

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**PC. CRIMINAL APPEAL NO. 04/2022**

*(Arising from the District Court of Namtumbo in Criminal Appeal No. 3 of 2021, Original Criminal Case No. 37 of 2021 before Namtumbo Primary Court)*

**SALUM MAJEMBE NYAKAULA..... APPELLANT**

**VERSUS**

**CHRISTOPHER RENATUS KOMBA..... RESPONDENT**

**JUDGEMENT**

27.07.2022 & 11.07.2022

**U. E. Madeha, J.**

The Respondent herein was charged and acquitted of the offence of theft contrary to section 258(1) and 265 of the Penal Code Cap 16 (R.E. 2019) before the Primary Court of Namtumbo. As a matter of fact, the Appellant was dissatisfied with the decision of the Primary Court, therefore, he appealed to the District Court. On that note, the District Court upheld the decision of the Primary Court. The Appellant has lodged this second (2<sup>nd</sup>) appeal based on the following four grounds of complaints as reproduced below: - **Firstly**, the first appellate Court erred in law and facts in not holding

the Respondent liable while the Appellant herein had proved his case beyond a reasonable doubt. **Secondly,** the first appellate Court erred in law and facts while the evidence of the Appellant weighed more than the weak and contradictory evidence of the Respondent before the Primary Court. **Thirdly,** the first appellate Court erred in law and facts by not giving a chance to his key witnesses and not taking into consideration his six witnesses. **Fourthly,** the first appellate Court erred in law and fact not to hold the Respondent contrary to the law.

The brief facts of the evidence in the Primary Court's case records are as follows: The Respondent was alleged to have stolen twenty-eight (28) iron sheets weighing 85x700 and thirty (30) gears with the value of Tanzanian shillings one million, six hundred and eighty thousand (1,680,000). As a matter of fact, the Respondent was a roofing technician and entered into a contract to renovate the house of the Appellant from the 27<sup>th</sup> day of January 2021 of the first month and finished on the 31<sup>st</sup> day of January 2021. On the 21<sup>st</sup> day of February, the Appellant received a notice from his wife that the Respondent had finished work as instructed and had left the construction site. After wards, the Appellant went to the construction site. Surprisingly he realized that twenty-eight (28) iron sheets were

nowhere to be seen, in other words that were stolen. He reported the matter to the police station. Moreover, the Appellant testified that he did not personally see the Respondent taking the iron sheets he was told by some people that the iron sheet had been taken by the Respondent.

**PW2** told the Court that on 01<sup>st</sup>, February 2021 when he left the farm and arrived at the construction site, he did not see the technicians. On the same note, he tried to ask his neighbors who replied that he had not seen them last night but he saw a car around the construction site. **PW3** told the Court that on 31<sup>st</sup> day of January 2021 around 9:00 Pm while at her home place she saw a car arriving but she does not remember the color of it, also she could neither recognize what the car had brought or carried away afterwards. And that she told PW2 this very same story on the next day. **PW4** testified that, on 31<sup>st</sup> day of 2021 around 9:00 Pm a small car arrived in the streets of Lwinda but he could barely recognize it or what it was after, he guessed that maybe it was responsible for construction activities. Additionally, **PW5** in his testimony, he testified that, on 31.02.2021 around 9:00 Pm he saw a car (Carry) white in color which had arrived at PW2's home place but he did not make any follow up on it. **PW6** testified that on 26<sup>th</sup> January 2021 he handed over the iron sheets for construction of the house

to the builders as instructed by PW1. That he cross-checked and verified that there was a total of 96 iron sheets in the presence of four people the Respondent (Accused) inclusive. Afterwards, they carried them to the site area. On 27.01.2021 the Appellant phoned the Respondent and notified him about the transportation money for the iron sheets and fare back to Songea town. Thereafter PW6 left on 11.02.2021 he was informed that he should report the matter to the police station so as to give his statement on how he handled the iron sheets. Later on 17.06.2021 he was informed to appear in Court to give evidence on how he handled the iron sheet.

In his defense, the Respondent (DW1) testified that on 26<sup>th</sup>, January 2021 he handed over the iron sheets to the builders for the construction of house as instructed by PW1. Testified that on 25<sup>th</sup>, January 2021, at around 05:00 pm, he received a phone call from his relative informing him that the Respondent had finished roofing the Appellant's house, therefore, he informed him to go and inspect his work. After the phone conversation, the Respondent was paid his money through the mobile phone and returned to his home. Strange as it may sound, he was later surprised to be taken to police station for the stealing offence.

Simply stated, this is a summary of the evidence of both sides, which was presented in Court in connection to the theft of twenty-eight (28) iron sheets belonging to the Appellant. With the leave of the Court, the appeal was canvassed by written submissions whereby both sides had no representation.

In respect of the first ground, the Appellant submitted that the prosecution has a duty to prove its case beyond a reasonable doubt. He averred that going through the judgement and proceedings of the Primary Court, the Appellant testified that he sent ninety-six (96) iron sheets from Songea to Namtumbo. That the Respondent was seen at the scene the night before therefore, they suspected that he had stolen twenty-eight (28) iron sheets.

Regarding the second ground of appeal, the Appellant submitted that for evidence to be regarded contradictory it must be the one in which its contradiction goes to the root of the case, that in the present case their contradiction was minor since all the witness testified that they saw the car at the crime scene.

On the third ground of appeal, the Appellant stated that the Primary Court denied him a chance to bring his key witness and he was forced to close the prosecution case as evidenced at page 25 of the typed proceedings. He submitted that the omission renders the proceedings and resultant judgement a nullity. He backed up his argument by referring this Court to the case of **Mbeya Rukwa Auto Parts and Transport Limited v. Justine George Mwakyoma [2003] TLR.**

In Addressing the fourth ground of appeal, the Appellant faulted the District Court for overlooking the error by the primary Court in disregarding circumstantial evidence and deciding the case based on matters not testified by the parties, specifically the Appellant quoted a text from page 13 of the unnumbered judgement of the trial Primary Court.

In countering the first ground of appeal, the Respondent submitted that, the Appellant never proved its case beyond reasonable doubt because from the Primary Court's records there was no proof that it was in fact him whom did stole the alleged iron sheets. He made reference to section 3 (2) (a) of the Evidence Act Cap 6 Revised Edition 2019 which clarifies how a fact is proved in criminal matters. To cement his point, he cited the case of **Maliki**

**George Ngendakumana v. Republic**, Criminal Appeal No. 353 of 2014, Bukoba (Unreported), where in it was stated that;

*"... It is the principle of law that in criminal cases, the duty of the prosecution is to prove two things: one, to prove the offence committed and two, that it is the accused person who committed it." As for the present case, the Appellant failed to discharge that duty, and hence it could be irrational for the two lower Courts to decide in his favour.*

In answering the second ground of appeal, the Respondent submitted that as a general rule the burden of proof rest squarely on the shoulders of the prosecution, that the accused had no duty of proving his innocence. He supported his argument by referring this Court to the cases of **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010 CAT and the case of **John Mwakolobela, Kulwa Makolebela and Eric Juma Tanganyika v. Republic**, 2000 TLR 296.

On the issue of contradictory evidence as regarded minor by the Appellant the Respondent replied that their contradiction as noticed by the District Court is fundamental since it centers on whether the Respondent

took the alleged iron sheets as such it goes to the root of case hence weakens and casts doubts on the prosecution case. The Respondent made reference to the cases of **Delefa Misungwi v. Milika James** Land Appeal No. 32 of 2021 HCD and the case of **Luziro Sichone v. Republic** CAT Criminal Appeal No. 231 of 2010.

In opposing the third ground of appeal, the Respondent submitted that the same is baseless because it is trite law that on the Appellate stage the Court is not dealing with new evidence therefore, he could not bring other witnesses to the District Court.

Contesting the fourth ground of appeal, the Respondent submitted that it is an established principle that for the accused to be convicted basing on circumstantial evidence each and every circumstance must be fully proved. He requested this Court to make reference to the case of **Shaban Mpunzu v. the Republic**, Criminal Appeal No. 12 of 2002 he insisted that in the present matter from the Primary Court records there are numerous unconnected dots, thus the circumstances do not establish the alleged offence against him. Eventually, the Respondent prayed that the appeal be dismissed.

In his rejoinder, the Appellant had no much to submit he stressed on what he stated in his submission in chief, further he insisted that in respect to the first ground of appeal the Evidence Act (supra) as cited by the Respondent is not applicable since the matter originates from Primary Court wherein there are specific rules of evidence and procedures.

After going through the petition of appeal which encompasses four grounds plus the rival submission of both sides, I find that the key issue in this appeal is whether or not the prosecution side proved its case beyond reasonable doubt, or, in other words whether the evidence of the prosecution side irresistibly point to the guilty of the Respondent.

My perusal of the evidence on record has revealed that there is no where in the Primary Court record where the Appellant was denied right to be heard by himself or his witnesses in fact, he lined up five witnesses making a total of six prosecution witnesses of whom both testified on oath. From further scrutiny of the evidence on record I am settled that the prosecution evidence does not incriminate Respondent.

The Appellant claims that he contacted the Respondent to build house and handled him ninety-six iron sheets but later he was informed that the

Respondent stole twenty-eight iron sheets. Unfortunately, there is nowhere in the record depicting the exact number of iron sheets handled by the Respondent (no witness testified to this), In fact, there was no analysis regarding the usage of the iron sheets, and how many iron sheets were used in construction and how many remained.

Moreso there is no clear evidence as to how the Respondent stole the twenty-eight iron sheets, the only evidence connecting the Respondent as testified by the prosecution is that he is the one hired to construct the Appellant house and that prosecution witnesses saw a car a night before the alleged incident day around the construction place. Besides, the evidence shows that after completing the task the Appellant made payment to the Respondent through mobile phone transaction. Afterwards, the Respondent left. Later on, he was informed that some iron sheets have been stolen.

What can be gathered under the situation of this case is that the evidence on record is not purely circumstantial but suspicion oriented. It is in-sufficient to support a conviction; thus, I hesitate to say that the prosecution side has proved its case beyond reasonable doubt.

It is an elementary law that the prosecution should prove all the ingredients of offence without any doubt. This has been emphasized by Courts in numerous decisions such as **The Director of Public Prosecutions V Morgan Maliki and Nyasa Makorii**, Criminal Appeal No 133 of 2013 (Unreported) which states that:

*"A prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence which he is charged or kindred cognate minor offence... the prosecution is expected to have proved all the ingredients of the offence or minor cognate are thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof".*

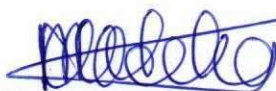
Basing on the above guidance, the prosecution must establish a prima facie case. The same is important because if no prima facie case is established, the Court could always give the accused person the benefit of doubt and acquit him. In this case, the prosecution has not established a prima facie case, there is no cogent evidence implying that the Respondent

did stole the alleged twenty-six iron sheets. In absences of the same, it is the unsafe for this Court to assume otherwise merely relying on suspicions.

In light of the foregoing reservations, and having warned myself of the risk of convicting the Respondent with an offence which was not proved beyond reasonable doubt I hereby proceed to upheld the decision of the District Court.

It is my considered view that this appeal lacks merits and it is hereby dismissed in its totally. It is so ordered.

**DATED at SONGEA this 11<sup>st</sup> day of JULY, 2022**



**U. E. MADEHA**  
**JUDGE**  
**11/07/2022**