

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

CRIMINAL APPEAL NO. 45 OF 2020

(Originating from Criminal Case No. 46 of 2020 the District Court of Shinyanga)

FUNGO PAMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

8th February, & 8th April, 2022

MKWIZU,J:

Before the District Court of Shinyanga, the appellant was arraigned for stealing by agent c/s 273 (b) and 258 of the Penal Code. The allegations by the prosecution during trial were that appellant, Fungo s/o Pamba was on 19th October 2019 at Ibadakuli within Shinyanga Municipal, by virtue of his position as a sales officer of Jambo Products Limited was handed goods valued at 27,879,00/= property of the complainant to transport and sale them in Mbeya Region and deposit the money in the complainant's account. Instead, he did leave with the goods to unknown destination and failed to deposit the required amount into the complainants account or return the unsold goods to the owner. The matter was reported to the police, Appellant was then arrested on 14/2/2020 at Ushirombo and he confessed before the police to have committed the offence.

In his affirmed defence, Appellant denied the accusations except the fact that he was employed by Jambo as a sales agent. At the end of trial, the appellant was found guilty. He was convicted and consequently sentenced to three years and six months imprisonment plus an order of compensating the complainant a total amount of 27,879,000/=

Aggrieved, the appellant lodged five grounds of appeal whose main complaints are **(i) failure by the trial court to evaluate evidence and exhibits (ii) Prosecution case was not proved and (iii) Failure to consider defence.**

When the appeal came for hearing on 8th February 2022, the appellant appeared in person unrepresented and the respondent/Republic had the services of Ms. Salome Mbughuni, senior State attorney. Appellant had nothing substantial apart from praying for the consideration of his grounds of appeal in his favour.

In response to the appeal, the learned State Attorney's submitted that Prosecution managed to prove the case against the appellant beyond reasonable doubt. She said, according to PW1 and Pw3, appellant was an agent of the complainant and was entrusted with goods worth 27,879,000/=, to sale them in-Mbeya Region and deposit the money for the sold goods into the complainants account the duty that appellant evaded. She refereed the court to a general ledger tendered as exhibit in court. According to the learned State Attorney, PW4 witnessed the handing over of the goods to the appellant. PW5, a driver participated in transporting the appellant's goods to Mbeya the evidence, which was

supported by PW2, the investigator who recorded the appellant's caution statement (exhibit P1).

On whether there was failure to consider the defence, Ms. Mbughuni said, the defence evidence was considered but dismissed for being baseless. The trial court believed the prosecution witnesses and proceeded to convict the appellant. She lastly prayed for the dismissal of the appeal.

I have considered the appeal and the submissions by the parties. I will begin with the first issue raised on the appellant's first ground of appeal which reads

*"...The trial Court Magistrate erred in law and fact to proceed with a case which has disputes especially on the documents as there were a need to summon an **EXPERT IN HAND WRITING** in order to clear doubts on the alleged forged signatures on documents"*

The learned State Attorney's submissions did not have much on this aspect. She contended that that there was no need of calling an expert on this matter for the prosecution's case was proved. I think this court, being the first appellate court is mandated to the re- evaluation of the trial court's evidence and come to its own conclusion if need be.

I have revisited the trial court's records. The issue of forgery of the appellants signature is being brought here for the first time and that it never formed part of the trial court's proceedings. The first documentary evidence, appellant's cautioned statement (ExhibitP1) was tendered by the

prosecution on 17/9/2020 at page 15 of the proceedings. The objection raised was that it was written by the police while appellant knew how to read and write. The General Ledger was again tendered and admitted as exhibit P2 at page 22 of the proceedings without an objection from the appellant. At page 25 of the proceedings the appellant objected the admission of loading slips and the gate pass claiming to have not signed the same. Having considered the matter, the trial court ruled out that gate pass and loading slips (exhibit P3) did not require the appellant's signature. In all the situations above there is no forgery complaint brought for trial court's determination and so in the appellant's defence. I am thus in agreement with the learned State Attorney that given the circumstances and nature of the case, expert evidence was unnecessary.

Appellant's grounds 2,4 and 5 are complaints over improper evaluation of evidence. The main issue being variance between the charge sheet and the cautioned statement particularly on the values of the products allegedly handled to the appellant for sale. It is true that the charge sheet accuses the appellant of stealing products totaling 27,879,000/= while in his cautioned statement appellant confessed to have received complainant's goods valued at 28,625,406 on 19/10/2019. In convicting the appellant, the trial court relied on the appellant's admission of the general ledger, his admission that he received the complained products on 19/10/2019 and his inability to raise doubt on the prosecution case.

The records are clear that since the preliminary hearing stage, appellant admitted having been a sales agent to the complainant's company. He conceded to the admission of the general ledge claiming it to be his

account. He said, " I ***have no objection, the statement is in respect of my account***". The General ledger (exhibit P2) contains a transparent statement that appellant was on 19/10/2019 indebted to the tune of 27,879,000/=. The appellants confession statement is nothing but a confirmation of the prosecution evidence as he admitted the receiving of the complained goods, he admitted to have not paid for the said consignment and prayed for time to pay and his defence could not give any clarification on how the admitted facts above were incorrect. I, for that reason, find the contradiction minor, and that has not affected prosecution case. Grounds 2,4 and 5 are thus unjustified.

Connected to the 4th grounds of appeal is a complaint that Hemedi Sulla (PW5) was not a driver of the vehicle carried the complained goods. In his defence at page 36 of the trial courts records, appellant (DW1) said this witness was driving a staff vehicle. I think this complaint should not delay the court more. In his evidence Pw5 told the court that he transported the appellant's goods to Mbeya on 19/10/2019 and during cross examination, the witness position was not challenged at all. And even assuming that the alleged witness was a staff vehicle driver, there is no indication that he was incapable of driving other vehicles and/or that he did not on the material date transport the appellant's consignment. This complaint is also baseless.

Lastly is in relation to the appellant's defence. Contrary to the complaint on grounds three of the appeal, Appellant's defence was properly considered by the trial court. At page 5 of the trial courts decision, defence evidence was considered. The trial court was of the view that

able doubt on the prosecution

the upshot, I find the prosecution case proved beyond reasonable doubt. The appeal is on that ground dismissed. The trial court's conviction and the sentence are sustained.

DATED at **Shinyanga** this 8th day of **April** 2022.



E.Y. Mkwizu
E.Y. MKWIZU
JUDGE
8/04/2020

COURT: Right of appeal explained.

E.Y. Mkwizu
E.Y. MKWIZU
JUDGE