THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 04 OF 2023

(Arising from Kilombero District Court in Criminal Appeal No. 23 of 2022 which Originate from Ifakara Urban Primary Court in Criminal Case No. 139 of 2022)

STEGI KIPONGO ..... APPELLANT

VERSUS

VERONICA UWAMBE.....RESPONDENT

JUDGMENT

Hearing date on: 14/08/2023
Judgment date on: 21/08/2023

NGWEMBE, J.

Before this court, the appellant is on the second leg of appeal, after unsuccessful appeal to the district court, which upheld the judgement of Primary Court. The trial court convicted and sentenced the appellant for the offence of stealing, but slight rectified the sentence of meted by the trial court.

Both parties and the witnesses were members of the Village Community Banking (VICOBA) group known as *Upendo na Amani* at Katindiuka Village. The appellant was a treasurer of the group who kept the money box of the group at her home. It happened that the money box with all the money said to be Tshs. 2,700,000/= went missing, while under the appellant's custody. She is said to have suggested that some house breakers may have stolen it.

Upon being informed of the loss and visiting the appellants home, the members were not satisfied with the explanation given by the appellant and it happened that, she agreed to repay the money. But it seems the promises were not materialized, they thus prosecuted her before Ifakara Urban Primary court for stealing contrary to sections 258 and 265 of **The Penal Code.** After hearing the case, she was convicted and sentenced to pay fine of Tshs. 100,000/= or serve 3 months imprisonment term. A restoration order was also issued for her to repay the money stolen, a total of Tshs. 2,700,000/= to the victims.

Immediately she paid fine, but did not return restore that money to the group. Further she filed an appeal before the district court, which in essence was dismissed. But having considered the circumstance under which the offence was committed, the first appellate court substituted a conviction of stealing by that of stealing by agent contrary to section 273 (b) of **The Penal Code, Cap 16 R.E 2022,** without altering the sentence and subsequent orders.

Now the appellant has come to this court seeking to challenge the lower courts' decisions by raising three grounds in her petition of appeal as follows: -

1) That the first appellate court erred in law and facts to convict the accused on new offence without right to be heard.
2) That the first appellate court erred in law and fact to substitute offence of theft to steal by agent as a cognate offence.
3) That the first appellate court erred in law and fact to convict the appellant without given the right of defence.

As earlier pointed out, the case originates from Ifakara Urban Primary court. Both parties appeared in person and were unrepresented. Consequently, the oral hearing was conducted on 14/08/2023, precedingly, this court is not disappointed by the fact that parties did not

address the grounds of appeal, knowing that they had no service of a lawyer and the grounds of appeal are all based on points of law, the parties would not be able to argue them for having very limited knowledge on that sphere of knowledge.

The appellant just prayed the court to consider her grounds of appeal while partly disputing the amount stolen by saying she did not know exactly the amount of money kept in their box. On the other side the respondent resisted the appeal by saying it had no merit as the appellant was a member of the group and well aware of the amount of money kept in the box. The respondent insisted that, what they need is their money be repaid otherwise, they have nothing to do with the appellant as their co-member of their group.

At the onset, I am not prepared to dwell much on the complaint that the appellant was not given right to defend because it is defeated by the record of the trial court, which shows the appellant entered her defence and called a witness on her side at the trial court. Not only that, it is evident that, she had all the rights to cross examine the prosecution witnesses. Also, it is known that generally on the appeal stage no evidence is needed, unless it is so ordered under specific law like section 369 of the Criminal Procedure Act. Therefore, there is no need to dwell on that point, since it is clear no additional evidence was called up no at the first appellate court.

However, I will address her complaint on whether it was proper to convict the appellant in alternative verdict under the circumstance, since in ground 1 and 2 she laments that, she was convicted for the new offence without being afforded right to be heard. Particularly this point is in respect of the first appellate court, which having examined the facts, found that the theft committed was under the circumstances specified in section 372 (b) of the Penal Code, which specifies that: -

Section 273. "Where the thing stolen is any of the following things, that is to say-

(a) N/A

(b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay or deliver it or any part of it or any of its proceeds for any purpose or to any person; The offender is liable to imprisonment for ten years."

From its clear wording, it is understood that, the above section does not create a new offence. But it qualifies circumstances of the same offence of theft under section 258 of the **Penal Code** and prescribes the sentence other than the general sentence given under section 265. The main ingredients for this offence are those provided under section 258 of the Code, although, I accept that stealing by agent cannot be a cognate to stealing.

The court has considered the appellant's complaint seriously. It has visited the trial court proceeding as well. The particulars of offence in my opinion did not only disclose the offence of stealing, but stealing by agent. Although it had some weaknesses here and there, it clearly stated that, the appellant was entrusted cash money Tshs. 2,700,000/= for safe custody. The evidence adduced was clear to that effect. Since the appellant was charged for stealing and the evidence adduced proved the offence of stealing, but that even the circumstance stated in the charge was supported by the evidence, there was no injustice to convict her for the offence of stealing by agent as the first appellate court did.

All the same, in this case, the sentence was never changed. Only that the circumstances under which the theft committed were taken into cognizance. Again, considering the nature of the facts in this case, there is nothing the appellant was unaware. This court in another case of

Adam Ibrahim Vs. Njiwa Jonas (PC Criminal Appeal 23 of 2021) [2022] TZHC 330 in an akin circumstance held that theft and stealing by agent are offences of the same nature and ingredients. See also **Meck Malegesi & Another Vs. Republic (Criminal Appeal 128 of 2011) [2013] TZCA 410,** where the Court of Appeal as to the relationship between the sections had this to observe: -

> *"Before determining whether there are reasons for this Court to interfere with the concurrent findings of the offence of theft by the two courts below, it is opportune here to ask whether the offence of stealing by agent was proper offence to charge the appellants who were at the time public servants...Since the appellants came by the water pump by virtue of their employment as public servants, they should have been charged with offence of Stealing by servants contrary to section 271 of the Penal Code instead of stealing by agent contrary to section 273 (b)... The component of stealing or theft is an integral part of the offence of stealing by public servant. Component of stealing is also integral to the offence of stealing by agent for which the appellants were tried and convicted. In order to prove, as against the appellants, the offence of stealing by agent; the prosecution was required to bring its case within the ingredients of the offence of theft under section 258 (1) and (2) (a) of the Penal Code"*

It is my strong opinion therefore that, the first appellate court was correct in substituting the conviction under the circumstance. Same occasioned no miscarriage of justice unlike the appellant would want this court to believe.

Regarding the finding of fact, this court is aware that the present is a second appeal. Both courts below had a concurrent finding of fact

and were satisfied with the evidence of three prosecution witnesses who were members of the group. Both learned magistrates analysed the evidence and reached to a conclusion that, the appellant stole the money entrusted to her.

The parties did not address the grounds specifically as I pointed earlier that the appellant just prayed the court to consider her grounds of appeal while in her submission, she mainly challenged the finding of facts yet the grounds were mainly on point of law. I am aware that as a general rule, finding of the trial court on credibility of the witness binds the appellate court unless there are circumstances requiring departure upon reevaluation of credibility. The case of **Omari Ahmed Vs. Republic [1983] T.L.R 52**, among many others ruled: -

> *"The trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility."*

The other relevant rule I am aware of is concerning the role of a second appellate court when the two lower courts had concurrent findings of fact. The rule is that the second appellate court should not lightly interfere with the concurrent finding of facts reached by the lower courts unless there are strong reasons warranting to do so. The case of **Mbaga Julius Vs. R, Criminal Appeal No. 131 of 2015** also followed in **Nchangwa Marwa Wambura Vs. Republic (Criminal Appeal 44 of 2017) [2019] TZCA 459,** held: -

> *"We are alive to the principle that in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. This is so because we have not had the opportunity of seeing, hearing and assessing the demeanor of the witnesses. (See SEIF*

MOHAMED E.L ABADAN vs REPUBLIC, Criminal Appeal No. 320 of 2009 (unreported). However, the Court will interfere with concurrent findings if there has been misapprehension of the nature, and quality of the evidence and other recognized factors occasioning miscarriage of justice".

Therefore, at this stage this court can consider the appeal by examining the records and test whether the concurrent findings were justified by the evidence on record. Of course, keeping in mind, the advantage that the trial court had in the case, likewise the first appellate court in its re-evaluation. This is because as always known in our jurisdiction, if the second appellate court wants to test credibility of the witnesses, it can attain the same based on the record; testimonies of the witnesses and comment of witnesses' relevant conduct being part of the demeanour, if any. And generally, the court will check credibility by studying the consistence and coherence of the witnesses. See **Elisha Edward Vs. Republic, Criminal Appeal No. 33 of 2018** also the case of **Shani Chamwela Suleiman Vs. Republic (Criminal Appeal No. 481 of 2021) [2022] TZCA 592,** where it was held that: -

"On appeal the credibility of a witness can be gauged through coherence and consistence of his testimony".

I am mindful that being the second appellate court, the finding reached by the trial court on credibility of witnesses and other relevant facts to the trial court's domain as above stated, not only may bind this court but also is expected to assist this court, unless they are apparently faulty. I may therefore accord considerable weight on the credibility test by the trial court unless there are strong reasons to depart.

Having visited the records, facts are clear as laid in court through the witnesses' testimonies. Three members of the group including the secretary, coherently and consistently testified before the trial court that

the appellant was entrusted the trunk box with cash money said to be Tshs. 2,700,000/= and that the appellant reported to the members that the box which was kept under her bed was stolen with all the money and that the house was broken. That upon visit to his home where the appellant used to keep the money, they did not see any suggestion that her house was broken. All doors were intact including her bedroom door where the money was kept under the bed. This environment which the members observed at the appellant's home and her conduct, strongly suggested to them that none else than the appellant herself had stolen the money box.

It also happened that the appellant admitted by conduct and herself with her husband promised to repay the money. I have also considered her defence, she merely stated that on the fateful day she entered into her bedroom for some other issues when she noticed that the cashbox was missing. That the doors were intact but some bricks were removed at the upper course of the wall. She does not state any circumstance observed by the residents of her house.

The above evidence was well evaluated by both courts below and reached to a conclusion that, the appellant was the one who stole the money. The trial court based on the reasoning that there was no any breaking in the room where the money box was kept. The appellate magistrate accepted this reasoning and deducing from the facts, she added that since the money box was in possession of the appellant for safe custody, she was liable to ensure its safety. To the appellate magistrate, the appellant should have given some reasonable explanation to *clean her hands* under the circumstance, but she did not.

This court is well aware that findings in the courts decisions we compose every now and then, usually get upheld or challenged on some factors including but not limited to; comprehension and analysis of the

facts; application of the law to the facts as established by the evidence available; formulation of premises relevant to the contentions; sound reasoning and conclusion supported by all preceding values.

In this case, I am comfortable that both magistrates properly applied their mind to the facts, their reasoning were sound. Also correctly made observation by the appellate magistrate that, under the circumstance, theft was committed, it suited much to section 273 (b) of **the Penal Code, Cap 16.** To measure whether the offence was proved beyond reasonable doubt, one must study the nature of the matter.

No doubt, the evidence laid before the trial court was circumstantial. The law is clear and settled that, in order for the court to convict on circumstantial evidence, at least three conditions must be met. In the case of **Agustino Lodaru Vs. R, [2014] T.L.R. 45[CA]** the court held: -

> *"There are other factors that have to be considered before grounding conviction based on circumstantial evidence. Such factors include, but not limited, to the following;*
>
> *The inculpatory facts are inconsistent with the innocence of the accused person.*
>
> *Each link in the chain be tested so as to establish or otherwise, whether it leads to the accused's guilt. If it does not, then the whole chain of circumstantial evidence must be rejected. (See: Samson Daniel versus R. (1934) 1EACA 154).*
>
> *The facts from which an inference adverse to the accused is sought to be drawn have to be proved to the required standards in criminal trials, that is, beyond reasonable doubt"*

See also other cases like **Marecha Mashala Vs. R, (Criminal Appeal No. 447 of 2019) [2023] TZCA 123** and **Sikujua Idd Vs. R, (Criminal Appeal 484 of 2019) [2021] TZCA 427** on applicability

of circumstantial evidence that the evidence must point to the accused. This is what in the latter was observed: -

> *"This Court has on several occasions restated that in a criminal case based purely on circumstantial evidence, that evidence must irresistibly point to the accused's guilt and exclude any other person"*

Like the lower courts, this court, is satisfied that all the tests were met in the evidence of the prosecution, the appellant herself did steal the money box. Conviction was proper and there is no serious fault for this court to rectify.

On the basis of the evidence highlighted above, I have accepted the findings of fact by the lower courts. I acknowledge the legal reasoning of both courts below, therefore no justifiable ground for this court to fault the finding of the courts below. It is for that reason this appeal must fail, and I dismiss it forthwith.

However, I have considered the spirit of section 5 of The Third Schedule to **The Magistrates Courts Act** (MCA) on the powers of the Primary Court together with section 29 of the MCA on the powers of this court on appeal. I order that the restoration order of repayment of the money stolen be complied today, otherwise the appellant should go to jail for one year for defaulting the trial court's order to repay such amount of money. Even if she may serve such imprisonment yet she must repay the required amount of money.

Order accordingly.

Dated at Morogoro this 21st day of August, 2023.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

21/08/2023

Court: Judgement delivered in Chambers at Morogoro on this 21st day of August, 2023 in the presence of both parties.

A.W. Mmbando

DEPUTY REGISTRAR

21/08/2023

Court: Right to appeal to the Court of Appeal explained.

A.W. Mmbando

DEPUTY REGISTRAR

21/08/2023