THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 178/2019

(From the Resident Magistrate's Court of Mbeya at Mbeya, Criminal Case No. 71/2017)

1. BRIGHTON S/O JOSEPH @BRAI@MARO
2. OMBENI S/O MGONJA ..... **APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 12.05. 2020

Date of Judgment: 20.05.2020

Dr. Mambi, J.

In the Resident Magistrate's Court of Mbeya at Mbeya the appellants were charged with an offence of Gang robbery c/s 286 & 287 of Penal Code, Cap 16 [R.E.2002]. The records show that the appellants were alleged to have committed an offence as charged by invading one women (PW1) who were with her colleague two women. It was alleged that in that incident PW1 was robbed her properties such as a hand bag, a mobile phone, one laptop and the money

amounted to 70,000/-. It was alleged that the incidence occurred at night on 2 day of February 2017 at Iwambi within Mbeya City. Having found guilty, by the trial court convicted and sentenced them 30 years imprisonment each of them.

Aggrieved, the appellants filed their petition of appeal containing the following grounds-

1. That the trial magistrate erred in point of law and fact convicting and sentencing the appellants to serve thirty (30) years imprisonment each and an order to pay Tshs.300,000/= as compensation to PW2 each appellant.
2. That the trial magistrate grossly erred both in point of law and facts when he convicted both appellants on a charge of GANG robbery while there was no proof.
3. That the trial magistrate erred in point of law and fact on imposing judgment against both appellants without considering doubts adduced on the prosecution side as no eye-witness who saw the appellants at the scene.
4. That the trial magistrate erred in point of law and facts in the convicting both appellants without considering doubts in the prosecution evidence which fails totally the involvement of the appellants with regards to the offence charged.
5. That the trial magistrate erred in point of law and fact when he convicted both appellants by believing that they were among bandits who involved in committing the offence at the scene of crime

6. That the trial magistrate erred in point of law and fact when he convicted and sentenced both appellants relying on the caution statements (exh. PE5 and exh. 6) allegedly made by the appellants
7. That the trial magistrate erred in point of law and fact when he convicted both appellants by believing that they were accused person who sold exhibits PE4 (Laptop Dell 5400) to PW5 and Exh. PE3 (a phone make Tecno W4) to PW6 while PW5 and PW6 could not produce any document or selling agreement before the court as exhibit.
8. That the trial magistrate erred in point of law and fact when he convicted both appellants basing on two seizure note which tendered in court by PW3 as a exhibit PE2 collectively without taking into account that the phone and lap top were not found in possession of the appellants.
9. That the trial magistrate erred in point of law and fact when he was so biasness to the prosecution where finally he convicted and sentenced both appellants while the case was not proved beyond any reasonable doubts as result.

During hearing which was done electronically where both prates were connected through video conference, the appellants who were unrepresented adopted their grounds of appeal and they had nothing to add. The Republic through the Learned State

Attorney Mr. Baraka Mgaya briefly submitted that he does agree with the grounds of appeal. The Learned State Attorney submitted that, it is true that the appellants were not identified at the scene but were found with stolen goods such as mobile phone (Techno W4) and one Laptop HP type. He argued that the evidence of PW6 is clear that he bought the stolen goods for the appellants. The Learned State Attorney further submitted even PW2 tendered the receipt with IME number for the stolen mobile phone. He referred the decision of the court in ***Akili Chewa vs. Republic, Criminal Appeal No. 156 of 2017 at page 9 – 10***.

Mr Mgaya submitted that the caution statement of the accused is also clear that the accused/appellants admitted to have robbed the properties from PW2. The Learned State Attorney also referred page 25 of proceedings where he argued that the records are clear that the appellant's committed the offence they stand charged.

In their response, the appellants briefly submitted that they were wrongly convicted and sentenced as the witnesses were not telling the truth. They argued that the prosecution failed to prove the case since they failed to tender exhibit to show if they used weapons. They further argued that even the intensity of the light was not addressed. They argued that they were forced to make their statement on the caution statements by Police.

I have thoroughly gone through the grounds of appeal raised and the submissions of both parties. Before addressing my observation and my finding on the grounds of appeal and submission by the Republic, my perusal have revealed that there were some irregularities during haring. It appears the appellants committed and offence of theft and stealing and not gang robbery as charged and convicted. The records and evidence show that the ingredients of the gang robbery were not fulfilled. This means that the evidence show that the appellants committed an offence of theft and stealing and not gang robbery as convicted and sentenced.

Now having observed those irregularities, the question before me is to determine what should be the best way to deal with this matter in the interest of justice. In my considered view the best way to deal with this matter is by way of revision instead of trial de novo as the alter may cause more injustice. In this regard I wish to invoke section 272 and 273 of the Criminal Procedure Act, Cap 20 [R.E.2002] which empowers this court to exercise its revision powers to examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. This in accordance with section 372 of the Act. Indeed section 373 further empowers the court that in the case of any proceedings in a subordinate court, the record of which comes to its knowledge, the High Court may in the case of conviction, exercise any of the powers conferred on it as a court of

appeal under sections 366, 368 and 369 and may enhance the sentence. The Court is also empowered to make any other order other than an order of acquittal to alter or reverse such order.

I wish to refer section ***372*** of the Criminal Procedure Act, Cap 20 [R.E.2002] as follows:

> ***"372.*** *The High Court may call for and* ***examine*** *the record of any criminal proceedings before any subordinate court for* ***the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed,*** *and as to the regularity of any proceedings of any subordinate court.*
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> Furthermore, section 373 of the same Act provides that:
>
> ***"****(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise* ***comes to its knowledge****, the High Court may–*
>
> *(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may* enhance the sentence*; or*
>
> *(b) in the case of any other order other than an order of acquittal,* ***alter or reverse such order****, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal.*
>
> *(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection.*
>
> *(3) ...*

(4) Nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to do in the interest of justice

(5)...."

Reading between the lines on the above provisions of the law empower this Court wide supervisory and revisionary powers over any matter from the lower courts where it appears that there are illegalities or impropriety of proceedings that are likely to lead to miscarriage of justice. Reference can also be made to other laws. In the regard I will refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2002] which clearly provides that:

"44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers* ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:"

Indeed this court has power on its own motion or suo moto if it appears that there has been an error material to the merits of the

case involving injustice, to revise the proceedings and make such decision or order therein as it may think fit. From the above findings and reasoning, I hold that from the above provision of the law including various decision by the court, this court is right in exercising its supervisory and revisionary power on the matter at hand as noted by the learned Counsel. The law is clear it is proper for this court to invoke provisional powers instead of appeal save in exception cases. The underlying object of the above provisions of the two laws are to prevent subordinate courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. The underlying object of the above provisions of the two laws are to prevent subordinate courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction.

In my considered view all these facts and evidence clearly shows that ingredients of an offence of theft and stealing were complete by the act of appellant who stealing the properties from PW2. The evidence is also clear that the stolen properties were found in possession of PW6 who bought those properties from the appellant. The appellant were required to be charged and convicted under both section 258 and 265 of the Penal Code Cap 16 [R.E.2002]. Indeed the provisions of the law that is section 258 and 265 of the Penal Code Cap 16 [R.E.2002] gives discretionary power to the court to lesser punishment depending on the nature of offence and circumstances of the case. I wish to quote section 265 as follows:

*"Any person who steals anything capable of being stolen is guilty of theft, and is **liable**, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years".*

In my considered view, the Trial Magistrate was required to observe such omission and convict the appellants under the proper provisions of the law. In our case in hand it is clear from the record that the Trial Magistrate acted upon some wrong principle and imposed a sentence which is manifestly excessive which warrants interference of this court inevitable. In the premises, I am of the settled mind that the prosecution did properly discharge their duty of proving the case beyond reasonable doubt on the offence of theft and stealing but not on the offence of gang robbery. For the reasons I have started, I am of the firm view that the guilt of the appellants was only proved beyond reasonable doubt on the offence of theft and not gang robbery. I am satisfied that the evidence by the prosecution side was strong enough to convict the appellants on the offence of theft and stealing. Indeed this court has mandate to substitute the sentence where it appears the lower court has acted under wrong principles by excessively sentencing the appellant without justification. This was underscored by the Court in ***BERNADETA PAUL v REPUBLIC 1992 TLR 97 (CA).*** The Court in this case observed that:

*"An appellate court should not interfere with the discretion exercised by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has **acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive".***

In view of the above findings, it can confidently be concluded that, failure to properly consider the proper sentence (basing on the prosper offence) that seems to be excessive without justification warrant this court to reverse the decision of the trial court. Thus considering the circumstances, I consider substituting the sentence of thirty years imprisonment by the trial court with the sentence of seven years for an offence of theft and stealing.

The offence under which the appellants were supposed to be charged and convicted has minimum sentence of seven years. The word ***"liable"*** under the provision of the law (section 265 of the Penal Code) in my view means seven years imprisonment is the maximum sentence but the court has discretion to impose lesser offence depending on the circumstance of the case. Considering the period the appellants have been in custody (almost three years) the appellants are supposed to be in jail for the remaining of five years from the date they were convicted but they will serve the remaining two year's.

I am of the view that a term of imprisonment of three years from the date hereof, could be a lesson for them to learn that crime does not pay. However, this court find it justice to order the appellants to serve two years from the date of this judgment. This means that this appeal is partly allowed to the extent of the orders I have made. The appellants will thus serve the sentence of two years imprisonment. The appellants are also ordered to pay compensation to PW2 300,000/ Tshs for each as ordered by the trial court.

DR. A.J. MAMBI

JUDGE

20.05.2020

Judgment delivered in Chambers this 20th day of May 2020 in presence of both parties.

DR. A.J. MAMBI

JUDGE

20.05.2020

Right of Appeal explained.

DR. A.J. MAMBI

JUDGE

20.05.2020