

**IN THE HIGH COURT OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF SHINYANGA**  
**AT SHINYANGA**

**CRIMINAL APPEAL NO. 73 OF 2021**

**JOSEPH MICHAEL @ NHYAMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Appeal from the Decision of District Court of Shinyanga at Shinyanga.]**

**(Hon. U.S. SWALLO PRM)**

**dated the 18<sup>th</sup> day of August, 2021**  
**in**  
**Criminal Case No. 19 of 2021**

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**JUDGMENT**

1<sup>st</sup> & 29<sup>th</sup> June, 2022.

**S.M. KULITA, J.**

Joseph Michael @ Nhyama, referred to as the Appellant in this appeal, was charged in the District Court of Shinyanga for Stealing by Agent, contrary to the provisions of section 273 (b) of the Penal Code [Cap. 16 RE 2019]. It is in the particulars of the offence that, on the 10<sup>th</sup> day of May, 2019 at Ibadakuli, Jambo Company Industrial area, the

Appellant was entrusted with various types of soft drinks valued at Tshs. 23,667,457/= for sale purpose, but he stole them.

In a nutshell, the prosecution case as it was unfolded by its witnesses is that, on 27<sup>th</sup> December, 2017 the Appellant had entered into an agency agreement with the complainant, Jambo Company. The agreement was to the effect that, the Appellant would receive products from the complainant, sell them and deposit the proceeds in the complainant's account, within 7 days, the money equivalent to the goods supplied.

On that account, on 10<sup>th</sup> May, 2019, the Appellant was supplied with complainant's goods valued at Tshs. 23,667,457/=. The prosecution evidence shows that, after he had received those products, the Appellant neither deposited money into the complainant's account nor did he return to the office for reconciliation. That situation, prompted the complainant to send her Marketing Officer to the route that the Appellant had taken. Astonished, the Marketing Officer found that the Appellant had already sold the products to his customers. As they had waited the Appellant in vain, the complainant decided to report the matter to Police, who then arrested the Appellant.

On his part, the Appellant denied to have stolen from the complainant. He conceded to be in the agency relationship with the complainant. He added that, his last consignment was on 2<sup>nd</sup> May, 2019 for the products valued at Tshs. 8,032,000/=. To that, he testified to have reconciled and remained with no debt. He further added that, apart from the said agency relationship with the complainant, he was also doing another business. While attending that other business at Lindi, he was thus arrested and brought to Shinyanga for this case.

At the conclusion of the trial, the Appellant was accordingly found guilty, and upon conviction, a three years' imprisonment sentence, was met to him. This was on 18<sup>th</sup> August, 2021.

Aggrieved with that decision, the Appellant preferred the instant appeal on four grounds which may be summarized as follows; **One**, the trial court, by misconception considered the documentary evidence tendered by PW2 while the product issued which are read therein, were not ordered by the Appellant. **Two**, the trial court erred to hold the Appellant liable while PW4 did not tender documents showing that the Appellant received the products. **Three**, it was wrong for the trial court to admit the invoice and delivery note which lacks signature or fingerprint



of the Appellant. **Four**, the defense evidence was not considered and the case was not proved at the required standard.

The Appeal was heard on 1<sup>st</sup> June, 2022. On that date, the Appellant appeared in person whereas the Respondent, Republic had the service of Ms. Gloria Ndondi, Learned State Attorney who resisted the appeal.

Submitting in support of the appeal, the Appellant decided to adopt his grounds of appeal as his submission.

In reply Ms. Ndondi submitted that, according to the testimony of PW2 who is the Store Supervisor, the Appellant is the one who ordered the products in dispute. She referred us to page 7 of the lower court proceedings. She added that, the Loading Slip, the document which was tendered by PW1 who is a Chief Security Officer and admitted as Exhibit P1 bears the name of the Appellant.

In corroborating Exhibit P1 Ms. Ndondi stated that, among the admitted exhibits, there is a Gate Pass evidencing that the carrying truck was inspected before it was released. To this, Ms. Ndondi also stated that, the same bears the name of the one who ordered the consignment, the Appellant.

It was Ms. Ndoni's assertion that, during trial the Appellant did not dispute the tendering of such documents. To verify her assertion, she referred us to page 5 of the lower court proceedings. She insisted that, those documents speak for themselves, firstly, as to the one who authorized taking of the consignment and secondly, the one who ordered it. With this, she was of opinion that, the Appellant cannot dispute what he had done during trial.

With regard to the second ground of appeal, Ms. Ndoni submitted that, the oral evidence of PW4, who is a Finance Manager suffices for the Appellant's conviction. In it she stated that, PW4 told the court that the Appellant was employed as a Sales Agent, he received a consignment which he had ordered, but he escaped with the employer's money. She added that, this witness also told the court on the trouble that the employer had got in finding the Appellant, till when he was arrested at Lindi after he was reported at the Police Station. To her, PW4 had the duty of proving the Appellant's doubtful conduct while others proved on the other ingredients of the offence committed. To this, she cited the case of **DPP v. WILLIUM FESTO, CRIMINAL APPEAL NO. 19 OF 2020, HC MWANZA** (Unreported) contending that, the Appellant's escape from

job implies guilty conscious. Ms. Ndoni was of opinion that, though this witness had not tendered any exhibit, his evidence is reliable.

She added further that, the evidence of this witness (PW4) was in fact corroborated with that of PW3 and that of the Driver who testified as PW5 together with the Delivery Note (exhibit P3). To cement the same, Ms. Ndoni stated that, PW5 is the Driver who testified to have travelled with the Appellant while carrying the Appellant's issued consignment with his vehicle from Jambo office to Mbeya. This is the one who tendered the Delivery Note which was admitted as exhibit P3.

On ground number three, Ms. Ndoni submitted shortly that, the Delivery (Note exhibit P3) bears the Appellant's signature. She added that, only the invoice that does not have the Appellant's signature. To it, she contended that, it is because of the format in which it has been made, it has no place for the Appellant to sign.

Concerning the Fourth ground, Ms. Ndoni was of views that, page 4 of the judgment shows that the Appellant's evidence was considered, only that it fell short.

In rejoinder the Appellant submitted that, during trial there was no document that was tendered showing that he ordered any products from



Jambo. He contended further that, the Loading Slip and Gate Pass do not show that he ordered the products. He further referred this court to page 10 and 14 of the proceedings contending that, he objected the admission of all exhibits. On the rest of the grounds of appeal, he reiterated as how they appear.

That was the end of both parties' submissions.

I have taken into consideration both parties' submissions, the referred authorities, available records and the rival issues as well. I am prepared to determine the grounds of appeal one after the other in seriatim.

Concerning the first ground, that the trial court misconceived to consider the evidence of PW2 as the consignment in dispute was not ordered by the Appellant, I have the following; I have gone through the trial court's typed proceedings, from page 5 to 6 and found that PW1, a Chief Security Officer, testified to the effect that, he was called at the loading area, where he witnessed and signed the Loading Slip for the consignment taken by the Appellant. The record shows further that PW1 tendered the Loading Slip and the Gate Pass that allowed the carrying truck, to get out of Jambo Company's premise. It is also widely seen from

the records that; the Appellant did not object the admission of the same documents into exhibit P1 collectively.

The collectively admitted exhibit P1 enabled two things to be performed in respect of the consignment; **first**, it commanded the Store Supervisor to load a consignment for the Appellant and, **secondly**, the Security Officer to allow the loaded truck to get out of the company's gate with the consignment in question.

The act of the Appellant not to object on these documents during its admission and coming to dispute them at this stage, signifies the same as an afterthought. These documents corroborate what has been testified by PW1 and PW2. These witnesses together testified to the effect that, the consignment in question was ordered by the Appellant and it was handled to him.

I also managed to see the testimony of PW5, the Driver. At page 15 of the typed proceedings this witness told the court that, he is a Driver who drove the loaded truck from Jambo Company to Mbeya, where the consignment was going to be sold. This witness testified further that, he travelled with the Appellant and that he (Appellant) sold the products, starting with other places while they were on their way to Mbeya.



The evidence also transpire that, the consignment in question was ordered by the Appellant. If it was not ordered by him then why did he travel with the Driver in that loaded truck? Further, if the consignment was not ordered by the Appellant, then why would he engaged himself in selling the same? When taking together all of the above discussed evidence, they collectively tell one thing, that is, the consignment in question was ordered by the Appellant and the same was handled to him. On that account, I find the first ground of appeal fails.

Concerning the second ground that, the trial court misconceived to consider the evidence of PW4 while he did not tender any document proving that the Appellant received the consignment in question, I have the following to say; As rightly admitted by the Counsel for the Respondent that the records at page 12 to 13 show that PW4, a Marketing Officer did not tender any exhibit in court. However, in proving the fact that the Appellant received the consignment in question, it was not the sole duty of PW4 alone. That duty was **firstly** done by PW2, the Store Supervisor who testified to have loaded the consignment in the truck for Appellant, **secondly** PW1, Security Officer who testified to have allowed the loaded truck to get out for the Appellant and **thirdly**, PW5, the Driver of the loaded truck who testified to have travelled with the Appellant, who

also witnessed him selling the products in question. This is as we have seen above when determining ground number one of the appeal. Therefore, apart from making a follow up of the Appellant who was at large with the proceeds of sale, PW4's evidence also corroborates what the PW1, PW2 and PW3 have testified as narrated above.

With regard to the third ground that, the Invoice and Delivery Note should have not been considered for not bearing signature of the Appellant, my finding is that; as rightly submitted by the Counsel for the Respondent, I have perused the trial court's records and observed that, the Delivery Note bears the Appellant's signature. However, the Invoice does not bear it, but the reason behind is that its format does not provide for the place to insert the same. The question is, is it fatal? I will come to this question later when determining the last ground of appeal.

Concerning the last grounds that the Appellant's evidence was not considered and the case was not proved at the required standard, I prefer to go through the last paragraph of page 4 of the typed trial court's judgment which reads; -

*"In his defense the accused admitted to have been receiving products from the complainant but according to him, the last consignment was valued at Tshs.*

*8,032,000/= and he paid the money. He did not however produce any evidence to prove his allegations. Under s. 110 of Evidence Act Cap 2 RE 2019 he had a burden to prove the alleged facts. Since he failed to do so, there is nothing to create doubts on the prosecution evidence that he was entrusted with products and stole them.”*

The above quoted paragraph, proves that the Appellant’s evidence was considered by the trial court. Had it not been considered, this appellate court could step into its shoes and do the same as per the Court of Appeal findings in **AUGUSTINO SAMSON v. THE REPUBLIC, CRIMINAL APPEAL NO. 254 OF 2014, CAT at MBEYA.**

According to the available records, there is no dispute that the Appellant worked as a Sales Agent of the complainant. Further, as per the discussion done when determining ground number one of appeal, the Appellant ordered and received the consignment in question. Furthermore, as according to the testimony of PW4, the Appellant sold the products in question and escaped with the money he was required to return to the complainant. These pieces of evidence, as long as they are proved, they suffice to prove the prosecution case at the required standard. The



existence of these pieces of evidence makes no deference whether the Invoice that does not bear the Appellant's signature is expunged or not.

With this stand, I am of the settled mind that, the prosecution case at the District Court was proved at the required standard. The Appellant's appeal has failed, I thus proceed to dismiss the same for being unmeritorious. The conviction and sentence of the trial court are hereby upheld.



**S.M. KULITA**

**JUDGE**

**29/06/2022**

**DATED at SHINYANGA** this 29<sup>th</sup> day of June, 2022.



**S.M. KULITA**

**JUDGE**

**29/06/2022**