

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CRIMINAL APPEAL NO. 02 OF 2021

(C/f Criminal Appeal No. 36 of 2020, District Court of Moshi at Moshi, Original Criminal Case No. 141 of 2020, Uru Primary Court)

PASCHAL ALEX MUSHI 1ST APPELLANT
JANETH RAPHAEL CHUWA 2ND APPELLANT

VERSUS

CHRISTOPHER ESTOMI MOLLEL RESPONDENT

JUDGMENT

MUTUNGI .J.

On 20th September, 2020, about 13:30Hrs at Kilimanjaro Coffee Plantations in Uru-Shinga within Moshi District in Kilimanjaro Region, the appellants were alleged to have unlawfully stolen raw coffee worth TZS 230,000/= from the respondent's farm. They were thus charged with and acquitted of the offence of theft contrary to section 265 of the **Penal Code Cap 16 R.E. 2002**, (now R.E. 2019) by Uru Primary Court (the trial court). The respondent through the window of appeal went to the District Court of Moshi at

Moshi (first appellate court) which set aside the trial court's decision convicted the appellants and sentenced them to pay a fine at the tune of TZS 100,000/= or six months imprisonment. Aggrieved with the decision, the appellants preferred this appeal with one ground of appeal as hereunder: -

"That the learned appellate court magistrate erred in law and fact in substituting an acquittal of the appellants by Primary Court for conviction while the offence was not proved beyond reasonable doubt."

During hearing of this appeal, the appellants appeared in person and unrepresented, whereas the respondent was represented by Ms. Patricia Patric, learned counsel.

On the outset the appellants argued the respondent failed to prove the case against them beyond reasonable doubt. They submitted that SM1 Christopher Estomi Mollel testified that he saw the appellants stealing raw coffee but did not identify them and went forth to notify the security guards on duty (SM2 Petro Chuwa and SM3 Bryton Francis). According to the security guards they caught the appellants red handed inside the farm picking raw coffee while on patrol which fact contradicts with SM1's testimony

that he was the one who notified them. More so, SM1 was not at the crime scene but he alleged he was the one who took the alleged seized sack of raw coffee to the police and later tendered the same in court. He did so while there was neither a seizure certificate nor independent witness to confirm if the sack of raw coffee tendered was indeed what the appellants were allegedly caught with.

The appellants went on submitting, it was the 2nd appellant who was first caught while looking for her kids who had not returned home from herding goats in the farm. When she screamed the 1st appellant, (her husband) responded, only to be arrested and charged. However, this evidence was never challenged hence their conviction premised on evidence not proved to the required standard in criminal jurisprudence. Worse still was that the first appellant was threatened, that this would be the end of his employment with the respondent's company.

It was further argued that the respondent's evidence was tainted with discrepancies. These were on time and identification which were dully considered by the trial court but disregarded by the first appellate court. The appellants made a further note to the effect that at the hearing before the first appellate court, they had raised an

objection on two limbs. The legality of the appeal specifically on the appropriateness of the parties in the two files and the applicability of section 33(3) of the Magistrates' Court Act. The same was never entertained by the first appellate magistrate. They finally prayed their appeal be allowed and the first appellate court's decision quashed.

In reply, Ms. Patricia submitted on the alleged objection raised by the appellants before the 1st appellate court that, the same was never raised at the trial court, the 1st Appellate Court as cross appeal or in the current appeal as one of the grounds of appeal. Thus, this being the 2nd Appellate Court, there is no room to entertain the same. To cement her argument, the learned counsel cited the case of **Omary Kassim Mbonde Vs. The Republic, Criminal Appeal No. 175 of 2016, CAT at Dsm (unreported)** which laid down the principle that a second appellate court cannot adjudicate grounds of appeal which were not raised and determined in the 1st appellate court. Be as it may, parties are bound by their pleadings as stated in the case of **Swilla Secondary School Vs. Japhef Petro, Civil Appeal No. 362 of 2019 (unreported)**. In view thereof the

appellants are barred from raising the objection at this stage.

Ms. Patricia went on arguing, **section 37(2) of the MCA** provides for adherence to substantive justice and disregard of technicalities. On that angle although section 33 (3) of MCA requires an authorised person to sue on behalf of the corporate body, but the same does not mention that there has to be filed a board resolution or a power of attorney proving who is authorised to sue. In that regard, the respondent introduction at the beginning of the trial that he appeared on behalf of the Kilimanjaro Plantation Limited, which was never disputed. This introduction sufficed for him to represent the Company.

it was Ms. Patricia's further argument, the contradictions between SM1, SM2 and SM3 never occasioned injustice as the record clearly shows although SM1 saw people stealing coffee around 13:00hrs while was exercising, it wasn't until 16:50hrs when the appellants were apprehended by SM2 and SM3 while on patrol. SM2 confirmed to have been notified by SM1 of the coffee thieves in the farm, thus the difference in time as to when they were exactly seen and apprehended is minor and does not go to the root of the case. To cement this argument, the learned advocate

cited the case of **Abasi Makono Vs. The Republic, Criminal Appeal No. 537 of 2016, CAT at Arusha (unreported)** where the Court of Appeal observed, not every contradiction or discrepancy in evidence is fatal unless it is so fundamental and goes to the root of the case.

Ms. Patricia further averred in the event, if the contradictions are found to be fatal, this court has to give due regard to other factors such as the testimonies of SM-2 and SM-3, the exhibits and still pictures taken at the crime scene which were tendered at the trial court. The pictures (Exhibit "A2") place the appellants squarely at the crime scene hence they were properly identified. Exhibit "A1" (a sack of fresh coffee) could not have been picked in a short time to plant the same on the appellant. Exhibit "A2" reveals both the appellants appear in clothes contrary to what the first appellant had testified to have found the second appellant with no clothes. She added SM2 and SM3's testimonies deserve credence as no reason was established to discredit their credibility as key witnesses. They had tried to get a neutral witness but this was not possible.

Regarding lack of seizure certificate, Ms. Patricia argued, a certificate of search and seizure cannot be filled and

signed by anyone but by a police officer in charge of a police station or police officer with authority from a police officer in charge. This is provided for under section 38 of the Criminal Procedure Act, however, in the circumstances of this case, such document was not applicable. In that regard, the case against the appellants was proved at the required standard which warranted their conviction. Ms. Patricia prayed the appeal be dismissed with costs for want of merit. There was no rejoinder.

After painstakingly going through the subordinate courts' records and parties' submissions, while bearing in mind that this being a second appeal, the Court is not required to re-evaluate the evidence of the trial court or assume the role of the first appellate court by dealing with factual issues save where there is mis direction and non-direction. The same was the position of the Court of Appeal in the case of **Deemay Daati Vs. Republic Criminal Appeal No. 80 of 1994** which quoted with approval the case of **Salum Mhando Vs. Republic [1993] TLR 170** stating that: -

"Where there are misdirections and non-directions on the evidence a court of second appeal is entitled to look at the relevant evidence and make its own findings of fact."

The controversy in the instant appeal is raised when the trial court observed, the case was not proved at the required standard by law, i.e. beyond reasonable doubt and acquitted the appellants and whereas the 1st appellate court after re-evaluating the evidence on record concluded the appellants were indeed involved in the alleged theft and punished them accordingly. The issue for determination is therefore as raised in this appeal that: -

Whether the 2nd appellate court erred in convicting and sentencing the appellants after finding that the case against them was proved at the required standard.

Before determining this issue, the appellants claimed, the 1st appellate magistrate ignored or disregarded the objection they had raised in the first appeal. Essentially that there was no proof of the respondent suing on behalf of Kilimanjaro Plantation Limited c/s 33 (3) of the MCA. I took liberty of perusing the 1st appellate record and observed, such objection was never raised but rather submitted in their submission after the respondent had already submitted. In my considered view the fact that it was unfounded it is the reason the respondent herein abstained from responding on the same.

That apart, from the trial court's record, the respondent appeared representing the Kilimanjaro Plantation Limited which was also reflected at page one of the judgment that;

"Katika ushahidi wake SM1 alieleza kwamba yeye ametumwa kama mwakilishi wa kampuni na kusimamia kama mlalamikaji..."

As rightly argued by the respondent, this fact was neither objected to through a cross appeal nor by a preliminary objection at the trial court or during the filing of the 1st appeal. In the case of **Nurdin Musa Wailu Vs. Republic Criminal Appeal No. 164 of 2004, CAT at Dar es Salaam (unreported)** the Court of Appeal held: -

"...usually the Court will look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."

On the same footing, it is the settled view of this court raising this issue at this stage is a mere after thought and this court cannot entertain the same, was not a ground of appeal in the first appellate court.

Turning back to the merits of the appeal, section 258 of the penal Code defines theft to mean;

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

In the appeal at hand, it was proven that a company of four people were first seen by SM1 stealing raw coffee from the alleged farm. SM1 notified SM2 and SM3, (the security guards) who caught the appellants red handed with raw coffee, (Exhibit "P1"). They were also photographed at the crime scene and the still pictures were admitted as exhibit "P2". In their defence, they claimed were found on the alleged farm looking for their children who were late from herding goats. Their defence carried no weight as there was no proof of the same from any other witnesses since looking for lost children is a serious matter which under normal circumstances, they would have needed help or rather notified the respondent that they had entered the plantation (farm) in search of their children.

The appellants also alleged when they were apprehended, SM2 and SM3, security guards took a sack

of raw coffee from their vehicle placed it in front of them and took a photograph. However, as rightly argued by the 1st appellate court's magistrate, picking fresh coffee is a process which takes time thus, SM2 and SM3 could not have picked such a big amount as seen in exhibit 3 while on patrol in their vehicle. The 1st appellate court also observed that there were no grudges between the appellants and the respondent to the extent of framing them or fabricating a case against them.

In the circumstances, all elements of the offence of theft as elucidated in the provision I have cited, fits well with the appellants' actions. SM1 had spotted people in the plantation picking up raw coffee who immediately notified SM2 and SM3 that there were intruders on the plantation. While on patrol these two did witness people stealing raw coffee, on arrest the first and second appellants were snabbed. They were found in possession of the raw coffee in a sack. To put things right and on record, still photographs were taken. It is beyond all shadow of doubt that these were stealing the raw coffee from the alleged plantation.


The contradictions mentioned as regards the time when they were spotted, the court is in all fours with the first appellate court that the same was neither offensive nor

does it go to the root of the matter to dismantle the complainant's case. Further the fact that SM2 and SM3 (the security guards) arrested the appellants at the scene of crime this need not task the court, since the same was not disputed by the appellants. The court is further of the firm view, this being a kind of ambush one would not have expected independent witnesses or seizure order. Even though it is on record the respondent's witnesses had tried to seek for help from the helmet chairman and the police but in vain. This by itself does not take away their credence since there were no cogent reasons not to believe them coupled with the exhibits tendered.

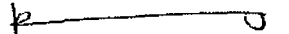
In conclusion I find no fault in the 1st appellate court's decision as the case against the appellants was proved at the required standard in accordance with the dictates of criminal jurisprudence.

For the reasons stated, I finally find this appeal devoid of merit and it is hereby dismissed in its entirety.


It is so ordered.


B. R. MUTUNGI
JUDGE
18/11/2021

Judgment read this day of 18/11/2021 in presence of both appellants and Miss Patricia Erick advocate for the respondent.


B. R. MUTUNGI
JUDGE
18/11/2021

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
18/11/2021