

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 45 OF 2022

(Arising from the decision of the District Court of Bunda at Bunda in Criminal Case No. 17 of 2021)

BETWEEN

PIUS s/o JOHN.....APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

A. A. MBAGWA, J.:

This is an appeal against conviction and sentence of the District Court of Bunda in Criminal Case No. 17 of 2021.

The appellant, Pius John was arraigned before the District Court of Bunda on a charge of stealing by agent contrary to section 258(1) and 273(b) of the Penal Code.

It was alleged that the appellant, Pius John on diverse dates between March, 2020 and 21st day of January, 2021 at Posta Street within Bunda township in Bunda district stole various goods to wit; soft drinks and foods as well cash all total valued at Tanzanian shillings fifty million eight hundred twelve thousand seven hundred fifty (Tshs 50, 812, 750/=), which were entrusted

to him by DS TRADERS COMPANY LTD for sale and custody but the appellant used them for his own benefit.

The appellant pleaded not guilty to the charge hence the matter went through a full trial.

To prove the allegations, the prosecution side paraded a total of eight (8) witnesses along with nine (9) exhibits both documentary and physical. The prosecution witnesses are Philbert Jeradi (PW1), Amina Selemani (PW2), F. 1594 D/CPL Elija (PW3), E. 3076 D/SGT Jonas (PW4), Happines Nashoni (PW5), Paulo Binton Obwana (PW6), Daniel Mataro (PW7) and Prudence Lubanza (PW8). Meanwhile, the exhibits tendered are caution statement of the appellant (P1), seizure certificate dated 21/01/2021 (P2), motor vehicle with registration No. 716 CJU (P3), seizure certificate in respect of the motor vehicle registration card dated 26/04/2021 (P4), motor vehicle registration card (P5), sale agreement of the car (P6), appellant's admission statement dated 21/01/2021, EFD receipts, together with cash sale tax invoice (P8), and a copy of business license of DS TRADERS COMPANY (P9).

In defence, the appellant stood the lone witness and did not produce any exhibits.

According to the prosecution evidence, DS TRADERS COMPANY LTD is a registered company which deals retail and whole sale of soft drinks and foods at Bunda. It was the prosecution account that the appellant was employed by DS TRADERS COMPANY LTD as cashier. According to Philbert Jeradi (PW1), the appellant's main duty was to receive orders and cash payments from the customers. PW1 continued that he conducted stock taking/ audit and detected that the appellant had occasioned loss of Tshs. 50,812,750/=. He said that Tshs 33,812,750/= was cash which he received from the customers but did not hand it to the company's responsible officer one of Amina whereas Tshs 16,813,550 was the value of goods which the appellant misappropriated. Having discovered the loss, the company's director one Daniel Mataro (PW7) summoned the appellant and probed him about the loss. The appellant admitted commission of the offence in front of Amina Selemani (PW2), Paulo Obwana (PW6) and Daniel Mataro (PW7). The appellant reduced his admission in to writing (exhibit P7). This fact was also corroborated by Amina Selemani (PW2) and Paulo Obwana (PW6). According to the prosecution evidence, the appellant initially pledged to repay the loss he had caused but later on he failed hence the matter was reported to police.

PW3 F.1594 D/CPL Elija arrested the appellant and later on recorded his caution statement. PW3 stated that the appellant confessed to have committed the offence in his caution statement which was tendered in evidence as exhibit P1. Further, the prosecution alleged that from the stolen money, the appellant managed to purchase various assets including a car make VITZ (exhibit P3) and parcels of land.

In defence, the appellant contested the allegations. He also denied to have ever been employed by DS TRADERS COMPANY LTD. He claimed that he had business relation with Daniel Mataro as he used to sell him maize. The appellant said that Mataro owed him Tanzanian shillings four million (Tshs 4,000,000/=) being the money for maize he supplied him but when he started demanding his money, Mataro became furious and decided to fix him with the case.

After a full trial, the trial magistrate was satisfied that the prosecution case was proved to the hilt. He thus found the appellant guilty and convicted him accordingly. Consequently, the appellant was sentenced to five-year imprisonment. In addition, the appellant was condemned to compensate the victim a sum of Tshs 50,812,750 which he allegedly stole. Further, the court

ordered disposal of motor vehicle make VITZ with registration No. 716 CJU (P3) and the proceeds therefrom to be part of compensation.

The appellant was not satisfied with the verdict and sentence imposed by the trial court. He thus filed the present appeal to fault the decision of the trial court. In the petition of appeal, the appellant raised two grounds namely;

1. That, the trial court erred in law and fact in convicting the appellant who was wrongly charged as an agent of the complainant while he was a servant/employee of the complainant and hence the loss caused by him could not amount to stealing as charged
2. That, the trial court erred in law and fact by convicting and sentencing the appellant while the prosecution failed to prove the charge against him beyond reasonable doubt.

During hearing of the appeal, the appellant was represented by Emmanuel Mng'arwe, learned advocate whilst the respondent/ Republic had the services of Nimrod Byamungu, learned State Attorney.

Submitting in respect of the 1st ground of appeal, Mr. Mg'arwe said that the trial court erred in law and fact to convict the appellant because he was wrongly charged as agent of employer something which is not true. He

lamented that in the preliminary hearing, the facts were to the effect that the appellant was employee of the victim and the appellant admitted the fact as indicated at page 5 of the typed proceedings. He argued that if the prosecution alleged that the appellant was employee of the victim, it was wrong then to charge him with that offence under section 273(b) of the Penal Code. He opined that it would have been correct had the appellant been charged under 271 of the Penal Code. The appellant's counsel thus prayed the court to find that the appellant was charged with the offence which is against the facts adduced by the prosecution.

Pertaining to the 2nd ground of appeal, he submitted that the trial court erred to convict the appellant whereas the prosecution did not prove the offence to the hilt. He expounded that under this offence, principal -agent relationship ought to be proved but there was no single evidence from the prosecution to that effect. As such, the prosecution failed to prove the charge. He augmented that this position was made clear by this court in the case **Donald Dickson Kishoka vs the Republic**, Criminal Appeal No. 81 of 2019, HC at Mtwara at page 9.

In the circumstances, Mr. Mg'arwe prayed the court to find that the trial court wrongly convicted the appellant based on doubtful evidence. Thus, he

prayed the court to allow the appeal, quash conviction and set aside sentence and consequential order.

Conversely, Mr. Nimrod Byamungu, on behalf of the Republic, resisted the appeal and fully supported conviction, sentence and orders made by the trial court.

On the 1st ground, he conceded that the appellant was employee of the complainant (victim). However, he opposed the appellant's counsel suggestion that the appellant was supposed to be charged under section 271 of the Penal Code in the circumstances of this case. The learned State Attorney submitted that as per the evidence, the appellant was entrusted the items which he stole. Byamungu continued that section 271 of the Penal Code does not apply in the circumstances of the case because it caters the employees who steal the employer's properties which come to their possession by virtue of the employment. He stressed that section 271 has no entrustment element hence the appropriate provision was section 273 which was preferred in the charge. In the alternative, the learned State Attorney, beseeched the court, in case it finds that the right section was omitted, to go further and ask itself whether there was any prejudice. Then, Mr. Byamungu hastily submitted that there was no prejudice because the

appellant was represented by learned advocate and from the particulars of offence as well as the evidence adduced, it is apparent that the appellant knew very well of his charge. He added that even the appellant's defence as found at page 14 to 42, shows that he knew very well the nature of charges he was facing. To bolster his argument, Byamungu relied on the case of **Festo Domician vs Republic**, Criminal Appeal No. 447 of 2017, CAT at Mwanza.

With regard to the 2nd ground of appeal, while concurring with the appellant's counsel that principal-agent relationship must be proved, the learned State Attorney parted company with the appellant's counsel that the employee is not an agent. He said that in real sense, the employee is agent. He referred to the definition of principal-agent as defined in Black's Laws Dictionary, 8th Edition authored by Brian A. Garna at page 70 and strongly submitted that it defines it to the effect that a special agent is an agent employed to conduct a particular transaction or to perform a specified act.

On the basis of the authority, he referred to, the State Attorney insisted that there was principal-agent relationship. With regard to the case of **Donald Dickson Kishoka (supra)** cited by the appellant's counsel, the State Attorney said that it is distinguishable because there was no entrustment

element unlike in the present appeal where there is overwhelming evidence that the appellant was entrusted the items for sale. Byamungu expounded that in exhibit P1, caution statement, the appellant explained very well how he was perpetrating stealing. Byamungu strongly argued that, according to the law, the best evidence is the confession of the accused himself and cited the case of **Chande Zuberi and another vs Republic**, Criminal Appeal No. 258 of 2020, CAT at Mtwara to fathom his contention.

Further, the State Attorney said that there is exhibit P7 (appellant's admission statement) which shows that the appellant started confessing even before he was taken to police.

In conclusion, Mr. Byamungu forcefully submitted that the offence was proved beyond reasonable doubt as the evidence brought by the appellant that he never worked with the victim's company, was an afterthought. He further argued that the appellant did not cross examine PW7 regarding framing up the case against him. Byamungu referred to the case of **Chora Samsoni Kiberiti vs Republic**, Criminal Appeal No. 516 of 2019 CAT at Musoma where the Court held that the defence was afterthought because it was not envisaged in the questions he was asking.

In fine, he prayed the court to dismiss the appeal in its entirety.

In rejoinder, Mr. Mg'arwe, counsel for the appellant said that the arguments by the State Attorney were bereft of merits. He said that the respondent contended that section 271 has nothing to do with entrustment but admitted the fact that the appellant was employee as such the correct provision was section 271 in that section 273(b) talks of agent and entrustment.

With respect to the invitation by the State Attorney, in his alternative prayer, to find that the anomaly was not fatal should the court be of the opinion that the section was not proper, Mg'arwe stressed that the only remedy is to quash conviction and set aside the sentence.

With regard to the meaning of agent and employer, Mg'arwe still maintained that the appellant was employee and not agent. As such, the evidence adduced has not established principal-agent relationship, he submitted.

Having carefully digested the submissions by the parties and upon a thorough appraisal of the record and grounds of appeal, I am opined that the 2nd ground of appeal namely, ***'that the trial court erred in law and fact by convicting and sentencing the appellant while the prosecution failed to prove the charge against him beyond reasonable doubt'*** is sufficient to dispose of this appeal and for that reason I will not delve into the 1st ground of appeal.

It is a cardinal principle of law that in criminal cases the prosecution has a duty to prove the offence beyond reasonable doubt. It is further a settled position that an accused cannot be convicted on account of his weak defence rather he should be convicted based on the strength of the prosecution evidence. **See, Pascal Yoya @ Maganga vs the Republic, Criminal Appeal No. 248 of 2017, CAT at Arusha**

I have keenly scanned the charge dated 26th January, 2021 on which the appellant was charged. The particulars of offence are quite clear that the appellant stole various goods and cash money Tshs 33,999,200/= both making a total of Tshs 50,812,750/=. The goods mentioned include fifty-seven cartons of Azam apple punch of 300mls valued at TZS 542,200/=: two hundred and thirty eight dozens of Maji ya Jambo of 1.5 liters valued at TZS 1, 831, 150/= and fourteen cartons of Azam energy can of 250mls valued at TZS 126,000/=: to mention a few. The thrust of the prosecution evidence is that the said goods and money were entrusted to him for either sale or submission to the relevant company officer but the appellant ended up converting the same for his own use. The first element therefore to be proved was entrustment. The prosecution was duty bound to prove beyond reasonable doubt that the items mentioned in the charge were truly

entrusted to the appellant and the appellant converted them into his own use.

I have dispassionately canvassed the whole of prosecution evidence from PW1 through PW8. None of them told the court to have entrusted to the appellants the goods mentioned in the charge. The evidence is silent as to how the alleged goods landed in the hands of the appellant so that the court could see that appellant received certain goods and a sum of money but converted them into his own use.

One would expect evidence from the prosecution such as ledger book or register evidencing the goods which were given to the appellant and what he returned to his employer in the end hence the difference between what he received and what he returned. For example, no body proved to the court that fifty-seven cartons of Azam apple punch of 300mls valued at TZS 542,200/= as alleged in the charge were handed to the appellant. PW1 simply testified that he conducted stock taking and discovered the loss of Tanzanian shillings fifty million eight hundred twelve thousand seven hundred fifty (Tshs 50, 812, 750/=). This, in my view, was a general statement which required to be substantiated by specific evidence in order to prove the criminal case.

Whereas I agree that the appellant's defence was so poor as he disputed the obvious facts such being an employee of the victim company on which he did not even cross examine, I strongly hold that the accused should be convicted on the strength of prosecution evidence and not upon defence weakness.

In the case of **Aburaham Daniel vs the Republic**, Criminal Appeal No. 6 of 2007, CAT at Arusha the Court of Appeal had the following to say;

'In any case the appellant had no duty to establish his innocence. Even if his defence was found to be weak, and even if he was found to be untruthful, the prosecution still had the duty to prove his guilt beyond reasonable doubt'.

I also glanced at the appellant's caution and admission statements which were admitted in evidence as exhibits PE1 and PE7 respectively but I found them insufficient to ground conviction. In fact, exhibits PE1 and PE7 are also evasive in that one cannot glean from them as to how and which goods were entrusted to the appellant. By and large, the case was poorly investigated and consequently prosecuted below standard. The prosecution left out key elements of offence and focused on the allegedly possible proceeds of offence such as a motor vehicle (exhibit PE3).

In the circumstances, I am opined that the prosecution evidence was too weak to ground conviction. The prosecution failed to prove the preferred charge beyond reasonable doubt. As such, the trial magistrate erred in law and fact to enter conviction against the appellant based on insufficient evidence.

In the event, I allow the appeal, quash conviction and set aside the sentence and resultant orders. The appellant is to be released forthwith unless he is held for other lawful cause.

It is so ordered.

Right of Appeal is explained.



A. A. Mbagwa

JUDGE

21/10/2022

Court: The judgment has been delivered in the presence of Nimrod Byamungu, learned State Attorney for the Republic and in absence of the appellant this 21st day of October, 2022.

A. A. Mbagwa

JUDGE

21/10/2022