IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 13 OF 2022

(C/F Criminal Case No. 496 of 2020 in the District Court of Moshi at Moshi)

SIGSMUND S/O THOBIAS TARIMO..... APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

Last Order: 1ST August, 2022

Date of Judgment: 3rd October, 2022

JUDGMENT

MWENEMPAZI, J.

The Appellant was charged and convicted by the District Court of Moshi at Moshi for 32 counts of stealing by servant contrary to sections 265 and 271 of the Penal Code, Cap 16, RE. 2019. He was sentenced to serve four years in prison for all counts and to pay compensation to the Respondent to the tune of Tshs. 37,602,654/-. Being aggrieved by the said decision, he preferred the Appeal to this court on three grounds that;

1. *That, the Honourable Magistrate erred both in law and fact by failure to evaluate the entire evidence properly and objectively.*
2. *That, the Honourable Magistrate erred both in law and fact by convicting the appellant without considering the prosecution did not prove its case beyond reasonable doubt.*
3. *That, the Honourable Magistrate erred in law and fact by convicting the appellant without considering the evidence of defence side.*

The appellant represented by Mr. Wilhad A. Kitali, Advocate while Ms. Marry Lucas, Senior State Attorney was for the respondent. Parties argued this appeal by written submission, in arguing for first ground the appellant's advocate stated that the trial court failed to evaluate evidence regarding existence of the bank statement to prove such money was not deposited, there was no involvement of the appellant in whole process of purported Audit. He went on stating that the prosecution evidence didn't reveal as to when the matter was reported to the police and proof of appellant to run away till his arrest, also there is contradiction between the evidence of PW4 and PW1 as to which station of Munuo petrol station Limited appellant cause loss or did steal. Further there is no evidence to prove that the money was not remitted to NSSF. Thus, all these contradiction and

inconsistences create doubts which must be resolved in favour of the appellant as decided in the case of **Fadhili Makanga vs. Republic,** Criminal Appeal No. 458 of 2017 CAT at Mbeya(unreported).

For the third ground the appellant's Advocate submitted that the trial court did not consider the evidence of the defence on its judgment especially the fact that at the time (2018-2019) the alleged offence was committed he was not a victim's employee rather he was employed by another person as exhibited in exhibit D2, and the same was not cross-examined or rebutted by the prosecution by way of bringing evidence on the contrary. To support this, he referred this court to the case of **DPP vs. Ngusa Keleja and Another,** Criminal Appeal No. 276 of 2017 (unreported).

It was the learned counsel's further submission that the law is settled on the principle that failure to make reference to the accused's evidence was prejudicial. Arguing further he submitted that failure to take into account the defence evidence meant that the appellant was not accorded fair hearing. He contended that fair hearing entailed inter alia that accused defence ought to be taken into consideration before the verdict was reached. To support his position the learned

counsel referred this court to the case of **Tanzania Breweries Ltd vs. Anthony Nyingi,** TLS law Report 2016 page 99.

On the second ground the appellant argued that prosecution evidence is full of contradictions as to the existence of appellant during Auditing on 09/11/2019 between PW1 and PW3. Also, the contradiction on PW3 as to when auditing was conducted either on 09/11/2019 or 22/11/2019. Also, contradiction in PW1 and PW4 evidence regarding as to who was audited between the appellant and the victim's Company Munio Petrol Station Limited. He went on stating that PW2 on his evidence failed to establish how the appellant stole money from Mpesa in the year 2018-2019 while he was not in control or access of the said Mpesa account from 2017. Therefore, the Counsel invites this court to disregard this piece of evidence as held in the case of **Emmanuel vs. Penuel [1987]** T.L.R. 47 CAT.

Further argument on this ground is that the trial court admitted exhibit P1 which was not listed and there was no prior leave of the court. Hence prayed to this court to find that the prosecution failed to prove the case beyond reasonable doubt, to allow the appeal on it's entirety and appellant be set free.

In reply to the appellant's submission, Ms. Mary Lucas, Senior State Attorney for the respondent conceded to both 1st, 2nd and 3rd grounds of appeal and supported the prayers advanced by the appellant. To support this she stated that the prosecution failed to prove elements of offence under section 271 of the Penal Code, Cap. 16 R.E. 2019 as appellant charged, since there is no proof of employer and employee relationship between the appellant and victim (PW1), that is there is no proof that the appellant was an employee of PW1 and had a direct control of the monies alleged to be stolen since PW1 testified to the effect that there was existence of contract of employment between them but the said contract was not produced as evidence during trial. She went on submitting that evidence of PW1 had a lot of contradiction on how the alleged stolen money had been stolen either through Mpesa Account or Exim Bank Account. The Counsel for the Respondent submitted that the conviction of the appellant was wrongly based on Special Audit Report, exhibit P2, which included transactions of years when appellant had already left. Therefore, the case against the accused person was not proved beyond reasonable doubt.

I have carefully considered the grounds of appeal preferred by the appellant, records of the trial court and submissions by the parties. In determining this appeal, my first port of call is concerning grounds number 1 and 2. I am in agreement with the learned Counsels for the appellant and respondent that the trial court failed to evaluate the entire evidence properly and objectively and the prosecution did not prove its case to the required standard, proof beyond reasonable doubt.

It is trite law that, it is the duty of the trial court to evaluate the evidence of each witness as well as his credibility and make a finding on the contested facts in issue as properly held in the case of **Stanlaus Rugaba Kasusura and Another vs. Phares Kabuye** [1982] TLR 338. In the case at hand the trial court ought to have evaluated and determined the cardinal issues as established in provision of the law under which the offence against the appellant was laid; determination whether or not the appellant was a servant of the victim's company was essential element in proving the offence against the appellant and it was an essential issue to be determined

first, and the same was required to be proved by prosecution's evidence.

Also, the trial court did not direct itself to determine the existence of employment contract, existence of Bank Statement and Mpesa transactions as well as to inquire any information from NSSF in respect of deposits done thereto. It is my settled view that the trial court misdirected itself in evaluating the evidence of prosecution witness to the incident and issue of employer and employee relationship, non-deposit of money to the Bank Account and Mpesa account, deposits to NSSF.

I fault the trial court for according undue weight to the whole weak prosecution evidence. The prosecution had the duty to prove its case beyond reasonable doubt against the appellant before the said court found the appellant guilty and convicted him on the proved charges. Further, the court must only convict the accused person (appellant in this case) on the strength of the prosecution case without considering much the strength of the defence evidence.

On the third ground it was stated in the case of **Mkulima Mbagala v. R, Criminal Appeal No. 267 of 2006** (unreported) in which the Court stated:

> *"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case.... is more cogent. In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at".*

Regarding failure to consider defence evidence side I think the appellant has not read properly the typed judgment of the trial court on page 22. It is my considered opinion that the judgment of the trial court does qualify to be a reasoned judgment since it contained evidence of both prosecution and defence side. Therefore the 3rd ground is devoid of merit.

In light of the above, I am satisfied that the appeal raised by the appellant has merit and proceed to allow it. Consequently, the conviction is hereby quashed and the sentence is set aside.

Accordingly, I order the appellant to be released forthwith unless otherwise lawfully held. It is so ordered.

T. M. MWENEMPAZI

JUDGE

3RD OCTOBER, 2022