

TANZANIA / JUDGMENT

julius sabasaba sisa vs the republic

2023 tzhc 20193 17 august 2023

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TZHCDECIDED
17 August 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
SONGEA AT SONGEA CRIMINAL APPEAL NO. 15 OF 2023 JULIUS SABASABA @ SISA
..... APPELLANT VERSUS THE REPUBLIC
..... RESPONDENT (Appeal from the decision District Court
at Tunduru at Tunduru in Criminal Case No. 169 of 2022)

JUDGEMENT

16th July and 17th August, 2023 KISANYA, J.: The appellant above mentioned was arraigned before the District Court of Tunduru (the trial Court) in Criminal Case No. 169 of 2022, with the offence of stealing contrary to section 265 of the Penal Code [Cap. 16 Revised Edition 2022]. The particulars of offence were to the effect that; on 11th November, 2022 at Extended Area within Tunduru District in Ruvuma Region, the appellant did steal cash a tune of TZS 3,000,000/=, the property of Alex Mwita. After a full trial, the appellant was found guilty, convicted and sentenced to serve one year imprisonment. He was also ordered to pay the said Mwita Alex, compensation of TZS 3,000,000/=. 1 Aggrieved, the appellant has filed an appeal before this Court. His petition of appeal is predicated on six grounds of appeal which rephrased into two grounds of complaints as follows:

1. The prosecution case was not proved beyond all reasonable doubt.
2. The trial court erred in law and in fact by passing its judgement and sentence contrary to the law. On the date scheduled for the hearing, the appellant appeared in person and unrepresented, while the respondent (the Republic) was represented by Ms Tumpare Lawrence, learned State Attorney. Starting with the first ground of appeal, the appellant submitted that, the prosecution did not prove its case as none of the prosecution witnesses stated to have seen him stealing the money. It was his further contention that, the trial court erred in law by relying on the evidence adduced by the prosecution without considering his defence. According to him, the trial court failed to consider that the complainant (PW1) did not prove the offence laid against him. The appellant went on submitting the evidence of PW1, PW2 and PW3 was contradictory. He contended that PW1 adduced that the loss was 3,000,000/= while PW2 testified that he did not find the money in the office. He further

submitted that PW3 told the trial court that he was informed by PW1 that the office had been broken but when he went to the crime scene, he found the office was not broken. It was also submitted that the trial court erred in law by relying on the hearsay evidence of PW2 whose evidence was based on the facts/information which he received from PW1. The appellant went on to contend the trial court did not evaluate the evidence adduced by both parties. He was of the view that had the trial court evaluated the evidence, it would have noted that none of the prosecution witness saw him stealing the money. He added that the investigator did not find him with any exhibit related to the offence laid against him. As regards the second ground of complaint, the appellant submitted that the trial court erred in law and fact to order him to pay compensation. He prayed his appeal to be allowed. In response, Ms. Lawrence contested the appeal. She merged the first five grounds of appeal by addressing the issue whether the prosecution proved its case beyond all reasonable doubt. She submitted that, PW2 testified that the appellant was not found at the office on material day and that she (PW2) heard the appellant stating that the money had been stolen. The learned counsel submitted that, a police officer (PW3) who went to the crime scene did not find the office broken. 3 As regards the amount of money, Ms Lawrence submitted that, PW1 testified to have audited the account on 9/11/2022 whereby the sale proceeds of TZS 15,000,000/= was left in the office. It was her further contention that an audit was not conducted on 10/11/2022 and that, when PW1 audited the account on 11/11/2022, he found a loss of TZS 3,000,000/=. The learned State Attorney submitted that, upon being asked about the loss, the appellant told PW1 that the office had been broken and the money therein stolen while the evidence of PW3 shows that the office was not broken. However, Ms Lawrence conceded that there was no any evidence tendered to court to prove the alleged loss. She urged this court to consider PW1's oral testimony on the issue of loss. It was her argument that the prosecution's evidence was not hearsay as contended by the appellant. Responding to the sixth ground of appeal, the learned State Attorney submitted that the judgement and sentence of the trial court were in accordance with the law. Her argument was based on the ground that the appellant was sentenced to one year imprisonment and thus in accordance with section 265 of the Penal Code (supra) which set out 7 years imprisonment as the maximum sentence of theft. In the circumstances, the learned State attorney was of the firm view that there is no sufficient 4 cause to fault the sentence imposed upon the appellant by the trial court. She cited the case of Robert Aron v. Republic, Criminal Appeal No. 68 of 2007 (unreported) to serve his argument. In conclusion, Ms Lawrence prayed for the appeal to be dismissed for want of merit. In rejoinder, the appellant had nothing useful to submit. After heedful consideration of the record and parties' submissions, this court is in agreement with the learned State Attorney that the first five grounds of appeal hinge on the issue whether the prosecution proved its case beyond reasonable doubts. It is an elementary principle that, in criminal cases, the prosecution is duty bound to prove the case beyond all reasonable doubts and that the said duty never shifts to the accused person. See for instance the case of Anthony Kinanila and Another vs. Republic, Criminal Appeal No. 83 of 2021, CAT at Kigoma (unreported), in which the Court of Appeal restated the said principle in the following terms: - "In any criminal trial, the

prosecution bears the burden to prove beyond reasonable doubt, not only that the offence was committed but also that it was committed by the accused person or that he was participated in the commission of the offence to the extent or degree as prescribed by the law” 5 The above principle was also stated in the case of Nung’uniko Gidule vs R, Criminal Appeal No. 223 of 2008 (unreported) which was referred to by the trial court. Pursuant to the section 265 of the Penal Code and the particulars of the charge sheet laid against the appellant, the prosecution was duty bound to prove, among others, that appellant did steal cash money to the tune of TZS 3,000,000, the property of Alex Mwita (PW1). As regards the cash money, PW1 stated to have been informed by the appellant that the office had been broken and that “cash money was not enough”. He went on stating that “there was loss of TZS 3,000,000” and “balance of TZS 12,068,533.14”. Such evidence implies that the appellant had caused loss. In other words, PW1 did not adduce that the appellant had stolen the cash money stated in the charge sheet. Since the appellant was not charged with allegation of causing loss, the prosecution did not prove the charge levelled against him. Even if it is assumed that the said loss implied cash money, it was detected after the auditing of the sale proceeds, expenditure and profit of 9th November, 2022 on one hand and the balance found on the fateful day (11/11/2022) on the other hand. However, the prosecution did not tender the audit report which was the basis of an oral testimony of PW1. According to section 61 of the Evidence Act [Cap. 6, R.E. 2022], the contents of document(s) cannot be proved by oral evidence. That being the case, I decline Ms. Lawrence’s invitation to consideration of PW1’s oral testimony on the issue of loss or cash money. There is another issue on the owner of the cash money subject to the charge levelled against the appellant. The prosecution’s evidence shows that the appellant was employed by Aleiga Microfinance Ltd as a manager. Although the said company is owned by PW1, it is in evidence shows that the stolen money, if any belonged to Aleiga Microfinance Ltd. This is so when it is considered that the audit which led to detection of loss or cash money stated in the charge case was related to Aleiga Microfinance Ltd. It follows that the charge and evidence were at variance on the owners of the cash money. Given that the prosecution did not amend the charge sheet as mandatorily required under section 234 of the Criminal Procedure Act, Cap. 20, R.E. 2022 (the CPA), I hold the view that the charge preferred against the appellant was not proved on the required standard. See also the case of Masota Jumanne vs R, Criminal Appeal No. 137 of 2016 (unreported) in which the Court of Appeal held that:- “In a nutshell the prosecution evidence was riddled with contradiction on what actually was stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State 7 Attorney. This also goes to the weight of evidence which is not in support of the charge.” On the foregoing, it is clear that the prosecution failed not only to prove the commission of the crime that there was a loss which is the underpinning of the offence but also, that the appellant is the reason for the same in one way or another. Therefore, I find it not necessary to discuss the second ground of complaint. In the end, I find the appeal merited. Consequently, I hereby allow it, quash the conviction and set aside the sentence together with the order of compensation imposed upon the appellant. I make no order for release of the appellant because he has already

served the sentence. DATED at SONGEA this 17th day of August, 2023. S.E. KISANYA JUDGE 17/08/2023 Judgment delivered this 17th day of August, 2023 in the presence of the appellant and in the absence of the respondent. Right of appeal explained. S.E. KISANYA JUDGE 17/08/2023 8 9

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