

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 43 OF 2020

JAMES KUSAYA.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the Nkasi District Court at
Namanyere in Criminal Case No. 48 of 2018)**

JUDGEMENT

16th September – 4th November 2020

MRANGO, J.

This appeal arises from the decision of the District Court of Nkasi at Namanyere (henceforth the trial court). The appellant **James Kusaya** was arraigned and charged with two counts, one being the offence of theft contrary to **section 258(1) and (265) of the Penal Code, Cap 16. RE 2002**. The second count being the offence of forgery contrary to **section 333, 335(a) and 337 of the Penal Code**. After full trial, the trial court found the appellant guilty of the both two counts, hence convicted and sentenced him to custodial sentence of two years' imprisonment in respect of each count.

The appellant being aggrieved by the trial court decision has filed this appeal to this court challenging the decision of the Nkasi District Court in a petition comprised of four grounds, but essentially there is one complaint that is the case was not proved beyond reasonable doubt as required by criminal law.

When the appeal was called on for the hearing, the appellant appeared in person, unrepresented while the respondent *cum* republic was represented by Ms. Safi Kashindi Amani, learned state Attorney.

When the appellant was required to support his appeal, he prayed for the court to adopt the grounds of appeal he has lodged.

Ms. Safi Kashindi Amani, learned state attorney for the respondent / republic supported the appeal, however she said on different grounds despite the fact that the case was proved beyond doubt by the prosecution.

Ms. Safi submitted that she has noted some irregularities when the case was heard and determined by the trial court, for instance at pg. 15 of the trial court proceedings she said the prosecutor tendered seizure certificate but the said exhibit ought to have been tendered by PW3

Inspector Salum. Ms. Safi further said no reason whatsoever given why it was tendered by PW3. The exhibit was admitted as exhibit PI. She cited the case of **Seleman Moses Sotel @ White versus The Republic, Criminal Appeal No. 385 of 2018** (CAT), unreported pg. 12 the court observed that the prosecutor is not competent to tender exhibits because he cannot be both a prosecutor and a witness at the same time. Again the exhibit was not read over to the accused as required by law as per the case of **Edgar s/o Kayumba versus DPP, Criminal Appeal No. 498 of 2017 (CAT)**, unreported pg. 9. The omission to read the documents after admission is an irregularity which may not be cured.

Ms. Safi further submitted that at pg. 26 of the court proceedings, the same irregularity was repeated when PW6 Miki Richard was testifying he tendered two cards of the motor cycles; however the said cards were not read over as a requirement of the law.

Again, Ms. Safi submitted that at page 27 & 28 of the court proceedings, the cautioned statement of the accused person was read over before the court before it was tendered and admitted as an exhibit P3 and that was irregularity as per the case of **Robison Mwanjisi versus Republic [2003] TLR 218 at page 226** where the court gave the

procedure of admission of documents before is read over. She submitted that even the admission of motor cycles was admitted before description. She therefore supported the appeal on the reasons advanced and the appellant has served substantial part of sentence as he was sentenced on 03/ 04/ 2019 and served one year and six (6) months, she prayed for the appeal be allowed and set the appellant free.

In rejoinder, the appellant had nothing to submit.

The question to determine before this court is whether the present appeal has merit in the eyes of the law.

Addressing the first irregularity as raised by the learned state attorney in respect of a person who is competent to tender exhibit, it has been a trite law that a person who at one point in time possesses anything, a subject matter of trial is not only a competent witness to testify but he could also tender the same. See the case of **The DPP versus Mirzai Pirbakhshi @ Hadji & 3 Others, Criminal Appeal No. 493 of 2016**, CAT DSM. In this case it was further observed that the test for tendering the exhibit therefore is whether the witness has knowledge and he possessed the thing in question at some point in time.

In our case at hand, it is very obvious that PW3 Inspector Salum did fill the certificate of seizure at the place of scene, therefore he had knowledge in respect of the property seized. The competent person to tender such exhibit at the trial court was PW3 Inspector Salum, not public prosecutor as it was done before the trial court. The position was clearly articulated in the case of **Seleman Moses Sotel @ White versus The Republic** cited to me by the learned state attorney where the court observed that the prosecutor is not competent to tender exhibit because he cannot be both a prosecutor and a witness at the same time.

Therefore, the act of the prosecutor to tender exhibit while not competent in law is irregularity as he cannot hold two caps at one time

The irregularity noted above goes to the root of the principles of the fair trial as it was observed in the Court of Appeal case of **Kigundu Francis and Jackson Mussa vs. R**, Crim. Appeal No. 314 of 2010, where the court outlined what was defined to be the minimum standards for a fair criminal trial in a case of **Musa Mwaikunda v. R** [2006] TLR, where the accused is said to have a fair trial if the following standards are met;

- a) Understand the nature of the charge

- b) Plead to the charge and exercise the right to challenge
- c) Understand the nature of the proceedings namely, that it is an inquiry as to whether the accused committed the offence
- d) Be able to follow the course of the proceedings
- e) Understand the substantial effect of any evidence that may be given in support of the prosecution; and lastly
- f) Be able to make a defence or to answer the charge

However, my further scrutiny of the trial records further reveals that the seizure certificate and Motor cycles which were admitted, were not read out to the appellant contrary to the established court's principle of clearance, admission and reading out. The principle entails that document after being cleared for admission must be read out to the person and the person against whom the document is read out get an opportunity to admit or dispute the content as to be true or false. The same principle was violated by the trial court when it read over the cautioned statement of the accused person before it was tendered and admitted as an exhibit which is irregularity as per the case of **Robison Mwanjisi versus Republic** **supra** cited to me by the state attorney, Ms. Safi Kashindi. which at pg.

226 hinted at to the three stages of clearing, admitting and reading out; which before its exhibitions as evidence. The court said;

"...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..."

It is very obvious that the procedure of reading out the document after it was cleared for admission was not followed, thus depriving the appellant of an opportunity to cast doubt or dispute on the content of the documents as it happened. That failure to my view may suggest the appellant did not understand the charge he stood charged with.

The Court of Appeal in a reported case of **Mohamed Matula vs. R** [1995] TLR 3 in elaborating the principle above stated that

"...It is the principle of law that the prosecution must prove the case against the accused beyond reasonable What the accused has to do is to cast doubt on the prosecution case. Short of other evidence for the prosecution to rely upon to prove

the case against the appellant that the statement was not read over to him is sufficient to cast doubt on the prosecution case. The appellant is entitled to some benefit of doubt."

Having said so, am of the firm view that the failure to read over seizure certificate, two cards of the motor vehicles and as well failure to read its description which form part of the facts as purported to have been narrated by the public prosecutor left the question to our minds as to whether the appellant fully understood clearly the charge leveled against him on the offences to enable him to affirm the facts as to be true or to dispute the same as to be false. Therefore, one can hesitate to say the trial conducted by the trial court against the appellant was not fair one.

With that in mind, the argument by the state attorney for the republic that there are irregularities as noted by Ms. Safi Kashindi, this court also sees that the irregularities noted goes to the root of the principles of fair trial outlined herein above. Thus I find the appellant was not given a fair trial.

In the event, I concede the argument by Ms. Safi Kashindi, learned state attorney that the appeal has merit, for the reason as advanced the republic that the court proceedings had some irregularities as discussed herein above as a result the appellant was not given a fair criminal trial. I therefore allow the appeal and accordingly I quash all the proceedings and judgment of the trial court and set aside the sentences. Considering the appellant has served substantial part of his sentence, it would not be in the interests of justice to order a retrial. I therefore order release of the appellant **James Kusaya** unless otherwise held for another lawful cause.

It is so ordered.

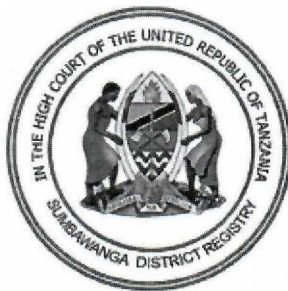



D. E. MRANGO
JUDGE
04.11.2020

Date - 04.11.2020
Coram - Hon. D.E. Mrango – J.
Appellant - Present in person
Respondent - Mr. John Kabengula – State Attorney
B/C - Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 04th day of November, 2020 in
presence of the Appellant in person and Mr. John Kabengula -
Learned State Attorney for the Respondent/Republic

Right of appeal explained.



D.E. MRANGO
JUDGE
04.11.2020