IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

CONSOLIDATED CRIMINAL APPEALS NO.190 AND 182 OF 2023

(C/f Criminal Case No. 67 of 2021 in the Resident Magistrate's Court of Dar es Salaam at Kisutu)

NAJIBU MANSOOR BWAJWAHUKA.....1st APPELLANT

SHADIAH SAID JOSEPH .....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order:30-4-2024

Date of Judgment:28-6-2024

B.K.PHILLIP, J

The appellants herein were charged with two counts, to wit; conspiracy to commit an offence contrary to Section 384 of the Penal Code and stealing by servant contrary to sections 258 (1), (a), and 271 of the Penal Code before the Resident Magistrate's Court of Dar es Salaam at Kisutu. Both were acquitted of the 1st count and found guilty of the 2nd count. They were sentenced to four (4) years imprisonment.

Aggrieved, each one appealed to challenge the trial court's judgment. Thus, two appeals originating from the same judgment were admitted with different admission numbers. Each appellant raised nine (9) grounds of appeal. I ordered the consolidation of the two appeals since they arise from the same case file. After the consolidation of the appeals, I ordered Najibu Mansoor Bajwahuka and Shadiah Said Joseph to be referred to as the 1st and 2nd appellants respectively.

The learned Advocates Respicius Didace and Sigsbert Ngemela appeared for the 1st and 2nd appellants respectively whereas the respondent was

represented by the learned State Attorney Mossie Kaima.

The appeals have been disposed of by way of written submissions. Briefly, the prosecution case before the trial court was as follows; between the 1st day of January 2018 and the 26th of March 2020 at Sasa Kazi Fuel Station Mtoni Mtongani area within Temeke District in Dar es Salaam Region the appellants did conspire to commit an offence, to wit; stealing. Between the 1st day of January 2018 and the 26th of March 2020 at Sasa Kazi Fuel Station, Mtoni Mtongani area within Temeke District, in Dar es Salaam Region being employees of Sasa Kazi Fuel Station the appellants stole a sum of Tshs. 852,246,698/=, being the property of Sasa Kazi Fuel Station which came into their possession by virtue of their employment.

To prove its case the prosecution paraded seven witnesses namely; Byenobi John Mwijage (PWl), Charles Philip Mzatula (PW2), Inspector Jullieth, (PW3), Salum Yahaya (PW 4), Shafiq Merali (PW 5), Musa Said (PW6), and James Lisawa Wawenje (PW7). The Court summoned one Witness namely Edwin Fidelis Ngarika who testified as the Court witness (CW1). The prosecution tendered three exhibits, to wit; Expert Investigation Report, Counter Books, and Police Report from the Forensic Bureau (exhibit P1 collectively), a certificate of authenticity of electronic Evidence, a printout of messages (SMS), and a CD (exhibit P2 collectively), and report from Vodacom Tanzania Limited on the particulars /ownership of Tel No.0766-094319 and 0754-501786 (exhibit D3). The Court witness tendered one exhibit, to wit; Certificate of settlement of dispute (CMA F.6) from the Commission for Mediation and Arbitration, (" CMA"), (exhibit CW1)

On the other hand, the 1st and 2nd appellants testified as DW1 and DW2 respectively. One Fatuma Jumanne testified as (DW3). She tendered in Court a letter from the Business Registration and Licensing Agency

("BRELA"), (exhibit D1). As alluded to earlier each appellant raised nine grounds of appeal which in essence raise similar issues of fact and law which can be conveniently summarized into the following broad grounds of appeal.

i) *That the trial Magistrate erred in fact and law by convicting and sentencing the Appellants while there was a variance between the charge and the evidence adduced during the hearing concerning who was the appellant's employer.*

ii) *That the learned trial Magistrate erred in law and in fact in relying on the evidence of Johnson Mwijage Byenobi (PW1) who identified himself as an Auditor, whose evidence was tainted with material irregularities.*

iii) *That the trial magistrate erred in fact and law for failure to properly analyze the evidence adduced as a result convicted the Appellants without the case being proved beyond a reasonable doubt but based on the weakness of the defence case rather than the strength of the prosecution case.*

iv) *That the trial magistrate erred in fact and law by convicting and sentencing the Appellants without establishing and proving the elements of the offence charged against the Appellants.*

v) *That the trial Court erred in law and fact to summon CW1 and rely heavily on the evidence adduced by CW1 and exhibit C-1) thereby compromising its impartiality by assuming the role of the prosecutor contrary to law.*

vi) *That the learned trial Magistrate erred in fact and law for failure to take into consideration the Appellants' defence.*

Submitting for the 1st ground of appeal, Mr. Didace argued as follows; Throughout the hearing of the prosecution case at the trial Court, it was

not proved that Sasa Kazi Fuel Station, the alleged employer mentioned in the charge sheet employed the 1st appellant at any time or at all. Sasa Kazi Fuel Station is a non-existent body. To cement his argument he referred this court to the testimony of DW3 (Fatuma Jumanne) who tendered in court a letter from BRELA (exhibit D1), indicating that "Sasa Kazi Fuel Station is not registered at BRELA. Mr. Didace contended that even though DW3 mentioned the existence of Sasa Kazi Fuel Limited an entity not stated in the charge sheet, the same has no connection with Sasa Kazi Fuel Station mentioned in the charge sheet, on the reason that Sasa Kazi Fuel Station and Sasa kazi Fuel Limited are two different entities in the eyes of the law. He maintained that to prove a case of stealing by a servant, it is mandatory to prove that the accused was employed by the employer referred to in the charge sheet. He referred this court to the textbook titled. "A Handbook for Public Prosecutors" by B.D. CHIPETA.He went on to submit that the author of the aforesaid handbook said that in stealing by a servant, the prosecution must prove the fact of the employment of the accused person beyond reasonable doubt. It is not enough to prove mere shortage, or merely that the accused person was negligent in the performance of his duties as a public servant, there must be evidence that the accused stole the money. Also, he cited the case of **Rajab s/o Mbaruku Vs Republic, [1962] E.A 669** and **Jackson Sumuni Vs. Republic, (1969) HCD, 369** to cement his arguments.

Furthermore, Mr. Didace pointed out that the prosecution, never tendered in Court any contract of employment. They neither tendered salary slips nor payroll showing who was the Appellants' employer. The issue of employment by the said Sasa Kazi Fuel Station which in any case was not in existence, was not proved, contended Mr. Didace. Expounding on the issue of the appellant's employment, Mr. Didace argued that the prosecution's material witness, Johnson Mwijage (PWI) on page 18 of the

typed proceedings during Cross-examination said that he never saw letters of employment of the appellants.

On his part, Mr.Ngemela argued that the trial Magistrate erred in law and fact by convicting and sentencing the appellant while there was a variance between the charge and the evidence adduced by the prosecution witnesses. He contended that in the charge sheet presented in Court on 20th May 2021, the particulars of the offence reveal that the money purported to have been stolen belonged to *Sasa Kazi Fuel Station,* to the contrary the evidence adduced during the hearing showed that the money alleged to have been stolen belonged to *Sasa Kazi Fuel Station Limited.* Mr. Ngemela was of the view that the variance between the charge sheet and the evidence adduced denied the appellants their right to know the nature of the charges facing them and as such could not prepare their defence effectively. The Respondent having known the discrepancies in the charge sheet was supposed to pray for amendment of the charge sheet under the provisions of Sections 234(1) of the Criminal Procedure Code, [Cap. 20 R.E 2022] (Henceforth "the CPA"). He pointed out that the defect in the charge sheet can be discerned in the testimony of PW2 on pages 21, 22, 24, 30, and 57 of the typed proceedings. Further, he argued that as per the testimony of Fatuma Jumanne,(DW3) Sasa Kazi Fuel Station is not a registered legal entity capable of owning anything capable of being stolen whereas PW5's testimony was to the effect that he is the Managing Director of Sasa Kazi Fuel Station.

Concerning the 2nd, 3rd, and 4th grounds of appeal, Mr. Didace submitted as follows; The learned trial Magistrate erred in law and fact in basing his decision on documents illegally seized without a search order or certificate of seizure, and further without knowledge of the 1st Appellant and to which the 1st Appellant was not called to identify. He contended that by reading

the impugned judgment it is evident that the trial Magistrate based his judgment on an Audit Report prepared by Johnson Mwijage (PW1). This witness never interviewed the 1st Appellant when preparing his report. Mr. Didace referred this court to page 18 of the typed proceedings to fortify his argument. He went on to argue that PW1 told the trial Court that he did not interview the 1st Appellant because doing so would be unethical as his profession does not allow him to do so. He got the ledger/counter books and Deeping books from the Manager's office at Dar es Salaam, and he was informed that those counter books were prepared by the 1st appellant. Despite being informed that the counter books were prepared by the 1st appellant, PW1 opted not to interview the 1st appellant, argued Mr. Didace, and contended that it is on record that during cross-examination PW1 told the trial court that the ledger/counter books were given to him by other persons not the Manager.

Moreover, Mr. Didace contended that the learned trial Magistrate erred in law and fact by failing to find out that all the ledger/counter books subjected to audit/investigation by PW1 had neither emblem /symbol of Sasa Kazi Fuel Station nor Sasa Kazi Fuel Limited for them to qualify to be relied upon in the charge of stealing by servant. He was emphatic that the learned trial Magistrate erred in law in assuming that Sasa Kazi Fuel Station and Sasa Kazi Fuel Limited were the same.

On the proof of the ingredients of the offence of stealing by a servant, Mr. Didace argued that the learned trial Magistrate erred in law and fact in convicting the Appellant of the offence of stealing by a servant in the absence of any proof of what amount the Appellant received (and from who) and absence of proof of what amount allegedly received by the Appellant was not accounted for. None of the prosecution witnesses showed how much the 1st Appellant stole from his alleged employer and how much the 1st Appellant received but failed to bank.

Moreover, Mr. Didace contended that PW1, the author of the relied upon by the trial court as the basis of the conviction of the appellants (exhibit P1 collectively), told the trial court that the report was prepared without considering expenditures at all. Mr. Didace referred this court to page 18 of the typed proceedings to cement his arguments. He was emphatic that loss of money cannot be ascertained without comparing revenue and expenditure.

Further, Mr. Didace argued that no specific incident of theft was proved to have been committed by the 1st Appellant. Though PW5 testified that the 1st appellant had a duty of purchasing fuel, doing measurements, receiving and banking money, and keeping records, the evidence adduced by the prosecution did not prove the amount of money received by the 1st appellant and the amount of money handed over to the 2nd Appellant, contended Mr. Didace. He went on to argue that PW5 told the trial court that he had no bank statement to prove the amount of money deposited in the Bank and did not know the exact amount stolen by the appellants. To cement his arguments he referred this court to pages 41-46 of the typed proceedings.

Mr. Didace faulted the trial Magistrate for relying on the evidence of Johnson Mwijage Byenobi (PW1), on the reason that during cross-examination he admitted that he conducted his audit/investigation without interviewing the Appellants. Expounding on this point Mr. Didace argued that compiling a report affecting someone's rights without affording him/her the right to be heard is tantamount to denying him/her right to be heard and therefore an abuse of the rules of natural justice. Additionally, Mr. Didace pointed out that Exhibit P1 (the report) had several shortcomings, to wit; **One,** it did not prescribe the fuel order or establish ownership of the purported fuel and no bank statements of the alleged

Sasa Kazi Fuel Station of Mtongani area were appended to the report to establish the cash flow and expenses. **Two,** the report was silent on vital matters to the extent that it was not prudent to rely upon it.

Mr. Didace argued that the trial Magistrate erred in law and in fact by shifting the burden of proof to the accused persons, thereby wrongly convicting them on the alleged weakness of the defence case rather than the strength of the prosecution case. He insisted that the burden of proof in criminal cases is on the prosecution side to prove the case beyond reasonable doubt. To cement his arguments he referred this court to the trial court's findings on page 6 which reads as follows;

".....accused persons were the ones to purchase fuels, to supervise the business of the same and to collect cash, also to bank the same. Therefore they are the ones to tell about the loss at the end of the day but they have defaulted with false defence... "

He insisted that the findings of the trial Magistrate quoted herein above are nothing but shifting the burden of proof. The burden which lies in the prosecution is not discharged merely by showing that the story of the accused is not truthful. He cited the case of **Moshi Rajab Vs R, Criminal App.688-M-67, (1967) HCD 384** and **Lameck Bundala Vs R, Crim. App. 707-M- 67 (1968) HCD 54**. He contended that the trial Court erred in law and fact in ordering the appellant to pay compensation of the amount of money since the evidence adduced during the trial court failed to connect the 1st appellant with the loss of that amount of money.

Furthermore, Mr. Didace argued that the Appellants were acquitted of the offence of conspiracy because none of the seven prosecution witnesses led evidence to prove the offence as per the finding of the trial court, thus having acquitted the accused persons on the first count of conspiracy, the learned trial Magistrate erred in law and fact in convicting the Appellants

on the second count of stealing by servant without proof of specific incidents of theft alleged to have been committed by each accused person. He was of the view that following the holding of the trial court aforesaid it was proved that there was no common intention by the accused persons to commit an offence of stealing.

Mr. Ngemela's arguments were to the effect that the prosecution side did not prove the case against the appellants beyond a reasonable doubt, thus the trial Magistrate erred in fact and law by convicting and sentencing the appellants. He contended that the trial Magistrate relied on an expert report which was tainted with material illegalities and elements of an offence, of stealing by servant were not established, and as such based on contradictory statements from the witnesses in respect to the exhibits tendered particularly exhibit P1 collectively. He pointed out that exhibit P1 collectively though they were admitted as exhibits were tainted with several irregularities, to wit; **One,** they do not qualify for the test of being relied upon as ledger/counter books which are prescribed under the law since their contents do not show how much fuel was ordered on a particular date, how much was received, how much was sold, what was the expenditure and what was the balance. These facts cannot be traced anywhere in exhibit P1. The Court has been on several occasions warning how Ledger Books should be handled for the same to bear sufficient information. To cement his arguments he cited the case of **Asia Iddi Vs Republic (1989) TLR 174. Two,** they do not tally with what the witnesses testified about the identification of the said counterbooks. PW-5 who purported to be the employer of the Appellants, on cross-examination, testified that all working tools for Sasa Kazi Fuel Station bear the emblem of the said Company. The counter books (exhibit P1 collectively) do not bear the Sasa Kazi Fuel Station emblem.

Three, no clear explanations were presented before the court on how those counterbooks were handed over to the Auditor, (PW1). Mr. Ngemela contended that PW1 testified that he received the counter books from PW2, Charles Mzatula but PW2 denied having handed over the ledger /counter books to PW-1 instead he told the trial court that those counter books were handed over to PW1 by the manager who was not summoned to testify in the case. It was also admitted by PW-5 that the Appellants were not called upon to hand over the counter books. Failure to call a key witness to clear this doubt about the counter books relied upon by PW1 in his professional exercise ought to have compelled the trial Court to draw an adverse inference against the Respondent, Contended, Mr.Ngemela. **Four**, PW1 testified that some of the ledger/counter books were misplaced and/or got lost before his audit was done and he neither showed any loss report to that effect nor informed the Court whether or not the lost counter books were found later on or otherwise. What remained on record was that there were books containing important information that remained untraced, contented Mr.Ngemela but the Auditor -(PW1) included in his Audit Report, the information contained in the said documents without establishing /showing how he came across the said data. This fact was not cleared anywhere by the Respondent. Upon being cross-examined PW1 admitted that he did not see any loss report, he knew counterbooks containing detailed information were missing. **Five**, exhibit P-1 included money that was banked apart from what was seen in the counter books. It was admitted that some money was banked, but there was no Bank Statement that accompanied the report. PW-5 testified that there was money that was banked but the expert report did not include the money that was banked. Mr. Ngemela was of the view that this anomaly suggests that the money alleged to have been stolen was banked and there was no evidence to show the difference between the money banked and the money indicated in the

ledger books. **Six,** the expert Report did not include and neither did it acknowledge expenditures at the fuel station. No reasons were advanced on why expenditures which included salaries, service charges, and all expenses at the station were not part of the report. Mr. Ngemela invited this court to abide by the finding of this court in the case of Mohamed **Abdallah Said Vs Republic, Criminal Appeal No. 38 of 2018,** (unreported) in which this court held as follows;

> *"None of the prosecution witnesses was clear as to how the money got missing. PW4 admitted that the appellant could use the money for expenditures such as generators and hank the rest of the money...in my view since the prosecution failed to lead the evidence showing how money was used for expenditure or submitting audited accounts before calculating the loss, a doubt is created as to whether the appellant stole the whole money or part of it."*

It was Mr.Ngemela's stance that for the case to be proven beyond a reasonable doubt, the evidence must be such strong against the accused person as to leave remote possibility in his favour which can easily be dismissed. It goes hand in hand with proving the basic elements of an offence. He cited the case of **Magendo Paul And Another v. R [1993] TLR 219,** to cement his arguments.

Furthermore, Mr. Ngemela argued that it is a trite principle of law that an offence must be proven beyond reasonable doubt and the duty is vested in the Prosecution side as elucidated in the case of **Joseph John Makune Vs The Republic [1986] T.L.R 44.** He pointed out that in the offence of stealing by servant basic elements which any Court of law is required to observe before conviction and sentencing of the accused person include proof to the effect that the accused person was employed as a servant, that the thing stolen was the property of his employer or came into his

possession under his employment, and that he (without claim of right) fraudulently took the thing capable of being stolen or fraudulently converted it. He went on to argue that by reading the impugned judgment, it is evident that the elements aforestated were not established. It was not established anywhere that the Appellants were employees of Sasa Kazi Fuel Station. There is no tangible evidence in terms of employment contract and job description that were tendered in Court as exhibits. The Appellants denied to have been employees of Sasa Kazi Fuel Station. The prosecution was supposed to prove that the property alleged to have been stolen was once owned by Sasa Kazi Fuel Station. Moreover, Mr. Ngemela contended that in his testimony PW5 purported to be the owner of the filling station in question. He told the trial court that he did not know how much was stolen from his Company and that to establish the amount of money that was stolen by the appellants it is prudent to have evidence of the pressed fuel orders from the Deport to the Filling station, but in response to questions posed to him during cross-examination, PW5 testified that there were no such orders with him to establish this fact.

Mr. Ngemela maintained that a thing capable of being stolen must be owned by someone before it could be said that money was stolen and the prosecution side needed to establish clearly that the stolen money was in existence. In the case, at hand there is no ownership of the money allegedly to be stolen was established and none of the Respondent's witnesses managed to establish how the money went missing in the course of business, which is fatal to the prosecution case. He referred this court to the case **Mohamed Abdallah Said v. Republic, Criminal Appeal No. 38 of 2018,** (unreported), to cement his arguments.

On the analysis of the evidence adduced, Mr. Ngemela argued that the trial Court erred in law and fact by failing to analyze the evidence before it and

as such shifting the burden of proof to the Appellant. A glance at the proceedings and the impugned judgment reveals that there was no analysis of evidence adduced at all. He went on to argue that, **One.** instead of analyzing whether Sasa Kazi Fuel Station is similar to and the same entity as Sasa Kazi Fuel Limited which is reflected on the charge sheet and evidence adduced respectively, the trial Magistrate left that issue undecided and took it for granted that Sasa Kazi Limited and Sasa Kazi Fuel Station is the same Company. **Two,** the Appellants denied having been employees of Sasa Kazi Fuel Station instead of tasking the Respondent to prove the existence of the Sasa Kazi Fuel Station the trial Court impliedly shifted the burden of proof to the Appellants by tasking them to prove whether they were employees of Sasa Kazi Fuel Station or otherwise. He referred this court to page 4 of the typed proceedings to fortify his arguments. Relying on the case of **Abel Masikiti Vs Republic, Criminal Appeal No. 24 of 2015** (unreported) Mr. Ngemela argued that it is now a well-settled position of the law that failure by the Court to analyze the evidence presented before is fatal.

On the 5th ground of appeal, Mr. Didace argued that by summoning CW1, to appear in court and testify in the case, the court assumed the role of prosecutor.CW1 testified after the closure of the prosecution case. The prosecution case was concluded on 11th March 2022. Edwin Fidelis Ngarika, CW1 was summoned to testify in court on 13th May, 2022. CW1 testified about a complaint purportedly settled on 21st January 2021 being a result of a complaint dated 30th December 2021. Further, Mr. Didace submitted that the Court ought not to have given weight to CW1's testimony because it was not proper since a complaint cannot be settled a date before it is filed. He was emphatic that CW1's testimony referred to Sasa Kazi Fuel Limited and not Sasa Kazi Fuel Station appearing in the charge sheet and according to exhibit DI Sasa Kazi Fuel Station has never been registered.

On his part, Mr. Ngemela submitted as follows; The trial Court erred in law and fact by assisting the prosecution side to fill the gaps in the prosecution case by summoning CW1 and admitting exhibit CW1 during cross-examination contrary to the law. It is on record that the Respondent closed its case on 11th March 2022. The exhibit CW1 which was tendered by CW1 was initially admitted as ID-1 for identification purposes only. Thereafter, the Court *suo motu* decided to summon CW1 to tender the said document (ID-1) as exhibited in the case. The Court deviated from its noble role of being impartial and sitting as an umpire in the determination of cases. What was done by the trial court was unbecoming and should not be condoned by this court.

On the 6th ground of appeal, Mr. Didace submitted that the Appellants testified to have been employed by Gapco and later Total. The prosecution failed to connect Gapco or Total with Sasa Kazi Fuel Station stated in the charge sheet. But the trial Court did not take into consideration the appellants' defence.

On his part, Mr.Ngemela submitted that there is nothing on the record presented before the trial court to justify that the names Sasa Kazi Fuel Station and Sasa Kazi Fuel Limited are used interchangeably thus, they are the same. The trial Court did not give any explanations on why the appellant's evidence (exhibit D1) was not considered. He contended that failure to consider the evidence adduced in the course of composing the judgment is fatal. To cement his arguments he referred this court to the case of **Andrew Lonjine Vs Republic, Criminal Appeal No. 50 of 2019** (unreported) in which the court among other things held that failure to consider the defence case is fatal and usually vitiates conviction.
Further, Mr. Ngemela argued that the trial court did not consider the Appellant's assertion in which they stated that the working tools including

counter/ledger books which were used by PW 1 to compose his report (exhibit P1 collectively) had never been their working tools.

At the end of their submissions, Mr. Didace and Ngemela beseeched this court to allow this appeal and set aside the impugned judgment in its entirety.

In rebuttal, Ms. Kaima argued that it is not true that Sasa Kazi Fuel Station is a non-existing entity. She contended that when DW3 was responding to questions posed to her during cross-examination she told the trial court that she knew Sasa Kazi Fuel Limited. Sasa Kazi Fuel Station might be a business used by Sasa Kazi Fuel Limited. She dealt with the request for a search if Sasa Kazi Fuel Station was registered as a company and did not make any search if it existed as a business name. Thus, Ms. Kaima maintained that there was no variance in the charge sheet and evidence adduced by the prosecution witnesses. Moreover, she argued that the absence of the word "Limited " in the charge sheet did not prejudice the appellants.

In response to the 2nd 3rd and 4th grounds of appeal, Ms. Kaima joined hands with Mr. Didace and Ngemela, that in the offence of stealing by servant, the prosecution is required to prove the fact of the accused's employment beyond a reasonable doubt. She went on to submit that in the case at hand the fact on the employment of the Appellants was proved beyond reasonable doubt through the testimony of PW2, PW4, and PW5 who testified in Court that he is the owner of Sasa Kazi Fuel Station and employed the appellants as his workers at his Filling Station aforesaid by an oral agreement. She referred this court to Section 10 of the Law of Contract Act, to cement her arguments. Ms. Kaima contended that the appellants used to send reports to PW5 on the daily transactions/ sales through messages using mobile phones. That fact was admitted by the

Appellants and PW5 was not cross-examined on that fact. She went on to argue that since CW1 testified in court that the 1st appellant complained to the Commission for Mediation and Arbitration where he claimed that Sasa Kazi Fuel Station was his employer CW1's testimony proves that the 1st appellant was employed by Sasa Kazi Fuel Station.

Furthermore, Ms. Kaima argued that in his defence DW1 acknowledged knowing PW5 as one of the persons to whom he used to send sales reports of Sasa Kazi Fuel Station. Also, he alleged that he was employed by Gapco. At the same time, PW5 testified that Sasa Kazi Fuel Station is under Total Company and formerly, it was under Gapco. Ms.Kaima was of a strong view that the 1st appellant (DW1) knows that he was employed by Sasa Kazi Fuel Station and he is misleading his court. The appellants failed to bring in court one Maulid Ally Athumani, a person who they alleged was their employer.

On Mr. Ngemela's and Didace's argument that the trial Magistrate shifted the burden of proof to the appellants in contravention of the law, Ms. Kaima submitted that requiring a person to testify in court or produce a written employment contract is not shifting the burden of proof to the accused but it is a duty of the one who alleges to prove his /her allegations. For a person to whom the allegations have been directed, he/she has to show the court the weakness of the prosecution case to create doubts that will convince the court to decide in his/her favor. In the matter at hand the appellants failed to create doubts on the issue of their employment with Sasa Kazi Fuel Station, contended Ms. Kaima. She insisted that it is not true that Sasa Kazi Fuel Station is a non-existing entity. According to DW3's testimony, when cross-examined by the State Attorney admitted knowing Sasa Kazi Fuel Limited and that Sasa Kazi Fuel Station might be a business name used by the company.

Moreover, she argued that the Appellants worked as supervisors and their

duties depended on each other because they were reporting to the same person and both were responsible for the daily sales collection of the funds and supervision of the sales of petroleum at Sasa Kazi Fuel Station, therefore, they are answerable to any loss occurring in that business.

On the arguments concerning exhibit P1, Ms. Kaima argued that no law in this country requires a registered auditor when conducting his duties to request or seek for court order to first seize any documents that are needed in the said audit process. What is required is for the person who requested to conduct an audit in his/her office to provide all necessary documents available and needed by the auditor in the conduct of his/ her duties. PW1 was supplied with the ledger books and other documents needed to accomplish his task by the officers of Sasa Kazi Fuel Station and PW1 couldn't summon someone who was no longer working at Sasa Kazi Fuel Station at the time the investigation/audit took place for the interview for the alleged loss, contended Ms. Kaima. She went on to argue that PW1 audited the books of Sasa Kazi Fuel Station concerning the period when the appellants were working with Sasa Kazi Fuel Station. He prepared and handled the ledger books and reports tendered in court as exhibits. (exhibit P1 collectively).Ms. kaima was of the view that since the appellant did not describe what kind of books they used in the preparation of their report to differentiate them from the ones tendered and admitted in court as exhibit P1 collectively, then, technically the counter/ledger books tendered in court (exhibit P1 collectively) were no disputed.

Moreover, Ms. Kaima submitted that the right to be heard is fundamental and whoever comes to equity must come with clean hands. She contended that in the case at hand the appellants had no clean hands since they tempered with the evidence by deleting some of the data/reports in the computer to hide what transpired during the period that was under

investigation. She maintained that the prosecution's failure to prove the offence of conspiracy does not render the charge of stealing by a servant defective since it was well drafted and proved beyond a reasonable doubt. Responding to the 5th ground of appeal, Ms. Kaima argued that our law confers power to the court to summon a witness and examine him/her to reach a just decision. She cited the provision of section 195 (1) of the CPA, to cement her argument which provides that any court may, at any stage of a trial or other proceeding under this Act, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. She went on to argue that the fact that the trial court summoned CW1 to testify in court does not mean that it usurped any role of the prosecutors rather it was trying to find the truth and make an informed decision in the interest of justice. Expounding her stance, Ms. Kaima submitted that the power to summon witnesses bestowed to the court is aimed at ensuring that justice is done and seen to be done. She insisted that CW1 admitted that the 1st appellant lodged complaints before the Commission for Mediation and Arbitration against Sasa Kazi Fuel Station as his employer

Concerning the 6th ground of appeal, Ms. Kaima refuted the contention that the trial Magistrate did not consider the appellant's defence. She contended that the trial court took into consideration all evidence adduced by both sides during the hearing. To cement her argument she referred this court to page 6 of the impugned judgment. In conclusion of her submission, she prayed for the dismissal of the appeals in their entirety.

In rejoinder, Mr. Didace reiterated his submission in chief and went on to submit as follows; PWI, PW2, and PW5 did not prove employment of the

accused persons by Sasa Kazi Fuel Station the "alleged employer" stated in the Charge Sheet which a non-existent body as per the testimony of DW3. A non-existent entity cannot employ. Charles Philipo Mzatula (PW2) told the trial Court that he works at Sasa Kazi Fuel Limited in Mwanza, a limited liability company not mentioned in the Charge Sheet. If the prosecution thought Sasa Kazi Fuel Limited was the appellants' employer, they should have stated so in the charge sheet. The evidence adduced by the prosecution showed that PW5 was the one who employed the appellants which was not in line with the particulars stated in the Charge Sheet. PW5's testimony revealed that Sasa Kazi Fuel Station is under Total Company. That fact was not stated in the Charge Sheet either. It is not clear between PW5, Gapco, and Sasa Kazi Fuel Station who was the appellants' employer.PW5 did not produce before the Court any contract of employment with the appellants or salary slips. Mr. Didace refuted the testimonies made by the prosecution witnesses that the appellants used to send PW5 reports on the daily sales/ transactions. To cement his arguments he cited the case of **Malanjabu s/o Shimbi & Another Vs Republic, Criminal Appeal No.144 of 2007** (unreported) in which this court (Mujuluzi J, as he then was) quoted with approval the case of **James Bulolo and Another Vrs Republic (1981) T.L.R.283**, in which it was held that it is the duty of the court; first of all, to collect analyze and assess the evidence; and see how far if at all, it touches upon every accused as an individual. The court is not to lump the accused persons together and wrap them up generally in the blanket of the prosecution evidence.

Mr. Didace pointed out that the submission by Ms. Kaima that the 1st Appellant acknowledged knowing PW5 as a person whom he used to send sales reports of Sasa Kazi Fuel Station is found nowhere in the entire evidence of DW1.

On the issue concerning Maulid Athuman, a person mentioned by the appellants as their employer, Mr. Didace contended that it was the duty of the prosecution to prove their case. Such duty does not extend to the accused persons. The prosecution side failed to prove its case beyond a reasonable doubt. It was the duty of the prosecution to prove the appellants' employment and who employed them. Concerning the arguments on the expert report by the auditor,(PW1), Mr. Didace submitted that the manner and way this auditor was appointed and given the "alleged documents" is doubtful since the evidence adduced in court did not disclose who gave him the documents used in the preparation of the report. He maintained that it was mandatory for the prosecution to establish how the documents passed to the hands of the auditor and to further prove that such documents were indeed prepared by the 1st Appellant in particular, but the prosecution failed to do so. He noted the Respondent's admission of the importance of the right to be heard and argued that failure to adhere to this celebrated right is fatal. The submissions by Ms. Kaima suggesting an exception to the general rule on grounds suggesting lack of clean hands on the part of the Appellants is highly misconceived, contended Mr. Didace.

In conclusion, in his rejoinder, Mr. Didace invited this court to take inspiration from the case of **Edward Masanja Vs Republic, Criminal Appeal 168 of 2006** (unreported), and **Haruna Said Vs Republic (1991) TLR 124**.

In rejoinder, Mr. Ngemela reiterated his submission in chief and contended that Ms. Kaima conceded that there was a variance between the charge and the evidence adduced, but endeavored to cover that variance by arguing that the same did not occasion injustice to the appellants. Mr. Ngemela argued that it is a settled principle of law that whenever there is variance between the Charge sheet and the evidence on record, and since

the parties are bound by what they present in Court, then the evidence must be ignored unless the Respondent invokes Section 234 of the CPA which provides among other things that amendments of the charge sheet must be made effected for the Court to proceed with conviction of the accused person. He cited the case of **Salim Said Mtomekcla Vs. Mohamed Abdallah Mohamed Vs Civil Appeal No. 149 of 2019** (unreported) to cement his argument;

Mr Ngemela argued that Ms.Kaima presented evasive denials without presenting any case laws to rebut the cases he cited which shows that it was not proper to charge the appellants with conspiracy and stealing by servant in the same charge. He maintained that the position in the case of **Steven Salvatory** *(supra)* **Hassan Idd Shindo and Another** *(supra)* remained intact and this court has to abide by the same.

On Ms. Kaima's response on the issue concerning whether or not the appellants were employed by Sasa Kazi Fuel Station, Mr.Ngemela rejoined that it is a trite principle of law, that a substantive side of the employer/employee relationship is the payment of salaries, payment of Pay as You Earn (PAYE), Social Security Contributions and the like. Such aspects were not reflected anywhere in the course of testifying either by PW-2 or PW-5. Sending reports alone does not justify nor does it prove the employer/employee relationship.

Moreover, Mr.Ngemela submitted that Ms. Kaima has not been able to make any response on the legal flaws that were revealed in his submission in chief, such as the lack of evidence in establishing how PW1 obtained the ledger books /working tools allegedly used by the appellants. Also, no loss report was produced in court in respect of the ledger /counter books which were alleged to have been either misplaced /lost by PW1 and PW-5. Mr. Further he contented that in his report PW1 included the information/data

that were in the lost ledger/ counter books without establishing how he managed to get those data. Even though the allegations about the loss of the documents in the said documents were not as well proven and the details within the said books were not revealed on how they were traced for them to be included in PW1's report accumulating to the said alleged stolen money in a charge sheet. What the Respondent alleged is that the said books were destroyed intentionally by the Appellants, but the same lacks proof taking into consideration that upon being arrested, the Appellants did not go back to the Filling Station.

Furthermore, Mr. Ngemela argued that Ms. Kaima failed to respond to the fact that there was no bank statement presented in court to justify whether the alleged missing money was not the amount banked, and the issue of the lack of a component of, expenditures in exhibit P1.

Mr.Ngemela contended that Ms. Kaima did not respond to concern on the trial Court's failure to consider the appellants' defence which in effect amounts to an admission that the trial court did not consider the appellants' defence.

About the court's decision to summon a court witness, Mr. Ngemela joined hands with Ms. Kaima on the discretional power of the court to summon a witness, however, he contended that the process should not be meant to assist the prosecution in filling in the gap in the prosecution case. It must be exercised judiciously without compromising the impartiality of a trial court. He pointed out that in the case at hand the court's witness was summoned to appear in court to tender a document which was presented by the prosecution side and admitted as ID1. Mr.Ngemela was of the view that it would have been prudent if the prosecution would have moved the Court to present its witness for that purpose. What the court did was to fill the gap in the prosecution case, contended Mr.Ngemela. He beseeched this

court to grant this appeal.

Having analyzed the competing arguments made by the learned Advocates and State Attorney, let me proceed with the determination of the merit of this appeal. I shall start with the 5th ground of appeal since it has a bearing on the determination of other grounds of appeal. As correctly submitted by Ms. Kaima and conceded by Mr. Ngemela in his rejoinder submission, the trial Court had the power to summon CW1 to appear in court under section 195 (1) of the CPA. However, Mr. Ngemela's concern was only the way CW1 was led to tender in Court exhibit CW1 which was initially admitted for identification purposes as ID-1. It is worth noting that the discretional power conferred to the court always has to be exercised judiciously, that is, for the interests of justice and reaching a just decision. I agree with Mr. Ngemela that the prosecution could summon another competent witness to tender in court the documentary evidence which was admitted for identification purposes as ID-1. However, the trial court cannot be faulted for admitting exhibit CW1 as an exhibit because CW1 identified it and confirmed that he was the author of that document, and thus was a competent person to tender it in evidence. The trial court summoned CW1 to appear in court for clarification on the contents of ID-1 as he was the author of the same. Resolving the controversy on the appellants' employment was key in the determination of the case. In my considered opinion CW1's appearance in court as a court witness was proper.

Coming to the 1st ground of appeal, it is common ground that the charge sheet states that the money alleged to have been stolen by the appellants belongs to Sasa Kazi Fuel Station, and the appellants were employed by Sasa Kazi Fuel Station, not Sasa Kazi Fuel Limited. During the hearing, the prosecution witnesses testified that the appellants were working at Sasa Kazi Fuel Limited. So, the word " Limited" is missing in the charge sheet.

The pertinent question here is; the fact that the word "limited" is missing in the charge sheet does it make the charge sheet fatally defective? My answer to this question is "No". In the case of **Omary Ally Fuku (administrator of the estate of the late Ally Rajabu) Vs National Microfinance Bank, The Attorney General, and Morogoro Municipal Council, Consolidated Civil Appeals No.135 & 427 of 2020,** (unreported), the Court Appeal dealt with a situation similar to this one which involved a difference of names in the document involved in a case. After going through all the documents involved in the case the Court of Appeal noted that despite the difference in the names all of them referred to the same person and proceeded to hold that the difference of the names was minor and not fatal. For clarity let me reproduce the holding of the Court of Appeal hereunder;

" *Therefore, as alluded earlier, the confusion about the deceased's name is minor and curable,* ***it does not go to the root of the case as rightly submitted by Mr. Mkoba"***

(Emphasis added)

In the case, at hand, the issue is equally about the names though in this case, it is the name of a legal entity. All the evidence adduced shows clearly that this case is about the Filing Station known as Sasa Kazi Fuel Limited located at Mtongani Area in Dar es Salaam Region. The appellants' testimony reveal that they were working at a Fuel Station located in the Mtoni Mtongani area. The Fuel Station referred to in the charge sheet is located in Mtoni Mtogani area. CW1 told the trial court that the 1st appellant sued Sasa Kazi Fuel Limited at the CMA following the termination of his employment.CW1 tendered in court exhibit CW1 (the CMA Form No.6-certificate of settlement) duly signed by the 1st appellant and one Charles Mzatula (PW2), the principal officer of Sasa Kazi Fuel Limited,

owned by PW5. The testimonies of PW2, CW1, and PW4, the pump operator at Sasa Kazi Fuel Limited, who testified that he was working with the appellants at Sasa Kazi Fuel Limited, and as well as exhibit CW1 corroborates the testimony of PW5, the owner of the Sasa Kazi Fuel Limited who testified that appellants were his employees. He terminated their employment after the occurrence of theft at his Fuel Station in Mtoni Mtongani. Both PW2 and PW4 identified the accused as people who were working at Sasa Kazi Fuel Limited. Exhibit P1 collectively (the SMS, sent to PW5 by the 2nd appellant, Police investigation report), exhibit P3 and the testimonies of PW4 and PW6 who interrogated both appellants prove beyond reasonable doubt that the appellants were employees of PW5, working at Sasa Kazi Fuel Limited. Therefore, the arguments raised by Mr. Didace and Mr.Ngemela that Sasa Kazi Fuel Station does not exist are misconceived. The omission of the word " Limited" in the charge sheet was minor as it did not go to the root of the case, and did not prejudice the appellants in any way in preparation for their defense. The particulars of the offence were elaborate enough to know that the Filling Station in question, was Sasa Kazi Fuel Station located in the Mtoni Mtongani area. The appellants were able to defend their case effectively.

To the avoidance of doubts, I have taken into consideration Mr. Didace's concern on the dates indicated in exhibit CW1 (the Certificate of Settlement of Dispute from CMA) and am inclined to agree with the response made by the court's witness (CW1) during cross-examination that the discrepancy on the dates in exhibit CW1 is due to slip of a pen. It is a human error and not fatal as the rest of the particulars in that document are in order.

With due respect to Mr. Ngemela, I am not inclined to agree with him that the contract of employment, salary slip, and contributions in social security funds are the only evidence that can be used to prove an employment

relationship between parties in a case. This court is required to assess the evidence adduced in its entirety including oral testimony of the witnesses from both sides. In my considered opinion, going by Mr. Ngemela's and Mr.Didace's line of argument that the charge sheet is fatally defective on the reason that the word " Limited" is missing in the charge sheet and Sasa Kazi Fuel Station is not in existence while there is ample evidence that the appellants were working at Sasa Kazi Fuel Station located at Mtoni Mtongani, which has been referred to by the prosecution witnesses will be entertaining undue technicalities. Thus, it is the finding of this court that the prosecution cannot be faulted for not amending the charge sheet. The first ground of appeal is hereby dismissed for lack of merit.

Coming to the 2nd,3rd, and 4th, grounds of appeal, it is common ground that the burden of proof in criminal cases is beyond reasonable doubt and the onus of proof lies to the prosecution side. It is also not in dispute that in an offence of stealing by a servant, the ingredients of the offence to be proved are; the existence of an employment relationship and the theft of the employer's property capable of being stolen. The issue of the appellants' employment has been dealt with in the 1st ground of appeal. The concern raised by Mr. Didace and Mr. Ngemela that it is not clear who employed the appellants on the reason that PW5 in his testimony mentioned that the Fuel Station in question was formerly, under Gapco then it was taken over by Total, is misconceived because the issue here is who was running that Fuel/Filing station (Sasa kazi Fuel Limited) and employed the workers who were providing services at the Fuel Station. The issue of ownership of the premises where the Filign Station is located should not be confused with the operation of the business on the premises. The owner of the premises is not necessarily the one operating/ running the Fuel Station. In short, I do not see any confusion on who was operating the fuel station (Sasa Kazi Fuel Limited) since as alluded to earlier, the

prosecution proved beyond reasonable doubt that Sasa Kazi Fuel Limited was owned and run by PW5.

Regarding the proof of theft of the amount stated in the charge sheet, the trial Magistrate relied on the expert report produced in court as exhibit P1 which was heavily challenged by Mr. Didace and Mr. Ngemela. I agree with Ms. Kaima that no law requires an auditor or expert assigned to conduct an audit /investigation of a private firm's business to obtain a court order or search warrant before taking the documents from his/her client for doing the assigned work. So, under the circumstances of this case, I am not inclined to agree with Mr.Ngemela and Mr. Didace that the ledger /counterbooks used by PW1 in his assignment were obtained illegally without a search warrant. The issue of a search warrant is completely irrelevant in this case since no ledger book or any document was confiscated by the Police from Sasa Kazi Fuel Limited as per the testimony of PW6 which corroborates PW1's and PW5's testimonies that the owner of Sasa Kazi Fuel Station, PW5 is the one who facilitated PW1 to obtain those books after engaging him to conduct audit of Sasa Kazi Fuel Limited business.

Having said the above, the next pertinent issue to be determined is the evidential value of exhibit P1 collectively and other exhibits tendered by prosecution witnesses. Exhibit P1 collectively which includes the ledger books for daily sales of fuel and dipping, report from CPA Johnson Mwijage Byenobi (PW1), certificate of authenticity of electronic evidence, Police report from forensic bureau in respect of the information/data in mobile phone numbers 0766094319 and 0754501786, printouts of communications (SMS) in mobile phones aforesaid which according to exhibit P3 belongs to the 2nd appellant and PW5 respectively plus the CD used to store the information. As correctly submitted by learned advocates

the counter books do not bear the logo or stamp of Sasa Kazi Fuel Limited, however, PW4, the pump attendant confirmed that those ledger books (exhibit P1) were the ones used by the appellants in recording the daily sales collection from the pump attendants. The lack of a logo in the counter/ledger book is minor and not fatal. The testimony of PW4 is corroborated with the testimony of PW1 who told the trial court that he visited the office of Sasa Kazi Fuel Limited in Dar es Salaam where he was given those ledger/Counter books which he used to accomplish his task. Thus, Mr.Ngemela's and Didace's concern that no explanations were given on how PW1 obtained the ledger/ counter books is unfounded. Moreover, PW1 testified before the trial court that he was given eleven counters books some were missing. He did his task using the counter /ledger books that were supplied to him and the information/messages for the daily sales sent to PW5 in Mwanza retrieved from PW5's and 2nd appellant's cellphones. The testimony of PW6 confirms that he wrote a letter to the Cybercrime Department- Forensic Bureau. Thus, it is proved that the messages from PW5's and 2nd appellant's cell phones were properly retrieved and correct. As it can be discerned from the testimony of PW1 the missing counter books did not affect PW1's task because the investigation/audit was done using the available information, and according to PW1, the audit revealed there was theft of the money. The report prepared by PW1 included the money deposited into the bank and the expenditures. Thus, it is not true that PW1 did not take into consideration expenditures and bank deposits. Moreover, the ledger /counter books show the amount of fuel bought and other counter/ledger books show the dipping records. As alluded herein the information/data that were supplied to PW1 were enough to conduct the audit in the period indicated in those documents/The expert report reveals that there was the theft of money to the tune of Tshs.852,246,698/= by the appellants who were working at Sasa Kazi Fuel Limited and responsible

for the collection of sales of fuels as well as buying fuel (stocks).

From the foregoing the cases of **James Bulolo** (supra) and **Malanjabu Simbi** (supra) are not applicable in this case, since having analyzed the evidence adduced by the prosecution side, I have endeavored to show how the evidence produced by the prosecution side proved that the offence of stealing by a servant for each appellant, in this case, was proved beyond a reasonable doubt.

Additionally, with due respect to Mr. Didace, the case of **Edward Masanja** (supra) and **Haruna Said** (supra) cited to support his contention that there is no proof of actual theft of the amount indicated in the charge is distinguishable from the fact of this case since in the former cases the accused persons admitted that there was a shortage of money and had agreed with the leadership to pay the missing of amount of money. That is why the court held that a mere shortage of money that occurs in the course of a servant's discharging his/her duties does not amount to stealing by a servant. In the case at hand, the appellants' have not agreed with the owner of the Sasa Kazi Fuel Station to pay back the amount indicated in the charge sheet which means that they have appropriated that amount of money that belongs to their employer. Similarly, with due respect to Mr. Ngemela, the case of **Mohamed Abdallah Said** (supra) is distinguishable from the case at hand since in the former case the court held that there was no proof of theft because no audit was conducted to establish the amount alleged stolen by the appellant, where in the case at hand the PW1 (CPA Byenobi John Mwijage), a professional accountant, produced in court an expert report (exhibit P1 collectively) to prove the theft.

Concerning Mr. Didace's contention that after acquitting the appellants of the offence of conspiracy it was wrong to convict them of the offence of

stealing by servant, it is worth noting that the offence of conspiracy is a different offence from the offence of stealing by servant. These two offences have different ingredients. They do not depend on each other and are incompatible, that is, when the actual offence has been committed the offence of conspiracy cannot stand. In the case of **Emmanuel Maghembe and three others Vs. the Republic, Criminal Appeal No.35of 2018**, (unreported), the Court of Appeal held as follows;

"In the circumstances, we agree with Ms. Mbughuni that since the intended offence was said to have been committed, it was wrong for the conspirators to be charged again with conspiracy and armed robbery in Magobot Njige & another Vs Republic, Criminal Appeal No. 442 of 2017 (Unreported), the Court stated as follows;

" It is settled law that, the offence of conspiracy cannot stand where the actual offence has been committed. In this regard, it was not proper to charge and convict the appellants of the offence of conspiracy"

As alluded to at the beginning of this judgment, the appellants were acquitted of the offence of conspiracy. There is nothing wrong since the appellants were not supposed to be charged with the offence of conspiracy anyway. The fact that the offence of conspiracy was not proved does not mean that the offence of stealing by a servant was not proved or cannot stand.

Further, I agree with Mr. Didace and Ngemela that the reasoning of the trial court as can be discerned from the impugned judgment appears to shift the burden of proof to the appellants, in particular where he faulted the appellants for failure to bring in Court One Maulid Ally who they claimed was their employer. However, this being a first appellant court has to re-evaluate the whole of the evidence adduced during the trial and come up with its findings. [See the case of **Andrew Lonjine** (supra)]. As can be

discerned in this judgment I have re-evaluated the evidence adduced by the prosecution side since the conviction of an accused has to be grounded on the evidence produced by the prosecution side not the weakness of the defence case and the standard of proof in criminal cases is beyond a reasonable doubt. However, It is important to understand what proving a case beyond a reasonable doubt means. In the case of **Magendo Paul and another** (supra), the Court of Appeal quoted with approval the holding in the case of **Miller Vs Minister of Pensions, (1947) 2 ALL ER 372** in which Lord Denning said the following;

" *The law would fail to protect the community if it admitted fanciful possibilities to deflect the Court of Justices. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with a sentence " of course it is possible but not in the least probable" the case is proved beyond reasonable doubt"*

Going by the interpretation of the phrase " proving a case beyond reasonable doubts" as explained in the case of **Miller** (supra), the evidence adduced by the prosecution, in this case, is so strong that I do not see even a remote possibility in the appellants' favour. In the upshot, the prosecution side proved its case beyond reasonable doubt.

Coming to the 6th ground of appeal, I do not agree with Ms.Kaima that the trial court accorded the appellants' defence due consideration as he classified it as a sham and general denial with no substance. However, upon re-evaluating the appellants' defence I noted that the same did not shake the prosecution case instead it strengthened it because some of the assertions made by the appellants were in support of the testimonies made by the prosecution witnesses. For instance, the testimonies of both the 1st and 2nd appellants in their defence confirmed that they were working at a Fuel Station located in Mtongani area in Dar es Salaam Region and that is where they were arrested. That said Fuel Station was initially owned by

Gapco and then was sold to Total Company. The 1st appellant was dealing with measurements and deposit of money at the bank and the 2nd appellant used to send messages on the daily sales/ collection to PW5. All of the above assertions are in line with the testimonies of PW5, contents of Exhibit P1 collectively, in particular, the contents of the CD and the printouts of the messages as well as the police report (exhibit P1 collectively) and Exhibit P3. Moreover, the fact that the 2nd appellant conceded that she used to send a report on the daily sales of fuel to PW5 under the instruction of Mr. Athuman Maulid whom she claimed was her employer, supports PW5's assertion that the appellants were his employees since under normal circumstances if PW5 was not the appellants' employer or was not the owner of the business Mr. Maulid would not have directed 2nd appellant, as per her testimony to send the report on daily sales to PW5.

From the foregoing, I do not see any plausible reasons to fault the findings of the trial Magistrate. In the upshot, this appeal is dismissed in its entirety.

Dated at Dar es Salaam this 28th day of June 2024

B.K.PHILLIP

JUDGE.