IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A, MKUYE, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 175 OF 2016

OMARY KASSIM MBONDE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mwandambo, J.)

Dated the 6th day of July, 2015

In

Criminal Appeal No. 58 of 2014

JUDGMENT OF THE COURT

8th & 17th July, 2019

MMILLA, J.A.:

This is a second appeal by Omary s/o Kassim Mbonde @ Mbwembwe @ Kalapaka (the appellant). He is appealing against the judgment of the High Court of Tanzania, Dar es Salaam Registry, in Criminal Appeal No. 175 of 2016 whereby that first appellate court upheld the conviction and sentence of the District Court of Mafia at Mafia in Criminal Case No. 54 of 2013. Before the trial court, the appellant and two other persons namely; Issa Hassan Kugemua and Ahmad s/o Maiko Emmanuel were charged with

three counts; conspiracy to commit an offence contrary to section 384 of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code), burglary contrary to section 294 and stealing contrary to sections 265 and 258 all of the same Act. While the trial court acquitted the said Ahmad s/o Maiko Emmanuel on all the three counts; the appellant and Issa Hassan Kugemua were acquitted on the first count only but were convicted on the second and third counts. They were each sentenced to fourteen (14) years imprisonment in respect of the first count of burglary, and a further term of seven (7) years each on the third count of stealing. Unfortunately, the trial court did not direct the mode in which the sentences were to be served; that is whether they were to run concurrently or consecutively, an error which was later on corrected by the first appellate court. However, the appellant's appeal to the High Court botched, and the sentence in respect of the second count of burglary was enhanced from 14 years to 20 years imprisonment, hence this second appeal.

The subject matter of theft in this case was a boat engine, the property of PW1 Mohamed A. Shehaly. The latter owned a passenger boat which was ordinarily plying between Utende, Chole and Jibondo villages in Mafia District.

In June 2013, PW1 detected that the engine of his boat was not in good mechanical order. He sent it to PW3 Daudi Aidan Mtanga, a mechanical, for maintenance. The latter kept it in his house to await repair. On the night of 13.6.2013 however, PW3 comprehended that his house was broken into and PW1's boat engine was missing. He hastily informed PW1, after which he proceeded to Mafia Police Station and reported the incident to them. The police immediately commenced investigation.

On the following day, that is on 14.6.2013, PW5 No. F. 4840 DC Thomas and No. F. 3709 PC Ahmad (PW6) got tips regarding the perpetrators of that crime. On that information, they arrested three persons; Issa Hassan Kugemua, Ahmad s/o Maiko Emmanuel and the appellant himself. They went first to the home of the appellant at which they conducted a search which was allegedly witnessed by PW4 Ahmad Jumbe. That witness was the hamlet chairman of Msufini area where the appellant was living. They recovered from the appellant's house the subject boat engine make Yamaha, HP 15. That engine and the search warrant were tendered before the trial court as exhibits. He was taken to police station. He was interrogated by PW6, to whom he offered a cautioned statement which was similarly tendered as an exhibit in court. The

appellant and his accomplices were subsequently charged before the trial court as it were.

Like his colleagues, the appellant's defence was very brief. While he admitted that the said boat engine was recovered at his place of residence, he categorically denied involvement. He asserted that the said engine was sent to him by two persons namely, Ramadhani Juma and Issa Hassan Kugemua. The latter, who was the second accused before the trial court had disassociated himself from the appellant's allegations against him. He denied knowing anything about that engine.

On the date of hearing of this appeal, the appellant appeared in person and had no legal representation. On the other hand, the respondent/Republic was represented by Mr. Ramadhani Kalinga, learned State Attorney.

The appellant filed a seven (7) point memorandum of appeal and his protests are: **one** that, the case against him was not proved to the standard required by law; **two** that, the evidence of the prosecution witnesses was contradictory, incredible and unreliable; **three** that, exhibit P1 (the boat engine) was tendered by PW2 who was not its custodian after

its recovery; **four** that, the keeping of exhibit PW1 abrogated the principle of chain of custody; **five** that, the cautioned statement was not read to him in court; **six** that, the first appellate court did not re-evaluate the evidence on record as it ought to have done; and **seven** that, the first appellate court wrongly relied on the search warrant which was not certified by the trial magistrate as required by law.

At the commencement of hearing, the appellant elected for the Republic to begin but reserved his right to rejoin, if need would arise. In view thereof, we invited Mr. Kalinga to commence.

At the very beginning, Mr. Kalinga informed the Court that he was opposing the appeal because in his view it is devoid of merit. He asserted however, that of the seven (7) grounds of appeal raised by the appellant, six of them are new because they were not raised before the first appellate court, therefore that the Court has no jurisdiction to determine them. He contended that only the first ground alleging that the prosecution did not prove the case against him was in order. He urged us to ignore grounds 2, 3, 4, 5, 6 and 7.

Upon being probed by the Court however, Mr. Kalinga conceded that though it was not raised, the fifth ground of appeal asserting that the cautioned statement was not read to him at the time it was received as an exhibit by the trial court can properly be discussed on account of it being a point of law. We are firm that he cannot be validly faulted on that stand.

Mr. Kalinga's submission in respect of the fifth ground was briefly that because the cautioned statement was not read to the appellant at the stage of receiving it as an exhibit, the contents of that document became invalid evidence which ought to have not been relied upon. He pressed the Court to expunge it from the record. He quickly added however, that even after expunging exhibit P2 (sic: P3) from the record, the remaining evidence is excellently solid to attract sustenance of appellant's conviction.

In the first place, Mr. Kalinga submitted that PW1 was the owner of the subject boat engine make Yamaha Hp. 15. That witness, he added, testified that he sent the said boat engine to PW3 for mechanical repair, at whose home it was stolen. He further submitted PW3 corroborated the evidence of PW1 when he admitted to have received the said boat engine from PW1 for repair, but that it was stolen on the night of 13.6.2013. Mr. Kalinga contended that those two witnesses described the engine in issue,

and that the information they made to the police facilitated its eventual recovery.

On the other hand, Mr. Kalinga maintained that the evidence of PW4, PW5 and PW6 was elaborate that the said boat engine was recovered in the room in which the appellant was living. PW5 and PW6 were policemen, whereas PW4 was, as aforesaid, the village chairman of Msufini village where the appellant was living. Mr. Kalinga was confident that recovery of that boat engine at the appellant's house was cogent evidence establishing his involvement in the alleged breaking and theft from the home of PW2. He persuaded the Court to find and hold that the appeal was filed without sufficient cause.

On his part, the appellant insisted that the prosecution did not prove the case against him beyond reasonable doubt. He requested the Court to allow his appeal.

We have intently considered the submissions of the parties. In the first place, we absolutely agree with Mr. Kalinga that except the first ground of appeal and the fifth which is on a point of law among the seven

grounds raised, the rest are new because they were not raised before the first appellate court. We endeavour to demonstrate.

The appellant had raised six grounds of appeal before the first appellate court. They are reflected at pages 33 and 34 of the Record of Appeal and were as follows: **one** that, the trial court erred in holding that he pleaded guilty to the offences he was faced with; **two** that, the prosecution did not prove the case against him beyond reasonable doubt; **three** that the trial court was biased, **four** that the trial court did not consider his mitigation at the time of passing the sentences; **five** that the allegedly stolen boat engine was not described by its owner; and **six** that, the prosecution side "framed up" the witnesses, particularly PW2 because he was not the village chairman of Msufini village as he purported. Looking at the grounds of appeal he filed in this Court however, it is pertinently clear that only the second ground among those which were filed before the first appellate court relating to proof of the case has been re-raised. As aforesaid, the rest are new.

Indeed, there are a range of cases in which the Court had the occasion to observe that as a second appellate court, it cannot adjudicate on grounds of appeal which were not raised and determined in the first

appellate court. We have in mind the cases of **Abdul Athuman v. Republic** [2004] T.L.R.151, **Samweli Sawe v. Republic,** Criminal Appeal No. 135 of 2004 and **Juma Manjano v. The DPP**, Criminal Appeal No. 211 of 2009, CAT (both unreported), just to mention some. In **Samweli Sawe v. Republic,** the Court held on the point that:-

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman v. R*** *(2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

The above exposition applies to the situation in the present case in which, as already mentioned, grounds 2, 3, 4, 6 and 7 of appeal have been improperly raised because they are all new. In the circumstances, these five new grounds of appeal are accordingly struck out.

We now indulge to consider the fifth ground of appeal which we have said asserts that the cautioned statement attributed to the appellant was not read to him after it was received as an exhibit by the trial court. As earlier on pointed out, this complaint has been conceded by Mr. Kalinga who agreed with the appellant that the omission to read its contents in court rendered that evidence invalid, thus unreliable. We wholly agree with them.

The Court has in a number of cases, emphasized that the accused person has the right to know the contents of the document after it may have been received as an exhibit. This entails that in order for such document to qualify as good evidence, it must be read to him/her. The Court has often emphasized this position in several cases, including that of **Sumni Amma Awenda v. Republic,** Criminal Appeal No. 393 of 2013, CAT (unreported) in which it was stated that:-

> *"We need to point out that both, the cautioned and extra judicial statements had a lot of details and immensely influenced the decision of the trial court . . . to have not read those statements in court deprived the parties, and the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such*

a situation, it is obvious that this omission too constituted a serious error amounting to miscarriage of justice and constituted a mistrial."

Basing on the above, because the cautioned statement attributed to the appellant was not read to him in the present matter, such evidence was invalid. Consequently, exhibit P2 (sic: P3) is hereby expunged from the record.

Notwithstanding the expulsion of the said cautioned statement, Mr. Kalinga maintained that the rest of the prosecution witnesses' evidence was sufficiently strong, credible and plausible to sustain the appellant's conviction. As already pointed out, he invited us to consider the evidence of PW1 and PW3 on the one hand, and that of PW4, PW5 and PW6 on the other. We sincerely agree with him.

The evidence of PW1 that he was the owner of the said boat engine make Yamaha – 15 Hp was not challenged by any one. He was the one who sent it to PW3 for mechanical repair. Indeed, PW3 had testified that he received the said boat engine make Yamaha -15 Hp from PW1 and kept it at his home, and that on the night of 13.6.2013 thieves broke into his

house and stole therefrom the said property. Again, this evidence was unassailed.

On the other hand, the evidence of PW5 and PW6 that the subject boat engine make Yamaha – 15 Hp was recovered from the appellant's room was similarly not challenged. Besides, the appellant himself admitted that it was recovered from his house, but that it was sent to him by two persons namely, Ramadhani Juma and Issa Hassan Kugemua. The latter was the second accused before the trial court. He rebutted the appellant's assertion of his involvement and testified that he did not know anything about that boat engine.

Since the appellant did not claim ownership of that boat engine, and because PW1 and PW3 managed to identify it as PW1's stolen property, we uphold the evidence that the subject boat engine was demonstrably the property of PW1. Given that it was recovered from the appellant, we are firm that the prosecution side proved the case against him beyond reasonable doubt that he was the one who broke into the house of PW3 and stole it. Thus, this ground lacks merit and is hereby dismissed.

Before we may conclude, we have felt the urge to consider the aptness of the sentences which were passed against the appellant in the circumstances of this case. Our concern is that after the first appellate court vacated the sentence of fourteen (14) years in respect of the second count on burglary; in its stead it imposed a maximum sentence of twenty (20) years imprisonment. We think the sentence in that regard was excessive. This also applies to the third count on stealing for which the appellant was sentenced to seven (7) years imprisonment. In our opinion this sentence was equally on the higher side.

At page 31 of the record of appeal, the appellant claimed, and it was not rebutted, that he was **a first offender**. The record does not show that the first appellate court ever considered that aspect before it proceeded to enhanced the sentence on that count from 14 years to 20 years which is the maximum under section 294 (2) of the Penal Code. That section provides that:-

> *"(1) Any person who–*
>
> *(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein; or*

(b) N.A.

(2) If an offence under this section is committed in the night, it is burglary and the offender ***is liable*** *to imprisonment for twenty years."*

The term **"liable"** suggests the trial court's discretion to impose a sentence it may consider to be befitting the circumstances of any particular case, including the mitigating factors.

We need to underscore the point that in the course of assessing a sentence to be meted out against the accused person, it is imperative for the court to take into consideration the surrounding circumstances of each particular case, including the aspect of the gravity of the offence. In essence, the sentence must be no more severe than is necessary to meet the purposes of sentencing. This is particularly so where the accused person is a first offender.

If we may repeat, the appellant in the present case was a first offender. That being the case, we think, it was very inappropriate to impose a maximum sentence, therefore there is need to intervene.

Thus, while we dismiss the appeal on account of what we have said in respect of the first ground of appeal; we nonetheless set aside the

sentence of twenty (20) years imprisonment in respect of the second count, similarly the sentence of seven (7) years in respect of the third count and impose instead the sentences of seven (7) and five (5) years respectively as from the date of his conviction. We make an order for those sentences to run concurrently as it were.

We accordingly order.

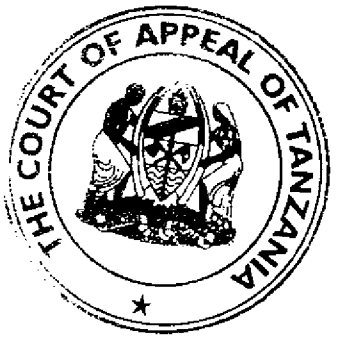
DATED at **DAR ES SALAAM** this 12th day of July, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

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



B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL