

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**SHINYANGA SUB REGISTRY**  
**AT SHINYANGA**

**PC. CRIMINAL APPEAL NO.202403012000005597**

*(Arising from Criminal Appeal No.17 of 2023 before Busega District Court, the same arise from Criminal Case No.119 of 2023 before Nyashimo Primary Court)*

**MAGESE MCHELE .....APPELLANT**

**VERSUS**

**STEPHANO GWANCHELE .....RESPONDENT**

**JUDGMENT**

**08<sup>th</sup> & 25<sup>th</sup> April 2024**

**F.H. Mahimbali, J**

The appellant filed Criminal charge against the respondent for theft of ten sacks of dengu. It was alleged that on 2/8/2023 morning hours the respondent did steal ten sacks of dengu the properties of the appellant. The trial Court after full consideration, dismissed the charge for lack of merit and thus the respondent was discharged.

The appellant was aggrieved by the decision of the trial Court, unsuccessfully he appealed to the first appellate court, he has now approached this Court for the second appeal, armed with a limb of four grounds of appeal which all fall under the question of evidence.

During the hearing of appeal, both parties appeared in person while unrepresented. Arguing for his grounds of appeal the appellant prayed for his appeal to be allowed based on the grounds of appeal he had filed. He further contended that he had a strong case against the respondent. He therefore, wonder why the respondent was not convicted by the trial court or first appellate court.

On the side of the respondent, he prayed for his reply to the petition of appeal to be adopted and form party of his submission. There was no rejoinder.

Upon scanning the trial Court records, petition of appeal and the submission of the parties, I have now to determine this appeal and the issue for consideration is whether this appeal is merited.

The appellant here alleged that his ten sacks of dengu were stolen by seven people, the respondent being one of them. He had contended that the stealing was done in his shamba measuring 16 acres. And thus, he witnessed the move and raised alarm for help. The matter went for conciliation but those people denied to have stolen the properties. He then decided to file criminal case against the respondent. Part of his evidence at the trial court goes this way:

*" nilikuta watuhumiwa saba shambani kwangu wakipakia dengi zangu kwenye mkokoteni"*

*SM2, " tulisikia kelele zikitoka mashambani, mimi na wanakijiji wengine tulisogea eneo la tukio. Tulimkuta mlalamikaji akisema ameibiwa dengi shambani, walikua wamekamatwa watuhumiwa"*

The respondent denies the allegation and averred that the appellant was arrested for stealing of one sack of dengi owned by the respondent. He was criminally charged in criminal case No.111/2023 which was pending before the Court.

*" hivyo shitaka hili limetengenezwa kwasabababu mimi ndiye nilimshitaki mlalamikaji kwa wizi wa dengi zangu kwenye shauri la jinai na 111/2023 linaloendelea hapa mahakamani lakini cha kushangangaza nikakamatwa na kubambikizwa kesi"*

*SU2 " nilisikia kelele za watu wakisema mwizi – mwizi nilienda eneo zilipokuwa kelele hizo niliwakuta watu wengi wamemzingira mlalamikaji akiwa ameshika gunia lililojaa dengi"*

*SU3 " nilimkuta mlalamikaji akivuna dengi kwenye shamba la mshitakiwa"*



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 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 wrongfully gained 'to himself or wrongful loss to another; and six, the property "was moved-and taken but without the consent from the possessor. **See D.P.P vs Shishir Shyamsingh, Criminal Appeal No.141 of 2021.**

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. 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, it was alleged that ten sacks of dengu were stolen by the respondent, but the same were not tendered to prove asportation. However, the question of ownership of the alleged cargo was not certain because each party claimed to be owner of it.

According to the particulars of the offence, the prosecution was required to prove at the trial that the respondent stole ten sacks of dengu as alleged fraudulently and without claim of right. I have closely examined the evidence for both sides in the record and like the first appellate Court, I entertain no doubt that the prosecution failed to prove the charge to the required standard.

I must emphasize that in criminal trial the prosecution is bound to prove the case beyond reasonable doubt instead of shifting the burden of proof to the accused, as it seems apparent in the case at hand. **In Fakihi Ismail v. The Republic, Criminal Appeal No. 146 "B" of 2019** (unreported), the Court stated that:-

*"It is elementary that the burden of proof in criminal cases rests squarely on the prosecution with no requirement that the accused proves his innocence"*

However, based on the evidence on records, it seems the appellant is the one who is mischievous against the respondent. Plainly the evidence of the respondent is watertight than of the appellant.

Meanwhile, I associate myself with the findings of the trial Magistrate that, the parties have land dispute which must be first be dealt with.

With all this observation, I must therefore conclude that this appeal has been brought without sufficient cause and consequently is hereby dismissed for being devoid of any merit.

DATED at Shinyanga this 25<sup>th</sup> day of April, 2024.



A handwritten signature in black ink, appearing to read "F.H. Mahimbali", is written over a horizontal line.

**F.H. Mahimbali**

**Judge**