IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 29 OF 2021

(Arising from the judgment of Magu District Court in Cr. Appeal No. 20/2021, Originating from the Primary Court in Cr. Case No. 02of 2021)

LUSHINGE BUHWAHWA..........................APPELLANT

VERSUS

JOHN LYAMBA...................................RESPONDENT

JUDGMENT

28th March & 16th May, 2022

DYANSOBERA, J.:

The appellant Lushinge Buhwahwa was the complainant before the Primary Court of Magu District at Kongolo in a Criminal Case No. 2 of 2021 in which the respondent was an accused person charged with stealing c/s 265 of the Penal Code [Cap. 16 R.E.2019] it being alleged that on 7th day of May, 2019 at 0900 hrs at Langi Village, Sato hamlet within the District of Magu in Mwanza Region, *"kwa makusudi na nia mbaya uliingia ndani ya nyumba ya Lushinge Buhwahwa na kuiba viti vinne*

bila idhini yake, viti vyenye thamani ya Tshs....kitendo ambacho ni kinyume na sheria".

The respondent denied the charge and the trial Primary Court, after hearing two prosecution witnesses and three defence witnesses, found the case against the respondent proved beyond reasonable doubt. It convicted and sentenced him to a fine of Tshs. 200,000/= or in default of payment of the fine, custodial sentence of four months term of imprisonment.

The respondent was not satisfied with the trial court's decision and successfully appealed to the District Court vide Criminal Appeal No. 20 of 2021 whereby, in its decision delivered on 22nd day of October, 2021, the District Court reversed the trial court's decision.

Aggrieved, the appellant has appealed to this court on the following grounds of appeal, namely:

1. That the Honourable first appellate court grossly erred in law and fact by misconstruing the trial court's proceedings and holding that it did not consider the defence side evidence at all while the records speaks volume that the trial court

considered and evaluated the defence's evidence in composing its judgment.

2. That the Honourable first appellate court grossly erred in law and fact by faulting the trial court's finding and allowing ground 4 of the first appeal upon adopting wrong reasoning for the evidence of the village chairman (SU 3) were at best hearsay and contradictory to the defence side testimonies.
3. That the honourable first appellate court grossly erred in law and fact for holding that the prosecution side failed to prove his case to the required standard while had done so and the respondent had admitted to have committed the offence of stealing two (2) out of four (4) plastic chairs that were stolen from the appellant's house in his absence and sold them without any lawful order and failure to disclose the whereabouts of the other two plastic chairs.
4. The first appellate court erred in law and fact in holding that the respondent's evidence were rejected by the trial court while raising new issue at

the time of composing its judgment, when influenced decision of allowing the first appeal without according parties an opportunity to address it on the same.

At the hearing of this appeal, the appellant was represented by Mr. Steven Kaswahili, learned Advocate while the respondent appeared in person and unrepresented.

Arguing in support of the 1st ground of appeal, Counsel for the appellant submitted that it was wrong for the first appellate court to hold, as it did, that the trial court did not consider the defence evidence when composing the judgment. The court was referred to page 4 of the typed judgment where the trial court is said to have evaluated even the defence evidence in that the respondent took the chairs alleged to be stolen but also the trial magistrate went further and evaluated the evidence of DW2. It was his argument that the case of **Hussein Iddi & Others v. R.** and other cited and other decisions, were inapplicable in the circumstances of this case and that there was misdirection on part of the first appellate court.

Combining the 2nd and 3rd grounds of appeal and arguing them together, learned Counsel submitted that prosecution proved the case against the respondent beyond reasonable doubt and the same respondent had admitted complicity when at pages 5 and 6 of the typed proceedings the respondent, the then accused, admitted that they went to take the chairs in the absence of the appellant but in the presence of the a child and that they did not bother to look for the appellant so as to inform him that they were taking the chairs as he had failed to contribute Tshs. 5000/= for construction of school latrines and that PW 2 corroborated this evidence.

On the argument by the respondent that the taking of the chairs resulted from Langi Village Minutes dated 18.10.2019, Counsel for the appellant contended that the respondent failed to tender any evidence on the minutes /recommendations of the village or the law that sanctioned his action.

Being aware that in criminal cases the prosecution bears the burden of proving their case beyond reasonable doubt, Counsel for the appellant argued that the law applicable in

primary courts is the Primary Court's Magistrates (Rules of Evidence in Primary Court) Regulation GN No. 22 of 1964 and 66 of 1972, specifically Reg. No. 2 (1) and (2). It was his argument that the respondent who was the accused had to prove that he had authority to act or do what he is alleged to have done by furnishing some proof including the minutes and recommendations, summons authorizing him to impound those chairs and that, if the said items were sold, then the receipts had to be produced and the buyer was to be summoned to explain where those chairs were taken.

Mr. Kaswahili was insistent that according to the evidence, the holding of the meeting was conducted on 18.10.2019 while the offence was commited on 7. 8.2019 which means that the incident occurred before the conduct of the meeting and that this fact was not controverted as the respondent did not cross examine on it. According to learned Counsel, failure to cross-examine on certain facts amounts to admission. He relied on the case of **Bomu Mohamed v. Hamisi Amiri**, Civil Appeal No. 99 of 2018 at p. 11 to support his argument. Counsel also told this court that the defence evidence was contradictory in

that the version of DW1 on when the meeting was held was inconsistent with that of DW 2. This court was referred to p.7 of the typed proceedings. It was also argued on part of the appellant that there was contradiction on the days the appellant was required to redeem his chairs

Arguing in support of the 4th ground, Counsel for the appellant submitted that the Magistrate at the District court raised a new fact that the trial court magistrate shifted the burden to the accused to prove his innocence. In his view, if the first appellate court found it to be an important issue, he had to call parties to address on him before he discussed it short of which, the parties were not accorded a fair trial and this was against the principle of natural justice.

Mr. Steven Kaswahili concluded his submission by insisting that the appellant proved the charge and the first appellate court erred in reversing the decision of the Primary Court which was proper. He prayed this appeal to be allowed, the decision of the primary court to be endorsed and this court to impose

stiff punishment as the village leaders have been embarrassing the citizens by using their positions.

Resisting the appeal, the respondent refuted the claims that they went to make a search on 7.8.2020 and the general meeting was on 18.10.2019. He was of the view that problem might have been a typing error. The respondent asserted that after 7.8.2020, the appellant went to the chairman to ask to be given back the chairs but that that was after the expiry of five days he had been given to follow up. It was the respondent's argument that the Chairman had required the appellant to pay Tshs. 5, 000/= as a contribution and Tshs. 10, 000/= as a fine. The appellant asked for extension of time for three days hence making a total of eight days within which he was to take that money to the office. The appellant did not live to his word. The respondent was of the view that the appellant knew that he was required to contribute but was adamant. The respondent pleaded to this court that if the situation is left as the appellant suggests, the development activities will be at risk and people will be reluctant to contribute for the development.

In his rejoinder, Counsel for the appellant maintained that since the respondent admitted to have gone to the appellant to collect the chairs and failed to justify that unlawful act by stating under which authority the respondent collected and took with him the appellant's chairs, the offence of theft was proved. Counsel for the appellant informed this court that the respondent's argument that the appellant was given eight days within which to redeem his property is not reflected in the record and that there is nothing showing that the appellant knew that he had to make contribution.

Having considered the rival submissions presented by either parties and after going through the records of the lower courts, I am now in a position to determine this appeal.

According to the appellant's complaints, there is only one issue calling for determination by this court and this is whether or not the case against the respondent had been proved beyond reasonable doubt by the prosecution.

In answering this crucial question, I will first revisit the law and then consider the evidence unfurled at the trial.

As to what the complainant has to prove, sub-rule (1) of rule 1 of the Schedule to the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN No. 22 of 1964 as amended by GN No. 66 of 1972 made under Section 18 of the Magistrates' Courts Act [Cap. 11 R.E.2019] provides as follows:-

> *"(1) Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence, unless the accused admits the offence and pleads guilty.*
> *Exceptions... (Not relevant)."*

In the case under consideration, there is nothing showing that the respondent did admit the offence of stealing nor did he plead guilty to that offence. This means that the appellant had to prove all the facts which constituted the offence of stealing. Did the appellant discharge this burden?

This, I will tell.

According to the evidence on record, the appellant was told by his child (PW 2) that the respondent had taken with him four plastic chairs. The appellant's efforts to meet the respondent and discuss on the issue was not successful. The appellant took the matter to the District authority whereby the

Solicitor tried to reconcile them but without success as the respondent refused to give the chairs back to him. It was in the appellant's evidence that the respondent sold the chairs without his (appellant's) approval. This piece of evidence was supported by PW 2, the appellant's daughter.

The defence was to the effect that the respondent was a Village Executive Officer, Langi village. He recalled that there was a meeting whereby it was agreed the community had to construct latrines for Langi Primary School children. The budget was Tshs. 2, 670,000/- and among the 463 households, there were 412 capable households and each houselhold had to contribute Tshs. 5,000/= and the defaulter would pay a total of Tshs. 15, 000/= out of which the sum of five thousand shillings would be contribution and ten thousand would be paid or levied as a fine. It was the respondent's evidence that the appellant was a defaulter and the leadership resolved that the appellant's property be seized and kept and in case he fails to redeem and pay the contribution, the property would be sold so as to realise the contribution together with the fine. It was the defence evidence that the respondent, in company with the militiaman

made a follow up and seized the appellant's two plastic chairs in his absence. The appellant not only failed to pay the contribution together with the fine but also failed to redeem the chairs within the agreed time. The chairs were then sold and fetched a sum of fifteen thousand Tanzanian Shillings. The respondent denied to have stolen the alleged four chairs arguing that they collected two chairs only after the appellant had defaulted to make the agreed contribution.

The respondent's evidence was support by that of SU 2 and SU 3 who maintained that although the appellant was aware of the community resolution he refused to pay contribution and the leadership had directed the respondent to recover the money through the mode of seizing and selling the defaulter's property.

In his judgment, the trial court found as a fact that the said "sheria ya Wananchi" was not tendered in court and the seizure was forceful and repressive. It found the charge against the respondent proved beyond reasonable doubt, convicted and sentenced the appellant accordingly.

On appeal by the respondent, the first appellate District Court was satisfied that, on the available evidence, the case against the respondent was not proved beyond reasonable doubt as the respondent's defence was not only plausible but also created reasonable doubt in the prosecution case but, unfortunately, the defence was not considered by the trial court.

Having analysed the evidence on record and the judgments of the trial primary court and the first appellate district court, I am satisfied that appellant managed to prove some ingredients of the offence of stealing. First, it was amply proved that there was asportation. The respondent, by taking the appellant's chairs in his absence, assumed his (appellant's) rights as the appellant as the legal owner had absolute rights over his chairs.

Second and third, the chairs, whether they were two or four, were the appellant's property as he had possession and control of the same.

Fourth, it was amply proved that the seized chairs were not returned back to the appellant but were sold. This means that the intention to permanently deprive the appellant his

chairs was proved. In other words, the prosecution, the appellant and PW 2 for that matter, proved the four elements of theft, that is appropriation, of the property belonging to another with the intention of permanently depriving the appellant the said chairs.

The last element was whether the appellant proved dishonesty on part of the respondent. This element requires two stage test. One, is that according to the ordinary standards of reasonable and honest people, was what was done dishonest? Two, if it was dishonest by those standards, did the respondent realise that reasonable and honest people would regard the conduct as dishonest?

I think the answers must be in the negative. This is so because, according to the evidence, the respondent had a genuine belief that he had legal right to appropriate the appellant's chairs. It was a resolution by the whole community. The appellant was a defaulter and the authorities had directed the respondent to make a follow up. The respondent executed those directions, the chairs were seized, the appellant failed to redeem them within the time agreed and later the chairs were

sold and the money used for the designed purpose, construction of school pit latrines.

The evidence fell short of proving the offence of theft the respondent was facing. As to the existence of contradictions which learned Counsel for the appellant pointed out, I am in no doubt that the said contradictions did not tilt the defence evidence that the seizure and sale of the appellant's chairs was justified.

With regard to the weight of evidence, Part II rule 5 sub-rule (1) of the said Regulations states that:

> *"(1) in criminal cases, the court must be satisfied beyond reasonable doubt that the accused committed the offence".*

My observation as stated hereinabove, leads to the conclusion there was no sufficient evidence to prove beyond reasonable doubt that the respondent committed the offence of stealing. The conviction entered by the trial court was against the evidence and the law and the decision of the first district court reversing the trial court's judgment cannot be faulted.

The appeal fails and is dismissed. The judgment of the first appellate district court is endorsed.

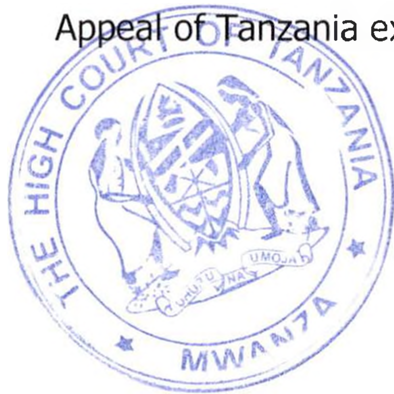
Order accordingly.

W.P. Dyansobera

Judge

25.5.2022

This judgment is delivered under my hand and the seal of this Court on this 25th day of May, 2022 in the presence of the appellant and the respondent. Rights of appeal to the Court of Appeal of Tanzania explained.



W.P. Dyansobera

Judge

25/05/2022