IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

PC. CRIMINAL APPEAL NO. 3 OF 2022

JOANITA JOEL MUTALEMWA ..... APPELLANT

VERSUS

CHRISTINA KAMUGISHA TUSHEMELEIRWA ..... RESPONDENT

JUDGMENT

9th, & 30th May, 2022

ISMAIL, J.

This appeal arises from criminal proceedings which were instituted in the Primary Court of Buguruni within Ilala District. The present appellant was an accused person who was arraigned and convicted of theft, contrary to section 265 of the Penal Code, Cap. 16 R.E. 2019. The subject matter of the theft was a cash sum of TZS. 4,223,423/-, allegedly stolen from the respondent's cash transfer agency in which the appellant was reportedly serving.

The trial court was convinced that the guilt of the 2nd accused, a co-employee, had not been established, while the appellant was singled out as a culpable party. The court went ahead and convicted her, ultimately sentencing her to imprisonment for 12 months. She was also ordered to effect a refund of the sum stolen.

The trial court's verdict bemused the appellant. She mounted a challenge through an appeal to the District Court of Ilala at Kinyerezi (1st appellate court), raising seven grounds of appeal against the trial court's finding. While quashing the trial court's proceedings and judgment, the 1st appellate court ordered that the matter be instituted in a court clothed with requisite jurisdiction to try the matter and apply relevant laws i.e. the Electronic Transactions Act, No. 13 of 2015 and the Electronic and Postal Communications Act, No. 3 of 2010. These pieces of legislation are not applicable in the conduct of proceedings in primary courts. In so doing, the 1st appellate court invoked revisional powers vested in it by section 22 (2) of the Magistrates' Courts Act, Cap. 11 R.E. 2019.

The decision to commence trial proceedings irked the appellant as she felt that, having served and seen out her custodial term, commencement of fresh trial proceedings amounted to a double jeopardy. She chose to institute

the instant of appeal. In the grounds of appeal, the appellant's contention is twofold. ***One***, that the 1st appellate court erred in law and in fact by ordering reinstitution of the matter while, for the fault of the trial court, the appellant served the whole sentence imposed by the trial court, and that the standard of proof in criminal cases was not attained; and ***two***, that the 1st appellate court erred in law and in fact when he ordered re-institution of the case, thereby occasioning a miscarriage of justice, and while the decision failed to comply with laws governing admissibility of electronic evidence.

Hearing of the appeal was done by way of written submissions. In respect of ground one, the appellant, represented by Mr. Danstan Nyakamo, learned advocate, was of the view that the order for retrial of the matter handed an opportunity for the respondent to fill gaps which were exposed in the lower court proceedings, an act which militates against the decision in ***Fatehali Manji v. R*** [1966] EA 343. The opportunity to fill gaps, the appellant contended, is also an infraction of the provisions of Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977 (as amended), and it is bound to cause injustice, as the appellant has fully served the sentence imposed against her.

Mr. Nyakamo was adamant that fresh proceedings will inevitably entail adducing fresh evidence that will address weaknesses in the prosecution's case and to the appellant's detriment. It is also a conduct which is abhorred by section 21 of the Penal Code (supra) which provides that a person should not be punished twice for the same offence. On this, the appellant relied on the decision of the Court of Appeal of Tanzania in ***Ernest Joseph Nyatando v. Republic*** [1983] TLR 170.

The appellant maintained that there was no sufficient evidence to prove the case beyond reasonable doubt, in the mould stated in ***Jonas Nkize v. Republic*** [1992] TLR 213.

Regarding ground two of the appeal the contention by the appellant's counsel is that the 1st appellate court issued a contradictory order for retrial without re-evaluating the entire evidence on record as the law requires. He argued that, being the first appellate court, handling of the appeal amounted to a rehearing which would entail carrying out a critical analysis. In this case, such analysis was not done and that the 1st appellate court's decision went against that requirement, thereby defying the holding in ***R.D. Pandya v. R*** [1957] EA.

The appellant pointed out further that there is a discrepancy on the sum that was allegedly stolen. He argued that, whereas the sum ordered for payment was TZS. 4,223,423/-, the 1st appellate court quoted TZS. 4,000,000/- as the figure that was misappropriated by the appellant. It was also the appellant's contention that another set of contradictions resided in the prosecution's failure to state the number of workers who were serving in the agency from which the money was allegedly fleeced.

The appellant urged the Court to allow the appeal.

In her rebuttal submission, the respondent gave the 1st appellate's decision a thumbs up. She argued that the key requirement for retrial is where interests of justice so require. She contended that circumstances of the case demand that a retrial be carried out. This is primarily because the decision of the trial court that ordered payment of TZS. 4,223,423/- has since been quashed and set aside. The respondent argued that the custodial sentence of 12 months was partially served, while with respect to compensation, only part of it was paid.

The respondent argued that the prosecution proved that, at the time of the incident, the phone through which the sum stolen was illegally transferred to third parties. She argued that the appellant's involvement in

the theft incident is clear, since she was entrusted with a password and only she, alone, would control and use it. The respondent cited the decision of the Court of Appeal in ***Mayala Njigailele v. Republic***, CAT-Criminal Appeal No. 490 of 2015 (unreported), in which it was held that retrial would be ordered where there is an assumption that the charge sheet is proper and is in existence before the court.

On the double punishment, the respondent argued that that will not necessarily mean that the appellant will be convicted. In any case, she contended, the appellant will have an opportunity to put a mitigation. She contended that retrial is a chance to right the wrongs done. She bolstered this contention by citing the decision of the Court of Appeal of Tanzania in ***Elibariki Kirama Kinyawa & Another v. John George a.k.a. Jimmy***, CAT-Civil Appeal No. 183 of 2017 (unreported). She prayed that the appeal be dismissed with costs.

The singular question for determination in this appeal is whether the 1st appellate court was right in ordering a retrial after the appellant had seen out her custodial sentence and settled part of her financial obligation imposed by the trial court. The view taken by the appellant is that the order

is a deflection of a cause of justice, while the respondent finds nothing worth of squeaking about.

The law allows courts to order retrial where it is found that the impugned proceedings were shrouded in wanton irregularities that render the legitimacy of the verdict suspect or wanting. The retrial is intended to right the procedural wrongs committed in the course of the trial. However, the trite position is that, where retrial is intended or is likely to hand the prosecution a chance of steadying the ship or stitching its torn case, the court is dissuaded from ordering a retrial. This is because fresh opportunity to fill in the gaps is likely cause an injustice to the accused person (See: ***Fatehali Manji v.*** R (supra)).

In the instant appeal, retrial was ordered by the 1st appellate court in order to allow for introduction of electronic evidence which is inadmissible in primary courts. Introduction of such evidence would inject fresh breath into the prosecution's case and mend the fissures which came with absence of proof of transfer of the stolen funds to third party beneficiaries or recipients. Such evidence is a welcome addition which would enhance the prosecution's case and tighten the noose against the appellant. It is a glorious opportunity

to fill in gaps and create sufficiency to the evidence which was otherwise insufficient. There can be no worse form of injustice than this.

More significantly, is the fact that the order for retrial comes with one important revelation. This is that, owing to the absence of the testimony on electronic transactions, the case against the appellant was not satisfactorily made out. In other words, the threshold of evidence requisite for establishing the appellant's guilt was not met, and the reason is that evidence which would be adduced in the case was not availed to the court before a finding of guilty was made. This implicit confession by the 1st appellate court ought to have led it to the conclusion that the burden of proof, permanently borne by the prosecution in criminal cases, was not discharged to the required standard (See: ***Joseph John Makune v. Republic*** [1986] TLR 44; ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (unreported)).

In the matter that bred the instant appeal, the allegation was that of theft whose actus reus involves the actual deprivation or conversion of the thing, in this case, the cash sums from the agency, while the intent, *mens rea*, resides in the offender's intention to fraudulently convert the stolen thing and deprive the owner of its use. My contention on this is in line with

the Court's lucid position, laid out in ***Christian Mbunda v. Republic*** (supra) wherein the Court (Msumi, J., as he then was), wherein it was held as follows:

> *"(i) It is an elementary rule of law in order to convict an accused of theft the prosecution must prove the existence of actus reus which is specifically termed as asportation and mens rea or animus furandi;*
>
> *(ii) in this case there was asportation but the appellant had no guilty mind or animus furandi when he used the money for the purpose other than buying millet from the village;*
>
> *(iii) it is not necessary for one charge with stealing by servant contrary to section 271, of the Penal Code that property stolen should belong to the accused's employer, but the section covers a situation where, though the stolen property does not belong to the employer it came into possession of the employee or the accused on account of his employer;*
>
> *(iv) the offence of stealing by agent is neither minor nor cognate to stealing by servant as proof of the latter does not necessarily notify the accused of the essential elements of the former."*

Since proof of these key ingredients of the offence was dependent on the evidence which was not tendered during trial, the 1st appellate court ought to have found that the finding of guilt and the eventual sentence were

arrived at while the prosecution had not discharged its burden of proof. The net effect of this was to order acquittal of the appellant. Invoking the provisions that conferred revisional jurisdiction and quashing the proceedings was a horrendous flaw which justifies the appellant's plea for its setting aside. I fully subscribe to this contention and I allow the appeal.

Before I make the final order, let me say a word or two on the contention on double punishment. The view held by the appellant is that retrial will bring about the prospect of being punished twice while she has already served her term after the first conviction. The basis for this contention is section 21 of the Penal Code (supra) which abhors double punishment. For ease of reference, it is apposite that the said provision be cited. It states as follows:

> *"A person shall not be punished twice, either under the provisions of this Code or under the provisions of any other law, for the same offence."*

I fully agree that retrial has a real chance of bringing an outcome that is unfavaourable to the appellant. I take the view that justice of the case requires that the appellant should not be put to yet another trial. Principally, the fact that she has served the sentence should constitute a key

consideration in having the 1st appellate court's order taken out of the way. In so doing, more consideration will accorded to justice than the letters of the law. As the adage goes: ***less law, more justice***.

In the upshot of all this, I find merit in the appeal and, accordingly, I order that the 1st appellate's decision be quashed and/or set aside, and have the appellant fully discharged from the impending proceedings.

Order accordingly.

DATED at **DAR ES SALAAM** this 30th day of May, 2022.

M.K. ISMAIL

JUDGE

30/05/2022