

**IN THE HIGH COURT OF TANZANIA**

**AT MOSHI**

**PC CRIMINAL APPEAL NO. 4 OF 2023**

*(Originating from Criminal Appeal No. 09 of 2021)*

**RICHARD VICENT MUSHI.....APPELLANT**

***VERSUS***

**TUNUKIWA GODWIN MGALA.....RESPONDENT**

**JUDGMENT**

30/04/2024 to 02/05/2024

**E.B. LUVANDA, J**

This is a second appeal. The Appellant was convicted and sentenced to a conditional discharge for four months by the primary court for committing the offence of stealing four gas cylinders valued Tsh 640,000 contrary to section 265 of the Penal Code, Cap 16 R.E. 2019. In addition, the Appellant was ordered to compensate the Respondent a sum of Tsh 640,000. The Appellant's first appeal was dismissed by the first appellate court for want of merit.

In the petition of appeal, the Appellant grounded that: One, the appellate court (sic, first appellate court) erred both in law and fact when failed to discover that the trial court entertained the matter without jurisdiction; Two, the appellate court (sic, first appellate court) erred both in law and fact when

failed to discover anomalies underlies the Respondent's evidence, the result made her dismissing his appeal without reasonable cause; Three, the appellate court (sic, first appellate court) erred both in law and fact when failed to ascertain that the Respondent failed to prove the offence of theft against the Appellant on the required standard.

At the hearing, the Appellant who fended himself was brief, he submitted that he explained to the magistrate (first appellate court) that the evidence of the Respondent and her witnesses were contradicting. He submitted that the exhibits which were alleged to have been arrested in his possession were not tendered in court.

In reply, the Respondent submitted that her evidence was cogent, arguing the Appellant appealed to the district court in vain. She submitted that the witnesses to wit the youth who assisted the Appellant to carry stolen items appeared to adduce evidence in court, arguing that is why the Appellant was convicted.

To start with ground number one regarding jurisdiction, the first appellate court is faulted for nothing. It is common ground that a primary court is established within a particular district and its designation is attached to the district in which is established. For easy of reference, I reproduce the

provision of section 3(1) and (2) of the Magistrates' Courts Act, Cap 11 R.E. 2019,

*"(1) There are hereby established in every district primary courts which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the respective districts in which they are established.*

*(2) The designation of a primary court shall be the primary court of the district in which it is established"*

Herein the particulars of offence suggest that the offence was committed at Ushirika wa Neema within Moshi Urban District. Therefore, I am not seeing as to how Moshi Urban Primary Court can be said that it lacked jurisdiction to entertain the offence which was committed within its area of establishment.

Therefore, ground number one is dismissed.

Ground number two, the same was preferred without sufficient ground of complaint. At page seven paragraph four downwards, of the first appellate court's judgment, ruled out on the alleged discrepancies regarding the number of stolen gas cylinder, and believed the testimony of the Respondent who had tendered receipts for purchasing those gas cylinders.

According to the records of the trial court, PW1 (the Respondent herein) asserted that four gas cylinders were stolen and tendered receipts for purchasing which were admitted as exhibit PG1 to 6. On other hand, Amedeus Simon Mushi (PW2) who stated to have been invited by the Appellant for a deal of ferrying the gas cylinder from the shop of the Respondent, asserted seeing the Appellant carrying one gas cylinder from the shop of the Respondent and loaded on a motorcycle. Gerald Julius Ngowi (PW3) alleged seeing the Appellant being on and off at the crime scene and saw him ferrying gas cylinder for almost three trips each carrying double gas cylinders.

However, as per the finding of the first appellate court, the discrepancies were not fatal as such could not entail the entire Respondent's case to flop. This is for obvious reasons that, the facts depicted above were in reference of what each particular witness saw. Therefore, grounds number two fails.

Ground number three, the first appellate court is faulted for nothing. PW2 and PW3 were eye witnesses, PW2 declined an invitation by the Appellant to assist ferrying one gas cylinder. PW3 saw when the Appellant was ferrying gas cylinder from the shop of the Respondent. As such a compliant by the Appellant that the stolen items were not tendered in evidence, is without substance. This is because the eye testimony of PW2 and PW3 was cogent

and reliable. Therefore, a call for tendering of physical objects was legally untenable. Equally a complaint that elements of stealing were not proved to the required standard is a misplaced idea. This is for the reason that PW2 and PW3 saw the Appellant committing the *actus reus* including asportation. The Appellant did not have any claim of right when was taking the gas cylinders, meaning that he did it with the intention of defrauding the Respondent. Above all, there was an evidence that the Appellant was on and off when taking a glass of beer at the shop of the Respondent, at the same time disguising to have conversation with the Respondent and in turn ferried the gas cylinders as aforesaid. Therefore, to my view, the action and conduct of the Appellant constituted all elements for the offence of stealing.

Therefore, the decision of the first appellate court is upheld, save for costs.

The appeal is dismissed.



E.B. LUVANDA  
**JUDGE**  
02/05/2024

Judgment delivered in the presence of the Appellant and the Respondent.



E. B. LUVANDA  
**JUDGE**  
02/05/2024