

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MTWARA)**  
**AT MTWARA**

**CRIMINAL APPEAL NO 105 OF 2020**

*(Originating from District Court of Ruangwa in Criminal Case No 45 of 2020)*

**ALLY MOHAMED SINGAGAE ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Hearing date on: 12/11/2020*

*Judgment date on: 27/11/2020*

**NGWEMBE, J:**

The appellant Ally Mohamed Singagae, being dissatisfied with the conviction and sentence meted by the trial court of Ruangwa District Court, preferred this appeal armed with seven (7) grounds which can be summarized into two of them as follows:-

1. The trial court erred in law and in fact in convicting and sentencing the appellant while the prosecution failed to prove the offence against him; and

2. The trial court erred in law and fact in convicting the appellant basing on the caution statement which made involuntary and it was objected by the appellant at the trial when it was tendered.

Brief recap of this appeal may be traced from 23<sup>rd</sup> February, 2020 at Namakonde area within Ruagwa District in Lindi Region, where the appellant was found with 70 Carton of tiles, the property which was alleged to have unlawfully acquired. In the circumstances, the appellant when was asked on the legality and lawfulness of the said properties, he failed to provide justification of his possession. Thus, charged under section 312 (1) (b) of the Penal Code Cap 16 R.E. 2019 which section compels the accused to prove that the property was lawfully acquired and owned. Since the appellant failed to do so, he was found guilty, subsequently convicted and sentenced to imprisonment for one year. The trial magistrate proceeded to order forfeiture of those tiles. Being so convicted and sentenced, he preferred this appeal.


On the hearing date of this appeal, the appellant was advocated for himself, while the respondent was represented by Mr. Paul Kimweri senior State Attorney. Being unrepresented, the appellant had limited contributions to his appeal. Briefly, he argued that the prosecution failed to prove the case against him, because the properties found under his possession infact they belong to him. He said, police went to inspect his house, where they found those tiles, which he bought for his use and he had a purchase receipt, which same was taken by police together with tiles. Further, argued that he was denied an opportunity to defend himself

as per the proceedings dated 1/9/2020. Thus the whole trial faulted principles of criminal justice. Therefore, the court should consider his grounds of appeal and find him not guilty.

In reply, the learned Senior State Attorney argued that, the appellant was charged under section 312 (1) (b) of the Penal Code, which section requires the accused to prove that the properties were found lawfully. He was of the view that the appellant failed to satisfy the court during trial, that the properties were lawfully found. Thus, the prosecution's evidence remained unchallenged.

He argued further, that under section 231 (3) of the CPA, when the accused fails to defend, the court will find adverse inference against him. However, on the caution statement, the learned senior State Attorney admitted that the trial court after admitting it as exhibit, failed to read its contents to the accused, which was fatal. Therefore, the remedy is to expunge it from the record. He added that, even after removing the caution statement, yet the case against the appellant still remain.

Based on the arguments of both parties and upon perusal to the trial court's records, the issue for consideration and determination in this appeal is whether the case was established and proved as required by law?

The trial court's record is clear that the prosecution lined up three (3) witnesses, namely; PW1 (E 7795 DC Steven Chale), PW2 (Issa Hamisi Nambela) and PW3 (H3380 DST Ikangaa). PW1 interrogated one Dastan 

Issa Kitenge@ Ngwili who was accused for house breaking and stealing. The suspect confessed to have involved in the offence of house breaking and stealing among other items 70 boxes of tiles, which were sold to the accused (appellant). The said 70 boxes of tiles were found in the house of the appellant. In tendering those boxes of tiles, the appellant objected it because they were his own properties. But the trial court proceeded to admit those boxes as exhibits in court.

The rest of evidences involved Danstan Issa Kitenge as provider or seller of the alleged stolen properties found in possession of the appellant. PW2 was a motor cycle transporter (Bodaboda) who transported those tiles under supervision of Danstan Issa Kitenge. PW3 testified to have recorded caution statement of the appellant which same was not read loudly in court after admitting it as exhibit. At the end the prosecution case against the appellant was closed.

When the appellant was granted right to defend, he simply refused to do so and prayed for judgement.

Under normal circumstances and a properly investigated and prosecuted case, Danstan Issa Kitenge ought to be joined as a co-accused or key witness for prosecution.

Dastan Issa Kitenge alleged to have confessed before PW1 that he sold those 70 boxes of tiles to the appellant. Such person was a material witness for prosecution side for he was the one who alleged to steal 70

boxes of tiles and sold them to the appellant. Above all Danstan Issa Kitenge had a statutory duty to identify those tiles in court during trial, before same were tendered in court. However, that was not done and nowhere in the proceedings indicates as to where about Danstan Issa Kitenge.

Failure to involve the source of allegations of the whole matter, or failure to call key witness to prove criminality of the appellant was fatal. Much as I agree with the learned Senior State Attorney, that the section preferred against the appellant was among the sections which provide strict liability, that the duty to prove innocence lies on the accused person, yet the law demand key witnesses to be lined up in court as prosecution witnesses. In the case of **Lazaro Kalonga Vs. R, Criminal Appeal No. 348 of 2008 CAT, Iringa** (unreported) the court held:-

*"The general and well known rules are that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"*

The same position was stated in the case of **Faraji Augustine Chambo Vs. Republic, Criminal Appeal No. 346 of 2015 CAT, DSM** (unreported) where the court held:-

*"A court may be invited to draw a permissible adverse inference against the prosecution case where a crucial or material witness who is within reach and who could have testified against a*

*critical or decisive aspect of its case is withheld without sufficient reasons".*

The trial court also believed on the evidence of PW1 that, accused produced receipt in respect of the said properties, but the receipts shows that the accused bought machine not tiles. Thus, the trial court based on such evidence and proceeded to convict the accused. However, such receipt was not tendered by PW1 to satisfy the court and to give an opportunity to the accused person to cross examine it. In essence the prosecution had a duty to prove such fact, that the said receipt was for machine and not for tiles as alleged by the accused. Above all, tiles nowadays in our country is acommon item. Therefore, proper identification with unique features differentiating with other tiles was inevitable. The one to do so ought to be Danstan Issa Kitenge. Section 112 of the Evidence Act, provide statutory duty to prove existence of a particular fact in issue. The section is quoted as follows:-

*"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person".*

The Court in the case of **Lamshore Limited and Another Vs. Bazanje K.U.D K, [1999] TLR 330**, held:-

*"The duty to prove the alleged fact is on the party alleging its existence"*

As such. the prosecution was duty bound to prove if the said receipt was for purchase of machine or for tiles. Failure to tender it in court for scrutiny was fatal.

In this case, the caution statement was one of the grounds complained of by the appellant. This point should not tie me up, for obvious reason as rightly argued by the learned senior State Attorney, that upon being admitted as exhibit, the same was not read over as required by law. Thus, the said caution statement is hereby expunged.

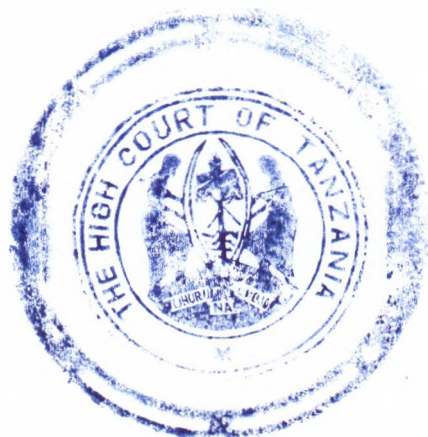
Upon removal of the caution statement and for the reasons stated above, the question is whether the conviction and sentence meted by the trial court may still stand. I think not, I am settled in my mind that the prosecution not only failed to establish and prove criminality of the appellant, but also the appellant though had a duty to prove lawful possession of those tiles, yet by producing receipt related to purchase of those tiles, the prosecution ought to tender it in court for court's scrutiny. Above all failure to call Danstan Issa Kitenge as a witness was fatal in the circumstances of this appeal. More so, the alleged stolen files are now common items, proper identification by Danstan Issa Kitenge was inevitable.

I therefore, proceed to allow this appeal, quash the conviction, set aside the sentence meted by the trial court and order an immediate release of the appellant from custody unless he is held on some other lawful cause.

Above all I order the said tiles be reverted back to the appellant as lawful owner.

**I accordingly Order.**

**Dated at Mtwara** this 27<sup>th</sup> Day of November, 2020.



A handwritten signature in blue ink, appearing to read "P.J. Ngwembe".

**P.J. NGWEMBE**

**JUDGE**

**27 /11/2020**



**Date: 27/11/2020**

**Coram: Hon. L.R. Kasebele, Ag.DR**

**Appellant: Present in person**

**Respondent: Mr. Kimweri, Senior State Attorney for**

**B/C: Nanyanga – RMA**

**Court:** Told parties that, the case is for judgment delivery and they said.

**Parties:** We are ready to proceed with judgement delivery.

**Court:** Judgment delivered today in court in the presence of parties, it is delivered as prepared by Hon. Judge Ngwembe.



L.R. Kasebele

**Ag. DEPUTY REGISTRAR**

**27/11/2020**

