IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 33 OF 2020

(Arising from decision of the District Court of Musoma at Musoma (Mrwa, T.J.-RM) dated 15th day of January, 2020 in Criminal Case No.47 of 2020)

RAJABU S/O JUMA @ RAMADHAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

3rd June and 31st August, 2020

KISANYA, J.:

In the District Court of Musoma at Musoma, the appellant, RAJABU S/O JUMA @RAMADHAN and RAMADHAN S/O GEORGE @MASKATI (hereinafter referred to as "the second accused") were arraigned for two counts. The first count was entering dwelling house with intent to commit an offence, contrary to section 295 of the Penal Code, Cap. 16, R.E. 2002 (the Penal Code). It was alleged that, on 28th January, 2019 at Rwamlimi area within the District and Municipality of Musoma in Mara Region, the appellant and the second accused entered into the dwelling house of one, BURENYA S/O SIMBIRA with intent to commit an offence therein, to wit stealing.

The second count was stealing contrary sections 258(1) and 265 of the Penal Code. The prosecution alluded that, upon entering the said house, the appellant and second accused did steal cash money Tshs, 615,000, one mobile phone Tecno with IMEI NO 355970071690511 valued Tshs 200,000 and one mobile phone Tecno, C.J IMEI NO3531140883132585 valued Tshs 600,000, all valued Tshs 1,415,000 the properties of BURENYA S/O SIMBIRA. The appellant and second accused pleaded not guilty to the both offence the charge read over to him. Therefore, the prosecution called four witnesses and tendered five exhibits to prove its case beyond reasonable. On his part, the accused person defende himself on oath.

At this juncture, I find pertinent to highlight the facts leading to arraignment of the appellant. On 28th February, 2019, BURENYA SIMBIRA (PW1) wakeup at 0500 hours. He went to take shower outside the house and left the door to his house open. At the same time the appellant passed by. Upon seeing the door to the house of the said BURENYA SIMBIRA open, he entered therein and took with him the above named properties. The police investigated the matter. That is when JUMA LAURENT was found in possession of one mobile phone, make Tecno F1 stolen BURENYA SIMBIRA's (PW3) house. He accounted how he bought it. In his defence, the appellant denied to have committed the offence. However, the second accused confessed to have bought the mobile phone from the appellant and that he sold the same one CHARLES WILSON (PW2). At the end, the appellant was found guilty and convicted as charged while the second accused was discharged. He was then sentenced to custodial sentence of 3 years and 2

years for the first and second counts respectively.

Feeling that justice was not done, the appellant has knocked at the doors of this Court by way of appeal. He is armed with five grounds of appeal which I have summarized as follows:

1. That there was no evidence to prove that the appellant entered into the dwelling house of PW3 and PW4 and commit an offence therein.
2. That the appellant was convicted based on the cautioned statement which was taken by force (retracted confession), and admitted without conducting an inquiry.
3. That the identification parade was conducted.
4. That the appellant was convicted basing on the properties alleged to have been stolen from PW3 and PW4 who failed to prove ownership of the alleged properties.
5. That the defence case was not given sufficient consideration and weight.

Hearing of this appeal was conducted through video conference in attendance of the appellant in person and Mr. Yesse Temba, learned State Attorney for the Republic.

Given a chance to address the Court on merit of the appeal, the appellant merely asked the Court to consider his grounds as stated in the petition of appeal, allow the appeal and discharge him.

In rebuttal, Mr. Temba indicated that he was not supporting the appeal. On the first ground appeal, the learned State Attorney argued that the evidence to prove that the appellant entered in the dwelling house of

PW3 and PW4 is the cautioned statement (Exhibit P4). He submitted that, in his cautioned statement (Exhibit P4), the appellant confessed to have entered the house of PW3 and PW4. Thus, the learned State Attorney was of the firm view that, the first ground of appeal was devoid of merit.

Regarding the second ground, Mr. Temba contended that the claims that the cautioned statement was taken after intimidating the appellant was an afterthought. His argument was based on the fact that, the appellant did not raise that ground when the prosecution prayed to tender it as exhibit. The learned State Attorney pointed out that, the appellant did not advance the reason for the trial court to conduct trial within trial.

Concerning the third ground of appeal on failure to conduct an identification parade, Mr. Temba replied that, the appellant was not identified at the scene of crime. In that regard, he was of the considered opinion that, there was no need of conducting the identification parade. He went on to argue that the appellant was convicted basing on Exhibit P4 and evidence of the second accused who testified to have bought the stolen mobile from the appellant.

On the fourth ground, Mr. Temba submitted that PW3 and PW4 proved to be the lawful owner of the mobile phone (Exhibit P2) stolen from his house. He contended that PW3 identified Exhibit P2 by colour and cracks while PW4 tendered the receipt (Exhibit P5) to prove ownership.

As to the last ground of appeal, the learned State Attorney submitted that the appellant evidence was considered by the trial court as reflected at page 3 of the typed judgement. That said, Mr. Temba asked the Court

to dismiss the appeal for want of merit.

I have considered the argument of the parties herein and the evidence on record. I will dispose of this appeal by considering the grounds advance in the petition of appeal

In the first ground of appeal, the appellant contends that evidence to prove that he entered in the house of PW3 and PW4 was not adduced. In other words, he alludes that, the first count was not proved. I agree with the learned State Attorney that, the only evidence which implicated the appellant in the offence of entering dwelling house with intent to commit an offence is his cautioned statement (Exhibit P4). This is reflected in the judgement of the trial court where it was held that:

> *Basing on the cautioned statement of the 1st accused person, it is also a matter of fact that he was the one who entered the house of Burenya having found it open with intent to steal from there in and he actually stole.*

I have read the cautioned statement and noted that, the appellant confessed to have entered the house resided by PW3 and PW4. This was after finding the entrance door open. The cautioned statement was corroborated by evidence of PW3 and PW4. Hence, I find the first ground devoid of merit.

The second ground is to the effect that the trial court failed to conduct an inquiry to ascertain legality of the cautioned statement (Exhibit P4). The appellant contended that the said cautioned statement was taken by force and after threatening and intimidating him.

It is trite law that, an inquiry or a trial within trial has to be conducted when the accused objects admission of the cautioned statement on the ground that he was beaten, threatened or intimidated. Also, such inquiry is conducted when the accused person denies to have recorded the cautioned statement. This position has been stated in several cases decided by the Court of Appeal. For instance in the case of **Twaha Ally and 5 Others V R,** Criminal Appeal No. 78 of 2004, CAT (unreported).

> *"If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

In the instant case, the appellant objected admission of the cautioned statement on the ground that "it was wrote in the absence of justice of peace". That was not a ground for the trial court to conduct the inquiry. Further, it is not a legal requirement that cautioned statement be taken in the presence of justice of peace. It follows that, the trial court was justified to admit the caution statement. There were no reasons or grounds advanced by the appellant to compel the trial court to conduct the trial within trial or inquiry. Therefore, I find the ground that the cautioned statement was taken by force raised herein as an afterthought.

As to the third ground of appeal, I agree with Mr. Temba that there was no need of conducting an identification parade in the circumstances of this case. This is because an identification parade is conducted to enable a witness to identify the attacker/assailant not known or seen before the

incident. This position was stated in **Joel Watson @Ras Vs R,** Criminal Appeal No. 143 of 2010, when the Court of Appeal that:

> *"The purpose of an identification parade is inter alia, to enable a witness identify his/her assailant whom he/she has not seen or known before the incident (See Abdul Farijalah and Another vs Republic, Criminal Appeal No. 99 of 2008; John Paulo @ Shida and Another vs. Republic, Criminal Appeal No. 335 of 2009 (both unreported).... As provided for under section 60 (1) of the Criminal Procedure Act (the CPA), an identification parade may be conducted during the investigation stage for the purpose of ascertaining whether a witness can identify the suspect of the crime."*

In the case at hand, no witness who claimed to have identified the appellant at the scene of crime. For that reason, there was no need of conducting an identification parade. Therefore, the third ground of appeal lacks merits.

I have opted to address the fifth ground before considering the fourth ground of appeal. The appellant laments that his defence was not considered by the trial court. I am live to the settled law that, the trial court is duty bound to analyze and consider the evidence adduced by the defence. Failure to consider the defence is fatal. This position was stated in **Sadick Kitime vs R,** Criminal Appeal No. 483 of 2016 (unreported), where the Court cited with approval its decision in **Moses Mayanja @ Msoke vs R**, No. 56 of 2009 that:

> *"... it is now trite law that failure to consider the defence case is fatal and usually vitiates the conviction. See, for instance:- (a)* ***Lockhart-Smith V.R*** *[1965} EA 211 (TZ),*

(b) ***Okoth Okale v. Uganda*** *[1965} EA 555,*

(c) ***Hussein Iddi Another v. R*** *[1986} TLR 166,*

(d) ***Malonda Badi & Others v. R*** *Criminal Appeal No. 69 of 1993 (unreported), among others."*

As rightly argued by Mr. Temba, the appellant's defence in the case at hand was considered by the trial court. This is reflected at page 3 of the typed judgement. The trial magistrate was of the firm view that, the appellant's defence was general denial. I have gone through the appellant's evidence during trial. It was to the fact that he was knew nothing about the matter. His evidence in chief was as follows:

"On March 2018, on the date I forget the same, I was arrested for allegation that I had stole/sold a stolen property, a phone. I said to the police I knew nothing about the matter. From there I was sent to court. Having heard the charge I plead (sic) not guilty to the charge. That is all."

I am in agreement with the trial court that, the above evidence was general denial. It was considered and measured against the evidence adduced by the prosecution which was found to be watertight. Even the appellant has not substantiated on how his defence which was not considered.

Returning to the fourth ground of appeal that PW3 and PW4 did not prove to be lawful owner of the stolen property. Mr. Temba was of the firm view that, the stolen property was identified by PW3 and PW4 who tendered the receipt (Exhibit P5). In addressing this ground, I will also consider whether the second count on offence of stealing was proved beyond reasonable doubts.

According to the charge sheet, the properties stolen by the appellant are cash money Tshs, 615,000, one mobile phone Tecno with IMEI NO 355970071690511 valued Tshs 200,000 and one mobile phone Tecno, C.J IMEI NO3531140883132585 valued Tshs 600,000 all valued Tshs 1,415,000 the properties of BURENYA S/O SIMBIRA.

As stated herein, no witness testified to have identified the accused person stealing the said properties. The trial court relied on the cautioned statement (Exhibit P-4) and evidence of PW3 and PW4. Further, the trial court considered the evidence of co-accused, mobile phone (Exhibit P2) found in possession of JUMA LAURENT and mobile receipt (Exhibit P5).

There is no dispute that the appellant confessed to have entered in the house of BURENYA SIMBIRA (PW4). However, he admitted to steal therein two mobile phones only. He described them as Tecno F1 and Samsung. He did not admit to steal other properties, namely Tecno, C.J IMEI NO3531140883132585 and cash money Tshs, 615,000. It is deduced from the evidence of PW3 and PW4 and Exhibit P4 that the door to the house of BURENYA SIMBIRA. Hence, there was a possibility that any other person could have entered to the house immediately before or after the appellant, and steal the other properties. Further, evidence reveals that, Tecno F1 was sold to JUMA LAURENT by the accused person. But, while PW3 testified that the mobile phone was hers, the charge sheet shows that all properties including Tecno F1 belonged to BURENYA SIMBIRA (PW4). Furthermore, none of the prosecution's witnesses who stated the IMEI Number of the mobile phone found in possession of JUMA LAURENT. However, it is

deduced the Exhibit Receipts that Tecno F1 tendered in Court had IMEI No. 355970097169051. On the other hand, the charge sheet shows that Teno F.1 stolen from the PW4's house had IMEI No. 355970071690511. These are two different mobile phones. For above stated reasons, I find that the offence of stealing was not proved beyond reasonable doubts.

From the foregoing, the appeal is partly allowed in that, the conviction in respect of the second count of stealing is hereby quashed and its sentence set aside. On the other hand, the appeal against conviction and sentence in respect of the first count of entering dwelling house with intent to commit an offence is dismissed. It is so ordered.

Dated at MUSOMA this 31st day of August, 2020.

E. S. Kisanya
JUDGE
31/8/2020

Court: Judgement delivered this 28th day of August, 2020 in the presence of the appellant in person and Mr. Nimrod Byamungu, learned State Attorney for the Respondent. B/C M. Kimweri-RMA presence.

E. S. Kisanya
JUDGE
31/8/2020

Court: Right of appeal is explained to the parties.

THE HIGH COURT OF TANZANIA
MUSOMA

E. S. Kisanya
JUDGE
31/8/2020