IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

PC. CRIMINAL APPEAL NO.3 OF 2021

(Arising from Songea District Court in Criminal Appeal No. 34 of 2021 which originated from Criminal Case No. 134 of 2021 before Songea Urban Primary Court at Songea)

MARIETHA MAPUNDA...APPELLANT

VERSUS

DAFROSA MAGNUS....... ....RESPONDENT

JUDGEMENT

30.05.2022&13.06.2022

U. E. Madeha, J.

The Appellant stood before the Songea Urban Primary Court where she was charged with stealing contrary to section 265 of Penal Code CAP 16 [Revised Edition 2019], in the end, she was acquitted. The Respondent being dissatisfied filed an appeal in the District Court. The Appellant was convicted and sentenced to twelve (12) months conditional discharge. The Appellant became aggrieved with the sentence and conviction, and as a result, she filed an appeal to this Court. She has brought this appeal premised on three (03) grounds of appeal which are as follows: -

Firstly, the first appellate Court erred in law and facts to hold the Appellant contrary to the trial's court decision while the Respondent had not proved her case beyond a reasonable doubt. **Secondly,** the first appellate court erred in law and facts while the Appellant's evidence herein weighed more than the weak and contradictory evidence of the Respondent herein in the trial Court. **Thirdly,** the first appellate Court erred in law and facts to hold the Appellant contrary to the trial Court's decision contrary to the law.

The brief facts of the evidence in the Primary Court's case records are as follows; The Respondent that is, (PW1) under an oath testified that the Appellant arrived at his home in January 2021 as a guard and she showed her all her belongings so as to protect them. The Respondent traveled to Mbinga district. He returned on 4th, of December 2021. He found one (01) mattress, fifteen (15) beams, and four (04) pots were missing, in other words, were lost. When the Appellant was questioned about the whereabouts of the named properties, she agreed to have them and promised to take responsibility by paying back fifteen (15,000) thousand Tanzanian shillings monthly. He later started responding with a negative attitude towards Respondent. They were advised to go to the village chairman, instead of paying PW1, she went to harvest two (02) sacks of

maize without the landowner's permission. PW2's evidence was consistent and matched with Respondent's evidence that the Appellant took the Respondent's mattress. In addition, it was alleged that the Appellant was given over to Respondent's maize farm for safekeeping and safeguarding. The Appellant on his side testified to the effect that: - the Respondent looked for her and had found her. she kindly told her that he was in a dire need of someone to stay in his house. Therefore, she gave her the house keys and told her that the house she was supposed to take care of on the same note another key was handed over to someone else. Later on, she denied having stolen the mattress whereby she confessed and agreed to pay back the money so as to buy another mattress.

The appeal was canvassed by written submissions; - the Appellant was represented by the learned advocate Mr. Lazaro Elineat Simba. On the other hand, the Respondent was represented by the learned advocate Mr. Makame Sengo.

Mr. Lazaro Ernest Simba the learned advocate in arguing the first ground of complaint submitted that it is a legal requirement of the law that the prosecution side has to prove its case beyond a reasonable doubt. He made reference to the case of **John Mkize v. Republic** (1992) TLR High

Court. The proof beyond reasonable doubt has never been so easy that the prosecution can do in a single way evidence for the Court to find an accused guilty of an offence. Further, he stated that the burden proof of the prosecution case is to be taken into the consideration and fully discharged. Taking into consideration that the Respondent's evidence herein was contradictory, inconsistent and weak. He elaborated further that the Respondent's evidence is against the PW2's evidence. That, the Appellant herein confessed to having committed the theft crime while the PW2's stated that she confessed to the payment and nothing else. In regard to that, the contradiction of evidence is material as stated in the case of **Mohamed Said Matula v. Republic** (1995) TLR. He said that the trial court's proceedings show that the confession was before the Village Chairman whereby at his best guess the Appellant was forced to confess. He was of the view that, it does not comply with the legal requirements of the confessions.

He further argued that the Appellant did not commit the alleged offence. He cited with approval the case of **Simon Kilowoko v. Republic** (1989) TLR 159. The learned advocate further submitted that the Appellant was wrongly convicted. He submitted that the prosecution's side did not weigh the evidence, he cited with approval the case of **Mwita and two**

others v. republic (1970) TLR. The counsel stated 'It was not the Appellant's duty to prove that their defence was true, they are simply required to raise a reasonable doubt in the mind of the Magistrate and more.

On the second ground, Mr. Lazaro Simba submitted that the Appellant's evidence was contradictory in its nature, he emphasized that both prosecution witnesses and defence witnesses were mingled with their false evidence. He submitted that the Appellant agreed to pay for the second time. the Respondent contradicts herself in her evidence and this goes to the roots and base of the case. He submitted further that, the credibility of witnesses in the trial Court is questionable.

He contended further that, the offence as per the charge sheet shows that, was committed on 12th, April 2021 at around 08:00 and that on the same material date she found one (01) mattress, fifteen (15) bolts, and four (04) pots missing in his house. That, Surprisingly, the evidence of the prosecution's witnesses is weak. In that sense, the court has to analyze clearly such evidence in order to reach a clear decision not as erroneous as he mentioned in the case of **Michael Haishi v. Republic** (1992) TLR and **Mohamed Said Matula v. Republic** (1995) TLR. Moreover, to cement his

argument the learned counsel elaborated that the stolen proprieties were never brought to the court as a proof.

With respect to the third ground of appeal, he submitted that the conviction was contrary to the law. As a matter of fact, the Court erred in law and facts when failed to draw an adverse inference after the prosecution side had failed to call some key witnesses, especially the ten-cell leader, chairman, and relatives who were with the complainant.

He averred further that, the first appellate court failed to clearly and properly apply the principle key witness one Bunjiku. Additionally, he argued that the proof beyond reasonable doubt was on the prosecution's side. It was to be taken into that consideration PW2's testimony shows that the key was left to one person called Bunjiku.

On the contrary, Mr. Makame A. Sengo submitted generally to the effect that: - It is a laid principle that in a criminal case the burden of proof is vested upon the prosecution side to prove the case beyond reasonable doubt as to mean that the offence has to be proved without leaving doubts and not on the weakness of the defence case.

Moreover, he averred further that during the trial, the Respondent was duty-bound to prove that the alleged property had been stolen and her witness come up/showed up and proved the same that the alleged item was really stolen and the one who stole them is the Appellant and their evidence matches to each other.

He submitted that, from the proceedings, the evidence of PW1 and PW2 both provided that the Appellant stole the mattress and the Appellant confessed before the street leader and promised to indemnify the Respondent. The counsel submitted further that, it is settled law that failure to cross-examine the witnesses leaves his or their evidence standing unchallenged as in the case of **Goodlack Kyando v. the Republic** [2006] TLR 363 which laid down the rationale behind the cross-examination.

The counsel further added that the Appellant did not bother even to question the credibility of the Respondent's evidence through cross-examination over the allegations. He submitted further that; the Appellant was a caretaker of the Respondent's house and thus she was living in the said house and she had a duty of watching over the Respondent's property which was inside the house. Therefore, the Appellant at this stage has been barred by the principle of estoppel from questioning the credibility of the

Respondent's evidence even at the appellate court the Appellant never questioned it.

Having gone through, the petition of appeal which encompasses three (03) grounds, I find that they boil down to two issues that namely; Whether the prosecution side proved its case beyond a reasonable doubt and whether the sentence imposed by the first appellate court was proper.

This Court is of the view that, the evidence as presented in the lower court shows that the Appellant agreed to have taken the Respondent's items, and therefore the evidence is factual. This is due to the reason that, in her testimony, she agreed to pay back or refund the money for the things she had taken.

In connection to the agreement that the witnesses were few in number, I agree with the decision given stating that no number of witnesses is required to prove the prosecution case. Reference is made to the case of **Yohanes Msigwa v. Republic** (1990) TLR 148 which stated to the effect that:

> "*As provided under Section 143 of the Evidence Act 1967* R.E.2019, *no particular number of witnesses is required for*

proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have been seen, and his/her credibility."

Likewise, similar position was stated in the case of **Goodlack Kyando** (Supra) that: -

> *"It is trite law that every witness is entitled to credence and must be believed as his testimony accepted unless there are good and cogent reasons for not believing the witness."*

Based on the above elaboration this Court is of the view that, the evidence of the prosecution witnesses proved the charge without leaving any doubt. The evidence is consistent with the offence committed by the Appellant. The evidence is sufficient because the Appellant was left in the house to take care of the Respondent's items as a caretaker and the landlord found that some of his properties are missing that are nowhere to be seen.

It seems to be true that, the Respondent's and PW2's evidence shows that the Appellant agreed to take the items which were missing such as the mattress. In regard to that, she promised to return the money she could not

pay the Respondent as they had agreed earlier, then they took each other to the court.

Furthermore, as regards the first (1st) issue as to whether the prosecution has proved this case beyond a reasonable doubt, it is my considered view that the prosecution proved their case beyond reasonable doubt. The evidence available was sufficient to suffice a conviction. This takes me to the second issue that is, whether the sentence imposed by the first appellate court was proper.

The District Court sentenced the Appellant to serve twelve (12) months a conditional discharge and she was ordered to compensate the Respondent the amount of Tshs 200,000/= within 30 days from the pronouncement of Judgement but the Appellant was not satisfied and thus decided to appeal before this court. Therefore, the basic question to ask is whether the District Court had the power to enter the conviction and sentence to the Appellant who was acquitted in the subordinate court. The arguments are supported by the case of **Jairos Sakuzi v. Mchemwa Mnyambuyu** [1994] T.L.R. 21 in which it was held that:

"It is the fundamental principle of law that no person shall be condemned unheard: a person acquitted by the trial Court cannot be convicted by the appellate Court without being given an opportunity to be heard.

The District Court, on appeal, had no Jurisdiction to substitute a conviction for acquittal without being given the Appellant the opportunity to be heard. The conviction was quashed and the appeal from the District Court was held de-novo."

As a matter of fact, this Court is of the firm view that the District Court was justified in substituting a conviction especially when the same was after it had been satisfied that the prosecution had proved their case beyond reasonable doubts.

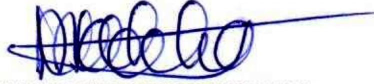
Therefore, the way forward was to convict and sentence the appellant. its further findings of this Court that is the District Court gave a just sentence because at the beginning the appellant herein was charged with the offence of theft contrary to section 265 of the Penal Code (supra). The said section provides that the general punishment for theft is seven (07) years. On the

other hand, the District Court passed a conditional discharge sentence for a period of twelve (12) months with an additional payment of two hundred thousand (200,000) Tanzanian shillings as compensation for the stolen properties. This appears to be lenient in my view. All that was done after the Appellant was heard on mitigation factors as seen at page 8 of the District Court's judgement.

Henceforth, I am satisfied that the case against the Appellant had been proved beyond reasonable doubt. As far as I can see, I have no reason to fault the findings of the District Court Magistrate who in my considered view correctly found the Appellant guilty, convicted, and sentenced him accordingly rather I am confined to uphold the same decision.

In the event and for all the reasons stated above, I find that this appeal is not merited. Consequently, the conviction and sentence thereof imposed on the Appellant by the District Court is hereby sustained. Lastly, the appeal is dismissed in its totality. Order accordingly.

DATED and **DELIVERED** at **SONGEA** this 13th day of June 2022.



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U. E. MADEHA
Judge
13/06/2022