

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO

CRIMINAL APPEAL NO. 16 OF 2023

(Originated from Criminal Case No. 04 of 2022, District Court of Gairo)

GODFREY JOACHIMAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 12/07/2023

Judgement date on: 17/7/2023

NGWEMBE, J:

The conviction and sentence of three years imprisonment pronounced by Gairo District Court moved the appellant to land in this house of justice. The source of his conviction and sentence was born out of allegations of stealing by agent contrary to section 273 (b) of the Penal Code. The charge comprised three accused persons and were charged for two counts. Two of the three accused were discharged by the trial court while finding the appellant liable for stealing one gear box, one deaf regeator and one spare tyre of motor vehicle bearing registration No. T. 769 CWY make NOAH worth TZS. 3 million, owned by Dickson William who entrusted it to the appellant.


The appellant after being convicted and sentenced for the offence of stealing by agent, he appealed to this court clothed with five grounds which for convenient purposes may be summarized into one ground to

wit; the prosecution failed to prove the offence as charged to the standard required by law. The remaining grounds clock around the same issue.

However, on the hearing date, unfortunate the appellant was not represented, thus had little to contribute to his appeal. At most he relied on his grounds of appeal and added that the alleged stolen properties even the vehicle alleged to have removed its spare parts were not produced and tendered in court during trial. Thus, prayed his appeal be granted.

The Republic was represented by learned State Attorney Josbert Kitale who outright supported the appeal by pointing out relevant legal issues which were not established and proved by prosecution during trial. He began by pointing out the cardinal rule of criminal law that, in establishing and proving the offence as per the charge sheet lies on the shoulders of prosecution. The standard of proof always is beyond reasonable doubt. Supported his submission by referring this court to case of **Joseph Makune Vs. R, [1986] TLR 44**. I may add that, such duty never shifts from the prosecution to the accused, rather the accused is bound to produce reasonable evidences capable of shaking the prosecution's case.

Having laid such cardinal rule governing criminal justify in our jurisdiction, the learned State Attorney, proceeded to justice it by directly challenging the trial court that the prosecution case was not established and proved to the standard required by law. Also, he justified his argument by citing the judgement of **Jonathan Joseph Vs. R, Criminal Appeal No. 391 of 2020 at page 7**.



Pointed that, the prosecution failed to produce the alleged spare parts for court's identification and tender incourt as outright evidence of stolen properties committed by the appellant. Since the prosecution failed to do so, the whole case stood unestablished and unproved. He cited the case of **Daniel John Mwakipesile Vs. R, Criminal Appeal No. 449 of 2019.**

Insisted that due to count 2 as per charge sheet, those stolen spar parts were available, but same were not produced in court and tendered for court use. Moreover, since those spare parts of Noah Vehicle are common items of similar vehicles are abundantly in our country, the prosecution in proving the case ought to produce special marks different from other similar spares. Justified his argument by referring this court to the case of **Leonard Makani & Another Vs. R, criminal Appeal No. 579 of 2017 at page 23.**

Rested his submission by insisting that the trial court erred in convicting the appellant from accusations which were not established and proved to the standard required by law.

Critically, the whole arguments advanced by the learned State Attorney together with grounds of appeal are centered on failure of the prosecution to establish and prove the alleged stolen spare parts. Failure to tender those spare parts which were readily available was fatal to the whole trial. This, I think is backed by countless precedents including the case of **Jonathan Joseph (Supra)**. In that appeal justices of appeal at page 7 held: -

"The particular circumstances of this case, the effect of the omission to tender in court the item



which is the subject matter of the charge, is to render the charge unproved"

In the same spirit and reasoning, the same Court of Appeal expounded the requirements of law related to proving the offence by properly identifying those stolen properties by giving special marks differentiating same with other similar properties. The court in the case of **Leonard Makani & Another (supra)**, held that: -

"the proper owner of the stolen property to properly and positively identify them. For such identification to be sufficient, it must be detailed and must give the description of the stolen property by giving special marks and before they are produced as exhibit. That way the court is assured that such properties are the ones stolen from the complainant"

In similar vein, the Court in the case of **Mustapha Darajani Vs. R, Criminal Appeal No. 242 of 2005** had this to say: -

"...in such cases description of specific mark to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits"

Legally, the alleged stolen properties, the alleged owner while testifying in court, must first be properly identified them; second provide special marks differentiating them with other properties of similarities; third upon properly identifying them, those properties should be tendered in court for admission as exhibits. Unfortunate, the whole proceedings of the trial court, the alleged stolen spare parts were neither brought in court nor were they identified by special marks. Hence, the whole prosecution case was built on mere allegations with no

proof at all. Above all even the alleged Noah vehicle was not produced for identification by the court. Thus, failed to establish and prove the contents of the charge sheet.

I have perused the judgement of the trial court with a view to find the reasoning of the trial magistrate. In effect the trial magistrate relied wholly from the cautioned statement recorded by the appellant at police. It is true that the appellant admitted to have stolen the alleged spare parts. Under normal circumstances, immediate after admitting to have stolen those spare parts, police investigator ought to investigate and recover those spare parts. Further PW3 a police investigator No. G. 5523 D/CPL even after recording cautioned statement of the appellant never took any positive steps towards investigating of where about those stolen spare parts.

This court and the Court of Appeal have sounded serious concerns on increasing failure of the investigators to perform their duty professionally. Poor investigation result into poor prosecution consequently courts are left wondering why the accused was brought in court. Finally, the court orders the accused for an immediate release. Thus, resulting into outcry of the society. The Court of Appeal in the case of **Hosea Francis @ Ngala & Maria Hosea @ Ulanga Vs. R, Criminal Appeal No. 408 of 2015 (CAT at Dodoma)** held: -

"We are obviously concerned about the failing standards of professionalism in the collection of evidence at scene of crimes. We are as surprised why, after visiting the alleged scenes where the deceased met her unlawful death, PW1 and other police officers who were in his entourage, failed to



collect physical evidences which the police according to PW3 were shown"

Similar remarks were made in the case of **R, Vs. Issa Mohamed @ Chiwele & 3 others, Criminal session No. 39 of 2016 (HCT at Lindi)** held: -

"Having found that the prosecution has failed to prove the case to the required standard, I feel it necessary to sound a note to the investigators, in the hope that they will take a lesson therefrom. Too often in criminal cases, I have noticed an inexplicable lack of seriousness on the part of police investigators a rather casual way of going about the business of collecting, handling, preserving and analyzing evidence. The result is a prosecution case that lacks crucial pieces of evidence that one would expect in a well-handled case"

I fully subscribe to the sentiments advanced in those cases on lack of professionalism of our investigators. This appeal is not exceptional, hence lack of serious investigators contributes greatly on failure of prosecution to prosecute the accused.

In the circumstance of this appeal and for the reasons so stated, I would safely conclude that, the prosecution failed to perform its duties to the standard required by law, that is, proving the offence beyond reasonable doubt.

In totality and for the reasons so stated, this appeal has merits same is allowed. I proceed to quash the conviction and set aside the sentence meted by the trial court; I therefore, order an immediate release of the appellant, unless lawfully held.

Order accordingly.

DATED at Morogoro in chambers this 17th day of July, 2023



P.J. NGWEMBE

JUDGE

17/7/2023

Court: Judgment delivered in chambers this 17th day of July, 2023 in the presence of the appellant in person and Mr. Josbert Kitale, Learned State Attorney for the Respondent/Republic.

Right to appeal explained to parties.



P. J. NGWEMBE

JUDGE

17/7/2023