THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB – REGISTRY

AT MBEYA

PC. CRIMINAL APPEAL NO. 12 OF 2023

(Originating from Criminal Appeal No. 49 of 2023 in the district court of Mbeya in Criminal Case No. 323 of 2022 in the primary court Mbeya at Mbalizi.)

LUCIA D/O JOHN .....APPELLANT

VERSUS

AKLEY S/O JANUARY .....RESPONDENT

JUDGMENT

Date of hearing: 22/4/2024

Date of judgment: 18/6/2024

NONGWA, J.

In the primary court of Mbeya district at Mbalizi in Criminal Case No. 323 of 2023 (trial court), the respondent was charged with the offence of theft contrary to section 258(1) and 265 both of the Penal Code, Cap. 16. From the trial court records and in particular the charge sheet, it was alleged that on 16/8/2022 at 3:45 morning at Mbalizi stand Tarafani Mbeya rural in Mbeya region being passenger of Mwalumengese bus from Saza to Mbalizi the respondent did steal bag, one dress, one bedsheet, one *kikoi* and underwear all valued at shilling 103,000 and cash shilling 150,000 totalling shilling 255,000/= the property of Lucia Kisazi kitevelo

which is the offence contrary to the law. He was found with no case to answer.

Brief fact of the case is that on 16/8/2022 the appellant was travelling from Saza to Mbalizi in the Mwalungese bus carrying bag which was put aside. On the way the respondent entered the bus also having a bag and put it near the appellant's bag. After reaching Mbalizi stand commonly called Tarafani, the appellant did not see her bag, she took the other bag opened it found voter card and other information of the respondent. Tried to call the respondent via phone in vain, the matter was reported to police and the appellant connected with theft of the bag.

At the close of prosecution case the trial court found a *prima facie* case not established against the respondent, he was acquitted. Dissatisfied the appellant unsuccessfully lodged the appeal in the district court of Mbeya via Criminal Appeal No. 49 of 2023 (appellate court). The appellate court concurred with the trial court that the adduced evidence did not establish the charge of theft. The appeal was thus dismissed.

Still disgruntled, the appellant filed petition of appeal with two grounds of appeal; **one,** that the trial court erred both in law and fact when dismissed the appeal by saying the same was devoid of merit, and **two,** that the trial court findings was not a triumph of justice for not

putting into consideration the two supplement grounds added orally during hearing of the appeal that the finding of the trial court was relied on the proceedings and records which was not a part to it as the parties were Rose Patrick being the complainant and Benard Afrom being the accused whereas 45 days was given for aggrieved party to appeal contrary to the law as see at page 7 of the record of the trial court judgment.

When the appeal was called for hearing, the appellant appeared in person, the respondent did not appear after all efforts to serve him proved futile, the matter proceeded *ex-parte* against him. The appellant prayed hearing of appeal through written submission.

In her submission, the appellant narrated sequence of events as foundation of her case which is not necessary at this stage. On merits of the appeal, it was submitted that, circumstance of the case pointed to the respondent as the one who stole the bag because was not ready to give cooperation and tried to escape but was later controlled by police. She went on to state that the respondent was interrogated at the police and his statement was important in the two lower courts. She added that the respondent's statement or police officer were crucial but was not given chance to call them to testify which could have turned the case otherwise, a thing which was not noticed in the judgment of the lower courts.

Further submission was that after judgment, the respondent disappeared to unknown place to date. That the lower courts misapprehended nature and quality of evidence requiring for interest of justice this court to intervene. The case of **Salum Mhambo vs Republic** [1993] TLR 170 was cited to support the argument.

Arguing the second ground, the appellant submitted that the case originates in Criminal Case No. 323 of 2022 being the complaint and the respondent, the accused. But to her dismay, the judgement of the trial court refers the complainant as Rose Partick and Benard Afron as accused. Further submission was that the trial court said appeal was to be filed in 45 days instead of 30 days making the order of the trial court illegal. This she argued it was extracted from other pleading and not her case, she said the judgment was a nullity. According to her, judgment in Criminal Case No. 323 of 2022 and Criminal Appeal No. 49 of 2023 is yet to be delivered. From the above prayed the appeal to be allowed with costs and the case to be remitted for retrial.

Having considered the record, grounds of appeal and submission of the appellant, the only issue for my determination is whether the appeal has merit. The appellant's case ended with a ruling of no case to answer. The trial court was satisfied that paraded evidence had not made out the

case against the accused person warranting him to enter defence. The respondent was therefore acquitted with the offence of theft which stand charged. In the primary court the procedure is governed by section 36 of the Primary Courts Criminal Procedure Code of the Third Schedule to the Magistrates' Courts Act [Cap 11 R: E 2019]. It provides;

> *'At any stage of the proceedings, the court may, if satisfied that the accused person has no case to answer, dismiss the charge and acquit the accused.'*

A stage of no case to answer applies in all criminal trial, that is at the closure of the prosecution case, the trial court is required to consider the evidence and make a finding as to whether the prosecution had sufficiently made out a case against the accused person to require him to mount his defence. If a *prima facie* case is not made out, the trial court is enjoined to find that the accused is not guilty. The term *prima facie* is not defined by statutes, however in the case of **Ramanlal Trambaklal Bhatt vs R** [1957] 1 EA 332 (CAD) the court stated;

> *'It may not be easy to define what is meant by a "prima facie case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.'*

Burden of prove in criminal cases is on the prosecution or claimant as the case here and the standard is beyond reasonable doubt. Sarkar on Sarkar's Laws of Evidence. 18th Edn., **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar**, published by Lexis Nexis. At page 1896, the learned authors had the following observation;

> ***'... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.*** *The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party....'*
> Emphasis added.

In primary court burden of proof is governed by rule 1(1) the Magistrate's Courts Act (Rules of Evidence in Primary Courts) Regulations G.N. 22 of 1964 which provides that;

> *'Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence, unless the accused admits the offence and pleads guilty.'*

And rule 5(1)

> *'In criminal cases, the court must be satisfied beyond reasonable doubt that the accused committed the offence.'*

The ruling whether the accused person has case to answer or not is based on a cannon that the accused is not supposed to be called to testify if the court is satisfied there is no evidence upon which the accused to enter defence. In the case of **The Director of Public Prosecutions vs Morgan Maliki and Another**, Criminal Appeal No. 133 of 2013 (unreported) cited in the **Director of Public Prosecutions vs Philipo Joseph Ntonda,** Criminal Appeal No. 217 of 2020 [2021] TZCA 707 (1 December 2021; TanzLII) the court held:

> *'So, on the principles set out in BHATT's and MURIMI's cases, we think that a prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence with which he is charged or kindred cognate minor one.* ***Which means that at this stage, the prosecution is expected to have proved all the ingredients of the offence or minor, cognate one thereto, beyond reasonable doubt. If there is any gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof.'*** Emphasize added.

[See also; **Director of Public Prosecutions vs Peter Kibatala,** criminal Appeal No. 4 of 2015) [2019] TZCA 157 (4 July 2019; TanzLII)]

In this appeal the appellant complain that circumstance of the case pointed to the respondent as the one who stole her bag. I am aware that there are concurrent findings of the two lower courts, both clear that the appellant adduced insufficient evidence in support of the charge. This court cannot disturb such findings unless there is misapprehension and no-direction of the evidence. See **Jaspini s/o Daniel @ Sikwaze vs Director of Public Prosecutions,** Criminal Appeal No. 519 of 2019 [2021] TZCA 58 (26 February 2021; TanzLII).

In the submission the appellant called this court to intervene though no attempt was made to refer to specific piece of evidence which supported the charge. However, I will endeavour to peruse the available evidence and see if there is misapprehension and non direction by the lower courts. Particulars of the offence reads;

> *'Wewe AKLEY January unashtakiwa kuwa mnamo tarehe 16/8/2022 majira ta saa 3:45 asubuhi huko stand ya Mbalizi tarafani wilaya ya Mbeya vijijini mkoa wa Mbeya mkiwa abiria katika basi la mwalumengese litokalo saza hadi Mbalizi uliiba begi gauni 1 shuka 1 kikoi 1 nguo za ndani zenye thamani ta sh. 103,000/= na fedha taslimu sh.150,000/= jumla sh. 255,000, mali ya Lucia Ksazi kitendo ambacho ni kosa na kinyume na sheria.'*

From the above the appellant was required to establish that she had a bag, one dress, one bedsheet, one *kikoi*, underwear and Tsh 150,000/= and that it is the respondent who took it unlawfully. I have perused evidence of the appellant who testified as SM1, there is no any evidence making any reference to one dress, one bed sheet, one *kikoi,* underwear and Tsh. 150,000/=. In her evidence the appellant just said she had a bag, while the charge mentioned several articles. One dress, one bed sheet, one *kikoi,* underwear and Tsh. 150,000/= were subject of the charge and the appellant was required to prove that he had and owned those properties. Evidence of SM2 did not refer to any of articles mentioned in the charge and whether it was the appellant who took it. In absence of evidence of ownership of those articles the charge of theft cannot be said was established. See **Ramadhani Hamisi Mkwembya @ Kigi vs Republic,** Criminal Appeal No. 396 of 2021 [2024] TZCA 395 (4 June 2024; TanzLII).

I therefore agree with the lower courts that the appellant failed to establish the case against the respondent upon which the respondent was to be called to defend.

In the second ground, the appellant complain that police officer was not called and statement of the respondent recorded at police was not

tendered. This issue was not raised in the appellate court so it cannot be determined at this stage. Even digging into the complaint, it has no merits because the appellant is the one who was prosecuting case in the trial court after she had testified and called SM2, prayed to close her case. It was upon her to call the police to testify in her support and bring the accused statement. She cannot blame the court for such failure because the court was not prosecuting any case to have known who were important witness or document to support the appellant's case.

Another complaint is that the judgment was delivered in the case between Rose Patrick and Benard Afron which was not her case. I have perused the ruling of the trial court and found the paragraph showing in whose presence judgment was delivered parties are referred as Rose Patrick and Benard Afron. However, that was not part of the decision of the trial court to have affected rights of parties as the appellant has submitted.

Another complaint is that the appellant was advised to appeal within 45 days instead of 30 days required in circumstance of her case. This will not detain me much as it was not decision of the trial court. Further the appellant was not prejudiced by mere indicating that was required to appeal in 45 days.

Mere inclusion of other names and days within which to appeal in the delivery part of the ruling which did not form part of the decision cannot be said it affected the ruling of the court. In **NMB Bank PLC vs Nickson Livinstone Temu,** Civil Appeal No. 487 of 2020 [2024] TZCA 40 (14 February 2024; TanzLII)

> *''Besides, we do not find that there was miscarriage of justice as no party's right was affected by mere presence of such statement in the award.'*

Indicating that the parties were Rose Patrick and Benard Afron and indicating that the appellant was to file the appeal if she so wished in 45 days was a mere slip of the pen which occasioned no injustice to the parties.

From what have been discussed, I find no merit in the appeal, consequently I dismiss it. Being criminal case no order to costs.

V.M. NONGWA
JUDGE
18/6/2024

DATED and DELIVERED at MBEYA this 18th day of June 2024 in presence of the appellant in person.

V.M. NONGWA
JUDGE