IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 3 OF 2022

(Originating from Resident Magistrate's Court at Arusha vide Criminal Case No., 299 of 2020)

AMANDUS KIMARIO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

REASONS FOR JUDGMENT

31/08/2022 & 12/10/2022

GWAE, J

On 31st August 2022 when this appeal was called on for hearing, I heard the arguments advanced by the parties' representatives namely; Mr. Emmanuel Sudi assisted by Mr. Melkizedeck, the learned counsel who appeared representing the appellant herein and Miss Alice Mtenga, the learned state attorney for the Republic and eventually, I allowed the appellant's appeal and ordered immediate release of the appellant from prison forthwith and reserved reason (s) for the judgment.

As revealed by the records of this court and Resident Magistrate Court of Arusha at Arusha (Trial court), the appellant was charged, tried and convicted of the offence of stealing by servant c/s 271 and 265 of the Penal Code, Cap 16 Revised Edition, 2019. He was then sentenced to

custodial sentence of term of four years which he was still serving when he appeared before the court for hearing.

It was the prosecution accusation followed by its evidence that, on between July 2018 and April 2019 the appellant being an employee of ASAS Dairies Limited in Arusha Branch did steal Tshs. 26,985,853/=the property of his employer. It was the evidence of the prosecution that the appellant did admit to have caused the loss to his employer when he was queried on the said loss.

The appellant when availed an opportunity to enter his defence, he denied to have admitted to have caused the loss except that he was forced to sign a document exhibiting that he caused the loss in the tune of Tshs. 26,985,853/= adding that the loss was caused by sales department.

The appellant felt aggrieved by the decision and sentence imposed by the trial court. He thus appealed to this court by filing his petition of appeal consisted of six grounds of appeal, to wit;

1. That, the Hon. Magistrate erred in law and in fact by failing to provide accused person with right to legal representation after his advocate had withdrawn himself from the conduct of the matter
2. That, the Hon. Magistrate erred in law and in fact by basing the accused's conviction in his own audit statement which had

a disclaimer but the latter was not considered by the trial magistrate

3. That, the Hon. Magistrate erred in law and in fact for the judgment and order given are fully defective for the two differ in content
4. That, the Hon. Magistrate erred in law and in fact by convicting the accused person by based on unfounded evidence
5. That, the Hon. Magistrate erred in law and in fact by failing to evaluate evidence visa-vis the circumstances of the case hence arriving at wrong decision
6. That, the Hon. Magistrate erred in law and in fact for the judgment and order given contravening the principle of double jeopardy.

The parties' representatives aforementioned orally argued this appeal as herein under;

In the 1st ground, Mr. Melkizedeck assisting Mr. Sudi argued that, it was wrong for the trial court for not giving the appellant chance to look for another advocate since his former advocate withdrew instructions as revealed by the trial court's proceedings at page 12-13. He cemented his argument by citing section 310 CPA as well as in the Article 13 (6) (a) &

(b) of our Constitution, 1977 and also courts' decisions in **Haruna Said vs Republic** (1991) TLR 124 and **Thomas vs. Republic** (1992) TLR 137.

Submitting on the ground Na.2 and 4, Mr. Emmanuel Sudi stated that, there was no cogent evidence to support the charge of stealing by servant as substantiated by PE1 and PE2. At page 13. According to him the prosecution evidence is all about loss. He reinforced his submission by citing the case of **Haruna's case** (supra). It was the opinion of the learned counsel for the appellant that, had the trial court properly directed its mind it could not have arrived at that decision. He urged this court to make a reference to **Mapambano vs. Republic**, Criminal Appeal No. 268 of 2015 (unreported-CAT) at page 10, where evaluation of defence was said to be enormously important.

Mr. Sudi went on arguing 3rd and 6th ground by stating that, it was wrong for the trial court to sentence the appellant to four (4) years imprisonment and order of return of Tshs. 26,000,000/ which amounts double jeopardy.

When permitted to roll the ball, the learned counsel for the Republic, focusedly supported the appellant's appeal by stating that, the offence of stealing by servant was not substantiated. She was further of the opinion that, there must be cogent evidence to establish that, the property or goods were used by an accused person for his or her use or benefit. She

supported her argument by citing the judicial jurisprudence in **Benedict Ajetu vs. Republic** (1983) TLR 190.

Now, to the court's determination of this appeal, as to the 1st ground of appeal. It is common ground as correctly argued by the appellant's counsel that, the right to a legal representation is the constitutional right provided under Article 13 (6) (a) of the URTC. The right to a fair hearing in criminal justice includes among other things the right to representation.

It follows therefore the withdrawal by Mr. Emmanuel to proceed representing the appellant on the contention that, he was not satisfied with the trial court's ruling on, whether it is mandatory requirement for an accused person to be supplied with a copy of document intended to be tendered during trial or not required the presiding magistrate to avail the appellant an opportunity to look for another advocate. Therefore, the withdrawal by Mr. Sudi, in my firm view, ought to have been followed by a brief adjournment to enable the appellant to look for another advocate or to have a full decision on, whether to proceed with the trial on his own or not. The appellant was therefore entitled to have amply made up his mind instead of compelling him to proceed with the trial immediately after the withdrawal by Mr. Sudi. Denial of right to legal representation in this case is found prejudicial on the part of the appellant since the right representation is the constitutional right.

It is my deliberated view that, the appellant should not be easily deprived of such right merely because of the misunderstandings between the defence counsel and the trial magistrate. More so, even if the witness was from Iringa Region yet, that alone ought not to be considered at the expense of the accused person now appellant. While observing the application of the doctrine of justice delayed is justice denied, it is also encouraged to underscore the legal principle that, justice hurriedly is justice buried as was recently demonstrated by the Court of Appeal in **Gurmit Singh vs. Meet Singh and another**, Civil Appeal No. 256 of 2018 whose decision was rendered on 5th October 2022 where it was stated and I quote;

> *"Both old Maxim; Justitia dilate Justitia negavit for justice denied and, justice hurried means justice buried complement each other..."*

In the light of the above findings, it is the view of this court that, the proceedings, judgment and ancillary orders made by the trial court after it had denied the appellant the right to legal representation are nothing but a nullity. The 1st ground of appeal is thus merited, the same is allowed.

In the 2nd ground and 4th ground above, examining the oral as well as documentary evidence on the trial court's records, I am satisfied that, the charge of the stealing by servant against the appellant ought to have strictly been proved. Both oral and documentary evidence in this case, merely prove the fact that, the appellant admitted the loss to have occurred to his employer. The testimony of PW1 that, the appellant admitted loss of Tshs.26 Million, in my firm view, does not establish stealing by servant pursuant to section 271 of the Code (Supra) save to loss occurred either through negligence on the part of the appellant or any other person. It was therefore unsafe to secure conviction against the appellant basing on the report of loss or evidence adduced by PW1. This court when faced the similar situation in the case of **Haruna Said vs. Republic** (1991) TLR 124 had these to say;

> *"In a charge of stealing by Public Servant, it is not enough to prove mere shortage or that the accused was negligent in the performance of his duties as public servant"*

Basing on the evidence adduced by the prosecution and adhering to the above principle of the law, I am not satisfied if the charge against the appellant was proved to the required standard as rightly argued by parties' counsel. These grounds of appeal are also not without merit.

Having determined as herein above, I do not see any valid reason of being curtailed by other grounds of appeal that is ground No.3, 5 and 6 of appellant's appeal.

In the upshot, these are reasons given for the court order dated 31st December 2022 allowing the appellant's appeal and releasing him from prison. It is so ordered.

DATED at Arusha this 12th October 2022

Sgd. M. R. GWAE
JUDGE
12/10/2022