

**IN THE COURT OF APPEAL OF TANZANIA  
AT BUKOBA**

**(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 478 OF 2015**

**JOSHUA MULINDWA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Bukoba)**

**(Mwangesi, J.)**

**dated the 21<sup>st</sup> September, 2015  
in  
Criminal Appeal No. 41 of 2014**

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**JUDGMENT OF THE COURT**

**22<sup>nd</sup> & 24<sup>th</sup> February, 2016**

**KILEO, J.A.:**

This is really an open and shut case as it will shortly become apparent in the course of our discussion. On 12<sup>th</sup> May, 2013 PW1, the Headmaster of Bukoba secondary School was informed that the keys of the school's academic office were missing. After consultations with his colleagues it was decided that the padlock be changed. The same day when the decision was made that the padlock be changed it was

discovered that 125 academic certificates and 75 results slips for form IV and Form VI of different academic years were missing. Subsequently, PW1 received communication from someone who purported to have the certificates and the results slips. This person, who turned to be the appellant Joshuas/o Mlindwa, (a security guard at the school) at first demanded Tshs. 2,600,000 /- from PW1 so that the documents could be returned to him, but after negotiations the amount demanded was reduced to Tshs. 1,500,000/-. PW1 was directed to send the money through M-Pesawith mobile telephone no. 0766116147. PW1 decided to involve the police who in the course of their investigations arrested the appellant. When the appellant's house was searched he was found in possession of 123 academic certificates and 41 results slips that were stolen from the school. The appellant admitted, during the tendering of the certificates at the trial, that they were indeed found in his house. He also admitted that he had sent some to the headmaster. This corroborated the evidence of PW1 that in the course of communicating with the appellant he had received 3 certificates and 3 result slips as proof that he (appellant) had in his possession the documents for which he was extorting money before their release. The appellant at the trial also admitted that he was found

with office keys belonging to Bukoba Secondary School. Such admission and the admission that he was found with the certificates and result slips that were stolen from the school is reflected on page 18 of the record. On the same page the appellant is recorded as admitting to have used sim card with number 0766 116147 in his communication with PW1 and further that this is the number that the money was sent through. The appellant gave a cautioned statement which was tendered in the trial court and which was not objected to. Basically in the cautioned statement the appellant admitted to have been found with the stolen documents. He also admitted to have registered the sim card with no 0766116147 that he was using in the name of Adolf Samwel.

Initially the appellant was charged along with Erick s/o Daniel before the District Court of Bukoba on three counts. On the first count they were charged with breaking into a building and committing an offence contrary to section 296 (a) of the Penal Code, Cap 16 R. E. 2002. On the second and third counts they were charged with stealing contrary to section 265 of the Penal Code it being alleged for the first count that they stole 118 academic certificates and 42 result slips for form four and form six issued by NECTA. On the third count they were alleged to have stolen a bundle of

keys, the property of Bukoba Secondary School. The appellant's co-accused whose link to the crime was merely the mention of his name by the appellant was acquitted and appellant was convicted on all three counts. He lost his appeal in the High Court except for conviction and sentence on the third count which the High Court found to have been duplication. Still being aggrieved he has come before the Court on a second appeal.

When the appeal came up for hearing the appellant appeared in person while the respondent Republic was represented by Mr. Hashim Ngole, learned Principal State Attorney. Before the appeal proceeded to hearing the appellant prayed and was allowed to make some amendments to his first ground in the memorandum of appeal. He asked us to substitute section 58 (1) (a) of the Criminal Procedure Act, Cap 20 (CPA) with section 50 (1) (a) of the same Act which appeared in ground one. Apart from that he opted to have Mr. Ngole make his submission first. The appellant's grounds of appeal thus read:

- 1. That, as exhibit P.5 (cautioned statement) was signed aside the Hon. Trial judge erred by failing to consider the contravention of section 10 (3) and 58 (1) (a) of the CPA Cap 20..*

*2. The, the Hon. Appellate court erred when acted on an uncorroborated evidence in respect of Exh. P7 and and 8 (seizure certificates) expunge.*

*3. That: the trial judge erred by relying on appellant's equivocal plea of guilty.*

Resisting the appeal, Mr. Ngole submitted that none of the grounds of appeal could be sustained. Arguing on the first ground the learned Principal State Attorney submitted that section 58 (1) (a) of the CPA was not applicable in the circumstances of the case as it applies in situations where a suspect informs a police officer that he wishes to write out a statement in which case the police officer is obliged to furnish writing materials for that purpose. The provision states:

**"58. Statements by suspects**

**(1) Where a person under restraint informs a police officer that he wishes to write out a statement, the police officer—**

**(a) shall cause him to be furnished with any writing materials he requires for writing out the statement;"**

The record does not show any where that the appellant informed the police officer (PW3) who took down the cautioned statement that he wished to write out a statement. The appellant did not elaborate this

ground to us. In any case, as pointed out by Mr. Ngole while referring to **Hassan Jafari Jaya and two others v. R.**, Criminal Appeal No. 153 of 2008, the appellant did not object to the production of the cautioned statement in evidence. He cannot rightly challenge it at this stage. The ground indeed lacks merit.

On the second ground Mr. Ngole was also of the view that it lacked merit since the exhibits that were complained of had been expunged. Mr. Ngole opined that the case was proved beyond doubt. We agree with Mr. Ngole. Whatever the appellant might have meant by the second ground which seems obscure to us, the fact still remains that even with the expulsion of the seizure certificates there was overwhelming evidence against the appellant. Apart from the fact that the evidence of the prosecution case showed that the appellant was found with the stolen documents and the keys to the second master's office, he himself admitted these facts thus boosting the case for the prosecution as rightly pointed out by Mr. Ngole. Not only that, he admitted to have registered the sim card through which the money that he extorted was sent. The sim card was found in his possession.

The appellant vainly tried to challenge the findings of the High Court and the trial court with regard to contradictions which he claimed were in the testimonies of the prosecution witnesses, however we must admit that we saw no material contradictions, but above all, the appellant though he did not plead guilty he literally admitted the charges against him when he admitted to have been found in possession of the incriminating documents, keys and the sim card. We have no doubt that the appellant committed the crimes that he was charged with. He is lucky that the prosecution was unable to come up with a charge on extortion because evidence also showed that he did extort money from PW1 so that the certificates could be returned to the school.

The only matter of concern to us was the sentences that were meted out to the appellant. The offence created by section 296 (a) of the Penal Code, Cap 16 R. E. 2002 which forms the subject of the first count carries with it a maximum sentence of ten years imprisonment. Stealing, which was the subject of the second count carries with it a maximum sentence of seven years imprisonment. The case was tried by a resident magistrate. He imposed a sentence of six years on the first count and the maximum sentence of seven years on the theft count. In terms of section 170 of the

CPA the trial magistrate was not, being not a Senior Resident Magistrate, empowered to impose a sentence of imprisonment that was above 5 years.

The provision states:

**“170 (1) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences—**

**(a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;**

**.....Provided that this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank.”**

Mr. Ngole readily conceded that the sentences that were imposed by the resident magistrate were not proper and he called upon us to exercise our powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (AJA) to set aside the sentences and substitute them with proper ones. We are obliged to Mr. Ngole for his readiness to concede to the obvious.

The trial magistrate passed sentences that he was not by law empowered to pass. The High Court ought not to have upheld those



sentences. In the exercise of powers conferred on the Court by virtue of section 4 (2) of the AJA we hereby set aside the sentences of 6 years and 7 years imposed for violation of sections 296 (a) and 265 respectively of the Penal Code and substitute thereof sentences of five years imprisonment on each count. The sentences are to run concurrently.

Apart from the variation on sentence we otherwise find the appeal to be lacking in merit and we accordingly dismiss it.

**Dated at Bukoba** this 23<sup>rd</sup> Day of February 2016

E. A. KILEO  
**JUSTICE OF APPEAL**

S. MJASIRI  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

  
E.F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**