THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 72 OF 2018

(Original Criminal Case No. 3 of 2017 before Rungwe District Court at Rungwe)

THE REPUBLIC ..... APPELLANT

VERSUS

MOSES MWIMBEGE KIBONA ..... 1ST RESPONDENT

ISRAEL ANANGISYE MWAKYUSA..... 2ND RESPONDENT

JUDGMENT

Date of last order: 07/09/2021
Date of Judgment: 14/09/2021

NGUNYALE, J.

The Republic as the appellant herein was aggrieved with the decision of the trial Court (Rungwe District Court) which acquitted the respondents namely **MOSES S/O MWIMBEGE KIBONA** and **ISRAEL s/o ANANGISYE MWAKYUSA** in offences of Conspiracy to commit an offence c/s 384 and stealing by servant c/s 271 both of the Penal Code Cap 16 R:E 2019. The appellants advanced two grounds of appeal which reads;-

1. ***The trial Magistrate erred in law and in fact for acquitting the respondent without considering the evidence adduced by prosecution witnesses.***
2. ***The trial Magistrate erred in law and in fact by entertaining a fake advocate to represent the respondent during trial.***

The appellant was ably represented by Ms Rosemary Mgeni learned State Attorney. The learned State Attorney abandoned ground number two, she proceeded to argue ground number one only. In support of the first ground, she submitted that the trial Court erred in law and fact to acquit the respondents without considering strong prosecution evidence in support of the offences of conspiracy and stealing by servant. The employer of the respondents testified and he said that the 1st respondent was pump attendant and the 2nd respondent was pump attendant and collecting sales at BP Filling Station Tukuyu, after collecting money he was preparing sales report and to bank money. After banking money, he was sending report to PW1. The witness testified in Court, sales report and bank statement were tendered without objection or cross examination which object evidence of PW1 and PW2. The testimony of PW3 is to the effect that the respondents admitted to have been employed and the 2nd respondent admitted to be responsible with collecting money and banking. The said caution statement was not objected. He referred the

Court to the case of **GEORGE MAILI KEMBOGA VS. R**, Criminal Appeal No. 327 of 2013 Court of Appeal of Tanzania at Mwanza which stated;-

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."*

The respondents did not ask questions thus they admitted the prosecution evidence. 1st respondent denied to have been working with the said filling station, second respondent admitted to be employed. The State Attorney submitted that the 1st respondent testified false evidence. The judgment of the trial Court shows that the magistrate acquitted the respondents saying that theft occurred but the respondents had no knowledge of keeping money thus money were lost. Theft was proved against the respondents.

The respondents could not attend their trial besides being served thrice through alternative service in local circulating newspapers on account of section 381 (1) and (2) of The Criminal Procedure Act Cap 20 R: E 2019. The appeal has been heard in their absence, likewise it is decided in their absence.

The central issue which needs to be answered is whether the offences were proved beyond all reasonable doubt the cardinal principle in criminal cases? The appellant in her submission was of the view that both counts

were proved. The trial Court erred to enter acquittal against the respondents. the testimony of PW1 and PW2 was accepted without objection and cross examination, also the caution statement as tendered by PW3.

The respondents were charged with two counts. The first count was of conspiracy, it is necessary to consider the ingredients of conspiracy; -

> *"It is a trite law that for an offence of conspiracy to be proved two ingredients must be proved, first, there must be an agreement by two or more persons and second, the agreement must be for doing an unlawful act or doing lawful act by unlawful means (see **R V. MATTAKA & OTHERS (1971) 1 EA 495 and KAREB KIONDERE V. R**, Criminal Appeal No. 122 of 2004, High Court of Tanzania at Dar es Salaam (un reported)."*

I had time to read thorough the prosecution evidence and the findings of the trial Court. There is no evidence which establish any agreement between the first and second respondent. The testimony of PW1, PW2 and PW3 could not establish that the two had any form of agreement towards commission of the alleged offence. The allegations levelled are that they had common intention to commit the offence. The illegal act has not been proved to be satisfied that all ingredients existed. In the case of **JOHN PAUL @ SHIDA AND ANOTHER VS R, Criminal Appeal No. 335 of 2009 Court of Appeal** (unreported) it was held;-

"conspiracy is an offence in its own right, it has own ingredients which must be proved, these are an agreement of more than one person to do unlawful or a lawful act by unlawful means and the person charged must be part of the agreement. All ingredients must exist in order to prove a charge of conspiracy."

Therefore, the trial Magistrate was right when he stated in his judgment;

"... I have careful gone through out the prosecution evidence to assess the evidence which proves conspiracy between the two accused in commission of the offence of stealing by agent. In fact, there is no even a single word which implicates the common intention between the two accused persons. PW1 and PW2 just told this Court that the two suspects were their employees, DW1 with a position of msimamizi Mkuu and DW2 a boss of the station with duty to deposit money in bank. In their whole evidence there is no evidence as to how the cash were flowing from the pump attendants to the final person for depositing to the bank."

It is without doubt that the first count was not proved beyond reasonable doubt because common intention was not established to form the basis of attracting conviction against the first and second respondent to the offence of conspiracy. The testimony which the appellant alleged that was not disputed by the respondents was not proving conspiracy at all in respect of both ingredients. Therefore it serves no purpose as far as conspiracy is concerned.

The second count the respondents were charged with the offence of Stealing by servant contrary to section 271 of the Penal Code Cap 16 R: E 2019. The important issue to be answered here is whether there was stealing by servant? In answering this issue it is necessary to refer to the provision which establish the offence section 271 of the Penal Code;-

> *"Where the offender is a clerk or servant and the thing stolen is the property of his employer or came into the possession of the offender on the account of his employer, he is liable to imprisonment for ten years."*

According to the provision above the important ingredients are two, **one** the offender is a clerk or servant of the owner of the property and **two**, he came into possession of the stolen property on account of his employment.

There is evidence from PW1, PW2 and PW3 that the first and second respondents were employed by PW1 the owner of the Tukuyu Filling Station. The first respondent denied to be the employee of the said employer. His testimony was overridden by the prosecution case as correctly held by the trial Court. The respondents were employed by PW1 the owner of Tukuyu Filling Station.

The last issue to be answered is whether the respondent committed the offence of stealing by servant? The prosecution case has been formed by

three witnesses PW1 the accountant of BP who was dealing with accountancy in Tukuyu Filling Station. He alleged that he discovered loss caused by the respondents. He tendered his report and bank statement. The proceedings during tendering the said documents as admitted on 6th March 2017 reads in part;-

> *"I have the reports that have been attached with bank slips thereon. I pray to tender them as exhibits.*
>
> *Court: The reports are shown to the advocate for defence and accuseds.*
>
> *MR. Benedict, Advocate; we do not object.*
>
> *Court: Admitted, collectively as exhibit P1*
>
> *PRM signed*
>
> *06.03.2017"*

Unfortunately, as the proceedings appears the content of the exhibit were not read for the parties especially the respondents to understand the contents of the said exhibit P1.

PW2 was the owner of the said filling station, he alleged that theft occurred and was occasioned by his employees the first and second respondents. His testimony based on the findings of PW1. The findings of PW1 are based on exhibit P1. The issue is whether exhibit P1 was properly before the Court? The proceedings above are very clear that the contents of the documents were not read in Court. In the case of **ISAYA JOHN V.**

THE REPUBLIC, Criminal Appeal No. 167 of 2018, Court of Appeal of Tanzania at Bukoba it was stated;-

> *"while it is true that, the PF3 was not read over to the appellant after it was cleared for its admission the same deserves to be expunged in the right of what we said in the case of* ***ROBINSHON MWANJISI VS. REPUBLIC*** *(Supra). We thus expunge Exh P '1' from record."*

Under the above position exhibit P1 is not worth of forming basis of conviction, it deserves to be expunged from the records as I hereby do. Therefore, the testimony of PW1 and PW2 cannot ground conviction unless it has been corroborated.

The remaining evidence is of PW3 B 7929 D/SGT Mwambiga a police officer who alleged that he recorded statement of the respondents. he said that the respondents admitted to have committed the offence charged per exhibit P2. The Court has warned itself on the possible dangers of relying to the caution statement alone to ground conviction taking into account that PW1 and PW2 were witnesses with direct interest of whom also corroboration was necessary.

The evidence of the said police officer suggests that he was responsible with investigation of the case, in his testimony he said in part 'I informed the OC- CID that the 1st accused recognized the 2nd accused as being one of his colleagues.' During cross examination PW3 said he did not know

exactly how the 1st respondent handled the money to the second respondent. The statement that he did not know movement of money means he cannot be reliable to prove the offence of stealing by agent or corroborate the testimony of PW1 and PW2. The fact that he has elements which suggests that he investigated the case, he cannot be also carrying reliable evidence to ground conviction or to corroborated the testimony of PW1 and PW2. In the case of **OMARI MOHAMED MARUKULA VS. THE REPUBLIC, Criminal Appeal No. 195 of 2018 High Court of Tanzania at Dar es Salaam** it was said that it is not advisable for a police officer who investigated the case to record the cautioned statement. In cementing the position the learned Judge quoted the case of **NJUGUNA KAMANI & 3 OTHERS V. REGNAM (1954) EACA** 316 which provides;-

> *"..it is the duty of every judge and magistrate to examine with closest care and attention, all the circumstances in which a confession has been obtained from an accused person,.... it is in advisable, if not improper, for the police officer who is conducting the investigation of a case to charge and record cautioned statement."*

Therefore, the Court hesitates to rely on the testimony of PW3 to ground conviction as correctly avoided by the trial Magistrate. In the end result the appeal is bound to fail.

In the final result this Court is satisfied that verdict as pronounced by the trial Court was justified. The appeal is hereby dismissed entirely for lack of merit.

D. P. Ngunyale
Judge
14/09/2021