IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 75 OF 2023

(Originating from Criminal Case No. 127/2022 in the District Court of Biharamulo)

DANFORD BUGANZI @ CHAMA.....1ST APPELLANT

GRACE JACOB .....2ND APPELLANT

VERSUS

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

JUDGMENT

18/03/2024 & 02/04/2024
E.L. NGIGWANA, J

This criminal appeal originates from the District Court of Biharamulo, at Biharamulo where the appellants were convicted and sentenced with the offence of stealing by agent. To appreciate the context upon which this criminal appeal was brought, it is apposite to narrate the historical background deciphered from the charge and evidence tabled at the trial court.

The appellants were hired by the complainant one Lucian Kifulebe who is a businessman operating MPESA and Bank agency business with NMB, CRDB and Azania Bank.

It was alleged in the first count, that the first appellant on 21st day of October, 2022 at 09:30hrs at Biharamulo town within Biharamulo District in Kagera Region, did steal cash money **TZS 14,760,891/=** which was entrusted to him by Lucian s/o Kifulebe (the complainant) to use it for business purposes, instead, he did steal the said money and spent for his own profit.

For the second appellant, it was alleged in the second count that on the same date and time, she did steal the cash money **TZS 3,558,091/=** which was entrusted to her by the same complainant for business purpose use, instead, she spent it for her own use.

The trial court conducted a full trial and ultimately, it was convinced that the case was proved beyond reasonable doubt whereas both appellants were convicted and severally sentenced to serve four (4) years term in jail.

Being disheartened with the conviction entered and sentence meted out by the District Court of Biharamulo at Biharamulo, the appellants have registered this appeal challenging the same through the following grounds:

1. *That, the trial court erred both in law and in fact to hold that the prosecution discharged its onus of proving the case against the appellants beyond reasonable doubt whereas not.*

2. *That, the trial court erred both in law and in fact to treat and rely on the evidence of PW2 as if he was an expert witness whereas he lacked such competence.*
3. *That, an adverse inference be drawn against the prosecution case for failure to produce in court material witnesses namely: (i) the wife of PW1, (ii) a person mentioned by PW1 as Erick who is alleged to have been sent to the bank to deposit Tshs. 1,000,000/= for Mpesa float and (iii) G 1651 D/CPL Abdul of Police Biharamulo as well as the abandonment of tendering in court of the inspection report purported to have been prepared by PW2.*
4. *That, the trial court misdirected itself by dealing with the prosecution evidence on its own that it was true and arrived at the conclusion without proper evaluation and consideration of the defence evidence.*
5. *That, the trial court misdirect itself for overlooking the doubts created, raised by the defence evidence thereby failing to resolve the same in favour of the appellant.*

6. *That, the trial court erred both in law and in fact to sentence the appellant who were not convicted for he charges that had been leveled against them.*
7. *That, trial court erred both in law and in fact to sentence the appellants on a nonexistent provision of the law which they are hitherto serving illegally.*

Finally, the appellants pray for the appeal to be allowed by quashing the conviction and setting aside the sentence meted out.

When the appeal matured for hearing, the appellants were represented by Mr. Christian Byamungu, Advocate and the respondent republic was represented by Mr. Jamal, the State Attorney (SA). Mr. Christian dropped the 6th and 7th grounds of appeal and remained with only five grounds where the 1st ,2nd and 3rd grounds were argued collectively, equally too, for the 4th and 5th grounds.

Arguing on the 1st, 2nd and 3rd grounds, Mr. Christian Byamungu submitted that the prosecution's case at the trial failed short of the following: **one,** failure to prove the case beyond reasonable doubt. **Two,** failure by the prosecution to call material witnesses. **Three**, failure of the prosecution to

tender audit report" *report ya ukaguzi wa mahesabu"* and, **four**, prayer to add the exhibit without affording the appellants the right to be heard.

He started explaining that the appellants stood charged with an offence of stealing by agent contrary to section 273 (b) and Section 258 (1) of the Penal Code, [Cap 16 R.E 2022]. He emphasized in that respect the prosecution had the duty to prove the charge beyond reasonable doubt as provided under section 3 (2) (a) of the Evidence Act, [Cap 6 R:E 2019] and as per the case of **Jonas Nkize versus Republic** [1992] TLR 123, also as per **Said Hemed versus Republic** [1987] TLR 117.

The appellant's counsel submitted further that the prosecution featured two witnesses to wit; PW1 and PW2, and tendered one exhibit to wit; P1, whereas PW1 testified how he hired the appellants and how he handed money to them daily and they returned the money during evening hours. Mr. Byamungu went on submitting that at page 14, it is evident that there are circumstances in which PW1's wife used to hand over money to the appellants but PW1 did not explain the amounts which he personally issued to the appellants. He wondered why PW1's wife was not summoned as a witness despite the fact that she was listed in the list of the prosecution

witnesses as Consolata Ntahondi. It was Mr. Byamungu's position of law that failure to call PW1's wife, left the evidence of PW1 uncorroborated.

The appellant's counsel contended further that the evidence of PW1 in respect of the amounts handed over to the appellant was hearsay. He referred this court to section 61 and 62 (1) (a) and (b) of the Evidence Act, [Cap 6 R.E 2022] which requires oral evidence to be direct. He further explained that as far as hearsay evidence is concerned, the court may accord no weight or accord little weight. He supported his position with the case of **Jadili Mahumbi versus Republic,** Criminal Appeal No. 229 of 2021 Court of Appeal of Tanzania at Kigoma. (Pages 11 – 12) and **Ndaisenga Vicent versus Republic**, Criminal Appeal No. 523 of 2021 Court of Appeal of Tanzania at Kigoma (pages 16 – 17). Mr. Byamungu therefore prayed to the court to see the hearsay evidence adduced by PW1 as of no evidential value.

Cementing on the credibility of PW2, Mr. Byamungu submitted that the said witness was not a competent witness because he did not submit credentials or documentary proof to show that he was an accountant. He argued that since PW2 was not a Certified Public Accountant, that is why there was no audit report tendered in court and that his investigation was merely internal one. He added that since PW2 was employed by PW1, it cannot be said that

the investigation was conducted by a free or an independent witness who had no interest to serve. He followed the stance in the case of **Kanael Sindafoo Ndasha and Two Others versus Brac Tanzania Finance Ltd** Civil Appeal No. 25 of 2019, HCT at Arusha page 10-11.

As regard to the issue of failure to tender the audit report, Mr. Byamungu submitted that even if the court trusted PW2, PW2 did not tender his inspection report despite the fact that he told the court to have handed it to PW1. Mr. Byamungu therefore deducted that, the evidence of PW2 that he discovered the loss of TZS 3,558,091/= allegedly caused by the 1st appellant and TZS 14,760,891/= allegedly caused by the 2nd appellant is not backed up by any document. He therefore contended that it is clear the trial court relied and acted on evidence which was neither tendered nor admitted as evidence in court, hence led to miscarriage of justice. (PW2's evidence is from pages 18 – 19).

He bolstered his stance with the case of **National Microfinance Bank PLC and Another versus Lello Laurent Sawe**, Consolidated Civil Appeal No. 385A and 339 of 2021 Court of Appeal of Tanzania at Dodoma at page 21 where the Court referred to its previous in **Shamshe Khalfa and Two others versus Suleman Hamed Abdalah** Civil Appeal No. 82 of 2012

Court of Appeal (unreported) in which it was stressed that without the report/investigation report, it is not possible to ascertain the loss. He went on substantiating that Exhibit P1 shows the transaction of issuing and reserving the money, thus was not sufficient to show that there was the alleged loss.

Mr. Byamungu went on submitting that before the commencement of the hearing at the trial court, the exhibit which was listed was *"Ripoti ya makabidhiano ya fedha kutoka kwa mlalamikaji kwenda kwa washitakiwa".* He however wondered that at page 7, it was named *"kitabu cha makabidhiano na mahesabu"* and again at page 10 it was named as "the handing money report". It was Mr. Byamungu's conviction that what is demonstrated by the three names is nothing but confusion therefore; he prayed for the court to expunge it from the record.

Coming to the issue of failure to give the appellants right to be heard, Mr Byamungu explained that on 23/02/2022, the appellants were not afforded the right to be heard before the prosecution was granted leave to add new exhibit (exhibit P1) which was not earlier mentioned during Preliminary hearing to wit. He stressed that if exhibit P1 is expunged from the record,

there will be no other documentary evidence in this case and will render the prosecution case fall short of proof.

The appellants' counsel warned himself to be alive of Section 143 of the Evidence Act, [Cap 6 R: E 2019], that there is no number of witnesses required to prove a matter. However, he made himself clear that there is exception to that rule depending on the circumstances of each case. It was his submission that this matter falls under exceptional circumstances because PW1 and PW2 left a gap which could have been filled in by other witnesses.

He explained the left gaps; that PW1's wife was not called, likewise CPL Abdul and one Erick who was mentioned by PW1 that he took money to the Bank. He cemented that the prosecution did not assign reasons as to why the said witnesses were not called to testify. He therefore prayed to this court to draw adverse inference on the prosecution case for their failure to call material witnesses. On that position, he invited this court to be guided by the cases of **Azizi Abdallah versus Republic** [1991] T.L.R. 71 and **Hemedi Said versus Mohamed Mbilu** [1984] T.L.R 113.

Submitting on the 4th and 5th grounds of appeal collectively which touches on the issue of non-evaluation of evidence and the failure of the trial

magistrate to consider the defence case, Mr. Byamungu expressed his observation that the defence evidence casted doubt on the prosecution case but the same was not resolved in favour of the appellants. He made the attention of this court at page 2 – 10 of the judgment, that the trial magistrate made a summary of the evidence adduced in court, but she never evaluated it and considered the defence case. He bolstered his stance with the case of **Stanslaus Kasusura Versus Phares Kabuye** [1982] TLR 338, Court of Appeal of Tanzania where it was emphasized that the evidence of both sides must be considered. (Pages 26-28), DW1 explained that PW1 instructed DW2, and finally ordered DW1 to give DW2 **TZS 10,000,0000/=** and finally to hand it over to one Rwandese. He contended that, that piece of evidence was never objected. DW1 also said that several times, PW1 received the money while being very drunk. Mr. Byamungu cited the case of **Jimmy Runangaza versus Republic**, Criminal Appeal No. 159 "B" of 2017 Court of Appeal of Tanzania (unreported) pages 15 – 16, where it was stated that doubts must be resolved in favour of the accused/appellant.

Mr. Byamungu went on submitting that the trial court said that the 2nd appellant received TZS 3,558,091/= from PW2 and that DW2 made such admission but does not exonerate the prosecution from proving the case since the accused person can only be convicted on the strength of the

prosecution case and not on the weakness of the defence case. To support his stance, he cited the case **of Makolobela Kulwa Makolobela and Another versus Republic** [2002] TLR 296. He added that, since this is the 1st appellate court; it has the mandate to re- evaluate the evidence adduced in the trial court and come at its own conclusion. He referred this court on the case of **Haika Chesam versus Republic**; Criminal Appeal No.37 of 2021 (pages 12-13.)

In reply, Mr. Jamal, learned State Attorney for the respondent republic submitted that, the prosecution has proved the case to the required standard as at page 15 of the typed judgment, DW2 (the 2rd appellant) admitted to have received the money indicated in the charge sheet. He added that as per the law, an accused who confesses is the best witness of his own. He went on that the 1st appellant also admitted to have received the money from PW1 and then gave TZS **10,000,000/=** to DW2, and the evidence was never denied hence the case was proved.

As regard, the complaint that, PW2 was not a competent witness for failure to show his credentials, Mr. Jamal responded that it has no merit because the learned counsel for appellants did not explain which law dictates so or he did not say which law was violated.

Responding on Exhibit P1, he submitted that it was admitted in court without objection, it was read in court in the appellants presence, thus since the same was not objected and it was admitted as exhibit, the argument that the same be expunged from the record is baseless. The issue that the Exhibit P1 had various names is an error committed by the court thus the prosecution should not be blamed.

As stated by the learned counsel for the appellants, Mr. Jamal conceded that there is no number of witnesses required to prove the fact however, on prosecution side, PW1 and PW2 were sufficient witnesses and they gave evidence of high quality therefore; there was no need to call other witnesses. He added that the evaluation was done by the trial court, and therefore, the decision rendered was very proper. In that respect, he prayed for this court to dismiss the appeal for want of merit.

In Rejoinder, Mr. Byamungu submitted the argument that DW2 admitted to have received money is baseless because the trial court record revealed that appellants pleaded not guilty to the charge, thus the prosecution had the duty to prove the case. He went on that DW1 said they were instructed by PW1 to give the money to **"Mnyarwanda"**. He reiterated his earlier submission that PW2 was not a qualified auditor. He explained that the

learned State Attorney did not respond to his submission adequately. He finally reiterated that failure by the prosecution to call material witnesses makes this court to draw adverse inference on the prosecution case. He ended up his rejoinder submission urging the court to allow this appeal by quashing conviction and setting aside the sentence imposed against the appellants.

I have read and considered the grounds of appeal, submissions from both learned counsels for parties and the entire records for the trial court. I have finally formed my considered opinion that the main wanting issue to determine is whether this appeal has merit or otherwise. By so doing, I will have to answer amid of this appeal whether the case at the trial court was proved beyond reasonable doubt.

The taking off point, is to pass through the provisions of section 273 (b) and 258 (1) of the Penal Code Cap 16 (now R.E 2022) upon which the appellants were charged and convicted with.

Section 273 (b) provides as quoted:

"Where the thing stolen is any of the following things, 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 it or any part of it or any of its proceeds for any purpose or to any person;"

It is trite that section 273 (b) is not a stand-alone provision in proving the theft related offences. In that regard, it has to be read together with section 258 (1) of the Penal code Cap 16 (supra) which also the appellants were correctly charged with. The case of **Meek Malegesi and Maura Ndaro versus DPP**, Criminal Appeal No 128 of 2011, CAT at Mwanza, it was sufficiently underscored that where one is charged with theft related offence, it must be charged with section 258 (1) and (2) of the penal code. The Court of Appeal was of the considered view that offences of stealing by agent as well as stealing by servant are integral part of theft. They must be charged together.

For easy reference Section 258 (1) provides as quoted:

"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."*

The essence of section 258 is to bring the mens rea aspect of theft to wit; the fraudulent intent into play to compliment the offence of stealing by agent.

In the case at hand, it is not in dispute that the appellants were working in the shop of the complainant (PW1) in his business of banking agency. From the evidence and circumstances underlying this case, it is clear that it is undisputed that they were in principal and agent relationship. Again, I have no doubts as per evidence from PW1 and exhibit P1 that they were entrusted a certain amount of money whereas as per exhibit P1 on 21/10/2022, the first appellant was entrusted TZS **13,000,000/=** and the second appellant, TZS **4,041,800/=** million as they used to operate their business daily without any loss save that on 21st October, 2022 where PW1 reported the appellants to have occasioned loss.

This court has discovered the shortfalls upon which the case at the trial court was flawed. **One**, the prosecution failed to **tender a financial audit report** which as per circumstance of this financial business was a plausible and credible documentary evidence to explain how the appellants occasioned loss. I say so because exhibit P1 is not audit report rather a document which shows the money which was entrusted to the appellants before financial

transactions which resulted to a loss, which is not a dispute confronting parties.

For instance, in the charge sheet, it is alleged that the first appellant stole TZS **14,760,891/=** but exhibit P1 shows that the first appellant was entrusted TZS **13,000,000/=** it was expected for the prosecution to tender the financial audit report from a qualified accountant and certified one to explain how the loss reached to TZS **14,760,891/=** for the first appellant and TZS **3,558,091/=** for the second appellant by comparing with cash at hand and electronic money in form of float.

If that is not enough, exhibit P1 had indicated the loss of the same appellant to be TZS **11,960,891.11/=** but there were other computations which added TZS **1,500,000/=** describing as Haluna and Mathayo for TZS **1,300,000/=** to bring the total of loss to be TZS **14,760,891/=** (total stolen amounts of money). However, there were no computations and reported transactions indicating how the two named persons transacted with the first appellant. Similar to the second appellant, where the charge alleges to have stolen TZS **3,558,091/=** but exhibit P1 indicates to have been entrusted TZS **4,041,800/=** but there was no computation done by the certified accountant through financial audit report. In my view, the

presentation of loss as it stands, is bound with uncertainties and hence reveals doubt in the prosecution case.

PW1 testified that he sent PW2 to conduct an audit exercise, I am thus inclined to agree with Mr. Byamungu that PW2 was neither an independent person as he was an employee of PW1 and nor was he a qualified person. Worse enough, he did not tender such a financial audit report which he testified to have made and handed to PW1.

Cementing on the need of tendering a financial audit report by the prosecution to prove the offences of theft similar to our case, my learned brother Mwipopo, J in **Bernard Israel Mnyilenga versus Republic,** DC Criminal Appeal No.75 of 2022, HCT of Tanzania relying on the position established by the Court of Appeal of Tanzania in **Azimio Machibya Matonge versus. Republic**, Criminal Appeal No.35 of 2016, Court of Appeal of Tanzania, at Tabora, (unreported), on page 17 of the judgment was quoted saying:

"As it was submitted by the counsel for the appellant, PW1 carried out his enquiry following the presence of a money deficit in school bank accounts. After completion of his investigation, PW1 made his report - Exhibit P3. This exhibit which the trial Court relied on in convicting the appellant on the 1st

count is not an audit report. ***It is a settled law that where there is an accusation of occasioning loss to the institution or specified authority, the audit report is needed to prove the presence of loss or stealing in an institution.*** *Thus, the 1st count was not proved of the absence of an audit report to ascertain the alleged stealing from the Southern Highland Schools in 2020"*

Two, it was not enough as Mr. Jamal learned State Attorney wants this court to believe that since the appellants had agreed that they were entrusted the money as it is depicted in P1, it is therefore automatically admitting that they stole the same. With due respect to the respondent's counsel, being entrusted with the money for business purpose in offences of stealing by agent is one thing and an intent to steal the same is another element which needs to be proved by the prosecution.

Even if the second appellant had admitted to have got loss, this did not mean the prosecution relinquished from performing its duty of proving its case beyond reasonable doubt pertaining how the loss came up. It is trite that the accused will only be convicted on the strength of the prosecution case and not on the weakness of the accused. In **Christian s/o Kale and**

Rwekiza s/o Benard versus R [1992] TLR 302 It was held that: *"An accused ought to be convicted on the strength of the prosecution case".*

Again, in another case of **Marando Suleiman Marando versus SerikaliyaMapinduzi Zanzibar** [1998] TLR 375, it was held that:

"The accused who needed not prove his defence, has discharged his duty in this case by merely raising a reasonable defence and sit remained for the prosecution to disprove that defence beyond reasonable doubt".

Three, exhibit P1 shows that in all dates when the accused were being handed over the money, there was no any date, they were alleged to have occasioned any loss save on one day only 21/October/2022.Therefore, it is difficult to say that the appellants failure to report the loss in time meant that they had fraudulent intent while it was on the very date when PW1 accused them for the loss. It is not enough after proving the element of entrustment alone under section 273 (b) and come up to the conclusion that theft was proved without proving another element of fraudulent intent under section 258 (1) of the penal code upon which the appellants were charged. See the case of **Meek Malegesi and Maura Ndaro versus DPP** (Supra). The element of entrustment is the *actus reus* of the offence of stealing by agent and an element of fraudulent intent is the *mens rea* of that offence.

Hence both elements need to be proved beyond reasonable doubt. As hinted earlier, the accusation of loss which is in the form of theft would be best explained by the audit report and not a handing over document; this is because what the appellants were issued or entrusted at the beginning of the business through handing over document is quite different from what they were finally accused of making a loss.

Four, failure to call material witnesses namely; G. 1651 D/CPL Abdul, Consolatha Ntahondi (PW1's wife) and one Erick. The trial court record shows that Consolatha Ntahondi and G. 1651 D/CPL Abdul were listed in the list of prosecution witnesses, but later on the prosecution side closed their case without calling them to testify and no reasons given by the prosecution for not calling them. PW1's wife was assisting PW1 to run the said business while D/CPL Abdul was the investigator of the case at hand hence, were both material witnesses.

The position of law is that, failure to call a witness who is in a better position to explain some missing links in the prosecution case justify an adverse inference against the prosecution. There are many decisions in support of this proposition. See for instance, **Boniface Kundakira Tarimo versus Republic** Criminal Appeal No. 350 of 2008,

Issa Reji Mafuta versus Republic, Criminal Appeal No. 337 of 2020 and **Yohana Chibwingu versus Republic** Criminal Appeal No. 177 of 2015 and **Ahamad Salum Hassan@Chinga versus Republic,** Criminal Appeal No.386 of 2021 (all unreported). In **Tarimo's case** in particular, it *was observed:*

"It is thus now settled that, where a witness who is in better position to explain some missing finks in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."

I am thus inclined to agree with the appellants' counsel that the offence of stealing by agent was not proved beyond reasonable doubts due to the flaws afore explained.

In the event, for the grounds afore explained, the appeal has merit and is thus accordingly allowed. The conviction entered by the trial court is hereby quashed and the sentence meted out is set aside. The appellants are accordingly set free unless held by any other lawful cause. It is accordingly ordered.

Dated at Bukoba this 2nd day of April 2024.

E.L. NGIGWANA

JUDGE

02/04/2024

Judgment delivered this 2nd day of April 2024 in the presence of both appellants, Ms. Gloria Rugeye learned State Attorney for the Respondent/Republic, and Mr. Respichius Renatus, B/C.

E.L. NGIGWANA

JUDGE

02/04/2024