

TANZANIA / JUDGMENT

BARAKA HUKUMU

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB REGISTRY AT SHINYANGA CRIMINAL APPEAL NO. 8967 OF 2024 (Arising from Criminal Case No. 97 of 2023, before Kahama District Court)

1. BARAKA SIMON JOHN
2. ESTHER ONESMO NKANDA
3. YOHANA JUMA NTAMBI
4. SHABANI RASHID SEIFAPPELLANTS
5. SYLIVESTER JOSEPH OPATA
6. CHANDE RAMADHANI ABDALLAH VERSUS THE
REPUBLICRESPONDENT

JUDGMENT

03rd & 31st July 2024 F.H. MAHIMBALI, J The appellants herein were arraigned before the trial Court for the offence of stealing contrary to sections 258 (1) and 265 of the Penal Code, Cap 16 RE 2022. It was alleged that on diverse dates between 1st January 2022 to 2nd December 2022 at Kahama Municipality, the 1 appellants stole Tshs 19,782,800 being the property of Umoja wa Mawakala wa Mabasi Kahama. It has also been alleged that the appellants being members were also made leaders of the said association, which consisted a total of 300 members. The collected funds of the association are kept in bank account No. 30610042109 NMB. Notably, on the material dates aforementioned the appellants fraudulently and with ill intent did withdraw the money of the association contrary to the consent of the association as per rules set and thus led for the occurrence of loss of the tune Tshs 19,782,800/=. Upon that finding, the matter was referred to VEO office and the appellants admitted to the loss and promised to pay back. Later on, the appellants changed their mind and denied to have stolen the alleged amount instead pleaded to have taken money in accordance with the rules governing their association. They were thus charged. The trial court after a thorough consideration of the evidence adduced, accordingly convicted them and sentenced to serve one-year conditional discharge. Aggrieved by the decision, the appellants knocked the doors of this Honourable Court with an armory of seven grounds of appeal namely; 2

1. That the learned trial magistrate erred in law in entertain the case No.97 of 2023 which was pre mature, that it was instituted without exhausting available remedies as per exhibit P2. (Constitution of the complainant)
2. That in the circumstances of the case, the learned trial magistrate erred in law in proceedings with the matter of defence without the appellants' defence counsel and so the appellants were denied a fair trial.
3. That the learned trial magistrate erred in law in admitting exhibit P2 especially bank statement, the so-called cooperative rules, having found the same to have been improperly tendered.
4. That the learned trial erred in law and in facts in holding that the prosecution proved a charge of stealing against the appellants beyond reasonable doubts.
5. That the learned trial magistrate erred in law and in fact in convicting the appellants by shifting burden of proof of their innocence upon them.
6. That the learned trial Magistrate erred in law and in facts in drawing adverse inference to the appellants by failure to call a secretary of the complainant (umoja wa mawakala wa Mabasi Kahama) as witness in court while the said secretary was among 3 the complainants (and of course a complaint) and the same is/was still on chair.
7. That the learned trial Magistrate erred in law and in facts in convicting the appellant on a charge of stealing Tshs 19,782,800, a charge based on evidence of PW4 who is unqualified, both personal and auditor. The matter was argued by way of written submission and both parties complied with the court schedule. The appellants had legal services of Mr. Bakari Chubwa Mheza learned advocate while the respondent had legal representation of Mr. Katandukila Kadata learned State Attorney. Amplifying for the appeal Mr. Chubwa abandoned ground No.2, he then replaced it with new ground that; the learned trial Magistrate erred in law in not appending signatures after recording evidence of the witnesses. Mr. Chubwa proceeded arguing that, they challenge the impugned decision for the matter being pre mature as per their constitution. The complainants/ victim who accuse the appellants were amongst the members of the association dully registered. The association was being governed by its constitution called Katiba ya Kikundi cha Umoja wa Mawakala wa Mabasi – Kahama, to wit is exhibit P2. Article 9 of the said 4 constitution provides for the stages of dispute resolution before the matter being taken to the court of law, especially disputes which involves Properties of the association. But the same was not heeded instead the complaint was referred to the court of law directly and do away with their constitution. Mr. Chubwa pointed out that the complaint ought to have first been referred to the ethics committee and later to the general meeting. If not yet settled, would have been referred to the VEO (local leader) before it was finally forwarded to the Registrar (DED Kahama). All these were not complied with. He banked his argument by reference to the case of J.E Construction Co. Ltd vs. Permanent Secretary Ministry of Agriculture and Another, Civil Case No.7 of 2023 HC. DSM. In his view Mr. Chubwa argued this Court to find

out the trial court had no jurisdiction to try the matter. Mr. Chubwa also submitted that they question validity of admission and reliance of collective exhibit P2. He submitted that, despite the fact that during the trial of the case the appellants had objected the admissibility of the exhibit on the grounds that the said exhibit was given to the witness by state attorney during the hearing before being described by the witness. But the trial magistrate did not pay attention and proceeded to admit it. Mr. Chubwa was of the view that the act by the trial Magistrate was contrary to the law, thus exhibits tendered contrary to the law ought to be expunged from court records. He 5 boosted his argument by making reference to the case of Balole Simba vs The Republic, Criminal Appeal No 525 of 2017 CAT Shinyanga. Whereas, Mr. Chubwa submitted that the trial court erred in its findings, when held that a charge of stealing was not proved beyond reasonable doubts. He alluded that according to the charge the appellants were arraigned for stealing Tshs 19,782,800/= but the trial magistrate in his finding ruled that there was breach of rules in withdrawing money from bank account of the association by the appellants, as per evidence of PW1, PW2, PW3 and exhibit P2. Similarly, the appellants did not cross examine the complainant on non- authorization of withdrawing of the alleged money in 2022. Failure of the appellants to tender general report of expenditure of money of the year 2022, failure of the appellants to show how Tshs 19,782,800/= was broken down in expenditure as for serving the football team, funeral allowance and loan to the members and lastly failure of the appellants to call secretary to tender necessary documents. Mr. Chubwa fortified that the holding by the trial Magistrate was misconceived due to the fact that the burden of proof is on the prosecution to prove the charge against the appellants and not otherwise. Therefore, conviction cannot be based on the weakness of 6 the defence and that the burden cannot be shifted to the appellants. He acceded his argument by referring to the case of William Ntumbi vs. The Director of Public Prosecution, Criminal Appeal No.320 of 2019. Further, Mr. Chubwa argued that since Tshs 19,782,800/= in the charge was extracted from exhibit P1 which is audit report tendered by PW4; in his testimony, PW4 and his Exhibit said the amount in the charge was identified as loss. Evidence of Pw1 who introduced himself as interim chairman, testified that the bank statement shows that the deposited and withdrawn money of the association was total of Tshs 17,000,000/=. To him Tshs 17,000,000/= was amount fraudulently withdrawn by the appellants but Tshs 19,772,800 was a loss verified by the auditor. PW2 named the loss to be 19,792,000/= . Mr. Chubwa's blame is that, the trial court erred to hold that the fifth appellant said Tshs19,000,000/= used in financing the football team and that other appellants admitted the costs to have taken. The correctness is that; one, the observation by the trial court was not backed up with trial court's records, thus the trial magistrate created his own piece of evidence, two, there, is nowhere the 5th appellant recorded testifying before the court that all Tshs 19,000,000/= was used to finance the team, loan to members and funeral activities, the trial court 7 then erred to hold such as there was variation of amount in the charge and evidence. Whereas, Mr. Chubwa blamed for the trial court to draw adverse inference on the side of the appellants only for failure to call secretary of the association as he could not offer anything as he was still in power like the appellants. The reasoned findings by the trial Court were misconceived when founded that the appellants erred to withdraw money without

adhering to the rules for withdrawing money of the association while there was no such requirement to be complied in exhibit P2. Since the charge was the result of audit report which discovered the loss of Tshs 19,782,800/= as tendered by PW4, it is therefore Mr. Chubwa opinion's that the charge was not proved due to contradiction of amount. By the way, PW4 was not an auditor, PW4 admitted to have not conducted the auditing, rather an inspection and that he was not assigned to prepare an audit report. Leave apart the evidence by PW4, but the rest is poor as there is no any other evidence incriminating the appellants with the offence charged. Moreover, Mr. Chubwa had complained that the trial magistrate when recording testimonies of witnesses, did not append his signature. Thus vitiated the whole proceedings as per Order XVIII Rule 5 and order XVIII Rule 10 of Civil Procedure Code. He watered his argument with 8 reference to the case of Mhajiri Uladi and Another vs. Republic, Criminal Appeal No.234 of 2020, Chacha Ghati @ Magige vs Republic, Criminal Appeal No. 406 of 2017 and Sijaona Mkwenji Frank vs. Republic, Criminal Appeal no.692 of 2020. Finally, Mr. Chubwa prayed for the proceedings not signed be expunged from court records and this court be pleased to order trial *denovo* as it was held in the case of Fatehali Manji vs republic, (1966) 1 EA 343 and Onesmo Yohana Taile vs Republic, Criminal Appeal No.196 of

2019. Thus, pledged for the appeal be allowed. On the side of the respondent, Mr Kadata strongly resisted the appeal. He argued on the first ground of appeal on jurisdiction issue, that such ground is devoid of any merit as the trial court has jurisdiction to try the matter and that it was not brought pre mature as alleged. Mr. Kadata stated that the appellants' counsel is misleading this Court to treat the matter as civil one while in fact it is purely criminal. The charge against the appellant was all about stealing contrary to section 258 (1) and Section 265 of the Penal Code whereby the prosecution managed to prove all the necessary ingredients of the charged offence. He refuted the case of J.E Construction Co. Ltd vs. Permanent Secretary of Agriculture and Another, (*supra*) cited by appellants' counsel on the allegation that in the instant case there is no any form of bargaining in choice of forum when comes to criminal matters. Therefore, the matter 9 before the trial Court was all about criminality and not contractual obligations. With the second ground, Mr. Kadata stated that the same is misplaced. He detailed that the documents complained to been received without adhering to the procedures is an afterthought as the same were received without any objection. He therefore argued that the argument by the appellants' counsel is an afterthought which need not to be accorded any weight. He boosted his argument by making reference to the case of Tumain Yared Mtoro vs. The Republic, Criminal Appeal No. 218 of 2022. With the third ground of appeal, Mr. Kadata contended that the prosecution case was proved beyond reasonable doubts. Further Mr. Kadata argued that the prosecution was supposed to prove that the appellants had fraudulently and without claim of right took anything capable of being stolen or converted to the use other than a desired one, the ingredients which prosecution did via their four witnesses and two exhibits. It was also proved that the appellants were members of the association and also leaders, thus custodian of funds of the association led by the 5th appellant. The prosecution proved that

fund was withdrawn contrary to the wishes of members of the association and was in contravention of its objectives. It has however never been 10 the association's objective to establish a football team. Therefore, the argument that some funds paid players of the association is unfounded as their constitution or its by-laws do not provide so. Therefore, the trial Court was right to convict the appellants with the offence charged with. Mr. Kadata further alluded that the prosecution's case was sufficiently proved as per evidence of PW1 and PW4. Anything short of that, is just a minor slip of the pen on the part of the trial Magistrate as he correctly recorded the actual amount to be 19,782,800 and the whole prosecution evidence supported the charge. The reliance of PW4 by the trial court is founded on the stance that the trial court enjoyed discretionary powers in assessing credibility of witness and not choice of parties. PW4 tendered his testimony in his capacity as supervisor of the Cooperative Society in Kahama who is mandated to oversee the compliance of the law. He also testified that in January 2023, he conducted the auditing of the appellants' union in collaboration with the internal auditor. Therefore, there is no good basis for expunging it from court records. Mr. Kadata propounded that every witness is entitled for credence and must be believed his testimony unless there cogent reasons for not believing the witness. He referred the court to the case of Goodluck Kyando vs. Republic, (2006) TLR 363 to the effect. 11 With the fourth ground of non-appending signature of the trial magistrate, Mr. Kadata countered that the same is misplaced. He argued that the trial Magistrate appended his signature after the words " section 210(3) of Criminal Procedure Act complied with" . That was sufficient certification as per the Act. The order of Civil Procedure Code cited by the appellants' counsel serves nothing with criminal matters. In the instant matter, the trial Magistrate complied with the law as he appended his signature after recording witness' testimony. Even if the same would have not been complied with, is curable under section 388 of the Criminal Procedure Act. By the way the appellants are not prejudiced anyhow. Mr. Kadata finally prayed for the appeal to be dismissed for lack of merit. Conviction and sentenced meted by the trial Court be upheld, prayed Mr. Kadata as he was winding his submission on this ground. By way of rejoinder Mr. Chubwa reiterated his submission in chief. In the first ground on the prematurity of the matter and lack of jurisdiction of the trial Court, Mr. Chubwa stated that the argument by Mr. Kadata is misconceived. Mr. Chubwa submitted that what should be looked upon is the mode of settlement of dispute governing the members of the association as per their constitution. Exhibit P2 did not 12 categorize kinds of disputes to be dealt and that the principle cannot be applied in isolation to some of cases against the other, to him all cases may be dealt in accordance with the rules of the association. With the second ground, Mr. Chubwa submitted that exhibit P2 was erroneously admitted. The trial magistrate did not say anything on the reasons for the reliability of such exhibit. On the third ground, Mr. Chubwa contended that the prosecution's case was not proved beyond reasonable doubt as there is no tangible evidence incriminating the appellants with the offense charged. With the fourth ground, Mr. Chubwa strongly submitted that the trial Magistrate did not append his signature when recording witness testimonies. Having heard the rival submission of the parties, I have now to determine this appeal as to whether it has been brought

with sufficient cause. In the foregoing, I must put clear that the offence against the appellants was stealing contrary to sections 258 and 265 of the Penal Code. Now, It 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 13 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 but without the consent from the possessor. See Director of Public Prosecution vs. Shishir Shymsingh, Criminal Appeal No.141 of 2021 (CAT Kigoma) at page 11. Therefore, to prove the offence of stealing the prosecution is required to show that all the elements/ ingredients of the offence are established. For clarity, section 258(1) of the Penal Code provides: "A person who fraudulently and without claim of right takes anything capable of being stolen; fraudulently converts to use of any person other than the general or specific owner thereof anything, capable of being stolen is said to steal that thing." It is in this regard that under section 258(2) of the Penal Code it is explicitly provided that the taking or conversion of something capable of being stolen must be done, fraudulently, (dishonestly), in this end, in order to convict an accused of the offence of stealing, it must be proved that the act was done fraudulently and without claim of right. In the case at hand the appellants alleged to have stolen Tshs 19,973,800/=. Dealing with first ground, Mr. Chubwa blamed that the 14 matter was pre maturely determined by the trial Court and thus it has no jurisdiction over the matter. To him the matter ought to be dealt in accordance with the constitution of association to which the appellants belong. The matter would have started at ethics committee, VEO and to the DED being a registrar of the association, but the set down procedures were not adhered. He however averred that regardless of the type of the dispute being criminal or civil yet was supposed to be dealt in accordance with the rules. The preposition was resisted by Mr.Kadata on the reasoned ground that being criminal matter it cannot wait for the exhaustive remedy as provided by laws of the association. I have gone through the said Constitution of the association specifically Article 9 (a- e) surely provides for mechanism of dealing with disputes in the association among its members or in relation to property. However, I am declined to agree with the argument by Mr. Chubwa. I sincerely, agree with Mr. Kadata that when comes to the criminal matters, the Court is not barred by any written laws or association's constitution. An association's member who commits any criminal offence is not immunized with the shadow of the members' constitution from not being charged with any criminal matter. For instance, in a common sense taking an example whereby one member kills the other member belonging to the same association, will 15 the killer not be charged for murder only because there has not been exhausted the remedies provided by the parties' constitution? The case of Tanzania Investment Bank vs Meis Industries Company Ltd and Another(supra), and Mosses Msaki vs Yesaya Ngeteu Matee are misplaced on the sense that they provide for the choice of forum in civil matters. However, the case of J.E Construction (supra) is also misplaced as it provides sanctity to the contract a matter which is not case at hand. I must therefore

conclude that the first ground is devoid of any merit. With the second ground of appeal on erroneous admissibility of exhibit P2, Mr. Chubwa has not been amused with the trial Court's admitting the said exhibit. He amplified that the document was given to a witness by state attorney without being described by the witness. Thus, ought to be expunged from court records. A grasp to the trial court's records, it is true that the purported exhibit was objected its admissibility and the court took cognisance on that but the same would have been featured in its judgment. But in the impugned decision, the trial court held that the exhibit was tendered in compliance with the law. The trial Magistrate also ruled out that exhibit P1 was on dependence of Exhibit P2, therefore there is no way you can do in proper administration of justice by admitting the one and reject the other. It is a well-established practice in cases where witnesses are required to testify on a document or object which would subsequently be tendered as Exhibit that the procedure is not simply to refer to it theoretically, but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as an exhibit. See Emmanuel Saguda @ Salukuka and Another vs. Republic, Criminal Appeal No. 422 "B" of 2013 at page 9. But in Robinson Mwanjisi and Three Others v. R, [2003] TLR 218, Mwinji Jamal Kitalamba @ Igonzi and Four Others v. R,

[2020] T.L.R. 508 and Huang Qin and Xu Fujie v. R, Criminal Appeal No. 173 of 2018 (unreported). It was much insisted that failure to read exhibit is fatal. Therefore, the insistence is on reading exhibit to make certainty and aware to the either party, but non description of exhibit is curable as the either party is given opportunity to pursue to the alleged document as the same is read. For instance, in Mwinji Jamal Kitalamba (supra) at page 509, this Court observed that: "(i) Failure to read the exhibit after being admitted the omission is fatal as it contravenes the fair right of an accused person to know the content of the evidence tendered and admitted against him. It was wrong and prejudicial" Therefore, I am in agreement with the trial Magistrate for the reasons stated by him. The witness is a competent person as he was custodian of the said documents, and clearly the said exhibit was read and explained. See at page 6 of the impugned judgement. In a similar vein, since exhibit was cleared in admission and read over the parties, then the trial Court was rational to admit this exhibit. Therefore, the case of Balole (supra) as cited by Mr. Chubwa is misplaced in the instant matter as the said exhibit cannot be expunged from court records only account of Mr Chubwa's submission. More so, Mr. Chubwa had complained that the prosecution case was not proved beyond reasonable doubts. To him was of the view that a charge against the appellants was for stealing Tshs 19,782,800/= but the trial magistrate in his finding ruled out that there was breach of rules in withdrawing money from bank account of the association by the appellants, as per evidence of PW1, PW2, PW3 and exhibit P2 and that the appellants did not cross examine the complainant on non- authorization of withdrawing of the alleged money in 2022, failure of the appellants to tender general report of expenditure of money of the year 2022, failure of the appellants to show how Tshs 19,000,000/= was broken down in expenditure for the alleged serving the football team, funeral allowance and loan to the members and lastly

failure of the appellants to call secretary to tender necessary documents made the trial Court to enter conviction on such weak evidence. Clearly, it is the trite law that the prosecution is placed with a heavy burden than that of the accused. The first long-established principle in criminal justice is that of onus of proof in criminal cases, that the accused committed the offence for which he is charged with is always on the side of the prosecution and not on the accused person. It is reflected under Section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2022] (The evidence Act) and cemented in the case of William Ntumbi vs. The Director of Public Prosecution (supra) as cited by Mr. Chubwa also in addition are cases of Joseph John Makune vs. Republic [1986] TLR 44 at page 49, where the Court of Appeal held that; The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities. The second principle is that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of Mohamed 19 Haruna@ Mtupeni & Another v R, Criminal Appeal No. 25 of 2007 (unreported) held that; "of course in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence." That means the evidence must be so convincing that no reasonable person would ever question the accused's guilt. See cases of Mohamed Said Matula vs. Republic [1995] TLR 3, Anatory Mutafulungwa vs. Republic, Criminal Appeal No. 267 of 2010 (unreported) and Festo Komba vs. Republic, Criminal Appeal No. 77 of 2015, the Court of Appeal of Tanzania (both unreported). In the instant matter, the appellants were arraigned before the trial Court for the offence of stealing Tshs 19,782,800/= being property of Umoja wa Mawakala wa Mabasi Kahama. The trial Magistrate at page 11 of the impugned judgement convicted the all accused(appellants) with the offence charged with. Meaning that the charge against the appellant was sufficiently proved. Thus, it goes without saying that what is 20 articulated by Mr. Chubwa that the trial Court convicted the appellants on grounds of unlawful transaction and failure to tender necessary report and witness is misconceived arguments. Here, I found prosperous to go through the prosecution evidence at the trial Court. Pw1 testified that the funds of the association are spent only when the chairman had called the meeting of the executive committee. If the so called committee so resolve, the money is withdrawn that is per their constitution. From 1/1/2022 up to 11/12/2022 the appellants were signatories of the association's account. In course of dealing, the chairman (5th appellant) was heard that the bank account of the group had no fund, report was made to the group where they asked for bank statement which showed that all Tshs 23 million which was in the account was not the same, as they had previous deposited 17, million the same 17, million was withdrawn and remained 400,000/= in bank account. They called all signatories asked for. Upon stiff interrogation the 4th and 6th appellants admitted the loss and prayed to pay but later turned hostile and rejected to

return. When auditing was made it was discovered that the stolen money is 19,772,800. Mindful the withdraw of money was made contrary to the rules govern the unity. There was no executive committee authorized the withdraw of money as required, thus money was taken illegally. 21 On his part, PW2 amplified that he is a member of executive committee of the unit, thus he never asked to pass resolution of withdrawing the alleged amount. PW3, being member of the group, he never called to discuss the withdraw of the money in that particular period. PW4 was co-operative officer who is charged with function of supervision of cooperative societies at Kahama Municipality including Umoja wa Mawakala wa Mabasi. He was ordered to check transaction of the unit by DED Kahama. They called all members and got the history of loss and given with documents for assistance. In the course of scrutinizing, they identified that there some expenditures were not known to them. No minutes how cash was withdrawn. At the end after thorough audit, it was established that Tshs 19,782,800 were missing. The report was prepared and submitted to the DED being registrar of the cooperative in his locality. He tendered exhibit P1 being a report of their investigation and which was admitted without objection. DW1 stated that on 24.4.2022, he convened a meeting and resolved to start their team. Thus, most of money withdrawn went to finance their team. He admitted that before the use of funds leaders of the group meet and discuss the use of funds intended and resolve thereto, then the fund is withdrawn from bank and later the members of the group are called and informed about the transaction. He blamed the constitution for not providing members to give consent for the 22 withdrawn money save themselves as leaders who act on behalf of all members. DW2 verified that they sat in the meeting of the leaders and ordered to withdraw the money, there was no way for her to resist the orders passed by their leaders. DW3 admitted to have withdrawn the alleged amount and thus their constitution do not provide for the requirements to provides minutes for withdraw of money. It is only when leaders sit and decide upon, themselves are called to withdraw money. DW4 contended that they had only withdrawn 14,398,000/= for expenditure of their team. Being signatory, he was called to go to the bank and withdraw the money. DW5 stated the withdraw of money was blessed with authorization of the leaders. The money withdrawn used for expenditure of their team, his testimony had also a bless of DW6, DW7 and DW8. Glaring from the extract of piece of evidence, I am of the firm findings that, it true that the money of the unit was withdrawn and there was no supportive evidence sanctioning the withdraw from members and its uses of such funds. There is no evidence of the beneficiaries of the funds as contemplated to be a team of the unit to have received the funds. The absence of which is questionable. 23 The prosecution alleged that the rules to withdraw of money of the unit was not adhered. The defence evidence suggests that the rules were complied since the constitution does not provide for consent of members for withdrawing money. Now, Article 4.2 of the Constitution of the association provides that; “matumizi ya fedha za kikundi” 4.2 (a) kununulia samani za ofisi, b. Kutoa mkopo kwa mwanakikundi, c. Kuanzisha miradi ya kikundii pale inapohitajika,

- d. Kugharamia wanakikundi pale inapohitajika f. Kusaidia makundi ya watu wenye uhitaji kama Watoto yatima, wajane na walemavu kulingana na mkutano mkuu wa kikundi, g. Matumizi mengine yatakayoidhinishwa na kamati kuu. 4.3. b. Kamati ya fedha itaandaa kanuni za fedha zitakazoidhinishwa na kamati kuu” Since the defence evidence had admitted to have withdrawn the money for the use of their team, the critics are; Where did they derive such mandate of using funds of the unit to fundraise the team? Their constitution places the use of funds of the unit, there is no category of team fundraise. See Article 4.2 of the Constitution. Leave apart the procedures of withdraw of money. If they 24 real resolved for starting their team why did not amend their constitution. Article 4.2 (g) of the Constitution provides for other expenditure approved by executive Committee. Article 6.1 of the Constitution provides for composition of the executive Committee. 6.1. “Kamati Kuu Kamati kuu itakua na wajumbe wafuatao.
- a. Mwenyekiti, b. Mwenyekiti msaidizi, c. Katibu, d. Katibu Msaidizi, c. Mweka hazina” Now, assuming there was a team of the unit, where is deliberation of the executive committee for the use of money of the unit. In absence of such evidence, it is hardly to prove that the withdraw of money was made in good faith. Sorry to say the money was stolen. Exhibit P1 reveals the truth as to what transpired, the same is in conformity with the defence evidence. Earlier, I had put clear that since the charge against the appellants was stealing then the prosecution had been burdened to prove the following ingredients: 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 25 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 but without the consent from the possessor. See Director of Public Prosecution vs. Shishir Shymsingh. Looking to the ingredients above, the prosecution successfully discharged its function as all elements were proved. Appellants had admitted to have withdrawn the money of the unit without justifiable cause, no evidential proof of the use of the withdrawn money, there was a syndicate of personal gain to the appellants. The money was fraudulently withdrawn by the appellants from the bank. I must therefore conclude that the charge against the appellant was proved beyond reasonable doubts. On the last ground that the trial Magistrate erred in law when failed to certify the proceedings when recording the witnesses’ testimonies. Mr. Chubwa has argued this Court to rule out that the fault by the trial magistrate vitiates the proceedings of the trial Court, he then prayed for trial denovo of the matter. 26 Here, I need to draw inspiration from the Criminal Procedure Act [Cap 20 R.E., 2022 (the CPA) wherein it is mandatorily provided that the evidence of each witness must be signed. In a countless number of cases as referred by Mr. Chubwa including; Yohana Mussa Makubi and Another vs Republic, Criminal Appeal No. 556 of 2015, Sabasaba Enos@Josephvs Republic, Criminal Appeal No. 411 of 2017, Chacha Ghati @ Magige vs Republic, Criminal Appeal No. 406 of 2017 and Mhajiri Uladi & Another vs Republic, Criminal Appeal No. 234 of 2020, North Mara Gold Mine Limited versus Isack Sultani, Civil appeal No.4S8 of 2020, (all unreported); the Court of Appeal insisted that a

signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings. In Yohana Makubi and Another (supra) the Court held, among other things, that: "In the absence of the signature of the trial Judge at the end of the testimony of every witness; firstly, it is impossible to authenticate who took down such evidence, secondly, if the maker is unknown then, the authenticity of such evidence is put to questions as raised by the appellants' counsel: thirdly, if the authenticity is questionable, the genuineness of such 27 proceedings is not established and thus; fourthly, such evidence does not constitute part of the record of trial and the record before us" Scanning the trial Court's records, I found the complaints by Mr. Chubwa is misconceived. The trial magistrate strongly complied with the law. Certification of the proceedings was at high level thus it is recommendable. All this said, I find this ground is devoid of any merit. Therefore, the matter cannot be tried denovo as argued by Mr. Chubwa when cited the case of Fatehali Manji vs republic, (1966) 1 EA 343 and Onesmo Yohana Taile vs Republic (supra). All this said and done, I find this appeal being devoid of any merit, and the same is hereby dismissed in its entirety for being brought without any sufficient cause but merely on a legal attempt of betting in which it has gone astray may be. Conviction and sentence meted out are hereby upheld and confirmed by this Court. It is so ordered. Right to further appeal is hereby explained. DATED at SHINYANGA this 31st day of July, 2024. F.H. Mahimbali Judge. 28 Court: I have noted that this charge involved stealing of money worth 19,973,800/=. After the said conviction and sentence, there is nothing ordered by the trial court on refund of the said money/compensation. Both learned counsel are invited to address the court on that whether compensation is not necessary. Ms Magoti S/A: Your lordship as per theft done, there ought to have been an order for compensation accordingly. I thus pray that this Court be pleased to order it now. Mr. Chubwa Adv for all appellants: On the compensation order, I humbly pray that this Honourable Court not to interfere with that order as there was a civil case at the Primary Court of kahama District whose decision is now pending appeal out come at the District court of Kahama registered as Civil Appeal No. 000015217 of 2024. Therefore, this Court will have to order the compensation order payment pursuant to this appeal judgment will cause conflicting decisions of the court. That is all. Court: Having heard the parties, on the issue of compensation order of 19,973,800/= (stolen money) not being ordered by the trial court, pursuant to Article 107A (2) of the Constitution of the United Republic of Tanzania, a court of law is obliged to award appropriate compensation in its decision in both criminal and civil cases in accordance with the 29 relevant law enacted by the parliament. See also section 25 of the Penal Code and section 328 of the CPA. Notwithstanding, the pending Civil Appeal before the District Court of Kahama, on their conviction, these appellants are hereby ordered that they jointly repay the stolen money amounting 19,973,800/= equally. Incase of default, the same be executed by attachment of each one's property to discharge the same. DATED at SHINYANGA this 31st day of July, 2024. F.H. Mahimbali Judge. 30

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