IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC. CRIMINAL APPEAL NO. 75 OF 2022

(Originating from Criminal Case No. 05 of 2021 in the Resident Magistrates' Court of Iringa at Iringa)

BERNARD ISRAEL MNYILENGA ----------APPELLANT

VERSUS

REPUBLIC ---------- RESPONDENT

JUDGEMENT

Date of Last Order: 30/03/2023

Date of Judgment: 28/04/2023

A. E. Mwipopo, J.

Bernard Israel Mnyilenga was employed by Southern Highland School at Mafinga as an accountant (Bursar) from 2013 to 2020. He was arrested and charged before Mafinga District Court in Criminal Case No. 05 of 2021 for two offences of Stealing by a servant contrary to sections 258 (1), 265 and 271 of the Penal Code, Cap. 16 R.E. 2019; and seven offences of forgery contrary to sections 333, 335 (1), 336 and 337 of the Penal Code,

Cap. 16, RE 2019. In alternative to the 1st and 2nd counts, the appellant was charged with the other 11 counts of stealing by a servant. It was alleged that on divers dates between the years 2018 to 2020, the appellant being an employee of Southern Highlands School, did steal a total of 116,378,900/= shillings by using documents with numbers 9766, 9768, 9776, 9785, 9787, 9788, 9792 and 9789. In the 11th to 22nd counts, which are alternative to the 1st and 2nd counts of the offence of stealing by a servant, it was alleged that between January, 2018 and April 2020, the appellant being an employee of Southern Highland School, did steal a total of shillings 4,965,000/= the property of his employer. The appellant pleaded not guilty to all counts, and the prosecution brought seven witnesses and 19 exhibits to prove its case. The trial Court found the appellant with the case to answer, and the appellant was availed with the right to defend himself. The appellant defended himself on oath and tendered two exhibits in his defence.

The trial Court in its judgment, convicted the appellant for the 1st and 2nd counts for offences of stealing by a servant and the 3rd to 10th counts for offences of forgery. The appellant was sentenced to serve ten years imprisonment in each of the 1st and 2nd counts and seven years in each of

the 3rd to 10th counts. The trial Court ordered the sentence to run concurrently for each count as the appellant committed those offences in different transactions. The Court also ordered the appellant to restore one hundred and sixteen million, three hundred seventy eight thousand, nine hundred shillings only (Tshs. 116,378,900/=) to the owner of the Southern Highlands Schools. The appellant was aggrieved with the whole decision of the trial Court and appealed against the trial Court's conviction, sentence and orders.

The petition of appeal filed by the appellant contained seven grounds of appeal. However, on 24.02.2023, the advocate for the appellant, Geoffrey Mwakasege, filed an amended petition of appeal having 11 grounds for appeal. I will reproduce the 11 grounds of appeal from the amended petition of the appeal for the reason to be provided herein later on. The said grounds of appeal in the amended petition of appeal were as follows:-

1. *That, the trial Resident Magistrate erred on both law and facts when he convicted and sentenced the appellant relying on very weak evidence of the prosecution, which did not prove any offence the appellant was charged with.*

2. *That, the trial Resident Magistrate erred both in law and facts when he sentenced the appellant and ordered the sentence to run consecutively.*
3. *That, the trial Resident Magistrate misdirected himself when he convicted the appellant on the 1st count relying on the specious report purported to be prepared by PW1, which he failed to demonstrate as to how he came up with a conclusion that there was a loss or deficit of Tshs. 18,760,000/= and for what qualification.*
4. *That, the trial Resident Magistrate erred in law and facts when he relied on exhibits P3 to P15 to convict the appellant, which was unlawfully admitted by the Court for being tendered by the P.P. instead of the witnesses and denied the right of the appellant to inspect them before the same was admitted by the Court the thing which denied the appellant the right of a fair trial.*
5. *That, the trial Resident Magistrate misdirected himself when he convicted the appellant on the 2nd count relying on the special report prepared by PW4, who failed to demonstrate how he came up with a conclusion that there was a loss of Tshs. 97,618,900/= and how that loss turned into stealing.*
6. *That, the trial Resident Magistrate erred in law when he relied on the evidence of PW1, who came to Court twice and presented contradictory new evidence instead of additional evidence, which is allowed by law.*

7. *That, the trial resident Magistrate erred in law and facts by not giving the appellant the right to recall witness after substitution of charge during trial.*
8. *That, the trial Resident Magistrate erred in law and facts by convicting the appellant for offences without regarding the retrospective principle of the law of which the offences were said to be committed before the law came into operation.*
9. *That, the trial Magistrate erred in law and facts for convicting the appellant on a defective charge.*
10. *That, the trial Magistrate erred in law and facts by relying on material evidence which did not fall under the chain of custody.*
11. *That, the prosecution side failed to prove this case against the appellant beyond reasonable doubt.*

I will briefly revisit the evidence before the trial District Court to understand the matter. It was the prosecution evidence that the appellant, who was employed as an accountant (bursar) by the Southern Highlands Schools, did steal one hundred and sixteen million, three hundred seventy eight thousand, nine hundred shillings only (Tshs. 116,378,900/=) the property of his employer. PW1, the Finance Manager of the Southern Highland Schools, testified that in February, 2020, there was a money deficit in School bank accounts from NMB Bank, MUCOBA Bank, CRDB Bank and TPB Bank. As the school received school fees from students in

January, 2020, PW1 decided to conduct an enquiry to see the reason for the deficit by reconciling school fees received according to a receipt issued and the amount deposited in the bank accounts from January to April, 2020. Usually, the school doesn't accept cash. PW1 found there is a deficit of shillings 18,760,000/=. He decided to report his findings to the management.

PW2, the executive director of the Southern Highland Primary School, testified that in January 2020, it was discovered that the school had a money deficit. However, it had enough students, and the bursar informed her that all students had paid their fees. She engaged LAGHE Company to conduct a special audit from 2018 to 2020. LAGHE Company conducted a special audit and found deficits in the school bank accounts for 2018, 2019 and 2020. The report showed a deficit of about shillings 97,618,900/=, which the appellant was supposed to return. The exit meeting was conducted between the auditor and school management. The appellant admitted the shortage of 75 million shillings even though he did not say who was responsible for the deficit. He said that he is willing to pay for the deficit. But he did not pay for it.

PW3 is the Managing consultant and the owner of LAGHE Company which conducted the special audit of the Southern Highland Primary School. He testified that his company is responsible for auditing and tax consultation, and he is a registered public accountant holding a CPA. On 21.01.2020, his company was tasked to conduct a special audit of Southern Highlands School. He engaged Kelvin Mushi – PW4, a CPA holder who resides at Mafinga, to conduct an audit of the school, and a Memorandum of Understanding was entered. PW4 conducted the audit, and Jackline Muhele assisted him. After that, PW4 prepared an audit report together with PW3.

PW4 testified that he audited Southern Highlands School for 2018 and 2019. Jackline Muhele assisted him. He used the list of students from 2018 to 2019, bank statements, bank slips, book of receipts, cash book and payment vouchers, which the appellant provided. He also used the attendance register of students for 2018 and 2019 from the headteacher. PW4 evaluated and analyzed those documents, and he found some parents with receipts showing they had paid school fees, but the said payment was not reflected in bank statements. This means the school fees were not deposited in the school bank account. The school fees not deposited in the

school bank accounts were shillings 97,618,900/=. As the appellant was the one who wrote and issued those receipts for school fees, it means he was responsible for the loss.

PW5 testified that he is the parent of two students, Derick Denis Mungai and Desmund Denis Mungai, studying at Southern Highlands Primary School. He testified that between 2017 and 2020, he paid part of the school fees to the appellant in cash. He said in 2017, he paid the appellant shillings 1,100,000/= as school fees for his children. In 2018 he paid shillings 900,000/=. In 2019 he paid shillings 900,000/=, and in 2020 he paid 490,000/=. He identified the receipt for payment of 400,000/= shillings for 2018 school fees – Exhibit P1 and 490,000/= shillings as school fees for 2020 – Exhibit P14.

PW6 is the father of Neema Tewele, a student at Southern Highlands Primary School. He testified that on 03.05.2019, he paid 475,000/= to the appellant as school fees for his child, and the appellant issued a receipt – Exhibit P15.

The last prosecution witness is Inspector John Mbogo – PW7. He testified that he was the case's investigator and that the evidence on

record showed that the appellant did steal a total of shillings 121,343,900/= as per the audit report. He said that the appellant admitted to withdrawing a certain amount from school bank accounts for study tours and admitted the loss, but he denied causing the loss. This was the end of the prosecution's evidence.

The appellant testified in defence as DW1 and denied stealing or committing any forgery to his employer. He said there was a misunderstanding with PW2 following his acts of asking to be refunded shillings 2,000,000/= he paid to the school following the loss of shillings 2,000,000/= for the study tour. He said he asked for a refund after the person who stole the amount namely Christopher Andongolile Mahali was found. Christopher Mahali told PW2 that even the appellant is responsible for the theft and that they have to conduct the audit from 2018 and 2019. PW2 ordered an audit to be performed, and he was not involved in the audit process. After the audit report was issued, he found some errors, as there was a difference between the amount collected as school fees in the system and what was stated by the auditor. He asked PW2 for a re-audit, but PW2 was rejected. He was arrested on 20.05.2020 by police. The appellant said the audit report needs to be corrected as the list of student

who pays school fees and the amount paid is wrong since some students are not in boarding. Some students do not pay total amount of school fees as they are children of staff members who pay only a quarter of school fees, and the amount is paid through salary deductions. He said the qualification of Jacqueline, who conducted the audit was not determined, and the flash recording of a meeting tendered as evidence was recorded secretly without his knowledge. This is the whole evidence from both sides before the trial Court.

On the hearing date, both sides were represented. The appellant was represented by Mr. Geofrey Mwakasege, Advocate, whereas Ms. Pienzia Nichombe, State Attorney, represented

The counsel for the appellant abandoned the grounds of appeal in the petition of appeal filed earlier, and he submitted on 11 grounds of appeal found in the amended petition of appeal he filed in Court. He commenced his submission by jointly submitting on the 1st and 11th grounds of appeal. He submitted that the appellant was charged in the 1st count for stealing a total of Tshs. 18,760,000/= and in the second count for stealing Tshs. 97,618,900/=. PW1 testified for the loss of 18,769,000/= shillings, and PW2 testified that in 2018 there was a deficit of 131,

251,500/= shillings, and in 2019 there was a deficit of 74,534,400/= shillings. All of this makes the total loss to be shillings 205, 785,900/=. PW3's testimony is that after he made the audit, he found a deficit of 59,674,000/= shillings for 2018 and shillings of 37,944,400/= for 2019. This is seen on page 41 of the typed proceedings. PW7 testified that the complaint to the police was that the appellant had stolen 2 billion shillings, as seen on page 70 of the proceedings. This contradiction shows that even the witnesses were unaware of the amount alleged to be stolen by the appellant. This raises doubt in the prosecution's case. The prosecution's case was not proved beyond a reasonable doubt.

In the second ground of appeal, he submitted that the trial court erred in ordering the sentence to run consecutively. In the sentencing manual prepared by the chief justice, when the offences were done in continuous transactions, the Court is supposed to sentence the accused person for each count, but the sentence shall run concurrently. In the case of **Shomary Mohamed Mkwama vs. Republic**, Criminal Appeal No. 606 of 2021, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), it was held on page 27 that the law is settled that the practice of the courts in terms jurisdiction is that, where a person commits more than one

offence at the same time and in the same series of transaction, save in very exceptional circumstances, it is proper to impose concurrent sentences. Based on this case and the sentencing manual for judicial offences, the trial magistrate erred to order the sentence to run consecutively instead of ordering the sentence to run concurrently.

He said in the third ground of appeal that PW1, who prepared a report - Exhibit P3 which shows that there was a deficit of 18,760,000/= shilling, needed to demonstrate his qualification and how he came up with such a deficit. PW1 failed to show that the act of stealing caused the said deficit. Thus, the trial court misdirected itself to convict the appellant by relying upon a report prepared by PW1, who needs an audit qualification to prepare such a technical report.

In the 4th ground of appeal, it was submitted that the trial court relied on exhibits P5 and P6, which the public prosecutor tendered instead of witnesses tendered without affording the appellant the right to object to its tendering. In the trial, it is the witness testifying before the Court who has to tender the document after proving to the Court that the document was in their custody, the witness had knowledge of the paper, or they are capable of testifying about the document. In the case of **Yohane Paulo**

vs. Republic, Criminal Appeal No. 281 of 2012 Court of Appeal of Tanzania, at Dar Es Salaam, (unreported), on page 12 the Court held that a possessor or custodian or an actual owner or alike is legally capable of tendering the intended exhibit in question provided he knows the thing in question. The typed proceedings on page 25 show exhibit P5 being tendered. But, PW2 did not pray for the exhibit to be tendered as an exhibit. For exhibit P6, PW2 did not pray to tender the exhibit, but the prosecutor prayed for the document to be admitted. This made the person tendering the document to be the prosecutor, not the witness. The counsel prayed for exhibits P5 and P6 expunged from the record. This contradicts the law, as the witness tenders the exhibit after accomplishing the requirements.

In the 5th ground of appeal, the counsel said that PW4 testified that there was a loss or deficit of 97,618,900/= shillings. PW4 relied on the bank statement of the Southern Highlands School accounts to show the deficit without showing how such a deficit occurred. The said school has several activities and does not depend on student fees only. There needs to be an explanation from PW4 on how the money was lost. There was no

evidence proving that the appellant caused the loss and not caused by other institutional activities.

The appellant submitted on the 8th and 9th grounds of appeal that the trial magistrate convicted the appellant on the defective charge as the offence the appellant was said to have committed was committed before the law came into operation. The charge sheet, which was substituted on 12.05.2021 as per page 20 of the typed proceedings, shows in the particulars of the offence of the 2nd, 3rd, 5th, 11th, 12th, 13th and 17th counts that those offences were committed in 2018, but the law cited in the charge is the Penal Code Cap. 16 R.E. 2019. The trial magistrate did not take regard to the retrospective principle of law.

It is a settled principle that the law does not act retrospectively. In the case of **Henry Ubinza vs. Agriculture Inputs Trust Fund and 3 Others**, Civil Application No. 114/11 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam,m (unreported), at page 12, it was held that the operation of legislation retrospectively depends on the intention of the enacting body as manifested by the legislation. Section 388 of the Criminal Procedure Act, Cap. 20 R.E. 2019, (CPA), does not serve the prosecutions as the said error prejudice the appellant since he was charged for

committing an offence not enacted when the incident occurred. Therefore, the appellant was charged with a non-existing crime when he committed the offence, hence the charge was defective.

In the 10th ground of appeal, it was submitted that Exhibits P1 to P13 were admitted before the trial court, and the Court relied on those exhibits in its judgment. However, no evidence shows the chain of custody of these exhibits. As a result, the chain was broken. Exhibit P1 is a receipt claimed to come from the parents. There is needs to be an explanation of how such receipts were found in the hands of the institution and investigator before the receipt was tendered and admitted in Court as an exhibit. The investigator must record documents passing in their hand before they are tendered in Court as evidence. In the case of **Joseph Nyatory Waibe vs. Republic**, Criminal Appeal No. 191 of 2020, High Court Mwanza Registry, (unreported), on page 8, it was held that the idea behind recording the chain of custody is to establish that the alleged evidence is related to the suspected crime rather than for instance having been planted fraudulently to make someone guilty.

The chain of custody requires that from the moment the evidence is collected, its transfer from one person to another must be documented and

that it be provable that nobody else could have accessed it. The impotence of chain of custody protects the accused person from the tempered exhibits, which may lead to the innocent person being convicted. The counsel prayed for the Court to expunge exhibit P1-P13 as there was no evidence to prove the document's chain of custody.

It was jointly submitted on grounds 6 and 7 of the appeal that PW1 testified in trial Court twice, and his evidence was contradictory. PW1 was recalled after the charge sheet was substituted on 12.08.2021 by the prosecution, as shown on page 20 of the typed proceedings. The trial court did not allow the appellant to recall witnesses who had already testified before the charge was substituted for cross-examination. In the case of **Republic vs. Jumanne Mohamed [1986] TLR 232**, it was held that recalling witnesses after the charge was substituted is the accused fundamental right which is natural justice on the principle of fair hearing. The trial court is supposed to show in the proceedings that the accused was afforded this natural right to recall witnesses when the charge sheet is substituted. The right is provided whether the accused person has defence counsel or not. Failure to afford the accused person such a right to recall a

witness after substituting the charge makes the whole proceedings and trial null and void and a retrial is inevitable.

On page 77 of the proceedings, the prosecution recalled PW1. But, the trial court did not inform the appellant what he has to do when the witness is recalled. PW1's testimony after he was recalled contradicted his previous evidence before the trial court. This is contrary to the law. These omissions render a trial nullity, and the Court is supposed to order a retrial. However, ordering a retrial allows the prosecution to correct their mistakes during the trial, which will prejudice the appellant. To deter injustice which may occur, the Court has to discharge the appellant.

In her response, the state attorney appearing for the respondent said that she would reply to each of the grounds of appeal as it was submitted by the counsel for the appellant, and the 1st and 11th grounds of appeal will be the last ground to be responded. It was her submission in the 2nd ground of appeal that the trial court ordered in its sentence for the sentence to run consecutively for each count. This is seen on pages 72, 73 and 74 of the judgment. The trial court provided the reasons for ordering the sentence to run consecutively. In the cited case of **Shomary Mkwama (supra)**, the Court said that when the trial court contains the

sentence to run consecutively, the reason must be provided for such a decision. The trial court provided its reason to order the sentence to run consecutively. If this Court finds that the punishment ordered by the trial court was improper, the Court may evaluate the reasoning, revise the trial Court sentence and impose a proper sentence according to the law as this is the 1st appellate Court.

It was submitted on the 3rd ground of appeal that PW1 said his qualification on page No. 13 of the typed proceeding PW1 that he was finance manager of the Southern Highlands School and his duties was supervising the accounting department and other financial activities. As supervisor of the financial activities of the institution, it was correct for PW1 to prepare the said report. PW1 issued Exhibit P3 due to his mandate in the institution. PW1 was the one who prepared the report, and he was the proper person to tender the said document. Thus, PW1 had the qualification to tender the report - Exhibit P3.

In the 4th ground of appeal, the typed proceedings on page 25 show PW2 testifying. PW2 prayed to tender Exhibit P5, and the prosecutor requested the Court to admit the exhibit as the witness prayed it, and the appellant did not have an objection. Exhibit P6 was tendered on page 26 of

the typed proceedings. The record shows that the prosecutor tendered the exhibit without following the procedure, and the trial court admitted it. The state attorney conceded that Exhibit P6 did not follow the procedure for tendering, and it was her prayer for the document to be expunged from the record. She believed that even after exhibit P6 was expunged from the record, the remaining prosecution evidence proved the offence without leaving any doubt.

The counsel said in reply to the 5th ground of appeal that the typed proceedings show PW4 testifying on how he got several documents on page 49 of the typed proceedings. The testimony of PW4 shows how he did conduct the audit and reached the conclusion that there is a deficit. He said that the accountant gave him the list of students for the year 2018/2019, bank statement, receipt book issued by the accountant after the student paid school fees, attendance register for 2018 and 2019, voucher and cash book for 2018/2019. After evaluating all these documents, PW4 got the said amount as the deficit.

It was submitted in reply to the 8th and 9th grounds of appeal that the charge the appellant was convicted with was not defective. The appellant was charged with several offences of the Penal Code, Cap. 16 R.E. 2019.

The appellant committed the same offence in the law, but executed it on various dates in 2018. It was in 2020 when the said offences were discovered. At that time, the Penal Code had already been revised to the Revised Edition of 2019. Thus, the appellant could not be charged with an offence under the Penal Code R.E. 2002. By using the Penal Code, Cap. 16 R.E. 2019, there is no injustice caused to the appellant. The charge was not defective as the offence is available in the Penal Code, and the appellant was informed about the offence he was charged with. Even invoking section 388 of the Criminal Procedure Act is unnecessary in this situation as the appellant was not prejudiced. Thus, the 8th and 9th grounds of appeal have no merits.

The counsel said the appellant alleged in the 10th ground of appeal that the trial court relied on exhibits P1-P15 which were improperly tendered as the chain of custody was not proved. The counsel for the appellant misdirected himself as the law provides what kind of exhibit is supposed to be kept and its record be provided. The law provides that when the exhibit is seized, the chain of custody has to be proved by documentation as evidence. The chain of custody aims to confirm that the said exhibit has never been tampered with or was not changed, and the

seized document is the one which was tendered before the trial court. The Court of Appeal stated this in the case of **Paul Maduka vs. Republic.** Exhibit P1 to P15 were not seized anywhere, and no document was seized from the appellant. Thus, there was no chain of custody issue as all exhibits were in the custody of the complainant. Even when the exhibits were tendered, the appellant did not object to the tendering of these exhibits. These grounds also have no merits.

In reply to the ground of appeals No. 6 and 7, it was submitted that the trial court proceedings on page 20 show that the charge was substituted on 12.08.2021, and the substituted charge was read over to the accused person. When the charge was substituted, only PW1 had already testified. According to sections 234(1), (2) (a) and (b) of the Criminal Procedure Act, when the charge is substituted, the accused person must be called to plea afresh. The law provides further that the accused has the right to contact or recall the witness who has testified to come to testify or for cross-examination. Section 234 (2) (c) of the Criminal Procedure Act provides further that the Court may permit the prosecution to recall the witnesses and examine the witness in addition to the evidence concerning the changes in the substituted charge. The section clearly

states that in a substituted charge, the accused person must be called to plea to the charge, and the accused may demand the witness who has already testified be recalled for cross-examination. The prosecution may pray for the witness to be recalled to testify for examination or to add any evidence according to the changes made in the substituted charge.

In this case, the prosecution prayed to recall PW1, who has already testified to provide additional evidence to the substituted charge. The appellant had a chance to cross-examine PW1. This is seen on pages 80 and 81 of the typed proceedings. Thus, the appellant got his right to cross-examining PW1. On the right of the appellant to recall the witness, the same is the discretion of the Court. The Court is not required to inform him of the right to place a prosecution witness for cross-examination, and there is nothing prejudicial to the appellant. The appellant got a chance to cross-examine all prosecution witnesses and defended himself. If there is any error on the part of the trial court and the prosecution during the trial, the same is curable under Section 388 of the CPA, Cap. 20 R.E. 2022. This ground has no merit.

It was submitted in the 1st and 11th ground of appeal that the evidence of PW2 shows that 18,760,000/= shillings deficit was for the year

2020 and 97,618,900/= shillings deficit for the years 2018 and 2019. This is found on Page 41 of the trial court's proceedings. For 2018, the deficit was 59,674,500/= shillings, and the deficit for 2019 was 37, 944, 4000/= shillings. These amounts for 2018 and 2019 bring the total to 97,618,900/= shillings. There is no dispute that the appellant was the accountant of the Southern Highlands School, and he was the person responsible for receiving school fees and issuing receipts. It shows that the prosecution proved the case without any doubt.

In his rejoinder, it was submitted by the counsel for the appellant that PW1 testimony showed his title in the Southern Highland Schools. Still, it does not show his qualification to hold the post and be able to prove the presence of the money deficit shown in his report – Exhibit P3. PW1 was not qualified to prepare a report showing a deficit of 18,760,000/= shillings.

On the chain of custody issue, it was his submission that PW7 testified that the students' parents gave him the school fees receipt. However, there is no evidence of how the receipt was kept before it was tendered as an exhibit. The said document tendered could be tempered. Thus, it was essential to prove the chain of custody.

On the right of the accused person to know his right under Section 234(2)(b) of CPA to recall the witness who has testified for cross-examination after substitution of the charge, the same must be done by the trial court to inform him of his right. The trial court is under the duty to inform the appellant of the right to recall witnesses. Failure to comply makes the requirement of the procedure to be vacant.

After hearing the submission from both parties, the issue for determination is whether the appeal has merits.

In the determination of the appeal, I will commence with the ground of appeals No. 8 and 9 that the trial Court convicted the appellant on a defective charge as offences he was charged with were said to be committed before the law came into operation. The counsel for the appellant submitted that the particulars of the offence of the 2nd, 3rd, 5th, 11th, 12th, 13th and 17th counts show those offences were committed in 2018, but the law cited is the Penal Code Cap. 16 R.E. 2019. In her reply, the counsel for the respondent said that the charge the appellant was convicted of was not defective. The appellant was charged with several offences under the Penal Code, Cap. 16 R.E. 2019. The appellant committed the same offence in the law, but committed it on various dates

in 2018. It was in 2020 when the said offences were discovered. At that time, the Penal Code had already been revised to the Revised Edition of 2019. By using the Penal Code, Cap. 16 R.E. 2019, there is no injustice caused to the appellant.

The person must be charged for the offence which is in existence in the law. It is settled law that the charge sheet must include a statement of the offence, which contains a reference to the section of the law creating the crime and the particulars of the offence as may be necessary for giving reasonable information as to the nature of the offence charged. This is per sections 132 and 135 (a) (ii) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (CPA). Section 135 (a) (ii) of the CPA requires the charge to encompass a specific section of the law creating the offence.

Usually, a person may not be prosecuted for acts that were not criminal offences at the time they were committed. The reason is that it is the law which creates criminal offence. The law is expected not to impose criminal liability for acts that were not criminal offences when they were committed. This is derived from the principle that criminal law should be sufficiently precise to inform a person of whether his conduct would be a

criminal offence. The exception to this principle is where the retrospective law is regarding the procedures provided that such law does not affect the punishment to which an offender is liable.

Charging the appellant under the wrong or non-existing law contradicts Section 135 (a) (ii) of the Criminal Procedure Act, Cap. 20, RE 2022. The charge sheet must reference the correct section of the enactment which creates the offence. Failure to cite the law in the charge sheet correctly prejudiced the appellant as he was not adequately informed of the offence he was charged with for him to prepare his defence. The Court of Appeal sitting at Dar Es Salaam stated in the case of **Abdalla Ally v. Republic,** Criminal Appeal No. 25 of 2013, (Unreported), that being found guilty on a defective charge, based on wrong and/ or non–existing provision of law, cannot be told that the appellant was fairly tried. A similar position was stated in the case of **Marekano Ramadhani vs. Republic,** Criminal Appeal No 202 of 2013, Court of Appeal of Tanzania at Arusha, (Unreported). In the case of **Daniel Shayo vs. Republic,** Criminal Appeal No. 234 of 2007, Court of Appeal of Tanzania at Arusha, (unreported), the Court of Appeal held that a conviction based on a charge unknown to the law is vitiated.

The appellant alleged that the particulars of the offence of the 2nd, 3rd, 5th, 11th, 12th, 13th and 17th counts show those offences were committed in 2018, but the law cited in the statement of the offence is the Penal Code Cap. 16 R.E. 2019.

Penal Code, Cap. 16, was among the laws revised and published in the Revised Edition of 2019 by the Attorney General according to the General Laws Revision Notice, 2020, G.N. No. 140, which was published on 28.2.2020. The revised edition incorporated amendments including up to November, 2019. The revised edition 2019 is not an enactment of a new law. It is incorporation of amendments in the specified laws, including and up to November, 2019. The offences of Stealing by servants and forgery existed in the Penal Code, Cap. 16, even before the year 2018, when the appellant was alleged to commit these offences he was charged with. The offence of stealing by a servant is contrary to sections 258 (1), 265 and 271 of the Penal Code, and the offence of forgery is contrary to sections 333, 335 (1), 336 and 337 of the Penal Code. Nothing has changed to these sections that create those offences in the Revised Edition of 2019 of the Penal Code. For that reason, I find that the appellant was charged in the trial Court with existing offences in the Penal Code, and he understood

the offences he was charged with. The charge sheet was not defective. The citing of the Penal Code as Revised Edition 2019 in the statement of the offence of the charge sheet does not prejudice the appellant in any way. Thus, I find the 8th and 9th grounds of appeal devoid of merits.

In the 4th, 6th and 7th grounds of appeal, the appellants raised the issue of irregularities in the trial procedures. The appellant should have been informed and availed of his right to recall and cross-examine the witnesses who had already testified when the charge was substituted on 12.08.2021. PW1, the only witness recalled after substituting the charge, provided contradictory evidence to the first evidence he adduced before the trial Court. Another irregularity is exhibits P3 to P15 were unlawfully admitted by the trial Court as they were tendered by the prosecutor instead of the witnesses, and the appellant was denied the right to inspect and object its tendering before the same was admitted by the trial Court.

As was stated by both counsels, the record shows that the trial commenced on 01.07.2021 when PW1 testified. The appellant did not cross examine PW1 when he was availed of his right to cross examine him. On 12.08.2021, the prosecutions substituted the charge, and it was read over to the appellant who pleaded not guilty to all 22 counts. By the time the

charge was substituted, only PW1 was the witness who had testified. The prosecution proceeded to call PW2 to PW7 to testify after substituting the charge. On 17.06.2022, the prosecution recalled PW1 under section 147 (4) of the Evidence Act, Cap. 6 R.E. 2019, to testify, and the appellant cross-examined him. The said section provides that the Court may, in all cases, permit a witness to be recalled either for further examination-in-chief or for further cross-examination. If it does so, the parties have the right of further cross-examination and re-examination, respectively. Thus, it is clear that the recalling of PW1 was not made following the substitution of the charge made by the prosecutions. This is contrary to section 234 (2) (b), which provides for the appellant's right to demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined.

However, the act of the prosecution side to recall PW1 to testify and the appellant to cross examine the witness has cured the omission of the trial Court to inform the appellant of his right to recall the witness who has testified to give evidence afresh or to be cross-examined further. As it was rightly submitted by the counsel for the appellant, the trial Court had a duty to inform the appellant of such right. Despite the omission, the act of

recalling PW1 and appellant cross examining the witness cured the defects. The appellant was not prejudiced in any way by the omission. Besides, the record does not show at all if there is a contradiction in the PW1 testimony. The counsel for the appellant did not point out the contradiction in his submission, and this Court failed to find contradiction in the record.

On the issue of exhibits P3 to P15 to be unlawfully admitted by the trial Court for being tendered by the prosecutor instead of the witnesses, the appellant said he was denied the right to inspect them before the Court admitted it. The counsel for the respondent responded by saying that it was witnesses who tendered all prosecution's exhibits save only for exhibit P6. The record revealed Exhibit P6 was tendered by the prosecutor. She said that the remedy is to expunge Exhibit P6 in the record for the irregularity.

As the state attorney correctly submitted, the record of proceedings of the trial Court revealed that exhibits P3, P4, P5, P7, P8, P9, P10, P11, P12, P13, P14 and P15 were tendered by the respective witness and were admitted as exhibit by the trial Court. The appellant was afforded the right to inspect and object to the tendering of these exhibits. In some of the exhibits, the appellant objected to its tendering for various reasons, and in

some exhibits, the appellant had no objection. The style of tendering these exhibits confused the counsel for the appellant to think that the prosecutor was tendering the exhibit as the prosecutor requested the Court to admit those exhibits by repeating what the witness said when tendering the respective exhibits.

The situation is different for exhibit P6 (minutes of meeting for receiving audit report). The proceedings of the trial Court do not show the witness (PW2) or anybody tendering it. However, the appellant appeared to have no objection, and the Court recorded that exhibit P6 was admitted as exhibit. The trial Court did not correctly admit the said exhibit, and I proceed to expunge it from the record.

The appellant's grounds of appeal no. 1, 3, 5, 10 and 11 were saying that the prosecution side failed to prove the case against him without a doubt. It was his submission that the prosecution failed to establish the chain of custody of receipts obtained from the parents of the students alleged to be issued by him. The report prepared by PW1 (Exhibit P3) does not qualify as proof of the loss of shillings 18,760,000/=, the prosecution witnesses contradicted themselves regarding the amount alleged to be stolen, and the special audit report prepared by PW4 failed to demonstrate

how the loss of Tshs. 97,618,900/= was occasioned, and how that loss turned into stealing.

From the submission, the counsel for the appellant was saying that there was no sufficient evidence to convict the appellant for the offences charged. On the other side, the counsel for the respondent contended that the prosecution's case was proved without doubt, there was no contradiction in the evidence adduced by prosecution witnesses, and there was no need to prove the chain of custody as there is no exhibit which was seized to the appellant, the report prepared by PW1 proved the loss of shillings 18,760,000/=, and PW4 demonstrated how the loss was occasioned. The said loss was proved to be stealing.

The appellant alleged that he was not involved in the audit process which is the main evidence proving that there was stealing of school fees. The evidence of PW3 and PW4 proved that the appellant issued some of the documents evaluated during the audit. Even the appellant testified to be aware there is a special audit conducted for 2018 and 2019, and he testified to object to the audit for 2018 as the audit has already been performed. Returns have already been submitted to TRA. On the allegation that Jacqueline conducted the audit while she had no qualification, the

testimony of PW3 and PW4 proved that Jacqueline was an assistant to PW4 who collected documents from the appellant. PW4 conducted the audit, and PW3 and PW4 jointly prepared the report. In his defence, the appellant said there was an error in the audit report as the total amount of school fees collected did not consider the student who had a discount in the school fees, day and boarding students whose school fees differed. However, the report shows day and boarding students who did not pay school fees. Also, the report's attachment shows each student's school fees for the respective year. Thus, the amount which was supposed to be collected as school fees in the report is correct.

Further, the appellant's counsel submitted that the prosecution failed to prove the chain of custody of exhibits P1, P14, and P15. These are receipts from the parents of the students alleged to be issued by the appellant after he received school fees from them. The chain of custody principle aim is to prove the integrity of a piece of evidence before it is admitted in Court. It includes tracking the movement of evidence from its collection, safeguarding, and analysis lifecycle by documenting each person who handled the evidence, the date/time it was collected or transferred, and the purpose for the transfer. It is trite law that chain of custody is

established where there is proper documentation of the chronology of events in handling an exhibit from seizure, control, and transfer until tendering in Court at the trial. This was stated by the Court of Appeal in **DPP vs. Mussa Hatibu Sembe**, Criminal Appeal No. 130 of 2021, Court of Appeal of Tanzania, at Tanga, (unreported). Chain of custody may be proved by oral evidence as it was held in the case of **Marceline Koivogui vs. Republic**, Criminal Appeal No. 469 of 2017, Court of Appeal of Tanzania, at Dar Es Salaam, (unreported).

Evidence of PW5 and PW6 proved that the said exhibits P1, P14 and P15 were issued by the appellant after they had paid school fees. PW7 testified that he obtained those exhibits from the parents of the students who paid school fees to the appellant during the interview. Despite the absence of documentary evidence to prove the movements of those documents from one hand to another, the oral testimony of PW7 proved that the exhibits were obtained from parents. Also, PW5 and PW6 identified the said exhibits and tendered them in Court as the receipt, which the appellant issued after they had paid their children's school fees to the appellant. This evidence proved, without doubt, the movement of those exhibits before it was tendered in Court as evidence, and there is no

possibility for the said exhibits to be altered. Thus, I'm of the same position as the trial Court that the prosecution evidence proved without a doubt the 2nd count.

In this case, the appellant was convicted by the trial Court for the 1st and 2nd offences of stealing by servant contrary to sections 258 (1), 265 and 271 of the Penal Code, and eight counts of forgery contrary to sections 333, 335 (a), and 337 of the Penal Code. In the first count, it was alleged in the particulars of the offence that on various dates in the year 2020, the appellant, being an employee of Southern Highlands Schools as an accountant, fraudulently and without claim of right he did take shillings 18,760,000/= the property of his employer which came into his possession on account of his employer. In the second count, it was stated in the particulars of the offence that on divers dates between 2018 and 2019, the appellant, being an employee of Southern Highlands Schools as an accountant, fraudulently and without claim of right he did take shillings 97,618,900/= the property of his employer which came into his possession on account of his employer.

For the offence of stealing by the servant to be proved, the prosecution's side is duty-bound to prove two ingredients. One, that the

appellant was the employee or servant of the owner of the property stolen; and two, the stolen property came into the appellant's possession on account of his employment. In the 1st and 2nd counts, there is no doubt that the appellant was an employee of Southern Highlands School as an accountant (bursar) from 2013 to 2020. This was stated by PW1, PW2, PW3, PW4, PW5 and pw6. Even the appellant admits in his evidence that he was employed by the Southern Highland Schools, which PW2 owns.

On whether the appellant did steal the money of his employer, which came into his possession on account of employment, in the first count, this is found in the testimony of PW1, PW2, and PW5. PW1, the Finance Manager of the School, testified that in February, 2020, he found a money deficit in the school bank account, and he decided to conduct an enquiry. In his investigation, PW1 found there was a deficit of a total of shillings 18,760,000/= in school accounts from January to April 2020. He found that the appellant was receiving school fees from students and was issuing receipts without depositing the said amount to the school bank account. PW1 tendered his report, which was admitted as exhibit P3. PW2 evidence is that PW1 conducted an enquiry and found a loss. PW5 evidence is that

in 2020, he paid shillings 490,000/= to the appellant for the school fees of his two children on 13.01.2020, and PW1 issued the receipt (exhibit P1).

As it was submitted by the counsel for the appellant, PW1 carried out his enquiry following the presence of a money deficit in school bank accounts. After completion of his investigation, PW1 made his report – Exhibit P3. This exhibit which the trial Court relied on in convicting the appellant on the 1st count, is not an audit report. It is a settled law that where there is an accusation of occasioning loss to the institution or specified authority, the audit report is needed to prove the presence of loss or stealing in an institution. This position was stated by the Court of Appeal in **Azimio Machibya Matonge vs. Republic,** Criminal Appeal No.35 of 2016, Court of Appeal of Tanzania, at Tabora, (unreported), on page 17 of the judgment. Thus, the 1st count was not proved of the absence of an audit report to ascertain the alleged stealing from the Southern Highland Schools in 2020.

Further, despite the evidence of PW5 proving that he paid shillings 490,000/= as school fees for his children to the appellant, there is no evidence whatsoever to support PW1's adhesion that the appellant did not deposit the said school fees into the school bank account. No school

account bank statement was tendered to prove that the said amount was not deposited. For that reason, even the 22nd count, an alternative to the 1st count, was not proved without doubt.

In the 2nd count, PW2 testified that following the discovery of a money deficit in the school bank account in January, 2020, she engaged LAGHE which is PW3's company, to conduct a special school audit for 2018 and 2019. PW3 entered a memorandum of understanding with PW4, a CPA holder, to conduct the audit. PW4 conducted the special audit and prepared the report together with PW3. The audit report – Exhibit P13 reveals there are numbers of school fees received by the appellant from the parents of the students which was not deposited into the school bank account. The said students had receipt issued by the appellant. The deficit was shillings 59,674,500/= for 2018 and shillings 37,944,400/= for 2019. The sum of the school fees received by the appellant, which was not deposited in the school bank account, was shillings 97,618,900/=. This evidence proved without a doubt that the appellant received a total of shillings 97,618.900/= as students' school fees from the parents of the students for the years 2018 and 2019. The appellant did not deposit it in a bank account. The evidence proves without doubt that the money ended

up in the hands of the appellant by virtue of his employment, and without claim of right. This evidence proves that the appellant did steal from the employer the money as it ended in his hands without being deposited in the school bank account.

For the 3rd to 10th counts, the appellant was charged with forgery offences contrary to sections 333, 335 (a), 336 and 337 of the Penal Code. The elements of forgery include making a false document intending to defraud or deceive. The evidence of PW1, PW3, PW4, receipt book- Exhibit P2 and the audit report – Exhibit P3 proved that the appellant inserted particulars in receipts with numbers 9766, 9768, 9776, 9785, 9787, 9788, 9792 and 9789 to show that students have paid school fees while it was not the truth. It was the testimony of PW1, PW2, PW3 and PW4 that school fees are deposited in the school bank account, but the appellant issued those receipts to students who did not deposit school fees in the bank account. The audit report shows that parents of the students who were issued with receipts by the appellant after they paid certain amount as school fees to him. The evidence is sufficient to prove the offence of forgery as the said receipts were issued by the appellant for the purpose of defrauding or deceiving the employer that those students with receipts

have paid school fees, the fact which was false. Thus, offences of forgery was proved without doubt.

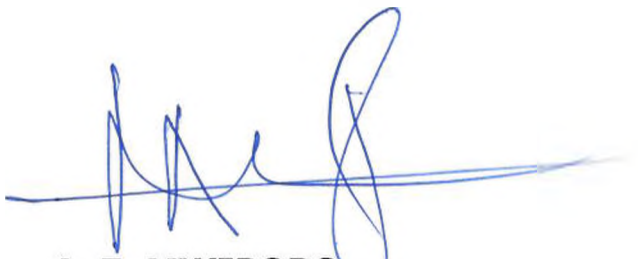
The remaining ground of appeal is ground No. 2 that the trial Resident Magistrate erred in ordering the sentence to run consecutively. As it was submitted by the counsel for the appellant, the trial Court convicted the appellants for the offences charged. It sentenced the appellant to serve ten years imprisonment for each stealing by servant offence and seven years for each forgery offence. It proceeded to order the sentence to run concurrently because the offences were committed at different times and on separate transactions. It ordered the appellant to restore shillings 116,378,900/= to the employer. The counsel for the respondent said that the trial Court provided the reason for ordering the sentence. If the Court is of the opinion that the sentence was not proper, it has to sentence the appellant accordingly.

As the Court of Appeal held in the cited case of **Shomary Mohamed Mkwama vs. Republic**, (supra), the law is settled that where a person commits more than one offence at the same time and in the same series of transactions, save in very exceptional circumstances, it is proper to impose concurrent sentences. In the case at hand, the appellant committed the

offence of stealing and forgery at the same time and in the same transaction. The trial Court's reasoning that the said transactions were separate does not hold water as the appellant committed those offences continuously from 2018 to 2019 when the audit conducted discovered there was stealing and forgery. Therefore, those offences were committed in the same series of transactions. Thus, the trial Court was supposed to order the sentence to run concurrently.

Therefore, the appeal is partly allowed to the extent discussed herein. The appellant's conviction in respect of the 1st count is quashed, and its sentence is set aside. The sentence of 10 years imprisonment for the 2nd count and seven years for the 3rd to the 10th count is upheld. However, as the offence was committed in the same series of transactions, the sentence shall run concurrently. The order for the restoring shillings 116,378,900/= to the employer (owner of Southern Highland Schools) is set aside for the reason that the said amount is the summation of shillings 18,760,000/=, which is alleged to have been stolen in the 1st count, and shillings 97,618,900/= suspected to be stolen in the 2nd count. As I held that the 1st count was not proved without a doubt, the conviction remains in the second count. In the circumstance, the appellant is supposed to

restore the stolen amount in the convicted count to the employer. Thus, I order the appellant to restore shillings 97,618,900/= to the employer (owner of Southern Highland Schools). It is so ordered accordingly. Right of Appeal explained to both parties.



A. E. MWIPOPO

JUDGE

28/04/2023