IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A, MWAMBEGELE, J.A And SEHEL, J.A.)

CRIMINAL APPEAL NO. 513 OF 2016

RAMADHANI HAMISI @ JOTI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Rumanyika, J.)

dated the 27th day of September, 2016
in
DC Criminal Appeal No. 209 of 2015

JUDGMENT OF THE COURT

3rd & 10th December, 2019

MWAMBEGELE, J. A.:

The appellant, Ramadhani Hamisi @ Joti, was arraigned before the District Court of Nzega for two counts of breaking into a building with intent to commit an offence and stealing contrary to, respectively, sections 297 and 265 of the Penal Code, Cap. 16 of the Revised Edition, 2002 (hereinafter referred to as the Penal Code). It was alleged in the particulars of the offence part of the charge sheet that on 04.03.2011, at Majengo area in Nzega District, Tabora Region, he, together with one

Hamisi Lulimba who was acquitted, did break and enter the workshop of Paulina Julius and stole four sewing machines valued at Tshs. 840,000/=, thirty pairs of wax *vitenge* valued at Tshs. 750,000/=, one bedsheet and an assortment of clothes valued at Tshs. 875,000/= and one Bible valued at Tshs. 4,5000/=. There was a third count for receiving stolen property which catered for another person going by the name Godfrey Urassa to which he pleaded guilty and discharged on condition that he should not commit any criminal offence within twelve months reckoned from the date of conviction. Godfrey Urassa is not a party to this appeal.

After a full trial in which the prosecution fielded five witnesses, the appellant was convicted and sentenced to a prison term of three years in respect of the first count and two years in respect of the second. The sentences were ordered to run consecutively. His first appeal to the High Court was barren of fruits and made matters worse for him, for despite his appeal being dismissed, the sentences meted out to him by the trial court were enhanced to fourteen and seven years in the first and second counts respectively. The sentences were ordered to run consecutively.

Undeterred, he has come to this Court on second appeal. He first lodged five grounds of appeal on 02.05.2017 and added three more

grounds in a supplementary memorandum of appeal lodged in the Court on 14.02.2018.

Before we go into the determination of the appeal in earnest, we find it apt to briefly narrate the relevant factual background to the appeal before us. It goes thus: on the night of 04.03.2011, at Majengo area in Nzega District, Tabora Region, the workshop (a tailoring mart) of Paulina Julius (PW1) was broken into by an unidentified person or persons who made away with four sewing machines valued at Tshs. 840,000/=, thirty pairs of wax *vitenge* valued at Tshs. 750,000/=, one bedsheet, an assortment of clothes valued at Tshs. 875,000/= and, God forbid, a Bible valued at Tshs. 4,5000/=. PW1 reported the matter to the Police Station where they later commenced investigation.

Upon investigation, they arrested the appellant who allegedly confessed to have stolen the items. Further investigation recovered two sewing machines in the hands of Jenifa Hubert (PW2) at Nzega who told them that they were kept there by the appellant who was his lover. Two more sewing machines were found in possession of the one already referred to as Godfrey Urassa in Shinyanga who also confessed that he bought the same from the appellant. This Urassa, as alluded to above,

was charged with receiving stolen property under section 311 of the Penal Code, convicted on his own plea of guilty and sentenced accordingly. The police also recovered an assortment of clothes in Shinyanga which were allegedly taken there by the appellant. The four sewing machines were tendered and admitted in evidence by No. E 2926 Detective Station Sergeant Dacto (PW4) and marked Exh. P1. A table and an assortment of clothes were also tendered by him and admitted and marked Exh. P2 and P3 respectively.

In his defence at the trial, the appellant completely dissociated from the charges levelled against him. He gave an explanation on how he came to possess the four sewing machines. He testified that he bought them from a friend whose name and identity he could not disclose. He admitted to have taken two of them to PW2 and the other two to the said Godfrey Urassa. He denied to have committed the offences.

At a later stage, the appellant was charged with and convicted of the offences in the manner already alluded to above.

When the appeal was placed before us on 03.12.2019f for hearing, the appellant appeared in person, unrepresented. The respondent Republic enjoyed the services of Mr. John Mkony, learned State Attorney.

When we called upon the appellant to argue his appeal, fending for himself, he adopted the memorandum and supplementary memorandum of appeal without more. He reserved his arsenals in rejoinder; after the response of the learned State Attorney, if need would arise.

Mr. Mkony expressed his stance at the very outset that he supported the appellant's appeal. Arguing for the appeal, the learned State Attorney submitted that the prosecution case was marred with doubts that at the end of the day as per criminal practice needed to be resolved in favour of the appellant. The learned State Attorney, with some tenacity, enumerated and discussed those doubts. First, he submitted that the alleged stolen goods were not identified by the complainant, Paulina Julius who testified as PW1. He submitted that PW1 did not identify well the property rather than that the sewing machines were the make of Butterfly and that they had incision marks. The learned counsel went on to submit that, that description was not enough to show that the marks, if any, were peculiar to the items stolen.

Secondly, he submitted, the stolen items were not identified in court; they were identified at the police station. In the circumstances, he charged, no one is sure if the stolen items which were identified at the police station were the very ones which were tendered in court as exhibits.

Thirdly, he submitted that the complainant did not establish ownership of the allegedly stolen items. She just said they were hers but did not tender any receipt to verify that she owned the same.

On identification of the stolen property, Mr. Mkony referred us to our previous decision in **Jackson John v. Republic**, Criminal Appeal No. 515 of 2015 (unreported) wherein identification of a motorcycle by colour only was held to be not enough.

When we prodded the learned State Attorney on whether the appellant was arraigned in line with the complaint in the first ground of appeal, he submitted that the record at para 9 shows that he was as, despite the fact that the record does not show the appellant's response to the charge, the fact that the court recorded that the charge was read to the appellant and pleaded thereto, was sufficient.

The Court also nudged the learned State Attorney regarding enhanced sentences, he was of the view that the same were within the legal limits as the ones imposed by the trial court were manifestly lenient.

The learned counsel thus submitted that the appellant's appeal had merits. He prayed for an order of the Court to release him from prison unless held there for some other offence.

Given the response by the learned State Attorney, the appellant had nothing in rejoinder. He just prayed to be set free.

We have considered the concurring arguments by the parties. We, like Mr. Mkony, state from the outset of our determination that the evidence against the appellant was shaky to mount a conviction against him. Mr. Mkony is right for submitting that there were doubts in the prosecution case which doubts must be resolved in favour of the appellant. Indeed, as Mr. Mkony rightly put, PW1; the complainant, did not identify well the allegedly stolen property at the Police Station before PW4. She did not testify with respect to any mark or marks on the items which would differentiate them from other items of that category. In her testimony, she simply stated at p. 19 of the record of appeal:

"The police also called me to identify the properties which I managed to identify all four sewing machines two out of which were butterfly and others were everlock and incision marks machines. I also identified one [pair of] scissors and some clothes ...."

It is apparent from the above excerpt in the testimony of the complainant that PW1 did not testify on any marks, let alone distinct marks, of the items allegedly stolen. She simply testified respecting their makes. In cases of this nature, identification of the allegedly stolen items is of paramount importance. A mere mention of the makes of the stolen items, as happened in the case at hand, is not sufficient.

Be that as it may, even if the complainant would have identified well the stolen items at the Police Station, that would not have been enough to prove the case against the accused person. The appellant must have identified the items in court. That was not done and we think the omission watered down the strength of the prosecution case. We shall discuss this point further hereinbelow.

Secondly, as already stated, PW1 identified the allegedly stolen items at the Police Station. They were not identified in court, what we have is

just a word from PW4 who testified that PW1 identified at the Police Station the items tendered in court. That was not appropriate. Even in court, a complainant is legally bound to identify stolen items conclusively; not generally. We grappled with an akin situation in **Jackson John** (supra), the case referred to us by Mr. Mkony. In that case, the stolen item was a motorcycle which had no special marks and no plate numbers and the complainant purported to identify it by colour. We held that identification of the motorcycle by colour alone was not enough.

Likewise, in **Vumilia Daud Temi v. Republic**, Criminal Appeal No. 246 of 2010 (unreported) when confronted with a similar situation, we relied on our previous decision in **David Chacha and 8 Others v. Republic**, Criminal Appeal No. 12 of 1997 (also unreported) in which it was stated:

> *"It is a trite principle of law that properties suspected to have been found in possession of accused persons should be identified by the complainant conclusively. In a criminal charge it is not enough to give generalized description of the property."*

[See also **Abdul Athuman @ Anthony v. Republic**, Criminal Appeal No. 99 of 2000 and **Ally Zuberi Mabukusela v. Republic**, Criminal Appeal No. 242 of 2011; both unreported decisions of the Court.]

In the case at hand, the fact that the allegedly stolen items were not sufficiently identified as distinct from other items of that nature, let alone not being identified in court, sheds doubts in the prosecution case as to whether the items the complainant purported to identify were actually the ones stolen from her workshop. It is also our considered view that it was incumbent upon the complainant to identify the allegedly stolen items in court. That was not done and this, therefore, is another taint casting a doubt in the prosecution case. As already put by Mr. Mkony, in such circumstances, we cannot be sure if the stolen items which were identified by PW1 at the Police Station were the very ones which were tendered in court as exhibits.

Thirdly, again, as rightly put by Mr. Mkony, PW1 did not establish ownership of the allegedly stolen items. She just said they were hers but did not tender any receipt to show satisfactorily that she owned the same. We have just an averment from her without any tangible proof. This is yet another dint in the prosecution case which this Court puts to inquiry.

The totality of the foregoing is that the prosecution case was tainted with doubts which our criminal jurisprudence requires us to decide in favour of the appellant. The doubts largely hinged on the casual identification of the stolen property by the complainant (PW1). They were properties of general nature which did not have any distinct marks as to differentiate them from others of the same category. Ownership of the allegedly stolen items was also not established.

We thus agree with the learned State Attorney that the case against the appellant was not proved beyond reasonable doubt. This appeal, basing on the said doubts, must succeed.

The above finding suffices to dispose of the appeal. However, before we pen off, we find it pertinent, as a postscript, to make a few remarks on the sentences enhanced by the first appellate court. With regard to the sentences, we think the appellant's complaint is justified. As good luck would have it, we have had an opportunity to discuss the sentencing powers of the appellate court in a number of decisions. In **Juliana Mocha v. Republic**, Criminal Appeal No. 364 of 2013 (unreported), we relied on our previous decision in **Musa Ally Yusufu v. Republic**, Criminal appeal No. 72 of 2006 (also unreported) to observe that:

> *"... the guiding principle is that an appellate court must not interfere with a sentence which has been assessed by a trial court unless the said sentence has glaring irregularities."*

We went on to observe that those irregularities include, but not restricted to: if the sentence is illegal, if the sentence was imposed following a wrong principle, if the sentencing court failed to take into account important mitigation factors and if the sentence is excessively high or low given the circumstances of each case and as the law governing a given offence provides.

In the case at hand, the first appellate court enhanced the sentences to fourteen and seven years on, respectively, the first and second counts. The reasons why the first appellate court took that course of action is found at pp. 102 – 103 of the record of appeal. The first appellate court observed:

> *"... having been convicted for both counts, whereby in accordance with the Minimum Sentences Act, 1972 sentences should be 14 years (1st count) and 7 years (second count of stealing) should have in the first place been ordered to run*

concurrently. Not consecutively. Because the offences were committed in a series of the same transaction. In any case however, the sentences of three years and two years respectively were manifestly lenient. I will therefore sentence it to fourteen (14) and seven (7) years in jail."

We are at one with the observation made by the first appellate court on sentences running concurrently. As rightly put, the two counts were committed in a series of the same transaction and thus the trial court should have ordered the sentences thereof to run concurrently; not consecutively as it did. In **Sawedi Mukasa s/o Abdulla Aligwasa** (1946) 13 EACA 97, more than half a century ago, the defunct Court of Appeal for Eastern Africa grappled with an akin situation. In that case, the appellant who had a long list of previous convictions, was convicted with burglary and theft and sentenced to consecutive sentences of seven years on each charge. On appeal, it was held:

"The practice is, where a person commits more than one offence at the same time and in the same transaction is, save in very exceptional circumstances, to impose concurrent sentences."

The Court then proceeded to direct that the sentences shall run concurrently.

Sawedi Mukasa s/o Abdulla Aligwasa was followed by the Court in the recent past in **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016 (unreported), a decision we rendered on 07.11.2019. In **Festo Domician** (supra) we also cited the decision of the Court of Appeal from our neighbouring jurisdiction Kenya in **Peter Mbugua Kabui v. Republic**, Criminal Appeal No 66 of 2015 in which the Court of Appeal of Kenya, also relying on **Sawedi Mukasa s/o Abdulla Aligwasa** (supra) had this to say:

> *"**As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given.** However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."*
> [Emphasis supplied]

We are guided by the holding in **Sawedi Mukasa s/o Abdulla Aligwasa** and **Festo Domician** (both supra) and subscribe to the position taken in **Peter Mbugua Kabui** (supra), which apparently followed the former case. The law is settled that the practice of the courts in this jurisdiction is that, where a person commits more than one offence at the same time and in the same series of transaction, save in very exceptional circumstances, it is proper to impose concurrent sentences. For the avoidance of doubts, that should be done even where an accused person is a confirmed person of previous convictions.

In the case at hand, the appellant was not a first offender and that is perhaps the reason why the trial court was attracted to order as it did. However, we are of the view that, that may have attracted only a heavier sentence; it did not justify the order made (of ordering consecutive sentences) which departed from the long established practice of the courts in this jurisdiction that offences committed at the same time and in the same transaction, save in very exceptional circumstances, attract concurrent sentences. For the avoidance of doubt, we see no "very exceptional circumstances" in the case to justify the departure.

Our reading of the quoted excerpt hereinabove from the judgment of the first appellate court has it that the first appellate court enhanced the sentences on two main reasons. First, that it went against the dictates of the Minimum Sentences Act, Cap. 90 of the Revised Edition, 2002 (hereinafter referred to as the Minimum Sentences Act) and, secondly, that it was manifestly lenient. With profound respect, we think, by making reference to the fact that the offences fell under the Minimum Sentences Act, the first appellate court fell into an error. We also do not agree that the sentences were manifestly lenient.

Starting with reference by the first appellate court to the Minimum Sentences Act, we hasten to remark that the offences committed in the matter at hand did not fall under the scope and purview of that legislation, the Minimum Sentences Act. For the avoidance of doubts, it may be instructive to state at this juncture that as for scheduled offences, subordinate courts have powers under the Minimum Sentences Act only in respect of certain offences under the Stock Theft (Prevention) Act, Cap. 265 of the Revised Edition, 2002. These are: trespassing with intent to steal and any offence relating to brands contrary to, respectively, sections 4 and 7 of Cap. 265 (as per the first schedule); being found near stock in

suspicious circumstances and passing through, over or under, tampering with, fences around a stock enclosure or cattle *boma* contrary to, respectively, sections 5 and 6 of Cap. 265 (as per the second schedule) and being in possession of stock suspected of having been stolen contrary to section 3 of Cap. 265 (as per the third schedule). Most of the offences under which subordinate courts had powers to inflict minimum sentences under the Minimum Sentences Act, were removed by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2002 – Act No. 9 of 2002 which legislation deleted the first schedule thereof. In view of the foregoing discussion, it should now be apparent that the first appellate court was not correct to state that the offences under scrutiny fell under the Minimum Sentences Act.

The sentences were also enhanced under the pretext that they were "manifestly lenient". We seriously doubt. We do not think the sentences of three years in an offence whose ceiling is seven years, and two years to an offence whose ceiling is five years, can be termed as being "manifestly lenient". We, for one, think the first appellate court had no legal justification to interfere with the sentencing discretion of the trial court. In **Mashimba v. Republic** [2007] 1 EA 180 the Court referred to the

following excerpt from **A Handbook on Sentencing** by Brian Slattery at p. 14 which, we think, is worth recitation here:

> *"The grounds on which an appeal court will alter a sentence are relatively few, but are actually more numerous than is generally realised or stated in the cases. Perhaps the most common ground is that a sentence is 'manifestly excessive', or as it is sometimes put, so excessive as to shock. It should be emphasised that 'manifestly' is not mere decoration, and a court will not alter a sentence on appeal simply because it thinks it is severe. A closely related ground is when a sentence is 'manifestly inadequate.' A sentence will also be overturned when it is based upon a wrong principle of sentencing ... An appeal court will also alter a sentence when the trial court overlooked a material factor, such as that the accused is a first offender, or that he has committed the offence while under the influence of drink. In the same way, it will quash a sentence which has obviously been based on irrelevant considerations ... Finally an appeal court will alter a sentence which is plainly illegal, as when corporal punishment is*

imposed for the offence of receiving stolen property."

In **Tofiki Juma v. Republic**, Criminal Appeal No. 418 of 2015 (unreported), relying on our previous decisions in **Mathias s/o Masaka v. Republic**, Criminal Appeal No. 274 of 2000 and **Nyanzala Madaha v. Republic**, Criminal Appeal No. 135 of 2005 (both unreported), we summarized the above principles as:

> *"(i) Where the sentence is manifestly excessive or it is so excessive as to shock;*
> *(ii) Where the sentence is manifestly inadequate;*
> *(iii) Where the sentence is based upon a wrong principle of sentencing;*
> *(iv) Where a trial Court overlooked a material factor;*
> *(v) Where the sentence has been based on irrelevant considerations such as these race as religion of the offender;*
> *(vi) Where the sentence is plainly illegal, as for example, corporal punishment is imposed for the offence of receiving stolen property; and*

(vii) Where the trial Court did not consider the time spent in remand by an accused person."

We do not think the circumstances in the present case fell under any of the circumstances enumerated above to justify the first appellate court interfere with the sentencing discretionary powers of the trial court.

Even if, just for the sake of argument, we were to agree with the first appellate court that the sentences were manifestly lenient to an accused person who was not a first offender, we do not think the appellant deserved the sentences imposed. The sentences imposed by the first appellate court were the maximum provided by the law. Sections 296 and 265 of the Penal Code prescribe the maximum sentences of fourteen and seven years, respectively, to any person who is convicted of the offences. Thus, even if we were to agree that the enhancement of the sentences was appropriate, we do not think the maximum sentences imposed by the trial court were justified. If anything, they were, in our considered view, on the very high side.

In view of the above, we, unlike Mr. Mkony, are of the considered view that the sentences of fourteen and seven years in prison imposed by

the first appellate court were manifestly excessive in the circumstances of this case. They were not deserved.

For the reasons stated earlier, we find merits in this appeal and allow it. We direct that the appellant, Ramadhani Hamisi @ Joti, be released from prison unless he is held there for some other lawful cause.

Order accordingly.

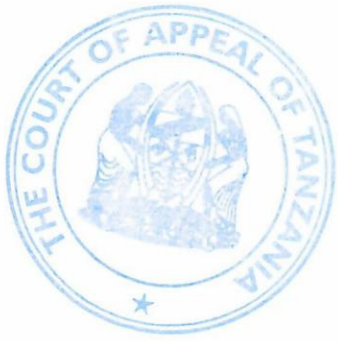
DATED at **TABORA** this 9th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2019 in the presence of the appellant in person unrepresented and John Mkony, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL