THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO 40 OF 2020

(Arising from the District Court of Masasi in Criminal Case No 94 of 2019)

FELIX ODILO MROPE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Hearing date on: 20/5/2020
Judgment on: 02/6/2020

JUDGEMENT

NGWEMBE, J:

The appellant Felix Odilo Mrope was aggrieved with conviction and sentence meted by the trial court. According to the charge sheet, he was arraigned in court jointly with Athuman Saidi Lindola @ Mang'una for the offence of breaking into a building and committing an offence contrary to section 296 (a) of the Penal Code [Cap 16 R.E. 2002], now referred to as [Cap 16 R.E. 2019] The second count was stealing contrary to section 265 of the Penal Code. Particulars of those two counts were that, on 20th August, 2019 at around 01: 40 hours, at Lupaso Secondary School, within Masasi District in Mtwara Region, the appellant did break into and entered into a store of Lupaso Secondary School with intent to commit an offence

therein. In the second count, is alleged to have stolen building materials namely Sixty bags of cement valued TZS 750,000=, twenty Iron bar valued TZS 400,000/= and three plastic containers of silk house colour valued TZS 60,000/= forming a total value of **TZS 1,210,000/=** properties of Lupaso Secondary School.

During trial, the prosecution lined up four (4) witnesses to prove the accusations against the appellant, finally was found guilty, convicted and sentenced to serve seven (7) years imprisonment. On the other side, the prosecution failed to prove any offence against the 2nd accused, thus the trial court proceeded to acquit him from both counts.

Being aggrieved with the trial court's decision, the appellant found his way to this court with seven (7) grounds, faulting both the conviction and sentence. Looking critically on those grounds, they are viewed as admission or confession of the offence committed. However, I would summarize his grounds of appeal into one ground to wit; *the prosecution failed to prove the accusations against the appellant beyond reasonable doubt.*

In arguing on this ground, the appellant did not procure services of learned advocate, thus, his contribution was very much limited. The Republic enjoyed the services of senior State Attorney Mr. Wilbroad Ndunguru. The appellant just argued generally, that this court should consider his grounds of appeal and that he paid fine in court to a tune of TZS 360,000/=, but still was jailed seven (7) years imprisonment. He lamented further that payment of that fine was witnessed by the Public Prosecutor called Edwine.

To his understanding, once he paid fine, the matter was settled, but was surprised to find that the prosecution continued to prosecute him in court. Thus, have been punished twice in one offence.

On the adversarial side, the learned senior State Attorney, argued that the element of stealing was established and proved, that the appellant deprived the owner of the construction materials stolen in the store permanently.

Further argued that the evidence of PW1 was so strong as he was the one who locked the appellant in the store, until in the morning. Above all the appellant confessed to have engaged in stealing properties of the school construction materials. He confessed before police force and during recording his caution statement. That even in his defence, the appellant admitted to have engaged in stealing school owned construction materials. He added that even in his submission in this appeal, is purely an admission of the offence he committed. In totality this appeal bears no value worth being considered by this court.

This court asked the learned Senior State Attorney to comment on the sentence meted by the trial court, he responded that such sentence was contrary to section 170 (1) of the Criminal Procedure Act. However, he cited section 388 of CPA to call upon this court to correct such error committed by the trial court.

I think, without taking much pain on this appeal, the evidence on record speaks loud, that the appellant was locked in the store where he stole two

bags of cement and when he was in the process of stealing the third bag, was locked in that store by PW1 until in the morning. It is also undisputed fact that he confessed before police force when he recorded his caution statement. For better understanding, confession as defined by **Black's Law Dictionary 8th Edition at page 317** means *"a criminal suspect's oral or written acknowledgement of guilt, often including details about the crime".*

Confession is a statements which are direct acknowledgements of guilt. The appellant's confessed on the offence he committed was in line with the actual events and circumstances testified by PW1, PW2 and PW3. Thus corroborating the appellant's confession. Though, the caution statement was not read over in court, soon after being admitted, yet what was testified in court by PW2 as Ward Executive Officer who witnessed the appellant being locked in store and he confessed before him that he stole two bags of cement is so strong to lead into conviction. The same confession was made before PW3, therefore, section 27 of the Evidence Act was complied with. The section is quoted hereunder for clarity:-

> "27 (1) *A confession voluntarily made to a Police Officer by a person accused of an offence may be proved as against that person"*

The Court of Appeal in the case of **Thadei Mlomo & Others Vs. R, [1995] T.L.R. 187 at 191** held:-

> *"Under section 27 once a confession has been proved to be voluntarily made then it would appear a court will accept it as the truth. However, if a confession was involuntary, then it will be accepted under section 29 if the court is of the opinion that*

the confession constitutes the truth. So in the former section the truth of the confession is presumed by the court while in the latter the truth has to be conceived by the court"

The appellant's submission in this court is likewise an admission that indeed he was involved in stealing the said cement. Therefore, this court takes his confession to be an acknowledgement of his guilty consciousness.

In respect to the caution statement, same was not read over immediate after being admitted. Such error is fatal, which this court must expunge it as I hereby do. Despite expunging that caution statement, still his confession remain valid and admissible because confession is not mandatory that should be in a written form, but even oral confession is admissible in court.

In regard to the alleged payments of fine of TZS 360,000/= that the appellant paid in the presence of the Public Prosecutor Mr. Edwine. Unfortunate that information is not part of the trial court's proceedings. It is a new fact which was not recorded during trial. This court cannot admit such new facts which were not testified during trial. Therefore, the issue of payment of fine of TZS 360,000/= lacks merits in this appeal. I therefore, fail to consider it any further.

In regard to the punishment issued by the trial court of seven (7) years imprisonment, I think the section charged provide sentence of ten years as maximum not minimum. More so maximum sentence always is reserved to the hard core criminals. Usually, first offenders are deserved lenient punishment. Moreover, district courts are guided by section 170 (1) of CPA, in issuing sentence to normal offenders; unless such sentence is under

minimum sentence Act. For better understanding section 170 of CPA is quoted hereunder:-

> *"A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences:-*
>
> *(a) Imprisonment for a term not exceeding five years; save that where a court convict a person of an offence specified in any of schedules to the minimum sentences Act which has jurisdiction to hear, it shall have jurisdiction to pass the minimum sentence of imprisonment"*

This section does not require any assistance of intellectual legal drafters' interpretation, but it means exactly what it says. The right punishment to the offence of stealing when proved beyond reasonable doubt is any period up to five (5) years for subordinate courts and maximum up to ten (10) years, for appropriate courts seized with that jurisdiction. Therefore, the trial court erred in passing the sentence of seven (7) years without considering other applicable laws. As such in the dictates of section 388 of CPA, this court has a legal duty to correct errors made by trial courts.

For the reasons so stated, this appeal lacks merits hence, I hereby uphold the conviction made by the trial court, and proceed to correct the sentence of seven (7) years into five (5) years imprisonment.

I accordingly Order

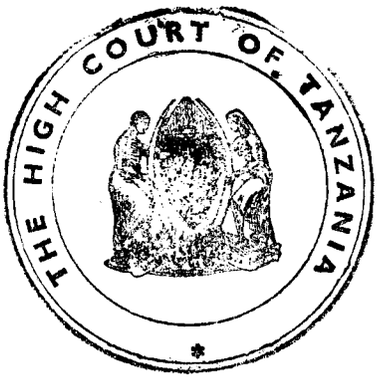
DATED at Mtwara in chambers this 2nd day of June, 2020

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE
JUDGE
02/06/2020

Court: Judgement delivered at Mtwara in Chambers on this 2nd day of June, 2020 in the presence of the Appellant and Mr.Paul Kimweri, Senior State Attorney for the Republic/Respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE
JUDGE
02/06/2020