THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL NO. 150 OF 2019,

(Arising from Criminal Case No. 36 of 2019, in the District Court of Ileje District, at Itumba).

EMMANUEL BERNARD THADEO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT.

08/06 & 25/08/2020.

Utamwa, J.

In this first appeal, the appellant, EMMANUEL BERNARD THADEO, appeals against the Judgement (impugned judgement) of the District Court of Ileje District, at Itumba (the trial court) in Criminal Case No. 36 of 2019. Before the trial court, the appellant stood charged with the offence of stealing by agent contrary to sections 273 (b) of the Penal Code, Cap. 16 R. E. 2002 (now R. E. 2019), henceforth the Penal Code.

According to the substituted charge admitted in the trial court on the 1st of October, 2019, it was alleged that, on the 4th August, 2019 January,

at about 10: 00 hrs, at GEO COMP LTD, in Ikumbilo village within Ileje District of Songwe Region, the appellant did unlawfully steal cash Tanzanian Shillings (Tshs.) **23, 916, 900/=** that was entrusted to him by one Zeng s/o Jian of GEO Engineering Corporation Company Ltd (the Construction Company) to pay workers of Masaganya Security Company (the Security Company).

When the charge was read over to the appellant, he pleaded not guilty. A full trial ensued and four prosecution witnesses testified. The appellant made a sworn defence. At the end of the day, he was found guilty as charged, convicted and sentenced to serve ten (10) years in prison. The trial court also ordered the sum of Tshs. **1, 975, 350/=** found in one of the appellant's bank accounts to be withdrawn and given to the Director of the Security Company. It was further the direction of the trial court that, upon the appellant completing his sentence, the said Director will see how best he can recover from the appellant the rest of the stolen money.

The appellant was aggrieved by both the conviction and sentence, hence this appeal. In his petition of appeal, he preferred three grounds of appeal. These grounds however, can be smoothly abridged into the following two grounds:

1. That, the trial court erred in law and facts in convicting and sentencing the appellant though the prosecution did not prove the charge against him beyond reasonable doubts.

2. That, the trial court erred in law in convicting the appellant without considering his defence.

Owing to these grounds of appeal, the appellant pressed this court to allow the appeal, quash and set aside the sentence and judgment of the trial court.

When the appeal was called upon for an oral hearing, the appellant, as an unrepresented layman, had nothing to add to his petition of appeal. Mr. Michael Shindai, learned State Attorney who represented the respondent Republic did not support the appeal on the following grounds: regarding the first improvised ground of appeal, he contended that, the four prosecution witnesses who testified before the trial court managed to prove the charge against the appellant beyond reasonable doubts. Their evidence was corroborated by the payroll (exhibit P. 1). The evidence showed that, upon being entrusted with the money at issue the appellant disappeared and was arrested in Handeni, Tanga Region. He further contended that, even if this court finds otherwise, as a first appellate court it can re-evaluate the evidence afresh. He supported this particular contention by citing the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Prince Charles Junior v. Republic, Criminal Appeal No. 250 of 2014, CAT at Mbeya** (unreported).

As to the second ground of appeal, the learned State Attorney for the Republic argued that, the trial court duly considered the defence case as shown at page 5-6 of the printed impugned judgment. The trial court considered the cases for both sides before it made the impugned

judgment. The respondent's State Attorney therefore, urged this court to dismiss the appeal.

In his rejoinder submissions, the appellant contended that, though he was employed by the Security Company, there was no evidence proving his job description in view of showing that he was entrusted with the duty to pay salaries to its workers. His duty was only to supervise security matters of the Security Company. The prosecution did not also produce any receipt showing the payment of the money at issue from the Construction Company to the Security Company through the appellant. He also complained that, one Ernest Messo, the actual treasurer of the Security Company was not charged in court. Again, no witnesses saw him being entrusted the money by the said Mr. Zeng.

I have considered the grounds of appeal, the arguments by the parties, the record and the law. In deciding this appeal, I opt to firstly test the second ground of appeal. This plan is for the sake of convenience. In case need will arise, I will also test the first ground.

The issues regarding the second ground of appeal are thus, two as follows:

i. Whether or not the trial court failed to consider the appellant's defence in testing his guilt.
ii. If the answer to the first issue is affirmative, then what is the legal effect of such failure by the trial court on its judgment?

Before I test the first issue, I find it incumbent to briefly narrate the prosecution and the defence evidence for the sake of a clear understanding of this judgment.

The prosecution case was pegged on the evidence of PW. 1 (Ramadhani Juma Rajabu), PW. 3 (Mr. Jushua Joel Mulungu) who are officers of the Security Company and PW. 2 (Zeng Jian) an officer of the Construction Company. The fourth witness was WP. D/C. Yasinta, a police offier who only investigated the case and testified mainly according to information received from other witnesses.

The prosecution evidence was essentially to the effect, that; the appellant was employed as supervisor of security guards of the Security Company. This company entered into a contract with the Construction Company. The former had to provide security services to the latter on payment. The payment were paid by the Construction Company to the appellant and his co-supervisor, the said Ernest so that they could, in turn, pay the salaries to the security guards of the Security Company. On the material date, one Mr. Zeng, (PW. 2), being an officer of the Construction Company, paid the sum at issue to the appellant and Ernest for paying the salaries to security guards. The two acknowledged the receipt of the money by signing the payroll (exhibit P. 1) for the month of July, 2019.

The prosecution evidence further showed that, the appellant and the said Ernest did not pay the money to the security guards. They instead, disappeared with the same. The appellant was later arrested in Handeni. The appellant also deposited Tshs. **4, 000, 000/=** in his NMB bank account in Arusha on 6th August, 2019 and withdrew the money by some instalments. The guards who were supposed to receive the salaries complained to PW. 2 and other officers of the Security Company that they had not been paid their salaries for the said month.

The appellant's defence was basically that, he was employed as supervisor of security guards of the Security Company. His duty was only to supervise the guards in providing security services to the Construction Company and to allocate them duty posts. He was not charged with the duty to receive money from the Construction Company and pay series to the security guards. However, in case a guard was not around at the time of payment of salaries, he could be entrusted his salary and keep the same in view of paying it to the absent guard. On the material date, he was not entrusted with any money from PW. 2. He in fact, signed the payroll only for verifying that the guards listed in it had attended at work on the days shown in the payroll and were entitled to salaries as shown in the list. It was the said Ernest who was charged with the duty to deal with the guard's salaries as the treasurer of the Security Company. He added that, he travelled out of his work following a short notice that his child had been burnt by fire. He left without any permission from his master since, as a supervisor, he was entitled to be out of office for not more than four days without any leave from his master.

Regarding the first issue posed earlier, I am of the view that, from the impugned judgment, the trial court convicted the appellant without considering his entire defence in evaluating the evidence. What the trial court did, was that, it summarised the prosecution and the defence evidence from the first page to the sixth page of the impugned judgement. In fact, the judgement has only nine pages. At the sixth page, the trial court framed the issue of *whether or not the said Ernest Nasson Masson was the treasurer of the Security Company or the Supervisor of that*

company. The trial court then, in evaluating the evidence to answer the issue it had framed, considered the prosecution evidence and answered the issue to the effect that, Ernest was a mere supervisor and not the treasurer as alleged by the appellant. The trial court also found that, from the record gathered from the bank, the appellant had deposited Tshs. 4, 000, 000/= in his bank account and he had travelled to Arusha after committing the theft. It then found him guilty and convicted him accordingly. It then imposed the sentence and made the orders mentioned above.

The trial court thus, in evaluating the evidence considered only one minor aspect of the appellant's defence. This was the averment that, it was the said Ernest who was the treasurer. It then rejected that insignificant aspect of the defence. The trial court did not consider other important aspects of the appellant's defence. It did not for example, consider his contention that, he had not been employed to pay salaries for guards, that he did not receive the money from PW. 2 for paying the salaries, that his job description was not presented in court, that he signed the payroll only for acknowledging the fact that the guards in the list were entitled to salaries for the given month at the tune shown in the list, that he had travelled to Arusha for a call to attend his burnt child, that he did not deposit the Tshs. 4, 000, 000/= in his bank account in Arusha, that he had a mandate to be out of office for four days without any permission from his master.

In my view, the trial court was supposed to consider all these aspects in the appellant's defence in evaluating the evidence of the whole case. It

was also duty bound to make a finding on whether it accepted or rejected those defence elements by giving reasons. However, it did not do so.

Due to the reasons shown above, the contention by learned State Attorney for the respondent that, the trial court considered the appellant's evidence from page 5-6 of the impugned judgement is not supported by the record. In fact, as I hinted above, what the trial court did at those pages was merely to summarise the appellant's defence and not to evaluate it in deciding on his guilty. What matters in law is the consideration of the defence case in evaluating the entire case and not in summarising it. This view is based on the understanding that, summarising the defence evidence as the trial court did, is a distinct exercise from evaluating it; see the decision by the CAT in the case of **Leonard Mwanashoka v. Republic, Criminal Appeal No. 226 of 2014, CAT, at Bukoba** (unreported).

The distinction between the terms "summarising" and "evaluating" is notable upon considering the literal meaning of the two terms. According to the Cambridge Advanced Learner's Dictionary, 3rd Edition, 401, Cambridge University Press, New York, 2008, page 480, to "evaluate" is to judge or calculate the quality, importance, amount or value of something. On the other side, to "summarize" is to express the most important facts or ideas about something or someone in a short and clear form; see the same dictionary (supra, at page 1459). A "summary" is only a short and clear description that gives the main facts or ideas about something (see at page 1459 of the same dictionary). A summary is therefore, not an evaluation in any way. I also underscored this position in the cases of **William David**

Monyo v. Republic, Criminal Appeal No. 255 of 2016, HCT, at Tabora (unreported) and **Maheri Chacha v. Republic, DC. Criminal Appeal No. 9 of 2017, HCT, at Tabora** (unreported).

Owing to the reasons shown above, I answer the first issue posed above affirmatively that, the trial court failed to consider the appellant's defence in testing his guilt.

I will now consider the second issue on the legal effect of the failure by the trial court to consider the defence case. The law of this land is clear that, the accused defence should be considered by the trial court in evaluating the evidence when it tests his guilt. As hinted earlier, a trial court is at liberty to deny the defence for some reasons, upon considering it. Nevertheless, it is not entitled to skip it altogether. The law further guides that, the omission by a trial court to consider the defence case in evaluating the evidence vitiates the conviction resulting from such failure; see the **Leonard Mwanashoka case** (supra). In deciding this case, the CAT followed a number of precedents including **Lockhart Smith v. R. [1965] EA 211, Okth Okale v. Uganda [1965] EA 555, Elias Steven v. R. [1982] TLR. 313, Hussein Idd and another v. R. [1986] TLR. 283** and **Luhemeja Buswelu v. Republic, CAT Criminal Appeal No. 164 of 212.**

In the **Leonard Mwanashoka case** (supra), the CAT further underscored that, evaluation of the evidence of both sides is the most crucial stage in judgement writing, and failure to evaluate or an improper evaluation of the evidence leads to wrong decision or miscarriage of justice.

The rationale of the stance of the law just underlined above is not far to fetch. I underscored it in the case of **Mahamudu S/O Juma @ Poti v. Republic, DC. Criminal Appeal No. 140 of 2016, HCT, at Tabora** (unreported) and in the **William David Monyo** case (supra). I also reiterate it in the case at hand as follows: failure by a trial court to consider the accused defence in evaluating the evidence (for determining his guilt) is tantamount to denying him the right to be heard. This follows the understanding that, the major objective of giving an accused person the right to be heard in defence is, for the trial court to hear him, evaluate the evidence of both sides and determine his guilt.

It follows thus that, failure by a trial court to consider the accused defence in determining his guilt renders the entire exercise of hearing his defence nugatory. Indeed, for purposes of an effective compliance with the Principles of Natural Justice, especially the right to be heard, a trial court has the duty not only to give the accused person the audience for his defence, but also to efficiently consider that defence in evaluating the evidence in view of determining his guilt. It is only by considering the defence case in this manner that the accused's right to be heard becomes complete and meaningful.

The above demonstrated abnormality committed by the trial court (in the case under consideration) also amounted to violation of the appellant's right to fair trial. This right is enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap. 2 R. E. 2002 as a fundamental right. The significance of the right to fair trial was efficiently underlined by the CAT in the case of **Kabula d/o Luhende v. Republic,**

Criminal Appeal No. 281 of 2014, CAT, at Tabora (unreported), and I quote its own words verbatim for the sake of a readymade reference;

> "It is accepted that a right to fair trial is one of the cornerstones of any just society. For this reason, this right is said to be a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their rights and freedoms,...It is an important aspect of the right which enable effective functioning of the administration of justice."

Owing to the reasons demonstrated above, I am of the settled view that, the trial court's failure to consider the appellant's defence was a fatal blow to the trial of this case. The proceedings and conviction of the trial court are thus, liable to be quashed. The sentence imposed against the appellant, the orders it made and the entire impugned judgement are also liable to be set aside. This finding constitutes an answer to the second issue posed above regarding the second ground of appeal. I consequently, uphold the second ground of appeal.

The finding I have just made above, is forceful enough to dispose of the entire appeal without considering the first ground of appeal. I will not thus, consider it.

I have also considered the issue of whether I should order for any retrial following the abnormality considered above. However, I have made my mind that, this is not a fit case for ordering a retrial. This is because, the law guides that, a retrial cannot be ordered where there is insufficient evidence and where ordering retrial will enable the prosecution to fill up gaps in its evidence at the first trial; see the decision by the CAT in the case of **Kaunguza s/o Machemba v. Republic, Criminal Appeal No.**

157B of 2013, at Tabora (unreported) following the case of **Fatehali Manji v. R [1966] EA 343.**

In the case at hand, I do not see sufficient evidence that will entitled me to order for retrial without enabling the prosecution to feel its evidential gaps. This view follows the facts that, for proving the offence of stealing by agent according to the provisions of section 273 (b) of the Penal Code under which the appellant stood charged, and according to the particulars of the offence, the prosecution was supposed to establish *inter alia*, two important ingredients of the offence. The first is that, the appellant was entrusted with the money at issue as an agent for paying the same to security guards. The second element is that, the appellant did not pay the money to them, instead he stole the same.

The prosecution evidence in the case at hand however, tried to establish only the fact that the appellant was entrusted with the money. It did not, in anyway prove that the guards were not paid the sum of money. This view is based on the fact that, no guard listed in the payroll was called as a key witness to prove that he had not been paid the salary. No reason was adduced by the prosecution for this omission. The court is thus, entitled to draw an adverse inference against the prosecution case for the omission to invite key prosecution witnesses to testify. The PW. 1 and 3 who testified before the trial court did not say that they were among the guards listed in the payroll. My perusal did not also see their names. Even if these two witnesses were in the payroll at issue, they could not testify on behalf of all the 94 guards whose names were listed in the payroll. Otherwise, that would amount to hearsay which cannot in law, prove any

fact at issue. PW. 1-4 thus, told hearsay to the trial court that the guards had not been paid salaries for the given month and had complained against the non-payment of their salaries.

Moreover, by its nature, the payroll itself (exhibit P. 1) seems to be a mere document showing days of attendance at work for the security guards and the sum they were entitled to be paid. It does not have any property of being a handing over of cash between PW. 2 and the appellant. Furthermore, though the trial court convicted the appellant for *inter alia*, the fact that he had deposited Tshs. **4, 000, 000/=** in the bank account in Arusha, it did not show the relationship between that money and the stolen money. Besides, one would expect a Bank Officer from the said bank branch to come and testify before the trial court as a key witness for vindicating the allegation which was disputed by the appellant. However, no such bank officer was called for the purpose and no reason was adduced for the omission. The court can thus, again, draw adverse inference against the prosecution case for the unreasoned omission.

Another reason for my hesitation to order for a retrial is that, the appellant has already served the illegal sentence of imprisonment for about a year now since the impugned judgment was made on 17th October, 2020. It will not thus, be fair to order retrial under the circumstances of the case.

Having made the above findings and observations, I make the following orders; I allow the appeal to extent shown above. The proceedings and the conviction of the trial court are quashed. The

impugned judgment, orders and the sentences imposed against the appellant are set aside. He is discharge without any order for retrial. The appellant shall thus, be released from the prison forthwith unless held for any other lawful cause. In case any complainant in this case wishes, he can recover the allegedly stolen money through a civil court. It is so ordered.

JHK. UTAMWA

JUDGE

25/08/2020.

25/08/2020.

CORAM; Hon. JHK. Utamwa, J.

For Appellant: present (by virtual court link when in Ruanda Prion, Mbeya).

For Respondent; Ms. Prosista Paul, State Attorney (in court physically).

BC; Mr. Kibona, RMA.

Court: Judgment delivered in the presence of the appellant (through virtual court link) and Ms. Prosista, State Attorney, in court, this 25th August, 2020.

JHK. UTAMWA.

JUDGE

25/08/2020.