

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO.2 OF 2022**

*(Appeal from the decision of Temeke District Court at Temeke dated 7<sup>th</sup> June, 2022 Hon. A.S. Rweikiza, SRM in Criminal Case No. 193 of 2021)*

**ABDALLAH A. MPILI.....1<sup>ST</sup> APPELLANT**

**RAMADHANI SALEHE ISSA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*28/04/2023 & 19/05/2023*

**POMO, J**

The Appellants together with other two accused person who are not party to the appeal herein were arraigned before Temeke District Court (the trial court) charged with two counts. **One**, conspiracy contrary to section 384 of the Penal Code [CAP 16 R.E.2019] (the Penal Code) and; **two**, stealing contrary to section 258(1)&2(a) of Penal Code. Upon full trial, the trial court found the first count to have not been proved against all the



accused persons. As to the second count it found the same to be proved against the appellants herein and acquitted the rest. The trial court then convicted the appellants and sentenced them to serve four years jail sentence, the conviction and sentence which have aggrieved them hence this appeal.

Briefly stated, the appellants were employees of the AMI and VAI Company of Kijichi area within Temeke district in Dar es Salaam Region. That, while the 1<sup>st</sup> Appellant was a Transport Officer the 2<sup>nd</sup> Appellant was a storekeeper. That, on diverse dates between January, 2019 and 17<sup>th</sup> day of January, 2021 the Appellants did steal the following properties: Four Diffys valued Tshs 10,000,000/-; 35 large motor vehicle tyres valued Tshs 18,000,000/-; 30 small motor vehicle tires valued Tsh 24,000,000/-; 5 Tank tops valued Tsh 400,000/-; 77 used batteries valued Tsh 3,600,000/-; motor vehicle clutch plate valued Tsh 230,000/-; one valve guide valued Tsh 150,000/-; one brake chamber valued Tsh 350,000/-; one starter valued Tsh 200,000/-; one cabin shock-up valued Tsh 240,000/- and 312.50 litres of diesel valued Tsh 59,110,000/- making the total value of the above stolen properties to be Tsh 131,880,000/-.

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That, in stealing the said properties, the appellants in their capacity as Transport Officer and Storekeeper of the complainant's company respectively did fraudulently authorize the above allegedly stolen properties to be taken away from the complainant's fenced yard in a manner which could not be easily detected. That, the said fenced yard is twenty-four hours manned everyday by Amton security service limited, a security guard company situated at Kijichi area within Temeke District in Dar es Salaam region who always have a register book in which every property taken away from the yard has to be registered. That, the company did so without noticing those properties which were being stolen by the appellants because they were the persons responsible in authorizing properties to be allowed out of the yard. It is until the time when the owner of the company noticed the said theft upon observing the missing of some of the stolen properties in the yard hence in cooperation with the company's lawyer the incident was reported to police hence the arrest of the appellants herein together with the other two accused, as alludeabove, were acquitted by the trial court.

The respondent republic having paraded five witnesses the trial court became satisfied that the second count of the charge to be proved to ground conviction against the appellants.

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Aggrieved, the Appellants have fronted seven grounds of appeal in their petition of appeal lodged on 18<sup>th</sup> day of July,2022. Further, on 23<sup>rd</sup> February,2023 filed additional four grounds of appeal both faulting the trial court decision on their conviction and sentence.

The Appellants' grounds of appeal condensed as follows:- **one**, prosecution evidence is at variance with the charge sheet; **two**, the appellants' were convicted on the second count of the charge sheet in absence of proof of common intention; **three**, local leaders nor arresting officer were called to testify the scene of crime and how they were arrested; **four**, the case was poorly investigated and prosecuted thus leading to miscarriage of justice; **five**, chain of custody of exhibit P1; P2; P3 and P4 was not established; **six**, the appellants' evidence were disregarded and/or rejected hence miscarriage of justice; conviction was based on suspicious and uncorroborated circumstantial evidence; **seven**, the appellant were convicted and sentenced for the offence of stealing while all the ingredients of stealing were not proved by the respondent republic and **eight**, the charge was not proved against the appellants.



On 28<sup>th</sup> April, 2023 when the appeal was called on for hearing the appellants were presented unrepresented and fended for themselves while for the respondent republic Ms. Dorothy Massawe, learned Principal State Attorney appeared. The Appellants allowed the learned Principal State Attorney to begin arguing the appeal while retaining their right of rejoinder.

At the outset, the learned Principal State Attorney supported the appeal.

Arguing the appeal, Ms. Dorothy submitted generally that the evidence by E7505 D/sgt Naiman PW2 contradicts the evidence adduced by PW3 Alex Mgalla the lawyer for the complainant company to which the Appellants were employees. PW2 mentioned things removed to be diff, fuel tank lid, used vehicle, stolen batteries while PW3 mentioned things which removed to be fuel tank led, batteries and diff per pp.45 -47 for PW3 and pp.38-39 for PW2 both of the typed proceedings

That, what was expected from the witnesses were to mention things listed in the charge sheet as having stolen of which they were twelve in number per the charge sheet. Ms. Dorothy thus argued that the contradiction is apparent and need to be resolved in favour of the appellants

That, the value of the stolen thing is Tsh 131,880,000/- basing on listed things stolen in the charge sheet but what was testified by the witnesses were just to mention few things followed by stating the whole value of allegedly stolen things as Tsh 131,880,000/- without regard to the items listed in the charge sheet. In the end, Ms. Dorothy argued the appeal be allowed

In their rejoinder, the first appellant had nothing to add rather than praying the appeal be allowed.

On the side of the 2<sup>nd</sup> Appellant, while supporting what the respondent republic submitted in support of the appeal, he argued that even the charge sheet is a fabricated one because it stated the stolen diesel was 312.50 litres worthy Tshs 59,110,000/- which means the value of one litre is Tsh 189,152/- (Tanzania shillings one hundred eight nine thousand, one hundred and fifty-two) the price which had never happened in Tanzania. He then prayed the appeal be allowed

Having heard the submissions and gone through the trial court record, it is now time to determine the appeal. In determining it, I will begin with

the last ground of appeal which is to the effect that the charge was not proved against the appellants

On the second count to which the appellant stand convicted the offence to which they were charged is that of stealing contrary to section 258(1)&2(a) of Penal Code. The section provides as follows: -

*"S.258(1) – A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steal that thing.*

*(2) – A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say –*

*(a) an intent permanently to deprive the general or special owner of the thing of it".*

Ingredients for the offence of stealing which must be proved by the prosecution side in order to ground conviction against the accused person were stated by the court of appeal in a recent decision of **DPP vs Shishir Shyamsingh, Criminal Appeal No.141 of 2021 CAT at Kigoma** (unreported) where the court at page 11 had this to state: -



*"It is settled law that for the offence of stealing to be established, the prosecution should prove that, **one**, there was movable property; **two**, the movable property under discussion is in possession of a person other than the owner; **three**, there was an intention to move and take that movable property; **four**, the accused moved and took out the possession of the possessor; **five**, the accused did it dishonestly to himself or wrongful gain to himself or wrongful loss to another; and **six**, the property was moved and took out without the consent from the possessor".*

[See also: Mwita Wambura Vs R, Criminal Appeal No.56 of 1992  
CAT(Unreported)]

Now, was the charge of stealing proved beyond reasonable doubt against the appellants by the Respondent republic? in proving the charge, the respondent republic paraded five witnesses. Their testimonies are to the effect that the appellants; being employees, did steal the complainant's company properties from its fenced yard at Kijichi area within Temeke district in Dar es Salaam Region on diverse dates in the year 2019 to 2021. Evidence to which reliance is made to convict the appellants are exhibit P1; Exhibit P2 and Exhibit P3 both being notebooks allegedly used to control movements of the outgoing and incoming things from the yard. These exhibits were tendered in court by E.7505 D/sgt Naiman PW2 on 24<sup>th</sup> December, 2021 as evidenced under pp.38 – 43 of the trial court typed proceedings



Despite tendering the said exhibits, PW2 didn't explain based on the exhibits the exact dates the allegedly stealing was done by the appellants to the complainants' company properties from the said fenced yard. Exhibit P1 is a notebook with 192 pages so is exhibit P2 while exhibit P3 is a notebook with 288 pages. Almost all the pages are written in a disorganized manner. The notebooks do not bear anyhow the logo of the complainant company or the allegedly security guard guarding the said yard. PW3 Alex Mgala the company lawyer; PW4 Rose Mwaikambo the Amton security service limited officer the security guard company which was providing security guard service to the complainant's company and PW5 Rashid Mohamed the security guard, none of them didn't mention what property was stolen by the appellant on what exact date. They all generally asserted stealing was between 2019 to 2021 without more.

The trial court's findings leading to conviction of the appellant is based on what I can say, stepped into the shoes of the prosecution in finding out the stolen items, as is so listed in its judgment as found from page 20 to page 23 of the typed judgment. The listed item by the trial magistrate did include mostly those not mentioned in the charge sheet. For example, mentioned is made at page 21 of the judgment that on 16/04/2020 one new



motor vehicle was taken out by the 1st appellant but is never shown if it was ever returned, three springs were taken out on 03/7/202 by the 2<sup>nd</sup> Appellant; on 15/12/2020 the 1<sup>st</sup> Appellant took out 3 gas pitcher (mitungi) to mention but a few. These few mentioned things together with many others are listed by the trial magistrate to have been taken out of the fenced yard without stating whether were later brought back to the yard or not. Itemizing each property stolen as to the date it was stolen was a duty cast to the prosecution through their respective witnesses so that when are so mentioned could lead to the trial court to afford the accused person the right to cross-examine on them, which was not the case here

In view of that I subscribe to the view taken by the principle state attorney that the case was not proved against the Appellants by the respondent republic as the ingredients of stealing set in the **Shishir Shyamsingh** case (Supra) were not proved. I therefore allow the ground of appeal

Since the above ground of appeal alone suffice to dispose the appeal I find no need to labour on the rest of the grounds as doing so shall remain to be an academic exercise

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Consequently, the appeal is hereby allowed. The conviction is quashed and the sentence is set aside. I order the appellants be released from prison forthwith unless are held therein for another justifiable cause.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 19<sup>th</sup> day of May, 2023



**MUSA K. POMO**

**JUDGE**

**19.05.2023**

Judgment is delivered in chamber on this 19<sup>th</sup> May, 2023 in presence of the Appellants and Dorothy Massawe, learned Principle State Attorney, for the Respondent republic



**MUSA K. POMO**

**JUDGE**

**19.05.2023**

