IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA.

DC CRIMINAL APPEAL NO. 27 OF 2020

(Arising from Criminal Case No. 91 of 2019 of Tunduru District Court at Tunduru)

SAID RAJABU @ NAKAMO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last order: 22/02/2021

Date of Judgment: 17/03/2021

JUDGMENT

I. ARUFANI, J.

The appeal at hand has its genesis from Criminal Case No. 91 of 2019 of Tunduru District Court (herein referred as the trial court) whereby the appellant was charged and convicted in the offence of stealing contrary to section 258(1) and 265 of the Penal Code, Cap 16 R.E 2019. The appellant was sentenced to serve five years in jail. Having being aggrieved by the decision of the trial court the appellant appealed to this court. Although the appellant came to this court with two grounds of appeal but his advocate prayed to abandon the second ground and argued the first ground which read as follows:-

1. *That, the trial court erred in law and facts by convicting the appellant in a charge of steeling without any proof.*

During hearing of the appeal the appellant was present through video conference after being linked from Songea Prison and he was enjoying the service of Mr. Kaukuya Yusuph Kaukuya, learned advocate. The respondent was represented by Mr. Hamimu Nkoleye, learned Senior State Attorney. Before going to the merit of the appeal, the court has found it is pertinent to state the background of the matter at this juncture for proper appreciation of the issues involved in the matter.

The appellant was the member of Namiungo Amcos Board which deals with buying crops from peasants. The appellant was appointed to buy cashew nuts at Nangolombe station which is one of Namiungo Amcos from 22/10/2018 to 16/12/2018. The cashew nuts purchased at Nangolombe station in the stated period of time was said to be 47,900 kilograms. However, it was stated it is only 46,292 kilograms of cashew nuts which was transported to Namiungo Amcos warehouse and said there was a loss of 1,608 kilogram.

After the stated loss being discovered it was agreed the appellant and his clerk one Mustapha Mustapha would have paid the stated loss

equally. The appellant was required to pay the value of the loss of 804 kilogram of the cashew nuts which was Tshs. 2,653,200/= and his clerk was required to pay the same amount and were required to pay the said loss by 18th March, 2019. The clerk paid the loss he was required to pay on the agreed date but the appellant failed to pay the loss he was required to pay. Having failed to pay the loss the appellant was taken to the police station and thereafter to the trial court where he was charged with the offence of stealing 804 kilogram of cashew nuts valued Tshs. 2,653,200/= the property of Namiungo Amcos.

In arguing the appeal the counsel for the appellant told the court that, in proving the offence leveled against the appellant the prosecution called four witnesses. He said none of the witness said the appellant and his clerk stole the alleged cashew nuts. He said what was said by the prosecution's witnesses is that there was a loss of 1,608 kilograms of cashew nuts occurred at Nangolombe station where the appellant and his clerk were assigned to buy cashew nuts.

He argued that, loss in business of buying crops like cashew nuts is a common phenomenon as its weight used to decrease if it has stayed for long time. He went on arguing that, as it was not stated what was the cause of the alleged loss the trial court erred in convicting the

appellant with the offence of stealing cashew nuts. He submitted that, as it was stated there was an agreement on how the appellant and his clerk would have paid compensation of the stated loss and after seeing the appellant had failed to pay the agreed loss Namiungo Amcos was require to institute civil case in court against the appellant to enforce their agreement and not to charge him with a criminal offence of stealing cashew nuts.

He argued further that, as the appellant was charged with a criminal offence the prosecution was required as provided under section 3 (2) (a) of the Evidence Act, Cap 6 R.E 2019 to prove the charge laid against the appellant beyond reasonable doubt. He said it was not proper for the prosecution to divide the loss of 1,608 kilograms and assumed the appellant stole 804 kilograms and his clerk stole 804 kilograms. He said it was also improper for the prosecution to fail to join the clerk in the charge of stealing cashew nuts laid against the appellant or call him as a witness in the case to explain to the trial court what happened and caused the alleged loss.

He submitted that, the act of dividing the loss of 1,608 kilograms of cashew nuts into two and required the appellant to pay the value of 804 kilograms of cashew nuts and his clerk to pay the value of 804

kilograms of cashew nuts and the act of not joining the clerk in the charge or calling him to testify before the trial court raised a great doubt to the charge laid against the appellant. The counsel for the appellant prayed the court to base on the above stated reasons to allow the appeal and set the appellant at liberty.

In response the learned State Attorney opposed the appeal and argued that, it is not true that all prosecution's witnesses said there was agreement for payment of loss of the cashew nuts. He said the only witnesses said there was an agreement for paying the loss of the cashew nuts was Shaibu Shaban Hamisi (PW1) and no other witness said there was such an agreement. As for the argument that the prosecution's witnesses did not say the appellant stole the cashew nuts but they said there was a loss the learned State Attorney said that is not true.

He argued that, as indicated at page 3 of the judgment of the trial court Daimu Ghaibu Chalumbe (PW3) said he took his cashew nuts to the Nangolombe station to sell and when he went to the said station on 7th November, 2019 to look for his payment he didn't find his name in the list of people who were supposed to be paid. He said PW3 said he didn't find his cashew nuts at the buying station and it was not put in

the record of the buying station that he took his cashew nuts there. The learned State Attorney said that was enough to established malice on the part of the appellant.

He said the argument that there was an agreement to pay the loss that was a way of settling the matter before taking legal action so that the people who were claiming for their money would have been paid their money. He went on saying that, as the appellant agreed to pay the loss but failed to honour his promise that caused a legal action to be taken against him. He said even the appellant said in in his defence that, the cashew nuts alleged was stolen was transported to Namiungo Amcos warehouse and mentioned the registration number of the motor vehicle and the name of the driver transported the same.

The learned State Attorney said that shows the appellant know the said cashew nuts and although he said it was transported to the Namiungo Amcos warehouse but there is no issue note or any evidence adduced before the trial court by the appellant to support his defence. He said the appellant failed to call the driver transported the cashew nuts to support the evidence he adduced before the trial court. As for the argument by the appellant's counsel that the charge of stealing was not proved and what was proved is the loss of cashew nuts the learned

State Attorney said that is not true. He said the people who were supposed to be paid at the station where the appellant was buying cashew nuts were not paid their money and their names were not in the list of the people who were supposed to be paid. He said that established the occurrence of the offence of stealing the cashew nuts.

He argued further that, the proceedings of the trial court shows the appellant did not cross examined the prosecution witnesses to establish what happened at his station of work was a loss of cashew nuts and not theft. He said failure to cross examine the prosecution witnesses shows he agreed with the evidence adduced by the prosecution witnesses. The learned State Attorney based on the above stated reasons to pray the court to dismiss the appeal of the appellant and confirm the conviction entered by the trial court and the sentence imposed to him.

In his rejoinder the learned counsel for the appellant argued that, it is not true that it is only PW1 said there was an agreement entered for the appellant to pay the loss as the proceedings of the trial court shows all the prosecution witnesses said there was an agreement for the appellant to pay the loss. He argued that, even if it was said by PW1 alone that there was such an agreement that was enough to establish

there was an agreement for the appellant to pay the loss. As for the argument that the name of PW3 was not in the list of the people who were supposed to be paid he said there is no list of the people who were supposed to be paid in the station where the appellant was working tendered in the trial court as evidence.

He went on arguing that, the offence of stealing was not committed against PW3 but against Namiungo Amcos. He said there is nowhere PW3 said his cashew nuts was stolen by the appellant or his clerk. As for the argument that the appellant said the cashew nuts was transported to Namiungo Amcos warehouse the counsel for the appellant said the learned State Attorney has not read the proceedings of the trial court. He said Nangolombe station was a substation which after buying cashew nuts was required to transport the same to the Namiungo Amcos warehouse for auction. He said that shows the cashew nuts were transported to Namiungo Amcos warehouse and not that it was stolen by the appellant.

He concluded his arguments by stating that, generally there is no evidence to show the appellant stole the alleged cashew nuts and the allegation levelled against the appellant is a mere suspicion. He submitted that, even the trial magistrate stated in the judgment of the

trial court that the appellant was suspected he stole the cashew nuts. In fine he prayed the court to allow the appeal and set the appellant at liberty.

After giving due consideration to the arguments made to the court by both sides and after going through the record of the trial court the court has found the issue to determine in this appeal is whether the prosecution proved the charge laid against the appellant to the standard required by the law which as provided under section 3 (2) (a) of the Evidence Act is beyond reasonable doubt. To the view of this court the above issue cannot be determined without going through the evidence adduced before the trial court. I understand it was stated in the case of **Ali Abdallah Rajabu V. Saada Abdallah & Others** [1994] TLR 132 that an appellate court is not required to interfere with the finding of a trial court based on fact except where there is an indication that the trial court failed to take some material point or circumstances into account and arrived to an erroneous conclusion.

While being guided by the position of the law stated in the above cited case the court has found pertinent to start by seeing what were supposed to be proved in the charge of theft laid against the appellant

which is preferred under sections 258 (1) and 265 of the Penal Code. Section 258(1) of the Penal Code provides as follows:-

> *"258(1). – A Person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently convert to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing".*

It is crystal clear from the above quoted provision of the law that, to constitute the offence of stealing under that provision, the following ingredients must be established; Firstly it must be established the accused person has fraudulently taken anything capable of being stolen or has converted to the use of any person other than the general or special owner thereof anything capable of being stolen. Secondly it must be proved the intention of the accused person is to deprive the person his permanent ownership of the thing or good taken.

In other words and as stated in the case of **Mshewa Daudi V. R**, Criminal Appeal No. 50 of 2018, CAT at DSM (unreported) the *actus reus* which is taking of a thing or good stolen and *mens rea* which is the intention to deprive the owner of the thing or good stolen must be proved. The similar position was stated in the case of **Christian Mbunda V. R**, [1983] TLR 340 where it was held that, it is elementary

rule of law that in order to convict an accused of theft the prosecution must prove the existence of *actus reus* which is specifically termed as asportation and *mens rea* or *animus furandi*.

Back to the appeal at hand the court has found the evidence adduced before the trial court by all prosecution's witnesses who testified as PW1, PW2, PW3 and PW4 and the defence made by the appellant shows that, there is no dispute that the appellant was assigned to buy cashew nuts at Nangolombe station in the period alleged the offence of stealing cashew nuts was committed by the appellant. The dispute is whether the appellant stole the alleged cashew nuts or he caused the loss of the cashew nuts alleged was stolen by him.

The court has found that, as rightly argued by the learned counsel for the appellant there is no any prosecution's witness said the appellant stole the alleged cashew nuts. All prosecution witnesses said it was found there was a loss of 1,608 kilograms of cashew nuts at the station where the appellant and his clerk were buying cashew nuts and the appellant and his clerk agreed to pay the stated loss. It was stated by the prosecution's witnesses that, the clerk of the appellant paid half of the value of the lost cashew nuts and the appellant failed to pay the

other half which was Tsh. 2,653,200/=. The act of the appellant's failure to pay half of the value of the lost cashew nuts caused the matter to be taken to the police station and thereafter to the court where he was charged with the offence of stealing the alleged cashew nuts.

The court has found the argument by the learned State Attorney that it is only PW1 said there was an agreement for the appellant to pay the value of the lost cashew nuts is not supported by the evidence adduced before the trial court. The court has found it is not only PW1 who said there was agreement for the appellant to pay the lost cashew nuts but all four prosecution's witnesses said there was an agreement for the appellant and his clerk to pay the lost cashew nuts and the appellant failed to abide to the agreement that is why he was charged with the offence of stealing.

The court has considered the argument by the learned State Attorney that the evidence of PW3 proved the offence of stealing levelled against the appellant as he was not paid his money for the cashew nuts he sold at the station were the appellant and his clerk were buying the cashew nuts and his name was not in the list of the people who were supposed to be paid but found it was not sufficient to prove the offence of stealing levelled against the appellant. The court has

arrived to the above finding after seeing that, as rightly argued by the counsel for the appellant there is no list of the people who sold their cashew nuts at the station where the appellant was working and were supposed to be paid at the appellant's station of work which was adduced before the trial court to show the name of PW3 was not in that list. Failure to adduce the said list before the trial court caused the court to find the evidence of PW3 did not prove the appellant stole the alleged cashew nuts.

It is the view of this court that, a mere finding that there was a loss at the working station of the appellant and even the agreement made for the appellant and his clerk to pay the lost cashew nuts were not enough to prove the appellant stole the alleged cashew nuts. The prosecution was required to go father and prove beyond reasonable doubt that the appellant took the said cashew nuts with the intension of depriving the owner their permanent ounership. The above view of this court is drawing an inference from the case of **Simon Kilowoko V. R**, [1989] TLR 159 where it was held that:-

> *"Admission that there may have been loss does not amount to an admission to have stolen the money. The prosecution has to prove beyond reasonable doubt that the appellant committed the offence charged."*

The court is in agreement with the argument by the learned State Attorney that the agreement stated was entered for the appellant to pay the loss of the cashew nuts was a way of settling the matter and it does not mean legal action would have not been taken against him. However, the court is of the view that, before the appellant being convicted in the offence of stealing the trial court was required to satisfy itself that the ingredients of the offence of stealing stated in the cases of **Mshewa Daudi** and **Christian Mbunda** cited earlier in this judgment had been proved beyond reasonable doubt by the prosecution.

The court is also in agreement with the argument made by the learned State Attorney that, failure to cross examine a witness presupposes a party is not disputing what was said by a witness. However, the court has found in the case at hand there is nothing said by the prosecution witnesses which can be said as the appellant failed to cross examine the prosecution's witnesses about it, it can be taken is incriminating the appellant with the offence of stealing laid against him.

The court has found that, as rightly argued by the counsel for the appellant the act of dividing the amount of the lost cashew nuts to the appellant and his clerk and required them to pay the same equally and the act of not calling him as a witness in the case of the appellant raised

great doubt to the prosecution's case. The court has come to that finding after seeing that, it was not made clear whether the alleged loss was caused by both the appellant and his clerk or by either of them. Therefore the court has found there is a doubt as to whether the loss was caused by the appellant or his clerk or by both of them.

The court has found as rightly argued by the counsel for the appellant, since the appellant and his clerk had agreed to pay the loss and as the appellant had failed to fulfil the agreement he made the right course to take would have been to institute a civil suit in court against him to enforce the agreement he made and not to charge him with a criminal offence of stealing.

It is because of the reasons stated hereinabove the court has found the charge of stealing laid against the appellant was not proved to the standard required by the law which is beyond reasonable doubt. Consequently, the appeal is hereby allowed, the conviction entered against the appellant is quashed and the sentence of five years imprisonment imposed to him is set aside. The appellant be released forthwith if he has no other lawful cause of detaining him in the prison.

It is so ordered.

Dated at Songea this 17th day of March, 2021

I. ARUFANI

JUDGE

17/03/2021

Court:

Judgment delivered today 17th day of March, 2021 in the presence of the appellant in person and is also represented by Mr. Aggrey Ajetu, learned advocate who is also present and Ms. Jeneroza Montano learned State Attorney is representing the respondent. Right of appeal to the Court of Appeal is fully explained to the parties.

I. ARUFANI

JUDGE

17/03/2021