

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUB REGISTRY OF SHINYANGA)
AT SHINYANGA**

CRIMINAL APPEAL NO.121 OF 2023

(Originating from criminal Case No. 28 of 2023 Itilima District court at Itilima.)

MATHAYO S/O JOSHUA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

3th April & 3th May, 2024.

MASSAM, J.:

The appellant hear in above was charged before the District Court of Itilima with count of stealing contrary to section 258 (1) (2) (a) of the Penal code Cap 16 R;E 2019.

The particulars of the offenses as per the charge sheet was that, on 7th day of May at Mwabasimbe Street Nkoma village within Itilima District in Simiyu Region the appellant above did steal electricity wire to wit 4500 meters type ACSR DOG 100 MM valued at TZS thirty thousand the property of Sengerema engineering group.

Brief facts of the case are that the appellant was a driver of the motor vehicle with registration no T 941 AUV and on 28/4/2023 he was assigned

to take some materials from Bariadi and sent in two sites Nkoma and Dasina. That day he took wires ACSR MM 100 which had 3000 meter together with other electronic tools, at Mwabasimbe he was supposed to send 4500 meter of wire and on 7th may 2023 appellant was seen to the site again took the said wire, and on 14th may 2023 the cite supervisor was informed that the said wire missing so he decided to report the matter to the police station and appellant was suspected as he was the driver of the said motor vehicle. He was arrested and interrogated and after the investigation appellant was taken to the court and the charge of stealing was read over to him.

At the trial, the prosecution managed to prove the said offense against the appellant, and subsequently was convicted to serve four years imprisonment.

Aggrieved therein, the appellant rightly lodged this appeal armed with 7 (seven) grounds of appeal as follows

(1) That the honor able magistrate erred in law and in fact for failure to take into account and evaluate the defense case in the judgment.

(2) That the honorable magistrate erred in law and facts for convicting the appellant without taking into account there was material discrepancies between the charge and the prosecution evidence.

3 That the honorable magistrate erred in law and in fact for convicting the appellant relying on contradictory evidence of PW3 .PW4 and PW5

4 That the trial magistrate erred in law and facts for the fact that the identification of the appellant was merely dock identification.

5 That the trial magistrate erred in law and facts by convicting the appellant basing on the prosecution evidence which has no complainant.

6 That the trial magistrate erred in law and fact by convicting the appellant basing on poor identification by the prosecution witnesses.

On the hearing of this appeal, the appellant was represented by Mr. Msafiri Henga advocate while the respondent was represented by Caroline Mushi and Mboneke Ndamubenya State Attorneys.

In submitting his appeal, the advocate for the appellant submitted on ground number one that, the trial court failed to evaluate the defiance case evidence as they relied to the four areas which was identification, defence of alibi arrest of appellant and interrogation done, he said that

nowhere in the trial judgment the same was considered the act which is fatal ,to support his argument she brought a criminal case no 42 /2020 High court Mtwara at page no 6 in that case shows the importance of the court to consider the defense evidence.

With regard to ground number two, he submitted that, there was discrepancies between the charge and the prosecution evidence as evidence of Pw3, Pw4 and Pw5 shows that the offence was committed on 7/5/2023 while the facts on preliminary hearing shows that the offence committed on 14/5/2023. He added by saying that in criminal cases the discrepancies like this gives accused benefit. On ground number 3 he submitted that, the appellant was convicted by contradictory evidence of PW3, PW4 and PW5, He added by stating that PW3 said that the said wires were taken on evening and there were six persons while PW4 said properties were taken in the night and there were five persons. He said that the said contradiction was fatal as discussed in the case of **Msafiri Hassan Masimba vs Republic** criminal appeal no 302 of 2015 pg. no 5. Again, he said that PW5 said that he did not witness the said stealing while PW3 said that he witnessed the stealing.

In regard to the six ground of appeal appellant complained that he was convicted without the complainant as in the charge shows that the complainant was Sengerema Engineering Company Group Ltd but in trial court the records did not show any resolution that company to file this case so the said case was heard without complainant. In regard to the 7th ground of appeal that he complained that he was convicted by poor identification by prosecution witness by looking to the record the PW5 said that he identified him by light of the torch but PW3 said that he identified him through the motor vehicle light. Also PW3 said that he identified him after heard someone called him Mathayo so he **said that the said identification was not sufficient as elaborated in the case of Masana Sabai @ Marco and Mito Yohana Masalu @ Mgogo criminal appeal no 180 of 2020** at page 7, and the case of **Badu Sumano @ kilagela vs. republic** the issue discussed there was intensity of light distance and time.

With regard to the 5th ground appellant complained that his defense was not considered as he brought a defense of alibi but the court disregard the same for the reason that was not brought in the earliest stage. In

regard of ground no 4 he disregarded the same and prays his appeal to be allowed.

In reply thereto, the respondent argued on ground number 1 by starting that the evidence was well evaluated and the trial court did consider his defense as it can be found in page no 7-8 of judgment which based on the defense of alibi and also the court told appellant to call the said person who he was with in proving the defense of alibi. In replying to the ground of appeal no 2 respondent replied that the same has no merit as section 234 (3) Criminal procedure Act elaborate that any discrepancies happened in the charge sheet and facts is not fatal, see the case of **Nhanga Daudi Vs. Republic** criminal appeal no 316 of 2013 cat Mwanza page No 11.

In regard to the ground no 3 it was the same as urged to the ground no2 so she has in view that the same has no merit as the issue to consider is if the same goes to the root of the case, as the evidence of PW3, PW4, and Pw5 testified how they saw an incident the said evidence was supported with the circumstantial evidence which was found in page no 10 of the proceedings which show how the appellant was handed the said wires to take to the scene and Pw3 confirmed to see the motor vehicle with

the said wires and Pw5 said that were taken to his house and it was evening hours and he heard the said person called Mathayo. He added that on 7/5/2023 the same person came and took the said wires and because the said motor vehicle was not handed to another driver, there is no doubt that appellant is connected in that stealing.

With regard to the ground no6-appellant complained that he was convicted without a complainant, in replying the same she said that this was criminal case so there was no need of board of resolution and for that matter the complainant was the Republic. Again, she said that the duty of the prosecution to know who was the material witness and in this case they saw Pw2 as the one as the said wires were under his control so he was the owner of that wires by that time. Coming to the ground no 7 which was based to the identification the same was well discussed to the case of **Waziri Amani** which gave the condition to be followed in considering the issue of identification as follows (1) for how long the appellant saw the accused /appellant (2) distance from the witness to the accused person (3) for how long accused person and witness know each other before the incident. (4) if there was light the kind of the light used. In this present case the light which was used was two torch and light of

motor vehicle hazard light. PW3 said that he heard the name of the driver called to be Mathayo and the saw him on 28/4/2023 and on 7th may 2023 as the appellant dropped to the car and ask water to drink it was like 3 steps from where he was so the ingredients to the **Waziri Amani** case fits to this case. So the said ground has no merit. Lastly she said that this court did consider the appellant defenses submitted that and submitted in inter alia that, the said offense was proved beyond reasonable doubt.

In brief rejoinder the counsel for the appellant insisted that, defense evidence was not considered and for the ground of appeal no 2 he still insisting that the charge brought had discrepancies. Also in the ground of appeal No. 3 he insisted that there was contradiction between the prosecution witnesses as it was shown to the case of Msafiri Hassan Masimba. In regard to the ground no 6 he still insists that the victim was a company so he still insist what he was already submitted before. Again, he said that the ingredients in **Waziri Amani** case was not satisfied in the issue of identification as the torch light was not sufficient so it was not right for the trial court to rely on it. Lastly, he said that in ground of appeal No. 5 it was not right for the trial court to convict the appellant basing on

the weakness of the defense. So he prays this appeal to be allowed and conviction and sentence given to be quashed.

Having heard the submissions from both parties, I will now make a determination on the merit of this appeal, and the issue before this court for determination is ***whether the appeal has merit.***

To start with, the provision of Section 3 (2) (a) of The Evidence Act Cap 6 R;E 2019, provides the standard of proof that ***"A fact is said to be proved when - (a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;"***

Again, ***Section 110 (1) provides that, "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

To be satisfied if the case at hand was proved beyond reasonable doubt, this court will start with ground number 3 which complained by the appellant that, the trial magistrate erred to convict the appellant relying on contradictory evidence of pW3, PW4 and PW5 in the appellants submission he complained that the evidence of the said witnesses were contradictory some of them said that the said wires were taken on evening and there were six persons while other said that the said wires were taken in night

hours and there were five persons, also appellant complained about the contradiction on the dates of commitment of the offence, PW4 said it was on 7/5/2023 while PW5 said that the said wires were taken on 28/5/2023. On the side of respondent replied that the law is very clear in section 234(3) of CPA that any discrepancies happened from the charge sheet and facts is not fatal. This court to satisfy itself what was complained by the appellant perused their evidence by starting with PW3 said that on 28/4/2023 evening hours he was at Mwabasimbe village he saw one vehicle dropping some TANESCO wires he identified the vehicle by its number and color and again on 7/5/2023 he saw the same vehicle coming again and took the said wires, and heard the driver called by the name of Mathayo, PW4 said that the accused person is namely Mathayo and he is the company driver, he remember on 28/4/2023 on the evening they took the material from Bariadi to the site of Nkoma to Dasina, they dropped the wires make aluminum conductor steel ran forced dog 100 mm 3000 meters the driver was Mathayo with vehicle with registration no T 941 AUV Nissan they dropped the said wires to the house of one Mabula Gumada as they expected to work there. On 26/5/2023 when they went there they did not find the said wires and when they asked the neighbors

they told them that the same vehicle which brought that wires is the one which came and took it on 7/5/2023.

PW5 in his testimony said that on 28/4/2023 when he was at home on the evening one vehicle brought wires to his home and requested him to keep it he knows the said driver and on 7/5/2023 evening one person came started to communicate through phones asking for the vehicle and the same day on night hours at around 20.30 the driver came and took the said wires, he had a torch and they were too close like three steps, also he asked him for drinking water so he identified well the driver, he added that the driver who brought the said wires to his home was the one who came and took it on 7/5/2023, according to the evidence which was given by PW3, PW4 and PW5 this court finds no contradiction on it as all witnesses testified that on 28/4/2023 was the date when the materials wires were taken to site, and on 7/5/2023 was the date when the said wire were taken by the same vehicle and driver who brought the same and on 26/5/2023 was the date the owner was informed about the missing of the said wires and reported the matter.

Coming to the ground no 4 and 7 where the appellant complained that he was convicted for the poor identification as he was identified on the

dock, the respondent side replied that the accused/appellant was well identified by using two source of light which was vehicle hazard light and torch .Also he was identified through his name Mathayo.

Respondent added by starting that the ingredients in famous case of **Waziri Amani** was satisfied as the distance from the place where the accused was and the prosecution witness was too near and the light used was hazard vehicle light and torch.

This court in determining the same started by perusing the evidence of PW2 who said that Mathayo was a driver who was entrusted to took the material (wires) to the site on 28/4/2023 and on 26/5/2023 when he went at the site he was informed that the said wires were missing and neighbors around told him that, they identified the vehicle which brought those wires and was the one who came and took it again, PW3 the bodaboda man said that on 28/4/2023 evening, he saw one vehicle with registration No. T 941 AVU brought material and again on 7/5/2023 the same vehicle came and took it and he heard him being called by his name Mathayo. He continued to say that he knows the driver since 28/4/2023 when he brought the said material to that site.

PW4 the electrician supported that on 28/4/2023 the appellant was given task as driver to take material site and he was with him and he delivered the material but on 7/5/2023 he came and took them again. PW5 said that on 28/4/2023 he was at home and there was a vehicle which brought material and requested him to keep them outside of his home and on 7/5/2023 the said person came and took it, it was night hours he had torch and the said vehicle turned on the hazard light so he identified him well. According to the evidence of PW2 - PW5 this court has no doubt that the accused person was identified by his name, his job as a driver and the one who was entrusted to deliver the said luggage to the site and the one who went again and take it. PW5 used torch light and vehicle hazard light to identify the appellant and they were too close, and it was not the first time seeing him as he saw him when he went to his home requesting him to keep his materials (wires), so this court is in support of the respondent's submission that the appellant was well identified. So the ground no 3, 4 and 7 fails for want of merit.

In regard to the 6 ground of appeal the appellant complained that he was convicted without the complainant as the owner of the alleged stolen properties being a company so there must be a board of resolution

in order for the case to be filed, but the respondent replied by starting that this was the criminal case the complainant always is the republic, in this ground of appeal this court supports that in all criminal cases the complainant is the republic unless if the complainant decided to file his case alone especially in the primary court or as private prosecution but in this case PW1 who was a policeman whose work was to arrest, investigate and brought suspects to the court on 26/5/2023 when he was at his working place he received information from Sengerema company that there was some missing wires in their office, he recorded the statement of that informer and started to conduct his investigation and later on he took the said file to the office of national prosecution service for further directives which later on, the matter was taken to the court, so this court has its view that the appellant was well convicted as the complainant of his case was republic through the office of NPS, so this court finds this ground also fails.

Coming to the first ground of appeal, the appellant complained that the trial court did not take into account and evaluate the defense case in its judgment as in their defense they relied in three issues identification, defense of alibi and his arrest but in the trial judgment nowhere is shown

that the court did consider the same but the respondent said that at page 7-8 of the trial judgment the trial court did consider the defense case especially in the defense of alibi which accused person came with it the trial court addressed it that if the appellant had a co driver he was required to bring him to the court.

This court has no objection that the law requires evaluation of evidence from both sides before arriving to conclusion at page no 7-8 trial magistrate said that the accused person came with the defence of alibi that the said date he was at Migato site 43 kilometres from the place where the said offence was committed but it was rejected as the accused had an advocate but he did not notify prosecution that he was intending to come with that defence as per section 194(4) CPA which require an accused person when intending to give defence of alibi to notify the court and prosecution his intention. Also he said that the accused person told the court that he had his co -driver one Mood Mbagala and when he was at Migato he was with him so the trial court said that it expected him to call the said co driver to testify that he was with him that date, this court is aware that, non consideration of defence evidence is fatal and it vitiates the conviction. The above position was discussed in the case of *Hussein*

Idd and another vs. republic [1986] TLR 166, where it was held that,

"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defense evidence."

Again, the court also kept on arguing that, *"Most recently in June, 2021 in the case of **Kaimu Said vs Republic (Criminal Appeal No. 391 of 2019) [2021] TZCA 273; (07 June 2021 TANZLII), the Court of Appeal, Lila J.A** relied on the case of **Leonard Mwanashoka vs. R Criminal Appeal No. 226 of 2014 TZCA and Hussein Idd and Another vs R (1986) TLR** to come to a conclusion that, failure to consider the defense rendered the trial a nullity. The Court reasoned that, the trial court and first appellate court are imperatively required to consider and evaluate the entire evidence so as to arrive at a balanced conclusion. (This court is put emphasis on this) An omission to do so is a serious misdirection and a clear indication that there was no fair trial. "*

The court also in the case of **Petro Ngoko Versus Republic**, while making reference to the above position went on saying at Pg 10 that,

"Having found that the trial court failed to properly analyze the evidence before it, I think, this Court, being the first appellate court is duty bound to re-evaluate and weigh the evidence by both sides (as a whole) so as to arrive at a just and fair finding" See also the case of **Charles Thys vs. Hermanus P. Steyn, Civil Appeal No.45 of 2007.**

Back to our case and after a thoroughly perusal of the trial judgment preferably at Pg 7-8 this court finds out that the trial court did evaluate and consider the defense case as if the accused person was intending to come up with the defense of alibi why he fails to notify this court? Also if he was not in the place of commitment of the offence and he was with his fellow driver why he choose not to call him therefore the said ground again fails.

From this evidence from both sides in a nut shell this court is of the view that the evidence tendered by the prosecution was enough to prove the offence against the appellant. This is due to the facts that, the evidence testified by all prosecution witnesses shows that, the appellant was and on 28/4/2023 he was entrusted to deliver the luggage to the site of Mwabasimbe area and he delivered it but later on 7/5/2023 he came and take it to unknown place, and the said date he was seen by the

neighbors and especially PW5 who agreed the said luggage to be dropped at his house and he identified him through his name and he was nearby him like three steps and there was a light of torch and vehicle hazard light. Also the appellant came with the defense of alibi but was rejected as was not complied with the law, also the accused person failed to bring the material witness to his defense one Mood Mbagha his co-driver to testify that he was with him to another place on the date of commitment of the offence hence it is clear from the case before the trial court was proved beyond reasonable doubt, which makes this ground baseless. So this court finds this appeal with no merit and is hereby dismissed as the trial court prove their case beyond the reasonable doubt. According to that the trial court decision is upheld.

It is ordered.

DATED at **SHINYANGA** this 3rd day of May, 2024




R. B Massam

Judge

3/5/2024