IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 54 OF 2020

(Arising from Criminal Case No. 27 of 2020 of Kigoma District Court Before: Hon. G.E. MARIKI, PRM)

SHISHIR SHYAMSINGH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

15/2/2021 & 24/02/2021

A. MATUMA, J

This is a very simple appeal (I will soon tell why I call it simple), in which the appellant was charged and convicted of stealing contrary to section 258 (1) and 265 of the Penal Code, [Cap. 16 R.E 2019].

He was alleged to have stolen **Tshs 30,000,000/=** the property of one Mohamed Enterprises (T) Ltd.

Having been convicted by the District Court of Kigoma, the appellant was sentenced to suffer a custodial sentence of twenty (20) months in jail. In addition to the said custodial sentence, the appellant was ordered to

compensate the victim (METL) the sum of **Tshs 30,000,000/=** allegedly stolen by him.

The appellant was aggrieved with the conviction, sentence and the compensation order hence this appeal with four grounds one of which was abandoned at the hearing of this appeal.

The grounds argued by the learned advocate for the appellant at the hearing of this appeal were;

i. *That, the trial resident Magistrate erred in law and in fact for convicting the appellant without the cogent evidence proved the offence beyond reasonable doubt.*
ii. *That the trial Court erred in law and fact for convicting the appellant relying on the (exhibit P4) Audition report which was none procedurally conducted.*
iii. *That the trial Court erred in law and facts for convicting the appellant by disregarding the appellant defense case and on failure to consider the principle that the appellant cannot be convicted on the weakness of defense case but on the strength of the Prosecution evidence adduced.*

At the hearing of this appeal the appellant was present in person and was represented by **Mr. Othman Katuli** learned advocate while the

Respondent had the service of **Mr. Shabani Juma Masanja** learned State Attorney.

The brief facts constituting this appeal is that; the appellant by the material time was a Branch Manager of the victim company at Kigoma Branch.

During his tenure he collected **Tshs 30,000,000/=** from one Kilahumba Kivumu (PW2) for the victim Company Mohamed Enterprises. It was on 27/1/2020. The said amount was a debt for goods sold to PW2 on credit basis. So PW2 paid his loan to the victim company Mohamed Enterprises through the appellant who was empowered by virtue of his position to collect debts from clients of the said victim company.

It was alleged that the appellant did not bank the said amount into the account of his employer and instead stole it for his own use. On the other hand, the appellant who did not dispute to have collected such amount, contended to have banked **Tshs 28,000,000/=** on the same very day and gave **Tshs 2,000,000/=** to his cashier one Juma for office expenses.

From the herein facts the appellant was arrested, charged, convicted and sentenced as herein above stated.

Arguing the first ground of Appeal, Mr. Othman Katuli learned advocate submitted that the prosecution case lacked a very vital piece of evidence which he referred to as ***"Financial Statement"***. He argued that the said

statement would have shown items like balance sheet, income statement and cash flow statement.

The learned advocate argued that such evidence would assist to reveal any deficit at the time the appellant was a Branch Manager as it would have indicated the goods and commodities that were in the hands of the appellant at the time he was a Branch Manager, the value of such goods and commodities, and the amount of money received after selling those commodities.

The learned advocate further argued that the appellant testified to have banked **Tshs 28,000,000/=** in the victim Company's account the fact which was acknowledged by the prosecution witness No 3.

Disputing the first ground of appeal, Mr. Shabani Juma Masanja argued that it is not a requirement of the law that in proving the offence of theft, the balance sheet be tendered.

He argued that even though, the prosecution tendered exhibit P2 the Bank Statement which also show the financial records of the victim Company.

The learned State Attorney agreed and in fact admitted that the appellant on the material date deposited Tshs 28,000,000/= into the victim Company's account but that such was an amount accumulated from cash sales.

As I have earlier on said this is very simple appeal. This is because it can justifiably be determined on the first ground alone as to whether the prosecution case was proved against the appellant beyond reasonable doubts as required by law. See the case of ***Said Hemed versus Republic (1987) TLR 117 (CA)*** in which the Court of Appeal held;

"In Criminal Cases the standard of proof is beyond reasonable doubts"

Again, the appeal is simple because the parties are not at issue;

i. *That, PW2 Kilahumba Kivumu was indebted more than Tshs 30,000,000/= by the victim Company in which by the time the appellant was a branch Manager.*
ii. *That, on the material date PW2 handled cash Tshs 30,000,000/= to the appellant for the victim Company.*
iii. *That, on the same very date, the appellant deposited Tshs 28,000,000/= in the victim Company's account.*

The dispute between the parties is only on whether the said Tshs 28,000,000/= which the appellant deposited into the victim Company's account was a daily cash sales or was part of the amount he received from PW2 for the victim Company.

PW3 Andrew Stephen Mafuru testified that the Tshs 28,000,000/= which the appellant deposited/banked was an amount of cash sales. He did not however account on the alleged sales as to which goods or commodities

were sold on that particular date amounting to the said banked money. The only reason which he advanced to justify that the amount was cash sales, is that when the money to be deposited is collected from debts, the one depositing must indicate the name of the customer who paid it so as to differentiate it with cash sales. This is as per gape 24 of the proceedings.

In the circumstances, I purchase and confirm the arguments of Mr. Othman Katuli learned advocate for the appellant that in the circumstances of the alleged theft, it was necessary for the prosecution to establish by vivid evidence the goods and commodities which were in the hands of the appellant, it is value and cash flow from it. From such evidence it is when it could be ascertained whether the Tshs 28,000,000/= which the appellant banked formed part of the cash sales or not. Failure so to establish leaves the appellant better positioned to state what was such amount for, than any other witness (Prosecution witnesses).

The prosecution witnesses gave nothing but speculative and conjecture evidence on the basis of the fact that the appellant in depositing the amount did not indicate the name of PW2 who gave him the money. I find no law which was infringed by the appellant for not endorsing the name of PW2 in the deposit slip so that such name could be reflected in

the Bank Statement of the victim Company's account. What was important and necessary, was for the appellant to deliver the amount to his employer by either means be it through banking or cash provided that the evidence of such delivery is established.

The appellant during cross examination by the prosecutor (Happiness learned State Attorney), explained that whenever they deposits money they use the company name and the name of the customer is only entered in the Cash book when filling entries. Looking at the Bank Statement exhibit P2 the Tshs. 28,000,000/= which the appellant banked were banked in the Company's name. I find that this explanation by the appellant during trial ought to have been credited and accepted because there was no strong evidence to the contrary. The Prosecution witnesses as I have said earlier had speculative views rather than a reality. Even if there were internal rules or practice that the name of the customer should be indicated in the deposit slip, any failure so to do does not constitute a criminal offence. Even though such internal rules if any, were not tendered in evidence for the court to satisfy itself of the internal measures against the one who abrogates them. The appellant as any other witness during trial ought to have been treated under the principle set out by the Court of Appeal of Tanzania in the case of ***Goodluck Kyando versus Republic, (2006) TLR 363*** that every witness is entitled to credence

and have his testimony accepted unless there is **good** and **cogent** reasons to disbelieve him.

In this case it were the prosecution witnesses who ought to have been disbelieved on the strength of the fact I have already stated that they had nothing but speculative views. Thus, for example; PW3 the only witness for the prosecution who tried to state that the Tshs. 28,000,000/= which the appellant banked were cash sales and not part of the debt collected from PW2 had such view merely because he did not see the name of PW2 in the Bank Statement and therefore could not differentiate it from the Cash sales as he himself stated at page 24 of the proceedings;

> *"For Kigoma Branch there was deposit of Tshs. 28,000,000/= if it is deposits for debts collected the one depositing must indicate the name of the customer* ***so as to differentiate it with cash sales"***

The learned trial Magistrate fell into a trap of this speculative views of the prosecution witnesses and convicted the appellant on such speculations when he held;

> *"I have gone through METL Bank Statement and found that all deposits into METL account had details of customers' names. This is contrary to what accused told the Court that he banked*

Tshs 28,000,000/= being part of the sum collected from KILAHUMBA".

A mere omission by the appellant to indicate the name of Kilahumba should have not been taken to rebut that such amount was from him. There should have been independent strong evidence to establish the source of such amount if the appellant was to be disbelieved.

The learned trial Magistrate thus erred in his approach of evaluating the evidence by allowing speculative views of the prosecution witnesses to affect his decision as it was held in the case of ***Materu Leiosn & J. Foya versus R. Sospeter (1988) TLR 102.***

But again, in our Criminal jurisprudence, it is wrong for the Magistrate or judge to act on conjectures and speculations in making decisions as such conjectures and speculations have no room in Criminal Trials. That was decided in a number of cases including but not limited to ***Mohamed Mureso versus Republic (1993) TLR 290.***

I had also time to rule out in the case of **Linael d/o Venance Komba and Another versus Republic**, Misc. Economic Application NO. 4/2020 High Court at Kigoma that;

"Speculations and conjectures in Criminal trials have not at any time been the business of the Court".

In the circumstances, I agree with Mr. Othman Katuli learned advocate for the appellant and hold that the **Tshs 28,000,000/=** deposited by the appellant into the victim Company's account were part of **Tshs 30,000,000/=** he collected from PW2 as per his own positive evidence at page 42 of the proceedings that;

> *"I know Kilahumba... On 27.1. 2020..... I collected from him 30,000,000/=. Upon arrival at the office I gave Tshs 2M to (Juma) my cashier and deposited 28 M in the bank".*

This piece of the defense evidence cannot be rejected lightly merely because at the time of the deposit, the name of PW2 was to be endorsed provided that it is not in dispute that such amount was in fact banked.

It would have been successfully challenged had there been positive evidence to the contrary as to where did it exactly came from (its source) be it from mathematical evidence or direct evidence, be it oral or documentary. In the absence of such evidence, the explanation by the appellant regarding the source of that money prevails.

Again, I am satisfied with the defense evidence that the **Tshs 2,000,000/=** was spent on official expenses as it was testified by the appellant himself; *"The 2 M was for official expenses".* This is because he was not cross examined on that fact.

With the herein observations, I allow the first ground of appeal to the effect that the prosecution case was not proved beyond reasonable doubts against the appellant. He was wrongly convicted and sentenced.

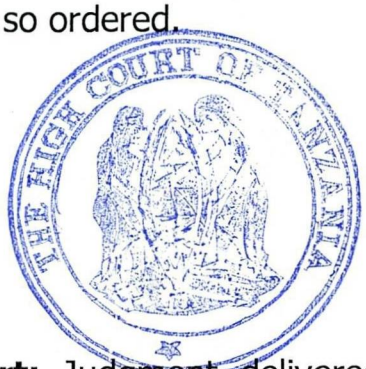
I therefore quash his conviction and set aside the sentence of imprisonment as well as the compensation order.

I order his immediate release from custody unless held for some other lawful cause.

Having so found, I see no need to dwell into the remaining grounds of appeal.

Right of appeal to the aggrieved party of this decision is explained subject to the requirements of the relevant laws governing Criminal Appeals to the Court of Appeal of Tanzania.

It is so ordered.



A. MATUMA

JUDGE

24/2/2021

Court: Judgment delivered this 24th day of February, 2021 in the presence of the Appellant in person and his Advocate Mr. Othman Katuli, and in the presence of Edina Makala learned State Attorney for the Respondent/Republic.

Sgd. A. MATUMA

JUDGE

24/2/2021