

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

AT KIGOMA

(PC) CRIMINAL APPEAL NO. 07 OF 2021

(Arising from Criminal Appeal No. 29/2021 of Kigoma District Court before Hon. K.V. Mwakitalu
- RM, Original Criminal Case No. 15 of 2021 of Mahembe Primary Kigoma before Hon. G. H.
Mateh, RM)

KHAMISI S/O SAID..... APPELLANT

VERSUS

HAWA D/O ISSA KADA.....RESPONDENT

J U D G M E N T

21/02/2022 & 13/05/2022

L.M. MLACHA, J.

At Mahembe Primary Court, the respondent, Hawa Issa Kada was charged of stealing contrary to section 165 of the Penal Code, Cap. 16 R.E. 2022. It was alleged that she stole 2000 bricks on 15/9/2019 at 17:00 hours, at Kasuku village, Kigoma District property of the appellant, Hamis Saidi. He was found guilty, convicted and sentenced to 4 months in jail. She was also ordered to pay back the bricks worthy Tshs. 110,000/= and damages Tshs 50,000/=. She could not see justice in the conviction, sentence and orders for compensation and damages. She appealed to the district court.

The district court (K.V. Mwakitalu RM) vacated the findings and orders of the primary court and set her free. The appellant was aggrieved and came to this court by way of appeal. He had 4 grounds of appeal which read thus;

- 1. That the Appellate Court erred in law and facts for not considering the number of stolen bricks were 1000 and no one mention 2000, even exhibit P1 supported that 1000 bricks.*
- 2. That the Appellate Court erred in law and facts for not considering exhibit P1 which proved that the stolen bricks were 1000 and the Respondent admitted to stole 1000 bricks and she promised to repay it.*
- 3. That the Trial Court erred in law and facts for acquitting the Respondent while there was cogent evidence that Respondent stole 1000 bricks the property of the Appellant.*
- 4. That the Trial Court erred in law and facts for acquitting the Respondent basing on contradiction of a number of bricks without regarding the evidence that the Appellant and his witness testified that were 1000 bricks and not 2000 bricks the evidence which supported by exhibit P1.*

Hearing was done by oral submissions. The appellant who has hearing disabilities spoke through the assistance of his wife Siwajibu Rashid. He told the court that he was sick on the material day. While on bed at home,

the respondent stole his bricks. His wife who happened to visit the valley noted that the bricks had been stolen. She reported the matter to him. He moved to the valley after 4 days and witnessed that his bricks had been stolen. He saw tire marks. He asked his neighbours who said that they had been picked by Mr. Adam. He moved to Mr. Adam who told him that he had been hired by the respondent to pick them. He moved to the respondent and could see the bricks. He moved to see the respondent's husband who said that the respondent had bought them. He moved to complain to the village chairman. He told him that they had stolen 100 bricks.

The respondent was summoned and came with the one who had sold the bricks to her, Mr. Bahela. Bahela said that he sold bricks to the respondent but came to pick them before being handled over. She was asked to return them but refused. The appellant moved to the hamlet chairman where she promised to pay but could not do so. He moved to the ward secretary to complain without success. He then came to court for redress.

In reply, the respondent said that she bought 5,000 bricks from Mr. Bahela Blakama for Tshs 500,000/= in 2015. She picked them in 2016. She was later called at the village office accused of theft of bricks something which

she denied. She stayed for 5 years but later arrested and sent to the police. She was charged before the primary court where she was ordered to pay Tshs. 160,000/=. He was sent to prison but later released on appeal. She denied to steal the bricks.

I had time to examine the evidence on records closely. I have also considered the submissions of parties. My reading of the evidence on record and exhibits tendered show that there was evidence showing that the respondent took the bricks without the consent of the owner. This is seen in the oral evidence of the appellant and his witness. It is also seen in the documentary evidence which was tendered in evidence. The documents speak for themselves. They read as under:

'MAKUBALIANO YA NDUGU HAMISI SAIDI NA HAWA ISSA

KWA KUDAIANA TOFALI 10.05.2021:

*"Mimi Hawa Issa nimekubali kumrudishia tofali zake 1000.
WAMEKUBALIANA MBELE YA MWENYEKITI WA KITONGOJI KATI
(A) SAIDI KADYUGENZE GAMBA.*

NITARUDI IJUMAA KUTOA TAARIFA KAMA NIMESOMBA,

KNY YA MWENYEKITI WA KITONGOJI KATI (A) DAUDI KALIAMWE (Signed) NA MJUMBE (Signed) SAINI YA ANAYERUDISHA TOFALI (Signed)"

"HATI YA MAKUBALIANO YA KULIPA TOFALI ZA HAMISI SAIDI 1000 Tarehe 28/05/2021

Mimi Hawa Issa Hamisi ninaahidi kulipa tofali za mtajwa hapo juu kuanzia tarehe 28/5/2021 hadi tarehe 4/6/2021 siku ya Ijumaa ndio nitakabidhi tofali 1000 kwa mdai mbele ya mtendaji wa Kijiji cha Kasuku, Pia ninaahidi kulipa fedha kiasi cha Tshs 20,000/= siku ya Ijumaa tarehe 4/5/2021. Endapo nitashindwa kutekeleza suala hili kwa wakati hatua kali za kisheria zitachukuliwa.

Jina la Mdaiwa:

HAWA ISSA HAMISI (Signed)

Jina la Mdai:

HAMISI SAIDI (Signed)

Makubaliano haya yamefanyika mbele ya Mtendaji wa Kijiji cha Kasulu.

Zubeda I. Sunzu (Signed).

28/05/2021"

The appellant gave a clear evidence at the trial court which was in line with his witness, PW2 Onesmo Raphael supporting the documents. He said that *'Tofali zilikuwa (1000) = elfu moja'*. PW2 said *'Nilianza kumuuzia SM1 tofali 1000. Alinipa laki moja na elfu kumi'*. The respondent gave her evidence in few sentences simply saying *'Nilinunua kwa Bahela... sina Shahidi niliuziwa tu na Bahela. Nilimpa laki tano (500,000) kwa tofali elfu tano (5,000)'*.

Based on this evidence, the primary court found the respondent guilty and convicted her. The conviction was set aside by the district court which said that there was a contradiction between the evidence of the appellant (PW1) and his witness (PW2) on the number of bricks. That whereas the appellant said that 2,000 bricks were stolen, his witness said it was only 1,000.

With respect to the magistrate, on the strength of the evidence on record, which I have tried to demonstrate, I don't see any contradiction between the evidence of PW1 and PW2. They all said that it was 1,000 bricks. That is also what is in the written exhibits. I think the magistrate may have confused the contents of the charge sheet and what is in the evidence of

PW1. The witness never said that 2,000 bricks were stolen but the charge sheet.

The charge sheet has 2,000 bricks while the evidence say it is 1,000. This is a contradiction. There is therefore a contradiction between the charge sheet and the evidence on record. The rule is that, where there is a contradiction between the charge sheet and the evidence on record the accused must be given the benefit of doubts and be set free. see **Vumi Liapenda Mushi v. The Republic**, CAT Criminal Appeal No.327 of 2016, page 7 (unreported). But, I think that rule must not be without an exception because all the cases decided under this rule came from either the RMs court or District Courts where charges are drafted by public prosecutors who also conduct the cases. The situation may not be so in the primary court.

Here is a case originating from the primary court where much as the charge may come from the police or prepared by the clerk, but the republic do not prosecute the case. The case is being prosecuted by the complainant who did not prepare the charge. I think that where the case is being prosecuted by the complainant who did not prepare the charge sheet and it is subsequently found that there is a variance between the

charge sheet and the evidence, the rule should not apply. The court must use its wisdom to resolve the controversy for as it was said by the Supreme Court of India in **Ritesh Sinha v. State of Uttar Pradesh and another** Criminal Appeal No. 2003 of 2012, *'the wages of procedural sin should not be the death of rights'*. The complainant should not be penalized for errors which were not committed by him. See also **Msasani Peninsular Hotels Limited v. Barclays Bank Tanzania Ltd and 2 others**, CAT Criminal Appeal No. 192 of 2006 page where it was said that the applicant cannot be penalized for the inefficiency of the staff of the court and **Huruma Mpangaos and others v. Tanzania Portland Cement Co.Ltd**, CAT Civil Application No. 98 of 2008 where it was said that the court cannot turn its back against its own mistake and throw away the blame on the applicants alone.

With that in mind, much as there is variance between the charge which was submitted at the primary court and the evidence adduced, I still have the opinion that the conviction was properly entered. There was both asportation and malice on the part of the respondent making the evidence intact. In that regard, the decision of the district court is vacated and set

aside. The decision of the primary court is restored with some modifications on the sentence and compensation orders.

Having examined the sentence and compensation order, I think the case did not call a six month jail sentence given the fact that the respondent was a first offender. An order for a fine and compensation could be enough. I accordingly substitute the sentence imposed by the primary court with a fine **Tshs.50,000/=** or two months in jail in default. The order for paying Tshs. 110,000 as compensation of 1,000 bricks is also varied for the prices may no longer be the same. I vary the order to read, **compensation of 1,000 bricks** instead of the money. The bricks to be supplied to the appellant within **14 days** from today. The handling over to be witnessed by the ward secretary. It is ordered so.

Appeal allowed.



A handwritten signature in blue ink, appearing to read "L.M. Mlacha".

L.M. Mlacha

Judge

13/5/2022

Court: Judgment delivered before the parties. Right of appeal explained.



A handwritten signature in blue ink, consisting of a large, stylized 'L' and 'M' followed by a horizontal line.

L.M. Mlacha

Judge

13/5/2022