IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 53 OF 2023

(Arising from Criminal case No.39 of 2023 of the District Court of Bukoba at Bukoba (E.W.Yona-SRM)

DELIUS DOMISIAN..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14/02/2024 & 15/3/2024

E. L. NGIGWANA, J.

The reason behind why this appeal found its way to this sub-registry of the High Court is because the appellant was aggrieved by the conviction and sentence of the District Court of Bukoba at Bukoba.

At the said district court, the appellant who was an employee of the company known as TRS Health Club Limited and another person known as James John (a security guard) who is not a party in this appeal were charged under the same charge sheet with two counts though each accused with his own separate count.

The first count was for the appellant only. He was charged for the offence of stealing by servant contrary to sections 257 (1), 258 (1) and 271 of the Penal Code, [Cap 16 R. E 2022]. The second count was for his co-accused James John, a security guard which was for neglect to prevent offence contrary to section 383, and 35 of the Penal Code, [Cap 16 R. E 2022].

At last, they were found guilty and sentenced respectively as charged. The appellant was sentenced to pay fine of **TZS 300,000/=** together with restitution of the stolen money **USD 3724** and **TZS 2,365,000/=** or to serve five (5) years imprisonment and the other accused to pay a fine of **TZS. 200,000/=** or to serve two (2) years imprisonment.

In his self-crafted petition of appeal, the appellant filed 14 grounds which I see no good reason to reproduce them here but suffices to say that all grounds simply converge that the case, at the trial court was not proved beyond reasonable doubt.

When this appeal matured for the hearing, the appellant engaged Mr. Ibrahim Muswadick while the respondent had a representation of Ms Gloria Rugeye (SA).

The appellant's counsel dropped six (6) grounds and remained with eight (8) grounds. As I said earlier, the entire debate greatly rested on the merit that the case at the trial court was not proved beyond reasonable doubt to cause the appellant to be convicted.

Mr. Mswadick submitted that there was no even a single eye witness of the incidence. He further added that the evidence was at variance with the charge. He substantiated that if at all PW3 testified that the appellant handed over to the complainant USD 1626, the charge sheet was expected to carry less than USD 3724 charged. Mr. Mswadick further contended that it was wrong for the court to rely on the evidence of the co-accused while he was a not trustworthy witness. He explained that DW4 (co-accused) said that, on the date of the incident while on duty, the appellant came at night around 20.00hrs in a company of two people and shortly kidnapped him and finally managed to steal money and later on was taken up to Sengerema and thrown into the bush.

He wondered if at all the incident occurred on 18/02/2023 and DW4 went to Mwanza and then to Karagwe, how comes that he failed to report the incident earlier at Mwanza or Karagwe or to his employer not later than on

3/03/2023, the date he was arrested and matched to police station where he narrated the incidence.

Mr. Mswadick further submitted that it was not proved whether the appellant was the sole person with the keys of the room which the money was kept since the general manager also had access to the said room. As regards the evidence that the general manager was in Dar es Salaam, he argued that the prosecution failed to prove by travelling tickets showing that the general manager of the company was really in Dar es Salaam.

It was Mr. Mswadick's further submission that the fact that the appellant admitted that the money got lost and his readiness to pay the same was clear indication that the offence was no longer criminal but civil case.
He concluded that if the trial court had considered the evidence of DW1, DW2 and DW3 it would have arrived at different conclusion. In that regard, he invited this court to follow the stance in the case of **Frugence Kibuye@Frugence Guzuye vs Republic**, Economic Appeal No.04 of 2022 HCT at Bukoba where the court considered the defence case which was not considered and arrived at different conclusion. He prayed for this court to do so and quash conviction, set aside the sentence and set the appellant free.

Ms Gloria, for the respondent opposed Mr. Mswadick's proposition that the case was sufficiently proved beyond reasonable doubt. She explained that in order to convict the accused for the offence of stealing by servant like the one at hand, the prosecution must prove the four ingredients: **One,** that the appellant was the employee of the complainant. **Two**; that there was movable property. **Three**, that the appellant did steal the said property of his employee and, **four** that, with that intention to defraud, the appellant obtained the property with intention to deprive the employer permanently.

She did not get trouble to substantiate the said ingredients. She submitted on the first ingredient that with no doubt that the appellant was the employee of the complainant to wit; TRS Health Club Limited. She added that the evidence of PW1, PW2 was vividly to that effect.

As regard whether the property was movable, she submitted that the appellant was charged for stealing USD 3724 and TZS 2,365,500= the property of his employer and money is a movable property. She further submitted that the said money was handed over to the appellant for construction and buying office equipment, the fact which was admitted by the appellant in his defence.

It was Ms Gloria's submission that the money was stolen while the appellant was the employee and he was the only person at that time who had access to the room where the said money was kept since the general manager who also had access to the said room was away from office in Dar es Salaam.

To show that the appellant planned to steal his employee's property, the learned counsel submitted that the CCTV Camera was switched off while its switch is found in the said room. She was to the effect that circumstantial evidence is very strong to convict the appellant. She further contended that the evidence of PW3 explains that the appellant orally confessed to him that he stole the money and asked PW3 the brother of the owner of the company to approach the complainant to forgive him. She buttressed that section 3 of the Evidence Act recognises confessions was also fortified by the case of **Twaha Ally and 5 others versus Republic,** Criminal Appeal No.78 of 2004 CAT, where the court stressed that confession of the accused is the best evidence if given voluntarily. She elaborated that the appellant was not tortured or threatened by PW3 to admit or confess that he had stolen the said money. She further relied on **Mawazo Anyandwile Mwaikaja vs DPP**, Criminal Appeal No.455/2017 CAT, at page 17 where oral confessions were explained. The learned State Attorney further submitted that apart

from oral confession, the appellant went to the extent of writing a letter admitting to have stolen money and used it for his own use and promised to pay it back, the letter was admitted as exhibit P2 without objection.

Ms Gloria submitted that DW4 well testified that on the material date, the appellant came back at work to collect his phone and since he was his boss, he did not doubt him but the appellant ended kidnapping him. It was his submission that in that regard all ingredients were proved beyond reasonable doubt.

Responding to the complaint that the trial court did not consider the evidence of DW1, DW2 and DW3, she conceded that apart from summarising the evidence from both sides, the trial court magistrate ought to have analysed, evaluated and consider such testimonies before reaching its decision. However, she argued that such irregularity is curable as per the case of **Hassan Mzee Mfinanga versus Republic** (1981) TLR 167 which spells that the first appellate court may step into the shoes of the trial court and consider the defence. She therefore asked this court to do so or to remit the case file to the trial court so that the defence case can be considered.

Responding to the complaint raised by the appellant's counsel that the evidence was at variance with the charge, she explained that the appellant

was entrusted TSZ 2,365,500/= and USD 3724 but he managed to hand over back to his employer USD 1626.It was the argument from the State Attorney that returning the less amount does not do away that the appellant had initially stolen the total sum of USD 3724.

As regard to the trustworthiness of the co-accused, the respondent's counsel elaborated that the trial court had the duty to access the demeanour of the said witness and had no reason to doubt or disbelieve him. She bolstered her stance with the case of **Goodluck Kyando versus Republic** (2006) TLR 263.

In rejoinder, Mr. Mswadick submitted that he has no problem that oral confession can be relied upon to convict but he brought this court to attention that oral confession must be treated with great care. He added that in the case at hand, PW3 did not state the environment and circumstances upon which oral confession was taken, whether the environment was safe or not. He added that in that letter, the appellant did not state to have stolen the money but he admitted that the money got lost while in his hands.
He reiterated that DW3 was not a credible witness at all since he had the phone of his boss but he never reported the incident within three days from its commission.

Since the State Attorney had admitted that there was an irregularity of failure to consider the defence, Mr. Mswadick conceded to the prayer that this court be pleased to step into the shoes of the trial court to consider it instead of reverting the case file to the trial court.

Reacting on the issue of evidence and charge being in variance, Mr. Mswadick submitted that it renders the charge defective and cannot be cured by section 388 of Criminal Procedure Act, [Cap.20 R.E 2022].

Probed by this court ***suo moto*** on the legal issue of sentence which was not among the grounds of appeal, Mr. Mswadick was of the view that the sentence was bad as it was mixed with the compensation order and it was not expressly ordered who is to be compensated or repaid. He cited the case of **Paschal Andrea versus Republic**, Appeal No.613 of 2020 CAT at Bukoba at page 18. He further argued that the trial magistrate imposed the sentence which was contrary with the one provided by the law. He added that if at all USD 1616 was handed over to the employer, it was wrong for the court to order compensation of the total sum of USD 3724 without deducting the amount already paid.

On her side, Ms. Rugeye conceded that the sentence was bad in law since it was ambiguous. She the submitted that amount awarded as compensation was excessive due to the fact that the complainant had already received USD1616 whereas, according to her, interference of this court is necessary as far as the sentence and compensation order are concerned.

I have placed much attention and perused the entire record of this appeal for the purpose of satisfying whether this appeal is meritorious. In so doing, I have considered the grounds and submissions advanced by both learned counsels.

Being guided with legal authorities submitted, both parties were at one that this court has jurisdiction to step in the shoes of the trial court and consider the defence testimony which was not considered by the trial court. Without hesitation, I agree with them and I will therefore consider and re-evaluate the same. See **Athumani Hassani versus Republic**, Criminal Appeal No.292 of 2017, CAT at Arusha (Unreported)

In **Mkulima Mbagala versus Republic**, Criminal Appeal No.267 of 2006(Unreported) the duty to consider defence was held among others that:

"...This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before the formal conclusion is arrived at"

In the first point of grievance, Mr. Muswadick faults the trial court that there was no even a single eye witness who testified to have seen the appellant stealing money. With due respect to Mr. Mswadick, there is no law which provides that every offence has to be proved by direct evidence only. Even circumstantial evidence if passed its tests can be best evidence under the best evidence rule.

There was unbroken circumstantial evidence from prosecution witnesses who testified before the court to link the appellant in the offence. **One,** PW3 testified that the appellant himself orally admitted to PW3 to have stolen the money. The record shows that PW3 is the brother of PW2 who is the owner of the company. It was the evidence of PW3 that the appellant urged him to approach PW2 and solicit his forgiveness. According to PW3, in that process the appellant took USD 1626 his bag and handed over to PW2. In the

circumstance, there is no any reason this court can register to disbelieve PW3's testimony. If that is not enough, PW3's line of evidence is collaborated by Exhibit P6 which is the petty cash voucher filled by the appellant to return USD 1626 which was among the stolen money.

The other grievance is that it was not proved that while the appellant was confessing to PW3, he was a free agent and that his oral confession was voluntarily made. As per trial court record, the defence from the appellant is that he remained in police custody for a long time, he was beaten, denied bail and forced to write letters to promise to pay the money and sell his house. He alleged that he confessed due to threat and torture.

The evidence of DW2 was to the effect that the appellant was denied bail and put in the police cell and was beaten.DW3 was the appellant's wife. She only testified on the issues of meeting with a group of people who wanted to sale her matrimonial house on the ground that her husband stole his employer's money.

Sincerely; the defence evidence from DW1, DW2 and DW3 had nothing substantial to shake the prosecution testimony. I say so because when the appellant was orally confessing to PW3, he was not at the police station but

at the employer's office within a short period after the money was reported stolen hence the incidences of staying in police cell, bail denial and torture cannot arise.

Again, the issue that there was no eye witness cannot arise here as I said earlier.PW3 testified that the appellant was in environment which he was free since he is the one who asked PW3 as a senior and old man to face his young brother (PW2) so that he can forgive him. In the premise, this court is convinced that the said oral confession was voluntarily made because; PW3 was neither the appellant's boss nor had any authority against him or any undue influence. I subscribe Ms Gloria's line of argument that confession of the accused is the best evidence if given voluntarily as per the case of **Twaha Ally and 5 others versus Republic** (Supra).

Again, Mr. Mswadick urged this court to water down the confession of the co-accused (DW4) who was the security guard on the ground that he was not trustworthy. In **Goodluck Kyando versus Republic** (supra) which was rightly relied upon by respondent's State Attorney, the Court of Appeal had this to say:

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing him. We have subjected the evidence of Pw7 and Pw8 to a very objective test; we have no cause to conclude that the same is improbable".

The appellant's counsel invited me to disbelieve DW4 on the ground that DW4 had the phone of his boss but he never reported the incidence within three days from its commission. Basically; his argument does not convince this court. In order to properly answer the appellant's counsel argument, it is of paramount importance to understand how the trial court or appellate court can assess credibility of the witness. I wish to be guided by the case of **Shaban Daud Versus Republic**, Criminal Appeal No. 28 of 2002 CAT (unreported) where it was stated that:

*"The credibility of a witness can also be determined in two ways: **One** when assessing the coherence of the testimony of the witness. **Two**, when the testimony of that witness is considered in relation with the evidence of other witness including that of the accused person".*

DW4 well testified that on the material date, the appellant came back at work to collect his phone and since he was his boss, he did not doubt him but the appellant ended kidnapping him with two bandits whom he came

with. He was transported in long way and was thrown in bush around Geita where he decided to go to his brother in Mwanza and finally back to Karagwe hence he came to report the matter to his boss.

When he was cross examined, he answered that the kidnappers took his phone hence he couldn't communicate with his boss. If at all he was kidnapped and his phone taken and transported from one Region to the other, there is no way he can be blamed for reporting the matter lately. After all, he was punished by the trial court for neglecting to prevent commission of offence.

Nonetheless, being charged and punished cannot disqualify his competence to testify what he witnessed. In law, his evidence was a confession of the co-accused which if well treated and collaborated may lead to conviction to the appellant. In **Pascal Kitigwa versus Republic** [1994] TLR 65 (CA), it was held *inter alia* that:

"The second accused in the trial court was an accomplice. A participant to the crime charged; Evidence from a co-accused as in this case is accomplice's evidence and a court may convict on accomplice's evidence without corroboration if it is convinced that the evidence is true, and

provided it warns itself of the dangers of convicting on uncorroborated accomplice's evidence."

Furthermore, when the evidence of DW4 is considered with other prosecution's witnesses' evidence to wit; PW1, PW2, PW3 and exhibit P6, (Payment voucher returning the stolen USD 1626 out of USD 3724 entrusted), and exhibit P3 (Payment voucher evidencing that the appellant was entrusted 3724), brings me to the same conclusion suggested by the respondent's counsel that DW4 was coherent and credible witness.

There was another point of grievance advanced by the appellant's counsel that since the appellant returned USD 1626 out of USD 3724 therefore; the evidence tendered in support was at variance with the charge which talks stealing total of USD 3724. I need not be detained in this discourse. I equally agree with Ms. Gloria that returning the less amount out of the stolen sum does not do away the fact that the appellant had initially stolen the total sum of USD 3724. With due respect to the appellant's counsel, the argument that the evidence was at variance with the charge is therefore misplaced.

The other complaint from the appellant's counsel was that, since there were two employees (the manager and the appellant) who had access to the room

and both possessed keys of the room in which the money was stolen, perhaps he was not the one who stole the money. On the same line of thinking, Mr. Mswadick proposed that since there were no travelling tickets for the general manager (PW1) possibly was in office. With due respect to Mr. Mswadick, I think this was not the appellant's defence. At page 37 of the proceedings, it is vivid that the appellant though testified that, he and the general manager (PW1) had access to the room but he said after he had found the money stolen without the office being broken, (in his words), he did not suspect the general manager.

In my view, his testimony did not shake the prosecution evidence which was to the effect that the general manager was in Dar es Salaam on official duty.PW1, (the general manager) himself testified so and he was supported by PW2 and PW3. Moreover, even the appellant testified that he only communicated with PW1 only through phone; he did not say they physically met on the incident day in Bukoba. Answering Mr. Mswadick, in my view; where this court finds oral testimony by PW1, PW2, PW3 proving the fact that PW1 was in Dar es Salaam and hence outside the office, the absence of documentary evidence to wit; travelling tickets cannot make such fact unproven.

The appellant defence that the money was stolen by use of artificial key by bandits was like a kick of the dying horse to exonerate himself so to say since it appears to be total lies. It is unbecoming how the bandits can steal some few USD and TZS only and leave the remaining money in the same cupboard while the whole money was collectively stored, given the fact the appellant testified himself (at page 36-37) that the whole amount of money entrusted to him was collectively kept in the same cupboard. There was no anywhere the appellant testified to have disentangled the same before.

The last argument put forward by Mr. Muswadick was that since the appellant had confessed to pay the money (through exhibits P4, P5) the offence had changed from criminal one to civil one. He was of the view that the complainant was barred to enforce it as criminal. With regard to this argument, the learned counsel did not supply any legal authority to convince this court.

With due respect to the appellant's counsel, and in my considered view, since it is trite law that time never run against the republic in any criminal offences, hence initially attempting to enforce a matter as civil wrong cannot in any way bar a future criminal prosecution.

In the premise, I find no any sentiment of merit in the submitted grounds of appeal. This court therefore is convinced that the case at the trial court was proved beyond reasonable doubt hence the conviction was properly entered.

Now remains the issue of sentence which this court *suo moto* tipped parties to address on it after noting a serious irregularity on the sentence passed by the trial court. I will quote it hereunder:

"..... I hereby sentence the accused persons, as follows:

1st accused, *to pay fine of* ***TZS 300,000/=****together with reinstitute the stolen USD 3724 and* ***TZS 2,365,000/=*** *or to serve five (5) years imprisonment.* ***2nd accused,*** *to pay a fine of* ***TZS 200,000/=,*** *or to serve two (2) years imprisonment."*

Parties were at one that in the case at hand, two issues to wit; a sentence and reinstitution order or compensation can neither be dumped together. Parties are also at one that the court cannot order restitution or compensation in alternative with the sentence. The sentence order as it stands cannot be legally executable simply because it is not known who is to be compensated or reinstituted. Is it the Republic or the victim/complainant; given the fact that the money which was stolen

belonged to the private company and not the government money. Worse still, there was clear evidence that out of USD 3724 which was entrusted to the appellant and later on stole it, he had returned USD 1626, how comes the trial court ordered the total sum without making deductions.

As way forward to rectify such defect, I opted to interfere the trial court sentence by stepping in to the shoes of the trial court to sentence the appellant properly according to law instead of reverting the file to the trial court for sentencing.

This is the revisionary power of the High Court on appeal under section 366 (1) (a) (ii) and (ii) of Criminal Procedure Act, [Cap 20 R.E 2022] where this court has jurisdiction to alter the sentence, reduce or increase the sentence; or with or without such reduction or increase or alter the nature of the sentence.

Section 271 of the Penal Code upon which the appellant was convicted provides:

*"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 above section, I am alive that where the term liable is used in the provision creating the term of imprisonment becomes not mandatory to sentence the mentioned term the court due to the circumstances allowable by law may pass the lower sentence.

Again, according to section 27(2) of the CPA where the offender is liable to imprisonment, the sentencing court has discretion to sentence a fine in additional or in alternative or both under the given circumstances of the case Section 27 (2) reads:

"A person liable to imprisonment may be sentenced to pay a fine in addition to, or instead of, imprisonment, or where the court so determines under the Community Service Act, to community service under a community service order."

Section 29 of the same Act gives the principle that where there is no express provision prescribing a fine, the court is unlimited though the fine should not be excessive.

It reads:

"Where a fine is imposed under any law, in the absence of express provisions relating to the fine in that law the following provisions shall apply-

(a) *where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited but shall not be excessive"*

Being guided by the principles above and taking into consideration that the appellant is in prison for a duration of almost a year serving a five-year sentence, I hereby interfere and alter the sentence of the trial court in lieu that the appellant to pay a fine of **TZS 300,000** or to serve four (4) years imprisonment.

I finally order that the appellant after serving the sentence imposed above should reinstitute unrecovered sum of **TZS 2,2365,500/=**and **USD 2098** to the complainant/victim because it was proved that USD 1626 was recovered and handed over to the complainant. It is so ordered.

Dated at Bukoba this 15th day of March, 2024

E.L. NGIGWANA

JUDGE

15/03/2024

Judgment delivered this 15th day of March, 2024 in the presence of the appellant and his advocate Mr. Ibrahim Mswadick, Ms. Elizabeth Twakazi, learned State Attorney for the respondent, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Queen Koba, B/C.

E.L. NGIGWANA

JUDGE

15/03/2024