

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MWANZA  
AT MWANZA**

**CRIMINAL APPEAL NO. 73 OF 2023**

*(Originating from Criminal Case No. 25 of 2023 of the District Court of Magu)*

**DOTTO BUJILIMA.....APPELLANT**

***VERSUS***

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

**JUDGMENT**

*18<sup>th</sup> August & 23<sup>rd</sup> August 2023*

***Kilekamajenga, J.***

The appellant together with Lucas Mizwale were charged in the District Court of Magu with two counts, namely theft contrary to section 258 and 265; and neglect to prevent offense contrary to section 383 of the Penal Code, Cap. 16 RE 2022. It is alleged that, Lucas Mizwale, being a watchman, failed to prevent the offense leading to the theft of materials for making gypsum strips. During the trial, the appellant entered a plea of not guilty and the prosecution paraded three witnesses to prove the offense to the required standard. When brought to testify, PW1 (Winfrida Opondo), being the factory owner, informed the trial court that, the appellant is her neighbour. On 16<sup>th</sup> February 2023, she received information about the theft of machines from her factory. At the crime scene, she followed some footsteps towards the appellant's house. She thereafter reported the incident to the Police. She also accompanied the police to the search of the appellant's house where they found the items with a value of Tshs.



2,800,000/=. PW2 (WP6772 D/C Defroza) searched the appellant's house and found remains of gypsum strips. She tendered the certificate of seizure which was admitted as exhibit P1. She further produced various pieces of broken gypsum strips which were admitted as exhibit P2. The third prosecution witness (Victoria Busumabu), being a ten cell leader, received information about the theft of eight machines from the factory. She was later informed that some gypsum strips and bags of gypsum powder were found in the house of the appellant.

In the defence, DW1 (Lucas Mizwale) testified that, he found the door broken and reported the matter at the ten cell leader and the two went to the crime scene. They pursued some footsteps towards the appellant's house. The police came and arrested him. DW2 (appellant) informed the trial court that, on 09<sup>th</sup> March 2023, the police searched his house and found nothing. They also searched his young brother's house in vain. He was arrested and some bags containing pieces of gypsum strips were confiscated.

Based on the above evidence, Lucas Mizwale was given conditional discharge whereas the appellant was convicted and sentenced to serve three years in prison. The appellant was disgruntled with the decision of the trial court hence appealed for justice to this court. The petition of appeal contained two grounds that:

- 1. That the trial magistrate at the District Court of Magu erred in law and facts by convicting and sentencing the appellant basing on circumstantial evidence which looked suspicious and not connected to the facts, offence, evidence tendered/adduced and without proper analysis of the ingredients of the offence which the appellant stands to be charged with or was charged at the trial court of Magu District.*
- 2. That the trial Magistrate at the District Court of Magu erred in law and facts by convicting and sentencing the appellant herein to serve for three years in jail imprisonment and payment to the respondent Tshs. 2,800,000/= as compensation while the offence charged/ the offence of theft was not proved beyond reasonable doubt.*

During the hearing of the appeal, the appellant while present in person he was represented by the learned advocate, Mr. Geoffrey Reuben Kishosha. When addressing the first ground, the counsel was of the view that, the appellant was convicted based on weak evidence as there is dearth evidence on the theft of machines by the appellant. Also, PW3 did not witness the appellant stealing the machine. Even the alleged machines were not found in the appellant's house. In his submission, the offense was not proved beyond reasonable doubt. He urged the court to refer to the case of **Vumi Liapenda Mushi v. The Republic**, Criminal Appeal No. 327 of 2016 (unreported). On the second ground, the counsel faulted the order of compensation because the offense was not proved. He cemented the argument with the cases of **DPP v. Delifinus Maximillian @ Derick and two Others**, Criminal Appeal No. 26 of 2020 (unreported); **The**

**Registered Trustees of Bakwata v. Mwanza City Council**, Land Case No. 58 of 2017 (HC) at Mwanza. He urged the court to allow the appeal.

In response, the learned State Attorney, Mr. Adam Murusuri objected the appeal arguing that the prosecution proved the case beyond reasonable doubt. PW2 searched the appellant's house and recovered gypsum powder and gypsum strips. The evidence of PW2 was supported with exhibit P1. Even the appellant did not object the fact that he was found in possession of bags of gypsum powder and gypsum strips. Also, the appellant failed to shed doubts on the prosecution evidence. The stolen properties were identified by the victim. He stressed on the prosecution proving its case. He supported the argument with the case of **Bulugu Nzungu v. R**, Criminal Appeal No. 39 of 2018, CAT at Shinyanga (unreported). When responding on the second ground, Mr. Murusuri remained content that the evidence was sufficient to warrant a conviction hence the order of compensation was an appropriate sentence as per section 25 of the Penal Code. He urged the court to dismiss the appeal and uphold the trial court's decision.

In the rejoinder, the appellant's counsel stressed that there was discrepancy between the alleged stolen properties and the evidence at hand. He called upon the court to interpret the doubt in favour of the appellant.

In this appeal, the counsel for the appellant faulted the findings of the trial court for being founded on weak evidence. In his opinion, the charge against the appellant was not proved. On the other hand, the learned State Attorney supported the conviction and sentence on the allegation that the prosecution proved its case. This ground moved by perusal of the record. According to the charge, the appellant was accused of stealing eight items for manufacturing gypsum strips. However, the words used in the charge are controversial hence I wish to reproduce them thus '*...vifaa nane vya kutengenezea mikanda ya gypsum...*' The evidence at hand further suggests that the appellant was accused of stealing machines used for manufacturing gypsum cornice strips. PW1 confidently testified that she was informed about the theft of machines. However, the police officer who led the search team into the appellant's house did not find the alleged machines but only found remains of gypsum strips. Various pieces of broken gypsum strips were tendered and admitted as exhibit P2. The certificate of seizure shows the items found in the house of the appellant thus: bags of gypsum powder and broken gypsum cornice strips (*Mikanda ya gypsum iliyokatika na mifuko ya poda za gypsum*). PW3 also received information about the theft of eight machines.

To put the evidence in context, the appellant was accused of stealing eight machines used to mould gypsum cornice strips. However, the search only recovered some broken gypsum cornice stripes and some bags of gypsum powder contrary to the contents of the charge. It seems, the initial allegation was hinged on the theft of eight machines but the evidence revealed something different. As argued by the appellant's counsel, there is discrepancy between the contents of the charge and the evidence at hand. In the case of **Sylvester Albogast v. The Republic**, Criminal Appeal No. 309 of 2015, the Court of Appeal cited the case of **Leonard Raphael and Another v. R**, Criminal Appeal No. 4 of 1992 thus:

*"Prosecutors and those who preside over criminal trials are reminded that when, as in this case, in the course of trial, the evidence is at variance with the charge and discloses an offence which is not laid in the charge, they should invoke the provisions of s. 234 of CPA and have the charge amended in order to bring it in line with the evidence."*

Under such circumstances, failure to amend the charge to reflect the evidence is fatal as it was stated by the Court of Appeal in the case of **Mashaka Bashiri v. The Republic**, Criminal Appeal No. 242 of 2017 that:

*"The failure to amend the charge sheet is fatal and prejudicial to the appellant hence leads to serious consequences to the prosecution case..."*

I have already portrayed the discrepancies between the charge and the evidence adduced. In line with the principles of the law laid above, having noticed the inconsistency, the prosecution was supposed to amend the charge in order to harmonise the charge and the evidence. As the trial court failed to notice the inconsistency leading to the conviction on the evidence not in support of the charge, the irregularity is fatal. See, also the case of **Matera Simango @ Masana v. The Republic**, Criminal Appeal No. 517 of 2019, CAT at Musoma (unreported). Based on this ground, I find merit in the appeal. I find no reason to address the second ground because it is based on the first ground. For the reasons stated above, the second appeal is also devoid of merit. In the upshot, I allow the appeal and order the immediate release of the appellant from prison unless held for other lawful reasons. It is so ordered.

**DATED** at **Mwanza** this 23<sup>rd</sup> August, 2023



**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**23/08/2023**



**Court:**

Judgment delivered this 23<sup>rd</sup> August 2023 in the presence of the learned State Attorney, Mr. Christopher Olemble and the learned advocate for the appellant, Mr. Geoffrey Reubeni Kishosha and the appellant present in person. Right of appeal explained.



**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**23/08/2023**

