

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

CRIMINAL APPEAL NO.71 OF 2022

(Originating from Criminal Case No. 93 of 2021 of Shinyanga District Court)

OTTOMAN ERNESTAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last order on 2nd February, 2023

Judgment date on 27th February, 2023

MASSAM, J.

On 30 August 2021 the appellant one Ottoman Ernest was arraigned in the Shinyanga District Court for the offence of stealing by agent contrary to section 273(b) of the Penal Code, Cap. 16 R.E. 2019. The facts as alleged by the prosecution at the trial court are that, appellant was a sales

agent for Jambo Foods Products company Limited, and that on 15th June 2021 at Ibadakuli Jambo area within Shinyanga Municipality appellant was entrusted by the Director of Jambo Food Products Co. Ltd different products of Jambo company valued at TZS. 16,503,001/= to take them to Tabora for sale and after the sale, he was required to deposit the sale proceeds, (money) within 7 days in the account of the owner (Jambo Food Products Co. Ltd).

The lower court's facts reveal that, on 5th December 2020 appellant was employed by Jambo Food Products Co. Ltd (the victim) as salesman of a company, his duty was to sell the products of the Co. It was said that the employment agreement was signed by PW4 Ally Khalfan Slym on behalf of the Company.

It was established that on the alleged date of 15th December 2021 appellant was entrusted by the Company and supplied with goods which were Soda, Juice water, biscuits both valued at TZS 16,503,000/= to sell them at Tabora. It was said that appellant managed to sale the same and he was required to deposit the money in the Company's account within 7 days before the appellant pressing for another order, but he failed to do so, that the account of appellant was verified by officials of sales and

marketing Department. Upon inquiry of the appellant's account their found appellant fair to deposit the sale proceeds that failure the Jambo Food Products Co Ltd Director ordered the matter to be reported to the police station.

On 15th August 2021 the matter was reported to Police. Investigation mounted later on the appellant was arrested at Dar es Salaam and brought to Shinyanga for more interrogation and after he failed to give clear information he was charged with aforementioned offence.

Appellant did not deny the fact that he was an employee of the Jambo Food Products Co. Ltd as salesman, he said on 28th May 2021 he received the products of the victim valued at Tshs 16,500,000/= after received he deposited the amount of Tshs. 16,500,000/= in the victim account, he said he sent a pay slip to the victim via what's ap media. Without and before reconcile with victim concerning the sale and money proceeds, appellant went to Dar es Salaam to look for another job, he informed the victim that he would be no longer working with the victim as a salesman.

At the end of the trial, the court found appellant guilty of the offence. It convicted and sentenced him to three years' imprisonment and to compensate the complainant Tshs. 16,503,000/=

The appellant was aggrieved with the conviction and sentence, so he has therefore appealed to this court on the following grounds;

- 1. That the learned trial magistrate erred in law and facts for convicting and sentencing the Applicant on criminal charge while in fact it is well settled that parties have to pursue first the matter on exhausting remedies through civil domain by which it is a mandatory requirement.*
- 2. That the learned trial magistrate grossly erred in law and in fact when directed herself on not admitting the exhibit tendered by the appellant in support of his case without adducing any reasons in the judgment as to why rejected such exhibits.*
- 3. That the learned trial magistrate erred in law and in fact in holding and deciding against the Appellant without explaining his right to appeal as required by the law.*

At the hearing of the appeal, appellant appeared in person unrepresented whilst, the Respondent/Republic was represented by Ms. Glory Ndondi learned State Attorney.

Arguing on the 1st ground of appeal, appellant stated that according to received edition of different law of 2022, dated on 8/3/2023, which revised section 4 of Criminal Procedure Act Cap 20 by adding sub-section 3 the trial magistrate erred by convicting him with a criminal case, while the victim was supposed to filed civil case first. He said he had a contract with complaint as a salesman, so he required first to be sued with civil suit.

Arguing for 2nd ground, appellant complained that the trial magistrate erred by not saying anything why she objected to admit appellant's exhibits. He said justice was not done to him.

On the 3rd ground, appellant complained that the trial magistrate did not gave him his right of appeal, he was convicted and sentenced without given right of appeal.

While arguing his appeal, appellant orally prayed the leave to the court to add more three grounds of appeal, the court granted the prayer. On those added grounds he started with additional 4th ground, he

submitted that, trial magistrate erred in convicting him, while his employer who is Jambo (the owner) did not appear in the trial.

On 5th ground he submitted that he was charged with two charges with different dates, while it was stated to happen the same date. He went on arguing on the 6th ground that the evidence of PW5 (Frank John) (driver) who said that he was the one who signed invoice and delivered note but he was the one who required to sign it, but prosecution side failed to prove if he was the one who signed it and took the said products.

On the last 7th ground, appellant lamented that he took the said products to Tabora, on 28/5/2021, and that was his last date to take product from the factory, but complainant said that he was given the said products on 15/6/2021. He said there were two weighing scale on the road to Tabora, one at Tinde and another one at Puge, he said he asked PW5, if he had a prove that on the alleged date, he passed via that road but failed to prove the same, so he prayed to this court to let him free.

In her reply, Ms Glory Ndondi State Attorney responded by starting that in their side they are not supporting the appeal but they support conviction and sentence given, as the prosecution proved their case

beyond reasonable doubt. She stated that in her reply to the 1st ground of appeal that the trial court erred in convicting accused person while he was supposed to be sued in civil case first, she said that according to section 4 (3) of CPA R.E 2022 it was required to sue him with civil case first.

On her response she said that it was their findings that 1st ground had no merit basing on the fact that the charge against accused person was filed on 2021, and she said the provisions stipulated in Criminal Procedure Act, was revised on 2022, so on 2021 it was not a legal requirement. She insisted that the said offence committed was criminal in nature and accused person was charged with stealing by agent, in proving the same, the law required them under section 273 (b) of Penal Code, R.E 2009 and the court required to prove the said ingredients as follows; (1) To show that accused person was agent in that scenario and (2) to prove accused person was entrusted by the complainant (owner of the property) in special task as to sell, so she said that was well elaborated in the case of **Christian Mbunde Vs. Republic** TLR 1984,340. in this case it was held that, to an appellant to be convicted under section 273 (b) of the Penal Code prosecution must prove that accused came to the possession of alleged stolen property as agent of either real owner or special owner, also

the prosecution side was supposed to prove that the said properties which handed over to him/her used for his own use.

In that point, Ms. Glory submitted that in proving the charge, prosecution brought six witnesses and exhibits, in that evidence PW3 (a legal officer of Jambo) at page no. 7-8, 15-16 of the court proceedings, and PW4's evidence found in page No. 8-11 of court proceedings, all witnesses said that appellant was employed as sales man and the employment contract was brought and tendered as exhibit on page No. 16 of court proceedings, their evidence proved that on 15/6/2021 appellant received products amounted to Tshs. 16,503,001 in order to sell them to Tabora and within 7 days, he was supposed to deposit the said money to the Jambo account but he did not do that.

Ms. Glory again submitted that PW4 was the one who started to look for appellant, and later he report the matter to the police station and appellant was arrested in Dar es Salaam on August 2021. By looking to the evidence produced Dar es Salaam was not the destiny of the said product, that act of going to Dar es Salaam without reconciliation the sale and taking long time from he was handled the product to the date he was arrested with to explanation prove that he stole the said money /products

that's why he was arrested at Dar es salaam and not Tabora or Shinyanga to cement the same she cited the case of **Republic Vs Nanjisunderjic (1935) 2 EACA 130**, in this case the court held that where a property was entrusted to a person and he converted to his own use and disposes of it, whether or not the intention to do so was conceived at or after the receipt, of the property, as soon as there is an overt act the offence of theft is complete and foundation for a case of receiving with guilty, knowledge laid. So, she said that the prosecution succeeded to prove its case.

In response to ground No. 2 Ms. Ndoni submitted that appellant said that the court did erred by not giving reasons for rejection of exhibits, on her side she submitted that at page No. 20-22 in court proceeding show that the said exhibits which were prayed to be tendered was objected as it was photocopy and the court did not inform the court that he was intending to tender the photocopy instead of original as stated in section 66 of Evidence Act R.E 2022, so in her side said that the court adduced the reasons why she rejected the same, in page No. 20 of the court proceeding.

On ground No. 3, Ms Ndoni reacted that appellant said he was not given right of appeal, she said it is true that the court did not give him

right of appeal but she said it was a human error which she sought could not prejudice appellant's right, thus why appellant he was in court pursuing his appeal. So, she said that ground has no merit.

On additional grounds, State attorney reacted that appellant said that his employer did not show up to that court to prove the appellant employed by the victim. She argued that it was not true that employer was the only witnesses who supposed to appear to the court. She contended that there were other witnesses who appeared to the court as witnesses, she said all witnesses adduced evidence that appellant received that products. She said the law does not force prosecution in choosing/calling a number of witnesses as well elaborated in the section 143 of Evidence Act.

In another ground of appeal that he was charged with two charges which had different dates, State Attorney stated that it was not true that appellant was charged with two charges which had different dates, she said appellant was charged with one charge but at page 17 of the trial proceedings it shown the charge was substituted and the court admitted the substituted, the said charge was allowed by the court, he said under the provision of 234 (1) of CPA R.E 2019, she said that if that charge was substituted, so the previous charge should cease to exist.

Also another ground that there was contradiction in the dates when accused person was given products, in that ground she respondent that it is true that the dates are different, the evidence of witnesses are different with the one which is in the charge, that act was immaterial as per section 234 (3) of CPA, R.E 2022, the law direct that when there was variance of time, between testimony of witnesses and charge sheet, that act will be immaterial as it was not miscarriage of justice, and that act was curable under section 388 of CPA.

Coming to ground 6 as appellant faulted that, PW5 did not prove that he was the one who signed that document, The delivery note, Ms. Ndondi contended that, the record show that appellant signed the delivery note, that evidence was supported by PW5 (driver) who was with him when signing.

On the last ground that appellant was handled the product on 28/5/2021 and not on 15/6/2021 and the issue of PW5, that appellant did ask PW5. Counsel for the respondent responded that nothing shows in court proceedings that appellant asked PW5 concerning that issue, so that ground was brought as after thought. She therefore prayed the court not

to allow the appeal but uphold the conviction and sentence passed by trial court.

In his rejoinder, appellant retaliated to the effect that he did not say how did he was handled the products but he said he was employed as salesman and not agent but the proceedings showed that he was the agent. He said he agreed to sign a delivery note on 28/5/2021.

I have subjected the entire appeal into a serious scrutiny. In this case appellant was charged and consequently convicted on the count of Stealing by Agent Contrary to **section 273 (b) of the Penal Code**. For an appellant to be convicted under Section 273 (b) the prosecution must prove inter alia *that* accused came into possession of the alleged stolen property as an agent of either the real owner or special owner as elaborated in the case of **Christian Mbunda v. Republic**, [1983] TLR 344, in this case the court observed that: -

"For an appellant to be convicted under Section 273 (b) the prosecution must prove, inter alia, that he came into possession of the alleged stolen property as an agent of either the real owner or special owner".

Basing on the above principle of the case law, in determining this appeal I confine myself to ask the question that "**whether or not the charge against the Appellant was proved beyond reasonable doubt.**" Before discussing the merit of this appeal, I trust determine the note as appellant on his first ground of appeal faulted the jurisdiction of the trial court under the provision of revised section 4 of CPA, Cap 20 RE 2022 by adding sub-section 3. I have read the said provisions of which the provision directs that;

4 (3) -Notwithstanding subsection (2), where a matter is of a civil, administrative or criminal nature, as the case may be, exhaustion of the remedies in civil or administrative domains shall be mandatory prior to the invocation of the criminal process in accordance with this Act.

Very unfortunately the noted point of law raised by the appellant was opposed by Ms. Glory who said that the said provision is helpless to assist the appellant bases on the fact that when appellant charged, the provision had no subsection (3) hence appellant is subject with the law of the time he was charged. I find this ground lacks legs to stand.

In determination the merit of this appeal I find that the center point of the prosecution was to prove the charge of the offence of Stealing by Agent. I am couched with the celebrate case of **Christian Mbunda v. Republic**, [1983] TLR 344 of which the court elaborated that for the prosecution to prove the stated offence must prove ingredients that: -

"For an appellant to be convicted under Section 273 (b) the prosecution must prove, inter alia, that he came into possession of the alleged stolen property as an agent of either the real owner or special owner".

In the light of the above directions, it is important to note that it is undisputed fact that the relationship between the appellant and the victim was an employer and an employee. The testimony of PW3 a legal officer of the victim proved that the appellant was an employee of the victim working as salesman. The contract of employment between the appellant and the victim was approved by the Director and PW4 the Finance and Administration Manager signed the contract on behalf of the Company.

The above evidence also proved by PW4 who supported the evidence that appellant was employed by the victim as a salesman. In his evidence,

PW4 testified that on 05/12/2020 appellant signed an agreement with the company and he (PW4) signed on behalf of the Company. In the other hand appellant at the trial court on proceedings at page 20 admitted by stating that it is true that he was working at Jambo Food Products as a salesman from 2020.

Now upon seen a proof that the victim and the appellant had a relationship of employer and the employee, it is in the context that the victim through witnesses complained that on 15/6/2021 he was supplied products valued TZS. 16,503,000/= to take them to Tabora where he was supposed to sell them on behalf of victim and deposit the money in the victim account within 7 days from a day he concluded the sale, after elapse of the said days when the appellant's account audited, it was discovered that appellant did not deposit any amount with no reasons of doing so.

Appellant denied the evidence that he received the products on the alleged date on 15/06/2021 but he defended that he received the products of the victim valued 16,500,000/= on 28/05/2021 he took them to sell then he deposited the required money of Tshs 16,500,000 in the victim's account. On the light of the statement of the appellant, the prosecution has duty to prove the issue occurred from 15/06/2021 which the appellant

denied to commit. Again, in **George Mwanyingili vs. Republic**, CAT-Criminal Appeal No. 335 of 2016 (unreported), the court had this to say;

"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."

In proving the above guidance, I will try to summary all evidence from both sides. My evaluation of the evidence, I start with PW1 the security officer of the victim he said on 15/06/2021 he witnessed one Adam Ramadhan loaded the Products applied by the appellant. He testified that after the product loaded in the motor vehicle, he signed the loading slip and he inspected the loaded vehicle with Reg. No. T 361 ANS and he allowed it to leave. PW2 testified that on 15/06/2021 appellant applied for the products, after he verified the loading slip, he loaded the products and signed the loading slip. He tendered the said loading slip which the court admitted as exhibit P1.

The key witness of the prosecution side to prove that appellant was supplied with the product is PW5 is a driver, he testified in the length that

on the material time at a premise of the victim, he loaded the consignment for the appellant. He was furnished with documents namely invoice, gate pass and delivery note. Thereafter, together with appellant they started their way to Tabora where appellant sold the products and after he sale, appellant signed documents, PW5 was remined with copies which he handled back to his office. The said document was admitted by the court a exhibit P3. PW4 was the witness who testified that they discovered that appellant was not deposited money as required to deposited within 7 after the sale.

The evidence of the prosecution never shaken by the appellant. The testimonies by PW1, PW2 are clear proof that the victim was supplied with products to the appellant for sale, in proving that the same was received by the appellant, PW5 who drove the vehicle from Shinyanga to Tabora, he witnessed appellant received and sold the said products and signed the delivery note (exhibit P3) which he returned to his office. I have read the said exhibit P3 which contained two documents, Invoice with Document No. 20693 dated on 15/06/2021 named Ottoman Maheke and delivery Note with 26624 dated on 15/06/2021. The said delivery note on 15/06/2021 signed by Frank John (PW5) and on 18/06/2021 signed by the

appellant. The contents filled in these documents collaborated with the evidence stated by PW1, PW2, PW4 and PW5 that on 15/06/2021 appellant supplied with products he received and he acknowledged through documents.

More also, PW4 proved by tendering exhibit P4 the general ledger which show the amount of Tshs 16,503,000/= which the appellant was required to deposit in the victim account.

The evidence of the prosecution on the other hand reveled that after the appellant received the products on 15/06/2021 took them to Tabora for sale, he never returned back to the office of the victim for reconciliation until the officials discovered his account was not deposited with money of sale's products. PW6 at page 18 testified that on 15/08/2021 he received investigation file of the offence of stealing by agent. He arrested the appellant in Dar es salaam. At page 23 of the proceedings, appellant admitted that PW5 signed a document to prove that the consignment was delivered to him and he was responsible with the deficit. As we have seen before, PW5 who was a driver testified that he handled the products to the appellant, appellant sold the same and the delivery note speaks clear that

appellant acknowledged to receive the products. On the alleged date, The said delivery note was returned back to office of the victim by PW5.

Furthermore, on the same page appellant confessed that he went to Dar es salaam, he informed the victim that he would no longer work with Jambo as a salesman. No evidence produced to prove by appellant that he terminated the employment and made a clearance to the office of the employer what we see is the evidence that appellant disappeared with proceeds of sale products of the victim.

I agree with Ms. Ndoni that the conduct of the appellant to receive the products of the victim with the aim of sale them and the proceeds of sale be returned to the victim was not good as the appellant after sold the said products, he disappeared until when he was arrested in Dar es salaam, that conduct proves that he intended to deprive the proceeds of the victim. With thus Prosecution proved the charge in standard required.

The 2nd ground that the trial Magistrate erred in law when she misdirected herself for not admitting the appellant's tendered exhibits and she never adduced any reason why she rejected to admit the appellant's exhibits. I have perused the proceedings of the trial court specifically at the page 20-21. The record show that appellant wanted to tender his exhibit to

prove that he deposited the money in the account of the victim, very unfortunately he wanted to produce the photocopy of bank slips which were not his, that lead the court reject it and adduce the reasons for its rejection that he was supposed to bring the original one or inform the court and comply with the requirement of law as elaborated under section no. 66 of Evidence Act R.E 2022 speaks clear that,

6." Documents must be proved by primary evidence except as otherwise provided in this Act." Also, he was supposed to comply with the requirement in **Finca Tanzania Limited vs. Shabani Said Mganda**, Civil Appeal No. 29 OF 202'1, HC (Unreported) it was held that;

"I wish in the first place to state the obvious that, a copy of document intended to be relied in evidence whether certified or not falls in the category of secondary evidence as envisaged under section 65 of the Evidence Act of which before being tendered in evidence, the requirement stipulated under the provision of section 67 of the Evidence Act have to be complied with"

Persuaded by the above position, a proof of document by secondary evidence is possible upon fulfillment of certain conditions set by the law. In the case of **Edward Dick Mwakamela vs. Republic** [1987] TLR 122 it was held that;

"For the secondary evidence to be admissible, it must satisfy the provisions of section 67 of the Evidence Act, 1967 on the admissibility of Evidence.

Basing on the above authorities, I find the 2nd ground of appeal lacks merit therefore I dismiss it.

The 3rd ground that the trial magistrate erred in law and fact in deciding a case without explaining the appellant's right to appeal, it is true that appeal is a right of the appellant and the court was required to explain to parties the right of appeal, but it seems the trial magistrate mistakenly skipped to explain as required. But by any means the said mistake did not prejudice the appellant to lodge the appeal and thus this appeal, as said by the State attorney that it can be cured by the law under the provision of section 388 of the Criminal Procedure Act Cap 20 RE 2022.

Now I turn to additional grounds 4th, 5th, 6th and 7th in my reading between the lines of the said additional grounds, I find that grounds 6th

and 7th are well discussed in the 1st ground. On the said ground it has been discussed that appellant failed to prove that on 28/05/2021 was the last day to receive the products from the victim, as the same time I have discussed that appellant at his defense he admitted that he signed the delivery note of consignment which brought to him by PW5.

Now the additional 4th ground that prosecution failed to call the employer to adduce evidence in court. In that light once again, I agree with Ms Glory that the law does not force prosecution in choosing/calling type of witnesses as it was guided in the section **143 of Evidence Act Cap 6 RE 2022** that;

"43- Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."

See the case of **Hamis Mohamed vs. The Republic**, Criminal Case No. 297 of 2011 CAT at page 7 the court stated that

"The second main issue for consideration is the failure by the prosecution to call the investigating officer. This issue needs not detain us. The law is clear. In terms of section 143 of the Evidence Act,

Cap 6 R.E. 2002, there is no specific number of witnesses required for the prosecution to prove any fact"

With thus it was not mandatory for the prosecution side to must call the employer of the appellant, while PW3 testified that PW4 is the Finance and administration Manager, he signed the employment agreement of the appellant on behalf of the Company. It means that the prosecution managed to call one of the managerial persons to testify in the court who stand as employer.

The 5th ground that appellant was charged with two charges. I have had an ample time to pass through the trial court records to investigate to satisfy myself if the complaint is real. The records show that at page 17 of the trial proceedings State Attorney prayed the court to substitute the charge, the court granted the prayer, therefore the Charge sheet of 30th August 2021 was substituted on 29th March 2022. The different between those two charges, is on dates. The charge of 30th August 2021 shows the offence committed on 10th June 2021 and the charge of 29th March 2022 shows offence was committed on 15th June 2021. It is my view that the differed dates committed on human errors because witnesses and document speaks the same that the offence committed on 15th June 2021.

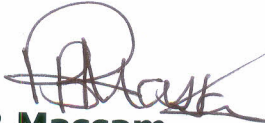
The law under section 234 (1) of CPA R.E 2022 allows the prosecution to amend a charge.

In length of this discussion, I find this appeal lack merit, the trial court convicted and sentenced the appellant basing on the prosecution evidence which proved the charge beyond reasonable doubt. So according to that there is no need to fault with the trial court decision with thus, this appeal lack merit, the trial court decision, upheld.

It so ordered.

DATED at SHINYANGA this 27th day of February, 2023.




R.B. Massam
JUDGE
27/2/2023

Court: Right of Appeal explained