IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC. CRIMINAL APPEAL No. 04 OF 2021

(Arising from Criminal Appeal No. 09 of 2019 of Nyamagana District Court, Originating from Urban Primary Court Criminal Case No. 1345 of 2020)

LAMECK AMOSI..... APPELLANT

VERSUS

REVINA KAGUMISA .....RESPONDENT

JUDGMENT

22nd April & 26th May, 2021.

TIGANGA, J.

Before Urban Primary Court of Nyamagana District, Mwanza Region, Lameck Amosi stood charged with one offence of stealing contrary to section 258 (1) and 265 of the Penal Code (Cap 16 RE 2002).

According to the charge sheet which instituted the case, he was charged to have stolen cash money Tshs. 2,719,000/= the property of one Revina Kagumisa, the respondent in this Appeal. The said offence was committed at Lumumba Street in Nyamagana District, Mwanza Region.

After full trial which involved two prosecution witnesses and one defence witness, the accused, now the appellant, was found guilty and convicted before that court and was sentenced to a conditional discharge and pay the money i.e Tshs. 2,719,000/= (two millions, seven hundred and nineteen thousands only) which he was found guilty to have stolen.

The decision aggrieved the accused person, who appealed against it before the District Court of Nyamagana in Criminal Appeal No. 22 of 2020 challenging the conviction and sentence, in which he filed four grounds of appeal as follows:

1. That, the trial court erred to rely on the exhibits whose source is not known neither reliability nor its authenticity
2. That, since there were evidence that the money in question belonged to the employer that the trial Court misdirected itself to find that the money belonged to the respondent – a co employee of the appellant.
3. That the trial court erred on point of law when it failed to consider the evidence of the appellant anyhow and thus denied him a fair trial,

4. That since the appellant was given goods for sale, and failed to account for the goods allegedly given to him, the trial Court erred on point of law and facts to find that the accused stole any money from the complainant.

Having deliberated on the grounds of appeal and the arguments submitted by the learned counsel for the parties, the appellate District Court dismissed the appeal on the ground that, in criminal cases the complainant is always the republic, and either police officers or state attorney (public prosecutors) appears and prosecute the case, while the informant becomes a mere witness.

Further to that, he held that the evidence tendered before the trial Court managed to prove the case beyond reasonable doubt. He relied on the principle of overriding objective, as reflected in Article 107A of the Constitution of the United Republic of Tanzania, 1977, and found that the case was properly instituted and the money allegedly stolen is the property of the company which acts through people, and the person who complained is the accountant of the company, therefore is an official who is the proper person to handle the money.

The appellant was aggrieved by the decision of the appellate District Court, he appealed to this court for a further search of justice. In such endeavour, he filed three grounds of appeal as follows;

i. That, after finding that the source of exhibit could not be known, the appellate magistrate erred in law when he failed to find that the offence of theft could not be established in the absence of the cogent, firm and strong evidence as to the amount of money alleged to have been stolen.

ii. That, since the appellate District Court found that the owner of the alleged stolen money wasn't the respondent/original prosecutor, and that no cash money was stolen by the appellant, the appellate Magistrate misdirected himself on point of law to invoke and apply article of the constitution to make good the variation between the evidence and charge sheet.

iii. That the appellate Magistrate misdirected himself on point of law and fact when as the first appellate court failed totally to re evaluate the evidence and make its own findings, but instead never considered the defence of the appellant and also failed to give reasons why he did not agree with the appellant's defence.

He asked the decision of the appellate District Court, to be quashed and set aside, the appellant be held innocent and any other order (s) that the Honourable court may deem appropriate to grant in the circumstance of this case.

By the order of this court, parties were ordered to argue this appeal by way of written submissions on the filing schedule fixed by the court. In filing the submissions, the appellant was represented by Mr. Baraka Makowe, learned Senior Advocate, while the respondent was represented by Mr, Bruno Mvungi, learned Advocate.

Parties filed their respective submissions as ordered by the court. In the submission in chief filed by Mr. Makowe, the appellant submitted that, although he filed three grounds of appeal, he at the hearing abandoned the third ground, therefore argued the fist and second grounds only. Submitting in support of the first ground of appeal, he submitted that the money allegedly stolen was ascertained from the exhibit which the appellate District court found to be improperly inserted in the record of appeal, therefore having found that the said exhibit was not properly admitted then it is deemed to be not part of the record, therefore could not be relied upon to found the conviction of the appellant. It was Mr.

Makowe's submission that, without that evidence, the prosecution case remained unproved beyond reasonable doubt, the fact which left the appellant innocent.

Regarding the second ground of appeal, which concerns the issue of what was stolen and the owner i.e whose property, he submitted that, according to the charge sheet, the respondent stood as the sole owner as she was the complainant and there was no evidence offered to prove that she was authorised by the "owner" of the property to prosecute the case and she never proved that, she was the special owner in the eyes of the law.

He submitted that in the case of theft the issue of ownership has been emphasized several times. In the case of **Leonard Zedekia Maratu vs R** (CAT) CR. Appeal No.86 of 2005, Mwanza Registry for example, it was held *inter alia* that, in theft cases, the owner of the money or any property allegedly stolen must testify to prove that he actually owned the property allegedly stolen.

According to Mr. Makowe, the said Revina Kagumisa did not show any letter proving that she was authorised to prosecute the case on behalf

of the employer to prove the loss or theft, contrary to the principle set by this court in the case of **Edward Shilinde vs Abel Mandwa**, PC. Cr. Appeal No.54/2016 Mwanza Registry. The court nullified the proceedings held at the trial court and the subsequent proceedings in the appellate court on the ground that the respondent who was just a member of the society initiated and prosecuted the proceedings at the trial court without mandate.

According to the counsel, there was also an issue of what was stolen, while the accused, now the appellant is said to have stolen cash money, the evidence produced before the trial court did not show that there was any cash money entrusted to him. Indeed the evidence shows that the accused was entrusted with goods for sale, but the said evidence, did not give description of each item and its value.

He submitted that in the absence of such evidence, the principle in the case of **Yohana Paulo vs The Republic**, CAT CR Appeal No.281/2012 Mwanza Registry (unreported) insists that, the case cannot be taken to have been proved beyond reasonable doubt.

In the reply, filed by Mr. Mvungi, learned Advocate for the respondent, although he conceded that the documentary exhibits were not procedurally admitted, the shortcomings were just procedural technicalities which should not be allowed to stand in the road to justice. According to him, as the appellant had not disputed to know the said documents, he therefore submits that the ground of appeal lacks merits as the appellant intends to benefits from his own wrong under the shield of procedural technicalities.

In his further submission against the appeal, Mr. Mvungi submitted that, the respondent reported the offence at the Nyamagana Police station since she was the one who gave the goods to the appellant and the appellant was supposed to sale them and bring the money to the respondent, and eventually to account them back to the company. Therefore, she was a special owner in the eyes of section 258(2)(a) of the Penal Code Cap 16 of the laws.

He distinguished the authority in the case **Leonard Zedekia Maratu vs R**, the case of **Edward Shilinde vs Abel Mandwa**, and the case of **Yohana Paulo Vs The Republic**, (supra), he said the facts in the above referred cases are not similar to the fact in this case.

Further to that, he submitted that the decision did not base on the documentary evidence only, it also based on the oral evidence of PW1 and PW2. Therefore he prayed the appeal to be dismissed with costs.

In rejoinder, the counsel for the appellant reiterated what he submitted in the submission in chief by way of elaboration and in the end asked the appeal to be allowed.

That being a summary of the records and the submissions filed by the parties in support and against the appeal, I find it pertinent that, before going to the merits of the grounds of appeal, I should point out the law giving the guiding principle governing the proof of Criminal Cases before the Primary Court, that is regulation 1(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations. G.Ns. Nos. 22 of 1964 and 66 of 1972, which provides as follows;

> *"1(1) Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence, unless the accused admits the offence and pleads guilty, except;*
>
> *(a) any fact which the relevant law or rule 2 declares to be the responsibility of the accused to prove;*
>
> *(b) (i) the matters set out in rule 3; or*

(ii) the facts which the court may presume (rule 4) unless the presumption is rebutted.

Regulation 5 provides that the standard of proof in criminal cases before the Primary Court is beyond reasonable doubt as follows;

> *(1) In criminal cases, the court must be satisfied beyond reasonable doubt that the accused committed the offence.*
>
> *(2) If, at the end of the case, the court is not satisfied that the facts-in-issue have been proved the court must acquit the accused.*

In this appeal, the offence for which the appellant was charged before the Primary Court is theft under section 258 and 265 of the Penal Code. In this offence, the prosecution needs to prove the following ingredients;

(a) That, the accused person did fraudulently and without claim of right take or convert anything capable of being stolen.

(b) That, the property was of another person, that other person being a general or special owner,

(c) That, the accused person converted the said property to the use of the person other than the general or special owner,

(d) That, the taking was with intent of permanently depriving the general or special owner.

This means the charge sheet must indicate the items stolen, and the owner of the item. In this case the appellant was charged to have stolen money, from the respondent and converted it for his own use.

In the case of **Maliki George Ngendakumana Vs The Republic.** Criminal Appeal 353 of 2014 (CAT) Bukoba (Unreported), the principle is that, in criminal cases the prosecution duty to prove the case is on two folds, one, that the criminal offence was committed, two, that it was committed by the accused person.

The evidence therefore was supposed to prove that, the money which was stolen belongs to the respondent and the same was stolen by the appellant. However, there was no direct evidence proving that, the appellant stole the money, the available evidence is that the appellant being an employee of Shayona Glocery was entrusted with goods to supply to various customers but when he returned, he did not return the some of the goods which were entrusted to him, and submitted no money. When he was asked, the appellant said he sold the said goods but he was

promised to collect the money in the future, but even in that said future, he did not submit the money realised from the sale to his employer.

The respondent relied on the documents showing that the goods were sold by the documents which showed that the goods were entrusted to appellant and he sold them but did not submit the money realised from the sale. The said documents were found in the case file, but there is no reflection or indication in the proceedings that the said documents were tendered and admitted in evidence as exhibits. That means, the documents were irregularly inserted in the case file without following procedure for admission of exhibits.

In law, the procedure of tendering exhibit is provided in the case of **Robinson Mwanjisi and Others Vs. The Republic**, [2003] TLR 218 where it was stated that:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out Reading out document before they are admitted in evidence is wrong and prejudicial."*

As earlier on indicated, the documents relied upon did not follow the procedure indicated above. Now what should be the remedy in the circumstances like this, the answer is in the decision of the Court of Appeal of Tanzania in **Robert. P. Mayunga and Another vs. The Republic,** Criminal Appeal No. 514/2016, CAT, Tabora, in which it was held *inter alia* that;

> *"It is settled law in our jurisprudence which is not disputed by the learned Senior State Attorney that documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being expunged from the record of the proceedings."*

With the above highlighted shortcomings, the documents could not be used as evidence, and in the absence of the said documents which prove that the appellant was entrusted with the said goods, and that he sold the said goods and obtained the money which he did not submit to the owner, it remain doubtful as to whether the appellant stole the goods which were entrusted to him, or the money realised from the sales. Lack of that important evidence on record, makes the connection on how the appellant came into possession of the money allegedly stolen by him before he stole the same, lacking.

Regarding the second grounds of who was the owner of the money allegedly stolen by the appellant, as earlier on indicated that the charge sheet must mention the owner of the property allegedly stolen. In this case, the respondent Revina Kagumisa was mentioned to be the owner of the money stolen. Although it was not elaborated before the trial court how did she become the owner of the money which apparently alleged to have obtained form the sales of the goods which belongs to Shayona Grocery, it was during the appeal, when it was elaborated that She is a special owner.

In law the term special owner is defined by section 258 (2) of the Penal Code Cap 16 (supra) to mean;

> *"...any person who has lawful possession or custody of, or any proprietary interest in, the thing in question".*

Now the issue is whether the respondent meets the conditions indicated above? From the evidence it has not been proved that, the respondent was in lawful possession of the stolen property, or that the same was in her custody or she had any proprietary interest in the stolen goods or money. That means, there is no proof that she was a general or special owner of the money, was the cashier or an accountant, she is not

even a manager, leave alone the director or proprietor of the business and there is no evidence that she was authorised to do so.

Furthermore, the evidence shows that, the money was of the company, this means the evidence adduced before the court was at variance with the charge. In the case of **Mohamed Abubakar vs The Republic,** Criminal Appeal No. 273 of 2013 CAT-Arusha it was held that once the charge is at variance with the evidence, it is obvious that the prosecution could not prove the charge they preferred.

Since it has been proved that the money had its owner, that owner was supposed to be called to testify to prove the ownership of the alleged stolen money or goods. That important witness was not called to testify. In the case of **Azizi Abdallah v The Republic** [1991] TLR 71 at page 72 where under holding (iii) thereof it was stated:-

> *"...the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

That said, I find the prosecution failure to call the owner of the money to entitle the court to make adverse inference against the prosecution case.

I have pointed out herein before a number of doubts inherent in the evidence of the prosecution, and that the same have not been cleared. The consequences of these kind doubts is articulated in the case of **Abuhi Omary Abdallah & 3 Others vs The Republic,** Criminal Appeal No. 28 of 2010 CAT Dar es Salaam it was held that;

> *"...where there is any doubt the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of doubt of doubts."*

The doubt in relation to the ownership of the said money which has not been cleared ought to be resolved in the favour of the appellant, the doubts regarding the items stolen whether its goods or money is also unresolved. All these doubt ought to have been resolved in the favour of the appellant. In the fine and having reasoned as hereinabove, I find the appeal to be meritorious, the judgment of the trial Court is quashed and sentence is set aside, so is the judgment of the appellate District Court. I consequently substitute thereat, the acquittal of the appellant.

It is so ordered.

DATED at **MWANZA** on this 26th May 2021.

J. C. Tiganga

Judge

26/05/2021

Judgment delivered in open chambers in the presence of the appellant in person, who is also represented by Mr. Baraka Makowe, learned Advocate and Mr. Bruno Mvungi learned counsel for the respondent. Right of appeal explained and guaranteed.

J. C. Tiganga

Judge

26/05/2021