IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 99 OF 2017

(an appeal from the judgment of Ilala District Court delivered by Hon. Mkasiwa SRM on 11th November, 2015 in Criminal Case No. 192 of 2010)

DEOGRATIUS KIRIA ..... APPELLANT

VERSUS

THE REPUBLC ..... RESPONDENT

JUDGMENT

13th and 28th June, 2018

BANZI, J.:

The appellant was arraigned before the District Court of Ilala at Samora, charged with the offence of stealing by servant contrary to section 271 of the Penal Code [Cap.16 R.E. 2002]. At the end of trial, he was convicted and sentenced to five (5) years imprisonment. Aggrieved, he preferred this appeal challenging both conviction and sentence.

The particulars on the charge sheet shows that, between 15th November, 2009 and 23rd January, 2010, the appellant stole different types of clothes valued at Tshs.10,554,975/= the property of his employer

Devotha Johakim Shop which came into his possession by virtue of his employment.

Before examining the merit of this appeal, it is useful to look at the facts of the prosecution case presented before the trial court. On 22nd July, 2009, Robert Joachim (PW1) launched a shop selling different types of cloth whereby he employed the appellant as a shopkeeper together with one Walter Mwakawiya as his assistant. The appellant started with the products valued at Tshs.10,300,000/= and as time went on the stock increased to the tune of Tshs. 27,026,550/=. All products with their price were handed over to him through a counter book which was tendered and admitted as exhibit P1.

On 25th January, 2010 PW1 in the presence of the appellant, Walter Mwakawiya, Emmanuel Mushi (PW2) and other two persons conducted stock taking and the same revealed the shortage of Tshs.10,554,500/=. According to PW1 the appellant admitted the loss and they reduced it in writing which was tendered and admitted as exhibit P2. Thereafter PW1 reported the matter to police whereby the appellant was arrested and charged accordingly.

theft. He further argued that, there was contradiction between PW1 and PW2 in respect of number of shopkeepers. While PW1 stated they were two PW2 claimed it was only appellant.

Coming to the second issue the appellant submitted that, since they were two persons involved in the shop, the prosecutions were supposed to call his assistant Walter Mwakawiya as their witness and failure to do so the court ought to have drawn adverse inference against them. Therefore, he submitted that since he is out of prison after being served his sentence, he prayed that, his appeal be allowed by quashing the conviction and setting aside sentence.

On his part, the learned State Attorney Mr. Bryson Ngidos did not support the conviction. Mr. Ngidos began by attacking the charge sheet which to his opinion was defective as there was non-citation of the section of the law on the statement of the offence. He submitted that, the appellant was charged with the offence of stealing by servant contrary to section 271 of the Penal Code. The statement of offence lacks section 258(1) of the Penal Code which creates the offence of theft. Hence leaving out section 258(1) renders the charge to be defective and it offends mandatory provisions of section 135(a)(i) and (ii) of the Criminal Procedure Act.

In his defence, the appellant admitted working for PW1 and he did not dispute about the stock taking conducted on 25th January, 2010. He only denied the outcome of the stock taking and the purported loss and claimed to be forced to write and sign exhibit P2. He contended that, their agreement was he takes 25% of the income and PW1 remains with 75%.

The appellant lodged seven (7) grounds of appeal but all grounds fall into two complaints that; the prosecution failed to prove the case against the appellant beyond reasonable doubt and the trial Magistrate erred in law by failing to draw adverse inference on prosecutions upon failure to call Walter Mwakawiya as their witness.

When the appeal came for hearing, the appellant had already completed his prison term since 10th May, 2018. He appeared in person unrepresented while the respondent Republic was represented by Mr. Bryson Ngidos, the learned State Attorney.

The appellant submitted that, the prosecution evidence was not strong enough to sustain his conviction as there was no audit report tendered in court to prove the alleged stealing. He also contended that, the trial Magistrate erred by convicting him basing on the admission for loss but not

Mr. Ngidos further argued that, the conviction of the appellant was based on circumstantial evidence which does not meet the standard required by the law. He cited the case of **Republic v Kerstin Cameron** [2003] TLR 84 whereby among the principles applicable on grounding a conviction on circumstantial evidence was that, evidence must be incapable of more than one interpretation. Mr. Ngidos submitted that, in the case at hand, the prosecution evidence gave more than one interpretation because there were two persons responsible for selling the goods at PW1's shop but the appellant was the only one charged while the other person was neither charged nor called as prosecution witness.

The learned State Attorney further contended that, by virtue of section 143 of the Evidence Act, the prosecutions were not compelled to call the said Walter Mwakawiya. However, since this person was assisting the appellant in the shop he was material witness to the prosecutions, and failure to call him the court ought to have drawn adverse inference against them. To support his argument, he cited section 122 of the Evidence Act, and the case of **Aziz Abdalah v Republic** [1991] TLR 71. He finalized by praying for appeal to be allowed by quashing the conviction and setting aside the sentence.

Having gone through the trial court record, petition of appeal and submission by both parties, the only issue for determination is whether the prosecution evidence was sufficient enough to sustain the conviction of the appellant.

Starting with the charge sheet, it is evident from the record that there was non-citation of section 258(1) of the Penal Code [Cap.16 R.E. 2002] which creates the offence of theft. Section 271 of the Penal Code [Cap.16 R.E. 2002] provides for punishment for a person who steals the property of his employer. Hence for offence of stealing by servant to be complete, the prosecution ought to have cited section 258(1) which creates the offence of stealing together with section 271 which provides for punishment when a person steals from his employer.

Section 135(a)(ii) of the Criminal Procedure Act [Cap.20 R.E. 2002] is very clear that the statement of offence shall contain a reference to the section of enactment creating the offence. The charge sheet ought to have been framed under section 258(1) and 271 of the Penal Code [Cap. 16 R.E. 2002]. Therefore, failure to make reference to section 258(1) rendered the charge fatally defective and hence, the conviction of the appellant cannot stand on a defective charge. Refer the cases of **Abdallah Ally v Republic**,

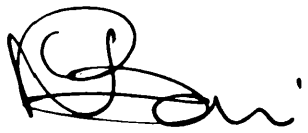
Criminal Appeal No. 253 of 2013 CAT (unreported) and **Marekano Ramadhani v Republic**, Criminal Appeal No. 202 of 2013 CAT (unreported).

Turning to the second issue, it is apparent from the evidence of PW1 that the appellant had an assistant in the said shop goes by the name of Walter Mwakawiya whose daily activity was attending customers just like the appellant. However, the prosecutions and for the reasons known to themselves they neither charged nor called him as a witness. Since they did not charge him together with the appellant as they were all responsible for selling goods in the said shop, he was a material witness and failure to call him the trial court ought to have drawn adverse inference against them. Refer the case of **Aziz Abdalah v Republic** [1991] TLR 71.

Upon perusing the judgment of the trial court, I find it prudent to comment on exhibit P2 which the trial Magistrate considered it as "*memorandum of confession*". PW1 stated that, the appellant admitted the shortage and they reduced it into writing which is exhibit P2. Looking on the said exhibit, the appellant did not confess to steal anything from his employer. Hence exhibit P2 is not a confession in the eyes of law as the trial Magistrate believed.

On the other hand, exhibit P2 shows that the appellant admitted the loss/shortage. He also contended that, he was forced to sign it. However, whether he admitted the loss or not, the position of the law is well settled that admission of loss does not amount to admission of theft. Refer the case of **Simon Kilowoko v Republic** [1989] TLR 159.

Having examined the shortfalls of the charge sheet and the evidence in general, it is quite clear conviction cannot be sustained as the prosecutions failed to prove their case beyond reasonable doubt. In the upshot, I allow the appeal, quash the conviction and set aside the sentence.



I.K. BANZI
JUDGE
28/06/2018

Delivered this 28th day of June, 2018 in the presence of Bryson Ngidos the learned State Attorney for the respondent and the appellant in person.

I.K. BANZI
JUDGE
28/06/2018

Right of appeal explained.

I.K. BANZI
JUDGE
28/06/2018