IN THE HIGH COURT OF TANZANIA

MWANZA SUB – REGISTRY

AT MWANZA

PC CRIMINAL APPEAL NO. 15 OF 2023

(Arising from the Judgment of the District Court of Magu in Criminal Appeal No. 22 of 2022 dated 13th April 2023 originating from Primary Court of Kisesa in Criminal Case No. 134 of 2022 dated 19th July 2022)

SUDI MZEE SUDI.....APPELLANT

VERSUS

LUCEA CHRISTOPHER.....RESPONDENT

JUDGEMENT

Date of last order: 30st October 2023
Date of Judgement: 6th November 2023

MTEMBWA, J.:

In the Primary Court of Magu at Kisesa, the Appellant was charged with the offence of stealing contrary to ***sections 258 and 265 of the Penal Code Cap 16 [RE 2019].*** It was alleged that, the Appellant on 23rd May 2022, did steal 77 bags equal to 7700 kilograms valued at Tsh. 11,550,000/= owned by the Respondent.

Having evaluated the evidence adduced during hearing, the trial court convicted the Appellant of the offence as charged and was ordered to secure peace within six months. The Appellant also was ordered to pay the Respondent Tsh. 11,550,000/= or handle to her a total of 7,700 kilograms of rice. Having been not satisfied with the conviction and sentences meted against him, he unsuccessfully appealed to the District Court of Magu. Dissatisfied further, he has now filed before this Court a Petition of Appeal with the following grounds;

1. *That the learned Senior Resident Magistrate erred in dismissing the above-mentioned appeal as there was no sufficient reason for doing so.*

2. *That since the Respondent did not prove the offence of stealing to the required standard. The learned appellate senior Resident Magistrate was not justified in upholding the Judgment of the Kisesa Primary Court and subsequent orders.*

During hearing of this appeal, the Appellant was represented by Mr. Anthony Nasimire, the learned counsel and the Respondent enjoyed the service of Mr. Maro Samweli and Mr. Mwita Emmanuel, the learned counsels. By agreement, this appeal was heard by way of written submissions. Professionally, I congratulate them for filing the written submissions within short time as ordered.

Arguing on the first ground of appeal, Mr. Nasimire submitted that the learned appellate magistrate at page 7 of the Judgement introduced new issues, addressed them and ultimately dismissed the appeal. He said, the issues to which the court based on were not brought to the attention of the parties and that curtailed the right to be heard to the parties. He therefore implored this court to evaluate and settle such fundamental error of the appellate court.

Replying to the first ground of appeal, Mr. Mwita Emmanuel submitted that it is not true that the Appellate court introduced new issues as alleged. He added that the appellate court evaluated the evidence on records and arrived at the best conclusion. He said, the issues raised at page 7 of the Judgment were not procedural

irregularity and did not infringe the Appellant of the right to respond to them. He alleged further that, at that stage of appeal, the issues could not be formulated.

Painstakingly I went through the records only to find out that the Appellant raised three grounds in his Petition of Appeal dated 15th August 2022. ***First,*** that the learned trial Magistrate erred in conviction the Appellant without evidence on records. ***Secondly,*** that learned trial Magistrate erred in relying on the documents which were not read during hearing. ***Thirdly***, that the learned trial Magistrate was not justified in ignoring the appellant's defense. At page 7 of the typed Judgment, the learned Magistrate formulated three issues or questions. ***One***, is it true that the Appellant sold the Respondent's bags of rice? ***Two***, is it true that the trial court did not consider the appellant's defense? ***Three***, is it true that the trial court unprocedurally received the documents?.

A close check one reveals that the issues or questions by the learned Magistrate were formulated from the appellant's Petition of Appeal. The first issue intended to ascertain whether there was theft

of 7,700 kilograms of rice. The second issue intended to establish whether the trial court failed grossly to consider the Appellant's defense. The third issue intended to establish whether the documents were properly received during hearing. So, the questions touched each of grounds of appeal raised. I see no problem on this. However, at this stage, it does not mean that I am satisfied with the way the same were determined by the learned Magistrate. I find therefore that the first ground of appeal has no merit and I proceed to dismiss it.

On the second ground of appeal, Mr. Nasimire submitted that the trial court did not prove the offence of stealing under ***section 258 of the Penal Code Cap16 [RE 2022]***. He added that, for a thing to be stolen, it must have been taken from either general or special owner. That during hearing it was alleged that the kilograms said to have been stolen were under the custody of the Appellant as such, convicting him under the above section was contrary to what the law provides. He however submitted that there was no evidence that the properties said to have been stolen actually existed. He cited the case of ***John Mgindi v. R (1992)*** **TLR 377**. He finalized by

highlighting that it was not true as ruled out by the Court that the documents were read during hearing.

Replying to the second ground of appeal, Mr. Mwita Emmanuel submitted that the Respondent proved beyond reasonable doubts that the Appellant stole 7,700 kilograms of rice. He added further that the appellant had full control of the premises as such he was supposed to make sure that the said kilograms are safe. That since the Appellant agreed to have received the said bags, it is undisputed that the Appellant is the owner of the said premises. He distinguished the cited case of **John Mgindi (supra)** and added that in this case the Appellant had exclusive control of the building where the said bags of rice used to be stored.

I closely looked at Primary Court Form No. 1 (Fomu Jinai Na. 1) and noted that on 1st June 2022 the Respondent filed her complaint. Thereafter the Charge of stealing was preferred. It was established that;

Wewe Sudi Mzee unashitakiwa kuwa mnamo 23/5/2022

huko kanyamo kata ya Bujora (W) Magu MZA kwa makusudi

na nia mbaya uliiba mchele wa mlalamikaji kilo 7700 zenye thamani ya Tsh 11,550,000 kitendo ambacho ni kinyume cha sheria za nchi hii.

The Appellant pleaded not guilty to the offence. During hearing the Respondent (PW1) testified that in the year 2020 she collected 288 bags of rice and only 264 were threshed as 24 among them could not be traced. That in the end, she got about 14,300 kilograms but 6,600 kilograms were sold. That the remaining balance of 7700 kilograms of rice were stored in the warehouse under the control of the Appellant. Later on, the said kilograms could not be traced. It was learnt later on that they were sold by the Appellant without her consent. PW2 one Julius Chamba Kulwa was of the different story. He testified that his wife, PW1, threshed 114 bags of rice. The Appellant (DW1) during hearing conceded that in the year 2020 the Respondent and her husband brought 278 bags of rice for threshing. However, he denied to have sold the said bags. He said, the Respondent was responsible to sell the bags of rice.

From what I have observed, there is a variance between the complaint filed by the Respondent and the charge. According to the complaint, it could appear, it was the Respondent (complainant) who handled the bags of rice to the Appellant (Accused person). In the first place therefore, there was no problem because the two agreed to that effect. The problem arose when the said bags could not be traced from the Appellant's warehouse. It was when a charge of stealing was preferred.

The question would be whether the Appellant was properly charged and ultimately prosecuted. The evidence adduced by prosecution reveled the offence of stealing by agent under ***section 273 (b) of the Penal Code [RE 2022]*** and not stealing under ***section 258 of the Penal Code [RE 2022]***. The section reads;

> *If 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 whole or part of the proceeds arising from any disposal of any property which has been received by the offender by virtue of a power of attorney for the disposal\ such power of attorney having been received by the offender with a direction that the proceeds should be applied to any purpose or paid to any person specified in the direction,*
>
> *The offender is liable to imprisonment for ten years.*

From the above, the question is whether the offence of stealing is an integral part of stealing by agent. I borrowed some incentives from the Court of appeal of Tanzania in ***Meck Malegesi V. R*, Criminal Appeal No. 128 of 2011, CA at Mwanza**, the court said;

> *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 follows therefore that in order to prove, as against the appellant, the prosecution was right to bring its case within the ingredients of the offence of theft under ***section 258 (1) and (2) (a) of the Penal Code.*** Having so resolved, the next question is whether the offence of stealing was proved beyond reasonable doubt**.** ***Section 258 (1) of the Penal Code*** (supra) provides that;

> *(1) A person who fraudulently and without claim of right takes anything capable of being stolen; or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.*
>
> *(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say*
>
> *(a) an intent permanently to deprive the general or special owner of the thing of it;*

From the above-cited section, the first essential ingredient constituting the offence of theft is the proof beyond reasonable doubt

that the taking of the bags of rice was without any claim of right. That taking of the bags is the physical part or actus reus of the offence of theft. While the respondent maintained that the said bags were kept in the warehouse controlled by the Appellant, the Appellant himself did not buy that story. He said all the bags were taken or sold by the Respondent.

It follows therefore that it was a duty of the Respondent to prove beyond reasonable doubt that the said bags of rice were under the custody of the appellant or if I may add, were entrusted to him. Such kind of evidence is lacking. It can not be imagined how the Respondent was so trustful to the Appellant that she could not even have agreement or records of what he entrusted to him. Even Exhibit ***"A",*** although tendered illegally as we shall see later on, cannot help the day. ***Section 110 (1) and (2) of the Law of Evidence Act, Cap 6 [RE 2019]*** provides that;

> *(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The Respondent therefore was under duty by law to prove that he entrusted the bags of rice to the Appellant short of which the allegations can not stand.

At page 6 of the typed proceeding, PW2 testified that he was the one who handled the 77 bags of rice to the thresher (Mkoboaji) who is the Appellant's employee. At page 7, he narrated further that ***"mchele huo nilimkabidhi msagishaji pale mashinani"***. At page 4 of the proceedings, when cross examined, the Respondent testified that ***"mzigo niliuacha mashineni na kukukabidhi tangu siku ya kwanza tunaweka mzigo huo"***. In that respect it was not clearly established who handled the bags to the Respondent. Was it the Respondent or DW2? It could appear the bags were not even handled to the Appellant himself but to his employee if we can buy PW2's story. At any rate and costs, there was no cogent evidence that the Appellant was so entrusted with the said bags. Going through the

records it was not clearly also established as to who owned the bags between the Respondent and DW2. With those contradictions, it was unsafe to convict.

In that circumstance it can not be safely arrived that the offence was proved to the required standards. As said before, it is not known to whom the bags were handled to and or who owned the bags between the Respondent and DW2. Is that circumstances it was unsafe not believe the defence by the Appellant that the said bags of rice were not left under his custody. In the case of ***John Makolobela Kulwa Makolobela & Another*** *alias* ***Tanganyika Versus Republic (2002) TLR 296***, the court noted;

> *A person is not guilty of a criminal offence simply because his defence in not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which established his guilty beyond reasonable doubts.*

The Respondent tendered Exhibit ***"A"*** during hearing. Also, DW2 tendered Exhibit ***"B".*** As they can be seen at page 5 and 11 respectively of the Proceedings, the same were tendered after cross

examination (during re-examination). In fact, that was unprocedural because the Appellant and the Respondent both did not have the chance to cross examine on the documents tendered. Even if they were so received at that stage, the Appellant and Respondent could have been offered an opportunity to cross examine on them. The records are silent as to whether the Appellant and or Respondent were offered such an opportunity. That was typically curtailment of the right to be heard.

There is another anomaly. The said documents were not read during hearing. The learned Appellate Magistrate resolved that the documents were read. With respect, the records do not support that. There is nothing suggesting that the documents were read after they were tendered. In ***Steven Salvatory v. The Republic*, Criminal Appeal No. 275 of 2018, CA of Tanzania at Mtwara** (unreported), the Court said;

> *Wherever it is intended to introduce any document in evidence, it should first be cleared for admission and actually admitted before it can be read out*

The Court proceeded to note at page 7 of the Judgement thus;

> *Applying the above stated legal position to the instate case, it is clear that after exhibit P1 was tendered and cleared for admission,* ***it did not complete the third stage of being read out in Court so that its contents would be heard by the Appellant****. Thus, exhibit P1 was improperly admitted in evidence. For that reason, we accordingly expunge it from the records.*

In the same way, Exhibits ***"A"*** and ***"B"*** are hereby expunged from the records. As said before, they were not read, as such there is no oral accounts on their contents. But, still, the remaining evidence cannot support the charge as aforesaid.

The Appellant's counsel, in his written submissions narrated that the Appellant's defense was not considered. With respect, that was not one of the grounds of appeal. It was raised through written submissions without leave of this Honourable Court. I will therefore not consider it. In view of the above, the second ground of appeal too has merit and I proceed to allow it.

In the upshot, the appeal is allowed. The conviction, sentence and orders meted against the Appellant by the lower courts are quashed and set aside.

I order accordingly.

Right of appeal fully explained.

DATED at **MWANZA** this 6th November 2023.

H.S. MTEMBWA
JUDGE