

IN THE HIGH COURT OF TANZANIA
AT DODOMA

(PC) CRIMINAL APPEAL NO. 2 OF 2016

(Arising from Criminal Appeal No. 24 of 2015 of the District Court of Singida at Singida; Original Criminal Case No. 210 of 2015 of the Utemini Primary Court)

BETRIDA FRANK.....APPELLANT

VERSUS

HALIMA ISMAIL.....RESPONDENT

JUDGMENT

17/8 & 05/10/2016

KWARIKO, J:

Appellant herein stood before the Primary Court of Utemini in Singida charged with the offence of Stealing contrary to section 265 of the Penal Code [CAP 16 R.E. 2002], she was accused of stealing Tshs. 5,800,000/= between March, 2014 and 05/3/2015 property of the respondent herein. Appellant who denied the charge was prosecuted and at the end of the trial she was found guilty, convicted and sentenced to conditional discharge for a period of six (6) months and an order of compensation to the respondent complainant at a tune of Tshs. 5,591,818 to be paid within twenty four (24) months.

On being aggrieved by that decision the appellant unsuccessfully appealed before the first appellate District Court of Singida. Therefore, this is second appeal.

However, before dealing with merit of the appeal it is prudent and I hereby do recapitulate the evidence on record from both parties.

The respondent herein who testified as PW1 revealed in evidence that in February, 2014 she had mobilised her cash from her saving of Tshs. 2,000,000/= and bank loan of Tshs. 6,000,000/= and started shop and salon business. PW1 employed the appellant as sales girl in the shop. She said she had the salon and Hostel as support business but she could not realise any proceeds from these ventures and appellant said she knew nothing in that regard. That, she found Tshs. 5,800,000/= missing from shop business and there was nothing deposited in the bank account. That, upon inquiry about the loss appellant demanded to do some accounting but that was not possible since appellant had destroyed books of account. Hence reported the matter to police. PW1 tendered some receipts, bank slips and bank statements as exhibits P1, P2, P3 & P4.

PW2, ZAKARIA JUMA evidenced that sometimes PW1 gave him a total of Tshs. 4,455,500/= to deliver to the appellant but did not know the purpose.

In her defence the appellant denied theft allegations and said she worked in the shop diligently and there was no any loss complained of before. That, the complaints by the respondent started when she demanded to be paid her unpaid salary arrears. That, the respondent owed her seven months' salaries totaling Tshs. 327,000/=. And that the respondent refused to do accounts reconciliation before she charged her.

Before this court the appellant filed this appeal through Kidumage & Associates (Advocates) where the following five grounds of appeal have been raised;

- 1. That, the 1st Appellate Court erred in fact and law in omitting to address the grounds of complaints as raised in the Petition of Appeal filed before it thus wrongly gave a generalized decision that occasioned a miscarriage of justice to the Appellant.*
- 2. That, the 1st Appellate court erred in fact and law in upholding the decision of the Primary Court of Utemini which convicted the Appellant of theft and sentenced her accordingly, without reappraising the evidence adduced before the trial court.*
- 3. That, the 1st Appellate court erred in fact and law in holding that per the weak evidence of the prosecution the charge of theft was proved at the required standard per the law against the Appellant thus wrongly convicted her.*
- 4. That, the 1st Appellate court erred in fact and law in making an order for payment of the allegedly stolen money in the sum of Tshs. 5,591,818/= without there being produced concrete evidence to substantiate such claim.*
- 5. That, the 1st Appellate court erred in fact and law in not taking into account the Appellant's defence at trial thus wholly relied upon the evidence of the Respondent herein thus occasioned a Miscarriage of justice.*

During hearing of this appeal Mr. Kidumage learned advocate appeared to argue the same on behalf of the appellant. It was thus submitted in relation to the first and second grounds of appeal that the first appellate court erred to decide the appeal without considering appellant's seven grounds of appeal which questioned trial court's decision that had convicted the appellant without proof that she committed the alleged offence. That, the first appellate court should have considered the complaints in the grounds of appeal which showed that the auditor of accounts ought to testify on his finding and that the audit exercise should have been done in the presence of the appellant to ensure that the alleged stolen money of Tshs. 5,591,818/= was really responsibility of the appellant. That, the first appellate court erred to generalize its decision.

As regards the third ground of appeal Mr. Kidumage submitted that the evidence on record did not prove the allegations since there was no evidence of the property sold and stolen proceeds. That, there was no inventory of the unsold stock, save for the brought in items and the value of the items in the entire shop ought to have been shown.

Moreover, it was Mr. Kidumage's submission that the auditor ought to testify and since he did not the reasons for such failure should have been given. That, even if the auditor was on safari he could still come in the later date to testify.

Mr. Kidumage learned advocate went further to expound that the trial court was not sure about the charge to be preferred against the appellant. That it decided to heap blame to the appellant simply because she was

sales girl and there was no direct evidence to prove her guilt as there was enough doubt to benefit her. That, there was either no circumstantial evidence to prove the case.

In relation to the fourth ground of appeal it was argued for the appellant that an order of compensation was misconceived since there was no proof of theft. That, to that end respondent ought to have filed civil suit.

Lastly, Mr. Kidumage contended that the first appellate court erred to uphold trial court's decision which did not consider appellant's defence evidence which showed that there were no any complaints against the appellant before. Also, the appellant was charged simply because she demanded her salaries which fact was not controverted by the respondent.

In reply to the foregoing Mr. Kalonga learned counsel for the respondent submitted in relation to the first and second grounds of appeal that the first appellate court considered the evidence on record and found that appellant's grounds of appeal had no merit. That, appellant said during hearing of the appeal had no any further explanation to make that is why her grounds of appeal were considered and decided and found that trial court's decision was justified.

It was Mr. Kalonga's further submission that the auditor's evidence was not necessary since documentary evidence was enough to prove the case. Whereas, it was shown that Tshs. 13,153,200/= was sale proceeds and purchase was valued at a tune of Tshs. 7,561,382 making loss of Tshs.

5,591,818/= which the appellant did not explain hence making her the thief.

Coming to the third ground of appeal Mr. Kalonga contended that the offence of theft was proved and the court did not use circumstantial evidence to convict the appellant. Thus, it is not true that the trial Magistrate was uncertain with the charge to be preferred and there was proof that loss occurred in the shop business and not in any business ventures like hostel.

Arguing the fourth ground of appeal Mr. Kalonga learned counsel submitted that there was enough evidence to justify order of compensation by the trial court as the appellant did not account for the loss. Hence, there was no need for respondent to file civil suit to realise her lost money.

Lastly, Mr. Kalonga argued that appellant's defence evidence was considered by the trial court. That, the claim of salary arrears was baseless since there was no evidence to prove that the respondent never paid the same.

In his rejoinder submission Mr. Kidumage learned advocate essentially maintained his earlier submission.

Following parties' submissions for and against the appeal the germane issue to decide is whether the appeal has merit. I will decide the grounds of appeal in their chronological order as follows;

In the first ground of appeal this court is in agreement with the appellant that the first appellate court erred when it did not consider the grounds of appeal as they were raised. This is so because the appellant raised among other complaints, failure of the auditor to testify to explain his audit report and whether documentary evidence was sufficient to prove the charge. It was important for the first appellate court to consider grounds of appeal after it had considered the evidence on record. The law obliges the first appellate court to revisit the evidence on record and make its own appreciation of facts and law applicable. It was thus not correct for the first appellate Magistrate to just hold that it had gone through the original record and hold that the case against the appellant was proved beyond reasonable doubt (*see also DPP V. ACP ABDALLAH ZOMBE & OTHERS Criminal Appeal No. 358 of 2013, Court of Appeal of Tanzania at Dar es Salaam, (unreported)*). This ground of appeal has merit.

The second ground of appeal is closely similar to the first ground of appeal and this court is of the firm view that the first appellate court ought to have freshly analysed the evidence on record to decide the appeal and find out whether the trial court's decision was justified. This ground of appeal succeeds.

In the third ground of appeal this court is in further agreement with the appellant that the charge of theft was not proved against her. The reason for this holding is that; **first**, it was not proved that the appellant received and acknowledged alleged goods that were stored for sale in the shop which could have shown the amount and value. The alleged

documentary evidence is one sided showing respondent's side of story without appellant's acknowledgment.

Secondly, no evidence was presented to show what was sold by appellant and what remained in the shop and the value thereto so that the difference could be seen and thus make out whether there was loss and hence whether the appellant was responsible for the same. The respondent said in evidence that accounts reconciliation could not be done as appellant had destroyed the books of accounts. How then audit was possible in that situation is a germane question that not has been answered by the respondent.

Thirdly, this court is of the view that if the bank statement shows that some entries were made by the appellant the respondent ought to prove that the appellant did not bank same cash and for which days or on which directives she did not do that.

Fourthly, the alleged auditing ought to have been done in the presence of the appellant as she was the sales girl. Hence, the audit exercise done in the appellant's absence was fruitless exercise as it did not give appellant opportunity of being heard before the report was prepared. And the auditor ought to give evidence so that he could be cross-examined by the appellant. His absence thus adversely impacted on the prosecution case since no sound reason was given as to why he could not testify (see also *AZIZ ABDALLAH V. R [1991] T.L.R 71*). The third ground of appeal succeeds.

As for the fourth ground of appeal this court finds that the amount of Tshs. 5,591,818/= allegedly stolen by the appellant lacks legal base. **First;** this amount was obtained through audit which was done in the absence of the appellant and without any inputs. There was no any prior documentary evidence to show how much monthly income was to justify the loss. This could have been obtained through knowledge of books of accounts prepared in collaboration between the appellant and respondent. The books of accounts thus could have helped the auditor to prepare his report. That is when the culprit in relation to loss, if any, would have been known.

Secondly, the amount of Tshs. 5,591,818/= differs from the amount alleged by the respondent that the appellant stole of Tshs. 5,800,000/=. That means the evidence on record differs from the charge laid down at the appellant's door. This ground of appeal thus succeeds.

Lastly, this court is of the view that the fifth ground of appeal lacks base since the trial court considered appellant's defence evidence in relation to salary arrears and clean record of the appellant and found that it was no-meritorious. Therefore, it is not true that the defence evidence was not considered. This ground of appeal fails.

Be as it may, the prosecution case at the trial was not proved as required in law and hence the first appellate court erred to uphold the trial court's decision. Therefore, this appeal has merit and is hereby allowed, conviction quashed and sentence and order of compensation set aside.

It is ordered accordingly.

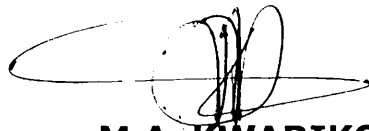


M.A. KWARIKO

JUDGE

05/10/2016

Judgment delivered in court today in the presence of Mr. Kidumage learned Advocate for the Appellant also holding brief for Mr. Kalonga learned Advocate for the Respondent and Mr. Nyembe Court Clerk.

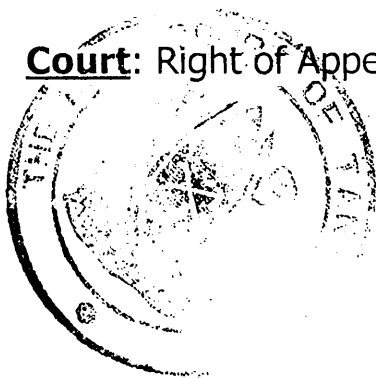


M.A. KWARIKO

JUDGE

05/10/2016

Court: Right of Appeal Fully Explained.



M.A. KWARIKO

JUDGE

05/10/2016