IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO 58 OF 2023

(Originating from the Judgment of the District Court of Manyoni in Criminal Case No.147 of 2022 dated 27/04/2023)

SUBIRA IBRAHIM @ SIMULE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 13/03/2024

Date of judgment: 04/04/2024

LONGOPA, J.:-

The appellant, one **Subira Ibrahim Simule** was convicted and sentenced to one year imprisonment for the Offence of Stealing by agents C/S 273(b) of the Penal Code, Cap 16 R.E. 2019. Also, the appellant was ordered to pay compensation of TZS 32,560, 794/= as the value of the lost/stolen fuel.

The facts of the case in summary are that: the appellant stood charged for two counts, namely stealing contrary to section 258(1) and(2)(a) and 265; and stealing by agents contrary to section 273(b) of

the Penal Code, Cap 16 R.E 2019. It is alleged that between 30/05/2021 to 03/06/2021 at the Afroil Petrol Station located at Kipondoda within Manyoni District, the appellant did steal 11,854 litres of diesel and 3,054 litres of petrol valued at TZS. 32,560, 794/= property of Afroil Investment Limited that was entrusted to her for safe custody and sale but did not do so. It is the assertion of the respondent that the appellant stole the fuel or through the position of being entrusted the appellant stole the said fuel.

The appellant denied the charges levelled against her and the prosecution had to call a total of six witnesses and seven (7) exhibits while the defence rallied two witnesses to rebut the allegations. At the conclusion of the hearing of the case, the District Court on 27th April 2023 acquitted the appellant in the first count of stealing and convicted her for the offence of stealing by agents thus sentenced her to one year imprisonment and order to pay fine.

Being dissatisfied by the decision of the District Court, the appellant is challenging the whole of the decision both conviction and sentence. The amended petition of appeal contains the following grounds of appeal, namely:

> *1. That, the trial court erred in law and in fact for convicting the appellant while prosecution failed to prove the offence on the required standard in criminal cases;*

2. That, the trial court erred in law and in fact for relying on evidence that was contrary to the charge;

3. That the trial court made procedural mistakes in admitting exhibit M-5.

4. That, the trial court erred in law and fact for convicting the appellant on the second count while she was improperly charged.

On strengths of these grounds, the appellant prays that this Court be pleased to allow the appeal, quash the conviction, and set aside the sentence against the appellant as well as an order of compensation and set the appellant at liberty.

On 13th March 2024 when the appeal was scheduled for hearing the appellant enjoyed the legal services of Mr. Paul Eugen, learned advocate and the respondent enjoyed the legal services of Mr. Francis Mwakifuna, learned State Attorney.

During oral submission, the appellant abandoned the third ground of appeal thus only three grounds of appeal were submitted on. The appellant argued that on the first and second grounds of appeal jointly, it is submitted that the charge indicated that a total of 11,854 litres of diesel and 3054 litres of petrol. Total value is TZS 32,560,794/=. That fuel was

entrusted to the appellant and stealing was done between 30/05/2021 to 03/06/2021 during the daytime.

It was argued that evidence does not support the charge as no single witness testified that stealing was done during the daytime. PW 3 stated that stealing was done on 02/06/2021 at night. PW 4, an auditor tendered exhibit M 6 and stated that the audit period covered from 1st May 2021 to 02/06/2021 while the charge sheet indicated that the offence was committed between 30/05/2021 and 03/06/2021. At the same time, page 1 of the report reveals that loss of fuel from first January 2021 to 02/06/2021. It was submitted that this report is contradicting the charge that was brought to Court given that it was the main evidence relied on by the trial Court.

The appellant submitted that there is conspicuous contradiction on the number of litres of diesel and petrol alleged to been stolen. Exhibit M6 stated the litres to be 11, 853 litres of diesel. The charge stated that the stolen litres of diesel was 11,854 and for petrol stolen litres are said to be 3,054. At the same time, oral testimony of PW 4 stated that total of 11,500 litres of diesel were stolen while 3000 with points litres of petrol were also not accounted for.

Also, there is difference on the amount of compensation arrived at by the trial court with evidence tendered in court. The trial court ordered compensation of TZS 32,560,974/= despite absence of any evidence of

value of alleged stolen fuel. PW 1 stated that the value is 32,500,000/=and some cents. The two are not the same and they do not tally.

It was argued by the appellant that difference of the evidence and the charge however small or little it should be interpreted in favour of the appellant. That principle was not done by the District Court. That was an error on the part of the trial court.

Further, it was submitted that two aspects call for this Court to consider regarding adverse inference to be drawn on the prosecution's case. First, at the scene of crime there are perfectly working CCTV cameras, but no CCTV footage was tendered in the trial court that could have established the commission of the offence. Second, there was an important witness named as dipping officer one Mr. Mdachi in the evidence of PW 3. This is the one taking measurements of stock of fuel in the morning and evening daily. It is necessary to form an adverse inference on the prosecution evidence for failure to bring this important witness. This is in accordance with a principle enumerated in the case of **Aziz Abdallah versus Republic** (1991) TLR 71.

It was further articulated that there is no evidence on standards of the reserve tanks for fuel to verify that the fuel was stolen and not otherwise. Also, there were no receipts and books of account(recordings) tendered indicating sales to validate that the stealing happened.

It was reiterated that in the offence of stealing by agents there must proof of two things/ ingredients. First, the property stolen was entrusted on the appellant for safe custody/ keeping. Second, the money or property was stolen by the appellant. The witnesses stated that appellant was entrusted with the property. There is no witness that the appellant is one who stole or seen stealing the property.

The appellant also argued that in the cautioned statement of the appellant she did not admit to have stolen any fuel. The appellant only accepted to have been entrusted with fuel for safe custody and sale. In the first offence stealing, the appellant was discharged as it was not proved. Failure to prove the two elements of the offence is clear failure to prove the case against the appellant. The case of **Agnes Nyamuhanga vs the Republic**, Criminal Appeal No. 341 of 2018 at pages 18-23.

On the last ground, the appellant submitted that the offence of stealing by agents C/S 273(b) of the Penal Code, is a theft related offence thus it was incumbent to include Section 258(1) and (2) (a) of the Penal Code in charging the offence. It was submitted that failure to include it amounts to denial of the right to clearly understand the nature of charge the appellant is stood charged. He submitted that the accused/appellant was improperly charged. The appellant cited a case of **Meck Malegesi and another vs Republi**c, Criminal Appeal No. 128/ 2011 where at page 8 the Court of Appeal restated the need of inclusion of the Section 258(1)

and (2) (a) of the Penal Code in charging the offence of stealing by agents as necessary to prove the offence of stealing by agents.

It was the appellant's submission that for all these reasons, it can be concluded that the case against the appellant was not proved within the required standards thus this court is enjoined to quash the decision of the District Court of Manyoni that convicted the appellant and set aside the sentence and the order of compensation.

Mr. Francis Mwakifuna, State Attorney did not support the appeal. He reiterated that the grounds of appeal lack merits thus in the respondent's view that conviction and sentence are both proper and this appeal be dismissed.

The respondents argued that on the first and second grounds of appeal, case was proved within the required standard, that is beyond all reasonable doubts. The stealing by agents offence was proved as all elements were proved. These elements are: First, there must be property entrusted to the appellant for safe custody; Second, that property is lost while in custody of the appellant.

The respondent argued that PW 1 tendered Exhibit M2, a letter of employment of the appellant that demonstrates that it was the duty of the appellant to supervise and manage the petrol station including to control incoming and outgoing fuel. PW 2 proved that he entrusted a total of

34,500 litres of fuel to the appellant as evidenced by delivery note as Exhibit M-4. The fuel included 23,000 litres of diesel, 6500 litres of petrol and 5000 litres of kerosene.

According to the respondent, PW 1 and PW 2 established the ingredients of the offence. They have established the elements of being entrusted with the property and the appellant had duties as manager to manage, supervise and control the fuel at the petrol station.

On the difference of dates between the auditor's report, it is submitted that the testimony of PW 4 stated that the audit was done between 30/5/2021 and 03/06/2021. In that report what was considered was the loss of fuel that was received on 30/05/2021. The focus is to show loss of fuel.

It was submitted that the cautioned statement tendered and admitted as Exhibit M-7 is vital as the appellant admitted having received fuel on 30/5/2021 and admitted that the same was lost while in her custody. It was submitted that this evidence corroborates evidence of PW 4. It was respondent's view that the difference does not touch on the root of the case as contents of the report is corroborating the cautioned statement.

Respondent argued that on the difference on the litres of fuel that were entrusted to the appellant, PW 1 stated that 11, 854 litres of diesel

and 3054 litres for petrol were missing. PW 4 found that total of 11,500 with some points litres of diesel and 3000 and points litres of the petrol were missing. It was argued that there is not so much difference on the amount stated in the charge and the evidence tendered in Court including Exhibit M-6. It is submitted that witnesses of the prosecution established the offence against the appellant. These are testimonies of PW 1, PW 2, PW 3, PW 4 and PW 5. It was further cemented by Exhibit M-7 which is an admission by the appellant in cautioned statement. The proof was sufficient to establish the offence.

On CCTV camera footage absence, respondent submitted that CCTV camera footage were not important as they could not establish the theft. The prosecution established that there was receipt of fuel and loss of fuel.

In the last ground, on elements of offence it was reiterate that all the ingredients were fully established by virtue of Section 273(b) of the Penal Code, Cap 16 R.E. 2022. There was proof that appellant was entrusted with the property and the loss of the same was established. The first element was established by Exhibit M-2 the employment letter where the appellant was entrusted to manage and supervise the petrol station from the receipt of the fuel to final sale.

The respondent summed up on ingredients that Exhibit M-6 reveals that appellant was entrusted with 34,000 litres and the delivery note Exhibit M-4 reveals total of 34,500 litres were entrusted. PW 1 established

that total of 11, 854 litres of diesel and 3054 litres of the petrol were missing. PW 4 confirmed the loss of the fuel while the cautioned Statement as Exhibit M-7 confirmed admission of the loss of fuel. The respondent's side is satisfied that the offence was proved to the required standard.

It was the respondent's view that two cited cases are distinguishable. In the case of Agnes Nyamuhanga, circumstances were different as in that case the appellant was not an employee, there were no witnesses as to the delivery while in the instant appeal there was proof of delivery. The respondent is of the view that that case is not applicable. Similarly, in Malegesi Case, it is distinguishable as stealing by agent is independent offence under section 273(b) of the Penal Code and its elements are therefore only those stated in that section. Section 258(1) and (2)(a) of the Penal Code was not required to be included in the charge. Those elements were included in the first offence which related to the offence of stealing. The elements of stealing by agent were proved.

It was argued that witnesses and exhibits were sufficient to establish offence of stealing by agents as corroborated by M-6. In the case of the **Republic versus Leopold Makolwe @Elias**, Criminal Case No. 13 of 2010 the court stated that evidence of admission/ confession by the appellant or accused person is strong evidence. The respondent reiterated that this appeal be dismissed for lack of merits.

On rejoinder, the appellant submitted that timing of the offence was very necessary to be established. The charge stated that the offence was committed in daytime and no evidence supports that aspect. The respondent admits that time of commission of the offence has not been established.

Exhibit M-6 has differences on date, PW 4 stated that the offence as per audit was done between 30/5/2021 and 03/06/2021. It is evident that there were disparities of the witnesses in oral testimonies and documentary evidence in terms of exhibits. The oral evidence cannot override documentary evidence/ written evidence.

It was submitted that in Exhibit M-7 reflects that appellant admitted being the manager of the petrol station, but she never admitted the offence of stealing by agents. Thus, there were no admission to the commission of the offence to warrant conviction.

On difference in dates, it was submitted that it is fatal as difference of dates goes to the root of the case. Simply, report having different dates with the occurrence of the offence has effect that such offence or matter was either premediated and pre-planned against the appellant or it did not happen.

Also, the question of difference in the number of litres stolen should not be over emphasized as such difference between the charge and

evidence on fuel that is core of the case amounts to failure to prove the case as it is stated in the charge.

With respect to adverse inference on the dipping officer, it is submitted that it was the duty of the prosecution to prove the case against the appellant beyond reasonable doubt. That duty cannot shift to the defence side.

It was reiterated that in the case of **Agnes Nyamuhanga** has the same circumstances as it is in the instant appeal. The appellant in that case was entrusted with all the property. The elements of the offence are the same. They do not choose between employee or otherwise except on circumstances. The prosecution was focusing only on element of being entrusted with the property but not stealing of that property.

Moreover, in **Malagesi's case**, it was argued that inclusion of that section 258(1) and (2)(a) that was left out is mandatory. Leaving the same out means that particulars of the offence are not disclosing the elements of stealing. The inclusion of that section was mandatorily required.

It was argued that a case cited by the respondent is not relevant as in the instant appeal the appellant has never admitted having committed stealing by agents. The cautioned statement has no admission of the stealing element.

In the circumstances of the appeal, the case was not proved against the appellant to the required standard thus it was not established as there are lot of reasonable doubts given that the appellant was not properly charged. All those doubts are to be interpreted in favour of the appellants.

The appellant prays that this appeal be allowed, conviction of the District Court of Manyoni against the appellant be quashed and the sentence be set aside as well as compensation order to set aside. It was the view of the appellant that at the end, the appellant be set free.

I have dispassionately considered the submissions of the parties, grounds of appeal and record of the trial Court both judgment and proceedings to determine validity or otherwise of the appeal.

The main issue before this Court is whether this appeal has merits. To determine such merits or otherwise, it is important to address some of the pertinent issues: First, the analysis of evidence by the trial court. Second, variance between the charge and the evidence adduced by the prosecution in court and its effect. Third, ingredients of the offence of stealing by agents and its proof. Fourth, totality of evidence in relation to discharging the burden and standard of proof.

Analysis of evidence by the trial Court is the first aspect to address in this appeal. The record of trial court reveals that: First, trial magistrate summarised the evidence of both sides on pages 2 and 3 of the judgment.

There is analysis in respect of two counts on pages 4 and 5 of the judgment as well. Second, the trial court found that first count was not proved i.e. stealing offence. Third, the appellant was found guilty in the offence of stealing by agents by reasons that a total of 11,854 litres of diesel and 3054 litres of petrol entrusted on the appellant were missing or stolen. These are the same litres stated in the charge.

The importance of proper analysis and scrutiny of the evidence on record has been subject of the Court's decisions. For instance, in **Method Kaluwa Chengula vs Republic** (Criminal Appeal No. 92 of 2021) [2023] TZCA 112 (10 March 2023) (TANZLII), the Court of Appeal, at page 8 emphasized that:

> *It is trite that, evaluation of evidence entails subjecting the entire evidence to scrutiny before making any finding of guilt or otherwise. We have said so in many of our decisions that summary of the evidence is not the same as evaluation of it. See for instance:* ***Leonard Mwanashoka v. Republic,*** *Criminal Appeal No. 226 of 2014 and* ***Mkulima Mbagala v. Republic****, Criminal Appeal No. 207 of 2006 (both unreported). As seen earlier, the trial court did not analyse the evidence on record before making of a finding of guilt against the appellant.*

Having analysed the evidence and found that appellant was guilty of commission of the second count, the main question is whether the available evidence on record support that finding. In course of analysis, I am inclined to state that it appears that the answer is in the negative. This shall be demonstrated in addressing the remaining issues.

Let me address the second issue on variance between charge and evidence adduced by the prosecution. I shall summarize evidence of prosecution and analyse whether the same tally.

PW 1 stated that the appellant was entrusted with fuel as a manager of Afroil Petrol Station in Manyoni and a total of 11,854 litres of diesel as well as 3054 litres of petrol were stolen while in appellant's custody. According to PW 1 the value of the fuel was TZS 32,500,000/=. PW 4 had two version of evidence on the same aspect. First, oral testimony of PW 4 reveals that 11,500 litres of diesel and 3000 litres of petrol were missing upon the completion of audit exercise. Second, the Exhibit M-6 reveals that a total of 11,853 litres of diesel were missing.

It is lucid that the evidence of PW 1 and PW 4 relating to the total litres of fuel allegedly to have been stolen is at variance. There are three versions of the amount of fuel stolen. The first version is 11,854 litres of diesel and 3054 litres of petrol as per charge and evidence of PW 1. The second version is that 11,500 with some points litres of diesel and 3000 with some points litres of petrol were missing/stolen as per oral testimony

of PW 4. This is reflected at page 38 of the proceedings. Third version is on Exhibit M-6 that a total of 11,853 litres of diesel were stolen/ missing. This is reflected in pages 2 and 3 of the report.

The second aspect on variance appears on the evidence of PW 1 and PW 4 regarding the dates of the alleged loss/stealing of the fuel. PW 1's evidence is to the effect that the offence occurred between 30/05/2021 to 03/06/2021. The evidence of PW 4 oral and exhibit M-6 are to the effect that the audit report relates to loss of fuel between 1st January 2021 to 2nd June 2021. In the same report, title appears that it is special audit of the loss of fuel for period on 1st May 2021 to 2nd June 2021. In the oral evidence of PW 4, it is revealed that audit covered 1st May 2021 to 3rd June 2021. These dates seem to be different. If the audit was from 1st January 2021 to 2nd June 2021 or from 1st May 2021 to 2nd or 3rd June 2021, the same would tally with the charge. The charge covers a period of 30/05/2021 to 03/06/2021. The differences in periodization between the charge, the evidence of PW 1 and PW 4 as well as the report Exhibit M-6 raise doubts as to the occurrence of the alleged offence.

The third variance is on the value of the alleged stolen fuel. The charge indicated that 11,854 litres of diesel and 3054 litres of petrol were valued at TZS 32, 560, 794/=. The evidence of PW 1 at page 15 of the proceedings was to the effect that the value of alleged stolen/ missing fuel is TZS 32,500,000/= and some cents. This is controverted categorically by evidence of PW 4 who is page 41 stated that audit was on loss of fuel and not examining or auditing financials/ amount of money derived from the

delivered fuel. However, Exhibit M-6 which was tendered by PW 4 indicates that loss in monetary form amounted to TZS 25, 460,244/= for diesel and TZS 7,100,550/= for petrol. Total amount according to the report would be TZS 32,560,794/=. However, the number of litres between the charge and the audit report are different. That raises alarm that either the charge or report is doubtful as oral testimony do not tally with documentary evidence of the same witness. It means the exceeding litre of diesel in the charge had no value in cash terms. The value of fuel in monetary terms in the charge cannot be reconcilable with oral testimonies of PW 1 and PW 4. They do not mean one and the same thing.

With the variance between the charge and evidence on record, it cannot certainly be said that there was sufficient evidence to warrant conviction of the appellant on count of stealing by agents. I am of settled view that the charge was not proved in the circumstances of the case.

I am comfortable that this is the legal position to take as per decision of the Court of Appeal in the case of **Francis Fabian @ Emmanuel vs Republic** (Criminal Appeal No. 261 of 2021) [2023] TZCA 17936 (12 December 2023) (TANZLII), at page 3, the Court of Appeal reiterated on the crucial role of the charge. It stated that:

> *In the circumstance of this appeal, we want to sound a note on the propriety of proving the contents of the charge sheet. We presuppose, it is an elementary knowledge of*

criminal justice that, the cornerstone of any criminal trial is the charge sheet. The charge sheet is a heart, brain and blood of criminal justice and fair trial. It plays a duo role of informing the accused person on the nature of his accusation and allow him to prepare his proper defense. Apart from that, the charge sheet notifies the trial court on the subject matter with a view to determining its jurisdiction and prepare the proper procedure to be applied during trial. Therefore, the charge sheet is the most important document in any criminal trial.

It is pertinent that this crucial document in administration of justice must be supported by cogent evidence that tally squarely with the particulars of the charge. Disparities between the charge and the evidence have insurmountable effect on the case. To apply the words of the Court of Appeal in **Francis Fabian @ Emmanuel vs Republic (supra**), at pages 4-5, the Court noted that:

*Moreover, it is a duty of the prosecution to produce all necessary evidence to each and every allegation made therein. In the case of **Abdel Masikiti vs. Republic**, Criminal Appeal No. 24 of 2015 (unreported) at page 8 thereof, this Court insisted that, **it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the***

charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates or month, then the charge must be amended in terms of section 234 of the CPA. If this is not done as in this appeal, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur.

It should not be re-emphasized that the prosecution being the initiators of the charge have been empowered by the law to amend the charge at any stage of the trial to address the anomaly on variance between charge and evidence under section 234 of the Criminal Procedure Act, Cap 20 R.E. 2022. Failure to seize such opportunity to amend the charge the conclusion of the case has only single effect of failure to prove the charge thus the accused is entitled to acquittal because the number of litres differed between the charge and evidence as well as timing of occurrence of the offence with alleged dates in the charge. This is despite that investigation, according to PW 5's evidence, commenced in 16/07/2021 while the audit report was in existence as it had already been submitted to the Complainant on 24/06/2021. The prosecution would have amended the charge accordingly.

This position was reiterated in **Frenk Onesmo vs Republic** (Criminal Appeal No. 476 of 2020) [2024] TZCA 41 (14 February 2024)

(TANZLII), the Court of Appeal observed on difference of charge and evidence. At page 11, it stated that:

> *We propose to decide another issue relating to the evidence being at variance with the charge which was argued by the learned State Attorney. We are in agreement with her that, while the particulars of the offence alleged that the offence of rape was committed between 22nd May, 2017 and 22nd August, 2017, the victim testified that her sexual relationship with the appellant started in April 2017. T**hus, had the prosecution found this variance, they ought to have amended the charge in terms of section 234 (1) of the CPA. However, the prosecution did not comply with the law and therefore the charge remains unproved.** See also; **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No. 175 of 2018 (unreported).*

I cannot agree with the submission of the respondent's learned State Attorney that the variance is minor, and it does not touch the root of the case. I am of the different view altogether. The charge is based on stealing of fuel namely diesel and petrol entrusted on the appellant. As such any departure on either the amount of fuel, dates on which the same happened and the value of the same must be interpreted in favour of the appellant. If the prosecution is not certain on total litres that were alleged to have been

stolen by the appellant, it raises doubts as to the occurrence of such incident at all.

The third issue is on the ingredients of the offence in charge and its effect. The departure between the parties is on whether the charge against the appellant was proper. The appellant was charged with offence of stealing by agents c/s 273(b) of the Penal Code, Cap 16 R.E. 2022 which states that:

> *273. Where the thing stolen is any of the following things, that is to say-*
> *(a) N/A*
> *(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 any of its proceeds for any purpose or to any person; the offender is liable to imprisonment for ten years.*

According to the appellant, this charge was defective given that this section cannot stand alone in charging the accused. The charge must include provisions of section 258(1) and (2) (a) of the Penal Code, Cap 16 R.E. 2022 as it is theft related offence whose elements/ingredients are normally traced in that section. The respondent is of the opinion that there was no need to including section 258(1), and (2)(a) of the Penal Code as it

is an independent offence which do not require any cross-reference to any other provision.

In essence, the appellant argues that the charge was defective for failure to include important provision establishing the ingredients of the offence. To discern that aspect, it is important to analyse the position taken by the superior court in the land. The Court of Appeal has set a criterion applicable where there are allegations of defectiveness of the charge. This is in the case of **Joakim Mwasakasanga vs Daniel Kamali & Others** (Criminal Appeal No. 412 of 2020) [2023] TZCA 55 (24 February 2023), where it was stated as follows:-

> *Normally it is the accused who would raise the complaint of a defect in the charge, be it during trial or on appeal. Courts have dealt with such complaints in two ways depending on the circumstances of each case. One, by sustaining the complaint where they take the view that the accused will be prejudiced by the defect. See the case of Antidius Augustine v. Republic, Criminal Appeal No. 89 of 2017 (unreported). The other way is by treating the defect as curable and inconsequential where they are satisfied that it does not occasion a miscarriage of justice or prejudice the accused. The latter is a more contemporary position of the law, but always depending on the circumstances. See the case of Abubakari Msafiri v. Republic, Criminal Appeal No. 378 of 2017 (unreported).*

In fact, Section 273(b) of the Penal Code refers to "where a thing stolen" to mean that in such offence prosecution should first establish existence of ingredients of stealing for the charge to be proved. I concur with counsel for the appellant that non inclusion of the section creating elements/ingredients of the offence of theft denied the appellant to clearly understand the nature of the charge she was facing.

In **Meck Malegesi & Another vs Republic** (Criminal Appeal 128 of 2011) [2013] TZCA 410 (31 July 2013), at pages 8 and 9, the Court of Appeal stated that:

> *Component of stealing is also integral to the offence stealing by agent for which the appellants were tried and convicted. In order to prove, as against the appellants, the offence of stealing by agent; the prosecution was required to bring its case within the ingredients of theft under section 258(1) and (2)(a) of the Penal Code. In the above cited section 258(1) and (2)(a), the first essential ingredient constituting the offence of theft is the proof beyond reasonable doubt that the taking of the pump was without claim of right. That taking of the pump is the physical part or actus reus of the offence of theft.*

Accordingly, the charge was defective by failure to include the necessary section for establishing the ingredients of the offence. I state so

because the main ingredients are two, namely: first, that the property was entrusted to the appellant so as to retain it in safe custody; and second, that the said property was stolen by the person entrusted to keep it.

These elements were emphasized by the Court of Appeal in the case **Agnes Nyamuhanga vs Republic** (Criminal Appeal 341 of 2018) [2022] TZCA 465 (22 July 2022), at page 18 where the Court reiterated that:

> *In present case, the parties are at idem that the provision under which the appellant was charged and convicted of, required the prosecution to prove two elements, one; that the money stolen was entrusted to the appellant for safe keeping, and two; that money was stolen by the appellant.*

On page 1 of the judgment, trial Court stated categorically that the second count is stealing by agent c/s 273(b) of the Penal Code. It was alleged that between 30/05/2012 to 03/06/2021, tat Afroil Petrol Station located at Kipondoda in Manyoni District the appellant **stole** 11,854 litres of diesel and 3054 litres of petrol all valued at TZS 32,560, 794/= property of Afroil Investment Limited that was entrusted to the appellant for safe custody and sale, but she did not do so.

The evidence on record established that there was a property entrusted to the appellant. There was no doubt about the first element. However, there is no proof that the appellant is one who stole the fuel

alleged to be missing. Thus, the second ingredient of the offence lacked cogent proof that it is the appellant who did steal such fuel. Thus, despite the charge being improper, the prosecution concentrated on proof of element of appellant being entrusted with the fuel which has abundancy of evidence but not on the element that it is the appellant who stole the fuel was neglected as there very scanty or no evidence to establish that fact.

The question of drawing adverse inference on failure to bring an important witness in trial court, I am of the view that it should not detain the Court. The person stated to be important featured in the evidence of PW 3. In my view, the dipping officer would have been necessary to be called if the complainant (PW 1) had stated about the person in his evidence. I state so given the fact that it is the PW 1 who complained to the police on alleged discovery of the missing/stolen fuel.

There is guidance on drawing of negative inference on prosecution evidence. In the case of **Ahamad Salum Hassan @ Chinga vs Republic** (Criminal Appeal No. 386 of 2021) [2023] TZCA 44 (22 February 2023), at page 12, the Court of Appeal underscored on adverse inference. It stated that:

> *...for undisclosed reasons, the prosecution did not produce any witness from police to explain the reason behind such a delay. Neither did they produce the father of the victim who is said to have reported the matter to the Village Executive officer. The position of law is that, failure to call*

a witness who is in a better position to explain some missing links in the prosecution case justify an adverse inference against the prosecution.

Also, in the case of **D.P.P.s vs Akida Abdallah Banda** (Criminal Appeal 32 of 2020) [2023] TZCA 209 (28 April 2023), Court of Appeal has a reiterated the need to carefully invoke the adverse inference by the 1st appellate Court. It stated at page 11 of the decision that:-

Going by the principle embodied in section 143 of the Evidence Act that no particular number of witnesses is required to prove a particular fact, and we have held so in a string of our decisions, and having subjected the evidence to that fresh scrutiny as a first appellate court, we are of the considered view that the learned trial judge jumped into barbed wires in taking inference adverse to the prosecution for not calling those two witnesses while the substance of their testimony was covered by the testimony of PW4 and PW6.

As I have stated that in my view, evidence of PW 3 was not material to the case thus having named one Mr. Mdachi as the dipping officer who took measurement of fuel at the Petrol station twice daily cannot alone lead to this Court to draw adverse inference of the prosecution evidence.

The last aspect is whether totality of evidence on record warranted conviction of the appellant in the circumstances. I have demonstrated in the foregoing part of this decision that there was variance between the charge and the evidence adduced in Court especially PW 1 and PW 4 who are the complainant and auditor respectively on the amount of fuel stolen, value of the fuel and the timing of the same; there exist defective the charge and absence of evidence to substantiate an important ingredient that it is the appellant who stole the fuel in question. I am of the settled opinion that these weaknesses touch the root of the prosecution's case thus the case against the appellant was not proved to the required standard.

The weaknesses have impacts on the prosecution's case as they have dented the evidence. They have impaired reliance on the available evidence to be unsafe for conviction. There are reasonable doubts to the prosecution case. In the case of **Chausiku Nchama Magoiga vs Republic** (Criminal Appeal No. 297 of 2020) [2023] TZCA 17810 (9 November 2023) (TANZLII), the Court of Appeal observed that:

> *The duty of the prosecution to prove a criminal case beyond reasonable doubt is universal and, in our case, it is statutorily provided for under section 3 (2) (a) of the Evidence Act, Chapter 6 of the Revised Laws. Further, in the case of* ***Woodmington v. DPP*** *[1935] AC 462, it was held inter alia that, it is a duty of the prosecution to prove*

the case and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. In the case of ***Magendo Paul & Another v. Republic*** *[1993] T.L.R. 219, the Court held 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."*

At the end, it is my findings that the trial court's conviction was based on contradictory evidence that had not established all the ingredients of the offence of stealing by agents. There is no evidence that it is the appellant who stole the fuel in question. Thus, the court ought to have acquitted the appellant for failure by the prosecution to prove the case beyond reasonable doubt. The sentence of one year imprisonment and order of compensation was not based on available evidence on record.

It is intriguing as to the basis of the trial court to order compensation while the evidence on record had lucid variance as the PW 1's evidence (Complainant) is that value was TZS 32,500,000/= and some cents which is not the same as in the charge. The order of compensation by trial court exceeds the amount stated in the evidence. It is contrary to the law. As such, there was no basis for the trial magistrate to award compensation which was not proved.

In totality of events, I am of the settled opinion that it was improper for trial Court to enter conviction and sentence against the appellant on the disjointed evidence on record. At this juncture, I am of the settled view that all the three grounds of appeal have merits and I shall proceed to uphold them.

In the upshot, I find this appeal has merits. I quash the conviction of the appellant by the District Court of Manyoni for the offence od stealing by agents as it was not proved. I set aside both the sentence entered and the order of compensation for being violative of the law. The appellant is hereby set free unless there is any other lawful cause to the contrary.

It is so ordered.

DATED at **DODOM**A this 4th day of April 2024.

E.E. LONGOPA
JUDGE
04/04/2024.