

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA
CRIMINAL APPEAL NO. 116 OF 2020

(Originating from Criminal Case No. 42 of 2019 of District Court of Mtwara)

THE DIRECTOR OF PUBLIC PROSECUTION..... APPELLANT

VERSUS

**GODFREY MICHAEL MWANVONGO @ Godfrey
Gabriel.....RESPONDENT**

JUDGMENT

Hearing date on: 28/4/2021

Judgment date on: 7/6/2021

NGWEMBE, J:

The Director of Public Prosecution was aggrieved with a judgement of the trial court (District Court) upon acquittal of the accused/respondent from the accusations of stealing by servant contrary to section 258 and 271 of the Penal Code Cap 16 R.E. 2002.

The genesis of this appeal originates from the accusations tabled against the respondent who is known by three different names to wit; Godfrey Michael Mwamvongo @ Godfrey Gabriel Mwalukwa @ Gabriel Godfrey Mwaluko on 24th July, 2017 to 10th December, 2017, being a sales officer of

G & B Soap Industries Ltd, Mtwara office, did steal TZS. 202, 644, 400/= property of the industry. Upon being so arrested, the respondent was arraigned in court charged accordingly. The prosecution lined up fifteen (15) Witnesses and sixteen (16) exhibits to establish and prove a prima facie case against the respondent. In defense, the accused/respondent was alone who denied generally on the involvement of stealing the complainant's money.

At the end of trial, the trial court, found the prosecution to have failed to prove the case against the accused to the standard required by law, hence acquitted him forthwith. Such acquittal aggrieved the Republic, hence this appeal clothed with one grievance to wit; *"the trial magistrate erred in law and facts by stating there was a variance between charge and evidence as it is curable"*

In the cause of hearing this appeal, parties agreed to address this court by way of written submissions. In a nutshell, the learned State Attorney, argued that the prosecution dutifully proved the offence against the accused/respondent to the standard required by law. Referred this court to the case of **Christian Mbunda Vs. R, (1983) T.L.R. 340**, where three key elements were established namely: - 1. The offender is the servant or employee; 2. The thing stolen is the property of his employer; and 3. The offender did in fact steal the said property.


Proceeded to argue that the respondent was an employee of G & B Soap Industries Ltd and this was not disputed by the respondent himself together with PW12 and exhibit 11.

Argued further that, the properties were proved to be of the employer as per exhibit p4, p5 & P6. Thus the Prosecution proved the element of ownership of the alleged stolen properties. The last element is whether indeed the respondent did steal the alleged properties. To justify his argument, referred this court to the case of **Mussa Mwaikumba Vs. R, (2009) T.L.R. 307** which dealt with essential elements of the charge sheet, whereby the accused person must know it.

The learned State Attorney rested by submitting that there were no variances between the evidence adduced in court and the allegations in the charge sheet. Prayed this court to allow the appeal and find the respondent liable to the offence charged, hence convict him and sentence according to law.

In reply, the learned advocate Rainery Songea argued quite forcefully, by rightly, citing section 3 (2) (a) of the Evidence Act, which places the burden of proof in criminal cases to the shoulders of the prosecution. Rightly, added that since this court is the first appellate court, it has a duty to reevaluate the whole trial court's evidence before arriving into the just conclusion.

Submitted further that, the accusations of the respondent were related to stealing of money to the tune of TZS. 202,644,400/=. Distinguished such allegations with the evidences testified in court, which all prosecution witnesses alleged that the Respondent did steal properties not money as stated in the charge sheet.



Referred to PW1 who testified that, after audit, they found loss of company commodities valued at TZS 202,644,400/=. Added that the whole prosecution evidences suggest stealing of commodities not money. Referred this court to the case of **Paulo Minja Vs. R, Criminal Appeal No. 304 of 2017** and in the case of **Michael Gabriel Vs. R, Criminal Appeal No. 240 of 2017**. Also referred into the case of **Justine Kakuru Kasusura @ John Laizer Vs. R, Criminal Appeal No. 175 of 2010**. All those cases were dealing with proving the charge sheet with evidences from the prosecution.

At the end, the learned advocate invited this court to reevaluate the evidences adduced at trial court and find if same satisfied the required standard of proof to lead into conviction of an accused person.

I find the invitation by the respondent's advocate to reevaluate the trial court's evidence is accepted and this court being the first appellate court, I find it is responsible do so as per the Court Appeal guidance in the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226 of 2014** (Unreported) where the Court of Appeal held:-

"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the first appellate court, to not only summarize but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about"



This being the current legal requirement in our jurisdiction, and this court being the first appellate court, I think, reevaluation of the whole evidence of the trial court, is inevitable.

Following the above guidance, the evidence of PW1 as per pages 12 &13 of the proceedings was related to auditing of company commodities in different stores at Mtwara. Those stores were under custody of the respondent, the total values of those missing commodities were at TZS 202,644,400/=.

The evidence of PW2 was simple, that on 20/8/2017 after receipt of an order from the respondent, he parked the required commodities and sent them to Mtwara as per the respondent's order. Another order was made on 7/10/2017. At the same time PW3 witnessed the breaking of doors of the stores of the company at Mtwara and auditing of commodities therein.

The testimony of PW4 was related to number of commodities found in the stores at Mtwara as per page 26 of the proceedings and was the one who determined the value of missing commodities to the tune of TZS. 202,644,400/=. The rest of the prosecution witnesses likewise, were related to the missing commodities and steps taken by the company toward the respondent.

With deep consideration of the available evidences, I find certain facts are undisputable. First, the respondent procured temporary employment of eleven months equal to one year less one month, with the complainant G & B Soap Industries Company Ltd. Exhibit P11 speaks louder that he was

employed effective from 12th July, 2017 to 11th June, 2018. His daily activities were sales and marketing of the companies' products. Second, the respondent was responsible to order certain quantity of products from the head quarter of the company and sale them. Third, the auditing of the companies' stores at Mtwara under the respondent the revealed missing commodities, which had a value of TZS 202,644,400/= . Fourth, the missing commodities were entrusted and under custody of the respondent. Thus, if they were missing, obvious the respondent knew where they were and or knew how they went missing.

Considering further, on the prosecution evidences and critical review of the tendered exhibits, I find no doubt they all related to loss/missing properties under custody of the respondent as opposed to stealing money of the employer as per the charge sheet.

The charge sheet is clear like a brightest day light, as quoted hereunder:-

"Stealing by Servant; Contrary to sections 258 and 271 of the Penal Code"

Particulars of offence

"Godfrey Michael Mwamvongo @ Godfrey Gabriel Mwalukwa @ Gabriel Godfrey Mwaluko, on between 24th day of July, 2017 and 10th December, 2017, being Sales officer at G & B Soap Industries Limited Mtwara Office did Steal Tanzanian Shillings two hundred and two million six hundred forty-four thousand four hundred, Tshs. 202, 644, 400/= only, the property of the said G & B Soap Industries Limited"


Obvious the contents of the charge sheet and its particulars, the offence indicates that the respondent did steal money of the employer as opposed

to commodities bearing similar value of money. According to the charge sheet, the evidences from the prosecution, ought to point out the involvement of the respondent in stealing such amount of money as opposed to stealing commodities valued TZS 202,644,400/=. However, in the whole trial, the prosecution evidences were related to stealing commodities of the employer. What does this mean in law?

It has been repeated now and then by this court and by the Court of Appeal that, charge sheet is a cornerstone and foundation in any criminal case before a competent court of law. The prosecution witnesses are invited in court to prove what is alleged in the charge sheet. This position was pronounced quite strongly in the case of **Isack Mathayo Macha Vs. R, Criminal Appeal No 24 of 2017** where the Court held:-

"It must be underscored that the complaint is which lays the foundation of a formal charge. Subsequently, the entire evidence paraded by the prosecution in its totality must point to the guilty of the accused beyond reasonable doubt. Where the evidence is not in support of the charge that clouds the prosecution case with a doubts and the benefit must be given to the accused person"

Even the learned State Attorney, argued quite strongly that the stolen properties were of the employer without amplifying types of those properties and their quantities . Proceeded further to argue *"the evidences of PW1, PW2, PW4 & PW5 & PW11 all proved that all of items which were stolen were the properties of G & B Soap Industries Ltd"* Unfortunate, such argument was in supported the contents of stealing properties/goods as



opposed to the contents of the charge sheet, which particularized stealing money.

The learned defense counsel Mr. Songea in his written submission, referred this court to the case of **Paulo Minja** (Supra) where the Court held:-

"It is a settled position of law that the charge and evidence must be consistent so as to give the accused a fair trial. So what happened when the charge sheet varies with the evidence?"

In respect to this appeal, all prosecution witnesses testified on theft of properties/commodities of the employer equivalent to the value of TZS 202,644,400/=, while the charge sheet was purely on theft of money. It means the prosecution witnesses were proving stealing of properties contrary to what is provided for in the charge sheet.

Notably, the duty of the prosecution is to bring evidences to prove what is alleged in the charge sheet. In the case of **Sylivester Stephano Vs. R, Criminal Appeal No. 527 of 2016** (unreported) the Court held:-

"When there is a failure of the prosecution to link evidence and charge sheet same may not lead into conviction".

I think, it is now settled in our jurisdiction that when the evidence does not prove what is alleged in the charge sheet, a prima facie case will not be established. This position is backed by the decision of the Court of Appeal in the case of **Salum Rashid Chitende Vs. R, Criminal Appeal No. 204 of 2015** (unreported) and in the case of **Mathias s/o Samweli Vs.**

R, Criminal Appeal No 271 of 2009 (unreported), where the court held:-


"When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place".

Obviously the prosecution in this appeal did not prove what was alleged in the charge sheet. There was no evidence from the prosecution linking the accused with stealing of money but missing of goods/commodities owned by the complainant.

Undoubtedly, a prudent prosecutor would observe the trend of its evidences and immediately ask the court to amend the charge sheet before closure of its prosecution case. The purpose of amendment is to align up the evidences and the charge sheet. The prosecution evidence must always prove what is alleged in the charge sheet. Similar position was arrived in the case of **Michael Gabriel** (Supra), where the court held:-

"In particular circumstances of this case, it was necessary to amend the charge because the evidence did not support the charge as regards the place at which the offence was committed. However, that was not done. The effect of the omission was to water down the prosecution evidence. Where, as a result of the variance between the charge and evidence, it is necessary to amend the charge but such amendment is not made, the offence will remain unproved"

This point likewise, was considered by the trial court at pages 31 to 34 of the judgement where the trial magistrate discussed at length on the variance of charge sheet and evidences therein. According to the available




evidences, the prosecutor ought to charge the respondent by particularizing the alleged stolen goods/properties equivalent to the amount of TZS 202,644,400/=. As it is, I tend to agree with the learned counsel Mr. Songea that the prosecution missed two opportunities, first to amend the charge sheet with a view to align with the intended evidences; and two to bring evidences in line with the contents of the charge sheet.

In totality and for the reasons so stated, I find no valid reason to depart from the decision of the trial court. Accordingly, I proceed to dismiss this appeal for lack of merits.

I accordingly Order.

Dated at Mtwara in Chambers this 7th day of June, 2021



P.J. NGWEMBE

JUDGE

07/6/2021

Court: Judgment delivered in chambers this 7th June, 2021 in the presence of Mr. Ndunguru Senior State Attorney for the Appellant and Mr. Stephen Lekey, Advocate for the respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

07/6/2021