THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 25 OF 2020

(Original from Mtwara District Court Criminal Case No. 248 of 2017 before Hon.E.S.Mwambapa, SRM)

SUNDAY BENJAMINI CHENGA@SAID.....1ST APPELLANT

YUSUPH HASSAN NDEMBO.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23rd Sept. & 2nd Dec. 2020

DYANSOBERA, J.:

At Mtwara Resident Magistrate's Court, the appellants Sunday Benjamini Chenga and Yusuph Hassan Ndembo, hereinafter, to be referred to as the 1st and 2nd appellant in that order, were charged with two counts. In the first count, they were facing a charge of burglary contrary to section 294(1) and (2) of the Penal Code, Cap 16 R.E. 2002 in which it was alleged in the charge sheet that on 6th day of August 2017 around night hours at

Shangani West area within the Municipality and the Region of Mtwara, the duo did break and enter into a dwelling house of one DEVOTHAT D/O RAYMOND with intent to commit an offence therein, to wit; STEALING. The said appellants were also charged in the second count with stealing contrary to sections 258(2) and 265 of the Penal Code [Cap 16 R.E. 2002]. It was also alleged in the particulars of the offence that the same date and at the same date and time, they did steal some properties to wit; one(1) TV Flat screen 32 inches make SONNY valued at Tanzanian Shillings Seven hundred Thousand(Tshs.700,000/=),one(1) feathered carpet red/black in colour valued at Tanzanian Shillings Three Hundred Thousand(Tshs.300,000/=),two(2) carpets valued at Tanzanian Shillings(Tshs.40,000/=),Two(2)fen valued at Tanzania Shillings one hundred forty thousand(Tshs.140,000/=),extension cable make tronic valued at Tanzanian shillings twenty thousand(Tshs.20000/=) and one (1) mobile phone make FELOA valued at Tanzania shillings two hundred sixty thousand(Tshs.260,000/=) all total valued at Tanzanian one million four hundred sixty thousand(Tshs.1,460,000/=) only, the property of DEVOTHA D/O RAYMOND. The appellants were found guilty and convicted on both counts. They were also sentenced to three (3) years imprisonment for the first count whereas on the second count were sentenced to two years imprisonment. Surprisingly, the trial court did not direct the mode of running the sentences.

To prove its case the prosecution called five witnesses: Devota Raymond (PW1), Godfrey Mangome (PW2), Salvina Peter (PW3), G1224 D/C Florence (PW4) and Inspector Manyasi Robert (PW5) inclusively were

the prosecution witnesses who adduced their evidence before the trial court. Also, the prosecution tendered documentary and material items as exhibits which were admitted as exhibits P1, P2, P3, P4 and P 5, respectively.

The facts that led to the appellants' arraignment and subsequent incarceration are that on 6.8.2017 at 06:00am PW1 woke up and found some of her households items at the sitting room were stolen while the rear door was broken. The stolen articles included the leather red carpet, two fans make nico, two electric extension cables, mobile phones make Fero (android), flat screen black 32 inches, rechargeable lights, two carton, CDS's, door foot carpets, one broom and another mixture red and black coloured. A report was relayed to the Police station at Mtwara. On 3.9.2017 in the evening police officers arrived at PW1's homestead with a car which inside of it contained various stolen items and one person she could not recognize, was handcuffed. PW1 managed to identify some of her stolen articles, that is, one fan, one rechargeable light and the extension cables. On 4.9.2017 PW1 went at the police station and wrote her statement regarding her stolen properties and eventually handled over her receipts of the stolen articles to the police officers. The handled receipts covered the following properties fan, carpet, extension cable and flat screen. After two weeks PW1 went at police station to identify her stolen properties whereby she identified the leather carpets. During trial PW1 tendered her receipts of the stolen properties which were admitted collectively as exhibit P1.

That version of evidence was supported by PW2 who knew the appellant by the name of Said and the second appellant by the name of

Yusuph who both rented his house. PW2 further testified that each appellant had rented his residential room but on 29.8.2017 at 2100hours police officer arrived at his homestead and was put under arrest with his wife. The arrival and presence of the police officers at PW2's house was purposely for inspecting the rented rooms by the appellants. During the search at PW 2, PW3 (a ten cell leader) was called as an independent witness to the search. In the search exercise, retrieved by PW 5 from the 2nd appellant's room were a flat screen TV black in colour, one deck, one leather carpet red and black in colour, two pairs of shoes and thirty pieces of Ds. From the 1st appellant's room, found were a fan cream coloured, one radio subwoofer cream in colour, one small flat screen white in colour, two long knives, one deck, one small radio,CDs,one mattress and coins not Tanzanian currency. PW5 prepared a certificate of seizure-exhibit P4 which was signed by PW2, PW3 and PW5. PW3 was emphatic that he had known the appellants since they rented the house of PW2.

PW4 took the cautioned statement of the 1st appellant on 31.8.2017 whereas the statement of the 2nd appellant was taken on 30.12.2017. PW 4 explained that before he took the appellants' cautioned statements he accorded them with the rights to call their friends, relatives or an advocate and gave them other basic rights including making their statements or stand mute and warned them that in case they opted to give their statements, the same would be used in a court of law against them. .PW4 managed to tender two exhibits which are exhibit P2 and P3 which were initially objected by the appellant on different reasons. The first appellant objected his cautioned statement on the ground that he did not

make it before PW4 rather he made before a justice of peace.Whereas,the second appellant objected his cautioned statement on the ground of not being interrogated by PW4 and was remanded at Lilungu prison since 29.12.2017. After inquiry being completed the trial court overruled the raised objections and admitted the cautioned statements of the appellants. In addition, the tendering of exhibit P4 was contested by the appellants. On his part, the 1st appellant objected exhibit P4 on the ground that PW5 was not listed during the preliminary hearing whereas, the second appellant contested it on the ground that he did not sign the certificate of seizure and it was not listed in the preliminary hearing. The trial court overruled the objections and admitted the certificate of seizure.

In their defence the appellants did not call any witness to support their evidence rather they defended for themselves. After taking an oath the first appellant completely denied any involvement in the commission of the offence. He recalled that the recorded statement was about the victim by the name of John Mathias CC No.208/2017 and argued that he stayed at the police station for almost eighteen days until on 6.11.2017 when he was taken to court to answer the charge. His other challenge was on his statement being recorded outside the prescribed time.

On his part, the 2nd appellant testified that on 13.12.2017 at 0700 hours he was at Comoro area where he was arrested by the police officers who informed him that they were in need of searching his house. according to him, the police officers searched his house but found him with nothing incriminating and that while at Mtwara Central Police Station, he was interrogated by force and his cautioned statement was taken without his

consent. He complained at the trial that he was assaulted by PW4 who held him upside down. The 2nd appellant also denied to have been recorded the cautioned statement while at the police station.

The trial court found the prosecution's evidence water tight proving the charge beyond reasonable doubt and convicted them as charged. Aggrieved by the conviction and sentences, the appellants have now come to this court by way of appeal with nine grounds of appeal faulting the decision of the trial Magistrate on the following:

1. That Honourable Judge, the trial Resident Magistrate erred in law and fact by holding the conviction and sentence appellants without considering that the prosecution side did not prove the case beyond reasonable doubt.

2. That honourable Judge, the trial Resident Magistrate erred in law and fact by convicting and sentences (sic) the appellants were not arrested at the scene of the crime committing the alleged offence.

3. That Honourable Judge, the trial resident magistrate in law and fact by the holding the convicting sentence without considering that on prosecution side inspected the rooms of appellant while the owner of these rooms did not found and the father house did not show the tenancy agreement. Show that the appellants were the tenants at the house of PW2.

4. That Honourable Judge, the trial resident magistrate in law and fact by holding the convicting sentence without considering that on prosecution side inspected the rooms of the appellant while the owner of these rooms did not found(sic) and the father house did not show the tenancy agreement. Show that the appellants were the tenants at the house of PW2.

5. That honourable Judge, the trial resident magistrate erred in law and fact by holding the convicting and sentence without considering that on prosecution side failed to call the credible witness who founded in room during the inspection in order to prove that the rooms was belong to YUSUPH and second room belong to his friend of YUSUPH and those goods was found in rooms.

6. That honorable Judge, the trial resident magistrate erred in law and facts for convicting appellants without considering that we were neither arrested at alleged crime area nor holding stolen properties but polices catch us appellant and connecting with offence of burglary and stealing while stole property were not living together.1st appellant was arrested at NANGANGA village and taken to Masasi police station while 2nd appellant was arrested with Police officer at Comoro area at properties which claimed to be stolen at PW1 house. Honorable Judge according to the explanation above you can see that this offence has been framed up against us appellants for the benefit of

prosecution side without proving the case beyond reasonable doubt.

7. That the trial Resident Magistrate erred in law and fact by holding convicting and sentencing the appellant by relying on the prosecution side telling appellants that we have being habitual offender without considering that the appellants we just connected with this offence of burglary and stealing without prove the case beyond reasonable doubted the commitment Magistrate Court suppose to look the reality of the offence and not basing on habitual offender of the appellants has required standard by law.

8. That the trial Resident Magistrate fundamental erred in law and fact by holding convicting and sentence the appellant relying on prosecution evidence without consider. That prosecution side failure to call/bring or mention the name of the lady before Court the credible witness the woman who alleged found in the rooms of the second appellant during the search so as to prove the testimonies of prosecution witness PW2, PW3, PW4 and PW5.

9. That the trial Resident Magistrate erred in law and fact in convicting and sentences we appellants by relying on habitual offender on balance of probability instead of proof beyond reasonable doubt.

At the hearing of the appeal the appellants appeared in persons fending for themselves whereas Mr. Paul Kimweri learned Senior State Attorney represented the respondent Republic. When invited to argue their appeal, the appellants opted the learned senior State Attorney to commence his submissions before they could make their reply if need arose.

Mr. Kimweri in his submission in reply, argued with vigour that the evidence adduced against the appellants was cogent and sufficient to justify the convictions and the sentences and that the sentences were the minimum the law prescribed.

He contended that the crucial prosecution evidence was of PW1 (complainant), PW2 (land lord of the appellants who witnessed search), PW3 (ten cell leader of PW2 and the appellants and who also witnessed search), DC Florence (PW4) who recorded the caution statements of the appellant's statements which, after the inquiry, were admitted in evidence. PW5, Inspector Manyasi who conducted the search at the appellant's rooms.

Elaborating on how the case against the appellants was proved to the hilt, Mr. Kimweri said that PW1 said clearly that on 6.8.2019 she woke up early in the morning and discovered that her house was burgled and the following items were stolen: TV flat screen, 2 fans, two extension cables, rechargeable light, a phone make Feloa, two door foot carpets, two CD cartons and a broom. After the theft, PW1 reported to the police and investigation revealed that the culprits stole the items and search was conducted at the residence of the appellants and upon the search the retrieved items were TV, two extension cables, the reachable light, two

door foot carpets and a fan. It was learned Senior State Attorney's submission that PW1 identified the items to be her property and managed to show the police the receipts in respect of all the properties in exhibit P1 eventually PW 1 tendered the retrieved items which were admitted and marked as exhibit P5 collectively.

With respect to the search, Mr. Kimweri submitted that a police officer who conducted the search was PW5, the landlord and the ten cells leader and that the search which was conducted led to the recovery of the items by the witnesses who witnessed the search and a certificate of seizure filled in.

Turning to the issue of confessional evidence from the appellants, Mr. Kimweri argued that appellants made confession which though repudiated, it was admitted after a due inquiry and formed exhibits P2 and P3.

Mr. Kimweri was of the considered view that the prosecution evidence sufficiently proved the offence against the appellants and the doctrine of recent possession could properly be invoked to ground conviction as, according to him, all the four elements of the doctrine were established that is one; there must be stolen items which were in possession of the accused. Two, that the items were proved to belong to the complainant. Three, the property was recently stolen and four the properties must be reflected in the charge sheet. Reliance was placed on the case of **Mohamed Hassan Said V.R**, Crim. Appeal No. 410 of 2011 at Dodoma at page 5.

Insisting that the charge against the appellants was proved beyond reasonable doubt, Mr. Kimweri urged this court to dismiss the appeal.

When it was their turn to rejoin, the 1st appellant submitted that he was apprehended on 28.8.2017 and the search was conducted on 29.8.2017 but he was not present since he was at the police station. Submitting on the recoding of the cautioned statement, he argued that he was not given his basic rights and that is why he disowned the statement and further that his statement was recorded six days after being apprehended.

The 1st appellant also denied to be known as Said as PW 2 and PW 3 put it arguing that his names were Sunday Benjamin Chenga. The 1st appellant thought that he was convicted because "Nilikuwa mzoefu wa Mahakama" been charged with six cases in court. He complained that some exhibits such as P 1 and P 4 were not read out in court and he did not, therefore, know their contents.

The 1st appellant further argued that Inspector Manyasi had no authority to supervise the search as an OCS and that the certificate of seizure had no signatures of witnesses and his. He also complained that it was not part of preliminary hearing and that though the receipt of TV was tendered, the TV was not brought in court. Besides, and the first appellant contended that PW1 failed to identify the culprits.

In his submission, the 2nd appellant submitted that he was apprehended on 13.12.2017 but to be interrogated on 30.12.3017 but that even then, on that date he was in prison on another case. He disowned the cautioned statement and produced the charge sheet showing that on 29.12 he was in prison. The second appellant was of the view that nothing showed that he was interviewed in prison and no evidence produced to

show that on 29.12 he was at the police station. He finally submitted that the dates of their apprehension were different.

Having heard the rival submissions by the learned senior State Attorney and the appellants has tasked me to go back to the trial court typed proceedings and judgment so as to be able to answer the very quest grounds of appeal raised by the appellants. Upon scrutiny I have seen only one major issue which needs determination of this court. The issue is whether the case against the appellants was proved beyond reasonable doubts. But before I embark on the raised issue; it is imperative to clear some matters which the appellants raised jointly in their petition of appeal. These matters are such as, **one**, they were not arrested in the scene of crime, **two**, no witness saw them when burgled and stole the properties of the complainant in her house, **three**, failure by a witness to produce a tenancy agreement and lastly appellant were arrested in two different places that is Nanganga at Masasi and Comoro in Mtwara.

To the benefits of the appellants it is not necessary that all accused who are brought before the court law must have been apprehended in the scene of crime or apprehended in one place or seen when burgled the house and stole the properties but what is important here is the proof of the facts concerning burglary and stealing. It is not necessary that the prosecution should parade witnesses who saw the appellant when committing burglary and stealing. The issue of being apprehended in different places should not detain this court since it is very possible that the accused made an arrangement not to stay in one place as they did.

Also, it is not necessary that the prosecution witness who claimed to have been their landlord had to produce a written tenancy agreement. A fact may be proved by oral evidence or document evidence. To emphasize on that a fact which needs to be proved will determine the nature of proof. At page 16 of the typed trial court proceedings shows how the second appellant cross examined PW2 who is their landlord and who told the trial court that:

> "When renting my room you told me you came from Mtwara you told me you have resided at Nkorokochi guest house and later decided to rent a house."

That piece of evidence above was corroborated with the evidence adduced by PW3 the ten cell leader of Njenga street who told the trial court that:

> "These accused persons in the dock I know them. I knew them. They rented rooms at my neighbor house of Godfrey Mangome.We are close neighbors. I started to see them from July I don't remember exactly date. I never saw them before."

Thus, it is my settled view that the fact of tenancy relationship between PW2 and the appellants was proved by the evidence of PW2 which was corroborated with the evidence of PW3.Therefore, there was no need to produce a written tenancy agreement since the evidence of PW2 covered almost everything which could have reduced in writing.Besides,the first appellant did not cross examine PW2 on the issue tenancy relationship something which is settled in our law and jurisdiction that failure to cross-

examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony. With that view it is apparent that the first appellant accepted the truth of the evidence of PW2 on tenancy relationship among them. See: **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 and **George Maili Kemboge v. Republic,** Criminal Appeal No. 327 of 2013 (all unreported) and **Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi & Another,** Civil Appeal No. 85 of 2005 (both Unreported) where the Court observe:

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

Now let me go back to the issue which is whether the case against the appellants was proved beyond reasonable doubt. In answering this issue during hearing the appellants raised several issues like the how their confession statements were recorded, time of which confession was taken from time of apprehension, the confession statement taken while in prison, failure by the prosecution to read exhibit P1 and P4 after admission, the certificate of seizure being not signed by Godfrey Mangome(PW2),signature of person searched(Yusuph Hassan) and the signature of an officer executing the order(Inspector Manyasi).Also, exhibit P4 was not listed in the preliminary hearing and TV receipt was admitted but the TV was not brought in court.

The record shows that during hearing at the trial court the appellants repudiated their cautioned statements though after inquiry the trial court aired out its ruling and it overruled the objections on the reason that the first appellant failed prove that he made his confession to the Justice of peace whereas the second appellant failed to prove that he was at Lilungu prison for another case. First of all, I admit that the appellants objected the tendering and admission of exhibit P2 and P3.It is quite clear from the trial court proceedings that neither PW4 nor PW5 did inform the trial court on the time which each appellants were apprehended and was put into the custody of the police. It was important for the prosecution witnesses to inform the court on the dates which the appellants were apprehended and detained at the police so as to see if there was compliance with the law on time of taking cautioned statements from the time of apprehension. Why am I saying this because the second appellant's complaint is on two avenues? The first thing is on the place which confessional statement taken and second, time taken to take his confession statement.Whereas, the first appellant denied to have made his confession before PW4.The lack of time of apprehension from the records of the trial court vitiates the exhibit P2 and P3..,, .Also, PW4 did not tell the trial court the case number which the confessional statement made before the justice of peace by the appellant was used. Since the confessional statements were repudiated by the appellant though overruled I find the trial court did not go further to inquire on the extra judicial statement which the first appellant claimed to have made to the Mtwara urban primary court. Inquiry is there in order to clear doubts on something being objected but the trial

magistrate had to go further to either order the appearance of the justice of peace who had taken the extra judicial statement of the first appellant or PW4 had to mention the case number in which the said extra judicial statement was taken. If this could have it been done it could have cured the allegation raised by the first appellant.

Also, the evidence adduced by PW4 was silent on important matters like when the appellants were apprehended since there is an allegation that the cautioned statement was taken after sixteen days stay in custody.Besides,the evidence of PW4 does not to show what the appellants admitted to have stolen from the complainant but it simply state the adherence to the procedures of conducting an interrogation. It has been difficult to know which properties were admitted to have been stolen by the appellants before PW4.This prompted me to visit exhibit P2 and P3 whereby I find out that the first appellant admitted to have stolen the following items at Shangani....., whereas as the second appellant mentioned the following items.....From exhibit P2 the first appellant stated that they stole 2 laptops,ipad,TV.....If PW4 had mentioned those properties admitted to have stolen by the appellants it could have given the trial court an ample time to correlate with the items mentioned by the complainant and those featured in the charge sheet. The missing statement of PW4 on the listed of stolen properties by the appellants to me gives doubts that it seems he was not conversant with the facts of exhibit P2 and P3.And therefore I would buy an idea of the first appellant that PW4 did not take his cautioned statement.

Apart from that, the appellants complained that exhibit P1 and P4 were not read out in court after its admission. Admittedly exhibit P1 and P4 were admitted in evidence and the proceedings of the trial court do not show if the same were read out court after admission. This omission is fatal as it was held in a number of cases of the Court of Appeal of Tanzania including **Thomas Pius vs. Republic**, Criminal Appeal No.245 of 2012 and **Jumanne Mohamed and Two Others vs. Republic**, Criminal Appeal No. 534 of 2015(both unreported) whereby the Court relied on its previous unreported decision of **Sunni Amman Awenda v. Republic,** Criminal Appeal No. 393 of 2013 where it stated as follows:

> "To hold that the omission to read them out was a fatal irregularity as it deprived the parties to hear what they were all about...*We need to point out that both, the cautioned and extra judicial statement had a lot of details and immensely influenced the decision of the court ... to have not read those statements in court deprived the parties, the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that this omission too constituted a serious error amounting to miscarriage of justice and constituted a mistrial".*

It is always been held that after a document is cleared for admission and admitted in evidence, it should be read out to the accused person to enable him understand the nature and substance of the facts contained therein. In the case at hand the documents complained of are Ext. P1 and P4. Exhibit P1 is a collection of receipts of some of the properties which the complainant alleged to have been

stolen from her home. Whereas, exhibit P4 is a collection of certificate of seizure of the stolen properties from the appellants. As already said, it was admitted in evidence but was not read out in court after admission. Given a plethora of authorities on the point some of which have been discussed above, Iam of the considered view that the omission constituted a fatal irregularity. I thus expunge Ext. P1 and P4 from the record.

Furthermore, now I should look on the issue of certificate of seizure which I have expunged it from record to have no signature of one witness (PW2), PW5 and the appellants. Whether the expunged certificate of seizure was a valid document to be relied upon by the trial court in grounding conviction of the appellants. It is my considered view that lacking of signatures of the named persons in expunged certificate of seizure vitiated the validity of the document. Hence it was wrong for the trial court to ground conviction basing on incomplete certificate of seizure.

Also, it is undisputed fact that PW2 named Said as the name of the first appellant but the charge sheet shows that the name of the first appellant is Sunday Benjamini Chenga and there is no unique name of Said. If that is the case it is definitely clear that PW2 was referring to another person who is not the first appellant.

In addition, following the expunged exhibits which include the receipts tendered by PW1 has effect to the doctrine of recent position. As submitted by the learned senior State Attorney that the said properties were found with the appellants were amply identified and stolen recently and bear a relationship with those mentioned in the charge sheet. It is my settled view that since exhibit P1 is expunged from the record then

will remain with no proof as to the ownership of the alleged stolen properties. Thus, Iam of the view that the case of **Mohamed Hassan Said V.R** (supra) cited by the Mr. Kimweli is not applicable in the case at hand due to lack of proof of ownership by PW1. Besides, even the properties which the first appellant admitted to have stolen were stolen at Shangani in the house of the Ugandan woman but the trial court proceedings shows that PW1 is a Tanzania and Nyakyusa by her tribe. This is well featured in the cautioned statement of the first appellant. More so the properties mentioned to have been stolen by the first appellant from the house of the Ugandanian woman include two lap tops and one ipad which are listed in the cautioned statement of the first appellant but not listed in the charge sheet.

Apart from that, the trial court sentenced the appellant to serve sentences of three years for the first count and two years for the second count. But what I have noted is that the learned trial magistrate did not order the mode of operating the sentences whether concurrently or consecutively. It is important for magistrates to specify which mode will run the sentences imposed against the convict(s) especially where there is more than one count.

In totality I find the prosecution did not prove the case against the appellants beyond reasonable doubts due to the stated reasons herein above. In the final event, I allow the appeal, quash the conviction and set aside the sentence imposed on the appellants. Further, I order that the appellants be released forthwith unless held for other lawful reasons.

Order accordingly.

W.P. Dyansobera

JUDGE

30.11.2020

This judgment is delivered under my hand and the seal of this Court on this 30th day of November, 2020 in the presence of the appellants who appeared in person and Mr. Paul Kimweli senior State Attorney for the Republic respondent.

Rights of appeal to the Court of Appeal of Tanzania explained.

W.P. Dyansobera

JUDGE