

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC CRIMINAL APPEAL NO. 29 OF 2020

(Arising from the decision of the District Court of Ukerewe at Nansio in Criminal Appeal No. 12 of 2020 original Criminal case no.27 of 2020 of Nansio primary court)

MATUTU S/O JUMA APPELLANT

VERSUS

EVODIA S/O JAMES RESPONDENT

JUDGMENT

15th & 26th February, 2021

RUMANYIKA, J.:

The 2nd appeal is against decision of Ukerewe district court dated 25/08/2020 upholding conviction and custodial sentence of five (5) years and compensation of value of the two missing stolen to Evodia James (the complainant) according to records the orders meted on Matutu Juma (the appellant) by Nansio primary court (the trial court) on 20/01/2020.

The parties appeared in person as long as cases in primary court were determined only on individual/private prosecution basis. It is very unfortunate and contrary to the law that the charge sheet was signed by D.9642 Sgt. Laurian of CRO Nansio police station leave alone the police officer having had played active role when he even asked the court to

adjourn the case as the complainant defaulted appearance according to records on 30/01/2020. I shall come back to this point later.

It is at this juncture equally important to point it out that the appellant was together and jointly charged with Manumbu Msimbiti for offences of stealing (1st count) and being in possession of property suspected stolen or unlawfully obtained (2nd count) respectively but in the end the latter was acquitted. Unless the context otherwise required therefore, only the appellant will be referred in this judgment because due to outbreak of the Corona-19 pandemic the appeal was through their mobile numbersand 0768517600 by way of Audio Teleconferencing heard due to pandemic.

The appellant did not have anything to submit additional to the memorandum of appeal.

The respondent in a nutshell she submitted that the appeal lacked merits because all the witnesses were credible, inclusive of the hand set purchaser/co-accused who had properly identified the appellant also through colour and chip the respondent having identified the hand set. That is all.

A brief account of the evidence ran as follows:-

Sm1 Evodia James (the complainant) stated that as she was on 16/01/2020 at about 1.0 am in bed, some culprits bugled into and stole her three handsets make Samsung S7, Samsung Galaxy Trend Plus and Itel her sibling raised alarms, the culprits ran away and disappeared. Then in the next morning they reported the case to police and shortly the appellant was arrested and charged.

Sm2 G.4225 D/C Dan of Nansio police station stated that having had the incident been reported to them, with effect from 20/01/2020, but in corroboration with VODACOM people he tracked the missing 3 handsets in the system but traced only one handset and, on that basis apprehended the appellant but away at Kisorya Bunda district. That also in the system they found the said Samsung Galaxy but shortly the still at large Yohana Jumapili with whom the appellant had recently communicated he disappeared.

Sm3 Dukia James stated that as she was in bed on 16/01/2020 at about 1.00 am but now invaded by culprits, through a window she saw

some items being hooked away, she raised alarms therefore the culprits ran away (as per Sm1). That is it.

Su1 Matutu Juma (the appellant) a fisherman of Kisorya Bunda he stated that on a date he couldn't remember he was simply arrested by two members of militia who he knew before and they accused him for two personally owned handsets make TECNO. That the 2nd accused was a fellow fisherman. That is it.

Su2 Manumbu Msimbiti stated that as he was at Kisorya Bunda on 17/01/2020 and the appellant offered to, the latter sold him the handset at issue for shs. 10,000/= initially offered at shs. 30,000/= only say a day later to be arrested by police and, on that basis therefore he led to the appellant's arrest. That is all.

As said before, end of the day only the appellant was convicted, sentenced and ordered to compensate the complainant.

Having defined "stealing" the district court was of the settled mind that there was no direct evidence against the appellant yes, but clear circumstantial evidence much as like the trial court did, the learned

resident magistrate he considered the public witnesses as credible and truthful.

The issue is whether the circumstantial evidence left no any other hypothesis other than the appellant's guilty (case of **Tamil Nadu V. John David** (2011), NSC 418 quoted with approval of the Court of Appeal of Tanzania in the case of **Godlizen Daud @ Mweta and another V.R**, Crim. Appeal No. 259 of 2014 (unreported). The answer is no. Reasons are:- **(a)** Sm1 did not, through special marks identify the hand set that Su2 was found in possession of much as if anything, it was common knowledge that there was in the world numerous of black coloured Itel handsets other than the complainant's **(b)** through the system the handset may have been tracked and traced yes, but there was to that effect no authentic report of any cybercrime officer much as Sm2 he wasn't in evidence even introduced being one of them leave alone nonappearance in court of at least one of the alleged VODACOM personnel/officers **(c)** the 2nd accused may have had named and he led to arrest of the appellant yes, but him being co-accused he had interest to save the latter's evidence therefore it should have been taken with great caution. It is very unfortunate that not

only the appellant was convicted only on the co-accused's evidence, but also the evidence was just taken whole sale to say the least.

I promised at a late stage to say a word or two on the individual initiated charge sheet having had been signed by the police officer. It is very unfortunate contrary to law and logic that the trial magistrate allowed this to happen in the primary court. Only Evodia James the complainant should have signed the charge sheet. It is trite law that unlike anywhere else, court orderlies in primary courts were not prosecutors or agents of the complaints or the law private prosecutors for that matter. At times it may happen when end of the day it culminated to a tortious claims for malicious prosecution then who would be sued? The complainant (Sm1) or the purported public prosecuting D.9642 Sgt. Laurian! It is my hope that in primary courts magistrates won't commit such serious vagaries in the court proceedings. Yet again, but strangely in his judgement the learned trial resident magistrate did not order disposition of the exhibit (the handset).

In the upshot the appeal is allowed. The conviction and sentence are quashed and set aside. Unless he was, for some lawful cause further held, the appellant be released immediately the handset make Tecno be restored to Sm1. It is ordered accordingly. Right of appeal explained.


S. M. RUMANYIKA

JUDGE

20/02/2021

The judgment is delivered under my hand and seal of the court in chambers this 26/02/2021 in the absence of the parties.




S. M. RUMANYIKA

JUDGE

26/02/2021