IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 152 OF 2018

(Originating from Criminal Case No. 158 of 2016 from the Resident Magistrate's Court of Dar es Salaam at Kisutu, the decision by Hon. M.S. KASONDE, RM dated on 30th November, 2017)

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

ANNA TEGEMEA KIPEKE.....RESPONDENT

JUDGMENT

Date of last order: 25/07/2019
Date of Judgment: 10/10/2019

MLYAMBINA, J.

The respondent herein is a Civil Servant who was working with Tanesco Kinondoni Region at Mikocheni as a Cashier. It was alleged by the appellant herein before the Resident Magistrate Court of Dar es Salaam at Kisutu that on diverse dates between April, 2013 and September, 2014 she did steal cash Tshs 96,347,018/= the property of her employer which came into her possession by virtue of her employment. Consequently, the respondent was charged for stealing by servant contrary to **Section 271 of the Penal Code, Cap 16 (R.E. 2002).** Upon hearing, the trial Court found the prosecution failed to prove their case beyond reasonable doubt.

The Director of public prosecutions on behalf of the Republic being aggrieved by the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu Before Hon. M.S. Kasonde RM, dated 30th November, 2017 on which the

respondent was acquitted filed this appeal against the said decision on the following grounds:

1. That, the Trial Magistrate erred in law and facts by misdirecting himself by confining his reasoning to the hand written receipt alone without relating the hand written receipts with the system generated ones.
2. That, the trial Magistrate erred in law and facts by holding that the prosecution failed to prove that the offence, was committed by the respondent as the respondent was sharing office with another cashier.
3. That, the trial magistrate erred in law and facts by misdirecting himself that the key witnesses were not called hence draw an adverse inference against the prosecution.
4. That, the trial magistrate erred in law facts by holding that prosecution failed to prove case by not bringing the hand writing expect as a witness.
5. That, the trial magistrate erred on facts and law by holding that the prosecution had not proved their case beyond reasonable doubt.

Whereof the appellant prayed that this appeal be allowed and the respondent be convicted and sentenced for the offence of stealing by servant.

At the hearing, the appellant has been represented by Senior Counsel Credo Rugaju told the Court that the prosecution proved the case beyond reasonable doubt. The court erred in acquitting the respondent. The court wanted the prosecution to bring handwriting expert. Counsel Rugaju could

not know under which reasons. In his view, the prosecution evidences were enough.

It was the submission of Counsel Credo Rugaju that the respondent was sharing the office with others. It was not stated the respondent was sharing office with whom. The court stated that the prosecution did not parade key witness. It never stated who is that key witness. In view of the appellant, one witness was enough to prove the case.

In any case, the prosecution had four witnesses. The witnesses (PW1 and PW2) were enough to prove to the court on how the offence was committed as it reflects at page 9 of the proceedings.

Counsel Credo Rugaju told the Court that, PW1 stated that in the cause of examining the documents, he discovered that 918 relating to VAT were in system of receiving money of TANESCO. The customers had paid but the money were cancelled to the system. This is false. To make clear, Counsel Credo Rugaju stated that at page 20 paragraph 3 from the bottom, also at page 21 PW2 told the Court that the accused did theft by making sure the serial number of a system generated were followed by hand written receipt. The later were supposed to be system generated.

It was the humble submission of Counsel Credo Rugaju that the findings of trial court which solely based on the hand written report without comparing the same with the receipt which are system generated were misdirection and makes the findings not factual and legal based. There was a poor analysis of evidence. In view of Mr. Credo Rugaju, the evidence of PW1 AND PW2 was enough proof of theft offence at Kinondoni TRA office. Counsel Credo

Rugaju therefore maintained that the public proved its case beyond reasonable doubt. He thus prayed the decision of the Lower Court be quashed and the respondent be convicted and properly sentenced.

In reply Augustine Kusarika advocate for the respondent submitted that the appeal before this Court is devoid of merits. The learned state attorney has submitted that the evidence of PW1 and PW2 were enough, that was not enough. PW2 at page 22, when cross examined, he stated that the accused person was suspended but he could not remember the date when he was suspended. Also, the hand writing receipts were not signed by the accused. The issue here, according to Mr. Augustine Kusarika is; who committed the offence. There is no proof that it is the respondent who committed the offence.

Augustine Kusarika advocate went on to reply that, according to the evidences and report the respondent ws reporting to the accountant. As such, the core witness was the immediate boss. The later was not called. Augustine Kusarika advocate invited the court to see at page 16. Based on that he prayed the appeal be dismissed for want of merits.

In rejoinder Senior State Attorney Credo Rugaju maintained that since the documents were system generated, it is the system itself which proved it as reflects at page 22 paragraph 3 of the proceedings.

At the outset, I wish to state that this being the first appellate court on this matter, I have the duty to analyse and re-evaluate the evidences which were before the trial court. The offence of stealing by servant as covered by **Section 271 of the Penal Code, Cap 16** requires the offender to be a

servant, the thing stolen is of the employer or came into the possession of the offender on the account of his employer. In the instant case, at first, the charge did not indicate properly the two alternatives given under Section 271. Needless such general observation, under Section 258 (1) and (2) of the Penal Code (supra) there are must be an act of theft with intention to steal other's property. In this case, as properly stated by the respondent's counsel, there was no proof of the *actus reus* of the respondent in stealing the appellant's cash.

It must be noted, however, that the appellants' suspicion of the respondent as the cashier who operated the computer was not sufficient to infer guilt. There were many other cashiers working in the same office. It is the requirement of the law that the prosecution has to prove beyond reasonable doubt to achieve conviction. A mere suspicion cannot be a good evidence for inferring guilty.

As observed by the trial Magistrate, the culminating evidence relied by the appellant herein were that of PW1 and of PW2 who prepared the special audit report (exh. P2). However, exhibit P3, P4 and P5 which were various receipts collected in the respondent's office herein were denied and were not signed by her. Though I agree with the appellant that one witness is enough to prove a case, there is nothing in evidence brought by the appellant herein to link the respondent with the offence charged. None of the brought witness did prove that it is the respondent who committed the offence of stealing the appellant's cash.

Indeed, the immediate boss of the respondent herein to whom the daily report was accounted for was the accountant. Surprisingly, the appellant herein never bothered to parade him as a material witness. This made the prosecution evidence remain weak.

Moreso, the allegation by Senior State Attorney Mr. Credo Rugaju that it is the system itself which proved the offence is a far fetching submission because the system is operated by people. It is such person operating or charging the operation of such system who is supposed to prove it.

Again, though there is no doubt that the respondent was the employee of the appellant, there is no direct link of theft of the appellant's cash been done by the respondent. The prosecution has a sole duty of proving their case beyond reasonable doubt as was expressed by Lord Denning in **Miller v. Ministry of Pensions (1947) 2 ALLR 373;**

"That degree is well settled. It need not reach certainly, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it is admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."

In the circumstances of the above, I find this appeal lacks merits at all. The same stands dismissed for lack of proof of the charged offence. Order accordingly.

Y. J. MLYAMBINA

JUDGE

10/10/2019

COURT

Judgment pronounced this 10th day of October, 2019 in the presence of Senior State Attorney Credo Rugaju for the Appellant and the Respondent in person.

Y. J. MLYAMBINA

JUDGE

10/10/2019