IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 504 OF 2019

MSENGI SELEMANI @ MC ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated the 5th day of July, 2019
in
(DC) Criminal Appeal No. 74 of 2018

JUDGMENT OF THE COURT

1st & 11th June, 2021

MWARIJA, J.A.:

The appellant, Msengi Selemani @ MC was charged in the District Court of Iramba with three counts under the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019] (the Penal Code). In the first count, he was charged with the offence of burglary contrary to s. 294 (1) and (2) of the Penal Code; that on 5/5/2017 at about 03:00 hours at Nselebwe Village within Iramba District in Singida Region, he did break and enter into the house of one Said Ibrahim with intent to commit theft.

In the second count, he was charged with the offence of theft contrary to s 258(1) and 265 of the Penal Code, that on the same date,

time and place stated in the first count, after having broken into the said house, the appellant stole one mobile phone make, Samsung J2 Model No. GH 9042253E value at TZS 250,000.00, the property of Said Ibrahim.

With regard to the 3rd count, the appellant was charged with the offence of being armed with offensive instruments at night with intent to commit an offence contrary to s. 298 (a) (b) and (f) of the Penal Code. It was alleged that on the same date, time and place stated in the first count, he was found armed with offensive instruments with intent to commit the offence of house breaking. The instruments allegedly found in his possession are; one torch, one pliers, four hooks, one screw driver, three pieces of glue, rubber bands, a piece of wire, and one gas lighter.

The appellant denied all counts and as a result, the case proceeded to a full trial. After having heard the evidence of five prosecution witnesses and the appellant, who was the only witness for the defence, the learned trial Resident Magistrate found that the prosecution had proved all counts against the appellant and consequently sentenced him to three (3) years and twelve (12) months imprisonment for the first and second counts respectively and five (5) years imprisonment for the third count. It was ordered that the sentences should run concurrently.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was however, unsuccessful. The learned first appellate Judge (Mansoor, J.) agreed with the trial court that the evidence tendered by the prosecution had proved the case against the appellant beyond reasonable doubt. She upheld both the conviction and the sentences meted out to the appellant. The appellant was further aggrieved by the decision of the High Court hence this second appeal.

The facts leading to the arraignment and the subsequent conviction of the appellant are not complicated. They may be briefly stated as follows: On 4/5/2017 at night, Said Ibrahim was charging his mobile phone make Samsung J2 in his room. At about 23:00 hours, he retired to bed leaving the phone on the floor still charging. When he woke up in the morning, the phone, which he left on the floor, was missing. When he inspected his room, he found that the window had been broken and his phone's charger was on the broken window. He informed his neighbours of what had befallen him and later reported the incident at Shelui police station.

Coincidentally, on the night of 5/5/2017, the team of villagers lead by Suleiman Daud (PW2), the chairman of the area where the offence was committed, was conducting patrol following a waive of criminal activities in the village. While on patrol, they received information about

the presence in the village, of a suspected criminal at Nselebwe area. PW2 relayed that information to the police. A trap was laid at all Guest Houses in the village including London Guest House. Later a person arrived at the said London Guest House (the Guest House), and the guard there one Hassan Kitalama (PW5) who had been required to liase with the patrol team, informed the police about that person whom he suspected to be a criminal. Shortly thereafter, some police officers led by Insp. Richard (PW3) arrived and arrested the suspected person who happened to be the appellant. After having been searched, the appellant was taken to Shelui police station. He was later charged as shown above.

In his evidence, PW1 stated that, after he had recorded his statement at the police station, he was required to identify his mobile phone from various phones which were under police custody. He said that, he identified it by its black colour, the password, the pictures contained in the phone and its cover, which had his phone number inscribed on it.

On his part, PW3 said that, when he searched the appellant at the Guest House, he found him with mobile phones and offensive instruments stated in the charge. He tendered two mobile phones and the instruments found in possession of the appellant. The same were

admitted in evidence as exhibit P2 collectively. He also tendered a seizure certificate which he prepared at the scene and the same was admitted in evidence as exhibit P3.

PW3 testified further that the appellant had checked in room No. 16 of the Guest House. His testimony was supported by the evidence of PW5 who added that the appellant was a frequent customer who used to have, in his possession, a bag containing mobile phones for sale. He said further that, on the date of his arrest, the appellant who arrived on 4/5/2017, left at 23:00 hours and returned at 03:00 hours. PW5 added that, he was the one who knocked at the appellant's door when the police arrived and that thereafter, witnessed the search of the appellant's bag.

At the police station, the appellant was interrogated by No. E. 9358 Cpl John (PW4). It was his evidence that the appellant admitted the offence charged and therefore, recorded his cautioned statement. The statement was admitted in evidence as exhibit P4.

In his defence of the said Ibrahim, the appellant testified that on 4/5/2017, he went to the Guest House to collect his three bags of charcoal which he had, two days before, asked the Guest House attendant to keep them for him. Having arranged for transport and after he had directed the driver where he should take the bags, the

appellant said, he remained at the Guest House's restaurant drinking tea. It was his evidence further that, while still there, police officers arrived and arrested him. He was searched of his bag which had 11 mobile phones and was eventually taken to police station.

The appellant went on to testify that, when he was interrogated at the police station, his explanation was that, he was a mobile phones retailer and the phones which were found in his possession were for sale, having bought them at Mwanza. He added that, although his wife went to the police station with the receipts evidencing that the phones were purchased at Mwanza, she ended up being arrested and locked up, only to be released two days later.

With regard to the prosecution evidence that he voluntarily recorded his cautioned statement at the police, the appellant refuted that evidence contending that he was beaten and forced to admit that he committed the offences charged.

In its decision, the trial court found that the prosecution had proved its case beyond reasonable doubt. It relied on the appellant's cautioned statement (Exhibit P4). It also found that the evidence of PW1 - PW5 sufficiently established that the appellant was found with the instruments of breaking, and mobile phones including the one which allegedly belonged to PW1. It was satisfied therefore, that the appellant

broke into PW1's room and stole the phone. On the appellant's defence, the trial court was of the view that the same did not raise any reasonable doubt in the prosecution's case. With regard to his defence that he was forced to record exhibit P4, the learned trial Resident Magistrate was of the opinion that, since the appellant did not object to the admission of that statement, it should be taken that he recorded it voluntarily. In support of his view, the learned trial Resident Magistrate cited the case of **Hemed Abdallah v. Republic** [1995] T.L.R 172.

As stated above, the High Court upheld the decision of the District Court. In her judgment, the learned first appellate Judge found that the prosecution evidence had proved that the appellant was apprehended in the Guest House and upon being searched, was found with *inter alia,* the stolen phone and instruments of breaking. According to the learned Judge, the evidence of the prosecution witnesses including the police officers PW3 and PW4, sufficiently proved that the appellant was found with PW1's phone and the instruments of breaking. She also agreed with the trial court that the appellant's cautioned statement (exhibit P4) and the seizure certificate (exhibit P3) lend credence to the prosecution case, more so because, the same were admitted in evidence without any objection from the appellant. The learned Judge cited the case of **Issa**

Said v. Republic, Criminal Appeal No. 10 of 2014 (unreported) to support that view.

In his memorandum of appeal, the appellant has raised six grounds of appeal which may however, be condensed into two grounds as follows:

1. That the learned first appellate Judge erred in law in failing to find that the appellant's conviction was based on the evidence of the exhibits which were unprocedurally admitted in evidence.
2. That the learned first appellate Judge erred in law and fact in upholding the appellant's conviction while the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal which was conducted by way of video conferencing facility, the appellant who did not have the service of a counsel, was linked to the Court from Isanga prison. On its part, the respondent Republic was represented by Ms. Beatrice Nsana, learned Senior State Attorney assisted by Ms. Phoibe Magili, learned State Attorney.

In arguing his appeal, the appellant adopted the contents of his grounds of appeal and opted to hear first, the respondent's reply submission and thereafter, make a rejoinder submission if he would find it necessary.

When she was called upon to make her reply submission, at the outset, Ms. Nsana informed the Court that the respondent was supporting the appeal. She agreed with the appellant that the prosecution evidence was insufficient to prove the case against him beyond reasonable doubt.

Starting with the first condensed ground of appeal, which subsume the first, second, third and sixth grounds of the appellant's memorandum of appeal, the learned Senior State Attorney argued that the evidence of the mobile phone (Samsung J2) was wrongly acted upon to convict the appellant because that property was not properly identified by PW1. According to Ms. Nsana, PW1 merely gave general descriptions of the property. Worse still, she said, its IMEI number was not even disclosed in the charge sheet. Relying on the cases of **Hassan Said v. Republic**, Criminal Appeal No. 264 of 2015 and **Hassan Said Twalib v. Republic**, Criminal Appeal No. 92 of 2019 (both unreported), the learned Senior State Attorney submitted that, since PW1 did not conclusively identify the mobile phone, his evidence was wrongly acted upon by both the trial and the first appellate courts.

On the second condensed ground of appeal which incorporates the fourth and fifth grounds of the appellant's memorandum of appeal, the learned Senior State Attorney argued that the prosecution evidence was

further weakened by the manner in which the trial court admitted the exhibits in evidence. She submitted that, apart from inadequacy of evidence in respect of the identity of the mobile phone, the said item was tendered by the prosecutor, not PW1 who claimed to be the owner. She added that, a similar irregularity was committed as regards the certificate of seizure which the prosecution relied upon it to prove that the appellant was found with instruments of breaking and mobile phones including the one alleged to be the property of PW1 (exhibit P2 collectively).

She submitted further that, exhibit P4 was similarly admitted unprocedurally because the same was read out before admission in evidence. She argued therefore, that all these exhibits deserve to be expunged from the record. To bolster her argument, she cited *inter alia* the cases of **Bakari Selemani @ Binyo v. Republic**, Criminal Appeal No. 12 of 2019 and **Geophrey Isdory Nyasio v. Republic**, Criminal Appeal No. 270 of 2017 (both unreported).

All these combined, Ms. Nsana went on to argue, render the prosecution evidence deficient to sustain conviction. She thus urged us to allow the appeal, quash the appellant's conviction and set aside the sentence meted out to him.

In rejoinder the appellant did not have any substantial argument to make. Breathing a sigh of relief for the stance taken by the respondent to support his appeal, the appellant urged us to release him from prison.

Having considered the submission made by the learned Senior State Attorney, it is instructive to start by stating the principle governing the Court's power to deal with concurrent findings of facts by two courts below. It is that; in a second appeal, the Court rarely interferes with concurrent findings of facts by two courts below unless there has been a misapprehension of evidence or where there has been a misdirection or non-direction on the evidence or violation of a principal of law thereby causing injustice to the case – see for instance, the cases of **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149, **Wankuru Mwita v. Republic**, Criminal Appeal No. 19 of 2112 (unreported), **Amratilal Damodar Maltaser and Anr. t/a Zanzibar Silk Stores v. A. H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31, and our recent decision in **Emmanuel Mwaluko Kanyusi and 4 Others v Republic**, Consolidated Criminal Appeals No. 110 of 2019 and 553 of 2020 (unreported).

In **Wankuru Mwita** (supra), the Court stated that principle in the following words:

> *"The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

That said, we now turn to determine the two condensed grounds of appeal. To start with the first ground, we agree with Ms. Nsana that the exhibits which were tendered in support of the prosecution evidence, were improperly admitted in evidence. Whereas the appellant's cautioned statement was read out before it was admitted, the mobile phone claimed to be the property of PW1 and the offensive instruments alleged to have been found in possession of the appellant (exhibit P2 collectively), were tendered by the Public Prosecutor instead of being tendered by a witness. In the case of **Robinson Mwanjisi and three Others v. Republic,** [2003] T.L.R 218, the Court gave guidance on the proper procedure for admission of documentary exhibits in evidence. It stated *inter alia* as follows:

" whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out otherwise it is difficult for the Court to be seen not to have been influenced by the same."

In the case at hand, the appellant's cautioned statement was read out before being admitted in evidence. The procedural irregularity of reading out that document while the same had not been admitted in evidence was a fatal irregularity. We therefore agree with the proposition made by Ms. Nsana and hereby expunge that statement from the record.

With regard to the procedure for tendering any kind of exhibit in court, it is a witness who is competent to do so, not a public prosecutor or any other person who is not a witness - see for instance, the case of **Thomas Ernest Nsungu @ Nyoka Mkenya v. Republic**, Criminal Appeal No. 78 of 2021 (unreported). In that case in which, like in this case, the Public Prosecutor tendered an exhibit, the Court observed as follows:

" A prosecutor cannot assume the role of a prosecutor and witness at the same time. With respect, that was wrong because in the process the prosecutor was not the sort of a witness who could be capable of examination upon oath or affirmation in terms of

section 98(1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined."

Given the above stated position, exhibit P2 collectively which was unprocedurally tendered by the prosecutor is therefore also hereby expunged from the record. The result is that the first ground of appeal has merit. We therefore allow it.

Having determined the first ground of appeal in the manner stated above, we think the second ground need not detain us much. There is no gainsaying that, according to the prosecution evidence, what linked the appellant with the three counts were the tendered exhibits, real and documentary which have been expunged from the record on account of having been unprocedurally admitted in evidence. In the absence of those exhibits, the three counts with which the appellant was charged, fall short of sufficient evidence to pove them beyond reasonable doubt. For this reason, we also find merit in the second condensed ground of appeal.

On the basis of the foregoing, we are of the settled mind that, the appellant's conviction resulted from the trial court's misapprehension of evidence. We find further, with respect, that had the first appellate court considered the pointed-out irregularities, it would not have upheld the

appellant's conviction. In the event, we allow the appeal, reverse the judgment of the High Court quash the appellants conviction and set aside the sentences meted out against him. He should be released from prison forthwith unless otherwise lawfully held.

DATED at **DODOMA** this 11th day of June, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This judgment delivered this 11th day of June, 2021 in the presence of the Appellant in person and Mr. Matibu Salumu Matibu, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL