

TANZANIA / JUDGMENT

JUDGMENT ROBERT ABEL MSANYA VS REPUBLIC

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB-REGISTRY AT MBEYA CRIMINAL APPEAL NO. 8541 OF 2024 (Originating from Criminal case
No. 246 of 2022 of District Court of Momba at Chapwa) ROBERT S/O ABEL
MSANYA.....APPELLANT VERSUS
REPUBLIC..... RESPONDENT

JUDGEMENT

Date of last Order: 24th June, 2024 Date of Judgment: 8th July, 2024 KAWISHE, J.: The appellant Robert Abel Msanya being aggrieved by the decision of the District Court of Momba at Chapwa, filed an appeal before this court. The appellant was charged with the offence of stealing by agent contrary to section 273(b) of the Penal Code [Cap 16 R.E 2022]. The particulars of the offence are that the appellant on 9th December, 2020 and 11th December, 2022 at Mpemba area, Tunduma Township, within Momba District in Songwe Region being a driver and in charge of motor 1 vehicle with registration number T 808 EAM/T 913 EAK make FAO the property of RK CHUDASAMA LIMITED did steal 500 litres of Diesel valued at Tshs. 1,684,000/=, 17 cargo belts valued at Tshs. 255,000/=, one metre of diesel pipe valued at Tshs. 100,000/=, one tyre lever valued at Tshs. 40,000/=, two vehicle triangles valued at Tshs. 30,000/=, one adjustable spanner valued at Tshs. 40,000/=, one valve key valued at Tshs. 5,000/= and one spare tyre valued at Tshs.800,000/=. All valued at Tshs. 2,964,000/= the properties which has been entrusted to the appellant by the said RK CHUDASAMA LIMITED to retain in safe custody and use of the said motor vehicle. Before the trial court the prosecution side paraded a total of seven witnesses. Thus, the fact of the case is adduced from the evidence of the prosecution witnesses. That, the RK CHUDASAMA LIMITED as a company which deals with the transportation and selling spear parts and tricycles, employed the appellant (DW1) as a driver. PW2 the human resource officer of the company stated that, the appellant was employed on 20th October, 2022. The employment letter and employment contract are admitted and marked as exhibit PE1. That, on 11th December 2022, DW3 (driver) was informed that, the motor vehicle has been deserted at Uzunguni parking. Then he went to the scene of crime and found the 2 said motor vehicle safe. But when they went to handle the vehicle to the security guard of Uzunguni parking (DW5), they found the door open. DW5 stated that for each incoming vehicle they register it on their register. The appellant car was

registered, the registration book was tendered and admitted as exhibit PE3. That, the appellant was announcing that he was selling belts and air pipes. On 12th December, 2022 DW1 the security officer of RK CHUDASAMA LTD also was informed by the HR of RK that their car with Reg. No. T 808 EAM/T.913 EAK has been deserted by the appellant at Uzunguni area. That, he went to the scene of crime, he inspected the car and found it with no fuel at all, some spare parts stolen like; spare tyre, 17 cargo belts, machines belts, 7 diesel pipes, one air pipe, one tyre river, two try angles, one valve key and one complete spare tyre. DW4 operation manager of RK CHUDASAMA CO. LTD stated that, the motor vehicle started its journey from DSM to Tanga, thereafter from Tanga it went to Tunduma. They filled it with 900 litres of diesel, and went to Congo they offloaded, and loaded the motor vehicle with copper and return back. When they reached Ndola, they added 100 litres of diesel, and when they crossed the border, they added 170 litres. That, DW4 went to the scene of crime and found that, it had no fuel and 3 other properties, the said stolen properties were 500 litres of diesel fuel, 17 cargo belts, machine belts (7), diesel pipe, (1) tyre leaver (1), adjustable spanner (1), triangle (1), diesel pipe (1), and other properties. He stated that, they handled the said stolen properties to the appellant in writing and there are receipts for fuel, the same were tendered and admitted as exhibit PE2. The appellant as testified by PW1 was arrested after being tracked by the police officers. In his defence the appellant denied to have committed the said offence. He alleged that, he arrived at Mbara area in Zambia on 9th December 2022. That, he parked the motor vehicle at Sinkala parking area opposite to Petro Africa Station. That, he was owing the company 180 litres of fuel. He was not given the fuel instead, he was threatened. That, they went to Dar es Salaam and they stayed there quite long without offloading. On 23rd December, 2022 he was phoned and went to his office where he was apprehended. He stayed there for three weeks later on he was sent to Tunduma Police Station. The appellant was convicted by the trial court and sentenced to serve four years in jail and to pay compensation of the stolen properties at Tshs. 2,964,000/= after completion of his imprisonment term. 4 The appellant being aggrieved by the said judgment, filed an appeal before this court with six grounds of appeal as follows:

1. That the trial court erred in law and facts to convict and sentence the appellant in case that was not proved to the required standard.
2. That the trial court erred in law and facts for failure to analyse and evaluate evidence.
3. That, the trial court erred in law and fact when determined the matter irregularly without following laid down procedures.
4. That, the trial court erred in law and facts to consider fabricated and contradictory evidence against the appellant.
5. That, the trial court erred in law and fact when it imposed excessive punishment over the convicts.
6. That, the trial court erred in law and fact for not recording crucial evidence adduced by the defence witnesses in the proceedings that led it to a wrong verdict. The appeal was argued by a way of a written submission upon agreement by parties. The appellant enjoyed the

service of the learned counsel Ms. Nyasige Kajanja while the respondent/Republic had the service of Mr. Igans Joakim, learned State Attorney. Submitting on the appeal, Ms. Kajanja, argued the 1st and the 3rd grounds of appeal jointly. That, the case was not proved beyond reasonable doubt, the trial court considered the fabricated and contradictory evidence. She submitted that, the charge sheet stated that, the offence occurred between 9th December, 2022 and 11th 5 December, 2022, none of the prosecution witnesses supported the charge sheet that on 9th December, 2022, 10th December, 2022 or 11th December, 2022 the appellant was seen stealing the items listed in the charge. Failure to mention specific date in which the crime was committed renders the charge unproved. She cited the case of Abel Masikiti vs. Republic, Criminal Appeal No. 24/2015 (unreported), to support his position. She went further to submit that, DW5 the security guard did not testify if he saw the appellant taking off the pipes and those belts which he announced to sell. Also, it was alleged that, the copper was tied by cargo belt, but none of the prosecution witnesses testified what, they used to tie those copper after the missing of 17 cargo belts. She went further to state that, PW4 did not state how many litres remained in the tank when 900 litres of diesel were added and did not state the kilometres the motor vehicle travelled. When the motor vehicle travelled to Congo PW4 did not reveal the point of destination. She argued also that, there was no any mechanical engineer who was called by the prosecution to notify the court as an expert how the motor vehicle consumed the fuel and the status of its oil pump. Therefore, the 6 absence of the evidence to prove consumption of the oil it left the matter unproved. Basing on the evidence of PW4 on the litres of oil filled in the motor vehicle it is total of 1170 litres, the counsel argued that, the motor vehicle travelled for almost 2,994 kilometres. Thus, it is not possible for the lorry to travel 2,994 Kms consuming 1,170 litres of diesel only. However, the complaint that, the evidence was fabricated and contradictory, the counsel argued that, the case was fabricated to deter the appellant from claiming his money which he used to buy 180 litres of fuel. Also, the fact that, the evidence of PW1 and PW5 testified that, the car was deserted at Uzunguni, and the police officers inspected the motor vehicle. But none of them was called to testify before the court. This makes the evidence of PW1 as a story. The appellant denied to have deserted the motor vehicle, he stated that, he drove it from Tunduma to Dar es Salaam. She went further that the appellant was not reachable, he was arrested after being tracked by the cybercrime's officers, but none of the cyber-crime officers as called to testify on this. 7 That the evidence of PW1 and PW3 show that, the motor vehicle was deserted at Uzunguni. But in his evidence PW5 informed the court that, he entered in his register on 11th December, 2022 the same was admitted as exhibit PE3. In his evidence PW3 stated that, he was ordered by the police to handle the car to the police officers but at the same time PW5 stated that, it was handled to him by the appellant. The counsel stated further that, the vehicle was inspected by PW1 and PW3. Thus, it is possible were the one who stole the missing properties. Also, PW5 as a convoy leader stated that, he was informed of the deserted motor vehicle, as a leader he was supposed to know whereabouts of the vehicles and drivers. But at page 17 of the typed proceedings, he stated that, he was informed by his fellow driver. The motor vehicle was deserted on 11th December, 2022 at about 8 pm. According to PW3 and PW5 who testified that, he received

the same motor vehicle on 11th December, 2022 at 11 Am soon after parking, the appellant was not seen. She also stated that, the said motor vehicle was not brought before the court. The counsel went further that, the charge before the trial court was defective. That, the appellant was charged under section 273 (b) of the Penal Code, but the evidence of the prosecution did not prove that the appellant was an agent, entrusted to retain the property in safe custody. The offence did not match with the particulars of the offence and the ingredients of stealing were not proved. Therefore, the case was not proved on the required standard. Arguing the second ground of appeal, that the trial court erred in law and facts for failure to analyse and evaluate the evidence. The evidence of the defence side was not considered at all, his evidence was reflected at page 6 only when he was making a summary of evidence. In his defence the appellant stated that, he did not desert the motor vehicle, after crossing the border he parked his motor vehicle at Sinkala yard thereafter he drove to Dar es Salaam. According to the counsel, the problem started when the appellant claimed to be repaid his money. That, if the trial court could have analysed and evaluated evidence of both parties could have come to conclusion that it is a fabricated case. She argued further that, the DW1 was arrested in Dar es Salaam. That, DW1 did not deny the fact, that he was in Dar es Salaam waiting for offloading his motor vehicle, and he was arrested by CHUDASAMA Company officials. She referred the case of Fikiri Katunge vs. Republic, Criminal Appeal No. 522 of 2016 to cement her position on the issue of analysis and evaluation of evidence. That, this court being the first appellate court has the duty to evaluate the lower courts' evidence and come to its own conclusion. In the fourth ground of appeal that, the trial court erred in law and fact by imposing excessive punishment to the appellant. That, the appellant was charged with the offence of stealing by agent under section 273(b) of Cap 16. That, he was sentenced to serve 4 years imprisonment. The counsel argued that, the offence does not fall under the scheduled offences under Minimum Sentences Act, Cap 90 R.E 2022. The subordinate court was supposed to pass custodial punishment of 12 months for non-scheduled offences as per section 170 (2)(a)(iii) of the Criminal Procedure Act Cap 20 R.E 2022. In the last ground that, the trial court erred for not recording crucial evidence adduced by the defence witness in the proceedings. That, the appellant was the driver given the motor vehicle to transport lime from Tanga to Congo, thereafter to carry copper from Congo to Dar es Salaam. The proceedings do not mention the place where he offloaded the lime. When he defended himself, he stated the place where he passed with the motor vehicle, and he informed the court how he used the fuel he was given by the company. Also, that he used his money to buy 180 litres of diesel after the company promised to refund him. Those pieces of evidence were not recorded and led the court to reach to a wrong verdict. The appellant's counsel prayed this appeal to be allowed, conviction and sentence to be set aside. Responding to the grounds of appeal, the learned state attorney Mr. Ignas Joackim Urban argued on the 1st and 3rd grounds of appeal that, the respondent succeeded to prove its case beyond reasonable doubt. That, during hearing the appellant did not dispute that, he was given the said motor vehicle and aforementioned stolen items by his employer in order to complete his journey to a designated destination. He referred page 11 of the typed proceedings where it was proved the same where the list of the items given to the appellant

was signed by the appellant, and at page 18, PW3 stated that, the security officer is the one who informed them that, the driver was the one who took all the properties. The appellant also did not cross examine the prosecution witnesses and failure to cross examine implies the acceptance of the truth of the witness evidence, he cited the case of Damian Ruhele vs. Republic, Criminal Appeal No. 501 of 2007 (unreported). That, the appellant did not cross examine PW4 as shown at page 21 of the typed proceedings when he tendered the receipts of the fuel 11 which were handed to the appellant. That, also he did not cross examine PW5 as per page 26 of the typed proceedings when it was stated by the witness that, the appellant announced to sell belts and air pipes while at parking area. The learned State Attorney added that, the prosecution demonstrated that the stolen properties were entrusted to the appellant to perform the acts instructed by the principal that is his employer, but the appellant converted to his own use. In the complaint of failure to mention the specific date, the learned State Attorney argued that, the charge sheet has to disclose the exact date and time as per section 132 and 135(f) of the Criminal Procedure Act, as indicated in the charge sheet herein there is no dispute that, instead of specifying the dates in which the alleged offence was committed the prosecution has alleged that it was between 9th day December 2022 and 11th December 2022. The same connotes that, the offence was committed in the two points in time. It is not mandatory to specify the exact date, in the situation when there was not sure of the dates when the commission of the offence occurred. He went further to submit that, it is mandatory for the prosecution to ensure that, the offence was committed within such alleged specified 12 time because the charge intends to inform the accused person the nature of the offence facing him such as the place, date, time and how it was perpetrated so as to accord him with necessary information with an opportunity to prepare his defence. He cited the case of Isidori Patrice vs. Republic, Criminal Appeal No. 224 of 2007 CAT to support his position. That, the prosecution in this case has supplied the appellant with the sufficient elements in the charge. Failure to specify the date when the offence was committed did not make the charged defective. Thus, the case of Abel Masikiti (supra) is distinguishable, the same base on contradictory dates on commission of the offence. Hence, the prosecution proved its case beyond reasonable doubt. The issue that no prosecution witnesses mentioned the specific date of the commission of the offence, and that the charge was defective the prosecution did not prove that the appellant was an agent entrusted to retain the stolen property in safe custody, the learned State Attorney argued that, the charge against the appellant is stealing by agent, the prosecution was duty bound to prove three elements; agency, stealing and entrustment, the same was proved before the trial court. The appellant was entrusted with the property by his employer and he deserted the property, when he was asked to come at the scene of crime he did not respond, and the 13 same properties were found missing. Thus, the conduct of the appellant lead to an inference of guilty. He referred the case of R vs. John Mashaka Mmbando Sigani @ Castro and Another, Criminal Session Case No. 10 of 2023. In the allegation that, PW5 at page 26 of the typed proceedings stated that, the driver announced to sell belts and air pipes but he did not tell the court whether he saw the appellant. He argued that, PW5 heard from the appellant and later on it was discovered that, the same was stolen. This draws inference that, the appellant

was responsible. The fact that, the police officers who inspected the car were not called to testify. The learned State Attorney argued by citing section 143 of the Evidence Act that, there is no particular number of witnesses shall in any case be required to prove any fact. He cited also the case of Hamis Juma Chamashine vs. R, Criminal Appeal No. 669 of 2021 TZCA TANZLII at page 24 to cement his position. Therefore, there was no need to parade the police officers. On the ground that, the trial court did not evaluate and analyse the evidence. He argued that, the trial court analysed the evidence before it and the appellant evidence was considered. As reflected at page 6 to 7 of the trial court's judgment evidence was analysed and at page 8 he analysed the appellant's evidence. The same evidence was incapable of shaking the evidence of the prosecution case, which was proven beyond reasonable doubt. He stated further that, the case of Fikiri Katunge (supra) is distinguishable from this case at hand. In the allegation of excessive punishment, the State Attorney argued that, the ground is baseless as the court sentenced the accused person in accordance with the law, because the appellant counsel admitted that, the offence does not fall under the Minimum Sentence Act. In the last ground that the trial court erred in law and fact for not recording crucial evidence adduced by the defence witness. The learned State Attorney argued that, the argument by the appellant counsel is an afterthought as the appellant intends to introduce new evidence which is not in record. The respondent prayed before this court that the appeal to be dismissed as the same has no merit, the respondent managed to prove its case to the hilt. There was no rejoinder made. 15 After having summarized the evidence of both parties and a thorough perusal of the trial court's records there are four issues to be determined. Which are:

1. Whether the prosecution has proved the case beyond reasonable doubt.
2. Whether the trial court has analysed and evaluated the evidence of the parties.
3. Whether the trial court imposed excessive punishment to the appellant.
4. Whether the trial court did not record crucial evidence adduced by the appellant. In responding to the issues raised, I am set to start with the third issue that, the trial court imposed excessive punishment to the appellant. That, the appellant was charged with the offence of stealing by agent contrary to section 273(b) of the Penal Code, and he was sentenced to serve 4 years. The learned State Attorney stated that, the court sentenced the accused person in accordance with the law. In my opinion I concede with the respondent's counsel that, the accused was sentenced accordingly. The ground has no merit. 16 Reverting on the fourth issue that, the trial court did not record crucial evidence adduced by the appellant. The appellant's counsel argued that, there are pieces of evidence which were not recorded. The respondent's learned State Attorney stated that, the allegation has no merit and it is an afterthought. It has to be noted that, the court's records must be respected by both parties for proper administration of justice. This is in accordance with the principle laid down in the case of Halfani Sudi vs. Abieza Chichili (Civil Reference 11 of 1996) [1998] TZCA 7 (9 April 1998) where the CAT stated that: "There is always the presumption that a court record accurately represents what happened" Therefore, I am inclined to the learned

State Attorney's submission that, it is an afterthought, and further it is an unproven accusation levelled against the learned trial magistrate who is condemned unheard. Thus, basing on the principle of presumption of accuracy of court's record and the principle of sanctity of court's records it is the view of this court that, where the authenticity of the recorded evidence is in question it is the court's records that is deemed to be accurate and unimpeachable. This was held in the case of Flano Alphonse Masalu @Singu & 4 Others vs. The Republic, Criminal Appeal o. 366/2018. Therefore, the ground has no merit. 17 Now digesting on the first issue as to whether the prosecution has proved the case beyond reasonable doubt. The law is very trite that, the prosecution is duty bound to prove their case beyond reasonable doubt. It is a settled principle that, reasonable doubts in the prosecution case should be resolved to the benefit of an accused person and it is the duty of the prosecution to prove the case against the accused beyond reasonable doubt. This was stated in the case of Syridion Michael vs. The Republic, Criminal Appeal No. 262/2022 [2024] TZCA 365 CAT at DSM. The meaning of proof beyond reasonable doubt was defined in the case of Magendo Paul and Another vs. Republic [1993] T.L.R 219 where it was stated that: "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed". The appellant in this case at hand was charged with the offence of stealing by agent contrary to section 273(b) of the Penal Code, which provides: "273. If the thing stolen is any of the following things, that is to say-

- (b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay or deliver it or any part of it or of its proceeds for any purpose or to any person". 18 Therefore, for the accused to be convicted under the said provision the two elements must be proved by the prosecution side. First that, the property stolen was entrusted on the accused for him to retain in safe custody or to apply, pay, or deliver it or any part of it or any of its proceeds for any purpose or to any person, and the second element that, the said property was stolen by the accused (person entrusted to keep it). The same was held in the case of Agness Nyamuhanga vs. R, Criminal Appeal No. 341 of 2018 CAT Shinyanga. It is the appellant's claim that, the evidence adduced by the prosecution witnesses did not prove the fact that, he was an agent entrusted to retain the stolen properties in safe custody. Thus, the ingredients of the offence were not proved. In reply the respondent argued that, the elements of stealing by agent that is agency, stealing and entrustment were proved. In my view, in the first element of the offence of stealing by agent, I am persuaded by the respondent's learned State Attorney that, the evidence of the prosecution witnesses proved that, the appellant was the driver who was working for the principal and received instructions thereto. That, he was entrusted with motor vehicle and other items. This is evidenced by PW3, PW2, PW1 and PW4. Therefore, the appellant as a driver was entrusted by his 19 employer to drive the vehicle and transport the cargo from Tanzania to other countries as evidenced by PW4. Thus, he was entrusted by his employer to deliver the cargo safely and to handle the properties within the motor vehicle. The appellant agreed to have been employed by the said employer and to have

carried out the activities as per the employment agreement. Therefore, the prosecution side has proved the first element. Considering the second element as to whether the said property was stolen by the appellant. The same will be argued when evaluating the evidence of the trial court. After having a thorough perusal of the appellant's submission, the counsel claimed a lot of things in order to disconnect the appellant with the alleged offence, when she submitted on proving the case beyond reasonable doubt. On the issue of date that, there was no specific date mentioned by the prosecution witnesses. The charge sheet indicates that, the offence was committed between 9th December, 2022 to 11th December, 2022. The evidence of the prosecution witnesses such as PW2, that, he was informed on 11th December, 2022, PW1 was informed on 12th December, 2022, PW3 was informed on 11th December, 2022, this proves that, their evidence was basing on information they received. 20 Thus, it was not possible exactly to mention the specific date in the charge sheet as to when the offence was committed. The principle is applicable is, when the specific date of the commission of the offence is mentioned in the charge sheet, then the prosecution is duty bound to base their evidence on the mentioned specific date in the charge sheet. This was so held in the case of Anania Turian vs. R, Criminal Appeal No. 195/2009 the case was cited in the case of Godfrey Elisalia and 3 others vs. R, Criminal Appeal No. 39 of 2022. Thus, failure to do so would render the charge unproved and the accused would be entitled to an acquittal. Given the facts on the charge under which the appellant was charged, no injustice occasioned. Thus, the complaint has no merit, and it is very trivial, because in this case the charge sheet does not mention the specific date. The other complaints which were raised when the appellant's counsel was arguing the ground that, the case was not proved beyond reasonable doubt. She complained on the ground that PW5 stated that, the appellant announced to sell belts and air pipes, but he did not testify to have seen the appellant taking off the pipes. That, the copper was tied by cargo belts, but there is no evidence from prosecution what was used to tie the copper, when the cargo belts were missed. The counsel 21 for the appellant also complained that, the fuel filled in the motor vehicle was not enough to travel for 2,994 kilometres. Also, that there is no prove how many litres of diesel were added and how much was consumed. She also stated that, there was no an expert who testified on how the car consumed the fuel. Thus, the case remained unproved. She went further to complain that, the police officers who inspected the motor vehicle when it was deserted at Uzunguni were not called to testify, because the appellant alleged that, he did not desert the motor vehicle. The issue of being arrested by the cyber officers, she complained that, the cyber officers were not called to testify. She also complained that, PW5 was handled with the motor vehicle at the same time PW3 was ordered to handle the motor vehicle to security guard, while it has already been handled to PW5. Thus, there was possibility the properties were stolen by PW3 and PW1. That, PW5 who was a convoy leader was supposed to know the whereabouts of the motor vehicle, but he was not aware. Basing on the appellant's complaints, the respondent's learned State Attorney argued that, the appellant was supposed to cross examine on it. He also argued that, the other witnesses were not called, it is the discretion of the prosecution to decide the witnesses to testify. 22 I am inclined to the submission made by learned State Attorney that, the complaints made by

the appellant were supposed to be cross examined by the appellant during trial, but the same was not done, therefore raising them at this stage is an afterthought. The same was held in number of cases such as Kaiza Gaudin vs. R, Criminal Appeal No. 170/2022 and the case of Paulina Samson Ndawavya vs. Theresia Thomasi Madaha, Civil Appeal No. 45/2017. In the case of Damian Ruhele (supra) cited by the learned State Attorney, it was held that: “It is trite law that failure to cross examine a witness on important matter ordinarily implies that the acceptance of the truth of the witness evidence”. Therefore, the appellant’s failure to cross examine the prosecution witnesses it means he accepted the witnesses’ evidence and, it will be difficult to suggest that, the evidence should be rejected. Pondering on the complaint of failure to call an expert who inspected the car, the cyber officers who arrested the appellant and the police officers who inspected the car, it is my humble view that, the State Attorney has rightly put it. That, as per section 143 of the Evidence Act, and as it was stated in the case of Hamis Juma Chamashine (supra) that: 23 “The prosecution was free to determine which form of evidence to prove its case and which, however probative to discard”. Thus, the prosecution is free to determine which forms of evidence to prove its case. Also, there is no particular number of witnesses shall in any case be required to prove a particular fact. Therefore, the complaints have no merit. On the second issue as to whether the trial court evaluated the evidence of both parties. Having a thorough perusal of the trial court’s judgment, as submitted by the learned State Attorney, page 6 and 7 of the trial court’s judgment evaluated the evidence of both parties. But this being the first appellate court has a duty to re-evaluate the lower courts evidence and come with its own conclusions. The prosecution evidence was that, the appellant was the driver employed by RK CHUDASAMA LTD. The company which deals with transportation and selling of spare parts and tricycles. The evidence of PW1 who is the security officer at RK CHUDASAMA LTD, PW2 human resource officer, PW3 convoy leader and PW4 operation manager of RK CHUDASAMA CO. LTD proved it, and employment contract was admitted as exhibit PE1. The prosecution evidence also proved that, the appellant as a driver was handled with the motor vehicle with Reg. No. T 808 EAM 24 together with fuel. The evidence of the prosecution regarding the first element of the offence that, the appellant charged with was undisputable by the respondent. Therefore, the appellant was entrusted by his principal to deliver the properties which claimed to have been stolen by the appellant. On the second element whether the said properties were stolen by the appellant. The PW4 testified that, they had travelled on 25th October, 2022 to Tanga for charcoal then they went to Tunduma, that they added 900 litres of diesel. They travelled to Congo, they arrived safely and offloaded. They packed copper and started to return. When they arrived at Ndola - Zambia they added 100 litres of fuel. That, they went to Nakonde boarder and crossed Tunduma boarder where they added 170 litres. Later on, he was informed that the motor vehicle was deserted. PW4 continued to testify that, when they went to the scene, it was discovered that there were no fuel 500 litres, 17 cargo belts, machine belts 7, diesel pipe 1, tyre leaver 1, adjustable spanner 1, triangle 1, diesel pipe 1 and other properties. In his evidence PW3 the convoy leader testified that, he was informed of the deserted motor vehicle on 11th December, 2022 at 8 PM. When arrived at the scene they inspected the vehicle. It was safe and doors locked. He

further testified 25 that, they called the appellant who replied that, the vehicle had no fuel. That, the appellant promised to come to the scene but it was in vain. He added that, the security guard, PW5 told them that, the appellant took the missing properties. On his part, PW5 testified that, he registered the appellant's motor vehicle in the register on 11th December, 2022 at 11 AM. He further testified that, the appellant was announcing to sell belts and air pipes. PW1 also testified that, he was informed of the deserted motor vehicle on 12th December, 2022. That, he travelled to the scene of crime. That on arrival, he inspected the vehicle and realized it had no fuel at all, missing some spare parts, stolen like spare tyre, 7 cargo belt machines, 1 diesel pipe, 1 air pipe, 1 tyre lever, two triangles, 1 valve key and one complete spare tyre. In his defence during trial, the appellant stated that, he bought 180 litres when he parked the motor vehicle at Sinkala parking opposite Petro Africa Station. That, when he demanded the company to refund him, he was promised to be paid but they did not do so instead, he was threatened. That, they went to DSM and he stayed there for quite long before offloading. He added that on 23rd December, 2022 he was phoned by one Raju that, the office requires him, when he reached 26 there, he was arrested. In my view, the available evidence adduced by the prosecution witnesses such as the evidence of PW1, PW4 and PW5 testified on the properties which were stolen by the appellant. Each witness mentioned properties that do not match with the properties mentioned in the charge sheet. For instance, the charge sheet states that, the appellant stole 17 cargo belts, while PW1 testified that, he stole 7 cargo belts and PW5 just testified that, the appellant announced to sell belts and air pipes. Another mismatch between the charge sheet and the testimony is, PW4 stated that, the appellant stole one vehicle triangle whereas, the charge sheet states that, he stole two vehicle triangle. Thus, this is fatal and the discrepancies go to the root of the case. The appellant was found guilty and he was supposed to refund the respondent, but the prosecution evidence does not prove exactly what has been stolen. As stated in the 4th ground of appeal, there is contradictory evidence on the prosecution side. This means that, the prosecution did not prove what was stolen. Such scenario was dealt with in the case of Agness Nyamuhanga vs. R, Criminal Appeal No. 341/2018 CAT Shinyanga, where they cited the case of Masota Jumanne vs. R, Criminal Appeal No. 137/2016 it was held: "In a nutshell the prosecution evidence was riddled with contradiction on what actually was stolen from PW1. Such circumstances do not only imply 27 that there was a variance as submitted by the learned state attorney. This variance goes to the weight of evidence which is not in support of the charge". Thus, such discrepancies in this case render the case not to be proved on the required standard. From the analysis made, the evidence from prosecution witnesses is hearsay evidence, there is no eye witnesses. They testified that, they went there to inspect the vehicle after being informed that, the motor vehicle has been deserted by the appellant. None of them proved that, the properties were stolen by the appellant, and none was present when the theft incident occurred. In this situation, PW5 who claimed to have registered the motor vehicle at the parking and heard the appellant announcing that he was selling belts and air pipes was the best witness to testify as an eye witness. Short of that, it is my considered view that, the available evidence does not connect the appellant with the offence charged with. The learned State Attorney also in his

submission admitted that, the appellant was arrested for his conduct, that he was not responding the phone. Thus, they used cyber officers to search for him. It means the conduct of the appellant is the one which caused him to be suspected to be the thief. The law is very trite that, mere suspicion 28 however strong is not sufficient to convict the accused. The prosecution's relied heavily on suspicious evidence. There is plethora of cases elaborated on suspicion evidence, such as the case of Juma Malaya and 2 Others vs. R, Criminal Appeal No. 159 of 2008, Mwita Marwa Abdallah vs. R, Criminal Appeal No. 250 of 2020[2023] TZCA 17349, where it was held that: "If anything, such evidence was but, founded on suspicion. It is trite that suspicion alone however strong, is not sufficient to sustain conviction in a criminal trial". Thus, the appellant was arrested basing on suspicion and there is no strong evidence for him to be convicted with the offence he was charged with. The evidence of PW4 also mentioned that, when they travelled from Tanzania to Congo, they used to fill the fuel. They filled 900 litres, 100 litres and 170 litres at different times and places. The receipts were admitted as exhibit PE2. In his defence the appellant started that, he filled 180 litres by using his money, which he was not refunded, and when he claimed for it, he was threatened. Having perused the tendered exhibits there is the receipt for 100 litres, 1500 litres, 900 litres and 180 litres. The 180 litres and 1500 was not testified by PW4. Basing on 180 litres which was not testified by PW4 but the same was alleged by the 29 appellant that, he bought by using his money. But the appellant did not adduce evidence to prove the same. In my opinion even though, the same was not cross examined by the appellant during trial, the prosecution's evidence has dents on this segment, which is not proved to the required standard. Having done and said that much, in my opinion the prosecution side evidence failed to prove the case beyond reasonable doubt. Although, they testified that, the properties were stolen, there is no direct evidence available to prove that the theft was carried out by the appellant. In the upshot, the appeal is allowed. As a result, the conviction, sentence and orders thereto made by the trial court, are quashed and set aside. The appellant be set at liberty forthwith unless he is held for a lawful reason. It is so ordered. Right of appeal is explained. Dated and Delivered at MBEYA this 8th day of July, 2024. E.L. KAWISHE JUDGE 30 Court: Judgment delivered in the presence of Mr. Ignas Joackim, State Attorney for the Respondent and Ms. Nyasige Kajana, learned advocate for the appellant. E.L. KAWISHE JUDGE 31

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