

IN THE HIGH COURT OF TANZANIA

(IN MWANZA SUB-REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 10 OF 2023

*(Appeal from the Criminal Case No. 01 of 2022 in the District Court of Magu at Magu
(Kimaro, SRM) dated 6th of December, 2022.)*

1. MATHIAS ERNEST @ MAYENGO.....1ST APPELLANTS

2. ATHANAS SIRRO NYABYAMAL..... 2ND APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 14/03/2023

Date of Judgment: 22/05/2023

Kamana, J:

This appeal arises from the decision of the District Court of Magu at Magu, in respect of Criminal Case No. 01 of 2022. It involved the Appellants who stood charged with stealing by servants, contrary to the provisions of section 271 of the Penal Code, Cap. 16 [R.E. 2019]. The subject matter of the alleged theft was different types of drinks whose estimated value is TZS. 71,604,355/=.

It was alleged that the incident occurred between March and September 2021 at Kanyama within Magu District. The owner of the stolen items is Mati Super Brands LTD.

Brief facts of the case are gathered from the testimony of the parties to the trial proceedings. They are simply that both Appellants were employees of the complainant as salesmen whose core function was to collect supplies from the company and distribute them to the clients in different places on condition that they deposit money to the company's bank account after effecting the sales.

Auditing was conducted on 18th December 2021 by PW1, Goodluck Silayo who suggested that TZS. 71,604,355/= were missing and all the culpabilities fell in the hands of the accused now the Appellants. The Appellants distanced themselves from accusations alleging that the missing figure was yet to be received from the customers.

The matter was reported to the Police who arrested the Appellants and arraigned them in court. After trial proceedings in which eight witnesses testified for the parties, the trial magistrate was convinced that a case had been made out against the Appellants. He convicted and sentenced them to imprisonment for three years.

The conviction and sentence have aggrieved the Appellants, hence this appeal which was predicated on five grounds as follows:

1. That, the trial Court erred in law and facts for convicting the Appellants while the prosecution case was not proved beyond the reasonable doubt.
2. That, the trial Court erred in law and facts for convicting and sentencing the Appellants without considering the defences raised by the Appellants and also the trial Court convicted the accused persons based on contradictory and uncorroborated evidence.
3. That, the trial Court erred in law and facts for relying on the documentary evidence tendered by the prosecution side to convict the Appellants while the same was un-procedural tendered and admitted in the trial.
4. The trial Court erred in law for failing to evaluate both sides' evidence to reach a reasonable verdict.
5. That, the trial Court erred in law and fact by receiving evidence of the witness who was not mentioned at the preliminary hearing stage.

When the matter came up for hearing, it was unanimously agreed that the appeal be disposed of by way of written submissions. However,

for this judgment, I do not see a reason to reflect the arguments of both parties. In the course of drafting the Judgment, it came to the understanding of this Court that the accused were charged and convicted under section 271 of the Penal Code. In that case, the parties were invited to address that issue to prove whether the charge was defective or otherwise.

Mr. Amos Sura, learned Counsel for the Appellants contended that section 258(1) of the Penal Code which creates the offence of theft was not cited in the charge sheet. He argued that section 135 of the Code provides for the modes of framing charge sheets that have been offended by the charge sheet in question.

The learned Counsel submitted that since his clients are now serving their sentence based on the defective charge, the recourse is not the retrial but to acquit the Appellants as the retrial would be used by the Prosecution to fill the gaps. To bolster his position, the learned Counsel invited this Court to consider the case of **Isumba Huka v. Republic**, Criminal Appeal No. 113 of 2012.

Replying, Ms. Sabina Chogogwe submitted that the charge sheet was not defective. She contended that section 258(1) of the Code does not create an offence but section 271. She further submitted that the charge sheet in this case was framed as per the requirements of section

132 of the Code as it depicts the statement of the offence and its particulars. She summed up that the learned Counsel for the Appellants did not state how his clients were prejudiced by non-citation of section 258 which in her considered opinion only provides ingredients of the offence of theft. Regarding the cited case, she dismissed it on the ground that her counterparty did not relate that case with the circumstances of this case.

Rejoining Mr. Sura reiterated his submission in chief. He further contended that by being charged and convicted under the wrong provisions of the law, as he said in his submission in chief, prejudiced his clients who are now serving their sentences.

Having heard the competing arguments, it is my conviction that the Appellants were charged and convicted under the wrong provisions. Section 271 of the Code, in my opinion, does not create the offence of theft. Principally, the said section provides for the mode of the offence of theft which is stealing by servants and the penalty for stealing by servants.

According to section 135(1)(1)(1) and (ii) of the Code, the statement of the offence must refer to the section which creates the said offence. Given that, the Appellants were supposed to be charged under section 258(1) of the Code which creates the offence of theft and

under section 271 of the Code which provides for the mode of the offence of theft which is stealing by servants. In the absence of section 258(1), the charge sheet was defective. **See: Abdallah Ally v. Republic**, Criminal Appeal No. 253 of 2013; **Marekano Ramadhani v. Republic**, Criminal Appeal No. 202 of 2013 and **Deogratis Kiria v. Republic**, Criminal Appeal No. 99.

Having found that the Appellants were tried and convicted under the wrong provisions, it is my finding that they were prejudiced as they were not afforded an opportunity to understand what constitutes theft in the eyes of the law. In other words, the trial against them was unfair.

Invoking revisionary powers bestowed to this Court, I nullify both the proceedings and judgment of the trial Court, quash the conviction, set aside the sentences meted against the Appellants and order for their release from custody unless held for other lawful causes. Order accordingly. Right to Appeal Explained.

DATED at MWANZA this 22nd day of May, 2023.



KS KAMANA

JUDGE