IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC CRIMINAL APPEAL No. 23 OF 2021

(Arising from District Court of Nyamagana in Criminal Appeal No. 05 of 2021 originated from the decision of Mwanza Urban Primary Court Criminal case No. 218 of 2021)

ADAM IBRAHIM ----------APPELLANT

VERSUS

NDIWA JONAS---------- RESPONDENT

JUDGMENT

Last Order: 23.12.2021

Judgment: 15.02.2022

M. MNYUKWA, J.

Before the Urban Primary Court of Mwanza at Mwanza, the Respondent in this appeal was arraigned and convicted of theft c/s 258(1) and 265 of the Penal Code of Cap 16 R.E 2019. The respondent was convicted and sentenced to pay a fine of Tshs 200,000/= or to serve six (6) months term imprisonment in default of fine. Aggrieved, the respondent appealed to the District Court of Nyamagana in Criminal Appeal No. 05 of 2021 for both conviction and sentence. When the appeal was determined, the same was allowed, and the conviction and sentence

of the trial court was set aside. The appellant did not see justice and using his constitutional right of appeal, he presently seeks to impugn the decision of the District Court with a petition of appeal comprised of three grounds.

1. That the appellate court erred in law and in fact for the failure to hold that the appellant had proved the case beyond reasonable doubts against the respondent.
2. That the 1st appellate court erred in law and in fact for misdirecting and improperly evaluating the evidence on record and which if properly evaluated could have ruled that the evidence evaluated by the appellant was watertight.
3. That the 1st appellate court erred in law for relying on extraneous matters.

The hearing of the appeal was by the way of written submissions pursuant to the court order dated 02.11.2021, where parties complied as the appellant filed his written submissions on 15. 11.2021 and the respondent filed his reply on 30.11.2021 and there was no rejoinder. The appellant afforded the service of Mr. Julius Mushobozi, learned counsel and the respondent had a service of Mr. Jackson Marwa Ryoba, learned counsel.

The appellant's learned counsel was the first to submit. On the first ground of appeal he averred that the appellate court erred in law and in fact for

the failure to hold that the appellant had proved the case beyond reasonable doubts against the respondent. He submitted that, at a trial court, the appellant proved the case beyond reasonable doubts as required. He went on that it is undisputed that the respondent was the appellant's employee and he used to keep records of the cash flow and do bank deposits.

He insisted that, though the respondent acknowledges that the amount claimed disappeared, he did not tender any document to justify that the same was deposited or handled to the appellant. Referring to the evidence of SM1, SM2 and SM3, he avers that they testified to establish the relationship between the appellant and the respondent that was of the employer-employee relationship and adduced evidence in similar trails as how the items and cash were stolen.

Reacting to the first appellate court's findings that the charge was about stealing by agent while to him according to evidence was theft, he asserts that when a person is charged with an offence consisting of several particulars, and a combination is proved such person may be convicted with a minor offence although he was not charged with. Supporting his argument he cited *section 38 of the 3rd schedules to the MCA Cap 11 RE 2019* and the case of **Robert Nencho & Another vs**

Republic [1951] 18 EACA 17 and the case of **Christian Mbunda vs Republic** [1993] TLR 340 HC.

Reproducing the charge as appeared at a trial court, he avers that there was no miscarriage of justice and the 1st appellate court failed to appreciate and substantively hold that there has been a miscarriage of justice but failed to order a retrial or order the prosecution to invoke section 388 of Cap 20 RE 2019. Insisting, he cited the case of **Halphan Ndumbashe vs the Republic** Criminal Appeal No. 493 of 2017.

On the 2nd ground of appeal that the 1st appellate court erred in law and in fact for misdirecting and improperly evaluating the evidence on record and which if properly evaluated could have ruled that the evidence evaluated by the appellant was watertight, he avers that the 1st appellate court failed to show how the decision was arrived when concluding that the appellant failed to prove his case beyond reasonable doubts. He added that the 1st appellate court was expected to re-evaluate the evidence to assess the weight and credibility before reaching its decision. He insisted that, the court failed to evaluate the evidence and therefore reached to an erroneous decision. In supporting his arguments, he cited the case of **Yusuph Amani vs Republic** Criminal appeal No 255 of 2014 CAT.

On the third ground of appeal, that the 1st appellate court erred in law for relying on extraneous matters. He claims that the 1st appellate

court erred to consider facts that are not featured in the trial proceedings for the proceedings did not show that the appellant is the causative agent for the loss of his properties as there was no evidence of the prosecution at the trial court to that extent. He claims that such impact is fatal and vitiates the whole proceedings of the trial court a nullity. Supporting his argument, he cited the case of **Lucas s/o Venance @ Bwandu and Another vs The Republic** Criminal Appeal No. 392 of 2018 CAT Mbeya (Unreported).

He retired praying before this court that the judgement of the 1st appellate court to be quashed and set aside and judgment be entered in favour of the appellant.

Mr. Jackson Marwa Ryoba learned advocate replied to the appellants' submissions. On the 1st ground of appeal, he avers that the law is clear that in criminal cases the standard of proof is that of proof beyond reasonable doubts and at a trial court the complainant did not prove the case to the required standard. Referring to the evidence adduced before the trial court, he insisted that it was neither the appellant nor his witnesses who testified to have seen the respondent stealing the alleged properties and no proper evaluation of the books of accounts tendered as exhibits to warrant the offence of theft.

He went further that the evidence by the respondent that the appellant took the books with him several days before he formed an accusation against him, creates doubts as to the allegation by the appellant against the respondent. Referring to the case of **Sultan Seif Nassor vs Republic**, he insisted that the 1st appellate court's findings were right that the appellant failed to prove his case to the required standard at a trial court.

Submitting on the issue of substitution of the offence from that of theft to the stealing by agent, he avers that section 38 of the *Magistrate Courts Primary Courts Criminal Procedure Codes* require the offence so substituted to be proved beyond doubt while the evidence adduced by the appellant only establish the relationship between the appellant and the respondent to be that of the employer-employee relationship and did not prove the offence of stealing by the agent against the respondent. Insisting he cited the case of **Marando Suleiman Marando vs Serikali ya Mapinduzi ya Zanzibar (SMZ)** 1998 TLR 375.

He further submitted that *section 388 of the Criminal Procedure Act Cap. 20 RE 2019* gives room for the court to interfere where such errors, omissions or irregularities has occasioned the failure of justice which is not the situation in this instant appeal. He insisted that the respondent was charged with the wrong provision of law and the particulars of the

offence could not be proved by the evidence adduced before the trial court for they were not reflected in the evidence adduced by the appellant and his witnesses before the trial court. Going to details, he insisted that the *Criminal Procedure Act Cap 20 RE 2019* as referred to by the appellant has nothing to do with this instant case for the same is not applicable to the Primary Courts which tried the matter.

The cousel for respondent further, submitted that the 1st appellate court raised the point of law as to whether the appellant was charged with the wrong provision of law. He went on that the 1st appellate court referred the offence of theft under sections 258(1) and 265 of the Penal Code, Cap 16 R.E 2019 and the evidence adduced before the trial court was on the offence of stealing by agent under section 273(b) of the Penal Code, Cap 16 R.E 2019 and the appellant insisted that the respondent was properly charged and on evaluation of the evidence, the 1st appellate court was right that the respondent was not properly charged.

On the 3rd ground of appeal, he disagree with the appellant learned counsels submissions that the 1st appellate court erred in law for relying on extraneous matters insisting that what is claimed by the appellant is not found in the court records. He went further that the cited case is distinguishable from the instant case.

He finally prays this court to dismiss the appeal with costs for the 1st appellate court was right to allow the appeal and set aside the trial court decision.

In the light of what has been submitted by both parties, and having carefully gone through the available record, I noted that the appellant's grounds of appeal revolves to the assertion that the case was rightly proved at the trial court and the 1st appellate court was wrong to fault the findings of the trial court. For the purpose of convenience, I am focused on the first long-established principles of criminal law that for the accused person to be guilty of an offence, the claimant must prove the case to hilt and the standard is beyond reasonable doubts. It is reflected under *Section 110 and Section 112 of the Evidence Act*, Cap.6 [RE: 2019] and cemented in the case of **Joseph John Makune v R** [1986] TLR 44 and **Yusuph Abdallah Ally vs Republic,** Criminal Appeal No. 300 of 2009 (Unreported)

In the determination of this appeal, I will determine the 1st and the 2nd grounds of appeal together for they are intertwined. The appellant claims that the 1st appellate court erred in law and in fact for the failure to hold that the appellant had proved the case beyond reasonable doubts against the respondent and improperly evaluating the evidence on record and which if properly evaluated could have ruled that the evidence

evaluated by the appellant was watertight. He insisted that the trial court was right to convict the respondent for the case was proved to hilt. Going through the records, I come to the findings of the trial court that the accused was charged with the offence of theft under sections 258(1) and 265 of the Penal Code, Cap 16 R.E 2019 and for that reason, it was the observation of the 1st appellate court that the ingredients of the offence of theft were not met on the adduced evidence to warrant the conviction of the respondent.

It is from this point I proceed to venture to the respondent accusations and the evidence against him at a trial court to find out if at all the case against the respondent was proved as required by the law.

It is with no doubt that the respondent who stood charged at a trial court, was accused of theft c/s 258(1) and 265 of the Penal Code, Cap. 16 RE 2019 and the appellant who was the claimant paraded four witnesses and five exhibits.

Going through the trial court's records, the appellant (SM1) testified that the respondent was his employee who he entrusted him with his business and properties and from that relationship, the respondent stole from him several items to include "mashine ya betri" worth Tsh 500,000/- , two Drill machine worth Tshs 350,000/= mashine ya kufungia Kabati worth 180,000/= pesa ya mauzo ya tofali worth Tsh 6, 407, 359/= and

Pesa ya mauzo ya Duka la Ujenzi worth Tshs 4, 563, 340/= that makes a total value of the amount stolen to be Tsh 12,646,293.

Before I proceed further, I find it wanting to venture on the elements of the offence of theft for clear analysis to find out whether the holding of the trial court or the 1st appellate court was proper. Taking into account the offence of theft as defined for under section 258(1) of the Penal Code, Cap. 16 R.E 2019 it must be established that it was the accused who took the property of another (asportation) with no claim of right and intending to permanently deprive the owner of his right of ownership. The elements connote two major elements for the offence to stand, that there must be an asportation (taking) and it should be done with a guilty mind of the intention to deprive the owner permanently.

When going to the trial court's record and specifically from the evidence of SM1, SM2 and SM3 it is well established that what is claimed to have been stolen by the respondent were not proved beyond doubts for the reasons that the items and money claimed to have been stolen were entrusted to the respondent and no evidence that it was the respondent in exclusion of others who stole them as charged. For that reason, I agree with the respondent's learned counsel that the offence of theft was not proved at the required standard against the respondent.

The appellant learned counsel contention that the respondent could the same way be convicted with a substitutional offence, which was disputed by the respondent learned counsel for the reason that the major offence of theft was not proved. Guided by the principle stated in the case of **Robert Necho and Anor v R** (1951) 18 E.A.C.A. 171 which was quoted with authority in the case of **Christian Mbunda vs Republic** [1985] TZHC 6 it is settled that, where an accused is charged with an offence, he may be convicted of a minor offence, although not charged with it, if that minor offence is of a cognate character, that is to say of the same genus and species.

In this case, it is with no doubt that the offence of theft under sections 158(1) and 265 of the Penal Code, Cap 16 R.E 2019 is cognate to stealing by agent under section 273(b) and a person accused of theft can the same be charged under section 273(b). This is possible for the offence of theft gives the accused notice of all circumstances going to constitute the minor offence intended to be substituted.

My take from here is whether the offence of theft was proved to substantiate the appellant learned counsel submission that the 1st appellate court erred. I again venture to the records and from the evidence adduced at a trial court, the appellant (SM1) testified that the respondent was his employee and did steal from him items stated on the

charge sheet and cash that makes a total of Tshs. 12, 646,293/=. The appellant tendered 5 exhibits to include cash flow ledgers "Exhibit A, B, C, D" and the appellant bank statement Exhibit "E". The respondent denied the allegations raising several doubts to the offence charged. First, it is apparently clear that no witness who testified to the extent that it was the respondent who actually stole the listed properties in exclusion of other. Secondly, the exhibits tendered were not exhibited with an audited report of accounting to verify the amount of loss, time and the manner it was stolen. That being a case, I agree with the respondent's learned counsel that failure of the appellant to prove all the elements of theft at a trial court, could not nececitate the trial court to substitute the offence of theft to that of stealing by agent as the law allows.

Again, from the submissions by the appellant's learned counsel that the 1st appellate court could invoke section 388 of the Criminal Procedure Act, Cap 20 RE: 2019, I am alive with the position of law that section 388 can be invoked to cure irregularities occationed on the charge sheet. This was emphasized in the case of **Halphan Ndubashe vs Republic,** Criminal Appeal No. 493 of 2017 which quoted with authority the case of **Deus Kayola vs Republic,** Criminal Appeal No. 142 of 2012 (unreported). Going to this appeal at hand, I find it distinguishable for neither the trial court nor the 1st appellate court stood a chance to invoke

section 388 of Cap 20 R.E 2019 for the proceedings originates from the primary court. It is from this point that I join hand with the respondent learned counsel's findings that as the matter originates from the primary court, the same could not apply.

For the reasons explained above, I find that the 1st appellate court findings were proper for the offence of theft was not proved beyond reasonable doubts. I therefore proceed to uphold the decision of the 1st appellate court and dismiss the appeal. Each party to bear his own costs.

Right of appeal explained to the parties.

It is so ordered.

M.MNYUKWA

JUDGE

15/02/2022

Judgement delivered on 15th day of February, 2022 in the presence of respondnet's advocate and in the absence of the appellant.

M.MNYUKWA

JUDGE

15/02/2022