

**IN THE HIGH COURT OF TANZANIA
AT MOSHI**

CRIMINAL APPEAL NO. 38573 OF 2023

(Originating From Criminal Case No. 278 of 2022, Moshi District Court)

SAID KIRUA KIRUA @ SAID KIRUA @

KIRUA SAID KIRUA @ SAID KIRUA SAID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

6th to 14th May, 2024

E.B. LUVANDA, J

The Appellant named above was tried in absentia, convicted and sentenced by the trial court to a concurrent term of imprisonment of three years for committing the offence of stealing by servant contrary to the provisions of section 342 of the Penal Code Cap 6 R.E. 2022. In addition, the Appellant was ordered to pay the complainant Direct Aid Society a sum of Tsh 20,465,100/=.

In the petition of appeal, the Appellant grounded that: One, the trial court erred in law and fact by failure to evaluate oral and documentary evidences adduced during the trial; Two, the trial court erred in law and facts for

convicting the accused (sic, Appellant) based on unproved case beyond reasonable doubt.

The Appellant submitted that the evidence is contradictory with shortcoming. He submitted that the case was heard in his absentia and he was arrested post-trial. He submitted that PW1 who is the director one Essam Ibrahim who is a Sudanese asserted that cash lost a sum of Tsh 9,119,100 were paid to ghost employees and a sum of Tsh 11,346,000 was supposed to be paid to the Loans Boards, making a grand total of Tsh 20,465,100. He submitted that PW3 who was the external auditor said a cash salary lost is Tsh 9,000,000 and Loans Board Tsh 10,000,000, which differ with PW1. He submitted that PW3 was self contradicting, arguing taking a sum of Tsh 10,000,000 and Tsh. 9,000,000 is equal to Tsh 19,000,000, queried as to where a sum of Tsh 24,400,000 alleged by PW3 to be a loss, is coming from. He submitted that the evidence of PW1 contradict to PW4 who is the officer from the loans board, who said a loss amounted to Tsh 11,116,000. He submitted that PW5 who is a human resource officer gave a figure of Tsh 20,000,000, while PW6 who is a sergeant of police said Tsh 22,000,000, arguing there is confusion for reason that every one was mentioning his/her figure.

He submitted that PW2 did not prove his name, no document was tendered if he is actually one Hemed Ally. He submitted that PW2 did not tender bank statement showing that a sum of Tsh 530,000 for November and December was credited into his account and withdrawn. He submitted that PW2 did not tender a printout of communication between PW2 and the Appellant.

He submitted that a sum of Tsh 9,119,100 was paid to employees but a sum of Tsh 11,346,000 was not explained how was withdrawn from the Bank and reached the Appellant.

For ground number two, the Appellant submitted that the alleged ghost staffs never testified and their names were not revealed, arguing only Hemed Ally appeared to testify. He submitted that the director did not handover to the Appellant letters for termination of the alleged ghost staffs, instead the director used to endorse whenever the Appellant submit the payroll. He faulted the magistrate for introducing facts which are not supported by evidence, citing page 15 and 16 of the impugned judgment. He submitted that according to PW1 the payments were effected for four years, he queried as to where is the auditor and how they used to close the accounts from 2018 to 2021.

He submitted that the magistrate believed a loss by merely seeing receipts without asking as to how were generated.

In reply, Mr. John Mgave learned State Attorney, for ground number two, he submitted that during trial the prosecution established that the Appellant was an employee as an accountant of Direct Aid Society, which facts was proved by PW1, PW3 and PW5. He submitted that the prosecution proved a loss of Tsh 9,119,100 which was paid as salaries to ghost employees. He submitted that the Appellant did not deny a fact that he was an employee including a fact that he effected those payments. He submitted that PW3 explained a loss of Tsh 24,400,000 as reflected in the audit report exhibit P11. He submitted that PW2 explained to have received money while not a staff, and later was phoned call by the Appellant who collected back the money, for explanation that it was wrongly send to PW2. He submitted that the trial court believed the evidence of PW3 (auditor) along exhibit P11 and was satisfied that the Appellant received the money.

For ground number one, he conceded a fact that the witnesses who adduced evidence mentioned different figures of an amount stolen. He submitted that the discrepancy of PW1 to PW5 was minor, argued are curable under section 388 Criminal Procedure Act, Cap 20 R.E. 2022, for reason that did not go to

the root of the case and therefore did not prejudice the Appellant. He submitted that human memories are invariable, argued the discrepancy may be due to lapse of time.

He submitted that the testimony of PW2 was enough to prove that the Appellant used to pay money to ghost employees. He submitted that the trial court was privileged of seeing witnesses, their credibility, arguing it was satisfied that they were credible, citing **Nyakuboga Boniface vs Republic**, Criminal Appeal No. 434 of 2016, CAT. He faulted the arguments of the Appellant argued that he jumped bail, waived to participate trial and cross examine witnesses and documents.

On rejoinder, the Appellant submitted that he was not a payment officer rather he was merely preparing, argued the payer was the signatory who used to sign knowing those staffs were not in service. He submitted that all witnesses depended on the audit report, arguing he expected all of them to testify on similar facts. He submitted that the discrepancy is huge between 20 million and 24 million, arguing issues pertaining to money are very sensitive. He submitted that PW2 who was the only employee failed to tender a document to prove receiving and paying money. He submitted that the money of loans board was not stated as to how it reached him. He submitted

that he is not responsible, arguing it is his boss who was handling it. He admitted to be an employee, argued what he did was in accordance with the directives of his boss, he merely complied to whatever he was directed to do or pay anything or pay salaries.

Regarding ground number one, I see not merit on this ground. At page eleven second paragraph from bottom to sixteen last paragraph of the impugned judgment, the learned Senior Resident Magistrate evaluated each facts and piece of evidence presented by six prosecution witnesses along documentary evidence of eleven documentations, made a thorough analysis along assessing its weight and relevance, cited applicable law and case law and then made a conclusion for unproved and proved counts and assigned reasons for the decision. In fact, the learned Senior Resident Magistrate strived to ensure no stone left unturned.

As alluded by the learned State Attorney, minor lapse on the decision is normal and cannot be taken as a sin or else taken as wholesale to had rendered the entire judgment fake or meaningless.

Arguably, it is expected for the judging officer to say it all, strength and weakness or contradiction, and decide whether they are grave (serious) or

minor. This being the first appellate court, I embark to assess the mentioned contradictions.

At a trial, PW1 Essam Ibrahim Ahmed Hamadelineel (director of Direct Aid Society) asserted a loss of Tsh 9,119,100 as salaries to ghost employees and Tsh 11,346,000 a sum ought to be paid to the Loans Boards. PW3 Hitesh Harsukhual Solaini (auditor) stated that he realized a loss for employees' salaries a sum of Tsh 9 points million and Loans Bords Tsh 10 points million, a grand total of Tsh 24.4 million. PW4 Sunday Charles Okarda (officer from High Education Student's Loans Bords) asserted that in their verification they found a sum of Tsh 11,116,000 to have not been paid into their account. PW5 Abdullah Seif Mohamed (human resource officer-Direct Aid Society, stationed at head quarter Dar es Salaam), asserted that in their investigation they revealed a loss of Tsh 20 million. PW6 D/Sgt Issa (sleuth) alleged that in his investigation he revealed the Appellant steal almost 22 million.

To my view the above discrepancies were attributed to a fact that PW1 discovered a loss through the reports by January and February 2022, which triggered an internal (in-house) preliminary investigation comprising an investigation team (PW5 inclusive) formed by the complainant Direct Aid Society in early March 2022. This was followed by the auditing conducted by

PW3 at the mid end of March 2022, who issued the audit report (exhibit P11) on 6/04/2022. And on 4/04/2022 it is when PW6 initiated criminal investigation. It can be said therefore that exhibit P11 was a final report for loss occasioned.

In view of the series of event narrated above, it cannot be said that all prosecution witnesses relied on exhibit P11. Above all the discrepancies were not serious one, nor can it be said had the effects of denting the prosecution case. I rather take a view that these were minor discrepancies which can be easily ignored, and it is accordingly ruled.

Regarding ground number two, as alluded by the learned Sate Attorney, the prosecution case was well presented, the evidence was credible. A complaint by the Appellant that the director was not availing a list or letters of terminated staffs, is irrelevant. The testimony of PW2 Hemed Ally Said, was watertight, and implicated the Appellant to have deliberately with intent to defraud credited salary into PW2' accounts, then sneaked to PW2 to collect the same on explanation that it was wrongly credited into his account by the fiat of the system purported set to credit automatically ending to December. Equally an argument that the Appellant was not signatory, merely prepared and submitted for approval or that PW2 did not tender identity card to prove

his name or bank statement showing that a sum of Tsh 530,400 was credited and withdrawn from his account, or that he did not tender printout of communication between PW2 and the Appellant, are all irrelevant. The oral account of PW2 was enough to prove a fact that money was credited into his account and thereafter the Appellant collected as aforesaid. Above all, PW2 explained that the Appellant used to visit at his work to collect the money. Therefore, a call for bank statement and printout of communication is overstressing the matter unnecessarily, because the actual handing over by PW2 to the Appellant was done man to man.

The Appellant is to blame himself for absconding to participate his trial. Because these arguments ought to be subject for test on cross examination and not to invite the appellate court to merely misbelieve prosecution witnesses without there being facts or questions tending to test veracity or shaking credibility of witnesses. The learned Senior Resident Magistrate said it all regarding consequential for absconding a trial, it is stated at length at page six last paragraph to page nine first paragraph of the impugned judgment.

Regarding a complaint that the money of loans boards it was not stated as to how it reached the Appellant. PW1 explained clearly that it was the

Appellant who used to prepare the said payment and submit to PW1 for approval. The payment voucher, payment request and receipts exhibit P2 to P10, inclusively, were initiated by the Appellant as payee. PW3 asserted that the said money was not paid to the Students Loans Boards. PW4 disowned the said payment. Therefore, the Appellant cannot escape liability.

That said, the appeal is devoid of merit. The trial court decision is upheld.

The appeal is dismissed.



E.B. LUVANDA
JUDGE
14/05/2024

Judgment delivered in the presence of the Appellant and Mr. John Mgave learned State Attorney for the Respondent.



E. B. LUVANDA
JUDGE
14/05/2024