IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO.182 OF 2022

(Arising from the decision of the District Court of Mkuranga in Criminal Case No. 86 of 2021 dated 21st Sept 2022)

JACKSON HAMISI MALONGO .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

23rd February & 16th June 2023

MKWIZU, J.

The appellant was arraigned before the district court of Mkuranga (the trial court), on a charge of stealing c/s 258(1) and 265 of the Penal Code, Cap. 16 [R.E. 2022] and sentenced to five (5) years imprisonment. The particulars of the offence alleged that on the 18th day of April 2021 at Dundani Village within Mkuranga District in Coast Region, the appellant stole 30 tons of salt valued at TZS 14,560,000 from the properties of NEELKABTH SALT LIMITED. The appellant pleaded not guilty to the charge, culminating in a trial in which 10 witnesses testified for the prosecution and one for the defence.

At the end of the trial, it was found that the prosecution has managed to sufficiently establish all ingredients of theft under section 258(1) of the penal code by showing that the accused /appellant bypassed all the company's loading procedures, and he used false documents to load and transport the salt from the company while knowing that there was no such an order. It accordingly found the appellant guilty as charged, convicted him, and meted out the sentence of five (5) years imprisonment.

Aggrieved, the appellant has filed this appeal on nine (9) grounds of appeal pointing to seven areas of grievance as follows:

1. An error by the trial magistrate for basing both conviction and sentence on the provisions of sections 258(1) and 265 of the Penal Code, cap 16 R.E 2022 which was not in existence at the commission of the crime and was not used in the charge sheet.
2. Failure by the trial Magistrate to state the reasons for the change of trial Resident Magistrate from one Hon. MWEISAKA, RM who was to Hon. K.P MROSSO- SRM,
3. Variance between the statement of the offence in the charge sheet and evidence
4. Non-joinder of the accused's boss in the charge
5. The trial court erred in admitting the cargo of salt at Neel Kant company was allegedly found at Vingunguti.
6. Failure by the trial court to consider the defence evidence.
7. Failure by the prosecution to prove the case beyond a reasonable doubt.

During the hearing, the appellant had the services of Mr. Emmanuel Machibya advocate while Ms. Rachel Dany learned State Attorney appeared resisting the appeal on behalf of the respondent/ Republic. The appeal proceeded by written submissions. Submitting in support of the appeal, the learned counsel for the appellant argued that the charge sheet filed in court against the appellant was preferred against provisions of section 258 (1) and 265 of the Penal Code RE 2019 while the trial magistrate's judgment is

referring to section 258 (1) and 265 RE 2022. He was of the view that since the law does not act retrospectively, then the sections cited in the judgment were not supposed to form the basis of reference to the appellant's conviction and sentence. He banked his submissions on the decision of **Basil Boay Surumbu V the Republic**, criminal appeal no 82 of 2017(unreported).

Submitting on the second grounds of appeal, the appellant counsel said, on 25th February 2022, Hon K P Mrosso was assigned to proceed with the trial on the reason that the trial magistrate was on maternity leave, but the entire judgment delivered contains no single sentence assigning a reason for that change of magistrates. Citing to the court the decisions of **Issa Sufiani Malua and 2 others v The Republic,** criminal appeal No 494 of 2015 and **Abdi Masoud and 3 Others v R**, criminal appeal No 116 of 2015, and **Priscus Kimaro v R,** Criminal Appeal No. 301 od 2013 (all unreported) he said, the failure to assign reason for a change of magistrate in a partly head case is fatal.

On failure by the prosecution to prove the case beyond a reasonable doubt, the appellant's counsel submitted that (1) there was a variance between the name of the company whose salt was said to have been stolen in the charge sheet and the name of the company from which PW1 was working. He said, while the charge sheet refers the victim's company as NEELKANTH SALT, PW1 introduced himself as a human resource officer from KNEEL KANT SALT COMPANY a different company altogether; (2) In an extra-judicial statement, the appellant confessed to having committed the offense under the

instructions of his boss, therefore, the said boss was to be joined as a co-accused;(3) that the trial court relied on hearsay evidence by PW1 Said Mohamed Kubenea ;(4) that the alleged stolen salt was not tendered in court as evidence;(5) since the statement by PW2 showed that the tax invoice was signed by the accused, Pw2 and their boss, all ought to be held responsible; (6) exhibit P5 is a cargo of salt allegedly found at the accused's father's house in Tabata while the prosecution alleges that the Salt was found in Vingunguti area.

He lastly blamed the trial court for failure to consider his alibi.

Responding to the 1st ground, the learned State Attorney firstly admitted that the law does not act retrospectively, He was however quick to add that the citing of sections 258 (1) and 265 of the penal code Cap 126 RE 2022 is not a fatal and therefore durable under section 388 of the penal code.

She criticized the second ground on the contravention of section 214 of the CPA on the ground that reasons for the change of trial magistrates were assigned rendering this complaint meritless.

The learned State Attorney went further to argue that the variance of the company's name from KNEEL KANTH COMPANY indicated in the charge sheet and KNEEL KANT COMPANY on which PW1 said he was working is a minor error. She as well implored the court to find the complaint on nonjoinder of the accused person to have no merit on the ground that it is the prosecution who bears the burden of proof.

Arguing grounds 5, 6, and 7 together the State Attorney said, the prosecution managed to prove their case to the required standards. The trial court heard and believed direct evidence given by PW1 who learned of the loss of the 30 tons of salt from the company, PW5 who was hired by the appellant to transport the said cargo, PW3, and PW4 who was also hired to offload the salt from PW'5 vehicle parked at Tabata to Vingunguti area, and PW8 and 10 who found the salt, the appellant's extra-judicial statement plus exhibit P2, P3, and P4.

The State Attorney was straight to the point that the defense evidence including that of alibi was considered but the appellant failed to establish with evidence his alibi defence as required by the law.

Regarding the failure by the prosecution to tender the salt allegedly found at the accused's father's house, and the confusion brought by the prosecution on whether the stolen salt was found at Vingunguti or Tabata, the State Attorney submitted that, the evidence by PW5 and PW10 was specific that the stollen salt was found at the accused father's house at Vingunguti in the presence of the local leaders. And that the appellant is the one who took the said salt there. She, in conclusion, implored the court to dismiss the appeal for lacking in merit, uphold the conviction, and sentence meted against the appellant.

The appellant had a brief rejoinder stressing that his grounds of appeal be considered in his favour, his appeal be allowed, and he be set free from prison.

I have considered all the grounds of appeal, submissions and authorities cited before the court. The first complaint by the appellant is founded on being convicted under a provision he was not charged with. As demonstrated above, the charge cited sections 258 (1) and 265 of the Penal Code, (Cap 16 RE 2019) while the trial court judgment kept on referring to the same sections but Revised Edition of 2022. The question that follows is whether that anomaly in the charge prejudiced the appellant. I don't think so. The aim of citing specific provisions in the charge is to give an accused person reasonable information as to the nature of the offense charged and appropriate punishment in case of conviction to enable the accused to prepare for his defence. This is by sections 132 and 135 of the CPA.

I have revisited the two sections in both the **Revised Edition of 2019** and that of 2022. In both revised editions the two sections are worded the same.

> *"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, steals that thing*
>
> *265. Any person who steals anything capable of being stolen is guilty of theft and is liable unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years."*

This being the case therefore, I am of the view that the citation of the Revised Edition 2022 in the trial court's judgment instead of the Revised Edition 2019 reflected in the charge sheet is not fatal as has occasioned no

injustice to the appellant. It could have been different if the two editions had different wordings. The defect is therefore curable under Section 388 (1) of the Criminal Procedure Act, Cap 20 Revised Edition 2022. The first ground of appeal is thus without merit.

The 2nd ground of appeal is on failure by the trial magistrate to record reasons for the change of magistrate in the judgment. The import of non-compliance with section 214(1) of the CPA has been a subject of scrutiny in various decisions of the Court of Appeal and this court as well where the position is that non-compliance with that provision is fatal. The Court of Appeal has in several cases insisted that where it is necessary to re-assign a partly heard matter to another magistrate the reason for the failure of the first magistrate to complete must be recorded and that not doing that can lead to chaos in the administration of justice. See **Priscus Kimaro vs Republic**, Criminal Appeal No. 301 of 2013 (unreported). And **Charles Yona vs Republic,** Criminal Appeal No. 79 of 2019 (unreported), the Court held that before the Court quashes a conviction due to non-compliance with section 214(1), it must be satisfied with two conditions. "*First, the appellant's conviction was vitiated by the non-compliance with section 214(1) of the CPA. Second, and perhaps the most critical one, the appellant must have been materially prejudiced by the conviction because of the evidence not wholly recorded by the successor magistrate."*

I have considered the circumstances of this case on its peculiar nature. It is evident on pages 50 and 51 of the proceedings that Hon. K.P MROSSO- SRM took over proceedings from Hon. MWEISAKA, RM, RM who had presided

over the trial from the start. The contents of the records of proceedings on the two mentioned pages go thus:

> "*DATE: 15/3/2022*
>
> *RE-ASSIGNED TO: K.P MROSSO-RM*
>
> *RE- ASSIGNED BY: DRMI/C*
>
> *SIGNATURE: H.I. MWAILOLO-RM*
>
> *COURT: Since the matter is about to become a backlog case and the presiding magistrate is on maternity leave, I hereby re-assignee it to Hon. K.P MROSSO so that it to be finalized within time…."*

Having taken over the matter Hon Mrosso recorded as follows:

> *"**Court:** this is a reassignment; the Trial Magistrate has started maternity leave. I will proceed from where the trial magistrate ended section 214(1) of the CPA, CAP 20 RE 2019 C/W."*

The trial court was in total compliance with the provisions of section 214 of the CPA. The 2nd issue also is dismissed for lacking merit.

The third ground of appeal raises an issue of variance between the charge and evidence. According to the appellant, the particulars of the charge had accused him of stealing from the company by the name of ***NEEL KANTH SALT LIMITED*** while PW1 introduced himself as a Human resource manager of ***NEEL KANT SALT COMPANY LIMITED*** and therefore an employee of a different company from the complainant company. It is worth noting here that, the law on contradiction is well settled not every

discrepancy or inconsistency in the witness's evidence is fatal to the case, it is only fundamental discrepancies going to discredit the witness that count, minor discrepancies in detail or due to lapses of memory on account of passages of time is always to be disregarded. This position was expressed by the Court of Appeal in **Nsamba Shapwata & Another v. Republic**, CAT-Criminal Appeal No. 92 of 2007 (unreported). Where it was held:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."*

I have re-evaluated the prosecution evidence particularly that of Pw1, the charge sheet, the point at issue, and the appellant's submissions. I am convinced that the pointed-out variance between the statement of the charge and PW1 evidence in respect of the company's name is a minor error that does not go to the root of the matter. The naming of the COMPANY NEEL KANTH COMPANY LIMITED instead of NEEL KANTH SALT LIMITED is just a normal error of observation or a slip of the pen by the recording officer. I have checked further if the appellant had challenged PW1's position as a human resource officer and found that there was no single question directed to PW1 enquiring about his position at the company on which both PW1 and

the accused worked. It is my opinion that had PW1 not an employee of the company at issue, the appellant would have noticed at the very early stages of the trial and could have raised the issue during the trial. His silence means the witness is not a weirder person. This ground is thus baseless.

The fourth issue raised in ground 9 of the appeal is the legality of exhibit P5 admitted at the Neel Kant company. It is evident from the records that exhibit P5, the salt consignment at issue was recovered at Vingunguti in the presence of PW17, PW8, and PW10 but during the admission, the said consignment was kept at Neel Kant company. PW10 evidence, however, clarifies the situation. He said, having recovered the salt at Vingunguti they took it to Mkuranga Police, and Via a letter (exhibit P4) they kept the salt at Neel Kant company for safe custody. The defence did not challenge this evidence during admission of the consignment, cross-examination, and even in the defence evidence. I am thus of the view that the challenge brought by the appellant at this stage of appeal is nothing but an afterthought.

Next for consideration is the complaint by the appellant that his defence was not considered featured in grounds seven and eight of the appeal. It is a settled law that the trial court must subject the entire evidence on record to scrutiny. Where the trial court fails to do so, the first appellate court is enjoined to do so in its role to re-evaluate the whole evidence on record to make its findings of fact either concurring with the trial court or otherwise. See **Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported).

The appellant considers that his testimony, exhibits, and alibi defence were all not considered by the trial magistrates while the learned State Attorney maintains that the appellant failed, not only to formally issue a notice under section 194 (3) of the CPA but also to prove his defence of alibi. My effort to evaluate the defence evidence has failed to find anything faulting the trial court's magistrate. All the exhibits tendered in court by the defence were documents relating to the cargo released on 17/4/2021,19/4/2021, and July 2020, the leased agreement between the appellant and another person. This evidence did not in my view raise any reasonable doubt in the prosecution's case. The variance of tons between the stolen consignments and the recovered consignment was well settled in the trial magistrate's judgment. On page 17 of the trial court's decision, for instance, the trial court said:

> *"…the accused did use documents normally used to remove salt from the company purporting to be a customer's order while knowing that there was no such order but rather himself who was stealing from the company.*
>
> *In his defense, the accused has narrated in detail on procedures of taking cargo from the company and distanced himself from the offence, the prosecution evidence is that on the day of the incident, the accused was a master of all procedures involved in purchasing salt from the company. The accused person also told this court that 2060 cartons cannot make 30 tons but 41 tons, this court finds that, since the salt was taken to the house of the accused and was not recovered on the day of the incident, any alteration may occur on the salt, no one even measure the salt to know each carton of*

salt weights 20kgs, this may also depend on the weight and number of packets of salt in a carton"

In the above excerpt of the trial court's analysis, the trial magistrate seems to have been convinced that the accused/ now appellant was the master of all the procedures on the material date, he caused the cargo to be taken out of the company without following the procedures. The issue relating to the number of stolen tons and recovered tons of salt was found unmerited and subsequently disregarded the defence version after being convinced that the prosecution has proved the case beyond a reasonable doubt.

Apart from his assertion that he was not in the company compass on the material date supported by the lease agreement between the appellant and another person, the appellant's defence of alibi was left without details discrediting the prosecution evidence. This issue is also found to be lacking in merit.

The fourth ground should not delay the court further. On this ground, the appellant is faulting the trial court for failure to join his boss as a co accused in this case. He maintained that since the offence was committed under the instruction of his boss, the boss ought to have been joined as a co-accused. The reality is the charge sheet brought before the court was in relation to the accused person and not any other person. The prosecution's duty under the circumstances was to prove the offence as against the charged accused and not otherwise. The choice to prosecute an individual is upon the prosecution to decide, neither a party nor the court can force the prosecution to join an individual in a criminal trial because at the end of the day the duty

to prove the charge remains on the prosecuting side. It is evident from the evidence that the connection between the offence and the accused's boss came to light through the accused extrajudicial statement in which he confessed to having committed the offence after having been so instructed by his boss. I think the accused has not been properly advised here. The directive by a boss to commit an offence has never been a defence in a criminal trial and cannot by any means exonerate him from liability. The fourth ground of appeal is dismissed for lacking merit.

Lastly, the grievance expressed in grounds 5, and 6 of the appeal is that the prosecution case was not proved beyond reasonable doubt. I have considered the grounds. The prosecution has brought in court ten witnesses. PW2, an assistant logistic officer at the Neel Salt industry. His evidence was on how he discovered the loss of 30 tons of salt in their officer after he was instructed by the appellant to go to the office on 18/4.2021 at 18. hrs to prepare a dispatch report. This witness informed the court that, on inspecting the logbook he discovered that 13 vehicles were released with salt consignments but only 12 of them had tax invoices and release orders. Concerned and after failing to get the accused, he reported the incident to his boss, PW1 and PW1 relayed the information to the police for investigation.

PW5 is the driver of the vehicle with Reg No. T 868, Scania hired by the accused to carry the stolen salt to Tabata Bima Msikitini. PW3 and PW4 are also the drivers who were hired by the accused to ferry the salt cargo from Tabata Bima Msikitini to Vingunguti. They all confirmed to have unloaded

the cargo from a big lorry that had been packed at Tabata Bima Msikitini . The salt Salt (exhibit P5) was recovered at Vingunguti in the accused father's house by PW 8 and PW10 in the search that was witnessed by PW6 and PW7. The appellant also confessed before a justice of the peace (PW9) to having committed the offence. I have no flicker of doubt that this evidence has managed to establish the elements of theft. The 5th and 6th grounds of appeal are also unmerited.

Consequently, the appellant's appeal is dismissed in its entirety for lacking merit. Order accordingly

DATED at **DAR ES SALAAM** this 16th day of **June** 2023.

E. Y Mkwizu
Judge
16 /6 /2023

COURT: Right of appeal explained

E. Y Mkwizu
Judg
16/6/2023