the same date, was not part of the money handed to the respondent by PW2, but that it was part of the cash sale. Notably, this argument found favour with the trial court but was upset by the first appellate court on appeal.

However, as rightly stated by the first appellate judge, whose reasoning and findings we have deliberately reproduced in part above, there is no sufficient evidence from the prosecution as to the source of which money was generated by the company sales. It was not sufficient, we think, for the prosecution to have simply convinced the trial court that the source of that money was cash sale without supporting the assertion with plausible evidence on record amid the defence of the

respondent which raised doubt on whether the offence of stealing was really committed.

Certainly, in the case at hand, the evidence to support the offence of stealing by the respondent should have come from PW1, PW3 and PW6. Unfortunately, PW1 had nothing to offer on the proof of the offence. Equally, the evidence of PW3 cannot be fully relied on to support the prosecution case. During examination in chief PW3 testified that he was in Kigoma in March, 2020 to audit the Branch as there was deficit of cash which was detected at the handing over between the ongoing and incoming managers. Later on, PW3 is on record to have admitted that on 27th January, 2020 TZS.28,000,000.00 was deposited in the company's account but simply expressed an opinion that if it was for debts collected, the name of the one depositing could have been shown. We are settled that this was not a confirmation that the appellant stole the said amount. Moreover, it is PW3 who tendered the audit report exhibit P5 which he purportedly prepared after he audited the Branch account in March, 2020. Surprisingly, the report is dated 19th February, 2020 and is titled "UPOTEVU WA FEDHA WA TSHS. 30,000,000.00." It is not known whether the purported report allegedly prepared in March, 2020, existed as the period when the Branch was

audited was on 19th February, 2020 which was done by PW6 during handing over as per his evidence and as rightly submitted by Mr. Rumenyela. It is thus doubtful how PW6 came to be involved in the said February 2020 audit in view of his evidence which indicated that he audited the Branch in March, 2020 when he was allegedly in Kigoma for handing over.

On the contrary, we note that the Audit Report of Kigoma Branch dated 19/2/2020, exhibit D1 which was tendered by the respondent shows that there was "Total Sales Man Outstanding" of TZS.32,659,100.00, and deference of TZS.2,586,558.00. It is in this

regard that in his defence the respondent testified that he was not aware any other audit conducted in his presence after the date of handing over.

In the circumstances, the evidence of PW3 and PW6 together with exhibit P5 cannot be held to be reliable amid the discrepancies and doubts raised above. The prosecution could not have therefore expected the evidence of PW3, PW6 and exhibit P5 to be sufficient proof

that the respondent stole TZS.30,000,000.00 in view of the defence of the respondent which in absence of impeccable evidence from that side remained unchallenged concerning the offence of stealing. Indeed, while

in his evidence in chief PW6 who conducted the audit for the hand over did not state that he discovered any loss during cross examination, he stated that there was a deficit of TZS 28,757,200.00 during the handover. Yet on further cross-examination PW3 testified that his evidence was about the handover and knew nothing about theft.

In this regard, considering that exhibit D1 which contain the actual position of state of the Branch financial situation during the handover was not contested by the prosecution, it is difficult to find the evidence of PW3 and PW6 credible and reliable.

More importantly, we respectfully disagree with the learned Senior State Attorney's argument, which according to the record of appeal cropped up for the first time on this Court that the deposited money was withdrawn from company's main cash account and later deposited into the bank account by the respondent. To be precise, this is a submission from the bar as it is not borne from the testimony of any prosecution witness. Indeed, at this stage, the counsel is not a witness who can be cross-examined on the matter.

All in all, from the foregoing deliberation, we are settled that the prosecution failed to prove the elements of the offence of stealing which faced the respondent.

We must emphasize that in criminal trial the prosecution is bound to prove the case beyond reasonable doubt instead of shifting the burden of proof to the accused, as it seems apparent in the case at hand. In **Fakihi Ismail v. The Republic**, Criminal Appeal No. 146 "B" of 2019(unreported), the Court stated that:-

*"It is elementary that the burden of proof in criminal cases rests squarely on the prosecution with no requirement that the accused proves his innocence; and that such proof must be beyond reasonable doubt – see the cases of **Joseph John Makune v. The Republic** [1986] T.L.R. 44 and **Mohamed Said Matula v. The Republic** [1995] T.L.R 3)."*

In the circumstances, while it is the duty of the prosecution to prove the case beyond reasonable doubt, it is equally the duty of the trial court to ensure that it is satisfied that the prosecution witnesses in support of the case have given relevant evidence which proves the elements of the offence with which the accused stands charged.

From the foregoing, and considering the evidence on record, we find no justification to disagree with the conclusion reached by the first appellate judge that the prosecution did not prove the case beyond reasonable doubt as no sufficient evidence was put forward to convince both the trial and first appellate courts that the respondent is guilty of the offence of theft.

Consequently, we find that the appeal is devoid of merit, and hereby we dismiss it in its entirety.

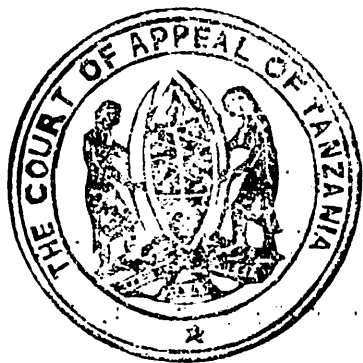
DATED at **KIGOMA** this 15th day of June, 2022.


F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June, 2022 in the presence Mr. Raymond Kimba State Attorney for the Appellant/Republic, and Mr. Daniel Rumenyela, learned Counsel for the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL