THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO 21 OF 2020

(Originating from Mtwara District Court at Mtwara

Criminal Case No 40 of 2019)

TINO S/O JOHN MAHUNDI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 12/4/2020

Judgment on: 23/6/2020

NGWEMBE, J:

The appellant Tino s/o John Mahundi in this matter was aggrieved by the decision of the District Court of Mtwara in Criminal Case No. 40 of 2019. He was charged for two counts, one is House Breaking contrary to section 294 (1) (a) of the Penal Code [Cap 16 R.E. 2002, now Revised Edition of 2019]; and Stealing contrary to section 258 (2) and 265 of the Penal Code. It was alleged that on 6th April, 2019 at Shangani East area within

Municipality and Region of Mtwara, did Break into a dwelling house of Regional Administrative Secretary of Mtwara Municipality during night with intent to commit an offence therein to wit stealing. The particulars of the second count is to the effect that the appellant did steal one flat screen Television make Samsung 32 inches valued at TZS 1,200,000/=; and decoder make DSTV valued at TZS 100,000/= both properties of the Government of United Republic of Tanzania.

Upon hearing both parties, the trial court found the appellant guilty of both counts, subsequently was sentenced to two (2) years imprisonment for the first count and three (3) years imprisonment for the second count, both sentences to run concurrently.

Being aggrieved with such conviction and sentence, the appellant ventured to this court by filing notice of appeal on a last day of issuing notice ,that is, 4th November, 2019 and subsequently lodged four grounds of appeal as follows:-

1. That the trial resident magistrate erred in law by failing to comply with mandatory provisions of the Tanzania Evidence Act section 127 (2) [cap 16 R.E 2002] as amended by Act No. 2 of 2016 (miscellaneous Amendments) PW4 was a child of tender age.
2. That the trial magistrate erred in law by admitting exhibit P2 and P3 un procedurally as exhibits.

   Through the proceedings, exhibit P3 was never read in court as required under section 210 (3) of the CPA. The trial magistrate failed

to acknowledge appellant on his rights under section 210 (3) of the CPA [Cap 20 R.E 2002] before admitting P3 as exhibit.

3. That the trial magistrate erred in law and fact by convicting the appellant using exhibit P3 the alleged seizure certificate which was full of legal defects and contravened with the provision of section 38 (3) of the Criminal Procedure Act [cap 20 R.E 2002].

4. That the trial magistrate erred in law and fact in convicting the appellant while the prosecution side failed to prove the charge beyond reasonable doubt.

On the hearing date of this appeal, the appellant appeared in person, while the Republic was represented by Mr. Paul Kimweri, learned senior State Attorney. In arguing his appeal, the appellant was just brief that there was no evidence linking him with stealing the alleged Television Screen. Thus, the trial court misdirected in convicting him based on a reason of being a habitual offender.

Responding to the appellant's submission, the learned senior Sate Attorney supported the conviction and sentence meted by the trial court. That according to the charge sheet, the complainant was the Republic of Tanzania, whose properties were properly identified by the guardian (PW1) of the respective house. The appellant was arrested by PW3 who rightly testified in court.

Further, the facts that he was arrested with scrapper instead of TV is irrelevant because the certificate of seizure included all the stolen properties including the said TV not scrapper. More so the appellant did not object admissibility of that TV in court.

In respect to the evidences of PW4 who was 14 years old, his testimonies were made after complying with section 127 of the Evidence Act as amended. At page 18 of the proceedings, the trial court recorded that a child knows to speak truth and taking oath. He referred this court to the case of **Selemani Mosses @ White Vs. R, Criminal Appeal No.385 of 2018** (CAT) Mtwara page 11. Therefore, this ground of appeal is irrelevant and baseless.

In respect to exhibit P2 and P3, he argued that both were properly admitted and P3 was read over after being admitted as per legal requirements. Therefore, ground 3 is baseless and inapplicable for the trial magistrate complied with all legal requirements.

In regard to ground four (4), he argued that, the stolen TV was owned by the Government. There was no scraper but a functioning Television owned by the Government. The appellant during trial testified lies that the TV was a scraper, which testimonies supported the prosecution case. To comprehend his argument, he referred this court to the case of **Daud Sabrick & Joseph Asajile Vs. R, Criminal Appeal No. 25 of 1998**.

He rested his submission by a prayer that the appeal is baseless same should be dismissed forthwith.

As I proceed with the task of determining this appeal, the guiding principles expressed in **Joseph John Makune Vs Republic [1986] TLR 44** are relevant in this appeal as quoted hereunder:-

> *"The cardinal principle of our law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle, one example being where the accused raises the defense of insanity in which case he must prove it on the balance of probabilities....."*

This principal is a yard stick in determining criminal cases in our jurisdiction. The prosecution has uncompromised duty to prove its case beyond reasonable doubt. The prove beyond reasonable doubt does not mean beyond human imagination or human ability, otherwise, the Republic will fail to protect innocent citizens against hard core criminals in the society. When the evidence testified in court points to no body, but to the accused, it means the accused is liable and the court should trust them that they spoke what they knew. Therefore every witness, should be entrusted and believed, as was rightly pronounced in the case of **Goodluck Kyando Vs. R, [2006] T.L.R 363** the Court held:-

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness".*

The statutory duty of the prosecution is to call credible and reliable witnesses to prove the accusations against the accused. In the case of **Nathaniel Alphonce Mapunda and Benjamini Alphonce Mapunda V. Republic [2006] T.L.R. 395 held:-**

> *"As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said Matula v. R. this Court reiterated the principle by stating that in a criminal charge the burden of proof is always on the prosecution. And the proof has to be beyond reasonable doubt. There must be* ***credible evidence linking the appellants with the offence committed****".*

In the same vein, the Court of Appeal repeated in the case of **Yusuf Abdallah Ally Vs. R, Criminal Appeal No. 300 of 2009** (Unreported). But what does it mean **"beyond reasonable doubt"?** This question has reminded me to the most lucid definition of the phrase ever made by **Lord Denning,** in the case of **Miller Vs. Minister of Pensions, (1947) 2 All ER 372,** where he said:-

> *"for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave only a remote possibility in his favour which can be dismissed"*

In totality therefore, I may gather that the degree of 'proof beyond reasonable doubt' will vary with the degree of seriousness of the offence under consideration. The more serious offence, the higher ought to be the burden of proof. As rightly pointed out by Lord Denning, what constitutes 'proof beyond reasonable doubt' cannot be something beyond human knowledge, or beyond human imagination, but must be attached with the evidence linking the accused with the alleged offence committed. There must be credible evidence linking the appellants with the offence committed.

There is a danger of becoming obsessed with proving the case leaving no slight doubt, however remote it is, I am sure, the law would fail to protect the community and deflect the course of justice. Notably, criminal statutes are enacted with purpose to protect the society from certain evil. When there are unshakable and credible evidences pointing to none except to the accused; and in the absence of clear explanation from the accused to contradict or raise reasonable doubt on such prosecution evidence; the court has a duty to convict him and sentence him according to the dictates of law.

The appellant in his defence during trial and in this court has categorically argued that what he had was a scraper of TV not a functioning TV. Such piece of evidence, I find it clearly, supports the prosecution case. The said scraper is nowhere to be seen, above all, whether such scraper was found in the house of the complainant or elsewhere? I think the wisdom of the

Court of Appeal in the case of **Mohamed Haruna @ Mtupeni Vs. R, Criminal Appeal** No. 259 of 2007, applies in this appeal. The Court held:-

> *"If the accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his guilty"*

Therefore, I would conclude in this ground by confirming the trial court's findings that the appellant was the one who was found with the stolen TV owned by the Government. The defence of scraper only supports the prosecution case instead of exonerating him from liability.

Considering on the ground of failure of the prosecution to comply with section 127 of the Evidence Act, is a legal requirement that whoever witness called in court to testify on a certain fact, but that witness is a child of tender age, that is, fourteen (14) years old or below must either promise to speak only truth or take oath or make an affirmation before giving evidence. Section 127(2) of the evidence Act is quoted that:-

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies".*

In respect of this appeal, PW4 was a child of tender age and his evidence was recorded after the following statement:-

> *"My name is Afraha Issa Hamis, I am not a student, I know speaking truth, I know taking of an oath, I left the school while I was in standard five".*

COURT. *"The child knows the duty of speaking truth and an oath, thus he will give his evidence under oath".*

According to the proceedings as recorded by the trial court, no doubt the trial magistrate knew the application of section 127 of the Evidence Act as Amended. Likewise, the child knew the meaning of not only to speak truth but also the meaning of taking oath or affirmation. In the case of **Issa Salum Nambaluka Vs. R, Criminal Appeal No. 272 of 2018**,(unreported) the court referred to the case of Geofrey Wilson Vs. R, Criminal Appeal No. 168 of 201**8**,(unreported) the court held:-

> *"We stated that, where a witness is a child of tender age, a trial court should at foremost, ask few pertinent questions so as to determine whether or not the child witness understand the nature of oath. If he replies in the affirmative, then he/she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness"*

In the circumstance of this appeal, section 127 of the Evidence Act was complied with. Thus, concluding this ground of appeal in negative.

I now turn to consider the ground on procedural irregularities of admitting exhibit P2 and P3. The appellant argued that the two exhibits were admitted in court during trial, but the contents were never read as required under section 210 (3) of the Criminal Procedure Act.

Undoubtedly, once a document is tendered in court and soon after being admitted, its contents must be read loud in order to allow the accused

person and any concerned person in court to hear the contents of that document. The purpose of reading the contents is to allow the accused person to be informed on the contents of the document; ask any question related to that document and enable him/her to prepare his defence against it. Failure to adhere to that legal requirement obvious prejudice the accused on his/her right, consequently the document may be expunged from the court record. This position was repeatedly insisted in many precedents including in the case of **Mathias Dosel @ Adriano Kasanga Vs. R, Criminal Appeal No. 212 of 2019** (unreported) when the court referred the case of **Mbagga Julius Vs. R, Criminal Appeal No.131 of 2015** [**CAT at Mwanza]** (unreported) and **Rashidi Kazimoto & Masudi Hamisi Vs. R, Criminal Appeal No. 458 of 2016** (unreported) the Court held:-

> *"Failure to read out documentary exhibits after their admission renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record".*

The same holding was repeated in the case of **Aneth Furaha and three others Vs. Director of Public Prosecutions, Criminal Appeal No. 161 of 2018** at Bukoba (unreported) the court held:-

> *"After the document is admitted, is for the contents to be read over before being acted upon in evidence".*

The consequences of failure to read the contents of the document admitted in court is to expunge it from the court records as if it never existed or admitted in court.

Having so said, in this appeal, I have carefully visited the proceedings of the trial court, as per page 15 of the proceedings, the records is very clear that exhibit P3 (certificate of seizure) was properly admitted during trial as the accused/appellant had no objection on admissibility of P3. Moreover, PW3, read loudly the contents of P3. Thus, complying with the legal requirements. Even on admission of P2 the appellant did not object or raise any issue on it. Thus, taken as he supported the admissibility of those two exhibits. Therefore, like day followed by night, this ground likewise fall short of shacking the well-considered judgement of the trial court. Consequently, this ground is answered in negative.

The last ground is related to the alleged failure of the prosecution to establish and prove a *prima facie* case beyond reasonable doubt. It is a cardinal principle of criminal justice in Tanzania that the prosecution bears the burden of proving its case beyond reasonable doubt. This is clearly provided for in section 3 (2) of the evidence Act, [Cap. 6 R.E 2002]. As to what it means beyond reasonable doubt the Court of Appeal in **Criminal Appeal No. 205 of 2007, Samson Matiga Vs. R,** (unreported) defined it as follows:-

> *"A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be strong as to leave no*

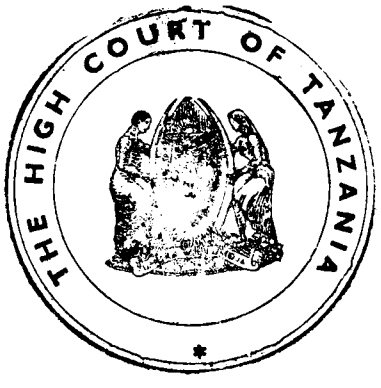
doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence".

In this appeal, the prosecution had a duty to prove its case beyond reasonable doubt that the one who committed the alleged offense was the appellant not otherwise. The records indicate the evidences of all five (5) prosecution witnesses, irresistibly pointed to the appellant. Such evidences were not shacked by the defence evidences. Thus, same linked the appellant with stealing of TV in the house of Regional Administrative Secretary. The whole evidences adduced by the prosecution side undoubtedly direct that the prosecution, dutifull,y performed their statutory duty and accordingly proved the case against the appellant to the standard required by law.

Having so said and for the reasons so stated, this appeal lacks merits consequently I hereby uphold the conviction and sentence meted by the trial court. Accordingly, this appeal is dismissed forthwith.

I according Order.

Dated at Mtwara in Chambers on this 23rd day of June, 2020



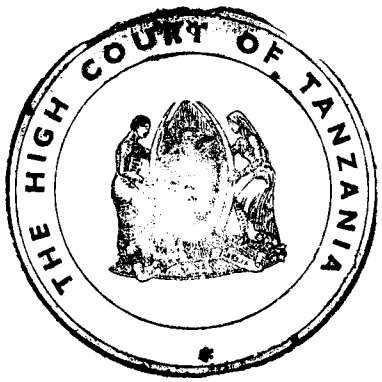
P.J. NGWEMBE

JUDGE

23/6/2020

Court: Delivered at Mtwara in Chambers on this 23rd day of June, 2020 in the presence of the Appellant and Mr. Paul Kimweri, Senior State Attorney for the Respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

23/6/2020