

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**(DAR ES SALAAM REGISTRY)**

**CRIMINAL APPEAL NO. 254 OF 2017**

*(Originating from the District Court of Morogoro at Morogoro Criminal Case No 71 of*

*2016 Before: Hon. I.A Msack– RM Dated 20<sup>th</sup> July, 2017)*

**OMARY BAKARI MANDWANGA----- APPELLANT**

***VERSUS***

**THE REPUBLIC ----- RESPONDENT**

**JUDGMENT**

**Last order date:** 05<sup>th</sup> June, 2018

**Judgment date:** 18<sup>th</sup> June, 2018

**MLYAMBINA, J.**

The appellant was charged with the offence of stealing by servant contrary to Section 271 and 258 of the Penal Code Cap 16 (R.E.2002). With the object of proving the charge, the trial involved five witnesses. These are; - **PW1** Athuman Kondo Mfaume aged 46 years. PW1 was the security Officer of the Freedom Electronic Ltd since 2008; **PW2** Erick Ezekiel, K/Ndege 45 years old working at Sumsung shop at Morogoro town as a Human Resource Manager of Electronic Freedom Ltd since 11<sup>th</sup> day of May, 2015; **PW3** Gullan Abbas Hussein 50 years old identified as a businessman at Freedom Electronic Ltd; **PW4** Ally Lazer 46 years old. PW4 was the stock

taking officer at Freedom Electronic Ltd; **PW5** D/2375 Sargent Gervas 53 years old police officer working at Dar es Salaam Investigation Department Central Police. The accused was the only defence witness. After hearing, the Morogoro District Court found the appellant herein guilty and was dully convicted and sentenced to serve three (3) years imprisonment. The appellant was also ordered to pay back the sum of TZs 13,404,502/= to Freedom Electronic Ltd.

Being aggrieved with such decision, the appellant has lodged 19 grounds of appeal that I will hereunder paraphrase;

1. That, the learned trial RM erred in law and fact by convicting the appellant while erroneously forced the accused/ appellant to proceed with the case in the absence of his advocate (Mr. Mlembe) from the time when the preliminary hearing was conducted without any notice as far as the trial Magistrate was prejudiced against the accused/appellant.
2. That, the learned trial RM erred in law and fact by convicting the appellant while the preliminary hearing was conducted contrary to the procedure of law as it was only the charged offence that were read and the accused person/appellant was

asked to plead without the prosecution to read out the whole facts of the case as it was mandatory requirement of the law as per Section 192 (1), (2), and (3) of the Criminal Procedure Act Cap 20 R.E.2002.

3. That, the learned trial RM erred in law and fact by convicting the appellant while relying on the discredited testimony of PW1 who was not present at the *locus in quo* and upon close examination by the accused person/appellant at page 9 and line 9-10 of the Court proceedings he stated; on 11<sup>th</sup> of May, 2015 when the event happened the accused person was already transferred to DSM contrary to the law.
4. That, the learned trial RM erred in law and fact by convicting the appellant while there was a failure to read over the charge to the accused person/appellant to enter the plea of not guilty when the prosecution case marked open (at page 8 of the Court proceedings) contrary to the law.
5. That, the learned trial RM erred in law and fact by convicting the appellant while erroneously believing that the appellant was the one who committed the charged offence while the prosecution side failed to tender the camera or photographs which shows the appellant hidden the alleged amount of money to prove the charge beyond reasonable doubt.

6. That, the learned trial RM erred in law and fact by convicting the appellant while erroneously granted a prayer to the prosecution side to add an exhibit (at page 16 line 20-22 of the Court Proceedings) as much as the accused/appellant was not afforded an opportunity to argue on the same contrary to the procedure of law.
7. That, the learned trial RM erred in law and fact by convicting the appellant relying on exhibit P1 (letter of agreement of the payment of TZs 15,500,000/=) and exhibit P2 (card of a car TOYOTA NOAH T129 CZB (Contrary to the law without reading over the content therein to prove their authenticity.
8. That, the learned trial RM erred in law and fact by convicting the appellant relying on discredited hearsay testimony of PW1 (at page 8 line 11-14 and PW3 at page 15 line 14-17, PW4 at page 21 line 20-22 and page 22 line 1-4 both of the court proceedings) in the lack of cogent as the trial court failed to summon Erick Msanya, Kondo Athuman and the boss of Freedom Electronic Company DSM to be attested to prove on the alleged stolen properties and money.
9. That, the learned trial RM erred in law and fact by convicting the appellant relying on the uncorroborated evidence adduced

by PW5 that the accused person/appellant admitted to commit the offence contrary to the procedure of law.

10. That, the learned trial RM erred in law and fact when it admitted the exhibit P3 (agreement letter) contrary to the law (at page 12 line 11-12 of the court proceedings) without proving the authenticity of the same contrary to the Evidence Act, Cap 6 R.E.2002. Even though the accused person/appellant had raised an objection but the trial Magistrate turned down.
11. That, the learned trial RM erred in law and fact by convicting the appellant relying on exhibit P4 (Cautioned Statement) *whereas* the prosecution side failed to prove its voluntariness and without the trial court to conduct an inquiry so as to ascertain the truthfulness of the same.
12. That, the learned trial RM erred in law and fact relying on the contradicted testimonies of PW1, PW2, PW3, PW4 (at page 8 line 13, line 24-25, line 26, at page 12 line 17-22 at page 15 line 16-17, line 25-26 and at page 20 line 24-26 all of the court proceedings) *whereas* both of these prosecutions witnesses did not reconcile with the alleged stolen properties or money as allegedly in the charge sheet.

- 13 That, the learned trial RM erred in law and fact by convicting the appellant relying on the PW4's testimony through one Venura Abiddinica a translator (without the consent of the accused person/appellant on whether he (appellant) rejected him to act as translator or otherwise and without the trial Magistrate to assign the qualification of him before he went further with the case.
14. That, the learned trial RM erred in law and fact by convicting the appellant while failed to address the appellant properly in terms of law in the ruling of prima facie case after the prosecution case marked closed at page 28 in the last line and page 29 line 1-15 on the Court proceedings contrary to the procedure of law.
15. That, the learned trial RM erred in law and fact by convicting the appellant while the identified owner of the money or properties alleged to be stolen, one Freedom Electronic Ltd, did not testify. Therefore, it left doubt as to whom was the owner of the same.
16. That, the learned trial RM erred in law and fact convicting the appellant while erroneously conducted the defence case twice (affirmed and non-affirmed defence) at page 30-38 contrary to the law.

17. That, the learned trial RM erred in law and in fact convicting the appellant by basing on the weakness of the appellants' affirmed testimony while erroneously failed to assess and to evaluate properly the evidence tendered before the trial court contrary to the procedure of law.
18. That, the learned trial RM erred in law and fact by convicting the appellant through the judgment that was written without complying with the condition of the law as stipulated under Section 312 (1) of the Criminal Procedure Act Cap 20 (R.E. 2002).
19. That, the learned trial RM erred in law and fact by convicting the appellant without the prosecution proved their case beyond any reasonable spac of doubt.

Wherefore; -

- (a) The appellant humbly prayed to this Hon. Court to allow the appeal, quash the conviction, set aside the sentence and an order of paying back the amount of TZs 13,404,520/= to the Freedom Electronic Ltd and leave the appellant at liberty.
- (b) That, the appellant prayed to this Hon. Court to be present during the hearing of the appeal.

During hearing of this appeal, the appellant who was unrepresented prayed all his 19 grounds of appeal be upheld so that he can be set free. The appellant also prayed the order to pay TZs 13,404,520/= be set aside so that he continue to serve his Country while free.

In reply, Hellen Masululi the learned State Attorney made submission by grouping the grounds of appeal into three categories. On the first ground, the state attorney told this Court that there were irregularities before the District Court. The first error is on the issue of stealing by servant. The State attorney submitted that, it is important to exhibit the contract of service to prove his employment. After going through the proceedings, the learned State Attorney did not see any contract of service to prove whether the appellant was employed by Freedom Electronic Limited. In view of the learned State Attorney, the employer was responsible to exhibit the contract of service.

The learned State Attorney went on to submit that the Manager of Freedom Electronic Limited gave evidence but he never tendered contract of service. According to the learned

State Attorney, the evidence of PW1, PW2 and PW3 shows that there were CCTV cameras evidence. That, the appellant took money and put into his socks. There was no any electronic evidence in terms of picture or whatever tendered before the court.

Another issue raised for consideration by the learned State Attorney was the question of Caution Statement. At page 25 and 26 of the proceedings, the evidence of PW5 who recorded the appellant's statement, the Caution Statement was admitted without been read to the appellant. In view of the learned State Attorney, the Caution Statement was basic. It led to conviction of the appellant. The learned State Attorney, without giving proper citation, refereed us to the case of **Seleman Abdallah vs republic (unreported)** of which laid a principle that; if Caution Statement is not read before admission, it must be expunged. The State Attorney viewed that, if the same is expunged the prosecution won't have strong evidence to convict the appellant.

The state attorney winded up her submission by maintaining that the public had no strong evidence to convict the

appellant. As such, the learned State Attorney conceded with the appeal to have merits.

In rejoinder, the appellant was of submission that on the issue of actual owner, he/she was supposed to appear and prove that his property was stolen. Thus, the Manager has no last say as far as the company's properties are concerned.

The appellant went on to rejoin that the Director was supposed to appear before the Court and prove. The appellant refereed this Court to the case of **Justine Kakuru Kasusura a.k.a. John Laizer vs Republic, Criminal Appeal No. 175/2010 Court of Appeal of Tanzania at Dar es salaam (unreported)**.

Wherefore, the appellant prayed for his appeal be allowed as prayed. Also his Car Card (exhibit P2 at page 17 TOYOTA NOAH T129 CZB and the Car itself be returned to him. That, such exhibit is not related anyhow with the case.

I have carefully considered this appeal. As correctly observed by the learned State Attorney, I noted true there were a lot of irregularities done before the trial Court. **First**, the prosecution side did not establish their case beyond

reasonable doubt as required by the law. (**see Jonas Nkize v Republic (1992) TLR 213**). The prosecution has to prove all the ingredients and unless it discharges that onus the prosecution cannot succeed. In this case, the contract of service which primarily is between an employer and an individual employed by the company in the name of Freedom Electronic Limited was not tendered. The employer/employee relationship between the complainant (PW1) and the appellant was therefore not established.

**Second**, as correctly submitted by the learned State Attorney, the evidence of PW1, PW2 and PW3 shows that there were CCTV cameras evidence. However, such electronic evidence was not tendered in Court as permitted under Section 40A of the law of Evidence Act, 1967 as amended in 2007 which states *inter alia*: -

*"In any criminal proceedings- information retrieved from computer systems, networks or servers; or records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission and communication facilities; the audio or video recording of acts or behaviours or conversation of persons charged, shall be admissible in evidence."*

**Third**, as properly argued by the learned State Attorney, the records, in particular the evidence of PW5 who recorded the appellant's statement, the Caution Statement, was admitted without been read to the appellant. In a number of times the Court of Appeal of Tanzania has emphasized on the importance of reading the Caution Statement prior been tendered as an exhibit before the Court. In the case of **William Lengai (Appellant) v Republic Criminal Appeal No. 203 of 2007 Court of Appeal of Tanzania at Dodoma (Msoffe J.A, Rutakangwa J.A and Bwana J.A)** held *inter alia* that: -

*The way the cautioned statement was recorded neither shows that the appellant was given an opportunity to agree to be recorded, nor was it read over to him after the recording. All these irregularities in respect of the cautioned statement should have led the two courts "a quo" not to rely on it, let alone to admit in evidence....in absence of the said statement, the prosecution case did not have a strong legal leg to stand on, leading to the conviction of the appellant. Fortified by this sober legal*

*thruth, and as conceded by Mr. Mulokozi, the conviction cannot stand.”*

Been guided by the findings of the case of **William Lengai (supra)** and of **Seleman Abdallah (supra)**, I find the Caution Statement been not read before admission renders the same to be expunged. The resultant effect of expunging the Caution Statement is to set aside the conviction in this matter.

**Fourth**, there is a question of the Director to had not appeared before the Court and prove the case. In the light of the decision in the cited case of **Justine Kakuru Kasusura, (supra)**, it is the complainant of theft who was supposed to testify. Freedom Electronic Limited Company ought to have been represented by its Director and not a Manager because the Board of Directors are in-charge of the Management of the Company's day to day business affairs done in good faith in terms of Section 36 of the Company's Act No. 12 of 2002 (R.E.2002).

**Fifth**, the appellant prayed his Car Card (exhibit P2 TOYOTA NOAH T129 CZB and the Car itself be returned to him because, such exhibit is not related anyhow with the case. Upon going through the records, in particular at page 17 of

the proceedings, I noted true the appellant tendered his Car Card as per the contention. There is no proof that the car itself was taken too. However, proprietary ownership of the Car is in its Card.

In the end result, I find this appeal has merits on the grounds explained above. The conviction and sentence matted against the appellant are vacated and set aside. The appellant is to be released from prison immediately unless otherwise lawfully held on some other charges. The order to pay the sum of TZs 13,404,520/= is set aside. Appeal allowed.



**Y.J.Mlyambina**  
**Judge**  
**18/6/2018**

Dated and delivered this 18<sup>th</sup> day of June, 2018 in the presence of the appellant in person and learned State Attorney Monica Ndakidemi for the respondent.



**Y. J. Mlyambina**

**Judge**

**18/06/2018**