

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MBEYA SUB – REGISTRY)

AT MBEYA

CRIMINAL APPEAL No. 129 OF 2023

*(Originating from decision in Criminal Case No. 97 of 2022 Chunya District Court,
Hon. J.J. Mhanusi , RM dated 20.9.2022)*

SELEMAN RICHARD..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

11th December, 2023 & 4th March, 2024

POMO, J.

Aggrieved by the decision of the Chunya District Court in Criminal Case No. 97 of 2022, which convicted the appellant of theft contrary to sections 258(1)(2) and 265 of the Penal Code, [R.E. 2022], the appellant now stands before this court appealing on the following grounds:

- 1. The trial court erred in law by convicting and sentencing the appellant without sufficient evidence presented by the prosecution to substantiate the charges.*
- 2. The trial court erred in law by convicting and sentencing the appellant without considering that the appellant was*

neither arrested nor found with the stolen properties from the complainant.

- 3. The trial court erred in law by convicting and sentencing the appellant without acknowledging that the appellant was merely a witness to the crime and refrained from intervening or raising an alarm due to fear of retaliation from the actual perpetrator, who was a co-worker.*
- 4. The trial court erred in law by basing the appellant's conviction on CCTV footage, which merely depicted the appellant entering the premises for work and did not show any evidence of theft.*
- 5. The trial court erred in law by imposing a disproportionate sentence of five years' imprisonment, which exceeds the limits set forth in section 170(1) of the Criminal Procedure Act, Cap 20 Revised Edition 2022 (the CPA).*

Briefly, the facts of the case are as follows. On 2.6.2022, at Mawelo village within Chunya District, Mbeya region, the appellant was accused of stealing 300 kilograms of carbon, suspected to contain gold, valued at Tshs. 200,000,000/=, belonging to Mika Aidan Msingwa.

Hearing of the appeal was through written submissions. The appellant fended for himself unrepresented, while the respondent republic enjoyed legal service of Ms. Jullieth Katabaro, learned State Attorney.

In a concise submission, the appellant argued that the prosecution failed to prove the charge against him beyond a reasonable doubt. He

emphasized that none of the witnesses (PW1, PW2, and PW3) directly witnessed him stealing the complainant's property. He pointed out that according to the evidence of PW2 and exhibit PE1, the actual perpetrator was Tito, not him, as they are co-workers. He denied involvement in breaking the CCTV camera or stealing the carbon. Additionally, he contested the admission of his caution statement, asserting that there was no corroborating evidence, as the stolen property was not found in his possession.

In response to the appellant's submission, Ms. Katabaro chose to address grounds one, two, and four of the appellant's appeal together. She argued that the prosecution presented four witnesses who sufficiently proved the elements of the offences charged against the appellant. While acknowledging that none of the prosecution witnesses directly witnessed the theft, she pointed out that the incident was captured by CCTV cameras installed in the building.

Ms. Katabaro elaborated that the CCTV footage showed the appellant and another individual, Sisto Moses, on 2.6.2022, at 19:30 hours, destroying a security camera near the first carbon tank. This act was recorded by another camera located at the second tank, unbeknownst to them. She explained that the recording depicted the appellant keeping watch while Sisto Moses removed carbon from the

tanks, concealed it in nylon bags, and hid it. After the theft, Sisto Moses disappeared, but the appellant remained behind to clean the carbon tanks, as evidenced on page 7 of the proceedings.

Furthermore, Ms. Julieth Katararo argued that the testimony of PW1 was supported by PW2, a police investigator, who presented the CCTV footage (exhibit PE1), clearly showing the two individuals breaking into the carbon room, tampering with the tanks, and stealing the carbon containing gold. She emphasized that since the defence did not object to the admission of the CCTV footage, it was effectively admitted as evidence. He referenced the case of ***Salum Mohammed @ Mnida vs Republic***, *Criminal Appeal No. 321*, to support this assertion.

Additionally, Ms. Katararo pointed out that PW4's evidence corroborated PW2's account, as PW2 had taken the cautioned statement of the appellant, wherein the appellant admitted committing the crime with Sisto Moses.

In response to ground four, Ms. Katararo contended that despite the appellant's claim of not being directly involved in the theft but merely witnessing it, the record indicates otherwise. She highlighted that after the incident, the appellant was interrogated by PW1, during which he verbally confessed to committing the offence alongside one Sisto Moses

and revealed the whereabouts of the stolen carbon. Additionally, Ms. Katabaro pointed out that the appellant also confessed to PW4, who documented his caution statement.

Ms. Katabaro argued that in criminal cases, the most compelling evidence often comes from the accused person themselves when they confess to their guilt. To support this assertion, she referenced the case of **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010 CAT at Arusha (unreported) at page 8.

On ground six of the appeal, Ms. Katabaro submitted that the trial court, as evidenced on page 4 of its judgment, duly considered the appellant's defence.

In a brief rejoinder, the appellant focused his argument on the CCTV footage, exhibit PE1, contending that clearly it shows that the individual stealing the complainant's property was not him, but someone inside the room. He referenced the case of **Zuberi Rashid vs. Republic** [1957] EA 455, emphasizing the principle that mere presence at the scene of the crime is insufficient for conviction.

Furthermore, the appellant has argued that the individual seen committing the crime was an employee of the company, and he lacked

the authority to question the person's actions, assuming they were acting under instructions from their superior.

Lastly, he pointed out that the respondent failed to address whether he was indeed arrested with the stolen properties, casting doubt on the prosecution's case. This marked the end of both sides' submissions

I have carefully examined the entire trial court record, along with the grounds of appeal presented in this court and the submissions by the parties. Now, the issue for determination is whether this appeal is merited or not.

Regarding grounds one, two, three and four of the appeal, the appellant argues that the prosecution failed to meet the legal standard required to prove the case against him, as he was not apprehended with the stolen property, and the CCTV footage does not depict him committing the theft but merely entering the premises for work. It is the rule of thumb that it is the prosecution's responsibility to establish the case against the accused beyond a reasonable doubt, as emphasized, among others, in the case of **Hamisi Mbwana Suya vs. Republic**, Criminal Appeal No. 73 of 2016 CAT at Arusha (unreported) at Page 22.

Upon reviewing the record, I am inclined to conclude that the prosecution successfully substantiated its case. Despite the absence of

direct eyewitnesses to the theft, the combination of exhibits and witness' testimonies implicates the accused. The pivotal evidence identifying the appellant as the perpetrator was the CCTV footage tendered by the investigator (PW2), illustrating the theft on the night of 2.6.2022. This footage, admitted as exhibit PE1, was scrutinized in court. Additionally, during the appellant's defence, he acknowledged watching the footage and admitted his presence, alongside Sisto, in transporting carbon to the cylinder. Notably, the admission of this footage went unchallenged, and the appellant refrained from cross-examining the witness who presented it. In support of this conclusion, the case of **George Maili Kemboge vs. Republic**, Criminal Appeal No. 327 of 2025 CAT at Mwanza (unreported) at page 4, citing the precedent set in **Damian Ruhele vs. Republic**, Criminal Appeal No. 502 of 2007 CAT at Mwanza, stated on the significance of unchallenged evidence in establishing guilt, thus: -

"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."

I regret to disagree with the Appellant; the footage in question not only captured the appellant entering the workplace but also corroborates his involvement in the theft, as affirmed by exhibit PE2, his cautioned statement. In this statement, the appellant gave a detailed account of his

participation in the incident, supporting the evidence presented in the CCTV footage. It is notable that the appellant did not challenge this statement or cross-examined PW4, the police officer who presented it. This failure to contest crucial evidence strengthens the prosecution's case against him.

The appellant's claim of being coerced or threatened lacks credibility, as he provided no substantiated details regarding the alleged coercion or threat. Moreover, the footage contradicts any suggestion of duress, as there is no indication of the appellant displaying concern or apprehension in the presence of Sisto on the day of the incident.

Furthermore, the absence of the stolen property in the appellant's possession does not absolve him of guilt, as stealing encompasses the act of taking carbon, an item susceptible to theft. Therefore, the prosecution has successfully demonstrated the appellant's culpability through a combination of compelling evidence and corroborating testimony, warranting consideration of conviction.

Regarding ground five of the appeal, which asserts that the sentence imposed is excessive according to section 170(1) of the CPA, I find this argument to be unsubstantiated. The appellant received a sentence of five years, which is within the limit specified by section 170(1) of the CPA.

Therefore, the sentence cannot be deemed excessive, especially when considering the magnitude of the theft involved.

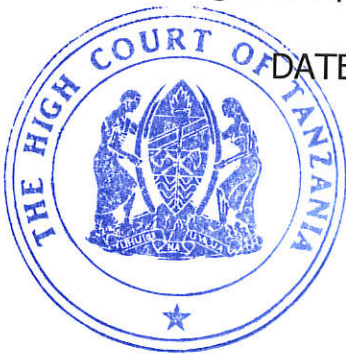
On the last ground of appeal, concerning the failure to consider the appellant's defence, it is noted that while the trial court's judgment includes a summary of the appellant's defence on page 4, merely providing a summary does not constitute a critical analysis of the appellant's defence case. In the case of **Amir Mohamed v Republic** (1994) TLR 134, the Court of Appeal emphasized that every judgment must include a critical analysis of both the prosecution and the defence. It is incumbent upon the trial magistrate to provide reasons for any disagreement with the appellant's defence. However, such critical analysis appears to be lacking in the judgment. Therefore, it is incumbent upon the first appellant court to re-appraise the evidence on the record and draw its own inferences and findings of fact. However, it must do so while considering the advantage that the trial court had in observing and assessing the demeanor of the witnesses at the time of giving their testimonies. This principle is supported by the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2027 CAT at Mwanza (Unreported) at page 17.

The appellant claimed that on the date of the incident, he was compelled by Mr. Sisto to commit the crime, asserting that he did not

intend to do so. He further argued that Sisto took the carbon alone while he was occupied mixing chemicals for extraction. However, this defence contradicts the events described in exhibit PE1. The appellant's failure to specify who coerced him, if coercion indeed occurred, casts doubt on the credibility of his defence. Additionally, he could have reported the incident once Sisto left, but he did not. Moreover, the appellant confessed in his cautioned statement, which received no objection at the time it was tendered before the trial court. Consequently, the appellant's defence, in my view, fails to undermine the evidence presented by the prosecution.

That said, I find the Appellant's appeal lacks merit and dismiss it in its entirety. It is so ordered

Right of Appeal Explained



DATED at **Mbeya** this 4th day of **March, 2024**

107.
MUSA K. POMO
JUDGE
04/03/2024

Judgment delivered in chamber in present of Appellant and Ms.
Veneranda Masai, State Attorney for the Respondent Republic

107.
MUSA K. POMO
JUDGE
04/03/2024