IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 318 OF 2018

(Origin; Kinondoni District Court Criminal Case No. 470 of 2016)

MIRAJI MWISHEHE MKANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 28/11/2019

Date of Judgment: 12/03/2020

S.M. KULITA J.

This is an appeal from Kinondoni District Court. The Appellant one MIRAJI MWISHEHE MKANGA was convicted and sentenced to serve the imprisonment of 7 (seven) for ***Stealing*** Contrary to Sections 258 and 265 of the Penal Code [Cap. 16 R.E. 2002]. Aggrieved with both conviction and sentence the Appellant filed a Petition of Appeal relying on the following six grounds;

(1) That the case against the appellant was fabricated as the said appellant stayed in the police remand custody for about 40 days, from 05/10/2016 the date that he was arrested to 14/11/2016 before he was brought to court.

(2) That the substance of evidence led by prosecution witnesses does not support the charge sheet, instead it creates apparent disparity particularly as to when the incident of theft had occurred.

(3) That the conviction of the appellant based on incredible, fabricated and improbable prosecution evidence that on 20/9/2016 while from Kigali the victim (PW2) found her bedroom open and her passports, both Diplomatic and Ordinary among the stolen properties. It could therefore be impossible for her to travel to abroad.

(4) That the trial Magistrate erred in law and in fact in failing to hold that the appellant has been a servant to PW2 for about 15 years and the items which were found and seized from the appellant had come into his possession by virtue of their relationship as gift.

(5) That the learned trial Magistrate erred in law and facts in convicting and sentencing the Appellant without specifying the offence, section and the law under which the appellant was convicted and sentenced.

(6) That, in alternative to the above five grounds of appeal the learned trial Magistrate erred in law and facts to impose excessive punishment to the Appellant notwithstanding that the appellant was the first offender and without considering his mitigation.

Briefly facts of the case transpire that on the unknown dates in September, 2016 at Kijitonyama area within Kinondoni District in Dar es Salaam Region the Appellant did steal several properties from the bed room of his master namely Angela Kizigha, owned by the said person, while she was on safari. During the hearing the appellant appeared in person while the Respondent (Republic) was represented by Ms. Ester Kyara, State Attorney.

In his oral submissions the appellant, Miraji Mwishehe Mkanga stated that he was aggrieved with the decision of the District Court of Kinondoni entered on 14/5/2018 hence appealed to this court. The appellant had nothing to submit orally but prayed for his grounds of appeal to be adopted as the submissions for his appeal. He concluded by praying the appeal to be allowed, conviction be quashed and the sentence of 7 years imposed against him be set aside.

In the Reply the state Attorney, Learned Counsel Ester Kyara for the Republic (Respondent) stated that she supports the conviction and sentence imposed by the subordinate court against the Appellant. She therefore prayed for the conviction and sentence of seven years to stand undisturbed.

Replying the first ground of appeal raised by the appellant that the case was cooked and he had stayed in the police remand custody for forty days before he was taken to court Ms. Ester Kyara stated that there is no record on that in the original case file and that there is no proof that he was not released on bail. She added that whatever it is, that was not a source of conviction against him.

As for the 2nd ground of appeal that the statements in a charge sheet particularly on the date that the crime was committed differs with that stated in the testimonies the Counsel submitted that the victim Angela Kizigha (PW2) did notice for the first time on 19/09/2016 that her properties had been stolen but he later on came to note on the 02/10/2016 that some more properties had been stolen in her bedroom. She said that a slight error of dates does not go to the root of the case.

The 3rd ground of appeal was replied by the State Attorney by stating that the appellant is wrong to submit at the appellate stage the question that PW2, the victim could have not managed to travel to Rwanda if her passports, both Ordinary and Diplomatic had been stolen. She further submitted that the appellant was supposed to argue this issue during trial at the subordinate court. She also submitted that the PW2 is a Member of Parliament, she might have more than those two passports or have altenative means of travelling thereto.

Replying the 4th ground of appeal Ms. Kyara, State Attorney submitted that the properties found in possession of the appellant at his resident as well as those found in the PW3's shop at Chanika ie. vitenge were identified by PW2 being among the properties stolen from her resident. She said that PW3 mentioned the appellant as the one who had sold the said vitenge to him. She said that the appellant alleged that he was given those things as gifts by PW2 but that is not true as PW2 herself denied and the Appellant had no proof on that. The counsel added that the appellant left and cut off communication with PW2 after he had been asked by the said PW2 about missing of her properties in

her bedroom. She said that it is the implication that the appellant had stolen the properties.

As for the 5th ground that the lower court didn't consider the law particularly the section and statute under which he was charged, the counsel stated that the appellant did manage to defend the case after he had been informed to have a case to answer which means that conviction and sentence had been made in a form of justice.

Submitting on the 6th ground of which the appellant called the altenative to the other grounds of appeal the Counsel stated that the appellant was rightly convicted and sentenced to serve seven years imprisonment by the lower court as it is the one highlighted under section 265 of the Penal Code [Cap 16 RE 2002]. She said that the court also considered the mitigation submitted by the appellant and reached into that right term of imprisonment as per the above mentioned provision. She concluded by praying the same penalty to stand still.

Having gone through the submission of both parties the court have the following observations; Starting with the 1st ground of appeal that the case against the appellant was fabricated that's why he had stayed in the remand custody of police for about forty days before he was

taken to court. That situation was not raised by the appellant at the lower court where trial was conducted. This is just the court of records which looks at the validity of the lower court's findings on the issues raised before it. The fact that the said issue of long term stay in the police remand custody was not raised at the lower court it is wrong for the appellant to submit the same as a ground of appeal before this court. It is like taking new evidence while it is not a forum for that purpose. That evidence is marked not proper before this appellate court, hence cannot be entertained. See **ISMAIL RASHID V. MARIAM MSATI, Civil Appeal No. 75 of 2015, CAT at DSM (Unreported).** The 1st ground of appeal is therefore devoid of merits, hence dismissed.

The applicant's 2nd ground of appeal looks to have no legal weight as it is not true that the dates for commission of crime in the charge sheet differs to that adduced by the witnesses in their testimonies. Upon going through the records I have actually seen the first charge sheet filed on the read that the crime was committed on 19/6/2016 but the said charge sheet was amended on 9/5/2017 whereby the crime was said to have been committed "***on the unknown dates of September,***

2016". Even facts of the case in the Preliminary Hearing read the same. This ground of appeal has no merit and the same is hereby dismissed.

As for the issue of impossibility of the Victim (PW2) to travel to Rwanda while her passport alleged to have been stolen the appellant was trying to show that the victim was a lier to say that among the properties stolen from her residential premise are her passports. But this cannot be regarded a must that the passports were not stolen. As rightly submitted by the State Attorney that she might have travelled thereto through the other means without holding the passport, keeping in mind that the said victim is a Member of Parliament in the Parliament of the United Republic of Tanzania. Another thing that I can comment thereon is that the appellant was supposed to challenge this issue during trial at the subordinate court. As the appellant he is estopped to raise the new issues during the appeal. The above cited case of **ISMAIL RASHID V. MARIAM MSATI (supra)** also refers.

In the 4th ground of appeal that the lower court erred in law and fact for failing to consider that the properties found in possession of the appellant were given to him by his employer (PW2) as gifts this court is of the view that the Applicant was supposed to prove that argument as

the victim denied to have given him those properties. That position plus the fact that the appellant left the working premise and cut off communication with PW2 after She had asked him about missing of her properties in her bedroom creates a picture that the appellant had stolen the properties.

As for the 5th ground of appeal the appellant alleged that the trial Magistrate did not mention the offence and section that the appellant had been convicted for. As rightly stated by the State Attorney that under section 231 (1) of the Criminal Procedure Act the appellant was informed to have a case to answer in the offence that he had been charged for, "stealing". He was then asked to defend his case. The Appellant replied that he would defend himself on oath and he would have two witnesses with no exhibit to tender. It means he had a knowledge as to what offence he was going to give evidence for. The judgment transpires that the accused/appellant was charged with the offence of ***"stealing"*** contrary to sections 258 and 265 of the Penal Code [Cap 16 RE 2002] - see page 1 of the judgment. At the end of the judgment (page 10) the magistrate stated *"I hereby find the accused ..... guilty of the offence and as a result I hereby convict him".* In the

plain meaning these statements transpire that the appellant was charged for stealing and convicted for the same offence. I find no defect on the lower court's judgment in convicting the appellant. This ground of appeal has no merit at all.

The appellant made ground no. 6 as the altenative to the other grounds of appeal in which he prays for the court to reduce the sentence as it is too excessive as compared to the mitigation adduced and the fact that the appellant is a first offender. On the other hand the Respondent's counsel stated that the penalty of 7 (seven) years imprisonment was accordingly entered as per section 265 of the Penal Code. I can agree with the State Attorney that the said term of 7 years imprisonment is the prescribed penalty for the offence of rape but that is a maximum penalty for the Magistrate with powers to enter such a penalty. For this matter it is the Senior Resident Magistrate as per section 170 of the Criminal Procedure Act [Cap 20 RE 2002]. The section states;

170. ***Sentences which a subordinate court may pass:-***

(1) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences–

(a) ***imprisonment for a term not exceeding five years;*** *save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act * which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;*

(b) – (c) .....not applied.....

(2).....not applied.....

Provided that this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank.

From the above cited provision you can note that the trial Magistrate having not attained the rank of Senior Resident Magistrate as it can be seen in the records that he is just the RM (Resident Magistrate) it was wrong for him to impose the sentence that exceeds 5 years for that offence of stealing while the same is not scheduled in the Minimum Sentence Act. I therefore reduce the

sentence to 5 years from 7 years that was imposed by the trial Magistrate. The said term of 5(five) years should run from 14/5/2018, the date that the sentence was passed.

The appeal is partly allowed.

S.M. KULITA

JUDGE

12/3/2020