IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 114 OF 2019

(*Arising from the Judgment of the District Court of Urambo Hon. B.K. Kashusha (RM) in Criminal Case No. 26 of 2014*)

MASHAKA MRISHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

KIHWELO, J.

The Judgment in this matter was reserved by my late brother, Bongole, J, who unfortunately did not live to compose it. Consequently, the record has been re-assigned to me.

In the District Court of Urambo, the appellant, Mashaka Mrisho was charged along with other three accused of the offences of Burglary contrary to section 294(2) of the Penal Code [Cap. 16 R.E 2002] and Stealing contrary to section 265 of the Penal Code [Cap. 16 R.E 2002] (Henceforth "the Penal Code"). It was alleged that the appellant on 20th December 2013 at night time at Block Q within Urambo District in Tabora Region, did break and enter in the house of one Frank Burushi with intent to commit an offence. It was further alleged

that the appellant on 20th December 2013 at night upon breaking and entering in the house of one Frank Burushi did steal one TV set Flat Screen Make Sumsung valued at Tshs. 1,200,000.00, three mattresses size 5x6 Make Dodoma valued at Tshs. 300,000.00 each the total value is Tshs. 900,000.00, a TV stand valued at Tshs. 350,000.00, a music system valued at Tshs. 1,200,000.00, two coffee tables valued at Tshs. 400,000.00, one deck Make LG valued at Tshs.100,000.00, two dinner sets valued at Tshs. 700,000.00 each total value of which is Tshs. 140,000.00, three Blankets each valued at Tshs. 100,000.00 the total value of which is Tshs.300,000.00, one Taxido suit valued at Tshs. 140,000.00 one CRDB Bank uniform valued at Tshs. 400,000.00 and other domestic and kitchen appliances in total valued at Tshs.5,200,000.00 the properties of one Frank Burashi.

As they did not admit the allegation, the trial was conducted and at the end of the trial it was only the appellant who was convicted of the offences of Burglary contrary to section 294(2) of the Penal Code and Stealing contrary to section 265 of the Penal Code and sentenced to serve 20 years in prison for the first count and 7 years in prison for the second count.

Aggrieved by that decision of the trial court, the appellant filed an appeal before this Court. In his petition of appeal, the appellant raised seven grounds of appeal. However, I shall not reproduce the said grounds of appeal because a cursory perusal of all the grounds reveals to me that most of the complaints centers on whether the prosecution proved its case against the appellant beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Mr. Miraji Kajiru, learned State Attorney.

When the appellant was called upon to argue his grounds of appeal, he did not have much to say as he urged this court to adopt the grounds of appeal as filed.

On his part the learned State Attorney supported the appeal and his response was fairly short. He readily supported the appeal of the appellant against conviction and sentence but on a different reason than most of the complaints of the appellant in the petition of appeal. His first argument to support the appeal was that there was no evidence that proved correct identification of the appellant at the scene of the crime. He argued further that the crime is alleged to have occurred at night and that there was no one witness who said he saw the appellant.

Traversing the record of the trial court in particular page 21 of the proceedings the learned State Attorney strenuously submitted that although there appears to have been a substitution of charge sheet but plea was not taken contrary to the dictates of section 134(1)(2) of the Criminal Procedure Act, Cap 20 R.E 2002 (Henceforth "the CPA"). He therefore argued that this omission was an irregularity which cannot be cured under section 388 of the CPA.

The learned State Attorney argued further and very briefly that the identification by the complainant was not correct as he never explained or described the appellant.

Mr. Kajiru, learned State Attorney concluded his submission by submitting that the search warrant which was admitted in evidence at the trial court was not read in court. To fortify the foregoing, he cited the case of **Robinson Mwanjisi & Three Others v. R** [2003] T.L.R 218. On the strength of the above submission the learned State Attorney thus urged this court to allow the appeal.

After the submission of the learned State Attorney, the appellant had nothing to add on the appeal but urged the Court to allow the appeal.

Generally speaking, in my reading, understanding, and appreciation of the appeal before me, I am of the view that it is an attempt to invite this court to revisit the entire case with the ultimate aim of faulting the decision of the trial court. Having heard the learned State Attorney and the appellant, it is plain that the determination of this appeal lies on the answer to the issues raised by the learned State Attorney.

This being the first appellate court I am entitled to re-appraise the evidence because an appeal is in effect a rehearing of the case. This position was stated by the Court of Appeal of Tanzania in the case of **Hassan Mzee Mfaume v R** [1981] TLR 167.

This case is purely based upon circumstantial evidence as no direct evidence was led to connect the appellant with the offence charged and the prosecution rests its case only on circumstantial evidence. It has been consistently laid down the Court of Appeal that where a case rests squarely on circumstantial evidence, the inference of guilty can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilty of any other person. See **R**

v Kipkering arap Koske [1949] EACA 135 at 136 cited with approval in **Walii Abdallah Kibutwa and 2 others v Republic**, Criminal Appeal No. 181 of 2006(unreported).

In the instant case the only evidence that connected the appellant with the offence charged is the evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7. In that case can it be said that the prosecution proved the case beyond reasonable doubt? The answer to this depends upon number factors which I will not address at this juncture for reasons to be assigned in due course.

I will begin by addressing the argument by the learned State Attorney that upon substitution of the charge a plea was not taken contrary to section 134(1)(2) of the CPA. A thorough perusal of the typed proceedings in particular at page 8 and 9 and not 21 as alleged by the learned State Attorney it is conspicuously clear that when the charge sheet was substituted, the same was read to the accused who were requested to plead. Let the records of the typed proceedings appearing at page 8 and 9 paint the picture:

"DATE: 23/05/2014

CORAM: H.M. MOMBA RM

PROSECUTOR: MALISA INSPECTOR

ACCUSED: PRESENT

INTER: JOSEPH S/OA

PP: We pray for substituting charge sheet, so that(sic) to add more one(sic) Ramadhan Samweli and read over them(sic).

1st Accused for 1st count- It is not true

2nd count- It is not true

2nd Accused for 1st count- It is not true

2nd count- It is not true

3rd Accused 1st count- It is not true

2nd count- It is not true

4th Accused for 1st count- It is not true

2nd count- It is not true

COURT: All accused pleaded guilty.

Hon. B.K. Kashusha (RM)

SIGNED"

It is instructive to interject a remark, by way of a postscript that the appropriate provision for plead taking is section 228 of the CPA and not 134 of the CPA (which deals with joinder of parties) as alleged by the learned State Attorney. I wish further to interject a remark, that, whereas the corum of the trial court during plea taking upon substitution of the charge sheet reads H.M. MOMBA according to records of the trial court but records reveal further that the one who signed after plea taking is Hon. B.K. Kashusha and this is a glaring irregularity which leaves a number of questions unanswered.

I wish to dispassionately point out another anomaly which is evident from the records of the trial court and that is failure to enter plea in line with the requirement of the law in particular section 288 which requires the court to enter a plea and not merely to record a plea as the trial court seems to have done. Normally the court will Enter a Plea of Guilty (EPG) or Enter a Plea of Not Guilty (EPNG) which is not the case in this instant appeal. This is also evident in the records of the trial court in particular at page 5 of the typed proceedings where the court Hon. H.M. MOMBA during the earlier plea taking recorded;

"**COURT**: Entered Plea of not girity (sic)."

Moreover, original hand-written records of the trial court are conspicuously clear that upon closure of the prosecution's case the trial magistrate entered a ruling under the provision of section 230 of the CPA on 20/08/2014 and found that the appellant had a case to answer the rest two accused were acquitted as the prosecution did not provide sufficient evidence that established a prima facie case against them. Unfortunately, the trial magistrate abrogated the mandatory requirement of section 231 of the CPA by putting the appellant on defence without explaining his rights. This is a serious irregularity. See, for example, **Bahati Makeja v Republic**, Criminal Appeal No. 118 of 2006 (unreported).

In view of the above infractions which cannot be cured by section 388 of the CPA. I am decisively of the view that these irregularities by themselves warrants the appeal to succeed.

I will now turn to the issue of the identification of the appellant by the complainant which according to the learned State Attorney he claimed that

it was not correct as the complainant never explained or described the appellant in court. This issue should not detain me much. According to the typed proceedings specifically at page 16 the records reads in part;

"...we went to Mashaka who was suspected to have broken my house the same Mashaka is the one who sat(sic) before the court of 1st accused."

The question is can this be said to be a proper identification in the dock? The Judgment of the trial court at page 3 reads in part;

"The witness recognised the 1st accused seat (sic) in witness dock."

I find considerable merit in the argument by the learned State Attorney that the identification of the appellant in the dock is marred with some ambiguities if not irregularities and therefore making the entire exercise of identification of the appellant in the dock an exercise questionable. It is, indeed, obvious that this disquieting aspect of the proceedings was occasioned by the laxity of the trial magistrate.

Next for consideration is the issue as to whether or not the search warrant was properly relied upon by the trial court to ground the appellant's conviction having been admitted without reading out their contents for the appellant to understand what it contained. This issue should not detain me and I don't intend to dwell much on it as records are conspicuously clear that the search warrant which was received in evidence and admitted as exhibit P1 was not read out after being admitted. This is clearly seen at page 12 of the typed proceedings. This omission is fatal as the Court of Appeal has held in a number of cases including **Thomas Pius v Republic**, Criminal Appeal No. 245 of 2012, **Jumanne Mohamed & 2 others v Republic**, Criminal

Appeal No. 534 of 2015 (unreported), **Issa Hassan Uki v Republic**, Criminal Appeal No. 129 of 2017 and **Saganda Saganda Kasanzu v Republic**, Criminal Appeal No. 53 of 2019 (both unreported). It is settled position that failure to read out an exhibit after its admission is fatal as it violates the accused's right to fair trial by depriving him the right to understand the nature and substance of the facts contained therein. Given a plethora of authorities on the point as referred above, I am of the considered view that the omission constituted a fatal irregularity. I thus expunge Exhibit P1 from the record.

To resume to the matter under my consideration, having expunged exhibit P1, I am, admittedly, left with a skeleton of the prosecution case. It is for this reason I don't wish to venture into an academic exercise of addressing other issues in futility.

To this end, I am satisfied that the appellant's conviction cannot be sustained and, accordingly, his appeal is meritorious. The conviction and sentence are, respectively, quashed and set aside with an order that the appellant should be released from prison custody forthwith unless he is detained for some other lawful cause. It is so ordered.

P. F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.

P. F. KIHWELO

JUDGE

10/12/2020

Court: Judgment delivered this 17th day of December 2020 in the presence of the appellant but in absence of the Respondent.

Right of appeal explained fully.

B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020