IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 23 OF 2023

(*Appeal arising from the Judgement of the District Court of Mkuranga at Mkuranga in Criminal Case No. 03 of 2022)*

HAMIMU SULEIMAN IBRAHIM ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

31st May, & 5th July, 2023

MWANGA, J.

The appellant, **HAMIMU SULEIMAN IBRAHIM,** appeared before the District Court of Mkuranga at Mkuranga on 23rd March 2021 to answer one count of Stealing by Agent contrary to Section 273 (b) of the Penal Code, Cap. 16 R.E 2019.

The prosecution case, so far as relevant, was this. One Hamida Masoud Ameir engaged the appellant, who owned a money transaction shop called *"Wakala"* or "Mobile Money Agent." According to the evidence, the two had worked together for quite some time before the office was relocated to the Kisemvule area. While at Kisemvule and a day after the starting of a business in the newly opened shop, it was alleged that on 22nd March 2021, the appellant, being an agent of the said Hamida Masoud Ameir, stole shop money to the tune of Tshs. 5,259,094/=.

As a result, the agent preferred a charge of stealing against the appellant, who ultimately denied the same. After the trial, he was found guilty as charged, convicted, and sentenced to serve four (4) years imprisonment and a refund of Tshs. 5,359,094 /=.

Believing to be entirely innocent, the appellant appealed against the convictions and sentences of the District Court on thirteen grounds of appeal, which can be listed as follows: -

1. The trial Magistrate erred in law and fact for convicting the appellant without considering that there was a variance between the charge

and evidence on the date of commission of the offense, the variance which should have been resolved in favor of the Appellant.

2. The trial Magistrate erred in law and fact for convicting the appellant of the offense of stealing by an Agent while both the prosecution and defense evidence show that the appellant was a servant and not an agent.
3. That the appellant had denied the facts in the preliminary hearing, which stated that on the 23rd day of March 2021, he was arrested by a police officer, taken to Vikindu Police Post, and interrogated by a police officer, the trial Magistrate erred in law and facts for convicting the appellant while the prosecution failed to bring before the court the police officers who were said to have arrested and interrogated the appellant to testify on the stated facts or getting any other proof proving the arrest and interrogation by the police officers with the appellant. This failure should have been resolved in favor of the appellant.

4. That the trial Magistrate erred in law and fact by failing to evaluate and analyze well the evidence brought before it. As a result, he arrived at a wrong decision.

5. That the trial Magistrate erred in law and facts for convicting the appellant based on the weakness of his defense.

6. The trial Magistrate erred in law and facts for convicting the appellant based on the contradictions between the prosecution and defense evidence.

7. That the trial Magistrate erred in law and fact to convict the appellant by relying on the sole testimony of PW3 Rehema Mtandama and PW4 Yusuph Shukuru, who were both employees of PW1 Hamida Ameir to vindicate that PW3 gave the appellant Tshs 1,000,000/= (one Million) which she owed to PW1 without any further proof while knowing that PW3 and PW4 had interest to serve to PW1.

8. That the trial Magistrate erred in law and fact by relying on exhibit P5, which had no evidential value to convict the appellant. The said exhibit was printed out on 4th February 2022 after the hearing had started and the investigation was complete.

9. That, having regard to the question on the date and time PW1 went to Vikindu Police Post to report the incident of theft, the trial Magistrate erred in law and fact for convicting the appellant. At the same time, there was contradicting testimony between PW1 and PW7 when PW1 went to report the theft incident at Vikindu Police Post. These contradictions should have been resolved in favor of the appellant.

10. That, regarding the date and time the police officer (s) went to the scene, the trial magistrate erred in law and fact for convicting the appellant. At the same time, there were contradictions between the

testimony of PW1 and PW7 on when the police officer (s) went to the scene, the contradictions which should have been resolved in favor of the appellant.

11. The trial Magistrate erred in law and fact for convicting the appellant. At the same time, there was a contradiction between the testimony of PW6 and PW7 on when and how the customer transactions with Number 0716832488 registered in the name of HAMIDA AMEIR (PW1) were requested from MIC TANZANIA LIMITED (TIGO). These contradictions should have been resolved in favor of the appellant.

12. That the trial Court erred in law and fact for convicting the appellant by relying on the testimony of PW1 and PW7 that the business was to start on 21st March 2021 and disregarding the appellant's defense that the business was to begin on 17th March 2021 without advancing reasons to that effect.

13. The trial Magistrate erred in law and fact for convicting the appellant without considering his defense that he was the one who reported the theft to Vikindu Police Post.

In this appeal, the appellant was represented by the learned counsel, Mr. Robert Rutaihwa and the respondent was represented by Mr. Emmanuel Maleko, the learned Senior State Attorney. The appeal was argued by way of written submission.

Mr. Robert submitted on grounds 1, 2, and 4 separately, while grounds 5 and 6 were argued together. The rest of other grounds i.e. 3rd, 4th 7th, 8th, 9th, 10th, 11th, 12th and 13th were all condensed and argued together. He, thus, commenced his submission, stating that looking at the particulars of the offense and the evidence on record, the appellant, at no point in time, stood as an agent of PW1. It was the counsel's submission that the relationship between them was between employee or servant and employer. Thus, he submitted that stealing by an employee is a different charge altogether from stealing by an agent, both in fact and under the law. The counsel contended further that the prosecution and defense evidence show that the appellant was a servant, not an agent. According to the counsel, PW1 was the owner of the Mobile Money transaction who is legibly qualified to be referred as an agent of the Mobile Companies with Vodacom, Tigo, and Airtel. The counsel cited the decision of this court in the case of **Rahimu Mohamedi Mbungo@Tongolanga Versus Republic,** where on page 6, Laltaika, J. submitted that there is a thin line between the offense of stealing by agent and civil wrongs.

The learned counsel proceeded further, submitting in the first ground of appeal that the alleged offense of stealing by the agent was said to have

been committed on the 22nd day of March 2021 at about 14:30 hours. Still, out of the seven (7) prosecution witnesses, no one testified that the offense of stealing by the agent was committed on 22nd March 2021 at 14:30 hours. The counsel referred to the testimony of PW1 where, on page 7 of the proceedings testifying in chief, she alleged that on 16th March 2021, she transferred Tshs. 1,980,000/= from NMB to her Agent till No. 0716 832488, and on the same date, she again transferred Tshs.400,000/= to Airtel till No. 0689 508801. The counsel also referred to page 9, where PW1 testified that on 16th March 2021, she deposited to the appellant Tshs. 1,980,000/= via Tigo till No. The appellant transferred Tsz. 1,989,000/= to another agent. Further, on the same day, he also transferred Tshs. 1,500,000/= to 0656 851212 (An agent till number. Further reference was made on page 11 of the proceedings when PW1 was cross-examined and testified that some money was transferred from 16th to 20th March 2021. With such testimonies, the learned counsel is questioning whether this alleged transfer to another agent on 16th March 2021 constituted stealing because the same is not reflected in the charge sheet, as the date of the omission of the offense, according to the chargesheet, was 22nd March 2021.

In addition, the learned counsel submitted that there was no direct evidence to prove that on 22nd March 2021, the appellant did steal the alleged money from PW1. More so, no eye witness verifying the fact of stealing on that date and hours, as alleged in the charge sheet. To support his contention, the learned counsel quoted the evidence of PW7 D/C Aggrey on pages 29 to 33 of the typed proceedings when saying that he was doubtful about whether the sum was stolen.

On top of that, the counsel referred judgment of the trial court stating that the trial magistrate did not analyze any evidence regarding the date of commission of the offence alleged as he doubted whether the prudent person can leave cash on the table drawer and go to the mosque.

The counsel concluded that, in as much as there was no evidence pointing to the date of commission of the offence but all evidence referring to different dates altogether, there was a serious variance between the charge and proof, which ought to have been resolved in favor of the appellant. The counsel cited the decision of the Court of Appeal in **Vumi Liapenda Mushi Versus Republic,** Criminal Appeal No. 327 of 2016 CAT at Arusha (unreported), where on page 7 of the typed Judgment, the Court held that where there is variance in the charge and the evidence, it should

be resolved in favor of the appellant. The counsel also cited the decision of this Court in **Abubakari Rashid Versus The Republic,** Criminal Appeal No. 24 of 2021, where Hon. Kakolaki J, quoting the decision in **Abel Masikiti Versus R.** at page 9, held that in any criminal charges, the prosecution must lead evidence disclosing the offense was committed on the date alleged in the charge sheet, failure of which is to render the preferred charge fatally incurable for being unproved, unless the same is amended under Section 234 (1) of the CPA, this entitle the accused to an acquittal.

In grounds 5 and 6 of the appeal, the learned counsel submitted that the trial magistrate pointed the contradictions regarding the testimonies of PW1, PW3, and PW7 in respect of the dates of the commission of the offence and the evidence adduced but failed to resolve the same in favor of the Appellant. Further, the counsel bashed the trial court judgment when the trial magistrate, on page 18 of the decision, said that although a person cannot be convicted on the weakness of his defense, the liability and contradictions strengthen the prosecution case. The counsel considered such findings to negate the court's duty to uphold the established principle that the prosecution must prove the case beyond all reasonable doubt.

Grounds of appeal No. 3, 4, 7th, 8th, 9th, 10th, 11th, 12th and 13th were submitted together. According to the counsel**,** the trial magistrate failed to analyze and evaluate the evidence on record on the basis that **One,** the variation of the chargesheet and the evidence adduced in terms of the date and time of the commission of the offence. The trial magistrate discovered that PW1 opened the shop with an amount of Tshs. 5,259,094/=on 21st March 2021. Therefore, he would have rejected relying on the previous transactions dated 16th March 2021, which do not establish any offense. **Two,** had the trial magistrate considered the evidence of PW3 and PW4 in the full effect, he would have realized that the same was incredible as PW3 was previously in debt to PW1 to the tune of 1,000,000/= but again, PW4 had replaced the appellant to his position as a servant, therefore had interests to serve. **Three,** the mental element in the alleged offense was never established. **Four,** there was no justification in awarding compensation to PW1 because the Appellant committed no crime.

According to the counsel, the trial court ought to have advised the parties to resolve the matter through disciplinary actions if there was an allegation that the appellant, as an employee, was negligent in discharging his duties. It was his view that that wasn't the case, and the trial court

miserably mishandled the evidence on record to convict the Appellant wrongly.

Per contra, Mr. Maleko opposed the arguments of the learned counsel, Mr. Robert, inviting this court to hold that all grounds of appeal are not meritorious. According to Mr. Maleko, there is evidence that the appellant was an agent of PW1 with a payment of Tshs. 100,000/=as a commission. He also referred this court at paragraph 15 of the trial court judgment where the term "agent was defined," stating that considering the nature of the business and the fact that the appellant was allowed to take profit, it was clear that the appellant was doing business on behalf of PW1.

Responding to 6, 9, 10, and 11 grounds of appeal, Mr. Maleko submitted that the contradictions, if any, were minor and did not go to the roots of the case. To support his contention, the learned State Attorney cited the decisions in **Emmanuel Lyabonga Versus Republic,** Criminal Appeal No. 257 of 2019 CAT (unreported) and **Bakari Hamisi Ling'ambe Versus Republic**, Criminal Appeal No. 161 of 2014 CAT(Unreported).

In reply to the 5th, 12th, and 13th grounds of appeal, Mr. Maleko resisted the contention of his fellow counsel, arguing that the accused was entrusted

with money and, in the absence of clear evidence that the money was stolen, proves that no one other than the appellant did steal the complainant money. According to him, the appellant was not convicted on the weakness of his defense but instead based on the grave evidence of the prosecution, which was reliable, credible, and trustworthy.

I have seriously reviewed the submissions of the counsels and authorities availed to me in this appeal. One of the central issues raised in the grounds of appeal was that the criminal charge leveled against the appellant was preferred under a wrong provision of the law, which is Stealing by an Agent contrary to Section 273 (b) of the Penal Code, Cap16 R.E 2019. The relevant section reads: -

> ***"273. If the thing stolen in any of the items following, that is to Say-***
>
> ***(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 for any purpose or to any person the same or any part thereof or any proceeds thereof."***

The offense of stealing by the agent is underpinned by terms such that the property claimed to have been stolen was entrusted to the offender to either retain in safe custody or to apply, pay, or deliver for any purpose or to any person. The offense itself is tricky; therefore, the prosecution is tasked to prove essential ingredients of the theft offense. The Court of Appeal echoed such lucid application of the provision in the case of **Meck Malegesi & Another Versus Republic,** Criminal Appeal No. 128 of 2011 (unreported), where it was held that -

> ***"Component of stealing is also integral to the offence of stealing by an 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."***

In the above reasoning, if the prosecution successfully proves that theft was committed, the next question is whether there was an agent-principal relationship. That is to say, the appellant was an agent of the complainant (PW1).

Given the above, having perused the evidence adduced at the trial court, the prosecution proved otherwise that the relationship between the appellant and the complainant was between employee or servant and employer. PW1, page 7 of the typed proceedings, was quoted saying: -

> "*Apart from being a public servant, I'm also an* ***electronic money transfer agent*** *… I* ***employed*** *HAMIDA (sic) s/o IBRAHIM on agreement that I'm his employed (sic) and that I would be paying him a starting salary of Tshs. 100,000/=*.

Likewise, on page 11 of the proceedings, while cross-examined, PW1 said: -

> ***"YUSUPH is my employee, <u>just like HAMIMU was</u>."***

The appellant was referring to "Hamimu," the appellant herein. In the circumstances, the agency-principal relationship between the appellant and PW1 cannot be seen to have existed in the business. The opposite, as rightly submitted by the learned counsel for the appellant, that the owner of the Mobile Money transaction (PW1) was the one to be referred to as an agent of the Mobile Companies to wit Vodacom, Tigo, and Airtel and not the appellant.

Another critical area to look at was the proof of the theft offense, as stated in the above-cited case of **Meck Malegesi & Another Versus Republic**(supra). That being not enough, the position was also laid down in the decision of this court in **Peter James Mkalagale and Another Versus Republic,** DC Criminal Appeal No. 32 of 2019 [Unreported], whereby my brother Mutungi, J. had this to say: -

> ***"The prosecution side, if at all, was being guided by The charging offense then had a duty to prove the ingredients. of the said offense. I borrow a leaf from the case of CHRISTIAN.***
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> ***MBUNDA Versus REPUBLIC (Supra), which was also cited by the respondents that: - ".... for an Appellant to be convicted under Section 273 (b) the prosecution must prove, interalia that came into possession of the alleged stolen property as an Agent of either the real owner or special owner".***

The learned counsel, Mr. Robert, contended that there was no proof of the theft offense. I tend to agree with him because the evidence of the

prosecution is based more on the actions of the appellant's transferring money to another agent***.*** If the money was transferred to another agent, then it was right for Mr. Robert to argue that the complainant in this case was an agent and not a principal of the telecommunication companies. Reference was made in the transfers to another agent from 16th to 20th March 2021 and 22nd March 2021. whether such transfer constitutes stealing must be a matter of evidence that the appellant fraudulently took the money within the meaning of section 258 (1) and (2) (a) of the Penal Code. The evidence of PW7 on pages 29 to 33 of the typed proceedings was not even sure whether there was real stealing. As rightly observed by Mr. Robert, page 30 of the proceedings indicated evidence of PW7 to the effect that: -

> ***"I came to know that on 16/3/2021 – 19/3/2021, there were money transactions performed by HABIB…….. I was doubtful on whether the sum was stolen; it is HABIB who stolen the money".***

Not enough, Mr. Maleko quoted page 18 of the trial court judgment where, in the first line, it was stated that;

"...the prosecution side managed to prove that accused was entrusted with the money ....in absence of clear evidence that the money was real stolen proves that no one other than the accused did steal the complainant's money..."

Again, in the trial court's judgment on page 17, the magistrate questioned whether the cash was stolen. In response, it was pointed out that, I quote: -

"It is hard to believe that a prudent person can leave cash on the table drawer and went (sic) to the mosque."

Such doubtful moments, as shown both at the trial court proceedings and the judgment, indicated that even the trial magistrate was unsure if the appellant stole the money. The decision was made based on assumptions, which, in law, is unacceptable.

It is a trite law that, in criminal cases, the burden of proof lies upon the prosecution, and it is beyond reasonable doubt. That was the position echoed in the case of **Pascal Yoya @Maganga Versus the Republic**, Criminal Appeal No. 248 Of 2017(Unreported), where it was held that: -

''It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. 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''.

In addition, in the case of **Mohamed Haruna @ Mtupeni & Another Versus Republic,** Criminal Appeal No. 25 of 2007 (unreported), the court had held that: -

*"... **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 defense."***

Again, in **Mwita and Others v. Republic** [1977] TLR 54, the court, when hearing a criminal appeal, emphasized that:

"The appellants' duty was not to prove that their defense was true. They were required to raise reasonable doubt in the mind of the magistrate and no more."

Having said all that, there was no proof that the theft was proved under sections 258(1) and (2) of the Penal Code because from the above-cited section, the first essential ingredient constituting the offense of theft is proof beyond reasonable doubt that the appellant stole the money.

After further examination and analysis of the evidence on record, it is reasonable to hold that stealing by the agent was not a proper offence to charge the appellant, who the complainant employed at the time. The fact established that the appellant was receiving a commission at the rate of Tshs. 100,000/= was not necessarily the fact that the appellant was an agent. In the cited case of **Abubakari Rashid Versus The Republic**(supra), the court held that,

> "***It is the law that in any criminal charges, the prosecution must lead evidence disclosing the offence was committed on the date alleged in the charge sheet, failure of which is to render the preferred charge fatally incurable for being unproved, unless the same is amended under Section 234 (1) of the CPA, this entitles the accused to an acquittal***.

The preceding notwithstanding, based on the shortcomings in the prosecution evidence, the appellant should have been given the benefit of the doubt.

As a result, I allow the appeal, quash the conviction(s), and set aside the sentence(s). The orders for compensation are also set aside. I, at this moment, immediately order the Appellant's release unless lawfully held.

Order accordingly.

H. R. MWANGA

JUDGE

05/07/2023

COURT: Judgment delivered in Chambers this 5th day of July 2023, in the presence of Advocate Rehema Samwel for the Appellant and presence of Mr. Emmanuel Maleko, learned Senior State Attorney for the respondent.

H. R. MWANGA

JUDGE

05/07/2023