IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEL NO 29 OF 2022

(Arising from Criminal Case No.87 of 2020 in the Resident Magistrate Court of Arusha at Arusha)

JOEL KEYA @ KAZIMOTO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 21st September, 2022
Date of Judgment: 3rd October, 2022

MALATA, J.

The Appellant, **JOEL KEYA @ KAZIMOTO,** appealed to this Court against the judgement of the Resident Magistrates' Court of Arusha at Arusha in Criminal Case No. 87 of 2020, dated 23rd September, 2020. Following the testimonies from the prosecution side, the Resident Magistrates' Court of Arusha found the Appellant guilty of stealing money worth TZS 60,000,000/=, TZS 6,000,000/= and United States Dollar 7000 and Tanzanite gemstone worth TZS 200,000,000/= the property of one **Emmanuel Joseph Wado** and **Ms Frida Emmanuel** contrary to

Sections 258 (1) and 265 of the Penal Code Cap. 16 [R.E.2019] (hereinafter Cap 16), and finally sentenced to serve four years imprisonment for each count. Upon completion of the four years imprisonment, the Appellant was ordered to refund the stolen properties to the owner.

It is on record that, through the testimonies of **Emmanuel Joseph Wado** PW1 and **Ms Frida Emmanuel** PW5 the wife of PW1 that, the Appellant was their employee.

To fault the Judgement of the Resident Magistrates' Court of Arusha, the Appellant raised seven (7) grounds of appeal which were consolidated and argued together. Essentially, the Appellant was challenging the fact that, he was wrongly convicted and sentenced as there was insufficient evidence to prove the offences against him beyond reasonable doubt. Further, he raised the issue of weakness on the part of trial court to accord weight to the contradictions by the prosecution witnesses.

At the hearing date, the Appellant was represented by Mr. Edmund Ngemela, learned advocate and Mr. Charles Kagirwa, learned State Attorney, appeared for the Respondent Republic.

The Appellant through Mr. Ngemela, submitted that, ***first,*** the Appellant stood charged with the offences of stealing money to tune of TZS 60,000,000/=, TZS 6,000,000/= and United States Dollar 7000 and Tanzanite gemstone worth TZS 200,000,000/= being the property of one Emmanuel Joseph Wado. As such, the Republic was required to prove existence and ownership of the alleged stolen properties, a fact which could have proved by the complainant (PW1) and PW5. Unfortunately, there was no proof whatsoever adduced before the Court. According to Mr. Ngemela, the shortfall was fatal and watered down the requirement of proving the offence of stealing contrary to Section 258(1) Cap. 16. To substantiate the same, this Court was referred to the testimonies by PW1 and PW5 in which throughout their evidence they did not produce any document proving existence and ownership of the said stolen properties.

Second, Mr. Ngemela submitted that, PW1 testified that among the stolen properties was mobile phone make iPhone but the same was not among the properties mentioned in the charge sheet. This court was referred to pages 37-38 of the typed proceedings. The learned counsel, submitted that, the omission to include the phone in the charge sheet did render the whole charge before the trial court unmaintainable. Further, he submitted

that, the prosecution was legally required to pray for amendment of the charge but in vain. He referred the Court to the principles propounded in the case of **Lengai Ole Sabaya and 2 Others vs Director of Public Prosecutions,** Criminal Appeal No.129 (unreported) where the Court referred numerous decisions to the effect, that where there is variance between the charge and evidence adduced then the charge ought to be amended, failure of which renders the charge defective.

Third, counsel for the Appellant submitted that, the prosecution evidence was full of contradictions which ought to have been resolved in favour of the Appellant herein. This Court was referred to contradiction by PW1 and PW2 on the presence of watchman at the scene of crime. While PW1 testified that there was no watchman, PW2 stated that there was a watchman guarding PW1's premises. That, while PW1 testified that there was one house girl in the house, PW2 stated that there were two house girls. Moreover, PW1 testified that, there was CCTV camera at scene of crime when asked as to why he did not tender the CCTV footage, he said that the CCTV was damaged. Also, PW1 testified that, there was iron grill window in the house but when cross examined, he stated that there was wooden window.

Fourth, Mr. Ngemela, faulted admissibility of the confessional statement, exhibit P1, stating that, having being repudiated, during trial within trial, the confession statement ought to have been tendered and admitted for identification (ID) purposes and allow the defence side to cross examine on the same. Failure to tender the same was fatal, asserted Mr. Ngemela.

On the other hand, the Republic, through Mr. Kagirwa, learned State Attorney, supported the Appeal for the reason that, the testimonies by the prosecution witnesses were full of defects which were fatal to the verdict. In support of the appeal the learned State Attorney pointed out that: ***First,*** PW1 testified that the incident occurred in April, 2018 but reported the same to the Police station in December, 2019 being more than a year. He maintained that there were no cogent reasons given for such delay. In such alarming incident of stealing cash money TZS 60,000,000/=, TZS 6,000,000/= and United States Dollar 7000 and Tanzanite gemstone worth TZS 200,000,000/=. He referred this Court to the testimonies by PW1, PW3 and PW5 in particular at pages 21, 30 and 42 of the typed proceedings. ***Second,*** he submitted that PW5, the eye witness testified to have seen motorcycle at the scene of crime but did not see the Appellant. ***Third,*** he

pointed out that, the confession statement was not tendered and admitted for identification (ID) purposes during trial within a trial, thus contravening the governing principles as pronounced by the Court of Appeal in the case of **Ausi Mamu and 2 others vs the Republic**, Criminal Appeal No. 232 of 2004 (unreported), denying the Appellant right to cross examine on the same as it was not made part of the proceedings.

This Court had time to go through, the referred Judgement and at page 13, the Court of Appeal had these to say;

> "...*with respect, to the learned trial Judge, it is elementary that the common practice is that during trial within a trial, the statement at that stage is marked only for identification (ID) and later, when the assessors resume at the trial of the main case, the statement are formally tendered and marked as exhibits"*

I have gone through the grounds of appeal, the trial court record and the submission by counsel for the Appellant as well as the concession by the learned State Attorney. The main issue calling for this Court's determination is whether the prosecution proved the charges against the Appellant on the required standard.

At the outset, it is cardinal principle of law that, standard of proof in criminal cases is beyond reasonable doubts. This has been embraced and has become part of our laws that, such proof must be beyond reasonable doubt. Section 3(2) the Evidence Act Cap. 6 [R.E.2019] reaffirms the position. The provision provides that:

> *"(2) A fact is said to be proved when-*
>
> *(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the* ***prosecution beyond reasonable doubt*** *that the fact exists". (Emphasize is mine)*

This means, that, the principal burden is on the accuser, and in criminal cases the accuser is the prosecution, the Republic. Our courts have ruled through numerous decisions that the onus of proving in criminal cases beyond reasonable doubt lies on the prosecution side and not otherwise. To mention few decisions, for example in the case of **Christian s/o Kaale and Rwekiza s/o Bernard vs Republic** [1992] TLR 302, it was made a principle that, the prosecution has duty to prove the charge against the accused beyond all reasonable doubts and conviction should be founded on the strength of the prosecution evidence.

It is trite law that in criminal cases the burden of proof has always remained on the state throughout, to establish the case against the accused beyond reasonable doubt. The rationale for this principle and legal position is that since the burden lies on the state (the Republic), the accused has no burden or onus of proof except in few cases where he would be under the burden to prove certain matters. This position was clearly clarified and underscored by the Court in **Milburn vs Regina** [1954] TLR 27 where the court noted that:

> *"It is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

The appeal at hand being a criminal case had to conform to the same standard in respect of the offence of stealing against the Appellant herein. The proof must be, ***first,*** it is the Appellant and not otherwise who stole cash money TZS 60,000,000/=, TZS 6,000,000/= and United States Dollar 7000 and Tanzanite gemstone worth TZS 200,000,000/= and ***second,*** that the stolen properties belonged to the complainants (PW1 and PW2). The Appellant herein was charged for stealing TZS 60,000,000/=, TZS 6,000,000/= and United States Dollar 7000 and Tanzanite gemstone worth

TZS 200,000,000/= contrary to Section 258(1) and 265 of Cap 16. The provision provides:

"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."

Again, section 265 provides:

"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".

The principles and purposes of charging the accused person is governed by *inter alia* the principle in the case of **Issa Juma Idrisa & Another vs. Republic** [2020] TLR 365 where it was held that:

"The charge is the foundation of all criminal trials. To ensure that a trial is fair, any person accused of committing an offence is entitled to know the nature and substance of the accusations levelled against him so as to enable him arrange for a focused defence".

Before discussing the grounds of Appeal, this Court considered the decorum of the charge sheet itself. I have considered the provision used in charging the Appellant for the offences of stealing, that is to say, section 258(1) of Cap. 16. Looking at the provision, I am settled that the same just provides for ingredients and definition of the what amounts to "theft". It does not create the offence of stealing. Even the marginal note of the said section provides clearly for what it intended to aid, that is to provide for the definition of the term "theft". This position is cemented by the Court of Appeal's decision in the case of **Sospeter Charles vs Republic,** Criminal Appeal No. 555 of 2016 (unreported), where the Court had this to say:

"Section 258(1) of the Penal Code ***illustrates the essential ingredients*** of stealing..."

As such, the Appellant was not properly charged as he ought to have been charged under the relevant provision creating the offence committed. As it is undisputed from the prosecution evidence that, the Appellant was the Employee (Servant) of PW1 and PW5 then the correct charging provision ought to be section 271 of Cap. 16 which provides:

> *"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".

Chapter XXVII of Cap. 16 is illustrative and provides for all kinds of offences relating to theft, stealing inclusive. The Code numerates categories of offences of stealing which can be committed by different individuals, owing to status they hold. The provisions include sections 269, 270, 271, 273 and 274. Coming to the appeal under scrutiny, the Appellant ought to been charged under section 271 of Cap. 16 as he was an Employee (Servant) of PW1 and PW5. The above cited provisions are applicable based on the evidence on record by PW1 and PW5. PW1 testified, at page the 17 of the typed proceeding that:

"Joel Keya Kazimoto was my employee of swimming pool from 2018 - 2019 December. He was my employee because after committed a crime he left".

PW5 stated at page 38 the typed proceeding that:

"I know Joel Keya Kazimoto as a young man who was washing our swimming pool. He was doing that job since 2018 -2019 December".

In view of the above analysis of legal principles and evidence on record, this Court is of the settled position that there is no iota of doubt that the Appellant was not properly charged.

Having disposed that legal point, this Court reverts into what has been submitted by both counsel in support of the Appellant's appeal. To begin with, in order for the offence of theft to be proved there must be; ***one,*** commission of an offence of stealing by the accused, ***two*** no claim of right by the accused, ***three,*** taking and conversion of the property capable of being stolen other than the general or special owner, ***four,*** permanently depriving the general or special owner of use of the property in question.

In the case at hand, the Appellant was charged and convicted of stealing TZS 60,000,000/=, TZS 6,000,000/=, United States Dollar 7000 and Tanzanite gemstone worth TZS 200,000,000/= contrary to Section 258(1) and 265 of the Cap. 16. However, based on the evidence adduced, the prosecution side in particular PW1 and PW5 the owners of the purported stolen properties did neither tender any document proving existence of stolen money and Tanzanite gemstone nor prove ownership. PW1 testified that, there was document but did not tender the same for the reasons

known to himself. Further, the Appellant was not found with any slight evidence connecting him with the stolen properties.

As stated herein above, in criminal cases the onus of proving the case beyond sane of doubt lies with the Republic. This Court is of the settled legal position that the Republic has failed to discharge its legal obligation of proving the case against the Appellant beyond reasonable doubt. In the absence of such proof, the offence of stealing cannot stand because the threshold of the ingredients stipulated in section 258 (1) the Cap. 16 have not been established and proved by the prosecution.

Regarding the ***second*** point raised by Mr. Ngemela, the charge before the trial court was defective for want of amendment following variance between the charge and evidence adduced. Specifically, according to the evidence of PW1 among the properties stolen at the crime scene was a phone, make iPhone. The question to is whether failure to amend the charge to reflect the said phone renders the charge defective. Based on the legal principles propounded in the case of **Lengai Ole Sabaya and 2 Others vs Director of Public Prosecutions** (supra), in which this Court

referred to numerous decisions of the Court of Appeal, it was held inter alia that:

"As indicated earlier, the settled law provides that failure to amend the charge is an incurable irregularity. That being (sic), I respectfully disagree with the learned State Attorneys and the learned trial magistrate who held the view that the omission did not prejudice the appellants. Similar stance was taken in the case of ***Masota Jumanne vs R, Criminal Appeal No. 137 of 2016 (unreported)****. In that case items such as 4 kg of sugar, 2 bars of soap, 7kg of rice featured in evidence, while the particulars of offence of armed robbery named a bicycle and Tshs. 15,000/= only. When the matter reached the Court of Appeal, it was held that:-*

"In a nutshell the prosecution evidence was riddled with contradiction on what actually was stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge."

Additionally, in **Mashaka Bashiri vs Republic,** Criminal Appeal No. 242 Of 2017 (unreported), the Court of Appeal while deliberating on a similar issue observed that:

"It is therefore evident that, even at this initial stage, the prosecution did not seek leave to amend the charge to include all the alleged stolen properties therein. The failure to amend the charge sheet is fatal and prejudicial to the appellant hence leads to serious consequences to the prosecution case as it was stated by this Court in various cases some of which have been cited to us by the appellant. Specifically, in the latter case, when the Court dealt with an akin situation where the charge sheet was at variance with the evidence in relation to the type of properties which were alleged to have been stolen from the complainant PW, it stated that: -

"We note that, other items mentioned by PW1 to be among those stolen like, ignition switches of tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of this case, we find that the prosecution evidence is not compatible with the particulars in the

charge sheet to prove the charge to the required standard."

[Emphasis added]

This Court entertains no doubt that in the appeal at hand, there was variance between the charge and the evidence on the items alleged to have been stolen from PW1 and PW5. The prosecution case, as rightly argued by the Mr. Ngemela, was not proved to the required standard. In the circumstances, I thus, find the second point to have merits and rule that the trial court convicted the Appellant on incurably defective charge.

Furthermore, the ***third*** point raised by Mr. Ngemela was existence of contradictions on the part of the prosecution evidence. It is well established principle of law that the court will not entertain contradictions unless they go to the root of the matter. This principle is rooted from the Court of Appeal decision in **Mabula Makoye vs Republic,** Criminal Appeal No. 227 of 2017 (unreported), where it was held that:

"The complaint by the first appellant that the prosecution's evidence was riddled with contradictions will not detain us. We have not been able to observe any material contradictions in the case as complained

by the first appellant. The law is now settled that the Court will ignore minute contradictions which do not go to the root of the matter."

This Court is of the settled mind that, the contradictions pointed out by the Appellant's counsel though do exist, but are minor as they do not affect the substantive part of the matter nor prejudice the Appellant in any way. I thus, find that, the said contradictions are not fatal.

The ***fourth*** point advanced by Mr. Ngemela was failure by of the prosecution side to tender the confessional statement during trial within a trial as required the law. He made extensive submission on the same as elucidated above. Based on the principles developed by the Court of Appeal in the referred case of **Ausi Mamu and 2 others vs Republic** (supra), and having gone through the proceedings, this Court noted that the confessional statement was not tendered and admitted for identification (ID) purposes.

This goes hand in hand with the fact that the Appellant was not accorded right to cross examine on the same after being made part of the court record. The Appellant was in fact denied the right to react on the document which was in dispute, leading to trial within trial. Further, it is

the same document which after trial within trial was admitted as exhibit P1, and the same formed basis of proving the case against the Appellant.

This court rules that the confessional statement, exhibit P1, was improperly admitted in evidence contrary to the principles of admitting documents in trial within trial as laid down in the case of **Ausi Mamu** (supra). That said, since exhibit P1 was admitted contrary to the law, it is hereby expunged from Court record.

On the other hand, Mr. Kagirwa, in support of the appeal pointed out the issue of delay to report the incident to the Police from its occurrence in April, 2018 until 2019 when it was reported by PW1 and PW5. He raised doubt as to why they did so bearing in mind the magnitude of the incident and alleged properties involved. Without iota of doubt, failure by PW1 and PW5 to report the matter to the Police Station for more than seventeen (17) months leaves a lot to be desired.

The inaction and silence on the part of the complainants in this case casts a lot of doubts on the prosecution evidence taking into account that there were no plausible reasons advanced for the laxity. The testimonies by PW1 and PW5 that, they were investigating, is untenable in law because they

are not qualified investigators and nothing substantial was adduced as outcome of their prolonged investigation.

Considering the analysis of evidence and governing principles of law in charging and proving criminal offences, in particular, the offence of stealing, this Court is satisfied that the Appellant was improperly charged and convicted. Even by assuming that the Appellant was properly charged (which is not the case), still there was no sufficient evidence to prove the offence of stealing or any kindred offences.

In the circumstances, this Court finds merits in the appeal, thus allow the appeal in its entirety. The Appellant's conviction is quashed and sentence set aside. The Appellant to be released from prison forthwith unless lawfully held for other offences.

It is so ordered

DATED at **ARUSHA** this 3rd day of October, 2022

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G. P. Malata
JUDGE
03/10/2022