

TANZANIA / JUDGMENT

ziada yahaya mkanilo vs republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB-REGISTRY OF DAR ES SALAAM) AT PAR ES SALAAM, CRIMINAL APPEAL NO. 38 OF 2023 (Arising from the decision of the District Court of Mkuranga at Mkuranga in Criminal Case No. 185 of 2021) ZIADA YAHAYA @ MKANILO..... APPELLANT VERSUS REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: December, 2023 Date of judgment: 22nd December, 2023 A. A. MBAGWA, J. This is an appeal against conviction and sentence meted out by the trial District Court of Mkuranga. The appellant, Ziada Yahaya @ Mkanilo together with one Ally Salehe @ Chossy (the deceased) were arraigned before the District Court of Mkuranga at Mkuranga hereinafter referred to as the trial court on a charge consisting of three counts of Stealing by Agent contrary to section 273 (b) of the Penal Code [Cap. 16 R.E 2019] In the 1st count, it was alleged that, the appellant and Ally Salehe @ Chossy on 20th day of August, 2020 at Kimanzichana village within Mkuranga District in Coast Region did steal 4000 kilograms of Cashews valued Tshs 6,000,000/=, the property of Situmai d/o Ally Mwaisaka. In the 2nd count, it was alleged that, the appellant and Ally Salehe @ Chossy on 20th day of August, 2020 at Kimanzichana village within Mkuranga District in Coast Region did steal 535 kilograms of Cashews valued Tshs 825,000/=, the property of Said s/o Abdallah Likamba. In the 3rd count, it was alleged that, the appellant and Ally Salehe @ Chossy on 20th day of August, 2020 at Kimanzichana village within Mkuranga District in Coast Region did steal 3667 kilograms of Cashews valued Tshs 5,500,500/=, the property of Abdallah s/o Mohamed Ngombaro. It is worth noting that, before the commencement of hearing, Ally Salehe @ Chossy passed away. Consequently, on 19th day of January, 2022 and upon proof of his death through production of the death certificate by the Republic, the trial court marked the charge against Ally Salehe @ Chossy as abated in terms of section 224A of the Criminal Procedure Act. Thus, the hearing proceeded against the appellant alone. In brief, what transpired at the trial court may be narrated as follows; Upon arraignment, the appellant pleaded not guilty to the charge hence the matter went through a full trial. As such, in a bid to prove the charge, the prosecution called five (5) witnesses and produced nine (9) documentary exhibits namely; a receipt for crops No. C 42534 titled "stakabadhi ya mazao" issued by Ichunguro AMCOS to Saidi Abdallah Likamba in respect of

535 kilograms of cashewnut (Exhibit P1), a receipt for crops No. C 42573 titled "stakabadhi ya mazao" issued by Ichunguro AMCOS to Abdallah M. Ngombaro in respect of 3667 kilograms of cashewnut (Exhibit P2), deed for submission of Ichunguro AMCOS Peasants' monies between the Appellant, the deceased and PCCB Mkuranga District dated 7th December, 2020 titled "Hati ya Makabidhiano ya Fedhaza Wakulima wa ICHUNGURO AMCOS" (Exh. P3), Makubaliano ya Uthibitisho wa kurudishiwa fedha kiasi cha Tshs. 102,400/= between the appellant, the deceased and PCCB Mkuranga District dated 22nd October, 2021 (Exh. P4), Hati ya Makabidhiano ya Fedha za Wakulima wa ICHUNGURO AMCOS between PCCB Mkuranga and one Hussein A. Mzungu for the return of Tshs. 700,000/= (Exh. P5), cash money to wit, Tshs. 700,000/= (Exh. P6), a letter dated 22nd November, 2021 from Hussein Ally Mzungu to the Head of the PCCB-Mkuranga District in respect of the refund of Tshs. 700,000/= (Exh. P7), a letter dated 18th February, 2022 with reference No. MKU/CID/C.5/4/4/VOL.IV/75 from the OCCID- Mkuranga District to the Head of the PCCB-Mkuranga District in respect of transmitting the Tshs. 700,000/= to the OCCID -Mkuranga District (Exh. P8), Letters dated 21st February, 2022 and 1st March, 2022 with reference No. PCCB/PWN/MKR/GCR/54/2020 from PCCB-Mkuranga District to the Officer Commanding District (OCD) Mkuranga-District (Exh. P9). As hinted above, the prosecution called five witnesses namely, Said Abdallah Likamba (PW1) complainant, Abdallah Mohamedi Ngombaro (PW2) complainant, Said Abdallah Said (PW3), Ward Executive Secretary, Beneth Kapinga (PW4) PCCB officer and CO. 5331 D/C Frank (PW5) Police officer. On the adversary, defence side paraded two witnesses namely; appellant (DW 1) and Yaabi Yahaya Maturu (DW2). It was the prosecution account that, on 20th August, 2020, the accused persons, Ally Salehe Chossy (deceased) and Ziada Yahaya Mkanilo were, at the material time, leaders of Ichunguro AMCOS as the chairman and secretary respectively. The duo, in the course of performing their duties, received cashew from farmers for purposes of storing in the godown and later on to sell it on behalf of the farmers including PW1 and PW2. However, things did not go the way it was expected. It was testified that in 2019 the cashew had no good market as such, after staying for a while in the godown without a buyer, it was resolved that cashew should be returned to the farmers. According to the prosecution evidence in particular PW1 Said Abdallah Likamba and PW2 Abdallah Mohamed Ngombelo as well as exhibit P1 and P2, PW1 submitted to AMCOS 535 kilograms of cashew valued at Tshs. 825,000/= whereas PW2 delivered 3667 kilograms of cashew valued at Tshs. 5,500,500/=. Following the resolution to return cashew to the farmers, PW1 and PW 2 went to AMCOS 4 to collect their cashew. However, the appellant could not give them back their cashew. As such, the incident was reported to the member of parliament and other government officers namely Ward Executive Officer (PW3) and PCCB office. It was testified that upon probe of the matter by PCCB, the accused admitted to have sold some cashew at a low price due to the fact that cashew had no requisite standards. The accused thus agreed to compensate the complainants in instalments and started to effect such payments. However, the complainants in particular, PW1 and PW2 did not agree with the low payments which the accused were ready to pay. The complainants insisted to be given back their cashew nuts so that they could look for their own market. Consequently, the matter was transferred from PCCB to police for further criminal investigation. It was the evidence of PW4 Beneth Kapinga and PW5 DC Frank that, through investigation, they found that the accused had sold the complainants' cashew without their consent. In defence, the appellant

denied the accusations. The appellant admitted to have been the secretary of AMCOS in the year 2020. She stated that she and the late Ally Salehe Chossy (deceased) received cashew from the farmers but could not find the buyer due to cashew's low grade. DW1 testified that, following lack of market, AMCOS convened a meeting with the farmers and principally agreed that farmers should be returned their cashew. However, the appellant denied her involvement in selling the complainant's cashew saying that it was Ally Salehe Chossy who sold it. With regard to TZS 700,000/= (exhibit P6) paid by her to the PCCB as compensation to the complainants, the appellant stated that it was due to pressure from the PCCB officers. The evidence of Yaabi Yahaya Maturu (DW2) had nothing useful to the appellant's case. She confirmed that it was agreed in the meeting to return cashew to the farmers. However, she was not sure whether the complainants got back their cashew. Upon conclusion of hearing, the trial court was satisfied that the prosecution case was proved to the hilt as such, it found the appellant guilty and consequently convicted her of stealing by agent as charged. In the results, the appellant was sentenced to serve four (4) years imprisonment or to pay half value of the cashew allegedly stolen. To use the trial court's own words, it said; 7 therefore sentence her to save (sic) four years imprisonment in default to pay half of the money (TSHS 6,151,000/=) complained by prosecution as actual of the cashew nuts. Discontented with both conviction and sentence, the appellant appealed to this Court. In her amended petition of appeal filed on 17th July, 2023, she advanced fifteen (15) grounds of appeal faulting the decision the trial court namely; 6

1. That, the Honourable trial magistrate erred in law and fact by convicting and sentencing the appellant basing on criminal charges while the matter was on its face purely a civil dispute.
2. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relied on the untenable and unreliable evidence of PW1 (SAID ABDALLAH LIKAMBA) at page 18-21 line 7 in the lack of cogent evidence to implicate the appellant with the charged offence contrary to the procedure of law.
3. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relied on the discredited evidence of PW2 (ABDALLAH MOHAMED NGOMBARO) which lacked any substantial value at page 21- 23 contrary to the procedure of law.
4. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relied on exh. PI and P2 (Receipts which were un-procedurally tendered by PW1 and PW2 at page 20 line 1-4 and page 22 line 1-8) without objection from the accused/appellant while the trial court erroneously failed to ask the appellant to object the tendering of those exhibits before admissibility contrary to the procedure of law.
5. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relied on the untenable and discredited evidence of PW3 SAID ABDALLAH SAID (WEO) which lacked any corroborative and probative value to link the appellant with the charged offence at page 25-26 contrary to the procedure of law.

6. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relied on the contradicted and discredited evidence of PW4 (BENEATH KAPINGA) PCCB Officer whose testimony partly deassociate/exhonorate the appellant and partly implicate the appellant in the lack of connative and cognitive evidence at page 24-34 contrary to the procedure of law.
7. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relying 7 on exh. P3, P4, P5, P6, P7, P8 and P9 (Payment agreement, special document for payment, Certificate of payment, Cash notes of Tshs. 10,000/-, demand letter for cash of the appellant, OC-CID letter to hand over exhibits and a letter from the PCCB office while the prosecution side failed to prove the chain of custody on those exhibits at page 29-33 contrary to the procedure of law.
8. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relying on exh. P3, P4, P5, P6, P7, P8 and P9 which were un-procedurally tendered by PW4 (BENETH KAPINGA) without objection from the appellant/accused while the trial court erroneously failed to ask the appellant to object the tendering of those exhibits contrary to the procedure of law.
9. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relying on exh. P1 and P2 (Receipts) which were un-procedurally tendered by PW1 and PW2 while the prosecution side failed to prove the chain of custody on those exhibits at page 20-22 contrary to the procedure of law.
10. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant relying on the discredited evidence of PWS CO. 5331D/C FRANK (Police Officer) at page 35-36 which lacked any probative value to link the appellant with the charged offence ab initio contrary to the procedure of law.
11. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant while erroneously failed to address the appellant properly in terms of law in the ruling of a prima facie case at page 37 after the prosecution case marked closed while it failed to assess, to analyze and to evaluate properly the evidence tendered by both parties contrary to the procedure of law.
12. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant while erroneously disregarded the defence testimony of DW1 appellant at page 40-41 and DW2 at page 43 which succinctly 8 7 raises sufficient reasonable doubt about guiltiness of the appellant contrary to the procedure of law.
13. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant while disregarding the prayer of the appellant DW1 to tender a documentary exhibit at page 40 line 1-16 while erroneously and biasly upheld the objection raised by the prosecution side without considering an expeditious of a fair trial and a balance of probability before rejection of a prayer.

14. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant while the charge sheet on the 2nd count was not read over to the appellant to enter plea of not guilty when it was re-amended by the prosecution side at page 17 last three lines to page 18- line 1-5 contrary to the procedure of law.
15. That, the Honourable trial Senior Resident Magistrate erred in law and fact by convicting and sentencing the appellant while the prosecution side failed to prove their charge beyond required standard of proof as it failed to summon its crucial witness named Stumai Mwaisaka to be attested before the trial court contrary to the procedure of law. Upon a cursory glance at the above grounds of appeal, I am opined that the appellant's complaints may be reduced into four grounds of appeal namely;
 1. That the trial court erred to entertain the matter while it was a purely civil matter.
 2. That the appellant did not plead to the second count hence her plea was equivocal.
 3. That the prosecution evidence was too weak to ground conviction 9
 4. That the documentary exhibits were tendered and admitted unprocedurally. It is noteworthy that, this appeal was disposed of by way of written submissions. The appellant enjoyed the services of Mr. Hussein Swedi, learned advocate whilst the Republic was represented by Ms. Gladness Mchami, learned State Attorney. While submitting in support of the appeal, the learned counsel for the appellant abandoned grounds number 4,8,11 and 13. Further, he consolidated grounds 2,3,5,6,7,9,10,12 and 15 and argued them conjointly whereas grounds No. 1 and 14 severally. Submitting in support of ground No. 1 of appeal to the effect that, the Honourable trial magistrate erred in law and fact by convicting and sentencing the appellant basing on criminal charges while the matter was on its face purely a civil dispute, Mr. Swedi analysed the facts of the case and the testimonies of PW1 and PW2 as summarised at page 2, 3 and 4 of the impugned judgment. He said that the complainants were aware that there was no good market for cashew and they had to wait to be paid after the same have been sold by AMCOS to prospective buyers. He further complained of the prosecution's failure to parade one Situmai Ally as their witness stressing that she was a key witness to prove the 1st count. io 7 It was Mr. Swedi's submission that, basing on the testimonies of PW1 and PW2, the relationship created between the farmers (PW1 and PW2 inclusive) and Ichunguro AMCOS falls under either a normal contractual relationship as per section 10 or an agency relationship under Part X of the Law of Contract Act, Cap. 345 [R.E 2019] respectively. He further referred this Court to section 134 of the Law of Contract Act which defines the term "agent" and "principal". The learned appellant's counsel said that according to section 134, agent is defined as a person employed to do any act for another or to represent another in dealing with third persons while the term principal has been defined to mean a person for whom such act is done, or who is so represented. In fine, the learned appellant's counsel for the appellant concluded that the appellant and the farmers had a principal-agent relation hence if anything went wrong, it is a breach of contract thereby resulting into civil claims. On that note, the appellant's counsel lamented that the matter was civil in nature hence the

trial court lacked the requisite jurisdiction to entertain the matter as a criminal case. To bolster his argument, he referred the court to the decision of Japhet Evod Mapunda & Two Others, PC Criminal Appeal No. 02 of 2021, HC at Songea (unreported). In reply to the 1st ground of appeal, Ms. Mchami had it that, the appellant did not dispute the fact that she was a secretary of the AMCOS and that, by virtue of her position, she was entrusted with 535 kilograms of cashew nuts by Said Abdallah Likamba (PW1) and 3667 kilograms of cashew by Abdallah Mohamedi Ngombaro (PW2) for safe custody pending availability of good market and sale. The respondent's counsel expounded that when the appellant was required to return the said cashew to the farmers, she failed to do so. She further added that the relationship between PW1, PW2 and the appellant herein was based on oral agreement which is acceptable. In that regard, the learned State Attorney strongly argued that this was a criminal matter and it was properly brought before the trial court. Submitting on grounds 2,3,5,6,7,9,10,12 and 15, Mr. Swedi, learned counsel for the appellant faulted the trial district court for convicting and sentencing the appellant based on the weak prosecution evidence. It was the counsel's argument that, according to section 273 (b) of the Penal Code under which the appellant was charged, the prosecution was required to prove two elements namely, that the stolen property was entrusted to the appellant and that the property was stolen by the appellant. As per the appellant's counsel, nothing in the trial court's record shows that the appellant was entrusted with the cashew purported to have been stolen. Rather, all prosecution witnesses identified the said AMCOS with different names such as Kanguro, Khanguro, Likumburu and 12 so forth to be the receiver of the allegedly stolen cashew with the appellant working as a secretary of the AMCOS. The appellants counsel added that, even the receipts tendered by PW1 and PW2 indicate the receiver different from the appellant. Thus, the appellants counsel opined that this was straight forward evidence to prove that the said cashew was not entrusted to the appellant. On whether the cashew was stolen, the learned appellants counsel at length on the testimony of PW4, a PCCB officer which is found at page 28, 29, 30 and 31 of the typed proceedings. The learned counsel forcefully argued that the element of stealing was not proved at all. In reply, the learned State Attorney submitted that Said Abdallah Likamba (PW1), Abdallah Mohamed Ngombaro (PW2), Said Abdallah Said (PW3), Beneath Kapinga (PW4) and DC FRANK (PW5) gave credible evidence which sufficiently proved all the charged offences. The learned State Attorney insisted that the prosecution evidence was cogent and consistent thereby sufficiently linking the appellant with the offences she was convicted of. In support of her argument, the learned State Attorney referred this Court to the case of Goodluck Kyando vs Republic (2006) TLR 363 wherein it was held that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. Regarding the complaints against admission of and reliance on documentary exhibits (P1, P2, P3, P4, P5, P6, P7, P8 and P9), Ms. Mchami submitted that, the impugned documentary exhibits could not easily be tampered with and PW4's evidence was that, some of the exhibits were kept by their office till 18/02/2022 when they were requested by the OC CID Mkuranga for further investigation (P3 - P4) while exhibits P1 and P2 were in possession of PW1 and PW2. In view thereof, the learned State Attorney stongly argued that

the complaints are unfounded. As such, she prayed the Court to dismiss them forthwith. The 14th ground was to the effect that, the trial court erred in law and fact by convicting and sentencing the appellant while the charge on the 2nd count was not read over to the appellant after amendment. The counsel explained that the alleged anomaly is found at page 15 of the typed proceedings. He continued that the proceedings dated 21st March, 2022 are silent whether the appellant was called on to plead when the charge in particular, the 2nd count was amended. Mr. Swedi submitted that the omission was fatal and it goes to the root of the whole proceedings. To back up his argument, the learned appellant's counsel cited the case of Ngaiaba Luguga @ Ndalawa vs the Republic, Criminal Appeal No. 66 of 2019, CAT at Shinyanga where the Court had this to say; "In the same vein, the appellant in the instant case did not enter a fresh plea following the amendment done, as such, he was not accorded a fair trial to the charge he was convicted of Legally, a conviction emanating from unfair trial is a nullity. In the premise, we are constrained to exercise our revisional powers bestowed on us under section 4(2) of the AJA and nullify the proceedings and judgment of the trial court. We further quash the conviction and set aside the sentence meted on the appellant. As to the way forward, Mr. Swedi beseeched the Court not to order a retrial on the ground that it would be prejudicial to the appellant. He referred the Court to the case of Fatehali Manji v. Republic, [1966] E.A. 343 which stipulated the conditions for ordering a trial. In the said case, the Court held that;- "In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence as for purposes of enabling the prosecution to fill in the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; Each case must depend on its own facts and circumstances and an order for retrial should only be made where interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person". In reply, the learned State Attorney conceded that non reading of the charge after amendment violated the provisions of section 234 (1) and

- (2) of the Criminal Procedure Act hence the proceedings were a nullity. However, on the way forward, she implored the court to order a re-trial from the stage at which a charge was substituted that is to say from the proceedings dated 21/03/2022 onwards. To back up her position, the learned State Attorney relied on the case of Omary Juma Lwambo vs The Republic, Criminal Appeal No. 59/2019, CAT at Dar es Salaam at page 9 and 10 in which the Court nullified the proceedings but ordered a retrial from the point when the charge was substituted. Having canvassed the rival submissions, I am grateful indeed to both counsel for their industrious and researched submissions. Suffice it to say that I have dispassionately considered both submissions in my deliberations. At this juncture, the relevant issue for determination is therefore whether this appeal is meritorious. As hinted above, the 2nd ,3rd ,5th ,6th ,7th ,9th ,10th ,12th and 15th grounds were consolidated and argued conjointly. After a thorough scrutiny of the complaints in above grounds along with the 1st ground, it is my view that the grounds require this Court to decide whether the charge

against the appellant was proved beyond reasonable doubts. However, for the reasons which shall be apparent shortly, I am not going to deliberate on this issue. I now turn to the 14th ground of appeal which faults the trial court for non-compliance of the provision of section 234 (2) (a) of the Criminal Procedure Act, [Cap. 20 R.E 2022]. It was the appellants submissions that the said provisions require a charge to be read over to the accused person for him to plead but in this case that was not done, Both counsel are one that, the omission to read over the charge to the accused person and calling upon her to plead was a fatal irregularity which cannot be remedied under the provisions of section 388 of the Criminal Procedure Act. On my part, I join hands with both counsel. As the appellant in the instant case did not enter a fresh plea after the amendment of the charge, she was 17 denied a fair trial whose legal consequences render a conviction emanating from such a trial is a nullity. In the premises, I am constrained to nullify the proceedings and set aside the conviction and sentence which resulted from nullity proceedings. In addition, upon perusal of the trial court record, I noted another monumental anomaly which unfortunately was not addressed by either party. It is common cause that the appellant was charged with three counts of stealing by agent. It was therefore incumbent upon the prosecution to prove all the three counts and, if all proved, the Court ought to specifically enter conviction for each count. However, in this case, the trial court entered an omnibus conviction which, in law, is untenable. At page 8 of the impugned judgment, the trial court held; 'I therefore find the accused guilty of the offence of stealing by agent as charged. I therefore convict her accordingly'. Admittedly, it is not clear as to which count among the three was the appellant specifically convicted of. As such, there was no conviction in law. Having made the above observations, I am of the considered findings that the trial of the appellant was marred with fatal irregularities. Consequently, I nullify the whole proceedings, quash conviction and set aside the attending sentence. Regarding the way forward, I have dispassionately considered the rival submissions and circumstances obtaining in this case. It is undisputed that the appellant has already served a substantial part of her prison sentence (about fifteen months). It is also undeniably clear that the appellant was charged and convicted of offences against property. There are direct individual victims namely, PW1 and PW2 whose cashew was allegedly stolen. In the circumstances, I find it in the interest of justice to have the matter determined on merits in order to decide the fate of the complainants' properties. On all the above account, I am constrained to order a retrial. This case should therefore be heard afresh before a different magistrate with competent jurisdiction. In the event, the appeal is allowed to the extent indicated. In the meantime, the appellant should be released from prison unless she is held for other lawful purpose. It is so ordered. Rights of appeal is explained Dated at Dgr esSalaam this 22TMJday ofDecember, 2023 A.A; Mbagwa JUDGE 22/12/2023 19

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