

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC CRIMINAL APPEAL NO. 44 OF 2020

(Originating from Tabora District Court in Criminal Case No. 68/2019)

STEVEN STANLEY @ JUMA KISANDU ----- 1st APPELLANT

ELIAS EZEKIEL ----- 2nd APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGMENT

19/03/2021 & 25/02/2021

BAHATI, J.:

This is an appeal arising from the impugned judgment of the District Court of Tabora in Original Criminal Case number 68/2019, the appeal is against the conviction and sentence of the accused persons herein named the appellants' **Steven Stanley @ Juma Kisandu** and **Elias Ezekiel**.

The appellants lodged separate petitions but the same were consolidated into one since they originated from the same criminal case.

In their case, the 1st appellant was convicted and sentenced for the offence of Stealing by servant c/s 258(1) and 271 of the Penal Code and Conspiracy to Commit an Offence c/s 384 of the Penal

Code whereas the second appellant was convicted and sentenced for the offence of Conspiracy to commit an Offence c/s 384 of the Penal Code.

The first appellant marshaled six grounds of appeal couched thus: -

- 1. That, the case for the prosecution was not proved beyond reasonable doubt against the appellant.*
- 2. That, PW5 did not cogently establish whether the appellant was his employee, this is more so considering the testimony of PW3 (The Zonal Manager of YARA (T) Ltd) whose general value (sic) is that YARA (T) LTD employed the appellant o (sic) connect PW5 and farmers.*
- 3. That, the items allegedly conspired to be stolen as alleged in the particulars of the offence in the second count, the items impounded as per exhibit P1 (the certificate of seizure), and those testimonies by PW4 and PW5 to have been stolen, were not specified to be subject of the charge in the first count.*
- 4. That PW5 did not establish ownership of the items allegedly stolen. Neither did he identify the items impounded from Kapufi's shop (Exhibit P4) both at the pre-trial and in the trial stage, since PW6 tendered exhibit P4 in the absence of both PW4 & PW5.*
- 5. That, the appellant was not found in possession of the stolen properties to show whether he came in possession of the same on the account of his alleged employer (who also did not*

identify them) as required by section 271 of the Penal Code, Cap.16 [R.E 2019].

- 6. That, Kapufi in whose shop the alleged stolen items were seized was not summoned to testify how he came in possession of the same and considering the fact that he denied involvement in any wrongdoing in the testimony of PW5.*

On the other hand, the second appellant leveled eight grounds of appeal as follows:-

- 1. That, the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law.*
- 2. That PW5 did not cogently establish that the appellant was his employee.*
- 3. That, the items allegedly conspired to be stolen as alleged in the particulars of the offence in the second count, the items impounded as per exhibit P1(the certificate of seizure), and those testified by PW4 and PW5 to have been stolen, were not specified to be subject of the charge in the first count.*
- 4. That PW5 did not establish ownership of the items allegedly stolen. Neither did he identify the items impounded from Kapufi's shop (exhibit P4) both at the pre-trial and in the trial stage, since PW6 tendered exhibit P4 in the absence of both PW4 & PW5.*
- 5. That, the appellant was not found in possession of the stolen properties to show whether he came in possession of the same on the account of his alleged employer (who also did not*

identify them) as required by section 271 of the Penal Code, Cap. 16 [R.E 2019].

- 6. That, Kapufi in whose shop the alleged stolen items were seized, was not summoned to testify how he came in possession of the same and considering the fact he denied involvement in any wrongdoing in the testimony of PW5.*
- 7. That, the learned trial magistrate erred in law to treat the offence of conspiracy to commit an offence in respect of the appellant in the second count as a standalone offence while, at law, the same cannot ground conviction without the appellant being charged with actually convicted in the offence which is alleged to have been conspired (Stealing by a servant in this case) thus, the doctrine of common intention was wrongly invoked upon the appellant.*
- 8. That, the cautioned statement of the appellant (exhibit P9) which learned trial magistrate relied upon to ground conviction was made upon expiry of the time prescribed by section 50 & 51 of the Criminal Procedure Act, Cap. 20 [R.E 2019] and that no inquiry was conducted to establish its voluntariness.*

Wherefore the appellants pray that his appeal be allowed, conviction be quashed and the sentence of 5 years set aside and order for their immediate release from prison.

When the appeal was called for hearing, both appellants appeared in person under legal representation of Mr. Kanani Chombala learned advocate, and on the other hand, the respondent

Republic was represented by Mr. Deusdedit Rwegira learned State Attorney.

Mr. Chombala submitted that, according to the statement of offence brought in court, it alleged that the appellants were employed at a shop of Benard Majambele trading as Mkitanga Agrovat and they stole on the 1st count TZS.42,318,700/= and TZS.3,700,000/= but they all rejected to have been employed by the claimant.

That, the trial magistrate raised three controversial issues, that the claimant's business is styled in its name as a business enterprise but no document being certificate or business license, VAT, TIN, or licence from TFDA was presented to prove the existence of such a business.

That during the proceedings, PW5 stated that he had a company namely Mkitanga Fire Engineering and that was exhibited in exhibit P1 a delivery, not from Athwal Transport and Timber Ltd. This was the only document that was used to prove that the claimant had a shop. The exhibit is in variance with charge as nowhere in the proceedings the PW5 stated that Mkitanga Fire Engineering refers to Mkitanga Agrovat as per the charge.

To support his argument on the variance between charge sheet and evidence he cited the case of ***Vumi Liapenda Mushi v. R Criminal Appeal 2016 CAT (Unreported)***. Mr. Chombala argued that the trial magistrate turned to be a prosecution witness rather than being a judge by introducing a fact that was not adduced by any witness

saying that he should not take time to discuss the difference between the two.

Mr. Chombala added that there was no proof of loss because no auditor was hired to ascertain the value of the alleged stolen goods out of that, he expected the owner to come with an inventory book to state the value of stolen items, he stated further that PW5 failed to justify ownership of the alleged properties and loss incurred.

Also, Mr. Chombala argued that the trial magistrate admitted in Court a cautioned statement of the accused which was taken outside the time prescribed by the Criminal Procedure Act, Cap. 20.

Objecting to the appeal Mr. Rwegira for the respondent submitted that, the case against the appellants to the essential ingredients were proved beyond reasonable doubt.

Mr. Rwegira submitted that it was proved by PW1 and PW2 that the appellants were rendering service at Majambele's shop, the prosecution was not proving employment, the issue was whether they were rendering service at the Majambele's shop.

On the second ground, Mr. Rwegira submitted the counsel alleged that business licence was not tendered if Majambele had no business licence does not make the accused steal.

On the issue of chain of custody, Mr. Rwegira submitted that there was no breach because the same never changed in hands, PW6 was the one who discovered the items and he is the one who tendered the same.

Mr. Rwegira added that the prosecution's duty was to prove the charge brought against the appellants, and he admitted that in composing the judgment the trial magistrate raised the issue of loss, the only remedy in circumstances like this is to remit back the file to the trial magistrate to recompose the judgment if the court finds that the irregularities are very cogent, it can order a retrial.

To sum up Mr. Rwegira submitted that, there was no variance between the charge sheet and the evidence adduced; a case was proved throughout the beginning.

In rejoinder, Mr. Kanani reiterated that the courts should not assume facts that were not presented to it through evidence; also PW6 confirmed that he was not a custodian of the exhibits.

Having considered the submissions of both parties, as this is the first appellate court, I am allowed to step into the shoes of the trial tribunal and re-analyze the evidence that was adduced. So I did and my findings are elaborated.

To start with the first count a simple definition of the offence is that, stealing by a servant simply means stealing money or goods through employment. To establish the offence of stealing by servant various aspects must be considered to arrive at a fair decision.

In my analysis, I will consider the submissions made by the learned counsels together with those aspects of the law so that the case comes to a fair ending. I will not go with the grounds of appeal as arranged in sequence rather I will analyze the points that I found to be holding the merits of this appeal.

As submitted by the appellants, the prosecution did not present evidence connecting the 1st appellant and the employment of Majambele Agrovat nor the stolen goods recovered from him. What the prosecution relied upon to prove employment is the delivery note which was signed by the appellant but in the title, it displayed the name of another company called Majambele Fire Engineering.

Though Mr. Rwegira denied that the prosecution was not bound to prove 1st appellant's employment I strongly differ with him because the offence of stealing by the servant is provided for under section 271 of the Penal Code, Cap.16 [R.E 2019] emanates from employment.

Prosecution witnesses confirmed that the 1st appellant was an employee the fact which was strongly denied by the appellant for the reason that there were no documents to prove his employment by the claimant, there is, therefore, doubt whether the appellant was an employee of Majambele Agrovat.

Having gone through the record of the trial court I strongly agree with Mr. Kanani that, the evidence that was adduced in court about the appellant's employment is in variance with the charge sheet and the trial magistrate assumption that Majambele Agrovat is the company with Majambele Fire engineering was wrong because it was not proved in evidence that the two names refer to one business.

Another thing that I noticed from this case is that one important person in whose shop stolen items were found was neither charged for stealing nor called as a witness to state how he came by the properties but instead the same properties were used as exhibits in the appellant's case without calling a person who was found in possession. That being the case the trial magistrate should have given the appellant benefit of doubt by holding that the prosecution had not proved its case.

*As to the second count which involved both appellants, I find it that conviction in respect of the offence of conspiracy was not necessary because the actual offence was said to have been committed. In **John Paulo @ Shida & Another, Criminal Appeal No. 335 of 2019 (Unreported)** it was held that:*

“It was not correct in law to indict or charge the appellants with conspiracy and armed robbery in the same charge because, as already stated, in a fit case conspiracy is an offence which is capable of standing on its own.”

Taking into account the nature and seriousness of the offence that the appellants stood charged and basing on the above-stated reasons, I find the appeal with merit and consequently allow it. The appellant's conviction and sentence imposed on them are hereby set aside.

I, therefore, order the immediate release of the appellants from prison unless they are held therein for other lawful reasons.

Order accordingly,

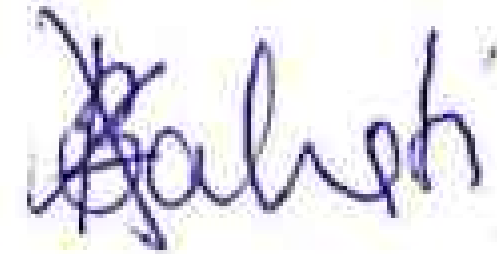


A.A BAHATI

JUDGE

25/03 /2020

Judgment delivered under my hand and seal of the court, this
25th day March, 2021 in the presence of the Appellants.

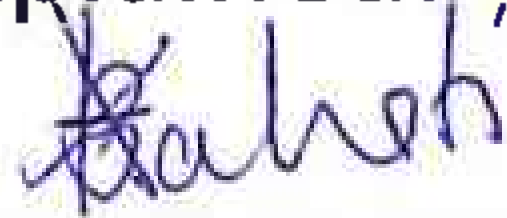


A. A. BAHATI

JUDGE

25/03/2021

Right of appeal is fully explained.



A. A. BAHATI

JUDGE

25/03/2021

