IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 12 OF 2022

MOHAMED AHMED@ BRECK.....APPLELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Kahama at Kahama.]

(Hon. C.L. Chovenye RM)

dated the 17th day of December, 2021
in
Criminal Case No. 325 of 2020

JUDGMENT

6th July & 28th October, 2022.

S.M. KULITA, J.

This is an appeal from Kahama District Court. The appellant herein was charged for "Stealing by Servant" contrary to the provisions of section 258(1) and 271 of the Penal Code [Cap 16 RE 2019].

Particulars of the offence as provided in the charge are to the effect that, the appellant between 1st September and 12th November, 2019 at

Igalilimi area within Kahama District in Shinyanga Region, being employed by VITA FORM (T) LIMITED as a Manager and Cashier of the Depot at Kahama branch, the Appellant did steal 2,175 VITA FORM goods valued at Tshs. 123,633,600/=, the property of VITA FORM (T) LIMITED which came into his possession on account of his employment.

In a nutshell the facts presented by the prosecution that gave rise to the trial of the appellant are to the effect that, the appellant was the employee of VITAFORM as a Manager and Accountant for Kahama Branch. That between 1st September and 12th November, 2019 at Igalilimi within Kahama District in Shinyanga Region, the accused person did steal 2,175 mattresses valued at Tshs. 123,635,600/=, the property of his employer. Following that accusation, the appellant was arrested on 30th December, 2020 and arraigned into court.

On his part the appellant denied the charge. At the conclusion of the trial the appellant was accordingly found guilty, and upon conviction he was sentenced to two years imprisonment. That was 17th December, 2021. Further, the appellant was ordered to compensate the victim at the tune of Tshs. 123,633,600/=after completion of the imprisonment term.

Aggrieved with that decision, the Appellant preferred the instant appeal relying on four grounds which may be summarized as follows;

One, the trial court failed to properly analyze the evidence adduced. **Two**, the trial court erred to convict the appellant while the case was not proved at the required standard. **Three**, it was wrong for the trial court to convict the appellant while relying on a weak prosecution evidence with contradictions and hearsay. **Four,** the defense evidence was not considered**.**

The Appeal was heard on 6th July, 2022. On that date, the Appellant appeared in person whereas the Respondent, Republic had the service of Ms. Gloria Ndondi, learned State Attorney who resisted the appeal.

Among the appellant's grounds of appeal is that the trial court relied on poor evidence of the prosecution side to convict him. This presupposes that, the prosecution case was not proved at the required standard. Both parties argued the appeal.

To find out whether the prosecution evidence was weak or not, one needs to go through it earnestly. At pages 13, 14, 15 and 16 of the typed proceedings of the trial court, it is seen that, the trial Magistrate has been recording the witnesses' evidence in the form of question and answers. I quote some of the lines for easy of reference.

"It was not only mattress, form sheet."

"He is supposed to make good received note"

"There was no any dispute or criminal report on that time."

"If you make entry, you can change."

"After his contract he go back to India."

Each of those sentences raises some questions for one to understand them. That is why, the trial magistrate is required to record the evidence of the witnesses in a narrative manner. In the way the trial Magistrate has recorded witness evidence, goes contrary to the dictates of section 210 (1)(b) of the Criminal Procedure Act. I reproduce it for easy of reference;

"In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-

(a) .....N/A.....

(b) the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative"

Non adhering to the mandatory requirement of section 210(1)(b) of the Criminal Procedure Act is a serious irregularity which vitiates proceedings and its resultant decision. See, **Denis Deogratias vs. The Republic, Criminal Appeal No. 362 of 2016, CAT – Tabora.**

The question is, what should be the way forward after ascertaining that the witnesses' evidence was not correctly recorded? In the case of **Sebastian Musa vs. Republic, HC. Criminal Appeal No. 171 of 2018** after being fronted by the same situation, a *re-trial* was ordered.

Here now, in order to ascertain whether this court should thus order a *re-trial*, the guidance of the case of **Fatehali Manji Vs. R [1966] E.A.343** was sought particularly on the below excerpt; -

"In general, a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.

Each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it"

The question is, in the case at hand, are there no gaps the prosecution will fill if *re-trial* is ordered? The answer is not far to fetch.

Upon going through the particulars of the charge with which the appellant was armed, it reads as I hereunder quote it; -

STATEMENT OF THE OFFENCE

MOHAMED AHMED @ BRECK between 01st September and 12th November 2019 at Igalilimi area within Kahama District in Shinyanga Region, being employed by VITA FORM (T) LIMITED as a Manager and Cashier of Depot at Kahama branch did steal ***2,175 VITA FOAM goods*** *valued at Tshs 123,633,600/= the property of VITA FORM (T) LIMITED which came into his possession on account of his employment.*

When you look at it, the same does not mention specifically the kinds of properties that the appellant was charged to have stolen. To me

this omission goes contrary to section 132 of the Criminal Procedure Act as I hereunder quote;

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged,* ***together with such particulars as may be necessary for giving reasonable information*** *as to the nature of the offence charged."* ***[Emphasis added].***

The appellant will not have reasonable information concerning the charge leveled against him, unless the charge sheet mentions specifically types of properties that the appellant is charged to have stolen. The cited provision above specifically requires the charge to contain particulars as may be necessary for giving reasonable information to the appellant. In our current case, this was not done. The appellant appeared to the court without knowledge of the things he is charged to have stolen. To that end, I am settled that, this charge is incurably defective.

The prosecution had a chance to make amendment of the charge during trial of the case, but they opted to remain mute up to the conclusion of the case. Possibly these omission posed difficulties on the

defense side at the trial court to prepare a defense case. This made the appellant to await up to the conclusion of the prosecution case to know the things he was alleged to have stolen.

Back to the issue of *re-trial*, as we have seen shortly above. On this I am of the view that, the order for *re-trial* will give a chance to the prosecution to fill that gap which may include amendment of the charge sheet.

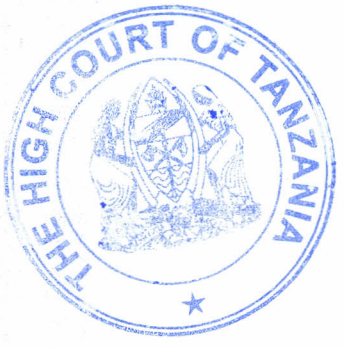
Further, in the court of appeal case of **Mayala Njigailele v. Republic, Criminal Appeal No. 490 of 2015, CAT at Tabora** it was observed that, an order for *re-trial* should not be made in a situation where the charge sheet is incurably defective. The said court stated;

> *"Normally an order of retrial is granted, in criminal cases, when the basis of the case namely, the charge sheet is proper and is in existence. Since in this case the charge sheet is incurably defective, meaning it is not in existence, the question of retrial does not arise"*

As the appellant complains in his grounds of appeal that the prosecution case was not established at the required standard and as long as there are trial defects as shown above, thus ordering *re-trial*; **firstly**,

will give chance for the prosecution to fill in the gaps, which will be against the dictates of the cited case of **Fatahel Manji** (supra) and **secondly**, ordering a retrial with a defective charge will be against the dictates stated in the case of **Mayala Njigailele** (supra). It is upon those premises; I refrain ordering *re-trial*.

I therefore allow the appeal. The appellant should be released from prison forthwith, unless he is held for any other lawful cause. The order for payment of Tshs. 123,633,600/= is also cancelled.



S.M. KULITA
JUDGE
28/10/2022

DATED at **SHINYANGA** this 28th day of October, 2022.

S.M. KULITA
JUDGE
28/10/2022