IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 13 OF 2015

(From Kilosa District Court Cr.Case No. 32 of 2014 Hon.S.B.Fimbo-SRM)

LUCAS VICENT LWIZA ..... **APPELLANT**

Versus

THE REPUBLIC ..... **RESPONDENT**

Last order: 24th June, 2015
Date of Judgment: 24th July, 2015

JUDGMENT

Feleshi, J.:

The appellant was charged before the Kilosa District Court with two counts of Stealing by Agents: Contrary to Section 273(b), (e) of the Penal Code, [Cap.16 R.E.2002] and upon conviction he was ordered to serve a concurrent sentence of five years imprisonment. The Particulars of the offence read:

1st COUNT

"Lucas Vicent Lwiza on unknown date and time between the month of December, 2013, January and February, 2014 at Mkamba Village within Kilosa District in Morogoro Region, being entrusted by CHARLES s/o FRANCIS as a manager did steal 2065 lts of petrol fuel valued at Tshs. 4,559,520 and 420 lts of diesel fuel valued at Tshs. 903,000/= all total valued at Tshs. 5,462,520/= the property of CHARLES s/o FRANCIS."

2nd COUNT

"Lucas Vicent Lwiza on unknown date and time between the month of December, 2013, January and February, 2014 at Mikumi Village within Kilosa District in Morogoro Region, being entrusted by CHARLES s/o FRANCIS as a manager did steal 2783 lts of petrol fuel valued at Tshs. 6,144,864/= and

1105 lts of diesel fuel valued at Tshs. 2,375,750/= all total valued at Tshs. 5,462,520/= the property of CHARLES s/o FRANCIS."

The facts giving rise to the present appeal are straight forward. The complainant one **Charles S/O Francis Ishangeki (PW.1)** told the trial court that in 2010 he employed the appellant and placed him at his GAPCO gas station and depot at Mkamba and Mikumi respectively on a monthly pay of Tshs.150,000/=. Being his relative, he entrusted him with the keys for the tanks and pumps and to check and supervise fuel delivery under one **Sophia Juma (PW.2)** who was his stations manager.

In 2014 he noted the above particularized fuel shortage and conducted a further inquiry which mounted suspicion against the appellant whose Bank was found with Tshs.19, 000,000/= the amount which was considered to be not matching with his sources of monthly earnings save to Tshs.1, 700,000/= which he said belonged to one **Raphael Juma (PW.4)** who fortified the story in court. The Appellant's Cautioned Statement and Bank Statement were tendered in court by **E.5390 D/Coplo Nyakwiyasi (PW.3)** and **E.1189 D/CPL Emmanuel (PW.5)** and were admitted in evidence as Exh.P.1 and Exh.P.2 respectively. The appellant **(DW.1)** denied the allegations and deposed monies found in his account save to Tshs.1, 700,000/= accrued from the deposits came from the joint fish business he operated with one **Innocent Nestory (DW.2).** The later gave evidence and fortified the appellant's position.

The learned trial Senior Resident Magistrate was contented that: one that the appellant was the only one who was entrusted by **PW.1** to receive oil; two that the appellant did not account for the inordinate deposits Tshs.17,

300,000/= found in his account. The trial magistrate asked a question- where did the accused used to get up to 10,400,000/= which he used to deposit at the bank? The learned senior trial magistrate then held **"...the accused had the duty to reasonably explain where, he received the money from. Instead the accused failed to prove to Court the existence of his business;** and third, that the loss of oil was the result of selling oil and saving the money in his bank account. She further remarked:

> In his final submission defence counsel said, since there was no audit report, then there was no proof of loss. The case cited by defence counsel is as well different since on this circumstances evidence seen from documentary evidence builds the essence of guiltiness on the accused. Mr.Mkilya also said, the prosecution stated in the charge that the offence was committed between December, 2013 and February, 2014 while in that time the money seen on exhibit P.2 was Tshs.800,000/=. This was just a typographical error to me, the defect made by the person writing the charge sheet should not deny the victim his rights. It is the duty of the victim to explain to the police on any money done and the police are the ones to prepare a charge. I cannot rule someone not guilty simply because of the defect done by the police. The Constitution advises courts to stay away from technicalities which I ought to do...In the upshot, I hereby find that the prosecution side has managed to prove their case beyond any reasonable doubt on both 1st and 2nd counts and so I hereby convict the accused as charged."

In the present appeal, Mr.Mkirya, the learned advocate who represented the appellant before the trial court had three grounds of appeal: first, that the Honourable Magistrate erred in law and fact by convicting the appellant without binding evidence ad by relying on incorrect and unbinding Exhibits; second, that, the Hon. Magistrate erred in both law and fact by, convicting and sentencing the appellant by considering the witness and evidences given by the PW.2 one Sophia Juma without considering the final

submission's opinion of the defence side; and third, that, the Hon. Magistrate erred in law and fact by rejecting or even not considering the opinion of DW.1 with regard to the funds (sic) of PW.5 in Exhibit PW.2.

In support of the 1st and 2nd grounds he submitted that there were no exhibits produced by the prosecution to prove the two counts contained in the charge sheet. That none of the five prosecution witnesses proved the offences against the period indicated and that **PW.1** did not prove that the complained of fuel was in filled in the reserve tanks. That as PW.1 had alleged to have conducted audit he was duty bound to produce in court the audit report to prove the allegations. Therefore the failure by PW.1 to tender the receipts which he said was at home rendered the conviction to base on mere speculations. He said in the case of **Aidan Mwalulenga v Rep**, Cr.Appeal No. 207 of 2006 the Court of Appeal held that suspicion cannot sustain conviction but instead entitles an accused person to an acquittal on the benefit of doubt.

He also alerted the court on the substantial contradictions obtained in the prosecution's case. That whereas the Charge sheet particularized the appellant being the Station Manager, PW.1 and PW.2 on the other hand deposed that it was PW.2 who was the Petrol Station Manager. Also that whereas PW.1 deposed that the appellant was responsible for transportation of fuel from Dar es Salaam to Mikumi and Mkamba PW.2 on her part deposed that that responsibility belonged to one Joel Mkumbo. Mr.Mkilya found the contradictions going to the root of the matter and invited the Court to resolve them in favour of his client. He also added that the evidence of PW.5 did not even substantiate the amount found in the appellant's account

No.21701607332 NMB Kilombero and the amount of money related to the loss suffered by PW.1.

He lastly attacked the learned senior trial resident magistrate for not acting on the defects found in the Charge Sheet and for assuming the prosecution role as shown at page 10 of the judgment as quoted above. Also he challenged the court's dependence on the cautioned statement which was recorded against the provisions of section 50, 51, and 57 of the Criminal Procedure Act, [Cap.20 R.E.2002]. He cited the decision in the case of **Juma Nyamakinana and George Mwita Msama Machage v Rep.**,Cr.Appeal No. 133 of 2011 and submitted that the learned trial magistrate erred in not adhering to it after it was cited to her. In that case he said it was held at page 5 that:

> "According to the record, the appellants were arrested on 10/10/2008 in the morning hours and their respective caution statements (exhibits "P4" and "P.5" respectively were recorded contrary to mandatory provisions 50 and 51 of the Act on 11/10/2008 for the 2nd appellant and 12/10/2008 for the 1st appellant. Section 50 of the Act provides for a basic period of four (4) hours from the time of arrest to the time for interviewing a person in restraint in respect of an offence. Such basic period may be extended under section 51 of the Act by the officer in charge of investigating the offence for a further period not exceeding eight hours or on application to a magistrate for a further extension of that period as deemed reasonable in the circumstances. there is no such evidence on record that there were such extensions granted before PW4 and PW6 recorded the cautioned statements of the appellants on 11/10/2008 at 11 a.m, which was a period of over 24 hours after 2nd appellant's arrest on 10/10/2008 in the morning hours; and on 12/10/2008 at 15 hours which was over 50 hours after arrest of the basic rights of the appellant. It is obvious that the two courts below turned a blind eye to the flagrant violation of the basic rights of the appellants to fair trial according to the laws of the land. Had the lower courts taken time to study the record, they would definitely have discovered these aspects of unfair trial to though appellants and would

have dealt with the exhibits accordingly to avert the injustice occasioned to the appellants. Section 57(1) of the Act protects the rights of the common man, the illiterates, etc. these e elaborate provisions were simply ignored by the courts below..."

On her part, Ms Imelda Mushi, the learned State Attorney who represented the Republic, the Respondent did not oppose the appeal. She however did not agree with Mr.Mkilya that PW.5 did not adequately investigate and substantiate the amount of money found in the appellant's account No.21701607332 at NMB Kilombero and the amount of money related to the loss suffered by PW.1 and hat the charge sheet on the face of it presented some defects and further that the trial court erred to act on the appellant's cautioned statement. She submitted that PW.5, as shown at page 12 of the proceedings, adequately investigated the case. As for the complained of defects in the charge sheet she submitted that the alleged defects (if any) are curable under section 388(1) of the CPA. Concerning the cautioned statement she argued that the learned Senior Resident Magistrate acted it (Exh.P.1) because it was not opposed during its admission. Anything to the contrary she said amounted to an afterthought which should not be allowed as is being made after the prosecution had closed its case.

However, Ms Mushi further conceded that her keen scanning to the trial court's judgment and proceedings revealed that the accused was convicted on weaknesses of his defence instead of the strength of the prosecution evidence. She argued that the case was not proved beyond any reasonable doubt for want of exhibits proving the fuel delivery and the loss complained of. She submitted that in the case of **Woodmington v. DPP** (1935) AC 462 it was held that it is the duty of the prosecution side to prove its case and the standard of proof is beyond any reasonable doubt. Under the circumstances

of the case at hand she said it was doubtful whether there was loss and whether the appellant was the one responsible. She further submitted that the findings of the trial court at page 10 of the judgment shows clearly that the appellant's conviction based on his failure to establish his defence. She said in the case of **Christine Kale and another v. Rep.** [1992] TLR 302 it was held that an accused ought not to be convicted on the weakness of his defence but on the strength of the prosecutions' case.

Therefore, the issue for determination is whether or not the prosecution's case was proved beyond reasonable doubt. I commend both Mr.Mkilya and Ms Mushi for their delightful submissions above. I am inclined to share their concurrent conclusions. Section 273(b) and (e) of the Penal Code (supra) reads:

> "273. If the thing stolen is any of the following things, that is to say–
>
> (a) N/A;
>
> (b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay or deliver it or any part of it or any of its proceeds for any purpose or to any person;
>
> (c) N/A;
>
> (d) N/A;
>
> (e) the whole or part of the proceeds arising from any disposal of any property which has been received by the offender by virtue of a power of attorney for the disposal, such power of attorney having been received by the offender with a direction that the proceeds should be applied to any purpose or paid to any person specified in the direction,
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> **the offender is liable to imprisonment for ten years."**

As rightly submitted by both counsels above, the offence of Stealing by Agents against the appellant could not exist for want of a proof satisfying that

PW.1 had really entrusted to the appellant the amount of fuel which gave rise to the complained of loss and, or that the monies found with the appellant in his bank account (Exh.P.2) were proceeds arising from any disposal of PW.1's fuel. It is true that the trial court unjustifiably pegged its decision on the appellant's banked money (Exh.P2) and his cautioned statement (Exh.P.1). It completely forgot that being the court of justice it was duty bound to consider the whole evidence amassed to it.

In view of the above, I have no doubt whatsoever to hold that the prosecution in this case did not produce any evidence to prove that PW.1 had really entrusted fuel to the appellant and it completely failed to match the whole amount of money found in the appellant's account (Exh.P.2) and the suspected fuel sale proceeds (if any) which gave rise to the loss portrayed in the charge sheet.

After going through the court findings above, I am also contented that the trial court unjustifiably shifted the burden of proof from the prosecution to the defence against the position laid in the case of **Christine Kale and another (supra).** The trial court also misconstrued the legal position when it erroneously acted on the appellant's cautioned statement merely because it was admitted without opposition against the rule that where the admitted statement turns to be untrue or is subsequently made known to the court that the statement was procured against the law that the statement and its contents becomes of no value. After all, no one in this case dared to scan the contents of the cautioned statement as had they done so I am sure they would have found that the document I have opportunity to examine did not present any confession to the offence mounted against the appellant.

It is also evident that in this case the trial court did not trouble itself to resolve the contradictions pointed out above within the principle propounded in the case of **Mohamed Said Matula v Rep.** [1995] TLR 3 where trial courts were held primarily duty bound to resolve contradictions arising in trial proceedings.

Lastly, my examination to the record as a whole showed that the trial court unjustifiably acted on a charge sheet whose particulars did not match with the evidence adduced by the prosecution witnesses and the contents of exhibits P1 and P.2. Very unfortunately, neither the court nor the parties before it attempted to resort to section 234 of the CPA in order to reconcile the apparent defects that were displayed in the charge sheet. I therefore do not agree with Ms Mushi that section 388 of that Act can be invoked now to cure those glaring defects. It is always upon the prosecution to ensure that the charge founding the criminal trial is capable of offering a fair trial. In the case of **Liku Charles @ Ngeleja v. Rep.** Criminal Appeal No. 192 of 2013, Tabora Registry (unreported) this Court emphasized that:

> "These officers should therefore, endeavour to satisfy *'the four W principle'*, which is mostly followed in drafting particulars of offence. When a triable statement of offence is chosen, the second component in the document should at least, particularize the offence by disclosing- **who is** the accused?, **when did** he do the unlawful act or omission?, **where did** he do that?, **how did** he do it, and **to who**?. In my considered opinion, the failure by admitting and trial magistrates to vet the competence of charge sheets, as it happened in the instant case and other cases dealt with by the Court of appeal above, always result into abuse of court processes and miscarriage of justice to parties."

As no remedial measures were taken in this case the evidence the prosecution's case cannot therefore be said to have been proved beyond any

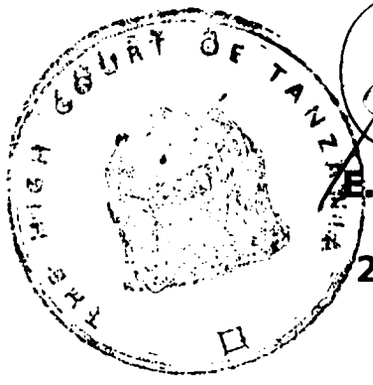
reasonable doubt to warrant the conviction and sentences imposed to the appellant.

In view of the foregoing analysis, I accordingly allow the appeal, quash the conviction and set aside the concurrent sentence in respect of both counts. The appellant is to be released from custody forthwith unless if he is otherwise lawfully held.

DATED at DAR ES SALAAM this 24th day of July, 2015.

E.M.FELESHI
JUDGE

Delivered in the presence of Mr. Sylivester Aligawesa, Advocate and the Appellant in person as well as Mr. Frank Tawale Mushi, the learned State Attorneys, for the Respondent. Right of Appeal is explained.



E.M.FELESHI
JUDGE
24/7/2015