IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 124 OF 2021

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

MWITA S/O RYOBA CHUNCHURYA ..... RESPONDENT

JUDGMENT

29th March and 29th April 2022

F. H. MAHIMBALI, J.:

The Respondent Mwita Ryoba Chunchurya was charged and acquitted of Tarime District Court with the offence of stealing by servant contrary to the section 258(1) and 271 of the Penal Code. It was alleged by the Prosecution that on diverse dates between 1st October and 17th November, 2019 at Kewanja village within Tarime District in Mara Region being a person employed by one Julius Marco Wambura as Manager at Nyamongo Filling Station, stole money cash Ths. 25,873,407/= which came into his possession on account of his employment.

The respondent, then accused person denied the allegations. This

compelled the prosecution to marshal a total of four witnesses in efforts to prove the charges. The respondent fended for himself in his defense testimony. Upon assessing the prosecution case and its evidence, the trial court was satisfied that the charges levelled against the respondent were not established on two legal findings: first, the theft charge lacked section 265 of the penal code which as per trial magistrate was crucial to be embodied. Secondly, that the prosecution case did not establish the charges preferred against the respondent. Thus, acquitted the respondent.

The acquittal findings by the trial court did not amuse the appellant, thus the basis of the current appeal, propped on three grounds of appeal, namely:-

1. That, trial Magistrate misdirected herself by holding that the accused/respondent was charged under improper sections.
2. That, trial Magistrate grossly erred in law by holding that the case was not proved beyond reasonable doubt.
3. That, trial magistrate erred in law for failing to prepare memorandum of the agreed matters as per section 192 (3) of the Criminal Procedure Act. (CAP. 20 R. E. 2019)

In arguing the appeal, Mr. Malekela learned state attorney who represented the appellant submitted that, with the first ground of appeal, the trial court erred in law for acquitting the respondent on the ground that it was not proper. He added that according to the trial court, the respondent was charged under section 258 (1) and 271 of the Penal Code, Cap, 16 R. E. 2002 (as it was by then). As per particulars of the offence, it was alleged that between 1st October – 17th November, 2019 at Keranja in Tarime, the respondent being an employee of Nyamongo Filing Station had stolen a total amount of 25, 873, 407/=. He amplified that the law is, an omission or none citation of section is curable if the particulars of the offence do establish offence charged. He referred this Court to the decision in the case of **Oswald Mikiwa Subu vs Republic.** Criminal Appeal no 190 of 2014, CAT at Mtwara on that amplification of his stance. He clarified that in the case at hand, the reason why the respondent was acquitted, is simply because there was not cited section 265 of the penal code. He argued that, the respondent being an employee of PW1, he was properly charged under section 258 (1) and 271 of the penal code. This is because section 258 (1) of the Penal Code defines theft satisfactorily. On the other hand, section 271 was the proper section in the circumstances of this case. Thus, the trial

court was wrong to reach that verdict on the basis of non – citation of section 265 of the penal code.

Lastly, he argued that, the trial magistrate erred in law by holding that the case was not proved beyond reasonable doubt. Relying on exhibit PE3 of the case, the respondent being with his advocate, had admitted committing the said offence and was ready to settle it at 15,000,000/=. As PE4 exhibit (auditing report), tendered by PW2, established that there was theft of Tzs 25,873,407/=, he was of the view that, the respondent stole the said money. As all these exhibits were not objected during their admission, suggests nothing but acceptance. He added further that, even the said settlement agreement (PE3 exhibit), the same was initiated by the respondent himself and not any other person. On that basis, he was of the considered view that it is clear as per evidence in record that the prosecution's case was well proved beyond reasonable doubt. He thus prayed that the decision of Tarime District Court acquitting the respondent be quashed and set aside. In its place, there be conviction in lieu of acquittal and that the respondent be accordingly sentenced as per law, he concluded.

On the other hand, the respondent who was represented by Mr. Magwayega learned advocate, resisted the appeal, amplifying that the District Court of Tarime reached a proper verdict.

He argued that, with the first ground of appeal, the trial court didn't error anything. Failure to cite section 265 of the Penal code, the charge was defective, thus, there was no proper trial, as the charge was fatal. He added that, as per PW1's evidence, it was in conflict with the position of the respondent as his employee. Since the respondent was employed as manager, but the charge sheet names him as accountant. To him, that was material inconsistence. In his assessment of that testimony, the said inconsistence goes to the root of the matter. Therefore, the inconsistence ought to have benefited the respondent. In his candid view, Mr. Magwayega, was comfortable that the trial magistrate properly reached that finding. He relied his stance in the case of **Isumbahuka vs Republic** Criminal Appeal No 113 of 2012, where it was held that, if charge is defective, then all evidence flowing from it does not stand.

With the second ground of appeal, he rebutted that the prosecution did not prove its case beyond doubt as required by law. Under section 271 of the penal code, for one to be convicted with the

offence of stealing by servant, there must be clear evidence that the said accused person was really employed by that adverse party. It is the requirement of law (Employment and Labour Relations Act) as provided under section 14 (2) of ELRA, the law sanctions that there be a contract of service between the employer and employee. None was brought to court. Failure to submit the said contract, suggests that there was no contract between the two. Furthermore, considering the evidence of PW1, he testified that the said respondent was employed as manager. It was then important to establish the employment status of the respondent. As the same duty appears to be done by Paulina Michael – daughter of PW1 – between the same dates the said money was stolen. As she was also responsible of sending money to bank, the chances are high that she might have mishandled the same. Since this Paulina is not one of the witnesses thereof by the prosecution, suggests much doubts. On the admitted exhibits tendered in court, he was of the legal stand that it amounted to admission as argued. The trial magistrate's finding on the said exhibit is clear on that position. Looking at the said PE3 exhibit there is nothing of admission as stated. The said PE3 if thoroughly examined, is nothing but a mere a paper. It has no any relevancy.

With PE4 exhibit, he equally accorded no value in it. He attacked it on its authenticity. This is because, its maker is not known, thus highly questionable. He submitted that the law is, admission of exhibit is one thing but its relevancy is quite another. Despite the said exhibits being admitted, could not relieve the prosecution from the proving the case beyond reasonable doubt. Since the said Mary Samson (advocate who witnessed the said agreement) was not preferred to be one of the prosecution witnesses, the prosecution's evidence is highly questionable. The Bank statement as it is, he submitted that has nothing to do in implicating the respondent with the charge.

On that basis, it was Mr. Magwayega's firm view that the prayer for the prosecution that the trial court's verdict be reversed is unwelcomed. He prayed that acquittal be maintained as the prosecution perfunctorily failed to establish their case against the respondent. The appeal be dismissed he prayed.

In his rejoinder submission, Mr. Malekela insisted that what section 265 of the penal code states, is just punishment of theft and not otherwise. Thus, not citing section 265 an offence of stealing by servant is not fatal (see **Jamal Ally Salome vs Republic**, Criminal Appeal No 52 of 2017 at page 15).

The issue whether the respondent was an employee or not with the appellant, he wondered if in the absence of written contract then there is no employment between them. Had Paulina been engaging with the transaction of sending money to Bank as alleged, the defense if believed so, could have called her.

With the validity of the said exhibits, they are relevant and nothing questionable. The reason why the said money was lowered from 25,873,407, it was merely because of the family issue (relationship between them) and nothing more. Otherwise, the stealing charge was well established and the respondent being charged with the said duty, could not escape accountability as charged. On that stance, he kept on praying that the decision of Tarime District Court be reversed, acquittal be replaced with conviction and that the respondent be accordingly sentenced.

Having heard the submissions from both parties and the provided authorities, the vital question is only one, whether the appeal is merited. In reaching that end, I will examine the charge sheet, relevant law and re-evaluate the case's evidence so as to determine whether the trial court properly reached her decision.

According to the evidence in record, it is undisputed that the said respondent was employed by PW1 on management affairs of his petroleum business at Nyamongo Filling Station. This is as per admitted facts of the case during the preliminary hearing. The law is, facts admitted during preliminary hearing are considered as proved. It is also undisputed as per evidence tendered that the said petroleum business encountered loss in sale transaction amounting 25,873,407/=. I say so relying on the testimony by PW1, PW2 and PW3.

The testimony of PW1 is clear that, he had employed the said respondent as his staff at Nyamongo Filling Station. As he encountered some doubts in the banking transaction against the sales thereof, it tempted him to make general audit against sales as per ledger books. As he encountered some notable differences between cash flow and the sales. He inquired from him what was wrong, he was restless and later disappeared. When he amounted auditing, he encountered a financial loss of **TZS 25,873,407/=.** He established this through the bank pay slips (P1 exhibit), ledger books for reception of petroleum and its sale records. Pw2 and Pw3 were involved in auditing and accounting transactions and encountered that much financial loss (P4 exhibit).

The defense testimony of the respondent has been this, he was not employed by PW1, but was just doing some exercises at the said

Filling Station of PW1 under his instructions. He also performed some monetary duties as being instructed by the daughter of PW1 called Paulina Julius Marco. He performed the duties for two months from September to November 2019. That sometime later, at the said office emerged some misunderstandings between him and Rhobi Chacha who is a niece to PW1. Then, he later received text message from PW1 that he had stolen money. Thus, the genesis of this case. When cross examined whether he was employed by PW1, he had denied. However, he admitted working in that office as being trained in management affairs and shifted burden to Paulina as thief of the said money. He further acknowledged knowing exhibit P3 (memorandum of understanding on payment of the stolen money to PW1).

The legal issue for consideration is whether, as per prosecution case and evidence there was stealing. According to the charged offence, the respondent was charged with stealing by servant contrary to section 258(1) and 271 of the Penal Code. For easy of reference, the relevant sections are hereby reproduced as hereunder:

> *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.*

271. 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.

The trial magistrate in her judgment, as the basis of her decision in acquitting the respondent reasoned that the charge was defective for failure to cite section 265 of the penal code. She reasoned this way, I quote:

"Well, I have gone through the charge sheet and find that it is proper that for the offence requires to be read together with proper section which describes the nature of the offence of theft or stealing and that be section 265 of the Penal Code [Cap 16, R.E 2019] which reads that:

265. Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years.

I have noted that section 265 of the Penal Code was not cited in the charge sheet. The issue was whether the accused person was in law properly charged. From the above position I can say that the offence was not described".

She then concluded that, the charge was therefore incurably defective and that anything flowing from it cannot stand. I beg to differ

with the trial magistrate on two reasons. First, the said issue was raised suo motto in the course of composing her judgment. She did not address the parties so that the said issue could have been argued first before she gave her position. Not affording that opportunity, she then, legally speaking condemned the appellant unheard (see **Deo Shirima and 2 others vs Service Ltd**, Application No 34 of 2008, **Charles Christopher and Humprey Komba vs Monincipal Council,** Civil Appeal No 81 of 2017, CAT at Dar es Salaam). That has not been the good position of the law. In doing so, she had sided with the respondent and prejudiced the appellant's case. However, even if the charge was defective, the appropriate remedy was to order an amendment and not to acquit the respondent as done (See **Diaka Brama Kaba & Another vs. Republic**, Criminal Appeal No. 211 of 2017 (unreported) which cited the case of **Ramadhani Hussein Rashid @ Babu Rama and Another vs. Republic,** Criminal Appeal No. 220 of 2018).

Secondly, the omission of section 265 in the charge sheet, in the circumstances of the charged offence was not fatal. As rightly argued by Mr. Malekela, learned state attorney that an omission or none citation of section is curable if the particulars of the offence do establish offence charged. The decision in the case of **Oswald Mikiwa Subu vs Republic.** Criminal Appeal no 190 of 2014, CAT at Mtwara is relevant at

this juncture and in the circumstances of this Case. I say so, basing on the argument that so long as the respondent knew what was being charged and the evidence adduced (established the same), the non-inclusion of section 265 did not prejudice him. The respondent knew the charge he was facing before the trial court and properly gave his defence. By the way what section 265 says is nothing but just general punishment of theft. In the circumstances of this case where the respondent was being charged with a specific offence of stealing by servant, which itself has its own penalty, the inclusion of section 265 was not necessary and it had no any useful service.

Lastly, is whether the prosecution case was proved beyond reasonable doubt as charged. In the case Magendo **Paul and Another Vs The Republic [1993] T.L.R 219 (CAT),** it was held inter alia that;

> *"..for a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"*

This was held in line with the philosophy enshrined in the case of **A. Chandrankat loshubhai Patel Vs the Republic,** Criminal Appeal No. 13 of 1998 (CAT - DSM) in which it was held that;

"remote possibilities in favour of the Accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of Criminal Justice if they were permitted to displace solid evidence or dislodge irresistible inferences"

In the case at hand, there is no doubt as per facts and evidence of the case that the respondent worked at the office of PW1 in petroleum sale transaction at management level. The respondent admitted this fact at preliminary hearing stage. However, he tried to refute the same at his defense hearing. So long as this was undisputed fact during preliminary hearing, it could not be raised at his defense. That notwithstanding, the testimony of PW1, PW2 and PW3 is intact on this fact. I think the issue of Employment and Labour Relations Act come into play when there is an employer- employee issue regarding their employment status but not in criminal situation. In this matter, there was no issue on employer-employee relationship. Considering the relevancy of exhibits P1, P2, P3 and P4, and what has been testified by PW1, PW2 and PW3, there is stealing by servant established. I have considered further that, the said memorandum of payment (P3 exhibit), it was signed by the parties on 27th April 2020 while the respondent was charged before the District Court on 29th January 2020. If he did not steal, I wonder what was he

intending to do with that memorandum of payment and by that time he was even out of bail.

In my considered view, and upon evaluation of the said prosecution's evidence and the defense evidence that the respondent did not steal but shifts burden to Paulina, I am satisfied that on the strength of the testimony of PW1, PW2 and PW3 together with exhibits P1, P2, P3 and P4, the prosecution case has been proved beyond reasonable doubt and that the respondent is responsible of stealing the said money as charged. That said, the decision of the trial court on a finding of not guilty and acquittal are hereby accordingly quashed and set aside for arriving at a wrong premise. The same is substituted with a finding of guilty, and consequently, conviction is hereby entered against the respondent as previously charged.

DATED at MUSOMA this 29th day of April, 2022.

F. H. Mahimbali

JUDGE

Mr. Malekela S/A: Your Lordship, the prosecution has no previous conviction record against the respondent. However, I pray for an appropriate sentence against the respondent who has now been

convicted. I further pray that the court to order the compesantion as it deems fit and proper. I so pray.

Mr. Magwayega Adv: Your Lordship, the respondent is the first offender he has no any previous Criminal record. As he is a young person, he be leniently considered.

Lastly, the respondent being a parent and husband, there be lenient sentence that will not affect his family.

Court: I have digested the arguments of both sides in respect of the sentence of the to be imposed. I am of the considered view that in the circumstances of this matter, custodial sentence will serve good purpose. I thus order that the respondent o effect the settlement of the lot occasioned on the money stolen as charged.

He is given from today to settle the same. Short of that will be liable for a custodial sentence of two years after the lapse of six months counted from today to be precise after 30th October, 2022

THE HIGH COURT OF TANZANIA
MUSOMA

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 29th day of April, 2022 in the present of Respondent and represented by Mr. Magwayega, advocate, Mr. Malekela, State attorney for the Appellant and Mr. Gidion Mugoa, RMA

Right to appeal fully stated to any aggrieved party.

It is so ordered

F. H. Mahimbali

Judge

29/04/2022