IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No. 203 OF 2019

JOSEPHAT S/O KITUGI @ MBOGO..... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

JUDGMENT

19th & March, 2020

Kahyoza, J.

Josephat Kitugi was arraigned and convicted of the offence of armed robbery. He was sentenced to serve an imprisonment term of thirty years. **Magreth Kibaraka, Pw2** deposed that Josephat entered into their house, injured her with a double-edged knife and took with him Tzs. 1,000,000/= and nine pairs of vitenge. The appellant appeals to this court on the ground that the evidence of seizure was not properly admitted, there was no inquiry before the certificate of seizure was admitted and that the independent person who signed the seizure certificate did not testify. The appellant further, contended that the charge and the evidence varied, the evidence contradicted each other and the witnesses were not credible. He concluded that the prosecution did not establish the chain of custody of the tendered exhibits.

The issue for determination based on the grounds of appeal are: -

1. Does the law or practice require the court to conduct an inquiry

before a certificate of seizure is admitted?

2. Was the content of the certificate of seizure read to the appellant? If not what are the consequences?
3. Is there any discrepancy or disparity between the particulars of the charge and the evidence as to the amount stolen?
4. Were the prosecution witnesses credible?
5. Was the prosecution evidence self-contradictory?
6. Did the trial court consider the defence evidence?
7. Was there enough evidence to convict the appellant?

I will commence with the first issue whether the law or practice requires the court to conduct an inquiry before a certificate of seizure is admitted. The appellant had nothing to add to the ground of appeal that the trial court admitted the certificate of seizure without conducting an inquiry. Mr Temba, learned State Attorney submitted that there was no law or rule of practice demanding before a certificate of seizure is admitted it must first conduct an inquiry.

I share the state attorney's stance. There is no law requiring a trial court to conduct an inquiry before admitting a certificate of seizure. An inquiry or a trial within trial is conducted to establish whether an accused voluntarily confessed. The circumstances of preparing a certificate of seizure do not need such a proof.

Was the content of the certificate of seizure read to the appellant? If not what are the consequences?

The learned state attorney conceded to the second ground of appeal

that it was true that the contents of certificate of seizure were not read to the accused after the same was admitted. He prayed the same to be expunged from the court record. However, he submitted that Pw1's evidence covers the evidence in the certificate of seizure. This was the position in *Issa Hassan Uki V. R* **Cr. Appeal No. 129/2017** unreported at Page 13 – 16. In that case, the court expunged the exhibit and made a finding that evidence on record was quite sufficient to cover the contents of the expunged exhibit. I totally concur with the state attorney, that the apposition of the law failure to read out the contents of the exhibit after it is admitted was a fatal irregularity. See *Sunni Amman Awenda v Republic*, Criminal Appeal No. 393 of 2013. The Court of Appeal held in that case that **the omission to read the contents of the cautioned and extra judicial statement out was a fatal irregularity as it deprived the parties to hear what they were all about.** It was therefore improper for the trial court to rely on it. It is expunged from the record.

I was requested to make a finding that the information in the expunged certificate of seizure was covered by the remaining witness. It is true that Pw1 DC Athumani and Magreth Pw2 covered how the stolen vitenge were recovered. Their testimony is sufficient to cover the evidence of the expunged exhibit.

I will not discuss the third ground of appeal as the certificate of seizure has been expunged.

Is there any discrepancy or disparity between the particulars of the charge and the evidence as to the amount stolen?

The State Attorney for the Republic conceded that indeed there is

disparity in the particulars of the charge and the evidence as to the amount stolen. **Magreth Kibaraka, Pw2** testified that the appellant stole Tzs. 2,000,000/= while the particulars in the charge sheet states that the amount stolen was Tzs. 1,000,000/=. The state attorney submitted that **Magreth Kibaraka, Pw2** did explained the cause of the deference. She explained that after she had reported to police that the accused stole 1,000,000/= she later realized the appellant stole one more TZS 1,000,000/=.

It the position of the law that minor discrepancies which do not go to the root of the matter, can be overlooked. See the decision in Dickson **Elia** *Nsamba Shapwata v. Republic*, Criminal Appeal No. 92 of 2007 (unreported) and in *John Gilikola v. Republic*, Criminal Appeal No. 31 of 1999 (CAT unreported) where the Court of Appeal held that "*due to the frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies.*"

After considering the discrepancies and the explanation given by the Magreth Pw2, I am of the view that the discrepancies in this case is not minor. It raises doubt if the appellant did steal money. Magreth Pw2 testimony was that she saw the appellant taking money. Either she did not witness him grabbing money or she did not know how much money she had.

Based on that uncertainty, it is my firm opinion that the prosecution did not establish that the appellant stole money.

Were the prosecution witnesses credible?

The appellant did not submit grounds why he thinks the prosecution witnesses are not credible. In the case of **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported), the Court of Appeal

propounded the manner credibility of witnesses can be assessed or determined. It stated as follows:

> *"Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways;* ***one****, when assessing the coherence of the testimony of that witness.* ***Two****, when the testimony of that witness is considered in relation with the evidence of other witnesses or including that of the accused person. In these occasions the* ***credibility of a*** *witness can be determined even by a second appellate court when examining the findings of the first appellate court.*

I do not find any ground to hold that the prosecution witnesses are not credible. This ground of appeal fails.

Was the prosecution evidence self-contradictory?

The appellant did not point out which evidence was self-contradictory. The State Attorney for Republic submitted that the offence of armed robbery is not proved by tendering a PF.3. He contended that Magreth Pw2 did establish that she was threatened by the appellant in order to steal and retain the stolen property. I agree with the state attorney that the offence of armed robbery is not proved by a PF. 3 but when the victim contends that she or he was injured in the course of commission of the offence and he got treated, one expects that PF. 3 will be tendered. There is no reason why the victim should depose that she was injured when she cannot establish that. It was enough to depose that she was threatened.

Did the trial court consider the defence evidence?

The last issue to be considered is the contention that the trial court did not consider the appellant's defence. Mr. Temba, learned state attorney submitted that the appellant's defence was considered by the trial court. He submitted that trial court found that there was enough evidence from the prosecution side and that the appellant's evidence did not raise any reasonable doubt. The appellant was arrested immediately after he committed the offence. The appellant was pursued by people after he committed the offence and arrested instantly. He committed the offence in the morning. There was no question of mistaken identity.

I examined the trial court's judgment and found that the appellant's defence was considered. The trial court stated that "*the fact that the accused (appellant) did not cross examine the victim during the prosecution's case, also the fact that the accused led to the discovery of the stolen vitenge .. ..the defence cannot be trusted.*" The quoted words prove that the trial court considered the defence evidence and found that it was not plausible. Indeed, the defence evidence could not shake the prosecution's evidence. I have no reason to fault the trial magistrate. Thus, even the last ground of appeal is dismissed.

Was there enough evidence to convict the appellant?

I find there was evidence to proof beyond all doubts that the appellant went to **Magreth, Pw2's** house and stole nine pairs of vitenge (Exh.P1). However, I found it doubtful if money was stolen as alleged in the charge sheet or as testified. I also found it established that the appellant was pursued after he committed the offence and arrested. There is evidence that the appellant committed the offence during the day light. There was no way he

could have been mistaken. I considered the appellant's defence that **Magreth Pw2** was his lover who fabricated evidence after the two quarreled and formed an opinion that piece of evidence was an afterthought. **Magreth Pw2** testified and the appellant never asked her any question relating to their relationship. That piece of evidence carried not more weight than what the trial court accorded to it. That is to hold that it was an afterthought and worthless. It is settled that **as a matter of principle, a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said**. See *Daniel Ruhere v. Republic* Criminal Appeal No. 501/2007, *Nyerere Nyauge v. R Criminal* Appeal No. 67/2010 and *George Maili Kemboge v. R* Criminal Appeal No. 327/2013, a few to mention.

The only element which I did not find it proved is whether the appellant threatened **Magreth Pw2 with a double-edged knife or injured her** before he committed the offence. **Magreth Pw2 deposed that she was injured and treated at the hospital. Magreth Pw2** never tendered any exhibit to prove that she suffered injuries and treated. One expected **Magreth Pw2** that tender a PF. 3 as exhibit. The Court of Appeal in *Zuberi Bakari v Republic* [2005] T.L.R 31 held that **"the offence of armed robbery is not committed unless it is established that the appellant used or threatened to use any actual violence to obtain or retain the stolen property."**

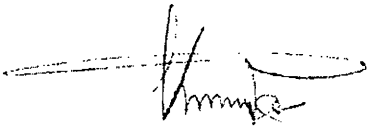
In the present case, there is no evidence to prove beyond all reasonable doubt that the appellant used force that is he injured **Magreth Pw2 in order to obtain and retain the stolen item.** The offence of armed robbery was not established. Thus, the conviction for armed robbery is

quashed and substituted therefor with the conviction for offence of stealing contrary to section 265 of the Penal code.

The sentence of thirty years is set aside and sentence of five years substituted for under the section 265 of the Penal Code.

For reasons stated above, the appeal is upheld to the extent shown above.

It is ordered accordingly.

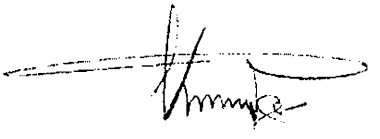


J. R. Kahyoza

JUDGE

27/3/2020

Court: I order that the vitenge be returned to Magreth, Pw2 and the knife be given the Prison department. This order is regardless of a further appeal to be lodged by any of the parties.

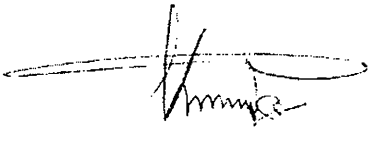


J. R. Kahyoza

JUDGE

27/3/2020

Court: Right of appeal explained after lodging a notice of appeal within thirty days.



J. R. Kahyoza, J.

27/3/2020