

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TANGA DISTRICT REGISTRY)**

AT TANGA

CRIMINAL APPEAL NO. 18 OF 2020

*(Originating from judgment of Hon. Kileo SRM in Criminal Case No. 39/2017 of Handeni
District Court at Handeni)*

NIKOLASI GEORGE MGONDE @MWITWE.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

*Date of last order: 11/10/2021
Date of judgment: 25/02/2022*

AGATHO, J.:

The Appellant was arraigned at Handeni District Court facing a charge of stealing by agent c/s 273(b) of the Penal Code [Cap 16 R.E. 2002] in Criminal Case No. 39 of 2017. In the judgment deliver on 7/2/2020 he was found guilty and sentenced to ten (10) years imprisonment. He was aggrieved by that decision and appealed to this Court on the following grounds:

- (1) That, the reeve of trial hyper erred in law and in fact to convict the appellant as charged on the imputed evidence whereas no document tendered that there was contract

entered between the appellant and PW1 the complainant over the agreement for buying his grains crops as his agent.

- (2) That, the prosecution witnesses have failed to prove their case to the standard required by the law.
- (3) That, the trial court magistrate erred in facts for failure to peer that the one million (TSH. 1,000,000), the money tendered is not a property of PW1 the complainant, but thereis not proved to a part of money stolen from the alleged among the total TSH. 10360,000/=.

The Appellant prayed that the appeal be allowed, and he set at liberty. On the dated fixed for hearing the Court directed the parties to conduct hearing of the appeal by way of written submissions. And the schedule was drawn, and the parties complied with.

Before examining the grounds of appeal to determine whether they have any merits, I should make few observations. I noted that the appellant in his written submissions has slightly changed the first ground. In the petition of appeal, he was alleging absence of a document to prove existence of a contract between the complainant and the Appellant. But in the written

submissions, the first ground of appeal is that the Reeve of the trial court erred in fact and law to convict the appellant basing on imputed evidence which is not sufficient to legalize the appellant's conviction. It is apparent that the latter ground is broader than the first ground of appeal found in the petition of appeal. The variation though is not fatal. I will thus proceed to determine the appeal.

Turning to the grounds of appeal put forward, beginning with the first ground, we ask whether the Reeve of trial hyper erred in law and in fact to convict the appellant as charged on the imputed evidence whereas no document tendered that there was contract entered between the appellant and PW1 the complainant over the agreement for buying his grains/crops as his agent.

- (1) That, the prosecution witnesses have failed to prove their case to the standard required by the law.
- (2) That, the trial court magistrate erred in facts for failure to peer that the one million (TSH. 1,000,000), the money tendered is not a property of PW1 the complainant, but there is not proved to a part of money stolen from the alleged among the total TSH. 10360,000/=.

I agree with the Respondent State Attorney that exhibit P1(exhibit P1 is the appellant's caution statement) and P3 (the appellant's extra judicial statement) be expunged from Court records as they were not read over in the Court. That is visible in the trial court proceedings. As for exhibit P1, it is apparent on page 10 of the said proceedings. And exhibit P3 is seen on page 14. And the Appellant retracted his caution statements as he alleged to have been beaten by the police. But there is strong evidence remaining to convict him. But since the law was contravened for trial Court failure to cause the exhibits P1 and P3 to be read out loudly after their admission in evidence, I thus proceed to expunge them from Court records.

The 1st the ground of appeal baseless. The issue whether absence of written agreement between the Appellant and PW1 exonerate the Appellant from the criminal liability. Evidence of PW1, DW1 (confession), DW3 (the Appellant's father) confirm that the Appellant owed the DW1 some money (which) is the evidence of the contract. As the Law, Section 10 of the Law of Contract Act [Cap 345 R.E. 2019] provides, an oral contract is enforceable, just like a written contract.

Regarding the 2nd ground of appeal, I find it lacking merits. The issue on this ground is whether the prosecution proved the case to the required standard that is case beyond reasonable doubt? The PW1 testimony found at pages 5-8 of the trial proceedings his evidence is credible. His testimony was not shaken even during cross examination. Moreover, the PW2's testimony is equally credible as seen on pages 8- 10 of the trial Court proceedings. He was not even cross examined by the Appellant. It is the law that failure to cross examine may be regarded as admission of what has been testified by the witness. This was held in the case of **Khalidi Mlyuka v R, Criminal Appeal No. 442 of 2019, Court of Appeal of Tanzania at Iringa** (unreported). It is also on record that the DW1 confessed before the PW5 the justice of peace though the said confession exhibit P3 has been expunged from the Court records, the testimony of the PW5 on pages 13 – 14 of trial Court proceedings) regarding the Appellant's confession is credible as it was not contradicted by the DW1. The latter admitted on the said confession as seen on pages 17 – 18 of the trial Court proceedings. Further, as may be seen on page 19 of trial Court proceedings, the DW3 the

Appellant's father confirmed that the Appellant owed the PW1 some money and that was reported at Kikunde Police Station.

As for the 3rd ground of appeal I find it lacking substance because the contradiction between the amount stated in the charge sheet and the evidence is minor. The charge shows that the amount claimed by PW1 to be stolen by the Appellant is TSH. 10,360,000/= . The PW1 testified that the amount is TSH. 10,150,000/= . The Appellant claimed that there is no evidence that TSH. 1,000,000/= is part of the stolen money property of the PW1 hence it was part of 10,360,000/= . In **Mohamed Said Matula v R, Twinogune Mwambela v R, Criminal Appeal No. 388 of 2018** (unreported) held that in evaluating contradictions and inconsistencies the Court has a duty to determine whether such contradictions and inconsistencies are minor or major and they go to the root of the matter. The issue of variation of a charge and evidence depends on the context of the case. In the case of **Sylvester Stephano v R., Criminal Appeal No. 527 of 2016 CAT at Arusha** (unreported) it was held that the variation between a charge and evidence was minor because the charge did not indicate the exact number of hippopotamus teeth claimed to be found in the Appellant's house.

The Court of Appeal held that the variation was minor because it did not prejudice the Appellant's rights and, he was aware that he was being prosecuted for being found in possession of two hippopotamus teeth.

In the present case the Appellant knew how much was sent to him by the complainant (PW1). The contradiction in the charge and PW1 testimony in terms of the amount alleged to have been stolen is minor. The contradiction did not occasion miscarriage of justice as was held in **SylivesterStephano v R., Criminal Appeal No. 527 of 2016 CAT at Arusha** (unreported).

Indeed, nowhere in the District Court judgment where it was held that the TSH. 1,000,000/= was part of the TSH. 10,360,000/= claimed to be stolen. On page 8 of the trial court judgment the Court held that DW3 (the Appellant's father) wanted to give the police TSH. 1,000,000/= so that the Appellant could be released while he knew that the Appellant owed the PW1 some money.

Again, regarding the money TSH. 1,000,000/= which is exhibit P2, that evidence is doubtful. I am saying so because its chain of custody was not well documented as required by the standard set in the case of **Paul Madukaand 4 others v R, Criminal**


Appeal No. 110 of 2007 (unreported). Moreover, as the Respondent State Attorney rightly submitted, there was no certificate of seizure prepared and signed after the search. the said money were tendered by the PW4 (police officer G. 5616 D/C Emmanuel) who on pages 11 of trial Court proceeding where his testimony if found did not state how he marked the money seized prior to its tendering before the trial Court. Due that flaw I proceed to expunge the exhibit P2 from Court records.

The evidence by prosecution is strong, and credible. It was not shaken by the defence. Three exhibits were expunged for contravening the law, and the variation of the amount of money claimed to be stolen as shown in the charge and the testimony of PW1 I have held to be minor contradiction that does not go to the root of the matter.

For the reasons stated herein above, the appeal lacks merits. Consequently, it is dismissed.

DATED at TANGA this 25th Day of February 2022.




U. J. AGATHO
JUDGE
25/02/2022

Date: 25/02/2022

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

Court: Judgment delivered on this 25th day of February, 2022 in the presence of the Appellant, and Paul Kusekwa the Respondent State Attorney.



U. J. AGATHO

JUDGE

25/02/2022

Court: Right of Appeal fully explained.



U. J. AGATHO

JUDGE

25/02/2022