

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

CRIMINAL APPEAL NO 4 OF 2023

*(Originating from Economic Case No 114 of 2021 Nachingwea District Court
at Nachingwea)*

ISAYA FUJO LUSOTOLAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

28th June & 31st 2023

LALTAIKA, J.

The appellant herein, **ISAYA FUJO LUSOTOLA** is dissatisfied with the decision of the District Court of Nachingwea in Nachingwea in Economic Case No 114 of 2021. He has appealed to this court vide a petition of appeal dated the 27th of February 2023. The petition carries three grounds of appeal as follows:

- (1) *That the trial Magistrate erred in law for failure to record evidence of informing each witness that is entitled to have his evidence read over to him. This has caused a miscarriage of justice to the appellant.*
- (2) *That the trial Magistrate erred in law and fact as there was a variance between the charge and the evidence as it is incurably defective.*

- (3) *That the trial Magistrate erred in law and fact as the case was not prove (sic!) beyond reasonable doubt in respect of the first count of which the Appellant was convicted.*

The gist of the matter as alleged by the prosecution is that on diverse dates between the 5th of July 2021 and the 7th of September 2021 the appellant (then accused) and another (not in this appeal) being public officers as a Medical Doctor and Engineer (in reverse order) of Nachingwea District Council of Nachingwea did steal 135 iron bars valued at TZS 2,547,000/= the property of Nachingwea District Council which has come to their possession as Chairman of Construction Board and site Engineer (in reverse order)

The second count of stealing by servants included not just the appellant but also 7 others (not in this appeal). The prosecution had alleged that the appellant and seven others on diverse dates between the 5th July 2021 and the 7th September 2021 knowingly that someone is designed to steal 135 [pieces] of iron bars valued at 2,547,000/= the property [of] Nachingwea District Council did fail to use all reasonable measures to prevent the commission of the offence. On finalization of the full trial, only the appellant was convicted of the second count of stealing by servant. The learned trial Magistrate, in her 27-page judgement dated the 12th of December 2022 convicted the appellant as charged and sentenced him to three years in jail. The appellant is vehemently aggrieved hence this appeal on the grounds reproduced above.

When this appeal was called on for hearing on the 26th of June 2023, the appellant enjoyed skillful services of Mr. Stephen K. Cleoplace. Advocate who appeared through video conferencing facilities provided by

the Integrated Justice Center (IJC) of the Judiciary of Tanzania in Mwanza. The responded Republic, on the other hand, enjoyed skillful services of Mr. Justus Zegge, learned State Attorney.

In brief, Mr. Kitale, learned Counsel for the appellant, while advising the Court to take note of his written version of the submission meant to serve time, submitted as follows. Mr. Kitale stated that at the trial court, his client, the appellant, faced two counts, Theft by Public servant c/s 258 and 279 on the first count and theft alternative count 383 on the second count. He was convicted on the first count and sentenced to three years in jail. The appeal consists of three grounds, but Mr. Kitale chose to address two of them simultaneously, focusing on variation of evidence and charge.

Mr. Kitale argued that the evidence failed to establish the exact number of iron bars stolen. Regarding the second ground, he claimed that the prosecution did not prove the offence beyond reasonable doubt. The prosecution presented five witnesses: PW1 on page 22 of the trial proceedings could not directly link the appellant to the theft of 135 iron bars and mentioned "loss" rather than theft. Similarly, PW2 on page 26 line 12 corroborated PW1's evidence using the term "loss." On page 13, PW2's testimony appeared to be hearsay and did not directly implicate the appellant.

As for PW3, on page 30, he referred to a person named Hamza Dickson Male, a procurement officer, who had access to the iron bars and stated that there were 365 pieces, not the 135 mentioned in the charge sheet. PW3 did not provide the date of the alleged theft, and on page 32 line 10, he mentioned that the delivery note was signed by the appellant,

who was not given the stolen property. He contradicted himself regarding the exact day of delivery on page 36 line 13. PW4, Hamza Dickson, on page 35 line 9, could not remember the exact number of iron bars he delivered, and his evidence was also focused on the missing bars, without directly implicating the appellant. PW5 on page 37 line 12 mentioned that some accused persons, including watchmen, did not fulfill their obligations, referring to 135,000 iron bars. However, he was aware of 365 iron bars delivered. The evidence provided by PW4 contradicted this, mentioning 345 iron bars with 19 missing.

Mr. Kitale emphasized that the charge and evidence must be consistent to ensure a fair trial. He cited the Court of Appeal of Tanzania's case of **MOHAMED BAKARI V. REPUBLIC** CRIM APPEAL NO 273 OF 2015 CAT Arusha, where the court stated that if evidence and the charge are at variance, the prosecution fails to prove the charge against the appellant.

Mr. Kitale emphasized that DW3, the appellant, had denied any wrongdoing. According to the case of **JOSEPH JOHN MAKUNE v. REPUBLIC** [1968] TLR 44, Mr. Kitale averred, the burden of proof lies with the prosecution, and the accused is not required to prove their innocence. Mr. Kitale argued that the evidence did not directly point to theft committed by the appellant and prayed for the conviction to be overruled and the sentence to be set aside.

Mr. Zegge, the learned State Attorney, responded to the submission of Mr. Kitale, the learned Counsel for the appellant, stating that the appeal was based on three grounds that were earlier submitted. He

mentioned that the first ground was dropped by Mr. Kitale, and the remaining grounds were about variance of the charge and evidence, as well as the case not being proved beyond reasonable doubt.

Mr. Zegge proceeded to argue all the grounds simultaneously. He pointed out that the accused, along with seven others, were brought before the court on two counts: Stealing by Public Servants c/s 258 and 271 of the Penal Code Cap 16 RE 2019, and Negligence to Prevent Offence c/s 383 of the Penal Code Cap 16 RE 2019. During the trial, seven accused persons were acquitted, while the current appellant was convicted on the first count and sentenced to three years in prison.

Referring to the charge sheet produced at Nachingwea District Court, Mr. Zegge emphasized that the appellant was charged with theft as a public servant, involving 135 iron bars valued at 2,547,000/=. He argued that the prosecution presented witnesses who proved the charged offense.

Mr. Zegge explained the testimony of the prosecution witnesses. PW1, the Acting Secretary of Nachingwea District Council, provided details about the construction project and identified the appellant as the site manager. He specified that 72 iron bars with 12mm diameter and 63 with 8mm diameter were stolen, amounting to a total of 135 iron bars. Although PW1 used the word "lost" during cross-examination, Mr. Zegge considered it a minor error.

Regarding PW2, Mr. Zegge mentioned that he explained how the iron bars were delivered from his shop to the appellant, who acknowledged receipt. He presented an invoice showing that 165 iron bars were sold by his shop, indicating that only 135 of the 365 purchased were stolen.

Mr. Zegge pointed out that PW5, a police officer, conducted the investigation and concluded that 135 iron bars were stolen. He acknowledged a typographical error in the proceedings where it stated 135,000 instead of 135. He requested the court to consider it a mere typing error.

To support his argument, Mr. Zegge referred to the case of **MARK KASIMIRI versus REPUBLIC** CRIM APPEAL NO 39 of 2017 CAT Arusha. He highlighted the principle of circumstantial evidence, stating that it should point towards the accused's guilt and form a complete chain with no escape. According to him, the evidence presented by PW1 to PW5 established the appellant's involvement in the theft, as he was the site manager and main supervisor of the project.

In conclusion, Mr. Zegge referred this court to the case of **WILLIAM NTUMBI v. DPP** CRIM APPEAL NO 320 CAT at MBEYA on page 19 where it was stated:

"For the case to be taken to have been proved beyond reasonable doubt, its evidence must be stronger against the accused."

The learned State Attorney prayed that the appeal be dismissed, and the lower court's decision be upheld.

Mr. Kitale, in his rejoinder, stated that it was not disputed that PW2's evidence, as recorded on page 26, indicated that in September 2021, they discovered that iron bars were missing. Dr. Haji and Engineer Isaya reported concerning the loss. He pointed out that this meant PW2 did not witness the incident and the information he provided was hearsay, which he deemed insufficient to support a conviction.

Regarding PW2's testimony on page 22, Mr. Kitale highlighted that the witness had mentioned the iron bars were "lost" and not stolen. He specified that 72 iron bars of 12mm and 65 iron bars of 8mm were lost, and he objected to these being considered typographical errors. He mentioned that praying for rectification was no longer possible as the court proceedings must be respected. He argued that these points were part of the evidence used to convict the appellant and questioned whether the rest of the iron bars were also lost or stolen.

Mr. Kitale referenced page 26, where the learned magistrate implemented section 210(3) of the CPA, stating that the evidence was read over to the accused, and he corrected them. He further noted that PW3 had also explained that 135 iron bars were lost, and nowhere did the witness mention theft. He added that PW3 stated he "gave" 365 pieces of iron bar to a person called Hamza, but Hamza contradicted this by delivering 345 of them, resulting in a total of 364 instead of 365.

The learned State Attorney, according to Mr. Kitale, failed to point out which witness had told the court about the value, leaving the charge sheet in question. He disputed the learned State Attorney's statement about PW4, the appellant, and emphasized that PW4 did not remember when he went to the shop, casting doubt on his credibility.

Mr. Kitale submitted that the evidence provided was insufficient since no one witnessed the theft, and none of the witnesses mentioned stealing. Instead, they all referred to the watchmen as being involved. Moreover, none of the witnesses complained that the appellant was negligent.

Regarding PW5, Mr. Kitale disagreed with the learned State Attorney's assertion that it was a typing error, citing that the case of **MARK KASMIRI** (SUPRA) was about circumstantial evidence. He argued that the learned State Attorney did not prove the case beyond reasonable doubt, and the evidence pointed to the watchmen as the potential culprits. He maintained that the appellant was not negligent and prayed for the appeal to be allowed, with the first count also disapproved, as was the case with the first count.

In the course of writing this judgment, I have discovered that the appellant who was initially sentenced to serve three years in jail was committed to an alternative sentence of **COMMUNITY SERVICE** for six months. The order for such committal is not dated. The learned counsel did not address me on this essential part of the appeal, making it difficult to place the same in the right context. I remain with more questions than answers, have the six months lapsed making the appeal overtaken by events? If the answer is yes, is it worth pursuing the same just for the sake of it? Again, if the answer is yes, does that make it a mere academic exercise?

This being a court of record, it cannot base its decision on scanty information. To this end, the appeal is hereby struck out. The applicant is at liberty to refile and provide sufficient information to the court.

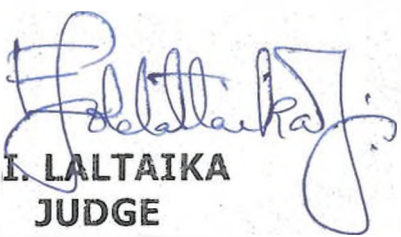
It is so ordered.

E.I. LALTAIKA
JUDGE
31.07.2023

Court

Judgement delivered under my hand and the seal of this Court this 31st day of July 2023 in the presence of **Mr. Melchior Hurubano and Ms. Atuganile Nsajigwa**, learned State Attorneys for the Respondent and the appellants.




E.I. LALTAIKA
JUDGE
31.07.2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.




E.I. LALTAIKA
JUDGE
31.07.2023

