

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 143 of 2023

(Originating from Criminal Case No. 153 of 2022 Mbeya District Court at Mbeya)

IBRAHIMU MUNDO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

11th December, 2023 & 14th February, 2024

POMO, J

Before the District Court of Mbeya at Mbeya in Criminal Case No. 153 of 2022 the appellant, together with LATIFA D/O ABDALLAH not a part to this appeal, were charged with the offence of Stealing contrary to section 258 (1) and 265 of the Penal Code, [Cap 16 R.E. 2022]. In the charge, LATIFA D/O ABDALLAH was the first accused and the Appellant was made the second.

It was alleged by the prosecution side that on diverse dates between 15th day of March, 2022 and 3rd day of July, 2022 at TAZARA area within the District and Region of Mbeya, jointly and without claim of right did steal the sum of TZS 36, 400,000/- (say: thirty-six million

and four hundred thousand Tanzania shillings) the property of REHEMA D/O AHMED WAKULICHOMBE (PW1)

They pleaded not guilty to the charge. As a result, the prosecution called three witnesses and tendered exhibits to prove the charge.

The charge laid down against them arose in the manner hereunder. The two were lovers. The 1st accused was living with her sister one REHEMA AHMED WAKULICHOMBE (PW1) an employee of TAZARA but also engaged in entrepreneurship. PW1 kept her earnings at her CRDB Bank Account No. 01J2014523100.

The Appellant had no income therefore he used to beg financial assistance from the 1st accused, his lover. At a time, the appellant seduced the 1st accused to steal money from her sister PW1's bank account. Following that, from PW1's bank account the 1st accused transacted several cash withdrawing through SIM banking and sent the money to the appellant's Vodacom mobile number registered under his name. PW1 discovered cash stealing in her bank account and observed the 1st accused's immediate behavior changes as she started living expensive life the fact which raised doubt to her. When PW1 asked about such changes, her response was that she had a rich boyfriend giving her those money. In PW1 further investigation, she found that CRDB bank mailed her informing about three cash withdrawing transactions amounting TZS 36,400,000/= that had been sent to the 1st

accused Airtel mobile number and thereafter sent them to the appellant's Vodacom mobile phone number. Following that, PW1 reported the matter to the police and on 15th July the 1st accused was arrested. Interrogated, she named her boyfriend, the Appellant herein, to be the one who induced her to transact the cash stealing from PW1's bank account. This disclosure led the arrest of the appellant and jointly arraigned before the trial court facing the charge of stealing.

In proving the offence, the respondent republic paraded three witnesses PW1, PW2 and PW3 and tendered exhibits. Defending, the 1st accused testified that, the Appellant induced her to steal PW1 cash because they were lovers and the Appellant had no income hence used to be assisted by her. She testified that the appellant taught her how to transact the mobile cash transfer from PW1's bank account through mobile phone. On the other hand, the Appellant denied the charge stating that he was not responsible for the offence although admits to receive the money from the 1st accused and cannot deny that because of their relationship and had enjoyed the money together as lovers.

The trial court was satisfied by the respondent republic evidence to have proved the charge beyond doubt hence convicted and sentenced each to serve four years jail imprisonment term with an order to payback the stolen TZS 36,000,000/- stolen on completion of serving the sentence.

Dissatisfied with the decision, the 2nd accused appealed to this court having five (5) grounds of appeal in kiswahili as follows: -

1. KWAMBA-Mahakama ya Wilaya ilipotoka kisheria pale ilipontia hatiani mrufani wakati upande wa mashitaka ulishindwa kuthibitisha mashitaka pasipo kuacha shaka lolote.
2. KWAMBA - Mahakama ya Wilaya ilipotoka kisheria pale ilipontia hatiani mrufani bila ya kuchunguza kikamilifu kwamba SM1 hakunikamata nikiiba ila aligundua kwamba kuna fedha imechukuliwa katika akaunti yake kulipia namba za simu.
3. KWAMBA-Mahakama ya wilaya ilipotoka kisheria pale ilipontia hatiani mrufani bila ya kuwepo Ushahidi wa mtaalam wa mitandao ya simu na taarifa ya maandishi ili kuthibitisha iwapo ni fedha kiasi gani kilichukuliwa katika akaunti ya SM1 kupitia simu ya nani na wakati gani kushindwa kufanya hivyo aliwatia hatiani warufaniv kinyume cha sheria.
4. KWAMBA-Mahakama ya Wilaya ilipotoka kisheria ilipontia hatiani mrufani ikiegemea katika maelezo ya onyo ambayo yalikosa Ushahidi wa kuyapa nguvu na yaliandikwa bila ya kufuata miongozo ya sheria.
5. KWAMBA-Mahakama ya Wilaya ilipotoka sana kisheria pale ilipontia hatiani mrufani bila ya kufanyia taathimini Ushahidi wote wa upande wa mashitaka na vielelezo vyake ambapo ilimtia hatiani mrufani kinyume cha sheria.

These Appeal grounds can literally be translated as follows: -

- 1. That the District court erred in law when convicted the appellant while the prosecution side failed to prove the charge beyond reasonable doubt.*
- 2. That the District court erred in law when convicted the appellant without investigating properly that PW1 did not found him stealing but he discovered that there is some money has been taken from her account through phone numbers.*
- 3. That the District Court erred in law when convicted the appellant without the presence of evidence of cyber expert and the written report to prove through whose phone, at what time and how much money was taken from the PW1`s account. Failure to do that it convicted the appellant against the law.*
- 4. That the District Court erred in law when convicted the appellant relying on caution statement which lacks supporting evidence and was taken without following legal procedure.*
- 5. That the District court erred in law when convicted the appellant without evaluating prosecution evidence and exhibits.*

The Appellant fended himself unrepresented while the respondent republic had legal representation of Ms. Lilian Otto, learned State Attorney. By leave of the court this appeal was argued by way of written submissions.

Submitting on the first ground, the appellant argued that all prosecution evidence and exhibits did not prove the charge. He said the stolen money through mobile transaction from PW1 account was done by 1st accused who confessed and not him.

As to the second ground, his submission is that the trial court convicted him unlawfully as the conviction was based on the confession of the co-accused. He referred this court to section 33 (2) of the Evidence Act, [Cap 6 R.E. 2022].

As regards the third ground, the Appellant submitted that the trial court misdirected itself for believing only the evidence of the complainant (PW1) without evidence of the expert to show as to how the money reached the appellant's mobile phone. That, the one who knew PW1's sim card number was the 1st accused and was the one who made all transactions by using her phone. He further said the 1st accused failed to prove that it was the appellant who advised her steal PW1's money.

On the fourth ground, the Appellant argued that the cautioned statement which the trial court relied on to convict him lacks corroboration and was recorded without following the laid procedures as he was not given his right to call a lawyer or a friend.

Lastly, the 5th ground of appeal, the Appellant submitted that the trial court convicted him without any written report from Vodacom, Tigo,

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Halotel or anywhere showing whose mobile phone made such transaction of the stolen amount.

In reply submission, Ms. Otto argued that for the matter to be proved beyond reasonable doubt the prosecution must prove all the essential elements establishing the offence of stealing. To support her stance, she cited the case of **Mosi Chacha @ Iranga and Another vs Republic**, Criminal Appeal No.508 of 2019 CAT at Musoma (unreported). That, the elements stated under section 258 (1) and 265 of the Penal Code, [Cap. 16 R.E.2022] were proved by the three prosecution witnesses. That, it is evident at page 18 of the trial court proceedings that PW1 testified on how the 1st accused transacted from her bank account the money which was later on diverted to the Appellant's mobile phone by the 1st accused.

Replying the 2nd ground, Ms. Otto argued that the Appellant was not caught stealing rather it was revealed that cash transfers were made from the complainant's bank account to the mobile phone number of the appellant. That, there is no dispute on the fact that the appellant was not there when PW1 recognized such crime but supports the trial court findings as envisaged at pp.10 – 11 of the judgment in applying section 22 (1) (d) and (3) of the Penal Code [Cap 16 R.E. 2022] which lucidly provide who will be a party to the offense. That, the 1st accused admitted stealing PW1 cash as evidence at pp. 36 – 37 of the trial court

proceedings having been seduced so to do by the appellant. That, Exhibit P2 shows the transactions from the Bank account of PW1 to the appellant. That, with the evidence above considered in connection with section 22 (1) (d) and (3) of the Pena Code (supra), proved that the appellant was a party to the offense. He cited the case of **DPP vs Abdallah Zombe and 8 Others**, Criminal Appeal No. 358 of 2013 CAT at Dar es Salaam (unreported)

On the 3rd ground, Ms. Otto replied by arguing that to prove the offense of stealing under section 258 (1) and 265 of the Penal Code did not require any expert evidence because the elements of the offence of theft are self-explanatory.

As to the fourth ground, it was Ms. Otto submission that the issue was supposed to be addressed by the trial court when the said cautioned statement was tendered and that the appellant did not object to its tendering. To substantiate, she pointed out page 31 of the trial court proceedings and cited the case of **Makubi Dogani vs Ngodongo Maganga**, Civil Appeal No.78 of 2019 CAT at Shinyanga (unreported). That, PW1 to PW3 gave unchallenged evidence as the Appellant didn't cross – examine them. He cited the case of **Shomari Mohamed Mkwama vs Republic**, Criminal Appeal No.606 of 2021 CAT at Dar es Salaam(unreported).

As regards to the fifth ground, Ms. Otto submitted that the trial court evaluated and analyzed the evidence from both sides referring to pp.9; 10 and 11 of the impugned judgment where the trial court considered the evidence of prosecution and defense side as well. In the end, she prayed this court to dismiss the appeal for being unmerited

In his short rejoinder, the appellant submitted that as the respondent accepted that the one who stolen the said money was DW1 thus its true that the trial court convicted him illegally. That, no anywhere in the trial record showing he assisted DW1 to commit the alleged offense and DW1 failed to prove on how the appellant influenced her to commit such offense.

Lastly, it was the Appellant's submission that no one can be convicted for the offence committed by his wife and that the respondent failed to observe that the trial court convicted and sentenced him in contravention of section 3 (2) (a) of Tanzania Evidence Act, [Cap 6 R.E. 2022] in that, apart from the confession of the co-accused, no factual evidence implicated him.

Having gone through the trial court's record, grounds of appeal and submissions made by parties, what I am called upon to determine is whether this appeal has merit. In determining, I will combine the 1st to 4th grounds of appeal as they are inter-related. This is because they are

centred on complaint that the charge was not proved to the required standard.

On the complain that the charge was not proved beyond reasonable doubt. It is vivid that the prosecution side paraded three witnesses PW1, PW2, PW3 and exhibits including cautioned statements of the accused persons as exhibits P3 and P4 respectively.

It is elementary principal of law that in criminal charge against the accused person must be proved beyond reasonable doubt. In **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda versus Republic** [2006] TLR 385 the court in emphasizing the burden of proof in criminal cases had the following to state: -

"As is well known, in a criminal trial the burden of proof always lies on the prosecution"

[see also: **Mohamed Said Matula vs R** [1995] TLR 3.]

In this appeal, as observed from the trial court proceedings, the complainant (PW1) firmly testified on how the 1st accused transacted cash withdrawing from her CRDB bank account while was later diverted to the the appellant`s mobile phone number. DW1 in her cautioned statement and testimony confessed that the appellant solicited and procured her to steal the money from PW1 bank account as her lover who had no money. The appellant himself, who testified as DW2 in his testimony and cautioned statement did not deny that fact. The

cautioned statements of the 1st accused and the Appellant were tendered by PW2 and PW3 respectively without any objections from them as evidenced at page 31 of the trial court proceedings. As if that was not enough, the appellant did didn't cross – examine PW3 on the said admitted cautioned statement (Exhibit P3). It is a settled principle that failure to cross examine on a fact implies acceptance of that fact as correct. See the case of **Bomu Muhamed vs Hamisi Amiri** Civil Appeal No.99 of 2018 CAT at Tanga (unreported) pp. 11 and 22.

Also the appellant complain that he was not caught stealing, it is on record and Exhibit P2 that the cash transaction from PW1 bank account were directed to the appellant's phone number and the testimony of DW1 were to the effects that the appellant solicited and procured her to steal the money from PW1 and send to him, the facts which nets him under section 22 (1) (d) and (3) of the Penal Code,[Cap 16 R.E.2022] comes into ply hence no need of expert witness prove.

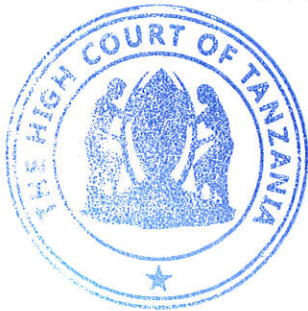
Regarding the last ground, the same is in regard to the complaint that the trial court did not analyze the prosecution, defence evidence and exhibits. As rightly submitted by Ms. Otto, learned State Attorney, there is no way the trial court can be fault because, as evidenced at page 9; 10 and 11 of the judgment, evaluation and consideration of the evidence of both parties were done. Therefore, the complaint is unsupported.

In the upshot, I find no merit in all the grounds of appeal and consequently, I hereby dismissed it for being devoid of merit and uphold the trial court decision.

It is so ordered

Right of Appeal explained to an aggrieved party

DATED at MBEYA on this 14th February, 2024




MUSA K. POMO

JUDGE

14/02/2024

Judgment delivered in chamber in presence of the Appellant and Mr. Augustino Magessa, learned State Attorney for the respondent republic


MUSA K. POMO

JUDGE

14/02/2024