

TANZANIA / JUDGMENT

Ashraph Hamza v

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9 April 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB-REGISTRY AT BUKOBA PC. CRIMINAL APPEAL NO. 5193 OF 2024 (Arising from Criminal Appeal No. 45 of 2022 at Bukoba District Court Originating from Bukoba Urban Primary Court in Criminal Case No. 425 of 2022) ASHRAPH HAMZA..... APPELLANT VERSUS SAMORA MAXIMILIAN..... RESPONDENT

JUDGMENT

5th and 9th April, 2024 BANZI, X: On 10th October, 2022, the appellant was arraigned before Bukoba Urban Primary Court (the trial court) charged with the offence of theft contrary to sections 258 (1) and 265 of the Penal Code [Cap. 16 R.E. 2019] ("the Penal Code"). It was alleged in the particulars of offence that, on 16th July, 2022 at Maji ya Kishaka area, within Lake Victoria, Bukoba District in Kagera Region, the appellant fraudulently and without claim of right, stole 37 gillnets valued at Tshs.2,800,000/= the property of Samora Maximilian (the respondent). The appellant denied the charge and, in a bid, to prove charge against him, the respondent called six witnesses. In the main, the evidence leading Page 1 of 12 to the conviction of the appellant reveals that, on 15th July, 2022, around evening hours, the respondent with his two colleagues went to the lake to set the gillnets and returned to the shore. On the fateful day, they went back to the lake and after fishing, they saw a speed boat coming towards them. After getting closer and upon being asked, the respondent informed him that his gillnets are within the standard. After that, the two argued for a while and at the end, the respondent handed him over the nets for purpose of inspecting them. However, after taking the gillnets, the appellant left heading to Muleba. The respondent made follow up and he was informed that, his nets were within the standard but they were in the hands of fisheries' officers. He informed Robert John Bambala (SM2) about his nets to be seized by the appellant. He tried to get his nets back but his efforts proved futile. When the Regional Commissioner visited their area, the respondent raised complaint and he was directed to the Officer Commanding Station and eventually, they filed this case before the trial court. His testimony is supported by Buberwa Yohana (SM3), Abdulaziz Rajabu (SM4) and Mgisha Remigius (SM5) who claimed to witness the appellant seizing the respondent's nets. In his defence, the appellant denied to steal the respondent's nets. He told the trial court that, he is the informant of Ministry of Livestock and Page 2 of 12 Fisheries within Kagera Region. On the fateful day, he went to Kemondo port, where he saw some boats with substandard nets. He informed the top officials of the Ministry and sometimes later, he was

joined with fisheries officers including Stanslaus Rwezaula (SU2), Gabriel Raphael Chambayi (SU3) Edistedius Josephat (SU4) and Wambura Kitati Wambura (SU5) and they began to follow them. In the due course, they managed to seize substandard nets commonly known as "makokoro" and around the shore, they seized 25 kilograms of illegally caught fishes from a certain lady. Thereafter, the said lady paid fine and the appellant returned to his respective home. Two months later, he was arrested following the complaints raised by the respondent during RC's visit at Kemondo on allegation of theft. After receiving the evidence of both sides, the trial magistrate was satisfied that, the offence of theft was proved on the required standard against the appellant, and thus, he convicted and sentenced him to serve twelve months imprisonment. In addition, the appellant was ordered to pay Tshs.2,800,000/= as compensation to the respondent for the stolen gillnets. Aggrieved with his conviction and sentence, the appellant appealed to the District Court of Bukoba (the first appellate court) where it upheld his Page 3 of 12 conviction enhanced sentence to 37 years imprisonment. Still aggrieved, he lodged this appeal containing the following grounds:

1. THA Tf the First Appellate Court grossly erred in law and facts to upheld (sic) conviction and sentence against the appellant while the case was not proved beyond reasonable doubts.
2. THAT, the First Appellate Court grossly erred in law and facts to upheld (sic) conviction and sentence without evaluate properly the defence evidence.
3. THA T, the First Appellate Court grossly erred in law and fact when it invoked its revisionary powers basing on extraneous matters which were not reflected in the court records, while there are no circumstances warranting invocation of the said powers. At the hearing of this appeal, the appellant was represented by Mr. Erick Mabagala, the learned State Attorney but the respondent defaulted the appearance despite being duly served by publication through Mwananchi newspaper dated 29th March, 2024. As a result, the hearing proceeded in his absence pursuant to rule 17 (3) of the Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) Rules, 2021. Page 4 of 12 Mr. Mabagala began his submission by citing the case of The Director of Public Prosecutions vs Shishir Shyamsingh [2022] TZCA 357 TanzLII which laid down six elements to be proved on a charge of theft. According to him, the complainant/respondent has failed to prove that he is the owner of the gillnets in question. Likewise, he did not produce anything to prove that, the gillnets in question valued at Tshs.2,800,000/=. Apart from that, it is on record that, when the appellant with three young men seized the gillnets, the respondent was informed that, the same were seized because they were below the standard. This evidence proved that, the appellant had no intention of stealing butz they were there for special official mission. He further submitted that, the fact that SM2 was informed about the gillnets to be seized does not prove the offence of theft. Mr. Mabagala added that, the appellant with his witnesses (SU2, SU3, SU4 and SU5) introduced themselves as employers of Fisheries and they seized the gillnets by lawful order, the fact which was not cross-examined by the respondent which connotes that, he accepted their evidence on that aspect. He cited the case of Nyerere Nyague vs Republic [2012] TZCA 103 TanzLII to support his submission. According to him,

the defence raised by witnesses for the defence does not support the ingredient of theft. Page 5 of 12 Furthermore/ it was the submission of Mr. Ma bagala that, had the appellant really stole the nets in question/ the respondent would have reported to the police immediately thereafter instead of waiting for two months and raised the said issue on the official visit of the RC considering that, there is no evidence to establish that, the appellant had escaped. Thus, failure to report the matter to the police immediately casts doubt on the alleged theft which ought to be resolved in favour of the appellant. Returning to the second ground/ it is his submission that/ the trial court and the first appellate court failed to consider the defence of the appellant. In their testimony, SU2 and SU5 who introduced themselves as fisheries officers, told the court that, they seized the gillnets after being informed by the appellant who was their informant that, there was illegal fishing conducted at Kemondo, Rushale area. Hence, had both courts evaluated their evidence, they would have concluded that, the offence of theft was not proved and it was not the appellant who seized the nets in question. In addition, the first appellate court misdirected itself by finding that, the appellant was an entrepreneur while the record shows that, he was the informant. He referred the case Of Leonard Mwanashoka vs Republic

[2015] TZCA 294 TanzLII and concluded that failure to consider the defence is a fatal irregularity which usually vitiates conviction. Page 6 of 12 Concerning the third ground, Mr. Mabagala argued that, the first appellate court erred to invoke the revisionary powers basing on extraneous matters and without any authority. Revisionary powers are invoked where there is illegality, incorrectness and impropriety on the impugned judgment. In our case, the first appellate court invoked the revisional powers and enhanced the sentence on the ground of gravity of the alleged offence. However, there is nowhere showing that, the judgment of the trial court is tainted with illegality to the extent of invoking revisional powers. Besides, the magistrate claimed that, the complainant has lost gain which is also extraneous matter not reflected in the proceedings. In addition, the first appellate court was supposed to invoke revisional power in favour of the appellant against the compensation order which was illegal as the trial court exceeded its powers of ordering compensation. In that regard, he prayed for this appeal to be allowed by quashing the judgments and setting aside the sentences and orders issued by both courts below. Having carefully considered the evidence on record together with the submissions of the learned State Attorney, the issue for determination is whether the appeal has merit. This being the second appeal, this court can interfere with the concurrent findings of two courts below where there are Page 7 of 12 mis-directions or non-directions on the evidence. See the case of The DPP

- v. Jafari Mfaume [1981] TLR 149. In the matter at hand, the trial court and the first appellate court arrived into the same finding that the offence of theft was proved on the required standard. However, as submitted by Mr. Mabagala, for the offence of theft to be proved, there are six ingredients to be established. These elements were set in the case of The Director of Public Prosecutions vs Shishir Shyamsingh (supra) where It was stated that: is settled law that for the offence of stealing to be established, the prosecution should prove

that; one, there was movable property; two, the movable property under discussion is in possession of a person other than the accused; three, there was an intention to move and take that movable property; four, the accused moved and took out the possession of the possessor; five, the accused did it dishonestly to himself or wrongful gain to himself or wrongful loss to another; and six, the property was moved and took out without the consent from the possessor. " According to the position of the law stated above, all elements/ ingredients of the offence must be established in order to prove the offence of theft. The respondent in his testimony stated that, on the fateful day, when he finished fishing, he saw the speed boat coming towards Page 8 of 12 them. He managed to recognise the appellant as among the persons who were in the said boat. At page 4 of the proceedings of the trial court, the respondent stated as follows and I quote: "...aiipoflka akaniuliza 'hiinimitegoyako unayotega inafika viwango'rii'kasema, 'inafika viwango, niinchisita double 3, akakataa akasema 'nina wasiwasi na nyavu hizi, baada ya kubishana sana akasema 'tukapime inchi kama tukikuta zinafika viwango unarudishiwa nyavu zako. Baada ya kubishana sana nikaona tutazama, nikaona nishaiimishe nyavu twende nchi kavu, tukapime kituo cha polisi. Baada ya kumpa nyavu aiiwasha mashine na kuelekea mazingira ya Muieba..." It is apparent from the extract above that, among the six ingredients set in the case of *The Director of Public Prosecutions vs Shishir Shyamsingh*, the last four elements were not established in the matter under discussion. First and foremost, there was argument between the appellant and the respondent on whether the nets in question have met the standard which falls short of the third element of intention to move and take that movable property. Secondly, it was the respondent who handed over his nets to the appellant and his colleagues which also falls short of the fourth and sixth element. Lastly, the same were handed over for purpose of ascertaining its standard which defeats the fifth element showing that, he Page 9 of 12 did it dishonestly to himself or wrongful gain to himself or wrongful loss to another. Had the trial magistrate properly evaluated the evidence of the respondent and his witnesses in the light of the six ingredients of the offence of theft, he would not have reached into conclusion that, the appellant stole the nets in question. The fact that, the appellant was seen taking out the nets, it does not prove that, he stole the same in the meaning of section 258

- (1) of the Penal Code. For the appellant to be convicted with the offence of theft, all six ingredients ought to be proved. Moreover, the first appellate court when upholding the conviction of the appellant had this to say and I quote: "Again/ no doubt that evidence in the trial court proved that the appellant was properly identified by complainant witnesses at the scene of the crime on the alleged material date/ in addition/ that the appellant did confess to committing that offence under the umbrella of what he called an operation against unlawfully fishing/ now the appellant is or was an authorized officer to conduct that operation? The answer is a big NO because the appellant did not explain who authorized him to do so." It is apparent from the extract above that, the first appellate court upheld the conviction because the appellant was identified at the crime scene and that, he confessed because he did not explain who authorised him to Page 10 of 12 conduct the operation. All these did not fit squarely on the six ingredients of the offence of theft alluded above.

Besides, the fact that, he did not explain who authorised him to conduct such operation, it does not mean that, the appellant confessed to steal the nets in question. Whether or not the appellant was authorised to conduct such operation, it does not prove the offence of theft. In that regard, the first appellate court also erred to uphold the conviction of the appellant without proof of the offence of stealing beyond reasonable doubt. Apart from that, had the two courts below considered the defence evidence, they wouldn't have reached into conclusion that, the appellant stole the nets in question. If the nets in question were illegally seized as suggested by the first appellate court, that in itself does not prove the offence of stealing. In that regard, it is the finding of this court that, the respondent failed to prove the charge of theft against the appellant. Thus, the trial court was wrong in convicting the appellant with the alleged offence and the first appellate court committed the same error in upholding the conviction. In addition, there was no justification by the first appellate court to invoke its revisionary powers and enhance the sentence against the appellant. According to section 22 (1) of the Magistrates' Courts Act [Cap. 11 R.E. 2019], the revisional jurisdiction of the District Court is invoked for the purposes of Page 11 of 12 satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court. In our case, there was no illegality, incorrectness and impropriety of the sentence meted against the appellant to justify revision. That being said, I find the appeal with merit and I hereby allow it by quashing the conviction and setting aside the sentence and compensation order against the appellant. I order his immediate release from prison unless otherwise lawfully held. It is accordingly ordered. I. K. BANZI JUDGE 9/04/2024 Delivered this 9th day of April, 2024 in the presence of Mr. Erick Mabagala, learned State Attorney for the appellant who is also present, Mr. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala RMA and in the absence of the respondent. Right of appeal duly explained.

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Prepared on 14 October 2026 · Esheria