IN THE HIGH COURT OF TANZANIA

AT SONGEA

PC CRIMINAL APPEAL NO. 06 OF 2013

(Originating from MBINGA URBAN PRIMARY COURT CRIMINAL CASE NO. 46 OF 2010. MBINGA DISTRICT COURT APPEAL NO. 39 OF 2010)

OMARI ZUBERI.....APPELLANT

Versus

JUNUS NYONDO.....RESPONDENT

Last Order: 02nd October, 2013

Date of Judgment: 28th October, 2013

JUDGMENT

FIKIRINI, J:

The appellant Omari Zuberi aggrieved by the Mbinga District court decision dated 28th December, 2010 appealed to this court having two grounds of appeal namely:

1. That the learned Resident Magistrate erred in law and fact to uphold the trial court's decision and finding whereas it was wrongly arrived at without sufficient evidence to support the charge of stealing.
2. That the appellate court erred in law and fact to concur with the conviction and sentence and orders made by the primary court basing on circumstantial evidence or other weak evidence which was not watertight to form the basis of conviction.

Brief background leading to this appeal is as follows: that the appellant was charged and convicted by the Mbinga Urban court for stealing contrary to section 265 of the Penal Code, Cap 16 R.E. 2002, in Criminal case no. 46 of 2010. Dissatisfied he appealed to the Mbinga District court which upheld the primary court decision and hence this appeal.

Before the primary court the convicting evidence was that on 02nd January, 2010, the appellant picked and kept money worth Tzs 1,100,000/= which was dropped by SM1-Yunus Nyondo. In so doing the appellant committed the offence of stealing. It was the respondent's account that he had put the money in an envelope and wrapped it in a sulphate bag due to rain. He then tied the sulphate bag on the rear seat of his bicycle and rode to a Saccos in the area. On the way to the Saccos he passed through an area

where the appellant and his colleagues about six (6) of them carrying out construction works. About seventy (70) paces from the construction site his bicycle hit a stone and swerved due to rain. The respondent did not stop until after crossing a bridge in the area. It is after stopping he noticed the sulphate bag parcel hanging while the envelope which had money missing.

On looking back SM1 stated to have seen the appellant picking something and hiding it under his Tshirt. On approaching them all six dispersed and pretended to concentrate on their work. The appellant and two other colleagues ran and hide on the side (wakakimbilia mpenyoni). SM1 stated his case to those who were present that he had dropped an envelope which had money in it. Those present denied seeing or picking any envelope. SM1 pleaded with them but to no avail. The matter was eventually reported to police and charges of theft preferred against the appellant and another person. During the hearing, SM1 called one witness SM2- Issaya Chaula who told the court that he saw the appellant carrying an envelope but did not know what it contained. Based on the above evidence the trial court convicted and sentenced the appellant.

During the hearing of this appeal, Mr. Waryuba represented the appellant. In arguing the appeal, apart from adopting both grounds of appeal as filed Mr. Waryuba as well argued that the prosecution did not establish and prove that the respondent had the money he claimed to be carrying on him. According to Mr. Waryuba, the prosecution had to establish and prove that. Another concern raised by Mr. Waryuba was as to why did the respondent carry the money by tying it behind his bicycle. Since no explanation was given to that effect he therefore doubted the respondent's claim.

Mr. Waryuba, equally challenged the way the appellant was picked from the group, as there was no clear evidence which was led by the prosecution in that regard. The appellant had denied picking the envelope containing money and keeping it.

Further in his submission and specifically addressing the second ground of appeal, Mr. Waryuba submitted that the prosecution relied on circumstantial evidence. He however, cautioned that the evidence relied on was not watertight as required by the law. He cited the case of **Ally Bakari & Pili Bakari V. R (1992) T.L.R 10** in support. Submitting on

that further, it was his contention that had SM1 been certain that the appellant was indeed the one who picked the envelope he would not have charged two people. By having more than one person charged it was an indication that he was not sure who picked the envelope. Based on his submission he prayed for the appeal to be allowed, the lower court decisions to be quashed and any other orders to be set aside and the fine paid by the appellant be paid back.

Responding to the submission, the respondent Yunus Nyondo maintained that the two lower court decisions were correct and the same was arrived at after the court had satisfied itself that the prosecution had proved its case beyond reasonable doubt. Regarding Mr. Waryuba's question as to why there were two suspects if the respondent was certain it was the appellant who committed the offence. It was the respondent's response that even though two suspects were charged but his evidence was directed towards the appellant. He therefore did not understand what more evidence the appellant's counsel wanted.

The respondent also referred the court to the evidence of SM2-Issaya Chaula who stated that he saw the appellant picking the envelope. The

respondent went on submitting that besides the above evidence, SM2 was also present when the appellant uttered these words:

" tuone kama cha kuokota kinaweza kulogeka au kufungika."

In a brief rejoinder, Mr. Waryuba besides reiterating his earlier submission he went on submitting on SM2's evidence by arguing that his evidence cannot be relied on since he alleged to have seen the appellant picking the envelope from his window, but the court was not told the distance, how big was the window and so forth. Likewise, he challenged the evidence that SM2 heard the appellant and his colleagues when discussing.

I have gone through the trial record and the decision of both the trial and the appellate courts. My focus in course of examining this appeal will be on whether the prosecution has proved its case beyond reasonable doubt, the standard required in law. I will however, be doing this having in mind that this is the appellant second appeal, whereby the finding of the lower courts are not to be disturbed unless otherwise. Relying on principles highlighted in the case of **Salum Mhando V. R (1993) TLR 170,** which referred to the case of **DPP V. Jaffari Mfaume Kawawa (1981) TLR 149**, I find

myself in a situation whereby it is necessary to re-evaluate the evidence of the lower courts.

I will start with the proof regarding the alleged dropped envelope containing money. It was the respondent version of the story that he was carrying money in an envelope. The said envelope was then wrapped in a sulphate bag. The bag was then placed at the bicycle rear seat. The respondent as well claimed to have seen the appellant picking the envelope and hiding it under his tshirt (see page 4 of the proceedings). The appellant denied picking any envelope.

My perusal of the trial court record did not reflect with certainty that it was the appellant who picked the alleged dropped envelope containing money and kept it, though the respondent claimed so.

Lack of support from the trial court record regarding the respondent's account and my own personal evaluation of the said evidence made me conclude that the prosecution had failed to prove its case beyond all reasonable doubt. The reasons for saying so are, **first**, the respondent when he went back he never pointed at the appellant straight but inquired from the group generally. If he saw the appellant picking the envelope why

not go to him straight? **Second**, even when the appellant appeared from the alleged hiding, still the respondent did not confront him, but allowed the debate to go on as to who picked the dropped envelope. **Third**, in course of the ongoing debate one Kaheneko was named as a suspect. Kaheneko was later arrested and taken to police station. **Fourth**, even when Kaheneko was in the police vehicle on the way to the police station, the appellant appeared and stopped the vehicle trying to stop Kaheneko's arrest. The respondent did not refute or challenged Kaheneko's arrest as a suspect. The respondent drove with the appellant in the same vehicle to the police station and yet, he did not mention the appellant as the one he saw picking the envelope. This can be found at the trial court proceedings from pages 4-8. The only time the respondent directly implicated the appellant was when he was cross-examining him. This can be found at page 7 of the trial court proceedings. Going by the evidence on record, I am of the view it was not established or proved beyond reasonable doubt that it was indeed the appellant who picked the envelope.

From the trial court proceedings there was more than one possibility, it was either the appellant as alleged by the respondent or Kaheneko who

was arrested and taken to the police station or the second accused person Jafa Jafa who was charged jointly and together with the appellant, but unfortunately he passed away while the matter was still pending or any other person present at the construction site. In actual fact there was no clear explanation as to how it narrowed down to two accused persons who were then charged.

Another issue examined was whether there was money amounting to Tzs. 1,100,000/= in that envelope as claimed by the respondent. It had really been hard for me to tell how the trial court concluded without a doubt that the dropped envelope had money as claimed. The only evidence was that of the respondent. Even though the evidence of a single witness is equally good, but in order for such evidence to be relied on two things must happen: one a great care must be taken in relying on such evidence and two, the evidence must be water tight to justify the conviction. **See: Mburu & Another V. R (2008) 1 KLR 1229.**

I had difficulties concluding that the trial court did examine the respondent's account with great care and tightness required to conclude he was truthful. My reasons are, the respondent being a 42 years old man, I

believe was old enough to carefully handle his money. Tzs. 1,100,000/= might not seem as huge amount of money but still large amount for one to loosely handle it by carrying it on the back of the bicycle for whatever reasons. There was as well no reasonable explanation as to why he did not opt for other safer options: such as tying the sulphate bag at the front of the bicycle or carry it on him. The above made me doubt the truthfulness of respondent's story.

During the hearing SM2- Issaya Chaula as well testified. In his evidence SM2 did not state seeing the appellant picking the envelope but holding it in his hands. Otherwise the information that the envelope had money was based on what he was told by SM1 on the second day. This can be found at page 8 of the trial court proceedings. So from this it can be concluded that SM2's evidence was only to effect that he saw the appellant carrying an envelope and nothing more. In his evidence SM2, however, did not give an account of how far was he when he saw the appellant holding the envelope. And how big was the window from where he managed to see the appellant holding the envelope. SM2 did not describe the type of the envelope or its colour and what made him conclude it was same envelope

"The court must ensure that such evidence provides irresistible inference on the guilty of the accused."

In the case of **Mswahili V. R (1977) LRT 25**, the court as well echoed the above position though a bit further by saying:

"In a case where facts are based solely on circumstantial evidence corroborating each other, a conviction is possible if the circumstantial evidence leads irresistibly to inference of guilt should be incapable of any other reasonable explanation."

Comparing the situation in the above cited cases to the situation at hand, I am of a conclusion that there was no irresistible inference on the guilty of the appellant. The prosecution had failed to prove that, the appellant was the one who picked the envelope and thus why they ended up charging two people. They also failed to prove that the alleged dropped envelope had money. The fact that there was an envelope dropped near the construction site where there were people around could not in itself confirm what the respondent was stating.

In passing I would like to acknowledge what the appellate court magistrate stated that picking and keeping whatever which is not yours' is legally and morally wrong. This is one of the many modes of theft. Therefore any picked item which does not belong to the picker should be processed as

per the laid down procedures which includes reporting and handing the picked item to the police. The situation in the present appeal was however different as it was not known with certainty as to who had picked the envelope and if the envelope had the money as claimed.

In light of the above, I am with conclusive mind that this appeal has merit and I hereby proceed to allow it by quashing the conviction and set aside all other orders followed thereafter, the appellant be released immediately unless held for other reasons. The fine of Tzs. 40,000/= paid be refunded to the appellant. It is so ordered.

Judgment Delivered this 28th day of October, 2013 in the presence of Omary Zuberi the appellant and Yunus Nyondo the respondent.

P.S.FIKIRINI

JUDGE

Right of Appeal Explained.

P. S. FIKIRINI

JUDGE

28th OCTOBER, 2013