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

**CRIMINAL APPEAL NO. 47 OF 2022**

*(Originating from Criminal Case No.185 of 2020 at Shinyanga District Court)*

**HILARY S/O PATRICE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

07/12/2022

**A. MATUMA, J:**

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

He was alleged in both counts that being a sales agent of the victim company he was on the 20/08/2020 entrusted various products of Jambo Food Products Co. Limited by the Director of such victim company which were valued at **Tshs. 22,653,400/=** in the first count and **Tshs. 31,809,600/=** in the second count but stole all such properties. The alleged stealing is stated to have been occurred at Ibadakuli Jambo area within Shinyanga Municipality.

After a full trial he was found guilty convicted and sentenced 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 three grounds in the initial Petition of Appeal and later lodged four grounds of appeal in the supplementary Petition of Appeal. The grounds of appeal in both Petitions carries the complaints that; *Material witnesses namely the Director of Jambo Food Products and the Police arresting officers were not called to testify, that the defence evidence was ignored, the trial court had no jurisdiction, that the evidence of finance manager was not worthy to be accepted as it based on his own system without making reconciliation with the products in the appellant's stock and that which were in the hands of his customers, and that there were contradictions in the prosecution's evidence but were ignored.*

At the hearing of this appeal, the appellant was present in person under custody while the respondent/Republic was represented by Mr. Jukael Jairo learned State Attorney.

The appellant submitted generally that the Director of Jambo was a necessary witness because he was the one to prove the contract between

them. That he worked with Jambo for two years and was to be paid 20% per each month but was not paid and when he started to claim such 20% he was fixed to this case. Also, that the Police officer who arrested him at Dodoma ought to have been called as a necessary witness for the prosecution because he could tell the court the place where he arrested the appellant and upon what circumstances. He lamented that such witness was not called so that to pre-empt him from cross examining the witness on the documentary evidences he seized from him including his bank statement for the two years, delivery notes and rental contracts. That he wrote a letter to request his documents but he was ignored.

On the ground that his defence was ignored, the appellant submitted that at the trial court he testified that he was arrested at Dodoma and denied time to collect the debts from his clients. That he was arrested at his work place, he is not a thief or else he could have escaped. He further lamented that there was no agreement that the goods must be sold in a certain specific time but all this evidence was ignored.

About Jurisdiction of the trial court, he submitted that he was wrongly charged in Shinyanga because everything was done in Dodoma

and that the circumstances show that Shinyanga was a prepared place for fabricating him to this case.

On the reconciliation, he submitted that he had banked with Jambo a billion money and therefore the finance manager should have reconciled the goods by visiting his godown and cross check the stock, his bank deposits, the indebited clients etc. He argued that it was not enough for the finance manager to sit on his computer to prepare documents to his detriment without involving him.

About the contradictions, the appellant argued that it is on record that the goods were given to Rajabu Mustapha and he is not Rajabu Mustapha. Also that the trucks alleged to have carried the goods at times were referred to as T 951 DRP but again as T 751 DRP, the second truck as T 650 DHH but sometime as T 650 BHH.

The learned state attorney on his party expressed that he was opposing the appeal. On the complaint of failure to call material witnesses he argued that the prosecution brought all those witnesses they considered important and that it is not the number of witnesses that matters but the credence and competence of the evidence. He referred me to section 43 of

the Evidence Act. He disputed that the defence evidence was not considered. He was of the view that the appellant ought to have cross examined the prosecution witnesses on his defence. About the jurisdiction of the trial court the learned state attorney submitted that the products were taken at Shinyanga in the presence of the appellant and he travelled with the goods to Dodoma and thus both courts in Dodoma and Shinyanga had jurisdiction over the matter.

About the reconciliations of accounts, the learned state attorney argued that there is no law that required the finance manager should to visited the godown and customers. He added that in preparing documents in the system the appellant need not be involved. That the invoices show that the goods were taken by the appellant as witnessed by witnesses. He disputed allegations of witnesses to have referred one Rajabu Mustapha as the agent who was given the goods and issues of contradictions relating to registration numbers of the trucks.

When I required the learned state attorney to address me on the variance between the charge sheet and evidence in relation to the date when the alleged offences were committed, the learned state attorney submitted that PW3 and PW4 testified that they handled the goods to the

appellant on 21/08/2020 but the delivery notes show that the appellant received the goods on 20/08/2020. The learned state attorney then argued that in the circumstances there is no documentary evidence to prove that the goods were delivered to the appellant on 21/08/2020. He however argued that the defect is curable as it was held in the case of ***Hatibu Hamis and Another versus The Republic, Criminal Appeal no. 90 of 2016*** CAT.

Having heard the parties for and against this appeal, down here is my findings.

Starting with the complaint that the defence evidence was not considered and or ignored, I find that this complaint has merit. In his defence the appellant repeatedly stated that he had the contract with the Director of Jambo Food Products as an agent to sale various products within Dodoma Region. That they had an oral agreement which was to be reduced in writing but at all times when he made follow up of the written agreement he was not given. That according to the agreement he had to hire the godown, rent a house for living and pay for the transport of the goods to various customers within Dodoma Region at Mtera, Bahi and Kondoa. That he took various properties from the Director of Jambo

valuing Tshs. 54,000,000/= but those products are not those which are referred in this case. He denied to have been given the products referred to this case arguing that the drivers PW3 and PW4 are not the one who sent him the goods and the trucks referred in this case could not carry the cargo of Tshs. 54,000,000/=. According to his defence evidence, the appellant made business with Jambo for two years and had deposited a billion money into Jambo account and the last goods he took amounting to Tshs. 54,000,000/= sold part of them. He used Tshs. 22,000,000/= to pay for the godown per year, Tshs. 9,800,000/= for rent per year and Tshs. 120,000/= for transport per day. That he deposited Tshs. 5,000,000/= into Jambo account, had a remaining stock of Tshs. 8,000,000/= and the rest of the goods he had supplied to his customers and was yet to collect the proceeds by the time of his arrest. He thus lamented that he is not a thief and demanded his documents which were seized at the time for his arrest but he was denied them. He demanded for the calling of the Director of Jambo so that he could clarify their agreement but was not brought and he demanded for the police officer who arrested him to come so that he could cross examine him on his documents they took but was not brought to pre-empty his questions.

With the herein defence, it is obvious that there is a civil claim between Jambo Food Products and the appellant. It is not a criminal matter altogether. Otherwise the Director of Jambo was a necessary witness to prove the contract between him and the appellant and the terms of such contract. Since no witness for the prosecution testified on the terms and conditions for the contract, the defence evidence relating to the terms and conditions of the contract remain unchallenged.

Since the prosecution case is to the effect that the appellant was a sales agent, the defence evidence that he had a remaining stock in the godown and some debts uncollected from his clients ought to have been considered. He did not buy goods for credit from Jambo but was entrusted the same for sale. In that regard he should have not been condemned for the unsold goods. I reject the arguments of the learned state attorney that there was no need for the finance manager to visit the godown and verify the debts from the appellant's customers in the reconciliation of the appellant's account at Jambo. That was necessary to ascertain whether he had sold all the goods and misappropriated the proceeds thereof. Not only that but also there was a need to bring the Bank Statement of Jambo Food Products in relation to the account which the appellant was required to

deposit the proceeds of sale because the appellant stated that he had deposited some amount but his documents were all taken away at the time of his arrest. The trial court should have satisfied itself as to whether there was no any deposit as alleged by the prosecution to avoid victimization of an innocent accused particularly when he lamented that his documents were seized by the prosecution and he was denied them so that he could use the same in his defence. His lamentations are corroborated by the fact that during preliminary hearing the prosecution listed among other exhibits, the Certificate of seizure for the properties they seized from the appellant but they did not even tender it in evidence.

That is why the appellant demanded even the arresting officer to have been brought so that he could explain the circumstances under which he was arrested. From him we could expect to get material information relating to the appellant's business at Dodoma. The appellant could have also benefited to have a person who seized his documents relating to this case for cross examination and subsequently required him to surrender the documents to the appellant for his use in defence.

I agree with the appellant that failure of the prosecution to bring the two witnesses; Director of Jambo one Selemani who entered into the

contract with the appellant and in the absence of any written agreement to speak for itself, and the police officer who arrested the appellant and seized his material documents and in the absence of certificate of seizure, it was fatal to the prosecution case and an adverse inference is called for.

The seizure of the appellant's documents and none use them in the prosecution case and failure to return them to him was meant malice and a calculated move by the prosecution to deny him an opportunity to defend himself properly. It was a misuse of prosecution power to the detriment of justice. I reiterate what I ruled out in the case of ***Erick S/O Osena versus The Republic, Criminal Appeal no. 87 of 2022*** and that of ***Katala Kikaja and another versus The Republic, Criminal Appeal no. 46 of 2022*** both of High Court at Shinyanga that once either party without any justifiable cause hinders the other party to properly give his evidence an adverse inference should be drawn against the party who hinders the other. In this case, the prosecutions took away the appellant's documents he intended to rely on them during his defence, they did not return them to him nor used them in evidence on their party, and they did not bring the arresting officer so that he could be cross examined by the appellant on his documents and on the certificate of seizure. That was

unfair deal within the prosecution machinery to frustrate the appellant's case which should not be accepted. I thus draw an adverse inference that had the appellant's seized documents by the prosecution been used in evidence by the prosecution and or had they been returned to him for him to use them in his defence, the prosecution case would have been destroyed completely in favour of the appellant.

I further draw an adverse inference against the prosecution case that had the Director of Jambo been brought as a witness and cross examined by the appellant, the prosecution case would have been detected to be a Civil matter and not a criminal one because there are issues of contract and allegations of breach of the terms thereof.

Failure to call an important witness has always been held to be fatal. This is the position in various cases including that of ***Samwel Japhet Kahaya versus Republic***, *Criminal Appeal No. 40 of 2017* in which the Court of Appeal of Tanzania at Arusha held;

> *"Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since* ***if a party to a case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act".***

In that respect failure of the prosecution to call Selemani the Director of Jambo Food Products who entered into an oral agreement with the appellant and the arresting officer who arrested the appellant and seized his documents was done to the detriment of the prosecution's case and they cannot take refuge under section 143 of the Evidence Act supra as was stressed by Mr. Jairo learned State Attorney.

Under the herein above analysis and findings the complaints relating to the reconciliation, failure to call material witnesses, ignoring the defence evidence have all been covered and accordingly affirmed to have been soundly and with merits.

Even though that relates to the products the appellant admitted to have been taken from the victim company. In respect of the current charge in this case, the appellant is alleged to have been entrusted goods on the 20th August, 2020 at Ibadakuli Jambo area within Shinyanga Municipality. But the delivery notes exhibit P1 and P2 contradicts the oral evidence of the drivers PW3 Gabriel Msipi and PW4 Hemed Sura who testified that they transported the goods to Dodoma and handled them to the appellant on 21/08/2020 contrary to the delivery notes which show that the appellant received the goods on 20/08/2020. I thus agree with the appellant that

PW3 and PW4 did not deliver the goods to the appellant on 21/08/2020 because they did not tender in evidence delivery notes of that date which they averred to have delivered the goods to the appellant. The delivery notes tendered in this case are useless as they are contrary to the oral evidence of the very relevant people who transported the goods.

On the complaint of contradictions between the prosecution evidences relating to the registration numbers of the vehicles allegedly transported the goods to the appellant in relation to this case, at first I thought that it was a typing error. I thus cross checked the original handwritten proceedings and found that it was not a typing error. PW1 Mseti Wilson who testified as a principal officer of Jambo and the store keeper stated in evidence that he loaded the goods in the truck no. T 951 DRP and T 650 BHH but PW2 Juma Shabani the Chief security officer who supervised the loading stated that the goods were loaded into trucks T 751 DRP and T 650 BHH while PW3 the driver referred to vehicle T 650 DHH. In the circumstances, the prosecution witnesses were even not sure on the exact number of the vehicles they loaded the goods to be transported to the appellant. Vehicle no. 951 cannot be said to be the same as vehicle no. 751 nor vehicle no. BHH can be said to be the same as DHH. Since the

prosecution did not reconcile the anomaly during trial I have no room to do the same at this appellate stage as by doing so would be prejudicing the appellant. I thus agree that there is contradiction in the prosecution case which I resolve in favour of the appellant. That is the stance which was taken in the case of ***Jeremiah Shemweta versus The Republic (1985)TLR 228*** which held that the discrepancies in various accounts of the story by the prosecution witnesses give rise to some reasonable doubts about the guilty of the appellant.

I finally determine the complaints relating to jurisdiction of the trial court and whether the charge sheet was proved to the effect that the stealing was done on 20/08/2020.

About jurisdiction, Mr. Jairo learned state attorney argued that the offence was committed between the two Regions Shinyanga and Dodoma. The goods were entrusted at Shinyanga and Stolen at Dodoma and therefore either court in the two Regions had jurisdiction to try the matter. On this I am far away to agree with the learned state attorney. We don't have evidence on record that the appellant was entrusted the goods at Shinyanga. That is only allegations in the charge sheet. The evidence itself of all prosecution witnesses did not say the appellant was either entrusted

or handled the goods at Shinyanga. PW3 and PW4 who were the actual persons allegedly to have been the one who handled the goods to the appellant testified that they handled him at Dodoma and caused him to sign the delivery notes at Dodoma. In the circumstances throughout the process of transporting the goods the same were still in possession of the victim company until when it is alleged to have been handled to the appellant. The mere presence of the appellant at the loading exercise does not make him liable to the property unless immediate after the loading he acknowledges the goods and receive them by signing the delivery note. Transporting the same without causing him to acknowledge receipts of the same has no any other interpretation than that the transporting authority did not intend to handle him the goods until they reach to the destination planned. In that respect the appellant received the goods at Dodoma if we have to agree with the prosecution evidence and in that regard only the Court within the jurisdiction of which the appellant was handled the goods could try this case in Dodoma. The District Court of Shinyanga had no jurisdiction. I join hands with the appellant in his wondering why Shinyanga and not Dodoma!!!

Finally, the evidence on record is at variance with the Charge Sheet. As I have said PW3 to PW4 testified that they handled the alleged stolen goods to the appellant on 21/08/2020 at Dodoma but the charge sheet alleges that the stealing by the appellant was made on 20/08/2020. In a very simple interpretation, the appellant stole the goods one day before they were brought to him by the victim company. He was brought goods he had already stolen. That makes the victim company a companion to the crime by transporting the stolen goods from Shinyanga to Dodoma.

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. 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. Even the conviction and sentence of the appellant was omnibus though my findings do note base on this ground because I did not hear the parties on this issue. But I find it better to demonstrate the same for consumption of subordinate trial courts. The appellant was charged of two counts but was not convicted in respect of each count. He was as well sentenced not in respect of each count. Both conviction and sentence was entered omnibus which is bad in law. To quote the relevant part in the trial court judgment;

> *"All said and done, I find out that prosecution managed to prove the charge beyond reasonable doubt. I hereby find the accused person guilty to the offences of stealing by agent contrary to section 273 (b) of the Penal code Cap 16 R.E 2019.* ***I hereby***

***convict him to the offence of stealing by agent contrary to section 273 (b) of the Penal Code Cap 16 R.E 2019"***

In relation to the sentence, the trial magistrate merely entered;

*"I hereby sentence him to go to imprisonment for four years"*

That was an omnibus conviction and an omnibus sentencing. The trial court ought to have convicted the appellant in respect of each count and sentence him in respect of each count. Thereafter it would have ordered the sentences either to run concurrently or consecutively. Failure to do that was fatal.

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.

THE HIGH COURT OF TANZANIA

**A. MATUMA**
**JUDGE**
**07/12/2022**