IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MKUYE,J.A., GALEBA J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 341 OF 2018

AGNES NYAMUHANGA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Shinyanga)

(Makani, J)

dated the 9th August, 2018
in
Criminal Appeal No. 146 of 2015

JUDGMENT OF THE COURT

15th & 22nd July, 2021

KAIRO, J.A.:

In the Resident Magistrate Court of Shinyanga at Shinyanga, Agnes Nyamuhanga, the appellant, was charged, tried and convicted of stealing by agent contrary to section 273 (b) of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code).

It was alleged that on 28th June, 2013, at Jamhuri Street within Kishapu District in Shinyanga Region, being a member of Jamhuri Group (the Group) as a treasurer did steal Tzs. 13,640,300/= entrusted to her by the members of the said Group to retain in safe custody. She pleaded not guilty to the charge.

To prove its case, the prosecution paraded four witnesses who were Bukanu Peter (PW1), Elipidino Kamara (PW2), Godwin Evaristi (PW3) and Nuhu Abdallah (PW4). The prosecution also tendered one documentary exhibit which was a Constitution of Jamhuri Group admitted as Exhibit P1. On the other hand, the defence side called four witnesses who were the appellant (DW1), John Marko (DW2), Zacharia Zito (DW3) and Juma Maganya (DW4). At the end of the trial, she was found guilty as charged, thus convicted and was sentenced to serve two (2) years imprisonment.

The trial court further ordered her to repay the group members of Jamhuri Group, Tzs. 13,460,000/= after serving the jail sentence. Being dissatisfied, she lodged an appeal to the High Court vide Criminal Appeal 146 of 2015 to challenge the trial court decision but to no avail, hence this current second appeal.

Briefly, the background of the case was to the effect that the appellant, DW1 was a Treasurer of the Group and was thus entrusted to keep an iron cabinet (the cabinet) into her family house where she lived with her husband, DW3. It is noteworthy that DW3 was also a chairman of the Group. The cabinet had three locks and their respective keys were kept by three other Group members who would open it on the meeting

day and close it after the Group's usual business, including extending loans to members. All the documents concerning Group members like book shares, book accounts and loan books together with the balance of the money were being locked into the cabinet before handing it over to the appellant for safe custody.

In his testimony, one of the cabinet key keepers PW4 stated that on 26th April, 2013 the group members had a meeting and some loans were extended to members of the Group. According to him, the remaining cash after counting was Tzs. 13,000,000/=. As usual, the amount and other documents were locked into the cabinet and handed over to the appellant for safe keeping.

He went on to testify that, on 28th June, 2013 around 7:45 p.m. while at his home, he received a phone call from PW3 informing him that the Group cabinet got lost mysteriously. PW4 went to the appellant's home around 8:45 p.m. and found some of the Group members have already gone to the police to report the incidence. A month later, the cabinet was found thrown into another village but empty.

PW2 was a tenant of the appellant. He testified that, on 28th June, 2013 around 19:00 hrs. he entered into his room and left other people

outside charting and drinking coffee. While inside, he heard the appellant crying and he went to know what transpired. But when he asked her, the appellant said nothing. It was not, until after the lapse of about 20 minutes that the appellant told the gathered people that there were bandits who invaded their house and ordered her to give them the cabinet, and if she would resist, they would kill her by the machete they had. She thus gave them the cabinet and they went away with it. He added that DW3 was not around during the incidence, but later he came back and together with the appellant they went to the police to give their statements.

In his testimony PW1, stated that, he was called and informed about the theft of the cabinet by one of the Group members. When he went at the appellant's home, he found her to have gone to the police to report the matter. PW1 also told the trial court that up to the date of incidence, the balance of the Group money into the cabinet was Tzs. 13,460,300/=. He further told the court that all along the members were assured by the appellant and DW3 that the cabinet was safe at their home and thus, he was surprised the way the cabinet was stolen. He also stated that the cabinet was later found thrown in the neighborhood village, but the locks were broken and nothing was inside.

As for PW3, he testified that on the fateful date around 19:15 hrs., he was near the appellant's house watching a football match. While there, he received a phone call from DW2 requesting him to go to his home. When he reached there, he found people gathered and the appellant was crying. When queried, she told them that she was invaded by the bandits who had a machete. That the bandits threatened to kill her if she will not let go the Group cabinet and thus, she gave them the cabinet and they disappeared. PW3 further stated that the appellant's husband returned after a while and together with the appellant, they went to the police. The witness further told the trial court that they had to keep the money at home as there was no bank at Mhunze where the Group members reside. PW3 also told the trial court that the stolen money, according to the book of account kept by DW3, was Tzs. 13 Million with some points.

In her defence, the appellant (DW1) conceded to be the Group treasure and cabinet keeper but denied totally to have stolen the Group money.

In her testimony she stated that, on the fateful date around 7:30 p.m., she was invaded by two unknown people inside her room and one of them was holding a machete. They ordered her to give them the

Group cabinet and lay down otherwise they will kill her. To save her life, she complied with the orders.

DW1, went on stating that, after ensuring that the invaders have left, she shouted for help and DW2 and DW4 came. After being told what happened, they decided to go to report the incidence to the police. She later went to the police as well where she narrated her ordeal and that she did not know how much money was in the cabinet. The appellant went on that, she was later arraigned and informed that she was suspected of stealing the Group money she was keeping to which she denied. She insisted that the money was stolen by the bandits who invaded her. She added that, their house had no security to ensure the safety of the cabinet and its contents. She also testified that the money was not being counted before keeping it into the cabinet and thus she was keeping the money she did not know its amount.

DW2 in his testimony stated that, on the incident date around 7:30 p.m. while inside his home, he heard the appellant shouting that she was invaded and the cabinet stolen. He went to see the appellant and called PW3 and together they went to report to the police. DW2 at first guessed the stolen money to be Tzs. 30 Million, but later basing on the

book of accounts kept by DW3, they found the amount stolen to be Tzs. 13 Million.

DW3, was the appellant's husband and a Group chairman. He asserted not to be around on the incident date. That, he arrived at his home at about 8:00 p.m. and found many people gathered and the appellant was unconscious which according to him was not normal. When inquired what happened, he was told that the share cabinet was stolen. Later the police came and took him and the appellant to the police station. He further stated that the appellant told the police that she was invaded by armed bandits and took the cabinet away. He further told the court that, he was the one who stated that the money stolen in the cabinet was Tzs. 20,000,000/=. However, after going through the book of accounts kept by him (DW3) with other members including PW1, PW3, DW2 and DW4, they found the amount stolen was Tzs. 13,000,000/=.

DW4 who was a neighbor to the appellant testified that on the fateful date at about 7:00 p.m. while seated at the appellant's verandah the accused told him that she was going to take bath inside. But after a lapse of about 25 minutes, he heard her crying. That when asked, she later stated that the Group cabinet was stolen. When further questioned,

the appellant stated that the bandits had invaded the room where she was and threatened her with a *panga* if she would resist giving them the Group cabinet so, she gave it to them. Then, DW2 and DW4 decided to go to the police to report being Group members and neighbors of the appellant.

When the appeal was called on for hearing before us, the appellant was present in person together with her advocate, Mr. Frank Samwel. On the other hand, the respondent Republic was represented by Ms. Verediana Peter Mlenza, learned Senior State Attorney assisted by Misses. Edith Tuka and Rehema Sakafu, both learned State Attorneys.

The appellant has raised four grounds of appeal in her memorandum of appeal. However, we wish to state from the outset that we shall determine only the 1st and 2nd grounds though Ms. Samwel addressed them all. We shall hereunder state the reason.

When responding, Ms. Mlenza submitted that the 3rd and 4th grounds were new and based on facts. She argued that the Court in that regard lacks jurisdiction to entertain them and impressed on us to

disregard them. On that account, she informed the Court that she will only respond to the 1st and 2nd grounds.

Responding to Ms. Mlenza's argument, Mr. Samwel contended that, the appellant had prepared the grounds of appeal basing on the decision of the first appellate court from which this appeal emanates. To back up his argument, he referred us to the 3rd, 4th, 5th and 8th lines at page 91 of the record of appeal, where he argued that the contentious issues in the 3rd and 4th grounds were discussed therein.

Going through the referred excerpts, we noted that the issues were raised by Mr. Samwel when submitting to the High Court in support of the appeal therein. However, being not the subject of appeal, the High Court neither discussed them nor made any finding concerning them. In the premises, we subscribe to the argument by Ms. Mlenza that the grounds are new as were not decided by both of the lower courts. As correctly argued by Ms. Mlenza, the grounds do not raise matters of law as such, we have no jurisdiction to determine them, and hence we reject them as prayed by Ms. Mlenza. It is a well-established principle that matters not raised and decided upon by courts below cannot be entertained on appeal, and there is a plethora of authorities to this effect like in **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal

No. 416 of 2013, **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018, and **Mbaraka Ramadhani @ Katundu v. Republic,** Criminal Appeal No. 310 of 2017 (all unreported) to mention but a few.

In **Hassan Bundala @ Swaga** (supra) the Court stated:

> *"It is now settled as a matter of general principle that this Court will only look into matters which came up in the lower courts and were decided; and not a matters which were not raised nor decided by either the trial court or the High Court on appeal."*

In the same vein, we refrain from considering the 3rd and 4th grounds of appeal herein.

Having so found, we herein reproduce the 1st and 2nd grounds which are subject to determination in this appeal as follows: -

> *"1. That the learned Judge erred in law as the trial court did, when she failed to realize that the prosecution did not prove the case against the appellant beyond reasonable doubt.*
>
> *2. That the learned Judge erred in law as it was for the trial court when she convicted the appellant basing on the uncorroborated hearsay evidence."*

The complaint in the 1st ground of appeal, is that the prosecution failed to prove its case to the required standard. Elaborating, Mr. Samwel submitted that, the appellant was charged and convicted under section 273 (b) of the Penal Code. He went on submitting that according to the said provision, the prosecution was to prove the following elements:-

(i) That the property (money) was entrusted to the appellant so as to retain it in safe custody and

(ii) That the said property was stolen by the person entrusted to keep it.

He argued that, though it was stated that the appellant was entrusted the cabinet which contained the money of Jamhuri Group members so as to keep in safe custody, but when given the same, no security was availed to her as well so as to ensure that the money stays safe. He went on to argue that, the cabinet used to be opened before the group members and they all knew that the keeper of the cabinet was the appellant. According to him, leaving the said Tzs. 13,000,000/= to the appellant for safe keeping under those circumstances was against common sense. He added, that even the group members were aware

that the money was not safe. He went on to argue that the group members were required to prove that when the money was entrusted to the appellant, its safety was guaranteed, the fact which the prosecution failed to prove as well, contended Mr. Samwel.

As regards the second element, Mr. Samwel contended that, none of the prosecution witnesses proved that the money was stolen by the appellant. It was Mr. Samwel's argument that all of them testified that it was the appellant who told them that on the fateful day, she was invaded by two people who had the machete and forced her to give them the cabinet with money or they would kill her. He further submitted that the invaders further ordered her to lie down and warned her not to shout. Having no alternative, the appellant had to comply. It was his argument that the evidence is clear that the appellant did not steal but the same was stolen from her and she was in no position to resist without endangering her life.

Connecting it with the 2nd ground, Mr. Samwel argued that none of the prosecution witnesses testified to be present at the scene of crime or to have witnessed the incidence. Instead, they were all told by the appellant of what transpired. He went on to argue that, into her judgment, the trial court relied heavily on PW2's testimony to convict the

appellant which decision was later upheld by the first appellate court. Nevertheless, the testimony being hearsay as well, his evidence together with that of other prosecution witnesses was therefore unreliable and thus, it was an error to mount conviction basing on it. As a conclusion, he beseeched the court to find that the prosecution failed to prove the charge against the appellant, thus the case was not proved and allow the appeal.

In her response, Ms. Mlenza conceded to the submission by Mr. Samwel that the prosecution was under the legal obligation to prove two elements under the provision the appellant was charged and convicted of:- **first;** that the property stolen was entrusted on the accused for safe custody, and **second;** that the said property was stolen by the accused. She, however, refuted the contention by Mr. Samwel that the two elements were not proved beyond reasonable doubt.

Elaborating, Ms. Mlenza submitted that there is no dispute that the appellant was a treasurer of the Group into whose hands, the money cabinet was entrusted for safe keeping. She added that, this fact was also conceded by the appellant herself.

On the argument that she was entrusted with the money without availing the security to her, Ms. Mlenza argued that the law requires the prosecution to prove that the accused (appellant herein) was entrusted with the money and not ensuring the safety of the entrusted money by giving her security. She further argued that, if the appellant was of the view that it was not safe to keep the money entrusted on her, she would have refused to keep it. Ms Mlenza added that, according to the record, it was the appellant and her husband who assured the group members that their home was safe. As such, raising the argument at this juncture was an afterthought. She therefore submitted that the first element was proved to the required standard.

As for the second element, Ms. Mlenza argued that although there is no direct evidence that the money was stolen by the appellant, the circumstances and her conduct suggest so. Elaborating, she argued that there was no reason explained as to why the appellant took 20 minutes to explain the alleged theft by the invaders to the people who responded to her raised alarm. To verify her contention, she referred us to page 14 of the record of appeal. Basing on the above arguments, Ms. Mlenza concluded that the prosecution has managed to prove the charge and

the case as well. In that regard the 1st ground is without merit and implored the Court to dismiss it.

Responding to the 2nd ground, Ms. Mlenza refuted the arguments that both lower courts erred to rely on the uncorroborated hearsay evidence of the prosecution witnesses to mount conviction against the appellant. She clarified that though the witnesses were not present when the incident occurred but they testified what they saw and heard at to scene of crime, as such, their evidence was not hearsay. She beseeched the Court to find the ground without merit and consequently the case was proved beyond reasonable doubt.

When probed by the Court as how much was the amount stolen, Ms. Mlenza answered that money stolen is as per charge sheet which is Tzs. 13,460,300/=. She clarified that, though the Group documents showing the members' accounts and balances were stolen together with the cabinet, but according to PW1 and DW1 there was a book of accounts for members which was being kept by the Group Chairman (DW3) into which they got the amount stolen. Ms. Mlenza went on to submit that, neither the appellant nor other witnesses controverted the stated amount in the charge sheet.

When we further asked her to comment on the amount of Tzs. 13,000,000/= stated by PW4 as the amount stolen, Ms. Mlenza argued that the difference of the amount as stated by PW4 and the one in the charge sheet was minor. She argued that the said discrepancy was caused by the memory error due to lapse of time. As a conclusion she prayed the Court to find the appeal unmerited and dismiss it in its entirety.

That apart, Ms. Mlenza also commented on the sentence of two years imprisonment meted on the appellant. She submitted that the sentence was so minimal considering what she claimed to be the gravity of the offence committed. She went on to argue that despite being aware that deciding the number of years in jail to be imposed to the convict is the discretion of the trial court, but in her view, that discretion was not exercised judicially in the case at hand taking into account the mitigation advanced by the appellant. It was her submission that, the said mitigation was not impressive enough to make the trial court reduce the maximum jail term of 10 years stipulated by law, to two years. She thus invited the Court to revise the sentence imposed for the purpose of enhancing the jail term.

When further probed by the Court as to whether the prosecution submitted anything before the appellant gave her mitigation so as to assist the trial court when exercising its discretion to impose the sentence, Ms. Mlenza answered negatively.

In his rejoinder, Ms. Samwel objected the prayer by Ms. Mlenza to enhance the sentence to the appellant. He argued, to which we subscribe that, the issue was not raised at the first appellate court, nor did the respondent lodged a cross appeal if she was not satisfied by the sentence imposed on the appellant. He thus prayed with the Court to reject the prayer and we accordingly grant it.

Rejoining for the 1st and 2nd grounds, Mr. Samwel repeated his submissions in chief. He however added that, he has noted Ms. Mlenza's concession with regard to the absence of any direct evidence verifying the stealing of the Group money by the appellant, which concession according to him, supports his argument that the elements of section 273 (b) of the Penal Code, under which the appellant was convicted were not proved by the prosecution. He reiterated his prayer to have this appeal allowed.

Having heard the parties' rival submissions and having gone through the record of appeal, the only issue for our determination is whether or not the prosecution proved its case beyond reasonable doubt.

This being the second appeal, we aware of the salutary principle that the Court would rarely interfere with concurred findings of fact by the two courts below. However, where the courts below have misapprehended the substance, nature and quality of the evidence adduced resulting to miscarriage of justice, the Court is warranted to interfere for the interest of justice. We have stated this position in our various decisions like **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 (unreported), **DPP v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149, to mention but a few. We shall revert to this point later.

In the present case, the parties are at idem that the provision under which the appellant was charged and convicted of, required the prosecution to prove two elements, **one;** that the money stolen was entrusted to the appellant for safe keeping, and **two;** that the money was stolen by the appellant.

The evidence on record is clear that the appellant was a treasurer of the Group and also a custodian of the cabinet used to keep the documents and money for the Group members. This fact was not disputed by the appellant. We do not, with much respect, subscribe to Mr. Samwel's argument suggesting that the appellant was to be availed with the security as well. This is because providing for security is not among the legal requirement under the provision.

Regarding the second element, the issue is whether the money was stolen by the appellant. According to the evidence on record, none of the witnesses was present when the theft incidence occurred. It goes that, no direct evidence is available to prove stealing of the money against the appellant. In her move to prove this element, Ms. Mlenza argued that the circumstances surrounding the stealing and the appellant's conduct during and after the incidence suggest that she committed the offence. Elaborating further, she argued that the appellant's unexplainable delay to tell the people about the theft when they responded to her alarm was against her innocence. We would not want to be carried away with this argument. According to the testimony of DW3 which was not controverted, the appellant was in a shock and lost conscious after the incidence. We think, Ms. Mlenza's argument is

hinged on suspicion. Nevertheless, the law is long settled that, suspicion however strong is not sufficient to sustain a conviction in criminal cases. See: **Juma Malaya and 2 Others v. Republic,** Criminal Appeal No. 159 of 2008 (unreported).

That apart, upon revisiting the record of appeal, we have also observed the variance between the charge sheet and the evidence in terms of the amount allegedly stolen by the appellant. Whereas the charge sheet states that the appellant stole Tzs. 13,460,300/= which amount was echoed by PW1, PW3 on the other hand stated the amount to be Tzs. 13 Million with some points without stating the exact amount. Again, PW4 on his part testified the amount to be Tzs. 13 Million. As if that was not enough, PW1 mentioned the figure to be Tzs. 13,460,300/= which according to him was gotten after they went through the Group members' book of accounts kept by DW3. However, the figure according to DW3's testimony after the said reconciliation was Tzs. 13 Million. To say the least, there is no gainsaying that the amount the appellant was charged with and convicted of, is at variance with the evidence adduced.

When probed on the variance of the amount of the money stolen as testified by the prosecution witnesses, Ms. Mlenza asserted that the

discrepancy was minor attributing the same to the memory error due to lapse of time. In our view, this is not a minor discrepancy to be disregarded. We are saying so as the appellant could not be in a position to understand exactly which amount of money she was alleged to have stolen so as to enable her prepare and make an informed defence, particularly, in this circumstance where the appellant claimed not to know how much money was inside the stolen cabinet (the 20th to 22nd lines at page 33 of the record of appeal).

It is further disturbing that PW1 and PW3 in their testimonies, both claimed to get the figures of the amount stolen from the same document allegedly to have been kept by DW3, surprisingly, each came up with a distinct figure and the document was not tendered in evidence. We wish to insist that, the observed variance cannot be considered to be minor, rather is a serious one that goes to the root of the matter. We thus do not agree with Ms. Mlenza's argument in this aspect, with due respect. We are fortified in this stance with the case of **Masota Jumanne v. Republic,** Criminal Appeal No. 137 of 2016 (unreported) wherein the Court when faced with akin situation stated as follows: -

> *"In a nutshell, the prosecution evidence was riddled with contradictions on what actually was stolen from PW1. Such circumstances do not only imply that there was a variance as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge."*

As similar stance was also taken in the case of **Stany Loidi v. D.P.P.,** Criminal Appeal No. 466 of 2017 (unreported).

The existence of the variance in the amount of money, in the charge sheet and the evidence adduced coupled with contradicting evidence from the prosecution witnesses regarding the amount stolen, creates doubts in the appellant's conviction rendering the entire case not to be proved to the required standard. On that account, we find that both lower courts misapprehended the nature and quality of the evidence, as a result occasioned injustice to the appellant. On that account, we are entitled to interfere with the concurrent findings of the lower courts despite being the second appellate Court so as to correct the occasioned injustice in favor of the appellant.

Consequently, we allow this appeal, quash the conviction and set aside the sentence imposed on the appellant.

We are alive that the appellant was serving two years custodial sentence since 21st April, 2015 which means she has currently completed the said jail term. With that in mind, we further set aside the compensation order to repay Jamhuri Group members Tzs. 13,460,000/=.

Appeal allowed.

DATED at **SHINYANGA** this 22nd day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 22nd day of July, 2022 in the presence of Mr. Frank Samwel, learned counsel for the Appellant and Ms. Caroline Mushi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

W. S. Ng'humbu
For: **DEPUTY REGISTRAR**
COURT OF APPEAL