IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 150 OF 2023
(Arising from the Jugdement of the District Court of Temeke dated 7th November 2022 in Criminal Case No. 323 of 2021 (Hon. Mwakenja, SRM)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

JAILOS ABEL NGAYA.....RESPONDENT

JUDGEMENT

Date of last order: 17th May 2024
Date of Judgement: 23th May 2024

MTEMBWA, J.:

In the District Court of Temeke, the Respondent herein was arraigned for the offense of stealing contrary to ***Sections 258 (1) and (2) and 265 of the Penal Code, Cap 16, R.E 2019 (Now RE 2022).*** It was alleged that, on 26th June 2020, the Respondent at Buza Mjimpya area within Temeke District in Dar es Salaam City, did steal a motor vehicle with Registration No. T 568 DDG make Toyota Noah valued at **Tanzanian Shillings 7,500,000/=**, a property of

PASCALIA SEZARI NAMUBI. The Respondent resisted the charge. As a result, prosecution paraded five (5) witnesses and tendered five (5) documentary exhibits.

Having evaluated the evidence adduced during hearing, the learned trial Magistrate ruled out that, prosecution failed to establish a prima facie case at lowest warranting the Respondent (accused by then) to enter his defense. The Respondent then was acquitted under ***section 230 of the Criminal Procedural Act, Cap 20, R.E 2022***.

The Director of Public Prosecutions (the DPP) was dissatisfied. As a result, the following grounds of appeal were preferred to this Court;

1. *That, the Learned trial Magistrate grossly misdirected himself in fact and in law for failure to analyze properly the prosecution evidence especially the testimony of PW1 and PW5 then went ahead to acquit the appellant.*

2. *That, the learned trial Magistrate grossly erred in law by stating that fraud as one of the elements of stealing was not proved. He misconstrued the term 'fraudulently' and acquitted the respondent.*

3. *That, the learned trial Magistrate grossly erred in law and in fact when stated that this case is of civil nature. He failed to take into account that the respondent intended to deprive PW1 her motor vehicle permanently.*

Initially, this matter was presided over by Hon. S. M. Maghimbi, J. It was resigned to me for final determination on usual campaign to clear out the backlogs. Before, it could appear, the Appellant failed to secure the physical attendance of the Respondent. On 23rd November 2023, an order of substituted service was entered. However, as per records, the order was not complied to. I then proceeded to enter the same order on 25th March 2024 which was complied with on 2nd April 2024. On 29th April 2024, I ordered arguing of this Appeal by way of written submissions in absentia of the Respondent whereby, **Ms. Rose Makupa**, the learned state attorney, argued for and on behalf of the Appellant.

Arguing on the first ground of Appeal, Ms. Makupa complained that, the learned trial Magistrate grossly misdirected himself in analyzing properly the testimonies of PW1 and PW5. She argued further that, PW1 introduced herself as the owner of the motor vehicle alleged to have been stolen by the Respondent and tendered Exhibit P1 (Registration Card). She contended further that, PW1 entered into a hire agreement (Exhibit P3) with the Respondent whereby the later was to pay a monthly consideration of Tsh.

450,000/=. That, the Respondent was able to pay for one month before disposing it to PW5.

Ms. Makupa continued to submit that, the facts above were not challenged by the Respondent by way of cross examination. In her views, the same were admitted. She cited the case of ***Goodluck Kyando Vs. Republic (2006) TLR 363.***

On the second ground of appeal, Ms. Makupa complained that, the learned trial magistrate grossly erred in law by stating that fraud as one of the elements of stealing was not proved. That, as a result of such misconstruction, he acquitted the Respondent. She noted further that, for the offence of stealing to be established, prosecution must prove the following; **one,** that, there was a movable property; **two,** that, the movable property under discussion is in possession of a person other than the accused; **three,** that, there was an intention to move and take it away; **four**, that, the accused moved and took out possession of the possessor; **five,** that, the accused did it dishonestly to himself or wrongful gain to himself or wrongful loss to another and **six**, that, the property was moved and taken without the consent from the possessor. She cited the case of ***Director of Public***

Prosecution Versus Shishir Shyamsingh Criminal Appeal no 141 of 2021. Court of Appeal of Tanzania at Kigoma.

The learned state attorney observed that, prosecution evidence sufficiently established that the stolen property was capable of being stolen (motor vehicle) and that the same was the property of PW1 by virtue of Exhibit P1 (motor vehicle registration card). That, PW1 entered into a hire agreement with the Respondent and thereafter the later sold it to PW5. The act of disposition without the consent of the owner establishes the element of asportation and ill motive thereby intending to permanently deprive the owner of her right over the motor vehicle. That, the taking was fraudulent and without claim of right.

It was the submissions of Ms. Makupa further that, PW5 testified that the said Motor Vehicle was sold to him by the Respondent at Tshs 2,000,0000/=. That alone was an indication that the Respondent had an ill motive (fraudulent intent). The learned state attorney concluded that, prosecution discharged the duty of proving the elements of the offence of stealing established under the law and fraud is not among them.

Arguing on the third ground of appeal, Ms. Makupa observed that, the learned trial magistrate grossly erred in law and in fact when stated that this case is of civil nature whereas he failed to take into account that the Respondent intended to deprive PW1 of her motor vehicle permanently. She added that, in criminal cases, there are two elements that is; *mens rea* and *actus reus.* That, it is the duty of prosecution to prove both of the elements in accordance to the standard of proof which is beyond reasonable doubt in view of ***section 3(2) of the Evidence Act Cap 6 R.E 2019.***

She concluded that, prosecution evidence supported the charge against the Respondent. Lastly, she implored this Court to quash the said Ruling of the trial Court and the Respondent be convicted and sentenced accordingly.

Having considered the arguments by the learned state attorney, I have assembled only one issue, that is, whether a prima facie case on the offence of stealing contrary to ***Sections 258 (1) and (2) and 265 of the Penal Code (supra)*** was established warranting the Respondent to inter his defense. As said before, having evaluated the evidence adduced during hearing, the learned trial magistrate

ruled out that a prima facie case was not reasonably established warranting the Respondent to enter his defense.

Indeed, in the case of ***Republic v. Edward Mongo (2003) TLR 45*** the Court noted that;

> *A submission of no case to answer may be properly be upheld when there has been no evidence to prove an essential element in the offence charged, or where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal would at that stage convict.*

In ***Sunderji Vs. Republic (1971) HCD 216*** the court noted that;

> *Before the accused can be called to upon to make his defence the prosecution must establish at lowest* ***a prima facie*** *case*

Well, being the first appellate forum, this Court has a duty to re-evaluate the evidence on records and put it under critical scrutiny and come out with its own conclusion (see ***Mapambano Michael @ Mayanga vs. Republic, Criminal Appeal No. 258 of 2015***).

According to the records, PW1 (the complainant) entered into a hire contract with the Respondent (accused) in which the former's motor vehicle registered as T 568 DDG make Toyota Noah was hired at a consideration of a monthly fee of Tsh. 450,000/=. The said hire

contract was drafted by PW2 and was tendered as Exhibit P3. The records reveal further that, on 26th November 2020, the Respondent sold it to PW5 by virtue of Exhibit P5. That, the said Exhibit P5 was witnesses by PW3. Having sold the said motor vehicle, while in remand prison, the Respondent wrote a letter to PW1 repenting on what he did. A letter was admitted as Exhibit P4.

Having evaluated the evidence adduced, the learned trial magistrate ruled out that a prima facie case to answer was not established by prosecution warranting the Respondent to enter his defense. The trial magistrate went further to advise the complainant to pursue her rights in a civil case for breach of contract.

When I was preparing this Jugdement, I noted some legal issues which need the attention of this Court before delving into the nitty gritty of the Appeal. I noted that, the hire Contract dated 26th June 2020 was entered into between PW1 (the complainant) and **Charity Foundation & Day Care Centre** (as per Exhibit P3). The Respondent herein (the accused) signed as "one of the directors" of the said school. I also noted that, the alleged motor vehicle was sold to PW5 by **Taasisi ya Charity Foundation School** where the Respondent herein acted as seller's witness to the said sale

agreement (as per Exhibit P4). According to the records, the charge of stealing was preferred against the Respondent personally.

In such state of confusion and in search of a right way to tackle the question before me, I sought the assistance of the learned state attorney. In particular, I wanted her to address me on whether the charge of stealing was properly preferred against the Respondent.

When prompted, Ms. Makupa, the learned state attorney observed that, in a hire contract, the Respondent was acting for and on behalf of the charity school. She added that, the Respondent herein is a director of the said charity school, a fact he never disputed during hearing by way of cross examination. It was submitted further that, in criminal law there are two elements, that is, *actus reus* and *mens rea* thus and in order to prove them squarely, the guilty minds of the directors should be looked at. She added that, the charity school was in possession of the said motor vehicle as per the testimonies of PW5 and the same was sold to him by the Respondent, thereby depriving PW1 of her right to ownership.

In addition to the above, Ms. Makupa observed that, the intention to deprive permanently is one of the ingredients of the offence of stealing. She submitted also that, the guilty mind or

intention can be derived from the acts of the directors. She viewed that, in view of the evidence available, the Respondent committed the alleged offence as charged.

Ms. Makupa had nothing to offer on the deference between the name **Charity Foundation & Day Care Centre** as per Exhibit P3 (the hire contract) and **Taasisi ya Charity Foundation School** as per exhibit P5 (the sale agreement). She observed that, the difference is harmless on the assertation that it was the Respondent who committed the offence.

Having been revived from such state of confusion as previously alluded, I dispassionately revisited the case of ***Director of Public Prosecution Versus Shishir Shyamsingh (supra),*** cited correctly to me by Ms. Makupa, where it was observed that;

> ***.....****for the offence of stealing to be established, the prosecution should prove that; one, there was movable property; two, the movable property under discussion is in possession of a person other than the accused; three, there was an intention to move and take that movable property; four, the accused moved and took out the possession of the possessor; five, the accused did it dishonestly to himself or wrongful gain 'to himself or wrongful loss to another; and six, the property was moved-and took out but without the consent from the possessor.*

According to the prosecution evidence, the offence of stealing by the Respondent is predicated on the testimonies of PW1, PW2, PW3, PW5 and the documentary evidence admitted as Exhibits P3 (hire contract) and P5 (the sale agreement). Evidentially, according to PW1, on 26th June 2020, the motor vehicle was hired to the Respondent on agreement that the later will pay Tsh. 450,000/= per month in view of Exhibit P3. PW5 testified that, on 26th November 2020, the Respondent sold to him the said motor vehicle at Tsh. 2,000,000/= in view of Exhibit P5. The question would be whether, prima facie case was properly established warranting the Respondent to enter his defense in view of the evidence adduced by prosecution.

According to Exhibit P3 (the hire contract), the contract was entered into between PW1 and Charity Foundation & Day Care Centre whereas the Respondent was described as one of the directors. In addition, in view of Exhibit P5 (sale agreement), the sale agreement of the said motor vehicle was entered into between Taasisi ya Charity Foundation School (seller) and PW5 (the buyer) whereas the Respondent was the seller's witness. The collective prosecution evidence entails that it was the Respondent who sold the motor

vehicle to PW5. Ms. Makupa insisted that, the Respondent was acting for and on behalf of the charity school as he was one of the directors.

Respectfully, for reasons to be advanced later, I have failed to buy Ms. Makupa's idea. **First,** it is not true that, according to Exhibit P3, the said motor vehicle was hired to the Respondent for a monthly consideration of Tsh. 450,000/=. Instead, the same was hired to Charity Foundation & Day Care Centre. **Second**, the said Motor Vehicle was sold to PW5 by Taasisi ya Charity Foundation School and the Respondent acted as a witness.

Since the offence of stealing was predicated on two documentary evidences or contracts (Exhibits P3 and P5), this Court has no mandate to come out with different interpretation as to who was the buyer and seller. The documents speak for themselves. Since the disposition or sale was reduced into writing it could not be overridden by an oral account. This is as per the dictates of ***section 100 (1) of the Evidence Act, Cap 6 R.E 2019*** which stipulates as follows:

> *When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other*

disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

Discussing the above provisions of the law, the Court in ***Agatha Mshote Vs. Edson Emmanuel & 10 Others, Civil Appeal No. 121 of 2019, Court of Appeal at Dar es Salaam*** had this to say;

We thus agree with the respondent's counsel that since the sale agreements expressly show that, PW2 and PW3 had purchased land in their own capacities and not on behalf of the appellant, the oral account by PW1, PW2 and PW3 is not compatible with the contents of the documented sale agreements which cannot be superseded by the oral account. The resultant effect is that the appellant also failed to prove ownership of the stated four acres...

In that respect, as per exhibit P5, the seller was Taasisi ya Charity Foundation School and not the Respondent otherwise there would be no need of having written contracts. Equally, as per Exhibit P3, the said motor vehicle was hired to Charity Foundation & Day Care Centre and not to the Respondent. In that stance, the oral account of PW1, PW2, PW3, PW4 and PW5 is incompatible with Exhibits P3 and P5. Besides, there was no evidence established by prosecution as to the relationship that existed between the Respondent and Taasisi ya Charity Foundation School (the seller)

thereby connecting him with the alleged offense charged with. For that reason, the ingredients of stealing as per ***Director of Public Prosecution Versus Shishir Shyamsingh (supra***) were not fully satisfied.

Ms. Makupa insisted that, the Respondent was the director of the charity school. However, she was unable to state as to which of the two institutions as per Exhibits P3 and P5 the Respondent acted as director. As such, this Court cannot venture into unknown by believing in the learned state attorney's assertion. With such state of confusion as to who hired and or who sold the said motor vehicle, I strongly hold the views that, the prima facie case was not established warranting the Respondent to enter his defense.

To that end, I agree with the learned trial magistrate that the prima facie case to answer was not established by prosecution warranting the Respondent to enter his defense. In the circumstances, I therefore proceed to uphold the Ruling of the trial Court in **Criminal Case No. 323 of 2021.**

I order accordingly.

Right of appeal fully explained.

DATED at **DAR ES SALAAM** this 23rd May 2024.

H.S. MTEMBWA
JUDGE