IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 123 OF 2023

(Arising from Criminal Case No. 48 of 2022 in the District Court of Dodoma at Dodoma)

LETWATI KISAU NGALAONI.....1st APPELLANT
PAULO TOPIA SATURO.....2nd APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

14th March and 10th May 2024

MUSOKWA, J:

This appeal emanates from the conviction and sentence against the appellants issued by the District Court of Dodoma. The appellants were charged with one count of theft contrary to the provisions of sections 258 and 265 of the Penal Code, Cap.16 (Penal Code). According to the particulars of the offence, it is alleged that the appellants, on 23rd November, 2021 at 6th road within the District of Dodoma in Dodoma Region; stole cash money, mobile phones, mobile phone accessories and air time vouchers valued at TZS 28,800,000/=, being the properties of one John Nswilla.

The appellants were sentenced to serve seven years' imprisonment and each appellant was ordered to pay TZS 5,000,000/= as compensation to the owner of the stolen properties. Aggrieved by the conviction and sentence, the appellants lodged this appeal comprising of seven (7) grounds of appeal as reproduced hereinafter verbatim: -

1. *That, the trial court totally misapprehending the nature and quality of the prosecution evidence against the appellants which did not prove the charge beyond reasonable doubt.*
2. *That, the trial court erred in law and fact basing its conviction and sentence without considering that the six ingredients found in section 258(1) of the Penal Code was not proved as to establish the offence of theft.*
3. *That, the trial court grossly erred in law and in fact when convicted the appellant without proof that the appellant was employed by the complainant and on the material time they were on duty as you can see that there was any evidence of contract which tendered in court evidencing that the appellant was an employee to the complainant shop.*
4. *That, the trial court erred in law and fact when totally failed to notice that the prosecution side failed totally to bring exhibits including receipts of the alleged stolen properties, business registration card, TIN number since the appellants were not arrested with anything connecting them with the alleged offense and there was no proof that the complainant owns the said shop.*
5. *That, the trial court grossly erred in law and in fact when convicted the appellant basing on caution statement which was obtained not in accordance of the law and admitted in court un procedurally.*

6. *That, the trial court erred in law and in fact when failed to consider that to rely on the evidence that there was a surety in absence of written document evidencing the contract was honoured in front of him and not a merely saying that there was surety while there no written document concluding that the appellants were properly employed by the complainant as one of the requirements of the law.*
7. *That, the trial court erred in law and fact when failed to consider the appellant defence when evaluating and analysing the whole evidence tendered in court by both sides.*

The appeal was heard on 14th March, 2024 whereby the appellants appeared in person and Ms. Tlegray, learned state attorney fended for the respondent.

In support of the appeal, the appellants simply adopted their grounds of appeal and prayed to re-join after the respondent's submission.

In reply, the learned state attorney submitted that the appellants initially filed seven (7) grounds of appeal whereby later, with the leave of the court, they filed seven (7) additional grounds of appeal, totaling 14 grounds of appeal. Ms. Tlegray prayed that the additional grounds should be numbered from the 8th to the 14th grounds respectively. In arguing against the appeal, she prayed to address the 1st and 2nd grounds of appeal collectively, the 3rd and 4th grounds of appeal collectively, the 5th, 11th and 14th grounds of appeal collectively and the remaining grounds were argued separately.

Responding to the 1st and 2nd grounds of appeal, the learned state attorney stated that in order to prove the offence of theft, the prosecution was required to adduce evidence to the effect that; there was movable property, that the movable property was in the hands of another person other than the accused, that there was intention to appropriate the said property, that the accused appropriated the said property; that the accused committed the said act with intent to defraud another person and for personal benefit; and the property was appropriated without the consent of the lawful owner. In support of her assertions, the learned state attorney preferred the case of **DPP vs Shishir Shyamsingh,** DC. Criminal Appeal No. 54 of 2020, Court of Appeal of Tanzania (CAT). Ms. Tlegray averred that she will focus on three (3) out of the six (6) ingredients which prove the offence of theft.

On the 1st ingredient of the offence of theft, she submitted that, there was movable property. PW1 testified before the court that he is a businessman and he owns a store where he sells mobile phones including phone accessories. Further, PW1 also engages in the business of money transactions. According to the counsel for the respondent, mobile phones including phone accessories are items which qualify to be termed as movable

property. Conclusively, it was her assertion that the 1st ingredient of the offence of theft was met.

Submitting on the 2nd ingredient of the offence of theft, Ms. Tlegray argued that the movable property was in the custody of another person other than the accused. Referring to page 8 of the typed trial proceedings, PW1 testified that he was the lawful owner of the shop. The learned counsel asserted that evidently, the movable property was in PW1's lawful custody and not in the custody of the accused persons.

On the 3rd ingredient of the offence, she submitted that, the said movable property was appropriated without the consent of the lawful owner. She referred to the trial typed proceedings, at page 17 whereby PW2 testified that he found out, that there had been a break-in at the shop. Further on page 9, PW1 testifies that he received a call from PW2, and was informed that there had been a theft and some items had been stolen. Ms. Tlegray asserted that the aforementioned, evidence the fact that there was no consent of the lawful owner in the appropriation of the said property.

In responding to the 3rd and 6th grounds of appeal, she stated that contractual agreements exist in many different forms, therefore they may be

either oral or in writing. PW1 entered into an oral agreement with the 1st appellant whereby he engaged the 1st appellant to be a guard at his shop. Furthermore, PW2 testified that he knows the 1st appellant, as he was engaged as a guard at the shop. Another witness, PW3, testified that he knew the 1st appellant well, and identified the said appellant as the guard of the shop. PW3 stated further that he was the surety of the 1st appellant in the oral agreement between the 1st appellant and PW1. Accordingly, these facts, stated Ms. Tlegray, are sufficient proof of an existing employer-employee relationship between PW1 and the 1st appellant.

In rebutting the 5th, 11th and the 14th grounds of appeal, Ms. Tlegray argued that the cautioned statement was procured in accordance with the requirements of the law. It is for this reason, she stated, that the 1st appellant did not object to the tendering of the said cautioned statement during the trial. Adding further, Ms. Tlegray submitted that, when PW4 was testifying before the court, the 1st appellant raised no objection against admission of the cautioned statement by the court to form part of the evidence. It is for this reason, she argued, that trial within a trial was not conducted.

In rebuttal of the 11th ground of appeal, she submitted that the police officer does not record an extra judicial statement but a cautioned statement. An extra judicial statement, she stated, is recorded only by a magistrate.

Regarding the 14th ground of appeal, she responded that, upon the cautioned statement being recorded by the police officer, the 1st appellant signed the cautioned statement. In this regard, it is evident that he consented to his statement being recorded without the presence of an attorney or a relative.

Having addressed the grounds of appeal which were argued collectively, she proceeded with the 4th ground of appeal. Ms. Tlegray admitted that the prosecution did not tender any evidence to prove PW1's ownership to the shop. However, the counsel submitted that the testimonies of PW1, PW2 and PW3, are proof of the said ownership as all the three witnesses testified that PW1 is the lawful owner of the shop.

In responding to the 7th ground of appeal; Ms. Tlegray further admitted that that the trial magistrate did not analyze the testimony of the defense. She referred to the case of **Yusuph Ndaturu vs The Republic, Cr. Appeal No. 195 of 2017,** CAT case, on page. 21. The case of **Josephat Joseph**

vs The Republic, Criminal Appeal No. 558 of 2017, at page 16 was also preferred. Ms. Tlegray further submitted that, under section 388 of the Criminal Proceedings Act Cap. 20 R.E 2022 (CPA), the powers of the appellate court to step into the shoes of the subordinate court and rectify an irregularity have been provided for. This recourse, she submitted, is availed to this court, and the court may exercise these powers if it deems fit, and analyze the testimony of the defense. As to the 8th ground of appeal, she stated that, it is evident that section 192 (3) of CPA was duly complied with.

In the 9th ground of appeal, she argued that it is true that the prosecution did not present in court neither the cows nor did they present the stolen sim cards which, it was alleged, were items that were purchased from the proceeds of the stolen amount. However, she added that, this is not sufficient ground to exonerate the appellants from the charged offence. This is due to the fact that the cautioned statement of the 1st appellant was tendered before the court and the same was procured in accordance with the requirements of the law. She concluded that the 1st appellant further confessed to having committed the offence as provided in the cautioned statement despite the fact that during the preliminary hearing he entered a plea of not guilty.

In addressing the 10th ground of appeal, Ms. Tlegray concedes that the trial magistrate did not furnish the appellants with the information detailing the complaint, as required under section 9(3) and section 10 (3) of CPA. However, she asserted that the complainant, PW1 testified in court, whereby the appellants had the opportunity to cross examine the said witness, which they in fact did. It was therefore her submission that this ground lacks merit.

Submitting on the 12th ground of appeal she stated that, in criminal cases, before accused persons are arraigned before the court, the law requires that investigation must be completed as per section 131 A (1), of CPA. Ms. Tlegray submitted that any delay, if any, in arraigning them before the court was for reason that investigation was not complete.

Responding to the 13th ground of appeal, she submitted that no infringement of rights occurred during the arrest of the 1st appellant. Prior to the arrest, the police officers introduced themselves and produced their official Identity Cards, thereafter the arrest was done. Ms. Tlegray concluded that, from the said testimony, it is evident that there was no infringement of the rights of the appellants during the process of arrest. She therefore prayed this court to uphold the decision of the trial court.

In rejoinder, the 1st appellant emphasized on the requirement of a written employment agreement upon the engagement of an employee. Adding further, he stated that in the alternative, a letter from the village executive officer to confirm such employment agreement should have been obtained. According to him, this document should have been availed by the prosecution during the trial. The 1st appellant further emphasized that the cautioned statement, was not procured following the proper procedure as there was no attorney or relative present.

Further, the 1st appellant submitted that at the police station, he was required to sign the cautioned statement without the police officer reading out and explaining the document. The 1st appellant further alleged that at the time he did not even know Kiswahili language and that he only learned Kiswahili language when he was in prison. Vehemently, he objected the alleged consent to the cautioned statement being recorded without the presence of an attorney or his relative. The 1st appellant asserted that during the trial he did not object to the cautioned statement being tendered as evidence as he was not given the opportunity to state anything. Denying the fact that he was employed as a guard in any shop, the 1st appellant prayed the court to decide the matter in favor of the appellants.

On the part of the 2nd appellant, he challenged the failure by the prosecution to tender before the trial court a business license or a TIN Certificate as proof of ownership of the business of the complainant. Proceeding further, the 2nd appellant stated that these documents were necessary to prove that the complainant was in fact the owner of the shop in which the alleged offence was committed. According to him, the trial court therefore erred to believe that the complainant was the owner of the shop without proof of ownership.

The 2nd appellant asserted that during the preliminary hearing (PH), the respondent declared that three (3) exhibits would be tendered as evidence during the trial, these were to include: the cautioned statement of the 1st appellant, the map of the scene of the crime, and the cows that were bought with the proceeds of the crime. However, none of the aforementioned exhibits were tendered before the court. Furthermore, there was no explanation that was provided by the respondent on the failure to produce the said exhibits. In addition, the 2nd appellant pointed out the discrepancy between the judgment and the proceedings regarding the number of cows that were allegedly bought out of the proceeds of the crime, being either three or four, giving rise to confusion as to what in fact is the truth.

Submitting further, the 2nd appellant stated that upon his arrest, he was marched by the police to his home wherein a search was conducted without a search warrant. He added that the date of his arrest also differs in the various records of the court, and explained that he was taken to the police station at Bagamoyo on the same date of his arrest which was on 06/12/2021. Further, that on the following day therefore 07/12/2021, he was transferred to Dar es Salaam and thereafter, he was brought to Dodoma on 16/12/2021. The 2nd appellant further contended failure by the prosecution to tender in court the 7 stolen simcards. The 2nd appellant prayed that the court should consider their grounds of appeal and determine the matter in their favour for the interests of justice.

In resolving this appeal, I have taken into account submissions of the parties and the records of the trial court. The main issue for this court to determine is whether the prosecution proved the charges against the appellants according to the required legal standards.

The standard of proof in criminal cases is beyond reasonable doubt as per section 3(2) of the Evidence Act, Cap. 6 R.E. 2022 which provides that: -

"(2) A fact is said to be proven 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.

Simply stated, the onus of proving the case beyond reasonable doubt lies on the prosecution. In the case of **Christina Kaale and Rwekiza Bernard vs Republic, (1992) TLR 302**, the court partly held that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubts and conviction should be founded on the strength of the prosecution evidence. In the case at hand, the offence of theft must be proven by the prosecution based on the following ingredients;

(i) That there was movable property,
(ii) That the movable property is in possession of a person other than the accused person,
(iii) That there was an intention to move and take that movable property,
(iv) Accused person moved and took away the movable property from the possession of the possessor,
(v) That, the accused did it dishonestly for wrongful gain to himself or wrongful loss to another, and
(vi) That, the property was moved and took out without the consent from the possessor.

For clarity, section 258 (1) of the Penal Code reads as hereunder: -

258.*-(1) 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.*

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say-

(a) an intent permanently to deprive the general or special owner of the thing of it;
(b) an intent to use the thing as a pledge or security;
(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion; or
(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner."

In addition, section 265 provides that: -

> *"**265**. Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years."*

In the instant case, the prosecution was required to prove the offence of theft as alleged, beyond reasonable doubt. The case of **Sylivester Stephano vs. R,** Criminal Appeal No. 527 of 2016 (unreported) is

preferred. Further, in the case of **DPP vs. Peter Kibatala,** Criminal Appeal No. 4 of 2015 (CAT) Dar es Salaam (unreported) at page 18 the Court held that: -

> *"In criminal cases, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt."*

Additionally, in the case of **Director of Public Prosecutions vs Shishir Shyam Singh, Criminal Appeal No.141 of 2021,** at page 17 the CAT held that: -

> *"We must emphasize that in criminal trial the prosecution is bound to prove the case beyond reasonable doubt instead of shifting the burden of proof to the accused.*

See also the case of **Fakihi Ismali vs the Republic,** Criminal Appeal No. 146 of 2019 (unreported). In establishing the existence of the first ingredient of the offence of theft, that the stolen item was movable property, the records of the trial court indicate that PW1 is a businessman and owns a shop located at 6th Road. Further, that he deals with the business of mobiles phones and their accessories, and that he engages in the business of money transactions. The testimony of PW1, who is also the complainant, is supported by the testimony of PW2, his employee and a shopkeeper. For

that reason, I am of the view that mobile phones including phone accessories are items which qualify to be movable property.

The 2nd ingredient of the offence of theft is that the movable property must be in the possession of a person other than accused person. PW1 testifies that he is the lawful owner of the shop. It is therefore evident that the movable property was initially in his lawful custody.

Regarding the 3rd ingredient of the offence, that there was an intention to move and take that movable property, it is on the records that the movable property was appropriated without the consent of the lawful owner. PW2 testifies, as recorded at page 17 of the trial court proceedings, that he found out that there had been a break-in at the shop. For ease of record, the relevant part is reproduced herein under: -

> *"On 24/11/2021 at around 09:00 hrs. I arrived at the office. I found the office was not as the way I left. I found the gate broken. I did find the watchman. I entered the shop I found some of the phones and accessories stolen"*

Furthermore, at page 9, PW1 testifies that he received a call from PW2, and was informed that there had been a theft and some items had been stolen. The trial court records read as follows: -

" In November 2021 on 23/11/2021 it was Friday I was in Morogoro-Ifakara and 07:00 hrs. I received a call from Sauna, she told me they break own shop and they stole everything into the shop."

It is apparent that there was no consent of the lawful owner in the appropriation of the said property. Responding to the 3rd and 6th grounds of appeal; I agree with the learned state attorney that contractual agreements exist in many different forms, they may be either oral or in writing. The records show that PW1 entered into an oral agreement with the 1st appellant to be a guard at his shop. Also, PW3 testified that he knew the 1st appellant well, and he was the surety of the 1st appellant in the oral agreement between the 1st appellant and PW1. I am of the view that these facts are sufficient proof of an existing employer- employee relationship between PW1 and the 1st appellant.

I will proceed to the 5th, 11th and 14th grounds of appeal concerning the cautioned statement, whereby it is alleged by the 1st appellant that it was not procured in accordance with the requirements of the law. Looking at the trial court's records at page 24, PW4 testifies as follows: -

"After I finished, I read over the statement to him he admitted it to be truth as coming from his own mouth. There after he did print

his thumb print. I remember the statement to my force number.. my handwriting..... I pray to tender it as exhibit."

1st Accused- I was not a watchman, I don't know it.

2nd Accused- The statement is not mine so I have nothing to say.

***Court:** The statement of 1st accused received as PI. The same read over in court."*

After considering the records of the trial court, now the question is whether the cautioned statement Exhibit P1 as tendered by PW4 was properly admitted during the trial. The records indicate that the 1st accused, (1st appellant herein) was given the opportunity to object or otherwise to the admission of the cautioned statement, contrary to his assertions. In response, apart from denying the contents therein, he did not object to its admission. I am of the settled view that the cautioned statement was admitted in accordance with the law as the 1st appellant did not object thereto. The 2nd appellant in his submission averred that the cautioned statement was not tendered in court by the prosecution, contrary to their assertion during the PH that the said document would be tendered in court. I am of the opinion that the 2nd appellant misdirected himself because the cautioned statement was in fact tendered in court. In addition, he was similarly given an opportunity to comment before the admission of the said document. In response, he stated that it was not his cautioned statement,

hence he had nothing to comment. The trial court, having provided an equal opportunity to the appellants, admitted the cautioned statement as Exhibit P1. Therefore, the proper procedure was followed in admitting the cautioned statement and accordingly, the 5th, 11th and 14th grounds of appeal lack merit.

In responding to the 11th ground of appeal, I concur with the learned state attorney that it is not the duty of a police officer to record an extra judicial statement, but a cautioned statement. An extra judicial statement is recorded only by a justice of peace. Therefore, this ground is unsound and fails.

As to the 4th ground of appeal that the prosecution did not tender any evidence to the effect that PW1 is the lawful owner of the shop, I find that the testimonies of PW1, PW2 and PW3, are clear that PW1 is the lawful owner of the shop. For that reason, I consider the said ownership to have been established to the required legal standards.

As to the 7th ground of appeal that the trial magistrate did not analyze the testimony of the defense, the state attorney conceded and referred to the case of **Yusuph Ndaturu vs The Republic,** Criminal Appeal No. 195 of

2017. Ms. Tlegray submitted further that, under section 388 of the CPA, the powers of the appellate court to step into the shoes of the subordinate court and rectify an irregularity have been provided for. She therefore submitted that this honorable court has the power to step into the shoes of the trial court, if it deems fit, and analyze the testimony of the defense. In the case of **Yusuph Ndaturu (supra),** the CAT held as follows: -

> *"In determining this appeal therefore, we shall henceforth consider the prosecution and the defence evidence with a view of finding out whether or not the evidence which was acted upon to convict the appellant was shaken by the appellant's evidence. For these reasons therefore, we do not as well, find merit in this ground of appeal."*

Guided by the aforementioned decision, I will proceed to analyze the appellants' defence with a view of finding out whether or not the evidence which was acted upon to convict the appellants was shaken by the appellants' evidence. The main defence of the 1st appellant during the trial is that he was falsely implicated. As recorded at pages 35 to 36 of the typed trial proceedings, the 1st appellant denied knowing the prosecution witnesses who identified him, including PW1 the complainant. Furthermore, he denied knowing the 2nd appellant. The credibility of his testimony is doubtful as not only did he confess to committing the offence in the cautioned statement,

but the 1st appellant further admitted to knowing the 2nd appellant and gave a lengthy explanation on the participation of the 2nd appellant in the commission of the offence. According to the explanation of the 1st appellant, the 2nd appellant was the master mind behind the organization and the commission of the offence.

The defence of the 2nd appellant was mainly that he is not a resident of Dodoma and on that basis denied having committed, or being party to the criminal act. Contrary to the testimony of the 1st appellant, the 2nd appellant admitted to knowing the 1st appellant. Undoubtedly, the appellants' defence which clearly is contradictory, has not in any way shaken the prosecution evidence which was established beyond reasonable doubts. For instance, the prosecution established the identity of the 1st appellant as one of the culprits through the testimonies of PW1, the complainant, PW2 the shopkeeper and PW3, a fellow mmasai and colleague of the 1st appellant. Further, the testimonies of the prosecution witnesses were corroborated with the confession of the 1st appellant in his cautioned statement.

On the 8th and 9th grounds of appeal that the prosecution did not present in court neither the cows nor did they present the stolen sim cards which, it was alleged, were acquired from the proceeds of the crime, the learned state

attorney stated that this is not sufficient ground to exonerate the appellants from the charged offence. This is due to the admission by the 1st appellant to committing the offence as evidenced by the cautioned statement which was tendered before the court; and the same was procured in accordance with the requirements of the law. In this regard, I am in agreement with the assertions of the learned state attorney. Further, the 2nd appellant was implicated by the 1st appellant in the cautioned statement. The 1st appellant stated that it is the 2nd appellant who suggested that they commit the crime and he proceeded to link him (the 1st appellant), with a third party who was to assist them with organizing and implementing the criminal undertaking.

I will address the 12th and 13th grounds of appeal that there was infringement of rights during the arrest of the appellants. The trial court records indicate that the police officers when arresting the 2nd appellant introduced themselves and produced their official Identity Cards thereafter the arrest was done. The trial court proceedings at page 37, reveal how the arrest was conducted and they provide that: -

> *"I was at Kilopeni area within Bagamoyo. I was arrested by three persons. They came with Bajaji. They found me selling drinking water, and maasai curious. They first wanted me to sale shoes to them. We didn't agree the amount. One of them*

asked me if I am Paulo. They told me I was under arrest. They introduced to me as the police officers from central police Dodoma. They showed IDs to me."

According to the evidence adduced before the trial court, I am of the view that there was no infringement of the rights of the appellants during the process of arrest. In the circumstances, I am of the settled view that the prosecution case was proven to the required standards. That said, the entire appeal is hereby dismissed.

It is so ordered.

Right of appeal explained.

DATED at **DODOMA** this 10th day of May, 2024.

I.D. MUSOKWA
JUDGE

Judgment delivered in the presence of Ms. Victoria Njau, state attorney representing the respondent; and in the presence of the 1st and 2nd appellants.

I.D. MUSOKWA
JUDGE