IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO.129 OF 2019

(Arising from Criminal Case No. 129 of 2019, District Court of Shinyanga)

1. SAMSON MALODA

2. MATHIAS MASANJA@RAS.....APPELLANTS

VERSUS

THE REPULIC.....RESPONDENT

JUDGMENT

2/4 & 8/5/2020

G. J. Mdemu, J.;

In criminal case No.167 of 2017, in the District Court of Shinyanga, the Appellants who were the 1st and 2nd accused persons together with Esther Katiba@Mama Ngeme, Dotto Katiba, and Amina Hamisi the then 3rd, 4th, and 5th accused persons respectively, jointly and together stood charged with the following offences, to wit; burglary contrary to section 294(1) (a) and (2) and stealing contrary to section 258 and 265 all of the Penal Code, Cap.16 for the Appellants; possession of goods suspected to be stolen or unlawful acquired contrary to section 312(b) of the Penal Code, Cap.16 for the then 3rd , 4th and 5th accused persons.

According to the particulars of offence in the charge and the facts on record, on or about the midnight of 17th of July 2017, at Kitangiri area within Shinyanga Municipality, one Paulo Luhende@Shija (PW3) when reached at his

residential premises found his main door open. No one was present. He entered the house only to find the following properties missing:1 flat screen television set make Aboder, subwoofer make sea piano, 1 deck make zeck, 1 mattress make tanform, 4 curtains, 4 bed sheets, 2 rubber shoes and cash Tshs. 250,000/=. On noting this, PW3 reported the matter instantly to the ten cell leader one Mustapha Mgendi (PW1) and then to police in which investigations commenced. When PW3 was on his way home from police, met one George who informed him to have seen his (PW3) shoes in possession of his friend. With this information, PW3 and the said George returned to police station whereby they all proceeded to the residential premises of one Mwinamila. The latter's son one Mashaka Mwinamila (PW6) stated to have purchased those shoes from the two Appellants at tshs.18,000/=The police then seized those shoes.

This information lead to the arrest of the Appellants and on 21st of July 2017, in the course of further investigation, search was conducted in the house of the 1st Appellant who informed the police to have sent the stolen properties to the then 3rd accused person. In presence of PW1 and Ally Makanza (PW2), search was mounted to the residence of the then 3rd accused person in which, bed sheets and curtains got retrieved. A mattress was also retrieved and seized during search conducted in the house of the then 5th accused person. The then 4th accused person was also arrested and upon interrogation he confessed to have taken party in commission of the offence.

With this evidence, the trial court on 27th of December 2018 found the Appellants and the then 3rd and 4th accused persons guilty, convicted and ultimately sentenced them to 4 years prison term in the second count of stealing in respect of the two Appellants. As to the then 3rd and 4th accused

persons, the court sentenced them to two years community service. In the first count of burglary, the court found the two Appellants not guilty and they were accordingly acquitted.

According the record, it appears the then 5th accused person passed away though the record is silent as to an order of abatement and also the death certificate. This conviction and sentence of the trial court aggrieved the two Appellants and sought this instant appeal on the following grounds:

1. *That the trial Magistrate erred in law and fact by misconception took not into consideration prosecution side witnesses did not appear in person to testify the same rather base on the caution statement.*
2. *That the trial Magistrate erred in law and fact by misapprehension held liable the Appellants under the doctrine of recent possession though the Appellants managed to direct the trial court where he got such purported stolen property.*
3. *That, the trial Magistrate erred in law and fact by not taking into account that neither items nor materials said to be used to break the house were tendered before the court of law to prove the same.*

At the hearing of this appeal on 2nd of April 2020, appeared before me Mr. Nestory Mwenda, learned State Attorney for the Respondent Republic. The two Appellants fended for themselves. At the hearing, the two Appellants opted to rely on the grounds of appeal which they jointly filed and prayed the same be adopted as their submissions. They unanimously found merits to the appeal thus prayed the same be allowed.

Resisting the appeal, Mr. Nestory Mwenda submitted in the first ground that, along with the caution statement, there are other evidence on the record which the trial court relied in holding the two Appellants responsible for the offence of theft. According to Mr. Mwenda, PW1 and PW2 witnessed search in the residence of the then 3rd accused where stolen properties (P1 and P5) got retrieved under the directives of the 2nd Appellant and was identified by PW3 to be his. The Appellants did not object reception of the seized properties in evidence.

As to the caution statement, Mr. Mwenda submitted that, in the evidence of PW4, on being arrested, the 1st Appellant named the 2nd Appellant to be his companion. He added that, the caution statement recorded by PW4 was admitted in evidence after conducting an inquiry. He concluded in this ground that, along with the totality of the prosecution case, there is also evidence of DW3 and DW4 testifying to have been given the seized properties by the two Appellants. This to the learned state Attorney also corroborated the prosecution case.

With regard to the 2nd ground of appeal on the doctrine of recent possession; the concern of the learned state Attorney was on failure of the Appellant to give explanation on how they came with the properties. The Appellants also did not deny to have given the then 3rd and 4th accused persons the stolen goods. In this, he cited the case of **Mathias Bundala vs Republic, Criminal Appeal No.62 of 2004** at page **11** that, failure to have such explanation renders the defence of the Appellants an afterthought.

In the last ground of appeal on failure of the prosecution to prove the offence of burglary; the learned state Attorney could not find the rationale of this complaint for the court acquitted the Appellants on that count. Mr.

Mwenda also drew the attention of this court on the procedure deployed in tendering documents by prosecuting attorney instead of witnesses as seen in pages 77 and 85 of the proceedings. He however thought the irregularity is curable in terms of section 388 of the Criminal Procedure Act, Cap.20.With all this, Mr. Mwenda observed no any merit to the appeal thus prayed its dismissal. There was no rejoinder from the Appellants.

I heard the two Appellants and the Respondent Republic. I have equally considered the grounds of appeal raised by the Appellants and the entire record of the trial court. As Mr. Mwenda did, I will also resolve each ground seriatim by beginning with the last ground 3 of appeal regarding conviction on the offence of burglary. As correctly observed by the learned State Attorney, the trial court did not find evidence on that count and therefore acquitted the two Appellants. This is revealed in the judgment of the trial court at page 14 in the following version:

> *Therefore I hereby acquit the 1st and 2nd accused for the 1st count, breaking has not been proved.*

I think, I should not therefore be detained in this ground of complaint.

Going to the 1st ground of appeal regarding reliance of the caution statement to convict the Appellants, I agree with the learned state Attorney that, conviction of the two Appellants on the offence of theft did not solely base on the caution statement but rather on the totality of the evidence as testified in the trial District Court. For clarity, trial court's judgment is reproduced in pieces as at page 13 as hereunder, much as I am disgusted by its phraseology:

"The accused person was no any legal document showing the transfer of the exhibit P1 from seller (1st and 2nd accused). This proves that the 1st and 2nd accused did steal the property exhibit P1.....

The 1st accused and the 2nd accused were the one who stole the property. Coming and taking away is proved. There is wrongful taking of the property of complainant exhibit P1 without the consent of the owner and was unlawful taking.1st accused admits that it is his property exhibit P1 was moved from the place where the owner (complainant) placed....."

The question perhaps should be one that, whether there is cogent evidence on record to hold the two Appellants with stealing as coached in the charge. Here is where the complaint of the Appellants regarding unfilled gaps in the prosecution case is called to question. This also is to be resolved along with the manner through which information got generated from the arresting of the Appellants, searching and seizing of stolen properties from the then 3rd and 4th accused persons. This is to say, this is a fit case to test the application of the principles of circumstantial evidence. I am saying so because this offence was committed in the night and there is no direct evidence in terms of section 62 of the Evidence Act, Cap.6 and more so, the Appellants were acquitted for the offence of burglary. Under the premises, the question how the stolen properties found in possession of the then 3rd, 4th and 5th accused persons passed to them from the two Appellants cannot be avoided.

In this 1st ground of appeal, Mr. Mwenda had two sets of evidence. One that search conducted in the premises of the then 3rd accused was under guidance and on information of the Appellants. Two that, the evidence of DW3

and DW4 is to the effect that the two witnesses received stolen properties from the Appellants. According to the record of the trial court, PW1 witnessed search on request of PW5 one F 6576 DC Mussa in the house of DW3. The 2nd Appellant was also present. There is nowhere in the evidence of PW5 that he ever approached PW1 to witness search. PW5 did not also state in his evidence to have conducted search. PW5 to say the least concentrated only on the caution statement. To this therefore, it has not been proved that the Appellants directed the police to the house of DW3(the then 3rd accused).This is **one**.

Two, there is no evidence on record if at all the house of DW3 was searched for want of any document on record to prove search and seizure. The search order was received for identification purposes as at page 27 of the proceedings and that the trial got concluded without having the same formally forming part of the record as an exhibit. Under the premises, it was wrong to conclude that there was search especially in circumstances where the evidence from investigators is silent in this.

Three, the arrest of the Appellants is also questionable in that PW3 the owner of the stolen property stated in court to have been informed by one GEORGE in the same material night that, his shoes was with his friend. At page 40 of the proceedings, the record reads:

> *"When I was on the way back home from the police, came one guy namely George and told me that he has seen my shoes at his friend. Thereafter George and I went to the police station and we took the police officers till to the house of Mwanamila. When we reached at Mwamanila's house, we found those*

shoes to the son of Mwamanila who stated that he was given those shoes by Tall"

This evidence of PW3 raises suspicion in the following, **first** that the said George got non disclosure to conclusion of trial. **Second**, how did he came to know that the shoes of PW3 are at the house of his fried, leave alone to know the identity of those shoes. **Third**, that friend was not disclosed and therefore unknown how did they reach at Mwamanila's premises. **Fourth**, it is not on record how those shoes landed in the hands of PW6 one Mashaka Mwamanila. **Fifth** , it is not on record if PW6 was given the shoes by the Appellant as stated by PW3 or that the Appellants sold to him as testified by PW6.**Sixth**, the said shoes did not form part of the record, leave alone failure to call in evidence the said George. **Seventh,** PW6 at page 97 of the proceedings testified that the shoes belongs to Shija as reproduced hereunder:

"After taking the shoes, the police came to arrest me at Kizumbi Secondary. They came with a man who knows the shoes in which I told them tall and 2nd accused. ***It was the shoes of Shija.****(emphasis mine)"*

My understanding to these chronological events to happen in one undisclosed duration raises doubts especially in absence of the testimony of George and the stolen shoes. The chain of events is broken. This is what the Appellants raised in their grounds of appeal that some important witnesses were not called and as such the evidence of the prosecution cannot be trusted. This being the position, complaint of the Appellants that they were convicted on the strength of the caution statement alone now holds water.

Being aware that caution statements got deployed in evidence after an inquiry testing their voluntariness, the fact that other evidences has been expunged, conviction of the accused cannot base solely on uncorroborated confessions unless the court believe the same to be true, of which, in the instant case, I do not hold in the affirmative. The reason is one that in that inquiry, there is no analysis as how the learned trial magistrate trusted the confession to be nothing but true. In her ruling at page 85 of the proceedings, the following observation regarding voluntariness of the confessions got made:

> *"On 28/11/2018, the 1st accused, 2nd accused and 3rd accused denied the caution statement which was tendered by PW4. The court conducted an inquiry to acknowledge whether the caution statement was voluntarily made came* ***given through the submission by both parties, the prosecution side and the defence side. I am with view that the caution statement was voluntarily made .Order accordingly****."*
> *(emphasis mine)*

From that ruling, one can hardly conceive reasoning towards a finding on voluntariness of the confessions. In the judgment, there is nowhere the trial magistrate indicated to have trusted the confessions to be true as to base conviction therein. Here now is where the requirement of corroboration comes in as stated in **Hatibu Gandhi and Others vs R. (1996) 12** that:

> *A conviction on a retracted uncorroborated confession is competent if the court warns itself on the danger of acting upon such confession and is fully satisfied that such confession cannot but be true.*

On that note, I find merit in the 1st ground of appeal and is accordingly allowed.

In the 2nd ground of appeal regarding conviction basing on the doctrine of recent possession, the starting point should be whether the two Appellants were found possessing properties recently stolen. For clarity, the charge in the second count is reproduced as hereunder:

"2nd COUNT 1st & 2nd ACCUSED

STATEMENT OF OFFENCE

STEALING contrary to section 258 and 265 of the Penal Code, Cap.16 RE 2002

PARTICULARS OF OFFENCE

SAMSON MALODA@TALL@PASTORY SAIMON and MATHIAS MASANJA@RAS jointly and together o 17th day of July, 2017 at night hours Kitangiri area within Shinyanga Municipality and Shinyanga Region stole TV flat screen make abode inch 24 valued at 350,000/=,subwoofer make sea piano valued at tshs.160,000/=,deck make zeck valued at 70,000/= 1 matress make tanform inch 8 valued at tshs.195,000/=,4 curtains and 4 bed sheets valued at tshs.65, 2 rubber shoes valued at tshs.70,000/= ,cash money 250,000/= all total valued at tshs.1,160,000/= the property of PAULO LUHENDE SHIJA."

In the evidence, exhibits P1 comprising 1 matress,1 deck make zeck, 2 curtains, and 3 bed sheets according to the evidence of PW1, PW2, PW4 and PW5, contradictory as they are, were found in the house of the then 3rd

accused person (DW3).As I observed above, the evidence on how those properties got into the hands of DW3 from the two Appellants is wanting. As stated, it is not proved if the Appellants took the police to DW3 and therefore the version of PW1 that during search, the Appellants were present is doubtful. That being the case, and as the Appellants were not found possessing the said exhibits, the principle in the case of **Mathias Bundala** (supra) that the Appellants herein are responsible for failure to agree or deny to have sent the properties recently stolen to witnesses cited to me by the learned State Attorney, is distinguishable.

In the final account, the prosecution has not proved beyond reasonable doubt that the Appellant committed the offence of theft as charged and therefore the trial court was not justified to hold them liable. In that stance, conviction is hereby quashed and the sentence of four (4) years imprisonment is accordingly set asides. Unless lawful held for some other causes, the Appellants should be released from custody forthwith. Order accordingly.

Gerson J. Mdemu
JUDGE
08/05/2020

DATED at **SHINYANGA** this 8th day of May 2020.

Gerson J. Mdemu
JUDGE
08/05/2020