**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SUMBAWANGA SUB-REGISTRY**

**AT SUMBAWANGA**

**CRIMINAL APPEAL CASE NO. 79 OF 2023**

(Appeal from the Judgement delivered on the 19th of October 2023, H.K. Temu, SRM, in Criminal Case No.73 of 2022, from the District Court of Kalambo at Matai, Rukwa Region)

ABEL s/o MATONDO ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Last order: March 14, 2024
Judgement: May 30, 2024

**JUDGMENT**

**NANGELA, J.**

This is an appeal from the decision of the District Court of Kalambo, Matai, Rukwa region. The appellant was charged with the offence of stealing by agent contrary to Section 273(b) of the Penal Code, Cap. 16 R.E. 2019. Following a thorough hearing of the case, the appellant was found guilty of the charges. He was subsequently convicted and sentenced to a four-year prison term.

Aggrieved by the conviction and sentence, the appellant has appealed to this court. In his appeal, he has raised six grounds of appeal, contending as follows:

1. That, the prosecution side failed to prove the charge against the appellant to the standards required by the law.
2. That, the trial court misdirected itself in law and fact when it convicted the appellant based on a caution statement although the case lacked proper investigation as the Police officer who investigated the case did not appear in court to prove the allegations.
3. That, the learned trial court grossly erred in law and fact by disregarding in total the defence evidence.
4. That, trial court misled itself in law and fact when it convicted the appellant based on the prosecution evidence while the court had failed to scrutinize and evaluate the same, a fact which is a fatal and incurable in providing clear justice.
5. That, the leader of the area where the said consignment of maize was sold

was not called before the court to prove the same.

6. That, the trial court erred in law and fact when it convicted and sentenced the appellant without observing that the owner of the car used to carry the consignment was not before the court to testify regarding with whom the appellant was in the vehicle.

Having laid bare such grounds before the court, the appellant urged this court to allow his appeal, quash the conviction and sentence and discharge the appellant from the offence he was charged with and set him free.

On the 14th of March 2024, this court called the matter for its full hearing. The Appellant was present and unrepresented. He argued the appeal on his own motion without being assisted by an advocate as he chose not to engage one. On the other hand, the respondent enjoyed the services of Ms. Atupele Makoga, learned State Attorney.

In arguing the appeal, the appellant urged this court to consider his grounds of appeal as they are. He told the court that based on those grounds of appeal he had raised, he should

be freed because the exhibits, which he alleged were maize bags stolen, were not brought to court and even the vehicle claimed to have been used to transport such a consignment was not brought to court, despite the assertions that such exhibits were seized by the police.

Furthermore, he informed the court that there was no waybill or delivery note to support his claim that the cargo was given to him. In view of that, he argued that there was no evidence to show that the cargo was being transported, given that no waybill was tendered as an exhibit. The appellant further argued that there was no proof provided proving the sale of the cargo of maize or who bought it.

In closing his brief submission, the appellant said that no one from the location where the cargo was purportedly sold appeared in court to testify as to whether or not there was a sale, and that not even the owner of the vehicle could prove that he had given him his motor vehicle for the purpose of loading the consignment. He therefore prayed for his appeal to be granted and for his release.

For her part, Ms. Atupele Makoga (State Attorney) informed the court that the respondent is opposing the appeal

and does not support it at all. Submitting as regards the first ground, she argued that the offence was sufficiently proved as the appellant unlawfully obtained the 300 bags of maize and that fact was fully proved as they called witnesses to testify in court. With reference to the testimony of Pw-1, Pw-2, and Pw-6, Ms. Makoga argued that the first ground of appeal ought to be deemed without merit in light of these testimonies.

Regarding the second ground, she asked the court to refer to the proceedings on page 40, which demonstrates that the trial court received and considered a caution statement. She also cited Pw-6's testimony, arguing that it provided the court with sufficient information about Pw-6's thorough investigation of the case. In view of all such evidence, she submitted that the second ground is also baseless.

As regards the third ground, it was Ms. Makoga's argument that the trial court did evaluate the evidence. She cited this court's pages 14–15 of the judgment of the trial court, saying that it is evident from these that the trial court complied with its legal duties in assessing the evidence presented. She argued that, in light of what she has said, the third ground is likewise unfounded.

Ms. Makoga argued further that by examining page 12 of the judgment, the fourth ground might just as easily be addressed in a similar manner. Because of this, she contended, it should also be determined that the fourth ground of appeal is without merit and therefore unfounded.

Regarding the fifth ground, Ms. Makoga submitted that it is likewise unfounded. She argued that it was evident from Pw-3's testimony in court and from page 17 of the proceedings that the fifth ground had no merit at all. So, she urged this court to find it to be baseless as well. Finally, as far as ground six is concerned, she told this court that the same is baseless if one looks at page 24 of the trial court's proceedings regarding how the arrest of the appellant was facilitated.

In view of all such submissions, she urged this court to dismiss this appeal in its entirety. The applicant was afforded a chance to rejoin. Seizing the opportunity, he implored this court to release him.

I have given careful thought to the arguments put forth by both the appellant and Ms. Makoga, the learned State Attorney for the respondent. One thing worth mentioning is that this is a first appeal, and this court has the avenue of

revisiting and reevaluating the evidence and may even come to its own conclusion.

That is a basic principle of law when it comes to dealing with a first-time appeal. See the case of **Leopold Mutembei vs. Principle Assistant Registrar of Titles, Ministry of Lands Housing and Urban Development & Another** (Civil Appeal 57 of 2017) [2018] TZCA 213 (11 October 2018). The trial court's factual findings are the only thing this court cannot reverse because it did not have the benefit of seeing the witnesses or receiving their testimonies.

See the cases of **D. R. Pandya vs. R.** [1957] EA 336; and **Jamal A. Tamim vs. Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (unreported) or any other finding is a finding of fact. See also the case **Materu Leison& J Foya vs. R. Sospeter** [1988] TLR 102. It is also a fundamental principle of criminal law that it is for the prosecution to prove its case beyond reasonable doubt.

As a matter of principle, it is not for the accused to establish his/her innocence and the weakness of the defence case is not a basis for the accused's conviction. With such

principles in mind, the issue is whether the prosecution side was able to prove its case to the required standards.

Ms. Makoga, the learned State Attorney for the Republic thought and averred that the prosecution case was firm and brassbound. She stated that the evidence was watertight, and, for that reason, the appeal should fail. On the other hand, the appellant sees it otherwise. In establishing its case, the prosecution called six witnesses (Pw-1 to Pw-6).

As I look at their testimonies, it is clear to me that the trial court got it right in convicting the accused. I hold that view because, looking at the testimony of Pw-1, it was clear that he had entrusted the maize cargo to the appellant, who later sold the same without authority to do so. Pw-1 is said to have identified the accused when he was brought to Sumbawanga from Tabora and that, when he inquired from him, the accused did admit to having sold such a consignment.

The evidence of Pw-1 was also supported by Pw-2, Pw-3 and Pw-4 who bought the maize in Tabora where their business is and that he bought the same from the appellant. Pw-1's testimony was that the car that was hired had a registration Number T.956DSS and this testimony was supported by Pw-5

who had released his car to ferry the cargo to Mwanza but was later told that those who had hired it ended in Tabora.

The testimony of Pw-6 also links the appellant with the whole incident of stealing by agent. In fact, Pw-6 was able to trace the mobile phone which Pw-5 had said was used by the person who hired his vehicle to ferry the maize consignment from Matai to Mwanza, and the same later turned to be the phone number of the appellant. Pw-6 did also inform the trial court that upon his arrest, the appellant confessed to have hired a truck from a person in Tunduma and sold off the consignment while in Tabora. The caution statement was admitted as Exh.P-1.

In my view, I would consider the accused's submissions and grounds raised in this appeal as afterthoughts. In principle, looking at the above testimonies of Pw-1 to Pw-6 in a nutshell, they negate what the appellant seems to raise as his first ground of appeal that the prosecution side failed to prove its case to the required standards. I do not think such a ground to be valid at any rate and I thus dismiss it.

Likewise, his second ground concerning the admissibility and reliance done by the trial court on the Exh.P-1, is also with

no merit since that was a proper piece of evidence which the trial court had all reasons to rely on it. Pw-6's testimony was so cogent and trustworthy that no one would refuse to believe his testimony. Even without the Exh.P-1 still the evidence against the appellant was indeed watertight. As such, his second ground of appeal should as well crumble.

The third and fourth grounds can be looked at together. They are centred on whether the trial court considered the defence case (evidence) and whether the evidence in its entirety was evaluated and if so, properly evaluated. In principle, a trial court is duty bound to properly evaluate the evidence laid before it and any decision arrived at without proper evaluation of the evidence laid before the court cannot stand. It must discharge such a duty simply because it was the court that directly saw and heard from the witnesses.

Such a position was once stressed in the Nigerian case of **Owakah vs. R.S.H & P.D.A** (2022) 12 NWLR (pt.1845) at 498, also cited in the case of **Exim Bank Tanzania Limited vs Sai Energy & Logistics Services Limited** (Commercial Appeal No.2 of 2022) [2023] TZ HCComD 380 (27 November

2023). In that case of **Owakah** (supra) the Nigerian Court had the following to say:

> "The evaluation of evidence and the ascription of probative value to such evidence remains the primary function of the trial court which saw, heard, and duly assessed the witnesses. Where a trial court unquestionably evaluates the evidence and justifiably appraises the facts, what the Court of Appeal ought to do is to find out whether there is evidence on record to justify the conclusion reached by the trial court. Once there is sufficient evidence on record from which the trial court arrived at its finding of fact, the Appellate Court cannot interfere with such findings."

Taking the cue from the above excerpt, the issue is whether the trial court in this appeal evaluated the evidence laid before it or not. In my view, I need not waste much time on this point since, looking at the decision of the trial court, it is

clear, as argued by Ms. Makoga, that, the trial court did evaluate the evidence of both sides and arrived at a proper conclusion that the prosecution had established its case to the required standards.

Its approach as it might be noted from pages 13 to 15 of the impugned decision was to respond to the issue whether the charges were proved based on the evidence on the record. The trial court looked at both the prosecution and the defence case and not just a one-sided examination.

Had it been so, that would be a serious error since, as it was stated by the Court of Appeal of Tanzania in the case of **Hussein Iddi and Another vs. Republic** [1986] TLR 166:

> "It [is] 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 defence evidence".

But even if one would say that the trial court did not evaluate the evidence, a fact that is not the case, this court, being the first appellate court, would still step in and do the task. See the case of **Selle and Another vs. Associated**

**Motor Boat Co. & Another Co.** [1968] EA 123, where Law, JA, (as he then was) stated that:

> "Where it is apparent that evidence has not been properly evaluated by the trial judge, or that wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself and draw its own conclusions (Price v. Kelsall, [1957] E.A. 752; Benmax v. Austin Motor Co. Ltd., [1955] 1 All E.R. 326)."

In my view, and as I stated earlier hereabove, the evidence was evaluated, and even a quick look at the testimonies of Pw-1, Pw-2, Pw-3, Pw-4, Pw-5, and Pw-6 all point to the guilt of the appellant without much ado. The last two grounds, five and six, of the appeal do not have merits as well. A case is not won because of the number of witnesses that were paraded in court. The law is very clear that even a single witness may be relied on to prove a case to the required standards.

Consequently, if the prosecution did not see the necessity to parade all such witnesses, and since those available were

able to establish the prosecution case to the required standards, then the grounds number five and six of the appeal are without merit and should as well be discarded.

In view of the above findings, it is the conclusion of this court that the appellant has not been able to successfully assail the trial court's findings and conclusions regarding his involvement in the offense with which the appellant was charged. The conviction and sentence meted out against him were therefore proper and should remain. In light of all that, I find this appeal to be lacking merit and I hereby dismiss it. The appellant is to serve the sentence imposed on him by the trial court.

It is so ordered.

**DATED AT SUMBAWANGA ON THIS 30TH DAY OF MAY 2024**


.....

DEO JOHN NANGELA

**JUDGE**

Right of Appealing to the Court of Appeal is fully explained and guaranteed.


.....

DEO JOHN NANGELA

**JUDGE**