IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODMA

PC CRIMINAL APPEAL NO. 23 OF 2022

(C/F Criminal Appeal No. 19 of 2022 before the District Court of Singida at Singida)

ERASTO EMMANUEL.....APPELLANT

VERSUS

BAHATI MUSHI.....RESPONDENT

JUDGMENT

Last order 10th August, 2023
Ruling: 01st September, 2023

MASABO, J.:-

The appellant is aggrieved by the judgment of the District Court of Singida at Singida exercising its appellate jurisdiction in Criminal Appeal No. 19 of 2022 over a decision of the Primary Court of Utemini at Singida (the trial court) by which the appellant was found guilty and convicted of theft. The particulars of the offence as drawn from the record were that, on the material date 2nd May, 2022 the appellant and two others, John Rajabu @Kasamuto and Ibrahim Musa, not parties to this appeal, stole different kinds of beverages from the respondent's beverage shop trading in the name of Singida Hut of wine situated at Mtunduruni Ward, Singida District within Singida Region.

In support of his case, the respondent while testifying as PW1 informed the trial court that he is a business man selling different types of beverages and had employed one John Rajabu a salesman. That the said John Rajab who was the first accused in the case, used to steal the

beverages and sell them to the appellant who had a beverage shop nearby. That, he discovered the incident through CCTV camera installed in the shop and upon calculation of the loss incurred he discovered the beverages stolen had a total value of Tshs. 19,000,000/=. It was further testified that, the first accused confessed to have committed the offence charged and he implicated the third accused person one Ibrahim Musa who was the watchman of the shop and the appellant as a buyer of the stolen beverages. Corroborating this account, PW2 and PW3 testified that the appellant and the other two accused persons confessed commission of the offence in their caution statements. However, the caution statements were not tendered during trial. The appellant and the third accused denied to have committed the offence. The trial court found all the three accused persons guilty, convicted them of the offence of theft and sentenced them to imprisonment for four months.

Aggrieved by the decision of the trial court, the appellant appealed to the District Court of Singida, the first appellate court, which dismissed the appeal after it held that the case against the appellant was proved beyond reasonable doubt and there was no reason to fault the trial court. Still aggrieved, the appellant has preferred this appeal on the following grounds of appeal.

1. That, the first appellate court erred in law and facts by relying on the weak evidence of the respondent who testified that different products have been stolen with the value of Tshs. 19,000,000/=(nineteen million) without considering the facts that the respondent did not give strong evidence to support

his allegation which would have proven that the products he alleged to be stolen worth the said amount of money,

2. That, the first appellate court erred in law and fact by upholding conviction of appellant relying on the testimonies of SM2 and SM3 (PW2 and PW3) while no caution statements which were tendered to support their evidence.
3. That, the first appellate court erred in law and fact by considering the evidence given by the respondent that the appellant did stole the said properties though the respondent didn't show the CCTV footage which could have shown how the appellant stole the said property.

The hearing of this appeal proceeded by way of written submissions. The appellant appeared in person, unrepresented and the respondent was represented by Ms. Salma Musa learned counsel.

Submitting in support of the appeal the appellant argued that the respondent did not prove the existence of alleged property purported to be stolen as he tendered no documents such as receipts evidencing buying of drinks and books for stock taking. Also, he did not prove on how he knew the total value of stolen properties. He cited the case of **Richard Otieno @Gulla vs. Republic,** Criminal Appeal No. 367 of 2018 CAT at Dar es salaam (unreported) to bolster his argument. It was his further submission that it is the requirement of the law that in criminal cases such as the one at hand the prosecution is duty bound to prove their case beyond reasonable doubt as held in the case of **Jonas Nkize vs. R** [1992] TLR 213-214. Based on this authority he reasoned that, the first appellate

court erred in law as it overlooked the fact that the prosecution did not discharge its duty. It mistakenly confined itself to the confession made by the first accused person and used it to sustain the conviction. He added that the argument that the appellant did not cross examine the first accused is with no merit as the failure to cross examine does not amount to admission. He added that, in addition to his failure to show type of drinks and the value of the said the respondent did not prove that he was in possession of such drinks or that he owned them.

On the second ground of appeal, it was submitted that the appellant and his co-accused persons recorded their caution statements but the same were not tendered in court by PW2 and PW3 who recorded them. The statements were important as they could have cured the contradictions made by PW2 and PW3. The contradiction between these two witnesses, he clarified, was that PW2 stated that the second accused person was given energy drink while PW3 stated that he was given beer by the appellant so that the first accused can move the stolen properties in his absence. It was his submission further that, since the appellant and the third accused denied to have committed the offence, their cautioned statement showing their confession ought to have been tendered in support of the evidence of PW2 and PW3. He added that, the credibility of the confession of the accused is full of doubts as he is the employee of the respondent and on the first date the charge was read to him, he plead not guilty but later on he changed his plea and plead guilty.

Regarding the third ground, it was submitted that production of footage of CCTV camera before the trial court was important to support the

respondent's case but the same was not produced. The fact that the trial court has no mandate to receive electronic evidence was to be cured by section 47(1) (a) of the Magistrate Court Act, Cap 11 R.E 2019 which allows transfer of cases from primary court to the district court or a court of the resident magistrate but was not done. In conclusion he submitted that the case against him was not proved and he cited regulation 1(1) of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations GN. No. 66 of 1972 in fortification.

In reply, Ms. Salma argued that the burden of proof has been stipulated under regulation 5(1) of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations. The standard being proof beyond reasonable doubts. She argued that the first accused person voluntarily entered a plea of guilty and pointed that the appellant is an accomplice in the commission of the offence. The plea, she argued, was corroborated by the conduct of the appellant who failed to cross examine the respondent. In fortification, she cited the case of **Yoseph Timotheus Mapunda vs. Republic** Criminal Appeal No. 1992 of 2020 [2022] TZHC 14178, TANZLII, **Damina Luhele vs. Republic,** Criminal Appeal No. 50 of 2007 Court of Appeal at Mwanza (unreported), **Hatari Mahurubu @Babu Ayubu vs Republic,** Criminal Appeal No. 590 of 2017 (unreported) and **Sebastian Michael and Others vs. The Director of Public Prosecution (DPP),** Criminal Appeal No. 145 of 2018 (unreported). She argued that as the evidence of respondent was unshaken by the appellant and was well corroborated by the evidence of the co-accused, the trial court was justified in convict the appellant.

On the second ground, it was submitted that tendering of caution statements before the trial court is not a mandatory requirement of the law and the choice of what evidence has to be tendered lies on the prosecution. This submission was fortified with the case of **Republic vs. Musa Kehanga Chacha** Criminal Case No. 28 of 2022 TZHC (unreported). It was further submitted that the first appellate court correctly upheld the conviction and sentence as it appreciated the evidence tendered by prosecution and it warned itself on the consequences of evidence and confession of the co-accused. She cited regulation 5(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations and the case of **Patrick Kitingwa vs. Republic** [1993] TLR 41.

On the contradictions in the evidence adduced by PW2 and PW3, it was submitted that mere discrepancies in the prosecution case does not negate the strength of the prosecution evidence on record. Once a confession is made by an accused person in his own volition, it can be relied upon by a court of law as held in **Tuwamoi vs. Uganda** [1967] EA 84. Therefore, since the first accused person confessed freely and there was no indication that his confession was obtained unlawfully, the appellant's lamentation is afterthought fronted to merely escape liability.

On the third ground of appeal, it was submitted that it is the duty of the prosecution to choose what evidence it wants to rely on to prove its case and there are is no hard and fast rule on what evidence it should tender as per the decision in **Republic vs. Musa Kehanga Chacha** (supra). On the matter of electronic evidence, it was submitted that it was inadmissible

in primary court as it has no jurisdiction to accept the same under the Evidence Act, Cap. 6 read together with Electronic Transaction Act, Cap 442. She submitted that the respondent's hands were tied by the law hence she could not adduce the CCTV footage in court. In the alternative, it was argued that although the footage was not tendered, there was enough evidence on record to hold the appellant criminally liable. Concluding the submission, the counsel prayed that the appeal be dismissed for lack of merit.

I have carefully and dispassionately considered the submissions above alongside the lower courts' records placed before me. From the record of appeal and the submission, the lower courts had a concurrent finding that the appellant and his two co accused committed the offence they were charged with hence guilty. In view thereof, this court being the second appellate court, I will proceed guided by the trite law that, in second appeal like this one, the appellate court will not interfere with the concurrent findings of facts of the lower courts unless there is a misapprehension of evidence by misdirection or non-direction or where it is clearly shown that there has been a miscarriage of justice or violation of some principles of law or procedures. Articulating this principle, the Court of Appeal in **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31 stated that: -

> Where there are two concurrent findings of facts by two Courts, the Court of Appeal, as a wise rule of practice should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure.

Cementing its position in **Raymond Mwinuka vs. The Republic,** Criminal Appeal No. 366 of 2017 [2019] TZCA 315 TANZLII pp 9-10, it held that: -

> Aware of the most decisions of this Court cautioning against our interference with concurrent findings of facts by two courts below, we shall guard against unwarranted interference of such facts. The decisions on that principle are in cases including; **Daudi Lugusi and 2 Others v. Republic** (supra) cited to us by Mr. Mwita, and **Jafari Mohamed v. Republic, Criminal Appeal No. 112 of 2006** (unreported). In the latter case it was held;
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> "An appellate Court, like this one, will only interfere with such concurrent findings of facts if it is satisfied that they are unreasonable or perverse leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law: see, for instance, **Petrers v. Sunday Post Ltd [1958] E.A 424: Daniel Nguru and Four Others v. R. Criminal Appeal No. 178 of 2004** (unreported); **Richard Mgaya (supra),** etc."

The ultimate issue to be determined at the end of this appeal is whether in view of the above, the concurrent findings of the lower court constitutes the anomaly complained against by the appellant in his three grounds of appeal and if so, whether as a result of such anomalies, there has been a misapprehension of evidence occasioning a miscarriage of justice or there is any violation of some principle of law or procedure warranting the interference of this court.

The major complaint in the three grounds of appeal is that the respondent did not prove its case. This complaint takes me to Regulation 1(1) and

5(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations GN. NO. 22 of 1964 which deals with the burden and standard of proof in criminal cases before primary courts where the present appeal emanates. As per this regulation, in criminal cases it is the complainant who carries the burden of proving the case unless the accused admits the offence. They require that, for a conviction to be entered, the court must be satisfied beyond reasonable doubt that the offence was committed by the accused. They provide thus: -

> 1. Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence, unless the accused admits the offence and pleads guilty.
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> 5. (1) In criminal cases, the court must be satisfied beyond reasonable doubt that the accused committed the offence.
> (2) If, at the end of the case, the court is not satisfied that the facts in issue have been proved, the court must acquit the accused. [the emphasis is mine]

The principles above is in tandem with the principle applicable in cases before higher courts which can be summarised that, in criminal cases, the prosecution is bound to prove two important elements, that the offence was committed and that, the person responsible for committing the same is none other than the accused who is before the court. Underscoring this principle in the case of **Maliki George Ngendakumana vs. Republic,** Criminal Appeal No. 353 of 2014 [2015] TZCA 295 TANZLII, the Court of Appeal instructively held that;

> It is the principal of law that in criminal cases a duty of the prosecution is two folds, one to prove that the offence was committed and two, that it is the accused person who committed it.

Further, in **Magendo Paul and Another vs. Republic** [1993] TLR 219 (CAT) it was held that:

> For a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily dismissed.

The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence as held in **Mohamed Haruna @ Mtupeni & Another**, Criminal Appeal No. 25 of 2007 (unreported) where the Court of Appeal stated that: -

> Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.

In the present case, the appellant was jointly charged and convicted with two other persons for the offence of theft. In the first and third ground of appeal, he has argued that the lower courts overlooked the fact that the offence was not proved to the required standard. The offence is established under section 258(1) of the Penal Code which provides that:

> A person who fraudulently and without claim of right takes anything capable of being stolen; fraudulently converts to use of any person other than the general or specific owner thereof anything capable of being stolen, is said to steal that thing.

As the appellant had denied the allegation, to discharge his burden of proof against the appellant, the respondent had to prove that as alleged in the particulars of the offence that beverages worth Tshs. 19,000,000/= were stolen from his shop and that the appellant was involved as the buyer of the stolen beverages. It is now settled that, for the offence of stealing to be established, the prosecution must establish asportation (actus reus) and ill intention of the accused to deprive the owner of the said thing (see **Christian Mbunda v. Republic**, cited in **Joanita Joel Mutalemwa vs Christina Kamugisha Tushemeleirwa** (PC Criminal Appeal 3 of 2022) [2022] TZHC 9866 TANZLII. These elements were amplified in the case of **Director of Public Prosecutions vs Shishir Shya Msingh** (Criminal Appeal 141 of 2021) [2022] TZCA 357 TANZLII, where the Court of Appeal held thus:

> 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 accused; 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.

From the evidence on record, it would appear that other than the first accused person's confession, there was no credible evidence to prove the elements above. While I agree with the first trial court that, a confession and evidence of a co accused person is valid and actionable against his co accused person, the law requires that it should be

corroborated for it to support a conviction. If it is to be relied upon to ground a conviction in the absence of corroboration, the court must be satisfied that it is only true evidence and before entering a conviction, it should warn itself of the danger of grounding a conviction based solely on such confession as stated in **Pascal Kitigwa v Republic** [1994] TLR 65 (CA).

Looking at the confession, it would appear that other than implicating the appellant, it provided no better particulars of the alleged theft. The types of drinks stolen and their value was not proved. All what the court was told is that, the offence was not committed on the single day. It was a series of transactions during which several drinks of the value Tshs 19,000,000/= were stolen. The specific type of drinks, their quantity and the manner by which the value above was arrived at was not disclosed. Needless to emphasize, as the complaint indicated the value of the stolen items, it was incumbent for him to substantiate such claims with concrete evidence such as stock taking record showing the type and quantity of the beverages which were in before the theft, how many went missing and their respective value but none was produced an omission which, as correctly argued by the appellant, casted a serious doubt on whether, in the first place, the appellant had the alleged beverages in stock and if he had, what was the actual quantity and value of such drinks. Here I am mindful that in his evidence, the first accused mentioned some stolen drinks whose value is far below the value claimed by the respondent hence inconsistent with the respondent's claim that the stolen beverages were worthy Tshs. 19,000,000/=

In my considered view, the CCTV footages could have provided some clarity on some of the missing links by, for example, showing the types of the beverages allegedly stolen from the respondent's shop, covered in blanket and later on moved out of the shop using a wheelbarrow. I do not intend to dwell on the admissibility of electronic evidence before primary courts as that will provide no answers to the missing link. As stated above, it is a cardinal law that the case against the accused should be proved beyond reasonable doubt. The fact that electronic evidence was deemed inadmissible in primary court did not relieve the respondent of his legal and evidential burden and as correctly submitted by the respondent, he could have prayed for transfer of his case to the District Court where he could have produced the CCTV and dutifully discharged his burden of proof. It is a lucid misdirection on the lower courts to use such legal technicality as a ground for sustaining a conviction in a case where the proof was below the required standards. In any case, the record is silent whether the respondent prayed to tender such footages which suggests that he did not and in so doing, he abdicated his legal duty to tender the same and leave it to the court to decide on their admissibility.

Back to the first accused's confession which has been complained in the second ground of appeal, as held while tackling the first ground, the evidence of a co accused is actionable but requires corroboration and if it was to be relied in absence of corroboration it should be such that it is the only true evidence and the court must warn itself of the danger of relying upon such evidence. In the present case, when the circumstances of the case as a whole are carefully considered, it would appear that, it was unsafe to heavily rely on such evidence as the evidence of PW2 and

PW3 which purported to corroborate the co accused's confession was itself questionable. PW2 and PW3 who were both policemen testified to have interrogated the first accused person and his co- accused persons and that, in the course of interrogation, they all confessed to have committed the offence they were charged with. However, they did not produce such caution statements an omission which casts a doubt on whether indeed the appellant confessed commission of the offence. In my firm view, the omission to tender the statements entertained an inference adverse to the respondent's case that the omission was calculated to conceal some facts unfavourable to the respondent's case. I say so guided by the principle that, much as the law requires no specific number of witnesses to prove any particular case as what matters most is the quality as opposed to quantity of evidence, it is important for the prosecution to produce all evidence that may prove their case beyond reasonable doubts and the failure of which attracts an inference adverse (see **Pascal Mwinuka vs Republic** (Criminal Appeal 258 of 2019) [2021] TZCA 174 TANZLII. Apparently, the two lower courts overlooked this principle.

For the above stated observation as regards the testimony of PW2 and PW3, I hesitate to hold that the confession of the first accused person was sufficient to warrant the conviction of the appellant. Further to these doubts, it is not hypothetical to think, as I do, that the first accused being an employee of the complainant not only had conflicting interests with his co- accused appellant but had a vested interest in the complainant who was his employer. Confessing to the offence and implicating the co-accused, obviously gave him a mileage in regaining the trust of his employer and attracting his sympathy. Under these premises it was

important that, the confession be corroborated by independent witnesses, a corroboration which cannot be said to have been provided by PW2 or PW3 as their testimony was similarly doubtful. The second ground is with merit.

In the totality of what I have stated, I find merit in the appeal. Accordingly, I allow it, quash the conviction and set aside the sentence metered on the appellant.

DATED and **DELIVERED** at Dodoma this 1st day of September, 2023.

J.L. MASABO

JUDGE