IN THE HIGH COURT OF TANZANIA

AT BUKOBA

H/C CRIMINAL APPEAL NO. 70 OF 2016

(Arising from original Criminal Case No. 95 of 2016 of in the District Court of Bukoba at Bukoba)

BADRU ABASI----------APPELLANT

VERSUS

THE REPUBLIC----------RESPONDENT

JUDGMENT

29/6/2018 & 20/7/2018

BONGOLE, J.

The crux of this appeal one that Badru Abasi hereinafter referred to as "the Appellant", was arraigned before the District Court of Bukoba at Bukoba with four (4) others accused persons in Criminal Case No. 95 of 2016.

He stood charged with two counts that is to say burglary c/s. 294(2) of the Penal Code, Cap. 16 R.E. 2002 and Stealing c/s. 265 of the Penal Code Cap. 16 R.E. 2002.

The particulars of the offences were that the appellant on 20th day of February, 2016 during night hours (*around 2:00hrs) at Kilimahewa area within the Municipality and District of Bukoba in

Kagera region did brake and entered the house of one JOYCE D/O SALVATORY with intent to commit an offence therein.

In the 2nd count was that the appellant on the same date, place steal six 6 sets of plates, four (4) sets of Cups, two (2) sets of glass cups, four (4) sets of small spoons, two (2) sets of large spoons, three (3) sets of knives, two (2) sets of falks, two (2) glass jugs, four plastic jugs all worth Tshs. 600,000/=, a dinner set (7pices) worth 400,000/= two (2) sets of Hotpots worth 400,000/= twelve (12) pots worth 200,000/= a set of pots with handles worth 280,000/= Kibao cha Nyama worth 10,000/= rice cooker make KENWOOD worth 200,000/=, a blender make KENWOOD worth 180,000/= two (2) diaba worth 65,000/= 2 small baskets worth 10,000/=; a small plastic basin worth 5,000/=; miko (4) worth 6,000/= a bulb worth 3,000/= a matress make super banco 6 x6 feet blue in colour worth 350,000/= a matress 5 x 6 feet pink in colour worth 250,000/= a blanket ten (10 kgs) worth 120,000/=, a blanket eight (8kg) worth 80,000/=, a bed cover special worth 50,000/= two blankets five (5kg) worth 80,000/=, a music system make Sony with four speakers a TV 32 inches make Sony worth in Total 1,600,000/=, eight 8 bed sheets worth 80,000/=, four 4 pillows worth 32,000/= eight 8 curtains worth 62,000/= two large Jackets worth 30,000/=, a truck suit worth 25,000/= a three (3)

sets of table clothes worth 85,000/=, a mobile phone make Nokia worth 150,000/= an iron make Philips worth 30,000/=, four (4) heavy Trays worth 80,000/=, a large thermos silver in colour worth 22,000/=, two (2) large plastic thermos worth 25,000/= cushion worth 40,000/=, a set of bread knives (heavy one) worth 20,000/=, a set of glass of sugar dish (heavy ones) worth 40,000/= six cushion (foronya) worth 5,000/=; six normal cooking pots worth 30,000/=; two (2) large plates (sinia) silver in colour worth 12,000/= various clothes and other unidentified items all worth in total Tshs. Six Million Tanzanian Shillings (Tshs. 6,000,0000/=) the properties of Joyce s/o Salvatory.

The other accused persons were all charged with an offence of Receiving stolen properties c/s. 311 of the Penal Code [Cap. 16 R.E. 2002]. They were found guilty, convicted and sentenced accordingly.

The Appellant was also found guilty for all the two counts, convicted and sentenced to save 15 years Imprisonment for the 1st count; and 5 years Imprisonment for the 2nd count the sentence which were ordered to run concurrently.

Aggrieved, the appellant has instituted the present appeal armed with 8 grounds. Thus:-

1. *That, the Hon. Trial Magistrate erred when he failed to calculate the amount of value of the stolen properties compared to the amount claimed to have been stolen in total of charge sheet status (six). Thus contravening with the mandatory provisos c/s. 132 of Cap. 20 R.E. 2002. Refer to the case of Musa Mwaikunda V. R. TLR. 387 (2006) and Isidori Patrice V.R Criminal Appeal No. 224 of 2007 (unreported).*

2. *That, the Hon. Trial Magistrate erred when he relied on the prosecution exhibits admitting and sustaining the conviction and sentence against the appellant, failing to procure the fundamental rights against the appellant to either reject or accept the admission.*

3. *That, the Hon. Trial Magistrate erred when the failed to intervaine deeply in the admission of exhibits without the corroboration of a search warrant.*

4. *That, the Hon. Trial Magistrate erred when he relied with the evidence of "PW2" "PW3" and "PW4", that the appellant led the police searchers and investigator s to his home and homes of 2nd, 4th and 5th accused were this evidence was not supported by the independent evidence (chairman/vice chairman and etc).*
5. *That, the Hon. Trial Magistrate erred when he failed to evaluate the evidence adduced by "DW5" together purchasing receipts tabled as evidence plus the evidence of "DW2" "W3" and "W4"*

claiming that the household domestic items were bought from street vendors around sabasaba of which the prosecution side had no objection to raise against the evidence tabled to prove whether it was sold to them by the appellant.

6. *That, the Hon. Trial Magistrate erred when he contravained with the mandatory proviso c/s 38 of CPA Cap. 20 R.E. 2002.*
7. *That the Hon. Trial Magistrate erred when he relied to sustain conviction and sentence of the 1st count against the appellant before being transmitted by the record to the High court for confirmation and contravained the mandatory proviso c/s. 170 (2) of the CPA Ca. 20 R.E. 2002.*
8. *That, the Hon. Trial Magistrate erred when he ignored the appellant defence.*

He therefore prays that this court allows the appeal.

When this appeal came for hearing the appellant appeared in person and whereas Ms. Maswi learned State Attorney appeared for the Respondent (Republic).

Arguing the appeal, the appellant adopted the grounds of appeal and added other two grounds.

First that the trial Magistrate erred by violating S. 234 of the CPA by using a defective charge sheet which was in contradiction with the

prosecution evidence. That the charge sheet enumerated the stolen properties and their respective value. He argued that the evidence by "PW1" and "PW5" never mentioned the value of theirs properties alleged to have been stolen when they testified before the trial court. He said the enumerated stolen properties and their respective value was Tshs. 6,000,000/= but he argued if we make calculation of the enumerated property it does not amount to Tshs. 6,000,000/=. Secondly that the trial court erred in admitting exhibits which were not mentioned during preliminary hearing. Further when preliminary hearing was conducted, it was not mentioned where, when, the incident occurred.

He added that the trial magistrate erred in relying on hearsay evidence of "PW1" and "PW5" as they had common interest of assisting one another in deceiving the court from arriving at just decision.

Further that the robbery incident was not proved as no any exhibit which was tendered in court to proof that there was breaking. In addition to that there was no any evidence showing that he admitted to have committed the offence and directed the policemen to the co-accused persons.

That exhibit "P5" certificate of seizure shows the alleged stolen or found properties but the same were not mentioned in the charge sheet and that the witnesses who witnessed search were not mentioned during preliminary hearing.

Furthermore that D/Sgt. Amosi was not the OC-CID as he stamped in the certificate of seizure so he argued that he forged the stamp.

Responding to, Ms. Maswi objected the appeal. She argued that the charge before the trial court was proper as it cattered for all the ingridients of disclosing the offences.

She said, the appellant conviction was not solely depended in all the admitted exhibits e.g. she said, at page 18 of the proceeding the appellant never objected as all the found properties were recovered from the property the accused pointed to have bought the same.

With regard to the 4th ground, she said it is not necessary that when inspection is conducted; the village chairman or other leaders to be present and that exhibit "P5" is very certain as to who witnessed search.

With regard to the 5th ground, she argued that it has no merit because what was alleged to have been stolen were common items

having marks JYC meaning "JOYCE". So she concluded that the trial magistrate never error.

On the 6th ground she admitted that it is true there was no search order but still there was the evidence of "PW2" "PW5" and "PW6" which was to the effect that the accused lead to the recovery of the stolen items. That their evidence was enough to ground conviction of the appellant she emphasized. She borrowed the principles laid down in the case of **Janta Joseph Kova V.R. Criminal Appeal No. 95 of 1996 CAT Dar es Salaam** at page 28 where the court held that what is to be proved is 1st the accused must lead to the recovery of the stolen item and that the same are identified by the owner. That the prosecution case established its case basing on this fact.

With regard to 7th ground on confirmation she said it was not the error of the trial court but at page 28 she said under **S. 373 (1) (a) of CPA** can be invoked to make the necessary orders.

On 8th ground she said it is not true that the trial court never made any evaluation of the defence evidence as it is vivid at page 20 of the typed judgment.

Furthermore that the sketch plane of the scene of crime which was admitted and the evidence by "PW1", "PW2" and "PW5" shows that

the house was broken. That their evidence was credible and reliable referring to the case of Goodluck Kyando.

On the issue of Preliminary Hearing she argued that there is no need of mentioning all the exhibits and or the witnesses.

Finally that "PW1" described the marks of her properties and that "PW5" testified as to how the appellant showed where he sold the property he stole which lead to the recovery of the stolen items. She therefore pray before this court to find this appeal devoid of merits and dismiss it.

In a brief rejoinder, the appellant insisted that he never lead the policemen to arrest the rest of his co-accused persons. That when he was arrested he found one of them at police station already had been arrested.

That those who were arrested stated as to how they acquired their properties and that they never receive the same from him as they even produce receipts to prove ownership. So he prayed that his appeal be allowed by find him innocent and quash conviction and set aside the sentence imposed upon him.

In due course of preparing this Judgment I noted that the impugned judgment of the trial court had some abnormalities to the

effect that it did offend the provisions of **S. 312 (1)** of the **Criminal Procedure Act Cap. 20, R.E. 2002**. I find it appropriate for the parties in this appeal to address me on that. Essentially 10 exhibits were admitted by the trial court in support of the Prosecution case and 3 in support of the defence case. However, all these exhibits were not relied upon or mentioned or referred in the said Judgment.

Ms. Maswi learned State Attorney who championed for the Republic had it that the trial court recorded the proceedings without touching the 10 prosecution exhibits and 3 defence exhibits. She said under such short comings the trial magistrate erred by not relying or touching the admitted exhibits. Notwithstanding she said, this court under **S. 366 of the CPA** can put on the shoes of the trial court and write the correct judgment in compliance with the law i.e **S. 312 (1) (a) of the CPA**.

Responding to that, the appellant argued that so long as Ms. Maswi conceded that the trial court judgment was not correct as it had some short coming, the court should base on what he complained that the trial court never done justice to him. So he pray that this court should determine the appeal as it is and it should not act as a trial court in correcting the irregularities occasioned by trial court as all the named exhibits were not found at his home.

put on the shoes of the trial court and write the correct judgment as suggested by Ms. Maswi learned State Attorney. I think and correctly so that by adopting the suggestion levelled by Ms. Maswi will create a bad precedent. The only avenue available under the circumstances is to return the record of the proceedings to the trial court with an order that the trial court writes a proper judgment in accordance with the law. The same to be ready within 90 days from the date of pronouncement of this order.

Meanwhile the appellant shall be under custody awaiting the compliance of the order given above.

S.B. Bongole

Judge

20/7/2018

Date: 20/7/2018

Coram. Hon. S. B. Bongole, J.

Appellant: Present

Respondent: Mr. Haruna, SA.

B/C: Peace M.

Mr. Haruna:

My Lord, the appeal comes for judgment and we are ready.

Court:

Judgement delivered in the presence of the parties this 20th July, 2018. Before me.

S.B. Bongole

Judge

20/07/2018

Right of Appeal explained.

S.B. Bongole

Judge

20/07/2018