IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUB - REGISTRY OF SHINYANGA)
AT SHINYANGA

CRIMINAL APPEAL NO. 1208 OF 2024
(Originating from Criminal Case No. 82 of 2022, Maswa District Court at Maswa)

BETWEEN

NUHU MSUYA.....1ST APPELLANT

MAGDALENA FRANSISCO.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

4th April & 31st May 2024.

MASSAM, J.:

The appellants herein above were charged before the District Court of Maswa at Maswa in Criminal Case No. 82/2022 with the offence of Stealing by Servant Contrary to **Section 258 (1) (2) (a)** and **271** of **the Penal Code** Cap 16 R.E 2022.

The particulars of the offence as per the charge sheet was that, on the diverse dates between 20th June up to 14th July 2022 at Lalago village within Maswa District in Simiyu Region, the appellants being the manager of Chagu Filling Station at Lalago branch did steal a total of Tshs. 6,185,478.44/= the property of John Chagu which come into their possession by virtue of their employment.

Brief facts of the case were as such that, both the appellants were employed by Chagu Filling Station at Lalago branch whereas the 1st appellant was employed as a branch Manager whose duties were to supervise all the activities at the station such as to receive fuel brought at the station, to cooperate with the pump attended, to sell fuel, to receive the money from the sale of fuel and to prepare a station report. For the second appellant, her duties were to sell fuel, prepare a day sale report and handleit to the Manager.

That, from different dates between 20th June to 14th July, 2022 both the appellants being the employees of Chagu Filling Station at Lalago branch stole cash money make Tshs. 6,185,478.44/= the property of John Chagu, which had been obtained from the work they were doing in that station. Following that act, both the appellants were arrested and denied to commit the offence.

At the trial, the prosecution prospered to prove the offence against the appellants, and subsequently were convicted to serve five years imprisonment each.

Pained therein, the appellants rightly lodged this appeal armed with 8 (eight) grounds which is to the effect that, "the trial Magistrate erred in law and fact in holding that the prosecution proved its case

beyond reasonable doubt" and therefore prays for this Honourable court to allow this appeal, quash the conviction, and set aside the sentence of the trial court.

During the hearing of this appeal, both the appellants were represented by Advocate Chrisantus Chengula, while the respondent was represented by Miss Caroline Mushi and Mboneka, learned state attorneys.

Succumbing on this appeal, the counsel for the appellants opted to unite grounds number 1,2,3 and 6 while the remaining grounds were argued distinctly.

With the first sets of grounds of appeal, that the trail magistrate wrongly convicted the appellant since the evidence adduced was weak, contradictory, unrealistic and also by admitting some of the exhibits preferably exhibit P3 which was denied by the 2nd appellant, the counsel demanded that, the trial magistrate did not properly evaluate and analyze the evidence since it did not connect the 2nd appellant with the offence. The counsel refers this court at Pg. 24 of the court proceedings whereas the evidence of PW1 shows that, PW2 who was the main supervisor of the said petrol station, from 20/06/2022 to 13/07/2022 all the reports were well recorded and confirmed that there was no any stealing happened until on 14th July 2022 when there was an allegation

from PW2 that there was a stealing happened from 20/06/2022 to 13th July, 2022.

The counsel maintained that, at Page 29 to 32 of the court proceedings PW2 testified that the source of knowing that there was theft emanated from exhibit P3 and P4 but exhibit P3 was objected by the 2nd appellant since she did not use it in her daily works but rather, she uses exhibit P4. Yet, he referred this court at Page 28, when PW2 testified that, on 4th July, 2022, the day when he discovered that there was theft, he was with Saulo Mohamed and was mentioned at Page 15 as a witness but did not appear before the court to give his testimony and support the evidence of PW2.

Again, the counsel argued that, the evidence of PW1 and PW2 confirm that PW2 was the main supervisor of that company and the only supervisor and all the information was supposed to be taken to PW2 but the 1st appellant at Page 73 testified that, PW2 was not only the supervisor since there was another supervisor known as Charles as it is shown within exhibit P4, a daily sheet report that on 23/06/2022 and 30 /06/2022 the petrol station was supervised by him and gave a report and there was no report of theft at that station but on those two dates it is when PW1 and PW2 testified that stealing was committed between 20/06/2022 to 13/07/2022 and again that Charles Chagu was not called

before the court to testify if there was stealing on the alleged dates on not. He cited the case of **Ahamed Salum Hassan @ Chinga Versus Republic, Criminal Appeal No. 386 of 2021**, where the courts insisted on the principle of failure to call material witnesses at Page 12 and 13.

Further to that, the counsel referred this court at Page 30 of the court proceedings when PW2 was testifying that on 14th July, 2022 after he had supervised and discover that there was stealing, he interrogated all the appellants and agreed to be linked with that theft but it was only the 1st appellant who was arrested on that day while the 2nd appellant was arrested after a month, that is on 13/08/2022 and there was no reasons as to why they were arrested on different dates. He refers this court at Page 30 when PW2 testified that, there was a conspiracy between the appellants in commission of the said offence but no where conspiracy was shown.

Likewise, the counsel claimed that, at Page 30 of the court proceedings, PW2 informed the court that the appellants were stealing by reversing the meter locally but yet again at Page 36 he testified that the said act of reversing the meter cannot be done hence this evidence is contradictory and the credibility of that witness is questioned. He clarified his argument by citing the case of Jackson **Anthony Vs,**

Republic, Criminal Appeal No. 242 of 2019, CAT at Mwanza. Pg 2 that, the evidence of a witness cannot be believed where the witness gives improbable or implausible evidence or where the evidence of the witness materially contradicts the evidence of another witness, and it is from this testimony that the prosecution evidence was contradictory, and they failed to prove the offence to the required standard and again they failed to connect the 2nd appellant with the offence.

Yielding on the 4th ground, that the trial Magistrate erred by relying on the evidence of PW4 and exhibit P6 which were not strong enough to connect the appellants with the offence, the counsel for the appellants reasoned that,as per the evidence tendered at Pg 59 and 64 of the court proceedings when PW4 was testifying he said that, he was called by PW1 on 18/07/2022 and thereafter he went to Maswa for auditing the company of Chagu filling station to verify if there was stealing, and after he get there he was supplied with the reports from the company management and after he had examined the report he realized that there was loss from 20/06/2022 to 15/07/2022 and was informed by the company that, the 1st appellant was responsible for that stealing,but with exhibit P4 there is no where which shows that the 1st appellant was the one who was responsible. Even in his report, that is exhibit P6 where he attached among the reports, he was auditing it does

not feature the name of the 1st appellant or his signature to show that the 1st appellant prepared that report. Further to that, he submitted that PW4 evidence shows that he audits by using same reports which are more than one report but prosecution failed to show if the report used was the one used by the appellant or other different reports since the appellant was not present during the auditing hence the tendered exhibit P6 and the evidence of PW4 was not strong enough to connect the appellants with the offence.

The same, on the 5th ground that the investigation done was shoddy to sustain conviction, the counselreferred this court at Page 53 and 55 of the trial court proceedings when PW3 was testifying that, they failed to arrest the 2nd appellant as she was not around, he submitted that that evidence contradicts with the evidence of PW2 who testified that on 14/07/2033 he interrogated all the appellants and both admitted to commit this offence but only the 1st appellant was arrested while the 2ndappellant was there too but was not arrested.

Once more, the evidence of PW3 contradict with the evidence of PW1 and PW2 since PW3 evidenced that the stealing done by the appellants was through stealing petrol from the fuel tanks while the evidence from PW1 and PW2 shows that the stealing was done through recording wrong information to exhibit P3 and P4. He refers this court at

Page 55. Further to that, the counsel claimed that even exhibit P5 which is a sketch map does not show if the said area had 'visima vya mafuta' as alleged by PW3 that, stealing was done in that 'visima' hence the investigation done was too weak to convict the appellants.

Submitting on the 7th ground that the trial court disregard their defense, the counsel argued that, from the entire judgment the trial Magistrate summarized only the prosecution evidence and left the defense evidence. He cemented his argument by citing the case of **Biloza Robert Vs. Republic, Criminal Appeal No. 9 of 2019** CAT at Sumbawanga, Pg 19 to the effect that failure to consider the defense evidence is as good as not hearing the accused and it is fatal.

With the last ground that the trial Judgment went against the provision of Section 312 (1) of the CPA by failing to give reasons justifying the conclusion of the court, the counsel submitted that, in the entire judgment there is nowhere the trial magistrate gave critical analysis of both sides or gave reasons as to why he convicted the appellants. He referred this court to the case of **M/s St. Anthony Secondary School Vs Lukumbulu Investment Co. Ltd**, CAT at Dar es Salaam, Case No 388 /16 of 2022 at Page 13 which held that, the strength of any decision lies on its reasons, as reasons is the soul and spirit of a good judicial decision, without it there can not be any validity

decision. Therefore, the counsel prayed for the decision and conviction of the trial court be quashed and the sentence be set aside.

On their reply, Mis Mushi submitted that, they are supporting the conviction and sentence imposed by the trial court and with the eight grounds of appeal as submitted by the appellants, on their side they merged grounds number 1,2,3,5 and 6 while other grounds were argued separately.

Arguing on the first sets of grounds of appeal, the learned state attorney submitted that, since the appellant were charged with the offence of stealing by servant, the issue to determine was whether the appellants were employees of that petrol station and whether the stealing occurred while at that station. The learned state attorney argued that, at the trial they brought 4 witnesses and presented 6 exhibits, and as per the evidence of PW1 who is the owner of that station and 1st appellant as a manager, his duties were to supervise all the station work and taking money from the 2nd appellant who was a pump attendant, and had a counter book which she uses to record all the sale of the day and submit it to the 1st appellant. The counsel added that, PW1 on his evidence testified that, he knew the 2nd appellant through her mother who lived near his brother's house and again PW1 tendered the letter written by the 1st appellant applying for that job.

With the issue of stealing, the counsel argued that, it was proved by PW2 who is the main supervisor of that station and knows the appellants at Pg. 28 of the court proceedings, and also testified that on 14/07/2022 he went to that petrol station for inspection with one Saulo and it is true that he measured the amount of oil in the tanks and discovered there was 1,042,000 litres of petrol and 442 litres of diesel while the report from the 1st appellant revealed that the petrol tank had 2,027,000.62 and the diesel was 1,241 and after he had interrogated the 1st appellant he had no proper answers. Again, PW1 interrogated the 2nd appellant and the counter book of her daily report was inspected by PW2 and the results were different too and the same was tendered as exhibit as it was among the documents helped them to discover that stealing by referring this court at Page 32 of the court proceedings.

The counsel went on succumbing that, the evidence discloses that the 1st appellant was reversing the meter locally in order to see that the oil has been sold while while it was not sold and that evidence was supported by the external auditor who testified as PW4 at Page 59 of the court proceedings who recognized the loss of 773 litter of diesel and 1,085 litters of petrol after auditing the report and also was informed that the manager was the 1st appellant and the report was admitted as exhibit without being objected.

Further to that, the counsel argued that, it was from the counsel for the appellants that PW1 testified on the exactly date when that stealing occurred but from the entire proceedings there is no such a testimony from PW1. With the issue of material witness one Saulo Mohamed as was not called to testify since he was with PW2, the counsel refers this court to the provision of section 143 of the TEA that no number of witnesses are required to be called to testify thus Pw2 was a material witness and the case of **Ahamed Salum (supra)** is distinguishable from this case although it had the same principle.

The learned counsel also argued on the issue of supervisor as the 1st appellant claimed that there is another supervisor rather than PW2, but during cross examination that facts were not questioned and bring that fact at this stage is an afterthought and can not be countered.

With the issue of contradiction of evidence of PW2, the learned counsel stated that his evidence is clear that a person can not be able to temper with the pump but it is easy to temper with the counter book, as he also testified at Page 30 that stealing was done in collaboration of both the appellants. The council also reasoned on the issue of arrest of the 2nd appellant and submitted that what they were required to prove is stealing and that it was done by the appellants and not the issue on how and when they were arrested.

On the issue of analysis and evaluation of the evidence by the trial magistrate, the counsel submitted that, the prosecution succeeded to prove the charge against both the appellants beyond reasonable doubt hence the first sets of grounds of appeal needs to be dismissed for want of merit.

Arguing on the 4th ground of appeal, that the trial court based on the evidence of PW4 who is an auditor, the counsel refers this court at Pg 59, 60 and 61 of the court proceedings when PW4 was testifying he pointed out that, his duty was to conduct an auditing and know if there was loss and he did not know the 1st appellant as he was just mentioned to him before conducting the audit and he was not aware as to who caused that loss but he come to realize it later. Again, the appellant at this stage is objecting the audit report but he was the one who represent it at the lower court and he never questioned the same.

With the complain that the appellant was not involved when auditing was conducted the counsel stated that PW4 in his testimony testified that he was there. On the issue of sketch map, she submitted that since it was not objected at the trial court, thus challenging it at this stage is an afterthought.

With regard to the 7th ground that the trial magistrate disregard the defense evidence, the counsel refers this court at Pg 9-10 of the court judgment and submitted further that, even if this court will observed that the defense evidence was not considered, still it has power to consider it and thus the cited case of **Biloza Robert (supra)** by the counsel for the appellants, the circumstance is different from the current case.

Regarding the 8th ground, that the trial court went against the provision of section 312 (1) of the CPA, the counsel submitted by referring this court at Page 9 of the judgment that, the reasons for the decision was given. Likewise, she submitted that, no format was given to be followed when giving reasons for the decision, and the cited case of **M/s. St Anthony Secondary School (supra)** is distinguishable hence she prayed to this court to dismissed this appeal for want of merit

Resting his submission, the counsel for the appellant make clarification on the issue that the 2nd appellant had a counter book of recording the sales and handleit to the 1st appellant, he referred this court at Pg 32 and 72 that there was no evidence which connected the 2nd appellant with this offence as she objected exhibit P3 and admitted to have been using exhibit P4.

With respect to the dates when the offence was alleged to have been committed, the counsel refers this court at Pg 24 which shows that it was done on 20/06/2022 and with the issue of material witnesses one Saulo Mohamed and Charles Changu, the counsel insisted that, they were required to be called and testify since they had a knowledge of the commitment of the said offence, and more, the said Saulo Mohamed was mentioned within the evidence of PW2 and PW3. Yet again, the said Charles was required to come and testify the dates that stealing was alleged to have been occurred since he is the one who made inspection to that station in those dates and according to exhibit P4.

Likewise, the counsel submitted on the issues of failure to arrest the 2nd appellant and maintained that, the trial court unsuccessful made analysis on the evidence presented by the defense as to why they were arrested on different dates since PW2 testified that he interrogated both the appellants and admitted to be associated with the loss. The counselrefers this court at Pg 64.

On the issues of not objecting some of the exhibits preferably exhibit P5 and P6 he submitted that, he was speaking about its importance in convicting the appellants and not otherwise. Further to that, he insisted that, in the case of **Salum Hassan (supra)** and the case of **Biloza Robert (supra)** are not distinguishable because what is

important is the principle lied down in those case and not the facts hence, he refreshed his submission by praying to this court to nullify the conviction and the sentence by the trial court.

Having heard the submissions from both parties, this court will now make a determination on the merit of this appeal, and the issue for determination is whether the prosecution proved the charge beyond reasonable doubt.

To begin with, it is clear under the provision of **Section 3 (2) (a) of The Evidence Act,** which provides the standard of proof that:

> ***"****A fact is said to be proved 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****."***

Again, ***Section 110 (1)*** provides that:

> *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

To be satisfied if the case was proved beyond reasonable doubt, this court will merge grounds number 7 and 8, and 1,2,3,4,5, and 6 jointly and make a total of two grounds to be determined.

To commence with, this court choses to start with grounds number seven and eight as it was complained by the appellant that the trial Magistrate failed to consider the defense evidence and that the judgment contravenes the provision of section 312 (1) of the Criminal Procedure Act [Cap 20 R.E 2022].

In his submission the counsel for the appellant contended that, the law requires evaluation of evidence from both sides before arriving to conclusion but in this case the trial Magistrate did not consider the defence evidence the facts which were totally denied by the respondent by referring this court to Pg 8 and 9 and 10 of the court judgment, and also added that, even if the defence evidence was not considered, since this is the 1st appellate court it has powers to step into the shoes of the trial Magistrate.

From the above complain this court is aware that, non consideration ofdefence evidence is fatal and it vitiates the conviction. The above position was discussed in the case of ***Hussein Idd and Another Vs. R.*** *[1986] TLR 166,* where it was held that,

> *"It was 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 defense evidence."*

Again, the court also kept on arguing that, "Most recently in June, 2021 in the case of **Kaimu Said v. Republic** (Criminal Appeal No. 391 of 2019) [2021] TZCA 273; (07 June 2021 Tanzil),the Court of Appeal, **Lila J.A** relied on the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226 of 2014** TZCA and **Hussein Idd and Another vs. R** (1986) TLR, 283, to come to a conclusion that, failure to consider the defense rendered the trial a nullity. The Court reasoned that, the trial court and first appellate court are imperatively required to consider and evaluate the entire evidence so as to arrive at a balanced conclusion. (*this court is put emphasis on this).* An omission to do so is a serious misdirection and a clear indication that there was no fair trial. "

The court also in the case of **Petro Ngoko v. Republic,** Criminal Appeal No. 246 of 2020, while referring to the above position went on saying at Pg 10 that:

> **"***Having found that the trial court failed to properly analyze the evidence before it, I think, this Court, being the first appellate court is duty bound to re-evaluate and weigh the evidence by both sides (as a whole) so as to arrive at a just and fair finding"* See also the case of Charles Thys vs. Hermanus P. Steyn, Civil Appeal No. 45 of 2007.

Back to our case and after a thoroughly perusal of the trial judgment preferably at Pg 8 and 9 nothing from the defense was featured in that judgment and it is also wisely that the trial Magistrate disregard the provision of section 312 of the CPA consequently, since this is the 1st appellate court it is then has a duty to re -evaluate and consider the evidence by both sides to arrive into fair findings as stated in the above cases.

To start with and from the trial records of the trial court, the appellants were charged with the offence of stealing by servant contrary to section 258 (1) (2) (a) and 271 of the Penal Code and the prosecution evidence based on 4 witnesses and they tendered 6 exhibits. Section 271 of the Penal Code provides that:

> *"Where the offender is a clerk or servant and the thing stolen is the property of his employer or came into the possession of the offender on the account of his employer, he is liable to imprisonment for ten years."*

From the cited provision, it is understood that, the above section does not create a new offence. But it qualifies circumstances of the same offence of theft under section 258 of the Penal Code and prescribes the sentence other than the general sentence given under section 265. The main ingredients for this offence are those provided

under section 258 of the Code, although, I accept that stealing by servant cannot be a cognate to stealing.

On the other hand, it is clear that, the offence of stealing by a clerk or servant contrary to Section 271 of the Penal Code, for the prosecution to secure a conviction must prove all the ingredients of the offence, specifically that at the time of the commission of the offence the accused were clerk or servant and was employed in that capacity by a person in whose possession the stolen property was.

From the evidence on record, it was from the prosecution witnesses that both the appellants were employed by PW1 at his petrol station, Chagu filling station at Lalago Branch whereas the 1st appellant was the branch manager of the station situated at Lalago and as per exhibit P1, his application letter, while the 2nd appellant was employed by the company as a pump attendant. That on 14th July, 2022, PW2 being the main supervisor of the company accompanied with Saulo Mohamed went to that station for normal inspection and upon their inspection of the fuel from both fuel tanks by using exhibits P2 collectively which are the deep sticks, the results exposed that there were 1042 litres of petrol and 472 litres of diesel. Thereafter PW2 being the main supervisor of that station compared that units with the report he had received from the 1st appellant which shows that there were

2027.62 litres of petrol and 1245 litres of diesel which meant that within one hour they had sold 1085 liters of petrol and 773 litres of diesel.

They questioned the 1st appellant but he had no relevant answers and thereafter they requested the 2nd appellant to submit the meter reading taken from the pump and compared it to the pump attendant book, to wit exhibit P3 and the report from the manager's reports, (exhibit P4) and they were absolutely different. They then interrogated the appellants and admitted to be involved in that stealing.

Afterwards, PW2 reported the matter to PW1 who also reported the matter to the police and after investigation done by PW3 they decided to arrest the 1st appellant and drew a sketch map to wit exhibit P5. Following that act, the company decided to hire an external audit, (PW4) who made his audit on 20/07/2022 and observed that there was a loss of 1085 litres of petrol and 773 litres of diesel occasioned from 20/06/2022 to 13/07/2022 valued at a total of Tsh. 6,185,478.44/= and as per exhibit P6 respectively.

In their defense the 1st appellant agreed to have been employed by the company at Lalago station as a station manager and on 14/07/2022 while at his working station PW2 accompanied by a young man arrived at that station for inspection. After they had asked for the files with the report from the 1st appellant, they inspected it and

thereafter they went to check the fuel tanks, the generator, and the fuel pump and then they asked for the money collected on that day. PW2 went on asking for the daily shift report of 13/07/2023 and signed on the report the amount he took from the 1st appellant. PW2 went away and after 15 minutes he returned back with the police and arrested him and he was taken to Maswa Police station by being informed that he stole Tsh. 6,000,000/= and thereafter was brought before the court on 4/08/2022 while the 2ndappellant was detained on 15/08/2022.

The 1st appellant stated further in his defense that, Exhibit P2 the said book was not used at their station but rather they were using daily shift reports (exhibit P4) which include all the necessary report and the report were correct. Again, he testified that PW2 was not only the sole auditor since one Charles Changu was also used to make inspection at that company and was mentioned in that report on 23/06/2022 and 30/06/2022 and his report was clear. He added that he does not recognize the report prepared by PW4 since it was made in his absence. The 2nd appellant on her testimony contended that she was working with the Chagu filling station at Lalago and that she was present on the 14th day of July upon the arrival at the fuel station by PW2 and another and witnessed what they did as testified by the 1st appellant. Subsequently on 18/07 /2022 she was called by PW1 and asked to be his witness

against the 1st appellant but she denied and therefore she was interrogated on 19/07/2022 by one WP Mwajuma with regarding to the loss occurred at that petrol station.

She testified that, since she was terminated from that work after investigation took place, she then decided to file a suit at CMA against Pw1, who upon being summoned, he refused to attended to the court and thereafter decide to arrest her on the allegations that she cooperated with the 1st appellant and stole from that petrol station.

The 2nd appellant went on testifying that, she was not arrested with the 1st appellant and denied to recognize exhibit P3 as they were using particular forms bears the name of that petrol station and their signatures.

From the above evidence given in a nut shell, it is clearly not in dispute that, both the appellants were employees at Chagu Petrol station at Lalago and that the alleged stolen money belong to the station to wit the employer which comes to the possession of the appellants on their account of the employer as explained earlier under the provision of section 271 of the Penal Code.

Since the above elements were proved the question now is whether the appellants being the workers of that company did still the claimed amount of money as stated in the charge sheet.

The evidence on records shows that, since the 1st appellant was the supervisor of that station, he is therefore responsible for the loss and as per exhibit P2, P3, P4,P5 and P6 including the evidence of PW4 the external audit who after a thoroughly perusal of the company's report, recognized that there was a loss done by the 1st appellant.

It is from this evidence, both the appellants claimed that in their daily activities they are not using exhibit P3 but rather the specific forms to wit Exhibit P4, which bears the name of the company and even during its admission to the court they denied exhibit P3.

In the circumstance, this court is of the view that since exhibit P3 was denied by the appellants, it was the duty of the prosecution to prove its validity but they failed to do so. However, this court after made a thoroughly perusal to that exhibit, it has failed to understand who was preparing that exhibit as it does not have the signature of any of the parties including their names.

Besides, this court, made analysis on the evidence testified by PW1, PW2 and PW3 and observed that, it contradicts each other. This is due to the facts that, when PW1 was testifying at Pg 30 he said that, *the manager was reversing the meter locally* whereas PW2 at Pg 36 said that*no one can reverse the meter at the Pump,* again, *PW1 on the same Pg. testified that, on 14th day of July he interrogated both the accused*

person and they admitted to have been committed the offence, but it is only the 1st appellant who was arrested on that day then Pw3 at Pg 55 testified that they arrested the appellants on different occasion due to the availability of the 2nd appellant.

Once more, at Pg 53 PW3 testified that, the incident was about the servants of Chagu petrol station stealing find in the "visima" of fuel at Lalago station while the evidence of PW1 and PW2 who testified that, the stealing was done through recording wrong information.

From this evidence this court is doubting, who is speaking the truth between PW1, PW2 and PW3. It is clear from the law that, the evidence from the witnesses shall collaborate and not to contradict since in the circumstances like this nobody can tell under such scenario that he is the one who is speaking the truth, this was well expounded in case of **Jeremiah Shemwete v. Republic** (1985) TLR 228, where the court held that:

> *"Discrepancies in the various accounts of the story of the prosecution witnesses give raise some reasonable doubts about the guilty of the appellant."*

In the case at hand, the discrepancies explained herein cannot ruled out to be minor as they go to the root of the case. It is not for the court to find out who was a liar between those witnesses, but it was the

duty of prosecution to prove that the appellants did what they have been charged with.

In addition, the evidence from the appellants reveals that they denied to be present when PW4 was making the report contained in exhibit P6 hence they are not recognizing it. This court thinks that, since exhibit P6 was made in their absence it is impossible to rely on it, because even on the date it was alleged to have been made, that is 20th July, 2022 the 1st appellant was already arrested since 14/07/2022 and the 2nd appellant was nowhere to be found as alleged by PW3 and there is no where which shows that they were brought back to the company for auditing process. Therefore, the submission by the counsel for the respondent that PW4 testified that the 1st appellant was present when the report was prepared is to mislead the court as the his evidence at Pg 61 of the court proceedings reveals that *"…. I was informed that the concerned person was a manager named Nuhu Msuya, I never met with him, and I don't even know him……".*How could the counsel for the respond lie to this court while, even the report maker made it clear that, he never met with him and he does not know him.

Subsequently, if the appellants were not there when such documents were made by including their reports as stated by PW4 at Pg 61 that, *"…..we took the first reports to see the stock, then reports on*

sales, and the tank and the pump report…… " how could this court get satisfied that, the reports used were the one prepared by the appellants while, even in his testimony PW4 did not specify the reports as to whether the reports used are the ones contained in exhibit P3, P4 or other reports, and how could the appellants get satisfied that, all that have been made in that report were true or notwhile they were not present.

Furthermore, there was other complain by the 1st appellant at Pg 73 when testified that, PW2 was not only the internal auditor, but the inspection was also done by Charles preferably the audit done on 23/06/2023 and 30/6/2022, and both the reports from those dates shows that there was nothing wrong. If that is the case, then this court questioned as to why the prosecution witnesses testified that the stealing occurred from 20/06/2022 while at the end of June 30, there was nothing wrong since that Charles inspected the report and comment nothing.

This court thinks the prosecution were obliged to bring that Charles as an internal audit to support the evidence of PW4, the external auditor, and failure to that makes this court to think that the evidence tendered were not enough to prove the case against the appellant.

Further in the case of **Aziz Abdalah Vs. R**, [1991] T.LR. 71, the Court of Appeal expounded the above position that:

> *"The general and well-known rule is that the prosecutor is under a prima face duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts."*

All the above reasons, it is crystal clear that the prosecution failed to prove the offence against the appellants as required in criminal cases which is beyond reasonable doubt. As it was emphasized in the case of **Fakihi Ismail v. The Republic,** Criminal Appeal No. 146 "B" of 2019 (unreported), 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 v. The Republic [1986] T.L.R. 44 and Mohamed Said Matula V. The Republic [1995] TLR 3."*

Consequently, court also find merit in the remaining grounds of appeal as they have been covered in grounds number seven and eight.

In the upshot, I allow the appeal, quash the conviction, and set aside the sentence imposed on the appellants. The appellants to be unconfined from prison custody henceforth unless withheld therein for a different and lawful cause.

Order accordingly.

DATED at **SHINYANGA** this 31st day of **May, 2024**.

R.B. MASSAM
JUDGE
31/05/2024