

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 75 OF 2022

(Originating from Criminal Appeal No.73 of 2021 at Shinyanga District Court)

**BENARD JOSEPH @ MTASHOKA APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT**

JUDGMENT

1/12/2022

A. MATUMA, J:

The appellant herein was charged in the Resident Magistrate Court of Shinyanga at Shinyanga for an offence of stealing by agent ***Contrary to Section 273 (b) of the Penal Code, Cap 16 R.E 2019.***

He was alleged to have been entrusted various products of Jambo Food Product Co. Limited for sale which were valued at **Tshs. 26,870,500/=** but used them for his own benefits.

After a full trial he was found guilty convicted and sentences to serve four (4) year imprisonment term and ordered to compensate the victim Company the alleged value of the products.

The appellant was aggrieved hence this appeal with a total of five grounds of appeal but for the purposes of this appeal I will determine

one of them which in essence carries all the complaints in other grounds. This is;

That the trial Magistrate erred in law and facts in totally misapprehending the nature and quality of the prosecution evidence against me which did not prove the alleged offence beyond reasonable doubt.

At the hearing of this appeal, the appellant was present under custody and was represented by Mr. Amri Linus learned advocate while the respondent/Republic was represented by M/S Grolia Ndoni learned State Attorney.

The learned State Attorney expressed that she was not ready to proceed as she was not yet prepared. The learned advocate played to proceed ex parte if the Respondent is not ready. I rejected the adjournment and ordered the hearing to proceed as it was scheduled. Having so ordered, the learned State Attorney took her belongings and moved out of the court room leaving the court puzzled and the appellant together with his advocate. I however proceeded to hear the appeal ex parte.

The learned advocate for the appellant submitted at length that the prosecution case was not proved beyond reasonable doubts because PW6 the driver who alleged to have delivered the goods to the appellant

contradicted himself, did not tender any TANROAD documents to prove that on the alleged date the vehicle transported the alleged goods to Chato, did not state the exact area he offloaded the goods be it the shop, store or godown, and did not produce any receipts to show that he slept somewhere else other than Shinyanga.

The learned advocate faulted the other prosecution evidence as a whole in that the same did not prove the charges. It did not show how could the goods be released without the appellant having pressed any order, that the appellant did not sign the delivery note which has the list of the products allegedly delivered to him but the delivery note has the dispute signature on the last page which do not have any item while the victim company's officer signed on both pages.

The learned advocate also challenged the prosecution case in that the charge sheet is at variance with the evidence on record. While the evidence purports that the crime was committed on 17/10/2018, the charge sheet alleges that the offence was committed on 10/10/2018. He also addressed the Court on the anomaly that while the charges were instituted in the Resident Magistrates Court of Shinyanga, the appellant was tried and convicted by the District Court which had no charge against the appellant.

Having heard the appellant's advocate, I am in agreement with the learned advocate Mr. Amri Linus that the charge against the appellant was not proved beyond reasonable doubts.

The charge sheet alleges that the stealing was done on 10/10/2018 at Ibadakuli Jambo area within Shinyanga Municipality but none of the prosecution witnesses gave the evidence to the effect that the appellant was at Jambo area that day and was entrusted such goods.

Instead, it is PW6 Ibrahim Khalfan who testified that he met the appellant at Chato on 18/10/2018 and handled the goods to him. During Cross Examination he was positive that; ***"I don't know if the customer has paid for the goods. My duties are to deliver goods"***

In that respect the goods he delivered on 18/10/2018 if we have to believe him are not subject to the allegations against the appellant in this Case. Now whether or not the said goods were really delivered to the appellant and whether or not he paid for them, it is not subject to the charge at hand.

The charge specifies that the stealing was on 10/10/2018 at Ibadakuli Jambo area.

As I have said earlier none of the prosecution witnesses gave any sort of evidence to prove that a such a date and area the appellant was entrusted the goods as alleged in the Charge Sheet.

In the case of ***Ntobangi Kelya and Another Versus The Republic, Criminal Appeal no. 256 of 2017*** and even that of ***Damas Mgoya versus The Republic, Criminal Appeal no. 13 of 2022***, the Court of Appeal of Tanzania made a clear guidance that once the date for the commission of the offence is mentioned in the Charge Sheet, the prosecution are duty bound to prove that the Crimes were Committed on the Crime date and short of that the charge would be remaining unproved and entitle the accused person to an acquittal.

In the instant appeal, the appellant remain incriminated by the charge sheet alone that he stole the products on 10/10/2018 but there is no evidence to prove such allegations.

But again, the evidence on record is at variance with the Charge Sheet. As I have said PW1 to PW4 testified that the stealing was on 17/10/2018 at Ibadakuli Jambo area, PW5 merely gave evidence relating to the arrest of the appellant at Musoma, and PW6 stated that he handled the goods to the appellant on 18/10/2018.

There is no explanation on record reconciling these three dates; 10/10/2018 as per Charge Sheet, 17/10/2018 as per PW1 to PW4 and 18/10/2018 as per PW6.

The prosecution was duty bound to amend the Charge Sheet and or the trial court should have been moved to order such amendment but that was not made. I find that failure to amend the charge sheet offended the law and prejudiced the appellant. The Appellant raised the issue of date during his defence but he was completely ignored. He was not Cross examined on such date nor the trial Court considered his challenge on the date allegedly he committed the offence.

During his defence at page 34 of the typed proceeding, the appellant stated;

"The Charge Sheet shows that on 10/10/2018 I received products from Jambo Company Limited, that is not true."

This piece of evidence was completely ignored by both the prosecutor and the trial Magistrate. In the case of **Noel Gurth a.k.a Baith and Another versus Republic, Criminal Appeal no. 339 of 2013** it was held that where there is variation between the charge Sheet and evidence, the charge must be amended forthwith, and that if no amendment is made the charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right.

The court concluded that short of an acquittal, failure of justice will occur.

In Issa Mwanjiku @ White versus Republic, Criminal Appeal no. 175 of 2018 on a similar situation it was held that, if amendment is not made the prosecution evidence becomes incompatible with the particulars in the charge sheet to prove the charge to the required standard.

I therefore find that the Charge Sheet in this case was not proved beyond reasonable doubt. That entitles the accused now the appellant to an acquittal.

But again I find the concern of the learned advocate for the appellant that while the appellant was charged in the Resident Magistrates Court, he was tried and convicted by the District Court a jurisdictional issue. The accused now the appellant was charged in the Resident Magistrates Court of Shinyanga as per the Charge itself but without any explanation he was tried and convicted by the District Court of Shinyanga. The two Courts are at different places within Shinyanga Municipality and they do not share buildings at least to cause us believe that there was perhaps a typing error due to sharing of working tools.

In that respect the charge sheet in the Resident Magistrate court had no evidence to prove it while the proceedings and judgment in the District Court had no charge filed against the appellant. Procedurally and substantially the appellant was unfairly tried and convicted. Therefore his conviction and sentence cannot stand.

I therefore allow this appeal and order that the appellant be released from custody forthwith unless he is held for other lawful cause. Right of appeal is explained.

It is so ordered.



A. MATUMA
JUDGE
01/12/2022