IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 85 OF 2019
(Originating from the District Court of Karatu Criminal case No. 13 of 2018
E.E Mbonamasabo RM)

ANGRES PAULO ..... 1st APPELLANT
ZAWADIEL DANIEL ..... 2nd APPELLANT
Versus
REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 02/04/2020
Date of Judgment: 05/06/2020

Masara, J.

In the District Court of Karatu, the Appellants, **Angres Paulo** and **Zawadiel Daniel,** and another person were jointly charged with four counts; namely, one count of Shop Breaking, contrary to section 296(a) of the Penal Code, Cap 16 [R.E 2002], two counts of Stealing, contrary to section 265 of the Penal Code, Cap. 16 [R.E 2002] and Burglary, contrary to section 294(2) of the Penal Code, Cap. 16 [R.E 2002]. The Appellants were convicted of all the four counts and sentenced to serve 3 years imprisonment for Shop Breaking, 2 years imprisonment for Stealing and 7 years imprisonment in jail for Burglary. Sentences were ordered to run

concurrently. The Appellants were aggrieved by both convictions and sentences, they have appealed to this Court on the following grounds:

a) That, the trial court erred in law and fact in convicting the appellants while the prosecution case was not proved beyond reasonable doubts;
b) That, the trial court erred in law and fact in convicting the appellants while the stolen properties were not identified;
c) That, the trial court erred in law and fact by not taking into consideration the seizure certificate while it was filled at the police station and not at the scene of crime;
d) That, the trial court erred in law and fact in not taking into consideration that the appellants were not identified at the scene of crime; and
e) That, the trial court erred in law and fact by taking into consideration the contradictory evidence by the prosecution side.

The Appellants therefore pray that this court quashes and sets aside the judgment of the trial District Court and let the appellants at liberty. The Appellants appeared in court in person unrepresented and fended for themselves, while the Respondent Republic was represented by Ms. Blandina Msawa, learned State Attorney. The learned State Attorney supported the appeal by conceding that the case against the Appellants was not proved beyond reasonable doubts.

The Facts

It was the prosecution evidence that on 10th January, 2017, PW1's son woke her up and informed her that the door to her house was open. Upon waking up she realized that the seating room door as well as the shop door were both wide open. On inspection, she found out that some items were missing. She mentioned the stolen properties as a subwoofer, DVD player,

7 pieces of vitenge, Flat screen TV, vouchers as well as cash money amounting to Tshs. 84,000/=. The value of all the stolen items was totalized at Tshs. 852,250/=. Later, one Salim found out the draw which PW1 used in keeping her money. He informed her that he found the said draw in an unfinished building. PW1 reported the matter to the ten-cell leader (PW3) and the street chairman (PW2) who assisted in searching for the stolen items. They suspected the first Appellant whom they found in a grocery drinking beer. On apprehension, the first Appellant is said to have shown cooperation by leading them to where the items were hidden. They reported the matter to the police.

Following the information given by the first Appellant and being assisted by PW5 they went to the then third accused person's house and upon search the stolen items were seized inside the third accused person's house. PW1 identified the stolen items which she named subwoofer, Vitenge, the DVD player and the money Tshs 50,000/= which was surrendered by the first Appellant and the other amount was found inside the house. The first Appellant and the third accused persons were arrested instantly and the second Appellant was arrested on 22nd January 2018.

On their defence, the first Appellant denied to have broken and stolen PW1's properties. He claimed that the stolen items were found in possession of Salim Hamis who was arrested on the same day. When he was taken to the lockup, his mother went there after a long conversation with the police officers Salim Hamis was released and the first Appellant

was charged instead. That the case framed against him. He added that he was tortured that is why he signed the cautioned statement (exhibit P1).

The second Appellant on his defence stated that on 20th January 2018 he was found selling illicit liquor (gongo) and he was taken to the police station where he found the first Appellant in the lockup. He was asked by the police officers to give some money as bribe but he did not have. Therefore he was given the statement to sign and was joined in the case facing the first Appellant.

Submission on Appeal

Arguing on the substance of appeal, the Appellants contended that from the charge sheet, one offence was split into four counts and convicted differently on the offence of the same transaction. The Appellants further averred that the trial court erred in using the confessional statement which was admitted contrary to the law. They were of the view that it is contrary to procedure to admit a cautioned statement in order that the same can help in making a ruling. They also faulted the procedure taken by the trial magistrate that the statement was read before procedure was completed. The Appellants further submitted that the evidence of PW1, PW2 and PW4 was about stolen items from PW1 but none of them identified them in court to prove their allegations of the items seized from the third accused. They were of the view that PW1 was supposed to identify the goods she alleged to be hers. Identification should not have ended at the police but also in court. Failure of this cannot be ascertained that the goods were stolen and that they are her properties.

In addition, the Appellants also faulted the judgment of the trial court for being unfair as the evidence which was used in acquitting the third accused is the same evidence which was used in convicting the Appellants. They questioned on what basis did the trial court trust the same evidence against them adding that there are two different findings from the same evidence. The Appellants then prayed to be acquitted as they are innocent.

Ms. Msawa, on her part, supported what was argued by the Appellants adding that the Appellant should have been charged only with stealing. She was quick to add that there was no evidence of the persons who stole the listed items. That although the investigators managed to trace items from the third accused and those items were tendered by PW5, however, PW1 was not recalled to identify those items. She cited the decision of the Court of Appeal in ***Hassan Said Versus Republic***, Criminal Appeal No. 264 of 2015 (Unreported) where the court held that the owner of the stolen properties has to explain special marks of the stolen items in court. She argued that this was not done in the instant case.

The learned State Attorney conceded that there are other errors from the trial court record. She pointed that the record was not taken procedurally, for example the way exhibits were admitted. She thus submitted that those errors signify that the Prosecution case was not proved beyond reasonable doubts against the first Appellant. Regarding the second Appellant the learned State Attorney was of the view that she could not see any evidence which led to his conviction.

Analysis

In determining the grounds of appeal, I will combine the first and fifth grounds of appeal since they are interrelated. The Appellants and the learned State Attorney rightly submitted that the prosecution case was not proved to the required standards, that is beyond all reasonable doubts. I say so because there were contradictions in evidence among the prosecution witnesses. The first contradiction is on the items alleged to have been stolen which were seized from the then third accused. PW1 in her evidence stated that the items seized from the third accused person were subwoofer, vitenge, DVD player and money worth Tshs 82,250/=. The evidence of other witnesses including PW2, PW3 and PW5 who were at the place where the items were seized differed in the items found in the house. Other items such as shoes, flat screen, vouchers, packets of cigarettes and belt were not mentioned by PW1, as among the items seized from the third accused's house but still, they were mentioned by other witnesses and were tendered as exhibits. Some of these items such as cigarettes, shoes and belt were not even mentioned in the list of PW1's stolen items.

The other anomaly is the procedure of admitting the exhibits adopted by the trial magistrate. When admitting exhibit P1 (the cautioned statement) the procedure adopted by the trial magistrate was rather strange. The said exhibit was read before being admitted as exhibit. Also, it was simply admitted as a full exhibit but it was not marked, yet it was labelled exhibit P1. Exhibit P2 (certificate of seizure) was neither tendered nor admitted as

exhibit but it was labelled as exhibit P2. PW5 prayed to tender the exhibit register, the trial magistrate did not admit it as evidence but it was labelled exhibit P4 and in the entire proceeding, there was no exhibit P3. This is contrary to procedure as it was held in the case of ***Robinson Mwanjisi and 3 Others Versus Republic*** (Supra) where the court stated that:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out, otherwise it is difficulty for the court to be seen not to have been influenced by the same."*

Furthermore, the reasoning of the trial magistrate for acquitting the third accused person leaves a lot to be desired. The same evidence which was used in convicting the Appellants is the same evidence which the trial magistrate used in acquitting the third accused person who was found in possession of the alleged stolen properties. Notably, the said third accused at the trial did not sufficiently explain how the properties came into his possession. Convicting the Appellant appears to be rather a double standard on the part of the trial Magistrate. Had he evaluated the evidence before him properly, he would have acquitted the second appellant who was never linked with the offence in the entire trial.

The standard of proof in criminal cases is well known that it has to be beyond all reasonable doubts. See ***Jonas Nkize Versus Republic*** [1992] TLR 213, ***Nchangwa Marwa Wambura versus Republic***, Criminal Appeal No. 44 of 2017 (Unreported)

Therefore, the inconsistencies in the prosecution evidence together with the anomalies highlighted suffice to hold that the case against the Appellants was not proved beyond reasonable doubt.

Regarding the second and fourth grounds of appeal, it is noted that the record of the trial tribunal does not state whether there is any piece of evidence which presupposes that the Appellants were found breaking and stealing in PW1's premises. The evidence which led to their apprehension appear to be personal investigation led by PW1, one Salim as well as suspicions. The said stolen items were not identified by PW1 in court so as to prove ownership of the said properties. As rightly submitted by the learned State Attorney, for the doctrine of recent possession to apply, the person alleging that his properties have been stolen has to give special description of the stolen properties before they are tendered as exhibits. In the cited case of ***Hassan Said Versus Republic*** (supra) the Court of Appeal while quoting its previous decision in ***Mustapha Darajani versus Republic***, Criminal Appeal No. 242 of 2015 (Unreported) held that:

> *"In such cases, description of specific mark to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits."*

See also the decision of Court of Appeal in the case of **Amitabachan Machaga @ Gorong'ondo versus Republic**, Criminal Appeal No.271 of 2017 (Unreported)

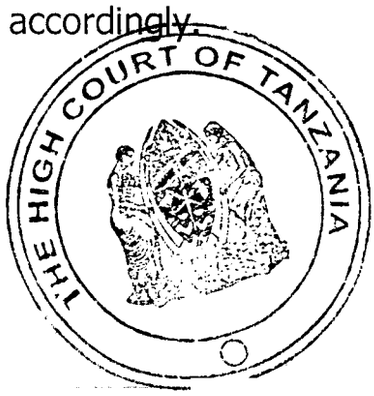
In the case at hand, the doctrine of recent possession was not complied with. PW1 neither described the items that were stolen and which were

seized from the third accused nor identified them in court when PW5 tendered them as exhibits. It therefore follows that they were improperly admitted in court as exhibits.

I also agree with the complaint raised by the Appellants relating to a number of counts framed against them. It is incomprehensible that the offence of stealing was given two separate counts in an event which took place at the same transaction. Furthermore, housebreaking and burglary could not be preferred separately as one count would have sufficed. The third ground of appeal was discussed in the first and fifth grounds. From the above exposition and on the strength of the analysis and authorities cited above, I am of a considered view that the appeal has merits. As stated above, the proceedings of the trial court were marred with irregularities and inconsistencies which raised a lot of doubts on the prosecution case. Such doubts have to benefit the Appellants.

For those reasons, the appeal is allowed in its entirety. The conviction is hereby quashed and sentence set aside. The Appellants are to be released from prison forthwith unless lawfully detained.

Order accordingly.



Y. B. Masara
JUDGE
June 5, 2020