

**IN THE HIGH COURT OF TANZANIA**  
**AT TABORA**  
**APPELLATE JURISDICTION**  
**(Tabora Registry)**  
**(HC) CRIMINAL APPEAL BNO. 139 OF 2004**  
**ORIGINAL CRIMINAL CASE NO. 154 OF 2003**  
**OF THE DISTRICT COURT OF SHINYNGA DISTRICT**  
**AT SHINYANGA**  
**BEFORE SANGU'DI JOSEPH RESIDENT MAGISTRATE**  
**ABUBAKAR S/O SADICK.....APPELLANTE**  
**VERSUS**  
**THE REPUBLIC.....RESPONDENT**

*7<sup>th</sup> August 2006, 20<sup>th</sup> August 2007.*

**JUDGMENT**

**MWITA, J.:**

Abubakar Sadick was convicted of stealing by agent contrary to section 273 (b) of the Penal Code and sentenced to three years imprisonment by the District Court of Shinyanga.

Aggrieved by both conviction and sentence Abubakar Sadick (appellant) has appealed to this Court.

At the hearing of the appeal the appellant was absent and unrepresented. He had so opted. The Republic had the services of Mr. Mganga, learned State Attorney.

Mr Mganga had no wish to support conviction.

The prosecution called only one witness, PW1. Threiya Hamud, the complainant.

PW1 testified to the effect that the appellant is her relative. On 10.12.2001 the appellant informed her that he would be going to Tanga. PW1 gave him 13 tins of ghee worth 800,000/= to be delivered to Awadhi Ahmed in Tanga. PW1 contacted Awadhi Ahmed and informed him by telephone that she had entrusted the appellant with 13 tins of ghee for delivery to him. After three days Awadhi Ahmed contacted PW1 and told her that he had not received the 13 tins of ghee.

In his defence, the appellant, as DW1 admitted to have been entrusted with 13 tins of ghee by Mohamed Mwinyijuma for delivery to his father in Tanga. On the way to Tanga, 8 out of 13 tins got destroyed. The appellant arrived in Tanga with 5 tins of ghee only. The appellant informed Mohame Mwinyijuma about the destruction of the 8 tins. Mohamed Mwinyijuma informed the appellant to pay shs. 20.000/= per each destroyed tin making a total of shs. 160,000/=. When the appellant sent the money to Awadhi, Awadhi refused to accept it because he wanted the sum plus interest.

Had Awadhi been called as a witness the matter would have been clarified.

In WARIOBA S/O KANDOSE V.R. (1967) HCD n. 125 it was held that where available evidence has not been called, there is some suspicion that the evidence would not support the allegations concerning it.

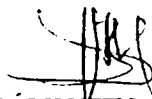
In AZIZI ABDALLAH V. REPUBLIC (1991) T.L.R. 71 it was held by the court of Appeal that the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts.\* If such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw an inference adverse to the prosecution.

In the instant case no sufficient reason was given for not calling Awadhi Ahmed as a prosecution witness.

The trial court should have drawn adverse inference to the prosecution. I therefore, step into the shoes of the trial Magistrate and draw adverse inference to the prosecution.

The appeal is accordingly allowed. Conviction is quashed and sentence set aside.

The appellant is to be released unless he is otherwise lawfully held in custody.



**D. M. MWITA,**

**JUDGE.**

**20<sup>th</sup> August, 2007**