IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO. 241OF 2017

(Originating from The Kisutu Resident Magistrate Court of Dar es Salaam as Criminal Case No. 142 Of 2016 Before: Hon. Shaid– PRM Dated 28th April, 2017)

ALEX NYAISA----------1st APPELLANT

HERMAN DAUD MKUMBA---------- 2nd APPELLANT

VERSUS

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

JUDGMENT

Last order date: 06th June, 2018
Judgment date: 29th June,2018

MLYAMBINA, J.

The appellants were convicted of stealing contrary to section 265 and 258 of the Penal Code Cap 16 (R.E.2002) and they were sentenced to seven years imprisonment each. Been aggrieved with the conviction and sentence, the appellants lodged this appeal each

one with his grounds of appeal. The following are grounds of appeal for the first appellant:

1. That, the learned trial Magistrate was biased when convicted the first appellant on this case but acquitted his co-accused who were alleged to have been found with the stolen vehicle.
2. That, the learned trial Magistrate grossly erred in both law and fact by convicting the first appellant yet failed to note that he was not conversant with the language that was been used in court, furthermore the court failed to note on record the language used.
3. That, the learned trial Magistrate grossly erred in both law and fact by convicting the first appellant based on exhibit P3 collectively (the alleged stolen vehicles) yet the prosecution witnesses failed to do the comparisons of the number on log book and the numbers on the engine chassis before the court to prove them, furthermore the appellant was not accorded a chance to object or otherwise.
4. That, the learned trial Magistrate erred in both law and fact by using contradicting evidence as to the colour of the stolen cars and also not noting that the second car was

never proved in court as the owner never brought it logs book which was tendered in court.

5. That, the learned trial Magistrate grossly erred in both law and fact by basing the first appellant conviction on exhibit P3 collectively the alleged stolen vehicle whereby they were not identified by crucial prosecution witnesses in court.
6. That, the learned trial Magistrate failed to note that the prosecution side had failed to prove their case to the hilt.

The following are grounds of appeal for the second appellant.

1. That, the learned trial Magistrate grossly erred in both law and fact by convicting the 2nd appellant based on the alleged exhibit P3 (Seizure Certificate) yet not any other witness ever testified to have witnessed while been seized nor to have signed it apart from PW5.
2. That, the learned trial Magistrate grossly erred in both law and fact by convicting the 2nd appellant based on exhibit P3 collectively (the alleged stolen vehicles) despite not according him a chance to either object or otherwise which is contrary to the natural justice.

3. That, the learned trial Magistrate grossly erred in both law and fact by convicting the 2nd appellant based on exhibit P3 collectively (the alleged vehicle) which were not identified by PW2, PW3, PW4 and PW6 in Court, yet they were vital witnesses who could have cleared any doubt that have arisen.
4. That, the learned trial Magistrate grossly erred in both law and fact by convicting the 2nd appellant based on exhibit P3 collectively (the alleged stolen vehicle) despite the prosecution witnesses failed to do the comparison of the numbers on exhibit P1 (logbook), the engine number and chassis number to clear the doubt.
5. That, the learned trial Magistrate was biased by convicting the 2nd appellant and acquitting his co-accused at the trial who were alleged found with the said stolen vehicle at Kigamboni Gezaulole.
6. That, the learned trial Magistrate grossly erred in both law and fact by using incredible, contradicting, inconsistent, and uncorroborated prosecution evidence that lacked corroboration as a basis of convicting the 2nd appellant.
7. That, the learned trial Magistrate grossly erred in both law and fact by using the second appellant conviction on exhibit P3 collectively despite the prosecution witnesses giving

contradictory evidence as to the colour and worse still one of the cars logbook was never tendered in court.

8. That, the learned trial Magistrate grossly erred in both law and fact by basing the second appellant conviction and sentence on the case that was not proved beyond reasonable doubt.

At the hearing, the first and second appellants being laymen, simply told the Court that their grounds of appeal be considered so that the conviction and sentence are set aside and they be set at liberty to join their families.

In response, Christin Joas learned State Attorney for the respondent objected the appeal for the reasons that the prosecution side proved the case beyond reasonable doubt. The respondent's counsel stated that, both appellants are talking of evidences. That, the first ground of appeal of the first appellant and on the fifth ground of appeal of the second appellant, they all allege that the co-accused was acquitted. In view of the respondent, the co-accused was set free because he was charged with second count and there were no proof beyond reasonable doubt by the prosecution but the appellants herein were charged on the first count.

I had time to revisit the records, I noted true that the other 4th co-accused was charged of the second count of being found in possession of property suspected of having been stolen or otherwise unlawfully acquired contrary to section 312 (b) of the Penal Code Cap 16 (R.E.2002).

As replied by the learned State Attorney, the evidence was not sufficient enough to convict him. The prosecution side failed to prove beyond reasonable doubt that the 4th accused was in unlawful possession of the stolen property. In the case of **Ally Bakari and Pili Bakari vs Republic (1992) T.L.R. 10** the court underscored the necessity of the prosecution side to prove their case in respect of possessed stolen property.

On the second ground of appeal of the first appellant, it was alleged that the first appellant was not conversant with the language being used in the Court. The learned state attorney responded that the first appellant got time to defend his case and he cross examined. That, if the first appellant did not understand he could not had defended himself. That this came after been found liable. There is nowhere in the proceedings where it shows that the appellants complained of not knowing the language been used.

The ground of been not conversant with the language used in court was watered down by the first appellant in rejoinder submission after conceding that the language used was Kiswahili though it was the first appellant's first day to be in Court. With that admission, the appellants cannot appeal with success on mere assertion that it was their first time to be in Court. What matters is that the appellants were properly accorded their right to be heard.

On the third ground of appeal of the first appellant and the fourth ground of appeal of the second appellant, the appellants alleged that they were convicted basing on exhibit P3 of which are the vehicles stolen, the appellants complained that they were no comparisons of cars. The learned state attorney replied that the evidence of PW1 Adam Augustino tendered the Car Registration Card and it was not objected by the appellants. It was admitted as exhibit P1. That, such car card had all particulars. So, there was no need of making comparisons. That, exhibit P3 (Certificate of Seizure) was brought before the court and was admitted by the Court.

In principle, I agree with the submission of the learned state attorney, as it will be appreciated later when analysing the last ground of appeal, the Certificate of Seizure cleared doubt on the colours of the stolen cars. None of the appellants herein did object

on its tendering. There was therefore no need of doing comparisons. It is my further view that comparisons should be made only in circumstances where there are two or more different properties subject of the dispute.

On the fourth and seventh grounds of appeal of the first and second appellants respectively, the appellants alleged that there were contradictory evidences as to the colour of the stolen cars. The learned state attorney responded that, if one looks on the evidence of PW1 at page 10, he stated that the first car had black colour and the other had bronze colour. Also, PW5 in his evidence at page 29-30 spoke of the same colour. PW6 at page 35 spoke the same colour. In view of the learned state attorney, there were no contradictions of the car colour. Indeed, PW1 proved that the cars belonged to Viattel trading as Halotel.

On the fifth and second grounds of appeal of the first and second appellants respectively, it was alleged that the appellants were convicted basing on exhibit P3 which is the stolen cars. The learned state attorney stated that the stolen cars were identified.

On the sixth and eighth grounds of appeal of the first and second appellants, it was alleged that the prosecution side failed to prove their case. In reply the learned state attorney had an opposite

stand. According to the learned state attorney, the respondent proved the case beyond reasonable doubt because both appellants are guards. They were on duty on that day, even after incidence the appellants were reported.

My cumulative effect when analyzing the fourth, fifth and sixth grounds of appeal; and my reading of the evidence of PW1, PW5 and PW6, lead to the position that there is no any contradiction in their evidences as far as the colours of the stolen cars are concerned. It is from that cogent evidences, the Court was correct in finding that the prosecution side did prove their case beyond reasonable doubt. It is the same cars which were proved to belong to the accused.

Worse, after the incidence the appellants run away. In view of the learned state attorney, the act of the appellants of running away shows that they were malicious. The learned state attorney refereed this Court at page 47 of the proceedings where it is revealed that the second appellant was arrested at Morogoro. The learned state attorney went on to reply that the appellants never disputed that they were on duty on that day.

In rejoinder, the first appellant denied to have committed the charged offence. The first appellant conceded that they are the

guards who were on duty on that day and he conceded that the cars were stolen on that day.

The first appellant went on to tell us that the second appellant brought food for them, after eating they slept up to 4:00am. That, upon waking up they did not see the stolen car and the second appellant. In view of the first appellant, the mistake he did is of not reporting the incidence.

The second appellant in his rejoinder also conceded that he is the guard who was on duty on that day but he denied to had run away. The second appellant asserted that he was at work on 16th January, 2016. The cars were stolen on 17th January, 2016 at 0100hours. The second appellant alleged further that he left at work at 11hours but on his way back the thieves forced him to go with them up to Kazimzumbwi.

The second appellant also asserted two points; one he was not given a right to question on tendering exhibits and; two, the court to consider the house/yard where the cars were stolen is full of CCTV cameras. But neither photos nor electronic evidence to prove.

I have carefully perused the entire records after following the arguments of the parties, I noted for instance at page 29 of the

typed proceedings, the accused were given right to object or agree on tendering of exhibit P3. All the three accused never had an objection.

Equally, I don't find for the necessity of the prosecution side to have tendered CCTV electronic evidence because the appellants did not deny that the cars were stolen. The appellants neither denied to be the guards on duty on the day the cars were stolen nor did they report the incidence. At page 50 of the typed proceedings, it is revealed that the second appellant was arrested at Mlimba on 25th February, 2016. That been some 8 days after the theft incidence. This proves that the second appellant knew what was happening. It is the second's appellant's guilty consciousness which made him run away without reporting the incidence.

In the light of the above findings, the appeal is dismissed for lack of merits. The conviction and sentence of the appellants are sustained.

Y. J. Mlyambina

Judge

29/06/2018

Dated and delivered this 29th day of June, 2018 in the presence of the appellant in person and learned State Attorney Adolf Ulaya for the respondent.

Y. J. Mlyambina

Judge

29/06/2018