IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

DC. CRIMINAL APPEAL NO. 32 OF 2019

(Originating from Moshi District Court Criminal Case No. 376 of 2016)

PETER JAMES MKALAGALE ----------1ST APPELLANT

ANNA LUTHER MKANGO ---------- 2ND APPELLANT

VERSUS

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

JUDGMENT

MUTUNGI .J.

The Appellants herein were charged for three counts as follows: -

1st Count: Conspiracy to defraud Contrary to Section 306 of the Penal Code. The particulars being that the Appellants on diverse date and time between 2013 to 2016 at Kiusa area within the Municipality of Moshi in Kilimanjaro Region conspired together to defraud the **NGILOI ULOMI ENTERTAINMENT COMPANY**, Tanzanian Shillings One Hundred

Fourteen Million, Seven Hundred Eighty Nine Thousand and Four Hundred and Thirty Five (114,789,435).

2nd Count: Stealing by Agent Contrary to Section 273 (b) of the Penal Code, that during the period as per the first count the two did steal 461 tyres whose total value is Tshs. 114,789,435/= properties entrusted to them by the company known as **NGILOI ULOMI ENTERTAINMENT COMPANY LIMITED** and lastly **3rd Count:** Money Laundering Contrary to Section 3 (k), 12 (a) and 13 (a) of the Anti-Money Laundering Act (No. 12 of 2006). The particulars being that, the two did directly engage themselves in involving the proceeds of predicated offence by stealing 461 tyres total Tshs. 114,789,435/=, the property of **NGILOI ULOMI ENTERTAINMENT COMPANY LIMITED** while they knew or ought to have known that the money was proceed of a predicate offence, to wit, stealing by agent.

At the end of the hearing the two were found guilty and accordingly convicted for the second count as mentioned above and acquitted on the first and third counts for lack of sufficient evidence. The court proceeded to sentence them to community service for 12 months and to pay back Tshs.

114,789,435/= to Ngiloi Ulomi Enterprises Company Limited. The Appellants were thereafter aggrieved by the whole of the Judgment of the District Court of Moshi at Moshi (trial Court) and lodged the following grounds of appeal: -

1) That, the case against the accused persons (Appellants) was not proved beyond reasonable doubt.
2) That, the honourable trial Magistrate erred in law and fact by failure to evaluate the evidence on the record hence arrived at an erroneous decision.
3) That, the honourable Magistrate erred in law and fact by ordering the Appellants to pay back Tshs. 114,789,435/= to Ngiloi Ulomi Enterprises Company Limited which was not proved by the said Ngiloi Ulomi Enterprises Company Limited to have owned tyres amounting to Tshs. 114,789,435/=
4) That, the honourable Magistrate erred in law and fact by convicting the Appellants on weak and uncorroborated evidence.

Before venturing into the merits of the Appeal, it is imperative to lay down the background leading to the instant appeal. The two Appellants had been employed by Ngiloi Ulomi

Company Enterprises Limited as Head supervisor and Assistant supervisor respectively. The said Company was operating its business at Kiusa in Moshi, Kilimanjaro Region dealing with motor vehicle spare parts. These included tyres, lubricants, batteries, and many others. In view thereof the two were entrusted with a shop to sale the/afore mentioned items. Having worked for some time, the Company suspected the Appellants to be engage in scruplous businesses. It was out of the luxurious life that they had put themselves into that raised eye brows.

The Company (complainant) decided in 2016 to send auditions to inspect the accounts in Moshi from its Headquarters in Arusha. The auditors did find 461 tyres missing worth Tshs. 114,789,439/= which the Appellants could not account for. The matter was reported to the Police station and a thorough investigation followed thereafter. It was found that the first Appellant on 23/06/2013 had bought a piece of land at Mabogini area for Tshs. 3,000,000/= and immediately thereafter started constructing a big house therein. He also had bought a motorcycle from money gotten out of some unknown source. What was surprising is the change of events

in that in 2016 the first Appellant did order the original owner of the farm/land he had bought (one Pantaleo) to change the name in the sale document and in co-operate the name of one Thomas as the buyer.

The Police investigation further revealed that, the second Appellant had invested a lot of money back at her birth place (Singida). It was found that she too had bought a piece of land in her father's name worth 4,200,000/= and built a hall, business frames therein. She also had a farm with pigs and cows. She had also repaired the family house. All these properties were photographed and pictures tendered in court. Having dag deep into the income of the second Appellant's father, it came to light that he was only paid 7,000/= per month, an amount too little to be able to acquire such valuable assets. It was concluded that the two had sent fraudulent reports to the Headquarters knowing very well that they had sold the Company's tyres and appropriated the proceeds which they used to accumulate wealth.

As already observed the trial court proceeded to convict and sentence them as earlier indicated in the Judgment hence this

appeal. When the appeal was called up for hearing, Mr. Gwakisa Sambo, Learned Advocate representing the Appellants and Miss Agatha Pima, Learned Attorney prayed the same proceeds by way of written submissions, which prayer was readily granted by the court. Substantially the Appellants main grievance is that they were wrongly charged and convicted for the offence of Stealing by Agent Contrary to Section 273 (b) of the Penal Code Cap 16 R.E. 2002.

It was the Appellants Advocate's contention that, in terms of Section 131 to 136 and the 2nd schedule of the Criminal Procedure Act (Cap 20 R.E. 2002) under part (b), an accused person must know the nature of the case facing him. The charge should disclosing the essential elements of the offence so charged. The Learned Advocate proceeds to submit that, the Appellants in the instant appeal were made to understand that they stood charged for the offence of Stealing by Agent whilst the evidence adduced by the prosecution side showed and proved the offence of Stealing by Clerks and servants. It was in evidence that the two were permanent employees of Ngiloi Ulomi Enterprises Company Limited as Head supervisor and Assistant supervisor at the Company's shop and in the

course 461 tyres valued at Tshs. 114,789,435/= came into their possession by virtue of their employment. It was thus the Learned Advocate's settled opinion that the Appellants were confused as to what kind of defence to bring forward.

The Learned Advocate called upon the court to go through the particulars of the offence of Stealing by Agent as drawn by the prosecution. He submitted the court will find, the charge failed to disclose the whole aspect of entrustment of the property to the perpetrators and the reasons for the entrustment of the property, whether to retain in safe custody or to apply, pay or deliver it or any part of its proceeds for any purpose or to any person. In the absence of such disclosure the charge was unmaintainable. In support thereof the Advocate cited the case of **Mussa Mwaikunda V. Republic [2006] TLR 387.**

The Learned Advocate urged further, the prosecution miserably failed to prove the case against the Appellants as required by law. In criminal jurisprudence the prosecution side has a duty to prove the offence charged beyond reasonable doubt as **per Section 110 (2) of the Tanzania Evidence Act,**

Cap 6 R.E. 2002 and in the case of **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda V. Republic [2006] TLR 395.** All that the prosecution did was to raise suspicions against the Appellants. The Learned Counsel urged, suspicion on its own cannot be the basis of conviction and referred the court to the principle found in the case of **Nathaniel Alphonce Mapunda (Supra)** and in the case of **Richard Matangule and Elia Richard V. Republic [1992] TLR 5 and 9**. What the prosecution did was to prove that the Appellants were working in the said shop but being mere employees does not mean they stole 461 tyres, the property of the said Company.

The Learned Advocate went forth and submitted on the weak and uncorroborated evidence of the prosecution side. He contended the only prosecution witness worth any mention was PW2 who was merely a Sales Officer having the same profession as that of the Appellants. He had an interest to serve since he was in one way or the other a potential sales man in the event there was a vacancy. To put salt to the wound, PW2 had no audit knowledge whatsoever and neither did he participate with the Appellants in the stock taking exercise.

There was neither evidence to parade how many tyres were present in or bought by the Company, how many were sold, how many were taken on credit or stolen. To make matters worse, there was no stock taking of 2013, 2014, 2015 or 2016 nor loss report thereto. There was no report sent to the TRA for tax purposes during this period. Given such circumstances the Learned Advocate wondered how could one declare there was theft.

The Learned Advocate proceeded to query or fault the failure by the prosecution side to summon some crucial witnesses. Among these, the owner of the Company, Evaline (the Manager) or a Professional Auditor. He pressed the court should draw an adverse inference that there was no loss occasioned. The case of **Hemed Saidi and Mohamedi Mbilu [1984] 113** was cited to cement the Learned Advocate's stance.

The Counsel faultered the reliance on Exhibit P2 (rough document for stocks) and "P3" (a tyre stock document) by the trial court to convict the Appellants. These were never signed and do not bear the Company's name or rubber stamp. It was

wrong to give much weight on such documents. Lastly, the Learned Advocate elaborated at length as to the error committed by the trial Magistrate by not giving legal reasons as to why she failed to give weight to the evidence brought by the Appellants. As rational beings, the Appellants have a right to be aggrieved. The same was laid down in the case of **Hamisi Rajabu Dibagulai V. Republic [2004] 181**. The Appellants did narrate as to the daily routine of sales, orders, delivery notes, the bin cards, daily sales sheets, closing of each day's sales, cash deposit books and the money taken to the Bank by the Cashier (Imelda or Sarah Maulidi). As though not enough Happiness Ndanshao and Eveline Mushi from the Headquarters (Arusha) had to pass through the sales then both Appellants would sign. All this evidence was not considered by the trial Magistrate.

To cap it all, the Appellant's counsel prayed in light of his submission, the court proceeds to quash the conviction and set aside the sentence.

Responding to the above submission the respondent's side quickly lamented that they are in support of the appeal. They

are forced into doing so, since the evidence adduced throughout the proceedings was insufficient to warrant conviction against the Appellants. It is obvious the evidence was supporting the offence of Stealing by Servant and not Stealing by Agent, which offence the Appellants faced in the lower court. For the offence of Stealing by Agent to stand, one is to be entrusted with goods for either safe custody, delivery etc. In the absence of the essential elements of the offence of Stealing by Agent then the Appellants could not be convicted on the charged offence. In support of the Respondent's submission, Ms. Akisa J. Mhando, Learned State Attorney cited the authority of **Christian Mbunda V. Republic [1983] TLR 340** and prayed that the Appellant's appeal has merits.

Having painstakingly gone through the submissions from both sides, I find the glaring issue in this appeal is, "whether the case against the Appellants was proved beyond reasonable doubt." The above in my settled opinion is the burning issue. It is an obvious fact that the two Appellants were charged and consequently convicted for one offence only out of the three. The same being the offence of Stealing by Agent Contrary to

Section 273 (b) of the Penal Code, Cap 16 R.E. 2002 which reads as follows: -

273 Stealing by Agent if the thing stolen in any of the following things that is to say: -

a) .....

b) "Property which has been entrusted to the offender either alone or jointly with any other person for him to retain in 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" (emphasis mine)

What then were the particulars of the offence in question? The same for ease of reference is as hereunder: -

PARTICULARS OF OFFENCE

PETER JAMES MKALAGALE and **ANNA LUTHER MKANGO** on diverse date and time between 2013 to 2016 at Kiusa area within the Municipality of Moshi in Kilimanjaro Region, did steal 461 tyres total valued at Tshs. 114,789,435/= the properties which were entrusted to them by the Company Ngiloi Ulomi Enterprises Company limited.

Glancing from the above and as properly submitted by the two sides, the evidence brought by the prosecution failed to disclose the whole aspect of entrustment of the property to the Appellants and reasons for doing so, whether for them to retain in safe custody or to apply, pay or deliver it, or any part of its proceeds, for any purpose or to any person. What the prosecution side succeeded to the largest extent as per the testimony of PW2 and PW7 is to prove that the two (Appellants) were employees, employed by Ngiloi Ulomi Enterprises in its shop at Moshi but not as Agents of the said Company. The prosecution side if at all was being guided by the charging offence then had a duty to prove the ingredients of the said offence. I borrow leaf from the case of **CHRISTIAN MBUNDA V. REPUBLIC** (Supra) which was also cited by the respondents that: -

> **"....for an Appellant to be convicted under Section 273 (b) the prosecution must prove, interalia that came into possession of the alleged stolen property as an Agent of either the real owner or special owner".**

The above was not done in the present appeal. The foregoing notwithstanding, the prosecution side did not even bother to

summon the Company's owner or Manager at the most to state whether the Appellants were entrusted with such goods as Agents or for which purpose in order to be termed the Company's Agents.

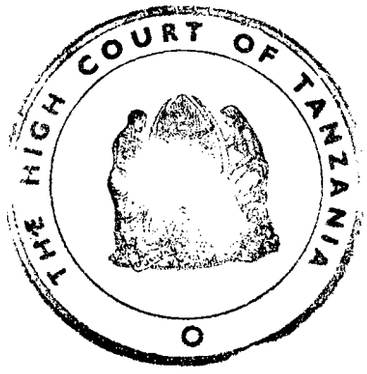
In the upshot, the evidence adduced by the prosecution side was not rooted on the offence of Stealing by Agent. It is a common and well known principle in our criminal jurisprudence that: -

> **"in criminal matters the burden of proof always lies on the prosecution and it should be beyond reasonable dout."**

The said principle is to be found in the case of **Nathael Alphonce Mapunda and Benjamin Alphonce Mapunda V. Republic** (Supra).

Conclusively, there being no evidence on the ingredients forming the offence of Stealing by Agent, the Appellants cannot have a case against them hence the trial court was wrong to have convicted them. There would thus be no need to go into the rest of the aspects raised by the Appellant's Advocate on the remaining grounds of appeal. In view

thereof the conviction and sentence imposed on the Appellants on the said offence is set aside, consequently the Appellants are released forthwith if still serving sentence. The repayment order of Tshs. 114,789,435/= to the Ngiloi Ulomi Enterprises Company Limited of 12/10/2018 following the conviction is also set aside. It follows the appeal is found to be meritorious and consequently upheld.



B. R. MUTUNGI

JUDGE

21/02/2020

Read this day of 21/02/2020 in presence of both Appellants and Miss Thabitina Mcharo (State attorney) for the Respondent.

B. R. MUTUNGI

JUDGE

21/02/2020