

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 121 OF 2018

(Arising from Kahama District Court in Criminal Case No. 55 of 2018, J.E Masesa, RM)

**MWESIGWA SEVERINE.....APPELLANT
VERSUS
THE REPUBLICRESPONDENT**

JUDGMENT

Date: of Last Order: 23/3/2020

Date of Judgment: 15/5/2020

MKWIZU, J

The appellant in this appeal is **MWESIGWA SEVERINE**. He is appealing against the decision of Kahama District Court in Criminal Case No. 55 of 2018 where the appellant was charged of stealing by agent contrary to section 273(b) of the Penal Code, CAP16 RE2002 (the Penal Code). He was convicted and sentenced to serve four (4) years imprisonment.

The brief facts are that in the year 2015 the appellant was employed by Kwema Primary school as a storekeeper. In December 2017, Pauline Mathayo, PW1 bought food for the school for the period starting from January, 2018 at a cost of 54,020,00/= and handled the said food items to the appellant-the store keeper through a ledger book. In January 2018, PW1

was informed by an informer that appellant is stealing food from the store. Assisted by PW3, PW1 inspected the store where a loss of items valued at 25,000,000/= was discovered.

The matter was reported to the police. On 24/1/2018, PW4 conducted search at the accused's resident in the presence of PW2, chairman for Korogwe Street in Malunga Ward and DW2, Stadius Simon Kamugisha. The records show that different items were found in the appellant's house including 1 bag of sugar, 3 bags of wheat flour, 2 buckets of cooking oil, receipts used to purchase of two motorcycles, sale agreement of a plot of land and appellant's personal book used to records personal transactions.

The appellant was then arraigned in court and convicted and sentenced as charged. Being dissatisfied with the decision of the trial court the appellant has come to this court with twelve grounds of appeal which essentially lay a complain that the prosecutions failure to prove the case beyond reasonable doubts.

At the hearing of the appeal the appellant was represented by Mr. Pastory Biyengo, Advocate and the respondent /Republic was represented by Ms.

Immaculate Mapunda, State Attorney assisted by Ms. Mwampimbi Liashari.

Mr. Biyengo prayed to argue the grounds of appeal jointly. He began his submission by faulting the prosecution for failure to prove the case beyond reasonable doubts. He argued that, prosecution failed to tender exhibit to prove that there existed the goods alleged to have been stolen. He contended that, Food Control Sheet tendered in court indicated the amount of food taken out of the store between 10th and 20th January 2018 before the arrest of the appellant and before the alleged theft which had no storekeeper's signature. He referred this court to the case of **Woollington V.DPP** (1935) AC 462.

Mr. Biyengo stated that, PW1, the owner of the stolen goods, failed to identify the goods which were tendered in court as exhibits. He explained that, the goods were tendered without any explanation on why they are associated with PW1 as no special mark was explained which could have differentiated the goods from other normal goods on the street.

He insisted that prosecution failed to prove the case beyond reasonable doubt. He prayed the appeal to be allowed and the appellant conviction be quashed, sentence set aside and appellant set at liberty.

On her party, Mr. Mapunda supported the appeal. Her contention was that the charge was not proved beyond reasonable doubt. She clarified that, the evidence on the record went to prove the offence of stealing by servant but not stealing by agent. It was the evidence by PW1 and PW2 that appellant was an employee of the school and not agent. Mr. Mapunda stated that, at Page 24, PW1 told the court that she bought food and stored them in the absence of the appellant and therefore it was not right to say that the appellant was entrusted with the goods. She was of the view that, prosecution was mandated to prove the charge sheet levelled against the appellant and not otherwise. Reference was made to the case of **Rajabu Shaba Sanuka V.R**, Cr. Appeal No. 461 of 2015 CAT Mwanza (unreported) cited with approval in the case of **Samwel V. Republic**, Criminal appeal no 271 of 2009. The learned State Attorney stressed that the evidence in the proceedings were not directed to prove the offence with which the appellant was charged with.

On a further note, Ms. Mapunda argued that, there are contradiction and inconsistencies in the prosecution evidence that go to the root of the matter. She said, while the charge sheet says the offence was committed on 21/1/2018, the Food control Sheet speaks of goods taken out of the store between 10th to 20th January, 2018, and the evidence adduced was to the effect that the offence was committed prior to 21/1/2018. He referred this court to the case of **Awadhi Abraham Waziri V. R**, criminal appeal No 303 of 2014 (Unreported). The inconsistencies went to the root of the case, insisted Ms. Mapunda.

Ms. Mapunda supported the complaint by the counsel for the appellant that goods tendered had no peculiar mark showing that they belong to PW1. She cited the case of **John Sayi @ Sengerema and Another V R**, Criminal Appeal No 544 of 2015 CAT Tabora (unreported) and urged the court to allow the appeal.

I have considered the submission by the learned Advocate and State Attorney and I have also gone through the proceedings and judgment of the trial court. The main issue for consideration is whether this appeal has merit.

As stated earlier in the introductory part of this judgement, appellant was charged with the offence of stealing by agent contrary to section 273 (b) of the Penal code Cap 16 R.E 2002.

For the offence to stand, the section above requires that the property (s) alleged to have been stolen must be entrusted to the accused person for either safe keeping, pay, deliver or any other purpose. Both parties have submitted in support of the appeal though on a diverse way. I think, the position of both the learned counsel for the appellant and the learned State Attorney's are justified. I will state the reasons.

Firstl and foremost, and as correctly submitted by the learned State Attorney, the evidence on records went to prove the offence of stealing by servant. It was the prosecution evidence that appellant was an employee of the Kwema Primary School as a storekeeper, where the properties were said to have been kept and later stolen. In other words, appellant was suspected to have stolen the goods/properties belonging to his employer which came into his possession on account of his employment. This was not the charge

laid against the appellant. Prosecution was bound to prove the charge and not otherwise.

Secondly, the evidence on the records failed to connect the appellant with the offence charged. According to the particulars of the offence as presented in the charge sheet, the appellant on 21/01/2018 at about 12.00 hrs at Kwema Primary school area within Kahama District in Shinyanga Region, being entrusted by Pauline Mathayo as a store keeper, stole various food items the properties of one Pauline Mathayo. The evidence brought by the prosecution witnesses failed to establish that on 21/1/2018 appellant stole the alleged goods as charged. PW1 alleged to have bought food items on 20/12/2017, she kept them in the store manned by the appellant without the appellant's knowledge and left to Bukoba for Christmas vacation. On her return, she handed over the goods to the appellant on 3/1/2018 through a ledger book.

As if that is not enough, prosecution evidence as narrated by PW1 and PW3 is to the effect that on 20/1/2018, PW1, PW3 and the appellant inspected the store in view of seeing if the goods were safe. The inspection revealed a loss

of goods itemized as 5000 kg of rice, 3000 kg of beans, 60kg of wheat flour, 45 bags of maize, 80 gallons of cooking oil and 20 bags of sugar all valued at 25,000,000/=. Appellant was interrogated and later on 21/1/2018 taken to the police. The above evidence do not point to the 21st day of January, 2018 as the date the appellant stole the said good. For these reasons therefore, it cannot be said that the prosecution managed to prove that on 21st January, 2018 appellant stole the alleged goods. In the case of **Rajabu Shabani @ Sanuka** (Supra) court of appeal faced with a similar situation had this to say at page 5 of the typed judgement:-

*"...following our decision in **Anania Turian** (Supra), this court in **Mathias Samwel V. Republic**, criminal Appeal No 271 of 2009(Unreported) categorically stated that "when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed by the accused by giving evidence and proof to that effect" In all these case conviction for rape in which evidence was similarly at variance with the charge as in the case under scrutiny, the convictions for rape were quashed"*

Moreover, prosecution tried to impress the court that appellant owned properties which are beyond his earning and therefore they were the produce of the said theft. However, as the evidence would reveal, the plot alleged to have been bought by the appellant had a sale agreement dated 15/8/2015 and the two motorcycles were bought on 19/8/2016 and 17/11/2016 respectively. The record is silent on whether there is any alleged theft committed by the appellant or any loss whatsoever in the store in question in the year 2015 and 2016 when the appellant is said to have acquired the properties mentioned above. In the case of **Simon Abongo V. Republic**, Criminal appeal No. 144 of 2005, CAT unreported it was held inter alia that

"The importance of proving the offence as alleged in the charge hardly need to be over emphasized, from the charge, the accused is made aware of the case he is facing with regard to the time of the incident and place so that he would be able to marshal his defence"

It is evident from the records that prosecution's evidence did not support the charge. This being a criminal case, prosecution is duty bound to prove the

charge beyond reasonable doubt. The burden never shift. See the cited case of **Woollington V.DPP** (Supra).

Given the shortfalls explained above, I find the appeal by the appellant having merit. I allow the appeal, quash the conviction and set aside sentence and order that the appellant **MWESIGWA SEVERINE** be release from prison forthwith unless he is held there for other lawful purpose.

It is ordered.

DATED at **SHINYANGA** this 15th **May** ,2020



E.Y. Mkwizu
E.Y.MKWIZU
JUDGE
15/5/2020