

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

**CRIMINAL NO.47 OF 2020**

(Arising from land Criminal Case No. 237 of 2019 at the District Court of Kahama at  
Kahama)

**AMOSI MASWANYA MOHAMED.....1<sup>ST</sup> APPELLANT**

**ADAM MAGABILO @ CHIWEJO.....2<sup>ND</sup> APPELLANT**

**SHIJA MATHIAS.....3<sup>RD</sup> APPELLANT**

**GODSAVE GEOFFREY MWANGA.....4<sup>TH</sup> APPELLANT**

**VERSUS**

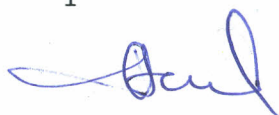
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

20<sup>th</sup> & 27 September, 2022

**L.HEMED, J**

At the District Court of Kahama (the trial Court), the appellants, Amosi Mawanya Mohamed, Adam Magabilo@ Chiwejo, Shija Mathias and Godsave Geoffrey Mwanga were convicted of the offence of stealing under section 258 and 265 of the Penal Code [Cap. 16 R.E 2002] and were



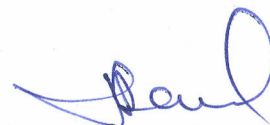
sentenced to community service for six (6) months and *"pay tshs 40,000,000/=within six months..."*

Before the trial court, it was alleged that on diverse dates between 30<sup>th</sup> June, 2018 to 9<sup>th</sup> day of May, 2019 at Kahama Filling Station along Isaka road within Kahama District in Shinyanga Region, unlawfully stole 36,962 liters valued at Tshs.88,708,800/= the property of one **Omary s/O Mahamud Jaha.**

Briefly, the prosecution evidence was that PW1, the security guard employed by Mustold Security Company informed the court that in August 2018 while he was at work at about 01:00hrs he heard the employees on duty making call to someone telling him to come as security guards were asleep. According to him, people who were on duty were Amos, Adam and Shija. He became alert for, he thought they were about to be invaded. Later he heard the car,land cruiser, white colour, coming from the direction of water department offices to the filling station. It went to the pump and one employee went to the pump and opened the pump lid and then handed the pipe to the person who was in the car who refueled the empty containers which were not less than 20 or 25. After thirty minutes the car

left and the appellant (not know) closed the lid. He was not content to what was taking place he decided to report the matter to the supervisor.

PW2 testified that he employed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants who were also the employees of his late father. PW2 discovered that the business was not going well, he asked Mohamed Shelamin (PW3) to install a security system namely quick book. After installation of the system, it was discovered shortage of fuel of 3201 litres, this was by June. They did not know how the short was occurring because the pump receipts showed the amount sold. In the following month of July, they discovered shortage of 4713 litres. In August they called a technician to inspect the pumps and found that they were okay. By August, they discovered another loss of 6000 litres. The technician advised them to fill one tank, refill to the full, and see if there was leakage, where they checked in the next day and found the amount to be the same and continued with the sale and got another loss. They conducted stocktaking and discovered loss until when PW2 was informed by the security guard that the pump attendants were stealing fuel at night.





PW2 informed the trial court that because they could not know at what time they would repeat, they decided to terminate them from employment, one after the other. In December, they conducted audit, they could not find loss.

PW3 Mohamed Shelami Abubakari, the supervisor of Kahama filling station was the finance and system administrator. That the security guard informed him that the appellants were stealing fuel at night. He advised the director to suspend the appellants. According to PW3, after the termination of the appellants from the employment, the loss decreased by 95%.

PW4 E.6656 D.Cpl Semudu was the one who investigated the crime. His testimony was to the effect that the 1<sup>st</sup> Appellant was interrogated by D/ssgt Obote and admitted and showed how the fuel was sold to the 4<sup>th</sup> appellant.

PW5, Gibrin Rashid testified to be the technician who inspected the pump and found no defect on them. PW6, D.9958 D/ssgt Obote testified to have interrogated the 1<sup>st</sup> appellant and recorded his cautioned statement.





In their defense the appellants denied the allegation where the 1<sup>st</sup> Appellant (DW1) Amos Masanywa Mohamed he stated to have started the work in October 2016 up to March 2019 where he quitted the job because he was not getting salary on time. He was arrested after he had already quitted from employment. He denied to have confessed in the cautioned statement. His testimony was to the effect that he was forced to sign the cautioned statement.

DW2 Adam Magabilo, the 2<sup>nd</sup> Appellant testified he was terminated from employment without following procedures. He was arrested when he instituted a claim of his salary arrears at the Commission for Mediation and Arbitration. DW3 Shija Mathius, the 3<sup>rd</sup> Appellant testified that when he was working at Kahama Filling station there was a procedure of handing over when one was retiring from work. He said that he was handing over to the accountant of the company daily. He testified that when he was in service there was no complaint leveled against him and that he was arrested and charged with the offence of stealing after he had instituted a case at CMA against the company.

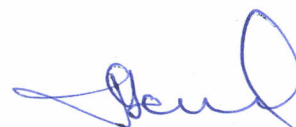
DW4, the 4<sup>th</sup> appellant testified that he never involved in fuel business and that he is a mere peasant. He told the trial court that even when the police conducted search at his home they found nothing.

DW5 one Ramadhan Salum, the watchman nearby Kahama filling station, who was working at night since 2018 to March 2019 testified that he never saw the appellants stealing. DW6 one Fred Kotec Mwamote testified to be the officer at TRA who testified that there is no car registered by TRA with Reg. No. T996 XXX.

After having heard the evidence from the prosecution and the defense side, the trial court found that the prosecution had proved beyond reasonable doubts the offence of stealing and hence the conviction and the sentence as aforesaid. The appellants were dissatisfied with the judgment henceforth the instant appeal on the following grounds: -

*"1. That the trial Court erred in law to decide the case in favour of the Respondent while prosecution side did not prove the case beyond reasonable doubts.*

*2. That the trial Court erred in facts to decide the case in favor of the Respondent whose evidence was contradictory and*

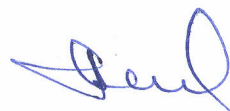


*full of discrepancies; the same facts did not establish and prove the offence beyond reasonable doubts to warrant a conviction of guilty."*

*3. That the trial Court did not exercise its adjudicative powers judiciously.*

At all the material time, the appellants were represented by **Mr. Amosi** learned advocate while **Ms. Wapumbulya Shani**, learned state attorney represented the Respondent.

Regarding ground one, Mr.Amosi argued that the prosecution did not prove the case beyond reasonable doubts because the Charge before the trial court did not establish the offence of stealing. He asserted that the appellants were charged under sections 258 and 265 of the **Penal Code Cap 16** but the Charge did not state the subsections and paragraph under which the appellants were being charged. He cited the case of **Mohamed vs. R (1980) TLR 279**, and that of **Mohamed s/oHassan @ Kichambike V.R Criminal Appeal No.37 of 2017**, to cement his point. He further submitted that the offence of Stealing which has the elements of taking and converting as per section 258(1) of the Penal Code Cap 16





was not proved before the trial court. He cited the decision of the Court of Appeal sitting in Arusha in the case of **Isdori Patrice vs. R. Criminal Appeal No.224/2007**, to back up his point that offence must contain essential elements.

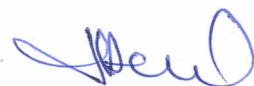
Mr. Amosi that, argued PW1 who testified that stealing of petrol was done several times at night, could not state how he was able to identify the appellants as he failed to tell the court how strong was the light to enable him identify the appellants. He even failed to tell the distance he was from the scene of crime at the time of commission of the offence.

It was further submitted by Mr. Amos that PW3 while before the trial court told that after the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were terminated from employment, stealing incidents went down by 95%, but when he was cross examined why the remaining 5% he could not have an answer. He stated that even after the termination of the appellants from the employment stealing has continued.

As to the 2<sup>nd</sup> ground of appeal it was submitted by Mr. Amos that the trial court misdirected itself to decide in favor of the respondent while the entire evidence was contradictory and with a lot of discrepancies. Some of

the examples cited by Mr. Amos were; the differences between the evidence of PW1 and exhibit P2, that the evidence of PW1 and caution statement of the 1<sup>st</sup> appellant (P2) cannot match because the accused wanted to exonerate himself from the accusation thus the evidence of P2 cannot be equal to the evidence of Pw1 (eye witness).

On the 3<sup>rd</sup> ground of appeal that the trial magistrate did not exercise his power judiciously as he failed to consider the defense of the appellants, Mr. Amosi stated that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants had testified that the accusations against them were just framed after they had lodged cases at CMA claiming payment of their salary arrears against their employer. The 2<sup>nd</sup> appellant said that he was terminated from employment on 27 December, 2018 and continued to make follow-up of his salary arrears in vain hence he instituted a case at CMA, after having instituted the case he was arrested on 17 May, 2019. The 3<sup>rd</sup> Appellant testified that he was terminated from employment on 30<sup>th</sup> January, 2019 and continued to make follow up of his salary and other entitlements in vain and instituted proceedings at CMA and was arrested on 17 May, 2019. Mr Amos cited the case of **Soud Seif vs. R Criminal Appeal No. 521 of 2016**, of the Court



of Appeal of Tanzania on the consequence of failure to consider defense evidence.

In reply thereto, **Ms.Shani**, leaned state attorney argued ground 1 and 2 jointly that the case against the appellant was proved beyond reasonable doubts through the witnesses and exhibits tendered in Court by the prosecution. She said, PW1 recognized the appellants before and even during the incident and the other witnesses supported the evidence of PW1 by explaining how the petrol was stolen and how the pumps were being disconnected in perpetrating the act of stealing.

Ms.Shani submitted further that failure to cite the subsections have not affected anything as explained by the defense counsel. The Charge was well understood, evidence was adduced against them and they understood it that's why they used their right to defend themselves. If at all there would have been any problem with the Charge, the defense side would have not defended themselves.

As to the involvement of the 4<sup>th</sup> Appellant in the commission of the offence, it was submitted by Ms. Shani that even if he was not an employee it was proved that he was purchasing stolen petrol. His acts of





taking the petrol during the night hours, he knew what was going on and thus he participated in the commission of the crime.

As to the 3<sup>rd</sup> ground of appeal, it was submitted by the respondent's counsel that the Court can convict or acquit the accused based on the strength of the evidence adduced by the prosecution and not the defense. In convicting the present appellants, the Court took into consideration such principle. The Court also considered the defense of the appellants but the same could not defeat the evidence of the Republic. Ms. Shani was also of the view that Labour cases are handled by different court other than the Court, which determined the criminal case, and there was no interruptions between the two cases. She thus prayed for the dismissal of the Appeal.

In his rejoinder submissions, Mr. Amos insisted what he made during his submissions in chief.

Having heard submissions from both learned counsel made in either to support or counter the appeal; let me turn to discuss the grounds of appeal. I have examined the three grounds, and I have come to the firm view that they can be disposed jointly through the discussion of the question that whether the prosecution managed to prove the case at the



trial court beyond reasonable doubts to warrant the conviction of the appellants.

The appellants herein were charged with and convicted of stealing contrary to section 258 and 265 of the Penal Code, [Cap. 16 RE 2019]. I am aware of the decision of this Court in **Christian Mbunda v. Republic** [1983] TLR 340, where it was held that: -

*"...in order to convict an accused of theft the prosecution must prove the existence of actus reus which is specifically termed as asportation and mens rea or animus furandi"*

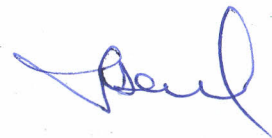
In the present case the property alleged to be stolen was the 36,962 liters of petrol from Kahama Filling Station, the property of one Ommary Mahamud Jaha where the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants happened to work as pump attendants before they were dismissed from employment. The question is was there such *actus reus* of stealing of the alleged liters of petrol by the appellants? Section 258 (1) of the Penal Code, [Cap 16 R.E 2019] provides thus:

*"... 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."*

From the provision stated herein above, in order to establish the *actus reus* of stealing, it has to be proved that the person charged fraudulently converted the thing capable of being stolen for the use of the person other than the general or special owner. In other words, the prosecution must, in the first place prove before the court trying the matter by producing the thing alleged to be stolen. In the present cases, the alleged stolen property was never produced in court. The evidence adduced before the trial court did not establish as to who was found to be in possession of it.

Additionally, I have examined the evidence adduced by the prosecution witnesses, PW1 testified that he heard one of the appellants who he did not mention his name, calling someone to come because the security guards were asleep later on the car came with empty containers in which petrol was filled therein. The evidence of PW1 raises many doubts because he did not establish if the person who came with the car with





empty containers was the one who was communicating with one of the appellants.

I have also found that the basis of the charge before the trial court was the complaints of PW2 who complained about the loss he got in his fuel business. According to the evidence on record, PW2 asked PW3 to install security system and discovered loss. It is when they called the technician PW5 who checked the pump to find out the source of loss but he could not find any. It was from the alleged loss where the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent were terminated from the employment. In the evidence of all prosecution witnesses, there was no one who witnessed the appellants stealing the alleged petrol. The 4<sup>th</sup> Appellant was connected to the case at hand as he was mentioned to be the person who was purchasing stolen fuel from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants. However, when search was conducted, the 4<sup>th</sup> Appellant was not found to be in possession of any kind of fuel nor he was found to engage in fuel business.

From the above analysis, I have come to the conclusion that the prosecution did not prove the case beyond reasonable as there was no



proof as to the *actus reus* constituting the offence of stealing. The evidence on record do not in any way connect the appellants to the alleged offence of stealing. I thus allowed the appeal. The Judgment of the District Court of Kahama is hereby quashed. Conviction and sentence made thereof are set aside.

**DATED at SHINYANGA** this 27/9/2022

  
L. HEMED  
**JUDGE**

Judgment is delivered in the presence of all 4 appellants appearing in person this 27/09/2022



Right of Appeal explained.

  
L. HEMED  
**JUDGE**