

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

CRIMINAL APPEAL NO. 40 OF 2023

(Originating from Criminal Case no. 46 of 2023 for District Court's for Mvomero)

ISAYA JOSEPH..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Date of last order: 06/11/2023

Date of Judgement: 09/02/2024

BEFORE: G. P. MALATA, J

The appellant, Isaya Joseph was charged with stealing contrary 258 and 265 of Penal Code Cap.16 R.E.2022. Hearing of the case took place and the appellant was convicted and sentence to accordingly.

Aggrieved thereof, he preferred an appeal before this court armed with six grounds of appeal. The grounds of appeal are mainly on the fact that the trial court convicted the appellant basing on insufficient evidence of the prosecution side.

In nutshell, the appellant was an employee in a Petrol station of one Mashaka Rashid. It is alleged that, on the 26/12/2022, the appellant as sells manager collected moneys for sells of fuel on the respective date and placed in his office. Thereafter the money totalling TZS 13,480,000/= were nowhere to be seen and there was no breaking in the room where the money was kept. In the event the appellant became the only prime suspect thence the charges and prosecution for stealing by servant.

The prosecution side paraded a total of five witnesses to prove the case whereas the appellant testified himself. To start with, there is a cherished principle of law as per the case of **DPP Vs Shishir Shyamsingh** Criminal Appeal No. 141 of 2021 (CAT) Kigoma, 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, as it seems apparent in the case at hand. In

Fakihi Ismail v. The Republic, Criminal Appeal No. 146 "B" of 20i9

(unreported), the Court stated that: -

*"It is elementary that, the burden of proof in criminal cases rests squarely on the prosecution with no requirement that the accused proves his innocence; and that such proof must be beyond reasonable doubt- see the cases of **Joseph John Makune Vs The Republic** [1986] T.L.R. 44 and **Mohamed Said Matula Vs The Republic**, (1995) TLR. 3"*

In the circumstances while it is the duty of the prosecution to prove the case beyond reasonable doubt, it is equally the duty of the trial court to ensure that it is satisfied that prosecution witnesses in support of the case have given relevant evidence which proves the elements of the offence with which the accused stands charged."

Having gone through the evidence on record, it is clear that, the appellant has admitted that, the money get lost while under his control and he was the last person to hold them with view of banking them. However, the money disappeared mysteriously. The appellant was in fact found guilty based on the circumstantial evidence. This is cemented by Mr. Simon Mpina learned State Attorney in support of the conviction when he cited the case of **Samwel**

Marwa@Uganga Vs R, in which the court held that the evidence must pinpoint liability to that accused and no other person to bolster the evidence on record.

Further Mr. Simon Mpina cited the case of **DPP Vs Shishir Shyamsingh** Criminal Appeal No.141 of 2021 (CAT) Kigoma where the court principled that;

*"It is settled law 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 not 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 but without ;the consent from the possessor. Therefore, to prove the offence of stealing the prosecution is required to show that all the elements/ ingredients of the offence are established. For clarity, section 258(1) of the Penal Code provides:*

"A person who fraudulently and without claim of right takes anything capable of being stolen; fraudulently converts to use of any person other than the general or specific owner thereof anything, capable of being stolen\ is said to steal that thing."

It is in this regard that under section 258(2) of the Penal Code it is explicitly provided that the taking or conversion of something capable of being stolen must be done, fraudulently, (dishonestly). To this end, in order to convict accused of the offence of stealing, it must be proved that the act was done fraudulently and without claim of right

Mr. Simon learned State Attorney resisted the appeal and prayed the same to be dismissed.

The appellant had nothing substantial to submit as he was not disputing that the money gets lost while in the hands of the appellant. Bearing that in mind, he submitted that, he had already paid a total of TZS 4,500,000/= out of TZS 13, 480, 000/=. He finally asked the court to allow the appeal and direct him to pay the remaining amount.

This court has taken much concern on evidence on record, and noted that all the element of stealing by servant was satisfied though circumstantial.

The appellant is not refuting to have caused the loss of money but just to refusing to have stolen. There is no evidence to rebut the prosecution evidence on the offence of stealing in the absence of any sufficient explanations.

As such, this court finds that, the complaint by the appellant is unfounded.

Thus, the conviction of the appellant is confirmed.

However, the accused was sentenced to serve twelve (20) months. In his submission in support of the appeal he asked the appeal to be allowed and continue to pay the outstanding balance. He further submitted that, he has paid **TZS 4, 500,000/=** out of a total amount of **TZS 13,480,000/=**,

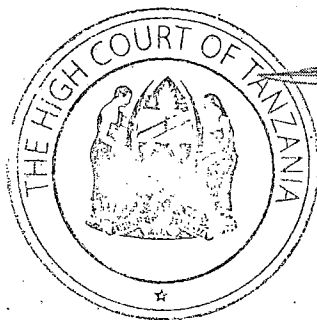
In the exercise of powers under section 366 of the Criminal Procedure Act, and considering the circumstances in this case, this court hereby altered and replaced the custodian sentence imposed by the trial court with the sentence that, the appellant is ordered to pay the outstanding sum of **TZS 8,980,000/=** within **eighteen (18)** months from the date of this judgement. Further, the appellant shall have two sureties of which, each of them to execute a bond of half of the ordered amount. All of which shall be done before the Deputy Registrar, High Court of Tanzania at Morogoro, District Registry as condition for release of the appellant from prison.

At the end of period or at any date of which the ordered amount shall have been fully paid, the employer and appellant shall appear in court for recording the status of execution of the judgement.

In the event therefore, the appeal is dismissed subject to the alteration made to the sentence.

IT IS SO ORDERED.

DATED at **MOROGORO** this 09th February, 2024.


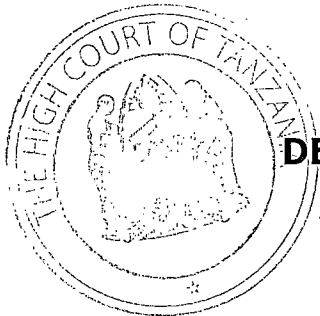


G. P. MALATA


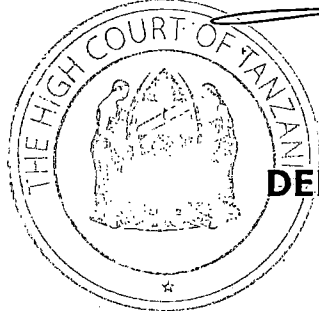
JUDGE

09/02/2024

JUDGEMENT delivered at **MOROGORO** this 09th February 2024.



S. P. KIHAWA
DEPUTY REGISTRAR
09/02/2024

Parties are at liberty to prefer an appeal to the court of appeal.



S. P. KIHAWA
DEPUTY REGISTRAR
09/02/2024