**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 85 OF 2022**

***(Originating from Criminal Case No. 340 of 2020 of Temeke District Court)***

**WILFRED ATILIO MNYELWA.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

***Date of last Order: 22/08/2022***
***Date of Judgement:17/10/2022***

**J U D G M E N T**

**MGONYA, J.**

**Wilfred Atilio Mnyenyelwa** was charged for stealing goods on Transit contrary to **sections 258 (1) and 269 (c) of the Penal Code Cap. 16 [R. E. 2019]** and convicted to 40 months imprisonment. The latter filed an appeal before this Honourable Court with 8 grounds of appeal as hereunder:

1. ***That, the learned trial Magistrate erred in law and in fact in his failure to analyse the evidence which resulted into a wrong decision;***
2. ***That, the trial Magistrate erred in law and in fact in convicting the Appellant in disregarding his testimony and merit of his defence which created great doubt;***

3. ***That, the trial Magistrate erred in law and in fact in convicting the Appellant basing on week evidences by the prosecution which was not made beyond reasonable doubt;***
4. ***That, the learned trial Resident Magistrate erred in law and in fact in convicting the Appellant whereas the charge was defective;***
5. ***That, learned Trial Resident Magistrate erred in law and in fact in convicting the Appellant whereas there were variances between the charge and evidence adduced;***
6. ***That, the learned trial Resident Magistrate erred in law and in fact in convicting the Appellant basing the on documentary evidence which were contradicting and wanting;***
7. ***That, the learned trial Resident Magistrate misdirected himself in deciding that, the point of stealing goods on transit do not need to be proved; and***
8. ***That, the learned trial Resident Magistrate erred in law and in fact in sentencing the Appellant against the law;***

The Appellant before this Court is represented by Mr. Kalori Fabian Mluge, learned Advocate while the Respondent is

represented by Ms. Imelda Mushi, State Attorney. When the matter was scheduled for hearing and the Court having found that the lower Court's records in place ordered the same to be disposed of by way of written submissions.

Mr. Kalori Fabian Mluge consolidated the 1st and 3rd grounds of appeal and argued the same by analysing or identifying ten discrepancies by the trial Court which he states to have been errored at the time of analysis in the judgement. He further submitted that the same led to the Court making a wrong decision through the identified errors which were mainly based on the prosecution's failure to prove their case beyond reasonable doubt hence convicting the appellant wrongly.

Submitting on the **2nd ground** of appeal, the Appellant's Counsel, averred that the Court erred in convicting the Appellant by disregarding his testimony and merit of his defence which raised great doubt to the Prosecution case. The case of ***MARANDO SULEIMAN MARANDO vs SERIKALI YA MAPINDUZI ZANZIBAR (SMZ) (1998) TLR 374*** was cited in support of this argument.

Mr. Mluge, learned Advocate again Consolidated the **4th** and **5th grounds** of appeal and argued that the Charge before the trial Court against the Appellant was defective and not curable. That there were variances between the Charge and the evidence that was adduced in favour of the Charge that was in Court

against his client. It is the Counsel's that, it is observation a general principle that the accused ought to know specifically what he is charged with so as to prepare his defence. That is the circumstance of this case, that was not adhered to by the Prosecution. Explaining further, the Appellant's Counsel overruled that, the particulars were vague and contradicting, and hence the Court relying on the same wrongly convicted the Appellant.

Submitting on the **6th ground**, Counsel for the Appellant stated that, the Court erred in convicting the Appellant based on documentary evidenced that was produced in Court by the Prosecution. Specifically, being Exhibit P1. Where the Appellants in his testimony stated to have contested the said documents of which after communicating with the Complainant he was directed by the same to sign the said document. However, the Court is said not to have accord any weight to the Appellant proceeded to convict him basing on contents of Exhibit P1.

With regards to the **7th ground** of appeal, Mr. Mluge learned Advocate claimed that, the Court misdirected its self that the point of stealing goods in transit need not to be proved. **Section 7 of the Penal Code Cap. 16 [R. E. 2019]** was cited; whereas the said section establishes the aspect of jurisdiction and hence the Counsel finds that it was of utmost importance that the

Prosecution had to prove exactly where the stealing took place. Mr. Mluge is of the view that, the facts were contradicting as to where the stealing took place at either at CRC Temeke or while in transit. Further no witness was brought forth to prove the same either.

Lastly on the **8th ground**, Mr. Mluge, learned Advocate stated that the Court erred by sentencing the Appellant against the law. The argument was based on the fact that there is a way that where loss occurred a driver pays a compensation to the loss. And that there was no evidence that required the Appellant to pay for the missing litres and refused.

In reply to the Appellant's submission, Ms. Imelda Mushi for the Respondent stated that, having gone through the Court proceedings, judgment as well as the Appellant's grounds of appeal she concedes to the appeal and submits to one ground that the Respondent failed to have proved the case beyond reasonable ground.

Further it was the Respondent's Counsel submission that, the Court erred in convicting the Appellant since the Charge was not proved against the Appellant because the evidence adduced before the Court did not prove that the Appellant stole 1,082 litres of petrol as alleged. None of the Witnesses connected the Appellant with the charge of stealing goods on transit. Further,

the Prosecution failed to prove exactly where the stealing took place neither the exact date that the stealing happened.

Moreover, it was submitted that there were variance of the amount of petrol that was alleged to have been stolen. That, the testimony at some point shows that officer of TRA and TAZAMA at Tunduma measured the amount of petrol and noticed 60 litres of petrol were missing which is normal due to temperature. Again, the Appellant upon reaching Zambia during the off load was informed that 1,082 litres of petrol were missing. Further, after communication with representative of the Appellants company, the Appellant was instructed to sign the documents on facts that there was a mistake done by the Tazama officers and they were working on it. However, the Prosecution never summoned any of the witnesses that knew of the missing litres of petrol to prove that 60 litres were missing at the Tunduma border neither was Amina summoned to testify on facts she had in her knowledge of the missing litres.

Finally, Ms. Imelda Mushi, State Attorney averred that, in light of the above submissions it is obvious that the Prosecution failed to prove the said case beyond reasonable doubt. On that basis the learned state Attorney Ms. Mushi, prayed that this appeal be allowed.

Having gone through the records before me and after considering the submissions of both parties to this Appeal, this

Court at this juncture is duty bound to determine the Appeal herein.

Beginning with the **1st** and **3rd grounds** that have been consolidated by the Appellant's Counsel, this Court determines them in the same manner. It was the Appellant's ground that, **the learned trial Magistrate erred in law and fact in his failure to analyse the evidence which resulted into a wrong decision** and that; **the trial Magistrate erred in law and in fact in convicting the appellant basing on weak evidences of the witnesses by the Prosecution which was not made beyond reasonable doubt.**

From the above, the Appellant's Counsel was of the view that the case filed against the Appellant at the trial Court was tainted with a number of facts unproved that led the Court into reaching an unjust decision. The same started with the charge that was filed in Court form its contents. The Charge alleged that the Appellant had stolen 1,083 litres of Petrol at CRC Company at Kurasini and yet the same charge contained another element that the stealing was done on transit.

It was submitted that failure to specifically show where exactly the stealing took place of which establishes jurisdiction, and failure to bring witnesses to testify on the alleged facts goes without saying that the Prosecution failed to prove their case beyond reasonable doubt.

It was from the above setbacks that the Respondent had admitted to have observed the failure of proving the prosecution case and admitted that there was no other remedy than conceding with the appeal. The Respondent had the same view that the Charge failed to have stated the exact place where the commission of the offence took place and failing to summon witness that would have proven the allegations led to fail proving the case beyond reasonable doubt in respect of the charge laid against the Appellant.

I have the knowledge that, it is a principle in law that in Criminal matters the standard of proof is **beyond reasonable doubt** and the same cannot be sugar cotted in any way. The standard used in criminal trial is proof beyond reasonable doubt whereas the same is viewed as requiring a high degree of satisfaction that the Prosecution must, through the evidence and materials it presents, create in the mind of the Judge that the Accused committed the crime he/she is charged with. The principle of proof beyond reasonable has been stated in a number of cases among them being the case of ***MECK MALEGESI and ANOTHER Vs REPUBLIC, (Criminal Appeal 128 of 2011) [2013] TZCA 410.***

The records before the trial Court showed that the Appellant was alleged of stealing **1,082 litres** of petrol on transit. It is in the same records that charge also stated that on 29/06/2020 the

Appellant at CRC Kurasini area in Dar es Salaam region did steal **1,082 litres** of petrol which were on transit to Zambia. Already from this kind of fact shows that the Prosecution were not certain where the stealing was occasioned. The same is important as it establishes jurisdiction of which is a fundamental aspect in law.

Moreover, from the records there was a variance of the amount of the missing petrol which was noticed at two different times by personnel that measured the same. There were 60 litres that was noticed at Tunduma and the same was concluded to have been normal due to evaporation. There were other personnel at Zambia that measured the petrol at the offloading station and again realized an amount of **1,082 litres** was missing.

The records state that, the Appellant had loaded 40,000 litres of petrol and was required to unload 39,500 litres and above but the same off loaded 38,400 litres and there was a shortage of **1,182 litres**. The record itself before the Court reveals that there was variance of the amount of the missing petrol the Appellant was alleged to have stollen.

From the above if the amount expected to be off loaded is added up with the missing litres the same do not add up to the 39,500 litres that was required to be off loaded. However, there is also the existence of two different amounts of litres stated to be missing one states **1,082 litres** and another states that it is

**1,182 litres** and the Appellant is charged of **1,082 litres** alleged to have been stolen by him.

From the above analysis, it appears that no witness involved in the measuring of the petrol at any point was summoned to testify of exactly what amount was missing and what is the real shortage that the Appellant is charged of stealing neither where exactly did the stealing take place according to the information contained in the Charge.

Having observed the charge that was filed against the Appellant at the trial Court and its contents that is the statement of the offence and the particulars of the offence; relating the same with evidence adduced by the witnesses that were summoned to testify at the trial Court, this Court too finds that **there was no sufficient evidence that proved beyond reasonable doubt that the Appellant committed the offence he was charged with. I find the 1st and 3rd grounds of appeal meritious.** Therefore, since the 1st and 3rd ground of appeal have merits, I find no reason to divulge in the remaining grounds of appeal for the reasons stated above.

In the event thereto, **the Conviction and sentence by the trial Court against the Accused is therefore quashed and set aside.** The accused is set free from the charges unless he is held for some other lawful cause.

It is so ordered.


**L. E. MGONYA**

**JUDGE**

**17/10/2022**