IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 73 OF 2019

(Appeal from the Judgment of the District Court of Iiemeia at Ilemela (Kalegeya, RM) Dated 17th of December, 2018 in Criminal Case No. 1 of 2017)

MT. 91714 PTE MASOUD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

6th May, & 15th June, 2020

ISMAIL, J.

In the District Court of Ilemela, the appellant, along with four other accused persons, were arraigned and convicted of theft, contrary to sections 258 (1) and 265 of the Penal Code, Chapter 16 of the Laws. Upon conviction he was handed down a custodial sentence of 12 months. It was alleged during trial that between May and September, 2011, the appellant and four others allegedly stole an asphalt plant valued at TZS. 250,000,000/-, the property of TEMESA. Aggrieved by the said decision,

the appellant has moved to this Court, seeking to assail the trial court's decision on two grounds of appeal, paraphrased as follows:

1. *That evidence used to convict was too week to discharge the prosecution's burden of proof beyond reasonable doubt; and*
2. *That the trial court grossly misdirected itself by convicting and sentencing the appellant without having regard to the doubts created by the defence.*

Before I delve into determination of the grounds of appeal and the parties' rival contentions, I find it pertinent that a factual background that bred this appeal be stated, albeit briefly, and it is as follows. Musa Mlongo, Zablon Elias, Martin Kigoye and MT. 55748 (Rtd) Julius Madale Katoto, who featured as 1st, 2nd, 3rd accused, respectively, along with the appellant, who featured as 4th accused, were arraigned in court on an allegation of theft of an asphalt plant, the property of TEMESA. The incident occurred between May and September, 2011, at the Airport Jeshini area within Ilemela District, in Mwanza region. Upon investigation, the quartet was charged with assorted counts of theft. The appellant and the fifth accused faced the second count of stealing, contrary to sections 258 (1) and 265 of the Penal Code (supra). The accused persons refuted the accusations. In the case of the appellant, his contention was that, while he was stationed near the

place at which the plant was mounted, he was not involved in any thievery incident. He contended that the plant was 200 metres away from where his guard station was. While he acknowledged the fact that the 1st, 2nd and 3rd accused persons were working with TEMESA, under whose ownership the stolen plant falls, he asserted that he did not know what their assignments were with their employer. He imputed a case a mistaken identity by PW4 who testified that he was there when the plant was stolen. Trial proceedings culminated into a conviction, whereupon a sentence of imprisonment for 12 months was imposed on each of the accused persons.

Hearing of the matter was done through video-conference and it pitted Mr. Alfred Daniel, learned counsel who represented the appellant, against Ms. Gisela Alex, learned State Attorney who appeared for the respondent.

Arguing in respect of the first ground of appeal, Mr. Daniel held the view that the trial proceedings were marred by wanton weaknesses. He held the view that the judgment was premised on the evidence adduced by PW4, PW5 and PW6 whose account of facts is at variance with respect to the role played by the appellant in the commission of the alleged offence. He contended that, whereas PW5's testimony, as found at page 81, is to

the effect that the appellant is the one who led the rest of the accused persons to stash the stolen machinery, testimony of PW4 (see pages 65, 74 and 75) was to the contrary. He asserted that these two pieces of testimony are contradictory or at variance with one another, thereby casting a serious doubt which would not warrant a finding of guilt against the appellant. Mr. Daniel held the view that the testimony of PW4 and PW5 which was the basis for conviction was weak and did not prove the case against the appellant. On this, he referred the Court to the decision of ***Republic v. G 2573 PC Pacificus Deophance Simon***, HC-Criminal Session Case No. 45 of 2013 (Iringa-unreported).

With respect to ground two, the counsel's contention is that the defence testimony which is found at page 155 of the proceedings was not considered by the trial court. The counsel contended that issues such as distance from the plant and the camp he was working at were testified on but were never considered. Mr. Daniel further held the view that, since the appellant testified that his alleged involvement was mentioned by the police, it meant that it is the police who informed the prosecution's witnesses on the appellant's involvement. Exploring further, the learned counsel submitted that the description of appellant as "white", given by

PW1, PW2 and PW3 who are alleged to have identified the appellant drew a confusion which was not clear as to whether this was meant to refer to the appellant or somebody else. He is of the view that such doubts ought to have been determined in the appellant's favour. With respect to identification, the appellant contends that the same was not properly conducted because the appellant was a known figure, having been arraigned in court in 2011, before he was discharged and re-arrested in connection with the proceedings from which the instant appeal emanated. This, he submitted, rendered the identification parade a sham.

The respondent's rebuttal was equally strenuous. While supporting the conviction and sentence imposed by the trial court, Mr. Alex held the view that the decision of the trial court was faultless, and urged that the same be upheld. Terming the first ground of appeal hollow, the learned attorney submitted that PW5 stated at page 81 that on 27th May, 2011, he was hired to go and pick some merchandise from an army camp where he was met with an army officer in uniform and led him to the camp. PW5 stated further that he was able to identify the appellant as a person who rode a motorcycle and led them to the scene of the crime. Ms. Alex further argued that PW4, a motor crane driver, testified (at pp. 74-75 of the

proceedings) to the effect that he was hired from Nyegezi and that, at some point, he was joined by the accused persons who included the appellant. Ms. Alex contended that PW4 identified the appellant and so did PW5. The learned counsel spotted no contradictions in any of the witnesses' testimony. She held the same view with respect to what the appellant's counsel contended as contradiction in the appellant's names. The contention is that names of the appellant were clarified by PW4 and PW5 and this is found at page 74.

Reacting with respect to ground two, the learned attorney argued that the appellant's involvement has been testified on by PW4 and PW5. With respect to the identification parade, Ms. Alex held the view that the parade was not important since the incident occurred during the day and that the accused persons, including the appellant, were known to PW4 and PW5. She found nothing concerning on the identification parade.

In further reply to the appellant's complaints on the testimony of PW1 and PW2, Ms. Alex submitted that the said testimony was not contradicted by the appellant and other co-accused persons, holding that in law, failure to cross-examine a witness means that the testimony of the said witnesses was not contradicted, and that such failure is considered to

be an admission of the facts adduced in evidence. To fortify her contention, Ms. Alex referred me to the case of ***Deogratias Nocholaus & Another v. Republic***, CAT-Criminal Appeal No. 211 of 2010 (unreported). Labelling the said testimony as an afterthought, the learned attorney urged the Court to disregard the appellant's complaint in that regard.

Submitting on the distance from the plant and the army camp, Ms. Alex contended that this issue was not raised during the trial proceedings. It cannot be allowed to surface at this stage of the proceedings. On proof of theft, she contended that the offence of theft can be proved once asportation is proved. This was done by PW4 and PW5, she contended. On this, she referred to the decision in ***Christian Mbunda versus Republic*** [1983] TLR 340. She argued that the offence of theft was proved.

In a quick rejoinder, Mr. Daniel still contended that the case against the appellant was proved. He contended that the testimony of PW4 and PW5 that 1st and 2nd accused hired them would not be enough to prove the case, and so was the act of finding the appellant at the scene of the crime. He maintained that the testimony of PW4 and PW5 was contradicting one another on a single issue. The learned counsel argued that doubts brought by the contradictions ought to have been decided in the appellant's favour.

Responding to the question of identification parade, Mr. Daniel still maintained that the same was conducted as seen at page 112 of the proceedings. He contended, however, that it has not been stated whether the same was conducted before or after the accused persons had been arraigned in court. He reiterated his rallying call that the appeal be allowed.

I have dispassionately reviewed the splendid arguments raised by the counsel, and I cannot thank the counsel enough for their industry and meticulous review of the trial proceedings. Having reviewed the voluminous proceedings of the trial court, as well, I am now able to dispose of this appeal.

Regarding the first ground of appeal, the crucial question for determination is whether evidence adduced by the prosecution was enough to discharge the burden of proof in the offence of theft. The appellant's contention is that whatever evidence that the prosecution tendered in court was not of any requisite sufficiency to warrant a conviction on the offence of theft.

It is an enduring canon of justice that, in criminal cases, proof of the allegations against an accused person is a burden that rests on the shoulders of the prosecution, and that such burden never shifts. The

standard of proof is, as well known, beyond reasonable doubt. This principle is as old as criminal law itself, and courts have, on countless times, laid an emphasis on its observance. In ***Joseph John Makune v. Republic*** [1986] TLR 44, it was held:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."*

The importance of this requirement was underscored, yet again, in ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), wherein it was restated as follows:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."*

The contention by Mr. Daniel is that the case against the appellant was not proved beyond reasonable doubt. Before we ascertain validity of this contention, it is apposite that the ingredients of the offence with which the appellant was charged be set out clearly. This can be done by glancing

through section 258 (1) and (2) of the Penal Code (supra) under which the appellant was charged. It provides as hereunder:

> *"1. A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.*
>
> *2. A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say;*
>
> *(a) an intent permanently to deprive the general or special owner of the thing of it;*
>
> *(b) an intent to use the thing as a pledge or security;*
>
> *(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;*
>
> *(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of taking or conversion; or*
>
> *(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner, and "special owner" means any person who is in lawful possession or custody of, or any proprietary in the thing in question."*

From this excerpt, it is clear that, in theft cases, action is as important as the intent. The act, that is to say, *actus reus*, is in the actual deprivation or conversion of the thing, while the intent, *mens rea*, resides in the offender's intention to fraudulently convert the stolen thing and deprive the owner of its use. A position in respect thereof was lucidly laid in ***Christian Mbunda v. Republic*** (supra), wherein the Court (Msumi, J., as he then was) held as follows:

> *"(i) It is an elementary rule of law in order to convict an accused of theft the prosecution must prove the existence of actus reus which is specifically termed as asportation and mens rea or animus furandi;*
>
> *(ii) in this case there was asportation but the appellant had no guilty mind or animus furandi when he used the money for the purpose other than buying millet from the village;*
>
> *(iii) it is not necessary for one charge with stealing by servant contrary to section 271, of the Penal Code that property stolen should belong to the accused's employer, but the section covers a situation where, though the stolen property does not belong to the employer it came into possession of the employee or the accused on account of his employer;*

(iv) the offence of stealing by agent is neither minor nor cognate to stealing by servant as proof of the latter does not necessarily notify the accused of the essential elements of the former."

The prosecution witnesses have demonstrated, with sufficient particularity, how the machinery was dismantled and moved from Airport Jeshini, where it was hitherto installed, to Nyakato Steel, where it was stashed and eventually disposed of. This testimony has been adduced by PW4, PW5 and PW6 who participated in facilitating movement of the said machinery. It is a testimony which beds well with the testimony adduced by PW3, to the effect that the 1st and 2nd accused, who were the appellant's co-conspirators and facilitators, went to hire her motor crane vehicle to take the machinery to Nyakato steel. This was done and PW5 drove the crane to the final destination. It is in this process that the appellant played a role by leading the said witnesses to the point where the machinery was planted. This is found at pages 70 through to 84 of the proceedings. The totality of this testimony proves that the act of stealing happened and that, in so doing, the appellant and his co-accused deprived the owner of its use. The movement of the machinery means that asportation was done. The trial court found that the testimony adduced by

these witnesses was credible and worth relying on. Their testimony is neither improbable nor is it implausible, and it was not materially contradicted by any other testimony or any witness. I thus apply the wisdom in ***Goodluck Kyando v. Republic***, CAT-Criminal Appeal No. 325 of 2007 (unreported), to hold that PW4 and PW5 adduced credible and believable evidence sufficient to ground a conviction. In the cited decision, the Court of Appeal held that *"every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."* See also: ***Aioyce Maridadi v. Republic***, CAT-Criminal Appeal No. 208 of 2016 and ***Bundala Mathlas v. Republic***, CAT-Criminal Appeal No. 62 of 2004 (both unreported). In that, respect, I hold the view that the prosecution did what it was required of and I find nothing blemished to depart from the trial Court's finding.

The appellant's other area of concern with respect to the first ground relates to what he contends as contradictions in the testimony, especially with respect to who took the machinery from the scene of the crime to Nyakato steel where it finally ended. The appellant contends that PW4 and PW5 were at variance in this respect. It is trite law, that discrepancies and inconsistencies in the witness's statement or testimony are contradictions

which can only be considered adversely if they are fundamental. If the same are of trifling effect, then they ought to be ignored. In ***Luziro s/o Sichone v. Republic***, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded.* ***It is only fundamental discrepancies going to discredit the witness which count."***

The decision in the just cited case followed in the footsteps of another splendid decision of the Court of Appeal of Tanzania in ***Disckson Elia Nsamba Shapurata & Another v. Republic***, Criminal Appeal No. 92 of 2007 (unreported), in which the learned Justices quoted the passage in ***Sarkar's Code of Civil Procedure Code***. It was held as follows:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be.* ***Material discrepancies are those which are normal and not expected of a normal person. Courts have to***

label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."

In ***Mukami w/o Wankyo v. Republic*** [1990] TLR 46, the Court of Appeal took the view that contradictions which do not affect the central story, are considered to be immaterial. See also: ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, CAT- Criminal No. 269 of 2012.

My unfleeting review of the testimony of PW4 and PW5 gives me no impression that the same was at variance with one another, in any form or magnitude and, with respect, I find the contention by Mr. Daniel profoundly unfounded. I hold that even if some contradictions were found, which is not the cases, the same were not of humongous value as to effect corrode the central story.

Ground two of the appeal has introduced a number of issues as well. In the first, the appellant has decried about the failure to conduct an identification parade which was intended to identify the culprits. On this, I wish to remind the counsel that the law is clear, that not in all cases is identification necessary, especially where the persons to be identified are known to the witnesses or the witnesses have met him before. In this case,

PW4 and PW5 identified the appellant in the dock, and stated in their testimony that they met him on the occasions that they visited the scene of the crime. Identification of the appellant through an identification parade was unnecessary in such circumstances. I find Mr. Daniel's insistence on this point serving no useful purpose.

My view is premised on what has been espoused in numerous court decisions. In ***Moses Charles Deo v. Republic*** [1987] TLR 134 it was observed:

> *"An extra judicial parade proceeding is not substantive evidence, it is only admitted for collateral purposes. In the majority of cases, it serves to corroborate the dock identification of an accused by a witness in terms of s. 166 of the Evidence Act, 1967."*

A more exquisite position was set out in the subsequent decision in ***Said Lubinza & 4 Others v. Republic***, CAT-Criminal Appeal Nos. 24, 25, 26, 27 and 28 of 2012 (Tabora-unreported), wherein the Court of Appeal held thus:

> *"It is trite law that identification parades derive their corroborative value from s. 166 of the Evidence Act, Cap. 6. In other words, identification parades are in themselves not substantive evidence. If properly conducted, their value is to*

corroborate the evidence of identifying witnesses, and the purpose of corroboration is only to confirm or support evidence which is already sufficient, satisfactory and credible and not to give validity or credence to evidence which is itself deficient, suspect or incredible."

In view of the fact that the trial court's basis for conviction was the testimony of PW4 and PW5, I hold the view that need did not arise for conducting the said parade.

Connected to this is Mr. Daniel's contention that, while the rest of the accused persons were identified by names, the appellant was only identified by PW1, PW2 and PW3, as "white" without revealing his actual name. Whilst this argument may have some semblance of credence, it is the timing of it that raises a few eye brows. The appellant did not raise this concern during trial. Having missed the bandwagon, the appellant cannot be heard to complain at this stage of the proceedings, it being a canon of law that failure of a party to cross examine a witness on a fact means admission of such fact. Raising it at this stage is considered to be an afterthought which would not be acceptable. In ***Ismael Ally v. Republic***, CAT-Criminal Appeal No. 212 of 2016 (unreported), the Court of Appeal observed:

"... the complainant's age was not raised during trial. It is also glaringly clear that the appellant did not cross-examine PW1, PW2 and PW3 on that point. Therefore, raising it at the level of appeal is an afterthought."

See also: ***Daniel Ruhele v. Republic***, CAT-Criminal Appeal No. 501 of 2007; ***Edward Joseph v. Republic***, CAT-Criminal Appeal No. 272 of 2009; and ***Nyerere Nyague v. Republic***, CAT-Criminal Appeal No. 67 of 2010 (all unreported).

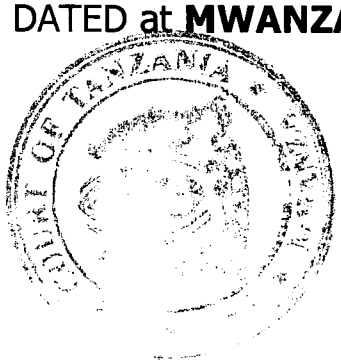
There is also a complaint with respect to the fact that the question of consideration of the appellant's defence, including distance from the plant to the site was not considered. This also includes the fact that he doesn't know why the police singled him out. As the respondent's counsel rightly submitted, this is quite far-fetched and irrelevant. What matters is if there is sufficient evidence to connect him to the offence with which he was charged. The trial court weighed the appellant's defence and found that it did not raise doubts which would persuade the trial court and give credence to it. I find plausibility, as well, in the respondent's argument that this is a question which would be posed and resolved through cross examination of the witnesses during trial. The appellant chose to spurn that opportunity. He cannot raise it now. All in all, this was quite a trivial

matter in a case where the prosecution was able to prove involvement of the accused in the incident for which they were charged.

In the uposhot, I find this appeal barren of fruits and I dismiss it. I uphold the conviction and sentence passed by the trial court.

I so order.

DATED at **MWANZA** this 15th day of June, 2020.



M.K. ISMAIL

JUDGE

Date: 15/06/2020

Coram: Hon. M. O. Ndyekobora, Ag-DR

Appellant: Present in person

Respondent: Absent

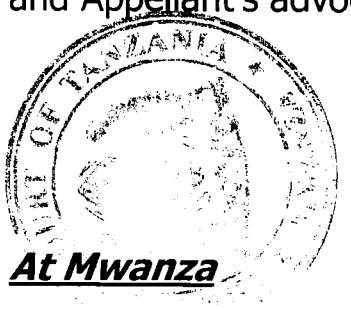
B/C: Leonard

Mr. Alfred Daniel, Advocate for the appellant.

We are ready for the Judgment.

Court:

Judgment delivered this 15th June, 2020 in present of the Appellant and Appellant's advocate one Mr. Alfred Daniel.



M. O. Ndyekobora

AG – DR

At Mwanza

15th June, 2020