

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 76 OF 2019**

(Appeal from the judgment of Mtwara District Court in Criminal case No. 5 of 2018)

**YUSUPH HASSAN NDEMBO.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

13&16 June, 2020

**JUDGMENT**

**DYANSOBERA, J.:**

The appellant Yusuph Hassan Ndembo was charged along with two others, namely, Moses s/o Fabian Mtakasimba (2<sup>nd</sup> accused) and Hassan s/o Issa Aman (3<sup>rd</sup> accused) in Criminal Case No. 5 of 2018 in the District Court of Mtwara at Mtwara as follows:-

In the 1<sup>st</sup> and 2<sup>nd</sup> counts, the appellant was charged alone with burglary and stealing, respectively. In the 3<sup>rd</sup> count, the 2<sup>nd</sup> accused Moses Fabian Mtakasimba was charged with receiving stolen or unlawfully obtained property while in the 4<sup>th</sup> count, the 3<sup>rd</sup> accused Hassan IssaAman was charged with being found in unlawful possession of stolen property. The charge dated 15<sup>th</sup> March, 2018 alleged that these offences were in violation of the provisions of the Penal Code [Cap. 16 R.E.2002].

At the end of the day, the appellant and 2<sup>nd</sup> accused were found guilty convicted and sentenced. The appellant was sentenced to three years imprisonment in the 1<sup>st</sup> count while in the 2<sup>nd</sup> count he was sentenced to two years term of imprisonment. The sentences were ordered to run concurrently. The 2<sup>nd</sup> accused earned a fine of Tshs. 1, 000,000/= or in default of payment of a fine, to two years term of imprisonment. Meanwhile, the 3<sup>rd</sup> accused was acquitted.

The appellant was dissatisfied hence this appeal which contains five grounds of appeal and whose main complaints are to the following effect:

1. The Preliminary hearing was conducted in contravention of the law,

2. Only a certified receipt of the TV was admitted instead of the original as intimated during the conducting of the Preliminary hearing.
3. There was no proof of burglary and breaking.
4. PW 4, who recorded his cautioned statement denied him of his right of calling his relative or take him to the Justice of the Peace and that the cautioned statement which was admitted in court was taken beyond the prescribed period and extracted through torture.
5. He was convicted on the contradictory and uncorroborated evidence of DW 2 and DW 3.

The prosecution case was, briefly, the following. PW 1 Mfaume Mkanachapa Juma is a resident of Mangowela. On 6<sup>th</sup> December, 2017 at 0400 hrs while preparing to go to Mosque, he discovered the main door open and a TV which was at the sitting room missing. A remote controller, an adapter and two shirts were also missing. On 11<sup>th</sup> January, 2018 he was called at the Police Station where he identified the TV by its Serial Number 4051773 (exhibit P 1); a remote and adapter (exhibit P 2) to be his property.

Ismail Kanina who gave evidence as PW 2 lives in the same house with the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. He recalled that on 22<sup>nd</sup> December, 2017 at midnight, the police officers searched the house. In the room which was being occupied by the 2<sup>nd</sup> accused and which was searched in his absence, nothing was retrieved but in the room in which the 3<sup>rd</sup> accused was living, there were found the exhibits P 1 and P 2. The police seized those items, and a certificate of seizure dated 22<sup>nd</sup> December, 2018 was prepared by Assist. Insp. Tuntufye . The 3<sup>rd</sup> accused and the 2<sup>nd</sup> accused's wife were taken to the police station. The said certificate of seizure was admitted in court as exhibit P. 3. It is, however, not clear who tendered it in court as that A/Insp. Tuntufye did not testify in court.

PW 3 Suleiman Amlima, an Accountant with the Cashew Board of Tanzania testified that PW 1 was the CBT's Board's Director before he retired. He told the trial court that he bought exhibit P 1 from Unit Centre at Tshs. 2, 450,000/= and paid the money by cheque. He tendered in court certified copies of Payment Advice (Taarifa ya Malipo) which was admitted as exhibit P. 4.

H. 6019 D C Muka, a police officer testified at the trial as PW 4. According to him he interviewed the appellant and 2<sup>nd</sup> accused and

recorded their cautioned statements. He recalled that on 14<sup>th</sup> December, 2017 the appellant declined to have his statement recorded and demanded the recording to be in the presence of his sister but that on 15<sup>th</sup> December, 2017, PW 4 recorded the appellant's statement in the absence of his (appellant's) sister on the reason that the said sister had failed to appear. Despite the appellant retracting the statement, the trial court admitted it and marked it as exhibit P. 5. On 24<sup>th</sup> December, 2017 PW 4 also recorded the statement of the 2<sup>nd</sup> accused (exhibit P 6).

On 11<sup>th</sup> April, 2018, the appellant's entered their defences which were a flat denial.

The trial court believed the prosecution case and threw to the wind the defences.

When the appeal was called up for hearing on 13<sup>th</sup> May, 2020, the appellant stood on his own and unrepresented. In the time, the respondent was represented by Ms Caroline Matemu, learned state attorney.

The appellant, when invited to argue his appeal, opted the learned state attorney to start first, then he would respond. Ms Caroline Matemu, learned state attorney, declined to support the appeal.

With respect to the first ground of appeal which is on non-compliance with section 192 and which the appellant contended that it led to miscarriage of justice, learned state attorney informed the court that the ground had no merit. She avouched that the law was fully complied with in that the charge was read over to the appellant, the preliminary hearing conducted, the memorandum of matters not at issue signed and filed and the facts which were at issue were tried, evidence given and the appellant was accorded of an opportunity to hear and if possible contradict them.

On the 2<sup>nd</sup> ground of appeal, learned state attorney argued that the ground was also baseless. She argued that when the exhibits were produced in court the appellant did not raise any objection or ask any questions. She contended that the principles of a party who fails to cross examine witness were amplified in the case of **Paul YustusNchia v. National Executive Secretary, Chama cha Mapinduzi and others**, Civil Appeal No. 85 of 2005, CAT, Dar es Salaam. She referred this court to paragraph 14 of the trial court's proceedings.

As regards the 3<sup>rd</sup> ground of appeal, Ms Matemu told this court that the law is clear that the breaking does not necessarily entail breaking in

the real sense as the opening and entering the house without permit may amount to breaking in a legal sense.

On the 4<sup>th</sup> ground of appeal, the learned state attorney viewed this ground lacking basis and an afterthought. She contended that the appellant did not object when the exhibit was being produced and did not raise the issue of his being tortured and threatened at the time it was being recorded. She also contended that even if the exhibit is expunged from record, still there is enough evidence of PW4 who gave his evidence orally and further that the statement given at the police assisted the recovery of the stolen items.

As regards the fifth ground of appeal, Ms Matemba argued that the appellant was not convicted on the evidence of DW 2 and DW 3 alone but on the evidence of both sides which was considered. She urged this court to find that the case against the appellant was proved beyond reasonable doubt.

In his rejoinder, the appellant told this court that he was not identified at the crime scene, the evidence did not implicate him and that the 3<sup>rd</sup> accused who was found with the stolen items was let scot free and the 2<sup>nd</sup> accused who had sold the items was only fined. He reiterated that

he was not afforded a chance of calling his relative when recording his statement before PW 4 and that the receipt tendered by PW 3 did not prove ownership of the stolen items.

I have given due consideration to the submissions by both the learned state attorney and the appellant. I have also considered the trial court's record in relation to the appellant's grounds of appeal in the petition of appeal.

The question I have to ask myself and determine is this. Was the evidence led by the prosecution at the trial sufficient to prove beyond reasonable doubt that the appellant committed the charged offences? This, I will tell.

This being a criminal case, the burden lies on the prosecution to establish the guilt of the appellant beyond all reasonable doubt by proving not only that the alleged offences were committed but also that it is the appellant who committed them. This, however, does not depend on the number of witnesses called upon to testify, for under the provisions of section 143 of the Tanzania Evidence Act, Cap. R.E.2002, it is provided that "Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact." What is



important is the credibility and reliability of the evidence. This position was reiterated by the Court of Appeal of Tanzania in various case laws including that of **Yohana Msingwa v. R** [1990] TLR 148 referred to me by learned state attorney and advocates.

It is the duty of this court, as the first appellate court, to re-evaluate all the evidence on record and come to its own conclusion.

In this case, the evidence which the learned trial Resident Magistrate considered and which learned State Attorney relied on to support the conviction and sentence is as summarised above.

Having revisited the above evidence and the principles governing criminal liability, I am satisfied that there was no sufficient evidence to ground conviction.

First, it was not proved how the breaking occurred and the stealing was committed. As rightly pointed out by the appellant, there was no evidence that the house of PW 1 was burgled. The argument by the learned state attorney that the burglary does not necessarily entail the breaking cannot be swallowed without a pinch of salt particularly where PW 1 was clear that he found the main door open. He did not state that the door was

broken nor was there any evidence that he had locked or even shut the door before he retired the previous day. Indeed, the ingredients of both burglary and stealing were not proved.

Second, as rightly pointed out by the appellant none saw him breaking and stealing from PW 1's house nor was he found at the crime scene.

Third, the appellant was not found with any incriminating article. The evidence on record shows that it is only the 3<sup>rd</sup> accused who was found with the exhibits P 1 and P 2 but the same 3<sup>rd</sup> accused was not convicted but let scot free. There was no prosecution evidence which materially implicated the appellant.

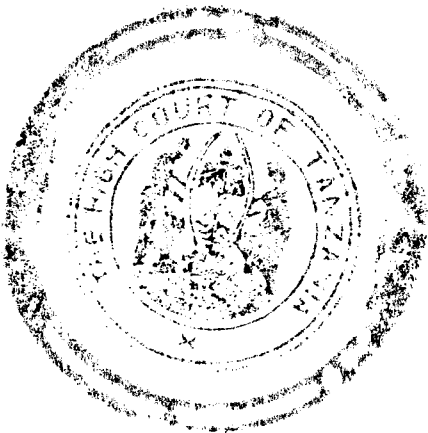
Fourth, the appellant's cautioned statement recorded by PW 4 and which was admitted in court as exhibit P 5 was retracted and no inquiry as to the voluntariness was made. Indeed, the record is clear that the appellant's right to have his statement recorded in the presence of his sister was violated.

Fifth, the appellant's defence raised a reasonable doubt in the prosecution case and the appellant had to be accorded the benefit of doubt.

For those reasons, I am satisfied and hereby find that the appellant's conviction was grounded on insufficient evidence. The case against the appellant was not proved beyond reasonable doubt.

I allow the appeal, quash the convictions and set aside the sentences.

I order the appellant to be released from prison forthwith unless lawfully held for other causes.



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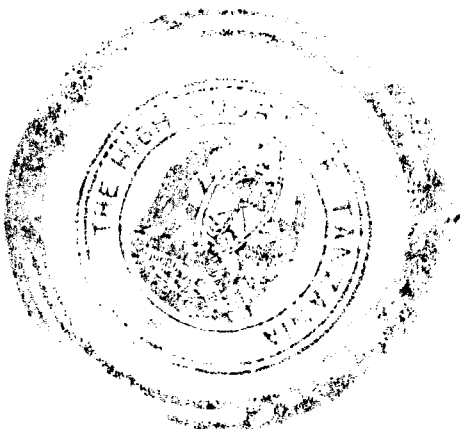
W.P. Dyarisobera

JUDGE

16.6.2020

This judgment is delivered under my hand and the seal of this Court on this 16<sup>th</sup> day of June, 2020 in the presence of Mr. Paul Kimweri, learned Senior State Attorney and the appellant (virtually present in court).

Rights of appeal explained.



A handwritten signature in black ink, appearing to read "W.P. Dyansobera".

W.P. Dyansobera

JUDGE