IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA.

DC CRIMINAL APPEAL NO. 34 OF 2020

(Originating from Criminal Case No. 38 of 2020 of Mbinga District Court at Mbinga)

HILARY R. KAPINGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of the Hearing: 24/03/2021
Date of Judgment: 28/04/2021

JUDGMENT

I. ARUFANI, J.

The appeal at hand has its genesis from Criminal Case No. 38 of 2020 of Mbinga District Court (hereinafter referred as the trial court) whereby the appellant, Hilary R. Kapinga was charged, convicted and sentenced into two counts. The first count was the offence of stealing contrary to section 258(1) & 265 of the Penal Code, Cap 16 R.E 2002 and the second count which was preferred in alternative to the first count was an offence of being found having in possession of property suspected to have been stolen or unlawfully acquired contrary to section 312 (1) (b) of the Penal Code.

After full hearing of the case the appellant was found guilty and convicted on both counts. He was sentenced to serve twelve months

imprisonment in each count and the sentences were ordered to run concurrently. The appellant was aggrieved by the conviction and sentences imposed to him by the trial court and through the service of Mr. Eliseus Ndunguru, learned advocate he filed in this court a petition of appeal containing three grounds of appeal. When the appeal came for hearing the appellant was represented in the matter by the mentioned advocate and the respondent was represented by Mr. Shabani Mwegole, learned Senior State Attorney. The counsel for the appellant prayed to abandon the third ground of appeal and argued the first and second grounds which read as follows:-

1. *That, the trial court erred in law and in fact when it convicted the accused while the prosecution failed to prove their case beyond reasonable doubt,*
2. *That, the trial court erred in law and fact to convict the appellant based on defective charge.*

The counsel for the appellant told the court in relation to the first grounds of appeal that, the prosecution failed to prove the charge levelled against the appellant beyond reasonable doubt. He argued that, after going through the evidence adduced before the trial he discovered the conviction entered against the appellant was based on the principle of being found in recent possession of the stolen property. He said the

evidence adduced before the trial court shows the stolen property which were two drams of tarmac were not found in possession of the appellant but were found in the motor vehicle with registration No. T 285 DMJ which was being driven by one Samwel D. Kapinga who testified in the case as PW2.

He told the court that, if you read the evidence of Lameck Gedo, who testified in the case as PW1 you will find he told the trial court they believed the two drams of tarmac found in the mentioned motor vehicle were the property of his employer as were blue in colour and there was no any other company which was constructing road in that area. He submitted that, the said evidence was not enough to establish the said drams of tarmac were the property of his employer.

He argued further that, despite the fact that the appellant stated in his defence as reflected at page 23 of the proceedings of the trial court that he was in the said motor vehicle but he was just a passenger in the said motor vehicle. He submitted that, under that circumstances it cannot be said the trial court was right in finding the appellant was found in possession of the stolen property. He referred the court to the case of **Boniface Sichone & Three Others V. R**, Criminal Appeal No. 180 of 2019, HC at Mbeya (unreported) where the conditions to be

fulfilled before invoking the principle of being found in recent possession of a stolen property or unlawfully acquired were stated.

He said the prosecution failed to prove any of the conditions laid in the above cited case and said even PW2 who was the in charge of the motor vehicle which was found carrying the two drams of tarmac alleged to have been stolen from the employer of PW1 was not joined in the case. He said instead of that person being joined in the case he was called to testify in the case as a witness while he was a person with interest to save.

He argued that, the two drams of tarmac were admitted in the case as an exhibit P1 without being stated; where was the motor vehicle which had carried the same. It is his further argument that, the proceedings of the trial court is not showing PW1 managed to identify the two drams of tarmac as their property which had been stolen. He based on the above stated reason to submit that, neither the offence of theft nor the offence of being found in lawful possession of the stolen property or unlawfully acquired was proved by the prosecution.

He stated in relation to the second ground of appeal that, the second count of being found in possession of a property suspected to have been stolen is a lesser offence to the offence of stealing preferred

in the first count. He argued that, under the principle of drawing a charge the second count was required to be preferred as an alternative to the first count but the trial court convicted and sentenced the appellant in both counts.

He said as the aim of having a charge sheet is to inform the accused person the offence is facing so as to enable him to prepare his defence for the purpose of a fair trial and as that principle was not observed in the appellant's case it vitiated his trial. He prayed the court to find the proceeding of the trial court is null and void, quash the same, set aside the sentences imposed to the appellant and set him free.

In his reply the Senior State Attorney told the court that, they are supporting the conviction entered against the appellant and the sentence imposed to him. He started with the second ground of appeal which states the appellant was convicted on a defective charge. He said the copy of the charge sheet he has is not showing it has any defect and said it was drawn properly as required by section 135 of the Criminal Procedure Act, Cap 20 R.E 2019.

He argued that, although the counsel for the appellant said the second count was supposed to be charged as an alternative count to the first count but that is how the appellant was charged in the charge sheet

levelled against the appellant. He went on arguing that, despite the fact the counsel for the appellant said the judgment of the trial court is not showing the second count was preferred as an alternative count to the first count but the appellant was fairly tried as the charge was read to him and he pleaded it is not true on both counts which shows he understood the charges he was facing. He said there is nowhere indicated the appellant was prejudiced in anyway. He added that, the trial court entered conviction against the appellant after being satisfied both counts had been proved beyond reasonable doubt. He prayed the court to dismiss the second count for want of merit.

He argued in relation the first ground of appeal that, it has no merit as the charge levelled against the appellant was proved beyond reasonable doubt. He contended that, the appellant was not convicted on principle of being found in possession of a recent stolen property but he was convicted on direct evidence. He said it was direct evidence as PW2 and PW3 saw the appellant loading the two drams of tarmac in the motor vehicle which was being driven by PW2.

The Senior State Attorney told the court that, PW2 said in his testimony as recorded at page 13 of the proceedings of the trial court that, he went to Tugutu village where he found the appellant who told

him he was the one who was calling him and told him to take the two drams of tarmac to Mbinga Airport area. He said PW3 who arrested the appellant said to have found the two drams of tarmac in the motor vehicle which was being driven by PW2 and he arrested them.

He said the argument by the counsel for the appellant that the appellant had no relationship with the mentioned two drams of tarmac and he was not in control over the same has no any truth as PW2 said he was called by the appellant through telephone and told him to go to Tugutu. He said after PW2 going to the said area he found the appellant who told him to take the two drams of tarmac to Mbinga Airport area. He said further that, the evidence of PW2 was corroborated by the evidence of PW3. He told that court that, the case of **Boniface Sichone** (supra) is not binding to this court as is the decision of the High Court.

He went on telling the court that, there are several decisions made by the Court of Appeal of Tanzania which shows how the doctrine of recent possession of a stolen property or acquired unlawfully is supposed to be used. He referred the court to the cases of **Juma Marwa V. R**, Criminal Appeal No. 71 of 2001, **Joseph Mkubwa and Another V. R**, Criminal Appeal No. 94 of 2007, **Mawazo Mandundu and Another V. R**, [1990] TLR 92. He said the subject matter of the

appellant's case was two drams of tarmac which was identified by PW1 to be the property of CHICCO. He said when PW3 arrested the two drams of tarmac the appellant was present and PW2 said the appellant was the one who was in control over the same.

The Senior State Attorney told the court that, the appellant is not disputing he was present at the area where the two drams of tarmac were arrested but his argument is that he was a passenger in the motor vehicle which had carried the drams of tarmac. He questioned the possibility of the appellant to be passenger in the motor vehicle which was found carrying the stolen drams of tarmac which was a Suzuki Carry make car.

He disputed the argument by the counsel for the appellant who said PW1 failed to identify the two drams of the tarmac by saying that, PW1 said at page 9 of the proceedings of the trial court that, the drams of tarmac had a mark of "c" and were blue in colour. He said PW1 stated further that the appellant was one of the workers in their company and said the appellant signed the seizure certificate which shows he was present when the stolen drams of tarmac were arrested. He said the appellant confessed at page 19 and 20 of the proceedings of the trial court that he was found with the stolen drams of tarmac.

He said in relation to the argument by the counsel for the appellant that PW2 was a witness with interest to save that, the trial court did not relied on the evidence of PW2 alone to convict the appellant as there was evidence of other witnesses who testified as PW3 and PW4 which was used by the trial court to arrive to its decision. He said as PW3 arrested the appellant with the two drams of tarmac which had been carried in the motor vehicle which was being driven by PW2 that evidence shows the prosecution managed to prove beyond reasonable doubt the offence levelled against the appellant.

At the end he prayed the court to find the first ground of appeal has no merit. He prayed the court to confirm the conviction entered by the trial court and the sentence imposed to the appellant as correct. When the court asked the Senior State Attorney whether the trial court was right in convicting and sentencing the appellant in both counts while the second count was preferred in alternative to the first count he said it was not right. He said the trial court was required to convict the appellant in the first count of stealing alone as it was proved by the evidence adduced before the trial court and he was not supposed to be convicted in both counts.

In his rejoinder the counsel for the appellant told the court in relation to the defectiveness of the charge levelled against the appellant that, he had not seeing the charge sheet levelled against the appellant. He said he based on the judgment of the trial court to argue the charge levelled against the appellant was defective as is not showing the second count was preferred in alternative to the first count. He however said that, as rightly said by the Senior State Attorney it was wrong for the trial court to convict the appellant in both counts if the second count was preferred as an alternative count to the first count.

He insisted in relation to the first ground of appeal that, the charge levelled against the appellant was not proved beyond reasonable doubt. He argued that, although the Senior State Attorney said the two drams of tarmac was the property of CHICCO but the tarmac alleged to have been stolen was not found in the area of CHICCO. He said PW1 did not identify the drams of tarmac by the alleged mark of "c" and said he didn't say anything after the two drams of tarmac being admitted in the case as an exhibit. He said PW1 said he didn't know what was inside the drams which were admitted in the case as an exhibit but he said there was heavy material in the drams.

He said there is no dispute that the drams of tarmac were found in the motor vehicle which was being driven by PW2 but said the appellant denied to have called PW2 through telephone and gave him the work of carrying the said drams of tarmac in his motor vehicle. He said as there was dispute in those facts the prosecution was required to bring evidence to prove the same. He said the evidence of PW3 was not reliable as while he said the tarmac had been carried in a motor vehicle make Isuzu Carry but later on he changed his story and said it was Isuzu Mazda.

He said that, although the counsel for the appellant supported his submission by using the certificate of seizure and the caution statement of the appellant which were admitted in the case as exhibits but those exhibits were not used by the trial court to convict the appellant. At the end he reiterated what he argued in his submission in chief that, the prosecution failed to prove the principle count that the appellant stole the alleged property.

After considering the rival submissions from both sides the court has found it is proper to start with the second ground of appeal which states the trial court erred to convict the appellant by basing on a defective charge. The court has found it is pertinent to start with that

ground of appeal because a charge is a foundation of any criminal cases of a nature of the case the appellant was facing before the trial court. That means a criminal proceeding; subsequent decision and sentence or order made in a criminal matter initiated by a defective charge cannot be left to stand as is void ab initio.

The court has found that, the defect the counsel for the appellant states is in the charge sheet used to arraign the appellant before the trial court is that of not charging the appellant in the second count as an alternative count to the first count. The court has found that, after the counsel for the appellant listened to the submission by the Senior State Attorney that the charge is not defective as the second count was preferred as an alternative count to the first count and after being informed by the court that is how is appearing in the charge sheet available in the file of the trial court the counsel for the appellant conceded the charge laid against the appellant was not defective.

The counsel for the appellant told the court that, he crafted the said ground of appeal by basing on what is stated in the judgment of the trial court as is not showing the second count was preferred as an alternative count to the first count. That being the position the court has found there is no more contentious issue need to be determined in the

second ground of appeal as the counsel for the appellant has conceded the charge used to arraign the appellant before the trial court is not defective. In the premises the second ground of appeal is hereby dismissed for want of merit

Back to the first ground of appeal the court has found as the appellant is stating the trial court erred in convicting the appellant while the prosecution failed to prove their case beyond reasonable doubt the court has found the issue to determine in this ground is whether the prosecution proved the charge laid against the appellant to the standard required by the law which is beyond reasonable doubt. That duty of proving a charge beyond reasonable doubt is casted to the prosecution by section 3(2)(a) of the Evidence Act, Cap 6 RE 2019 which states that, in criminal matters the prosecution is required to prove beyond reasonable doubt an existence of any fact they wish the court to find is in existence.

The court has found the counsel for the appellant argued that, after reading the judgment of the trial court he has found the appellant was convicted on the principle of being found in possession of a property suspected to have been stolen recently. After going through the judgment of the trial court, the court has found the trial court did

not rely on the said principle of the law to convict the appellant on both counts.

The court has found the judgment of the trial court shows at its page 6 that, as rightly stated by the Senior State Attorney the trial court convicted the appellant in the first count by relying on direct evidence of the prosecution witnesses and relied on the said principle to convict the appellant in the second count. The court has found in convicting the appellant in the first count the trial court relied on the evidence of PW2 who said the appellant is the one called him through telephone to go to Tugutu area to take his luggage.

PW2 said that, after going to the mentioned area he found the appellant who told him to take the two drams of tarmac in his motor vehicle up to Mbinga Airport area. He said the appellant and his fellows loaded the said two drams of tarmac in his motor vehicle and he drove the motor vehicle up to near to the Mbinga Airport area where were arrested by PW3. The trial court magistrate found the said evidence managed to prove the elements of the offence of stealing levelled against the appellant which as stated in the case of **Christian Mbunda V. R**, [1983] TLR 240 are *actus reus* and *mens rea* and used the said evidence to convict the appellant. That shows the conviction of the

appellant in the first count was not based on the principle of being found in possession of a property suspected to have been stolen recently but on the direct evidence given to the trial court by prosecution witnesses.

The court has found the counsel for the appellant said the two offences levelled against the appellant were not proved beyond reasonable doubt as the two drams of tarmac alleged were stolen from CHICCO were found in the motor vehicle which was being driven by PW2 and the said PW2 was not joined in the case. The court has found that, although it is true that the said two drams of tarmac were found in the motor vehicle which was being driven by PW2 but PW2 gave clear evidence which showed he was hired by the appellant to take the said drams of tarmac up to the area where were arrested by PW3.

PW2 said the appellant and his two fellows who ran away later on were the one loaded the said two drams of tarmac in the motor vehicle he was driving. He testified further that the appellant boarded in the front seat of the motor vehicle he was driving to lead him to the place he was required to take the luggage. He said the appellant's two fellows boarded on the back side of the motor vehicle and they went up to the area near to Mbinga Airport area where were arrested.

That evidence makes the court to find it cannot be said PW2 was required to be joined in the case as one of the offender as he gave clear evidence which shows how the two drams of tarmac found in his motor vehicle. It is because of the above stated reason the court has found that, failure to join PW2 in the case did not establish the prosecution failed to prove their case beyond reasonable doubt as argued by the counsel for the appellant.

The counsel for the appellant said the appellant said in his defence that he was not in control over the two drams of tarmac found in the motor vehicle which was being driven by PW2 as he was just a passenger in the said motor vehicle. The court has found the appellant failed to convince the trial court he was a passenger in the motor vehicle which was being driven by PW2.

Similarly, this court has failed to accept that argument after seeing the appellant did not say if he was just a passenger in the said motor vehicle where he boarded the motor vehicle and where he was going and why he boarded the said motor vehicle which was a luggage motor vehicle and not passengers' motor vehicle. The court has found as the issue as to whether the appellant was a passenger in the motor vehicle which was being driven by PW2 or not is an issue requires to be

determined by seeing credibility of the evidence of the appellant and as the trial court failed to believe the same this court has no right to go contrary to what was found by the trial court without cogent reason. Since there is no cogent reason advanced to the court to make it to find contrary to what was found by the trial court the court has failed to see any merit in the said argument.

The court has considered another argument made to the court by the counsel for the appellant that the appellant's case was not proved beyond reasonable doubt as PW2 was called to testify in the case as a prosecution witness while he was a witness with interest to save but failed to comprehend which interest the said witness was saving. The court has found if the interest the counsel for the appellant is talking about is that of saving from being joined in the case as an offender then as stated hereinabove his evidence shows clearly that he was not supposed to be joined in the case as an offender as he was just hired by the appellant to take the said drams of tarmac in his motor vehicle.

Sequel to that, the court has found as rightly argued by the Senior State Attorney the trial court did not rely solely on the evidence of PW2 to convict the appellant in the first count of stealing. The court has found that, as stated earlier in this judgment the trial court relied also

on the evidence of other prosecution witnesses like PW1, PW3 and PW4 together with the exhibits tendered in the trial court to convict the appellant in the said count. That makes the court to find this argument has nothing worth to be taken to establish the prosecution failed to prove the offence levelled against the appellant in the first count to the standard required by the law.

There is another argument raised by the counsel for the appellant that, the property alleged to have been stolen which were two drams of tarmac were not properly identified to be the property of the employer of PW1 namely CHICCO. The court has failed to see anything material in this argument. To the contrary the court has found PW1 stated clearly in his evidence that, after being told to go to the police station to identify the said drams of tarmac he went to the police station and managed to identify the same as the property of his employer namely CHICCO.

Although the counsel for the appellant said PW1 did not say anything in relation to the marks used to identify the two drams of tarmac after being admitted in the case as an exhibit but the court has found when the two drams of tarmac were being admitted in the case he said he managed to identify them by the mark of "c" which were on those drams and said the drams were blue in colour. Those marks were

not contradict in the cross examination made to PW1 by the appellant and the appellant did not challenge them when he was adducing his defence. Therefore to say the drams were not properly identified to be the property of the employer of PW1 namelyCHICCO is not true and is not supported by the record of the trial court.

As for the further argument by the counsel for the appellant that PW1 said the motor vehicle he found at the police station was Suzuki Carry but later on he changed his story and said was Suzuki Mazda the court has found that is not featuring anywhere in the evidence of PW1. Although it is true there are some witnesses said the said motor vehicle was Suzuki Canter and another one said is Suzuki Mazda but to the view of this court that is a contradiction which cannot be said it has gone to the root of the charge levelled against the appellant. In the premises the court has failed to see any merit in the said argument.

As for the second count which the court said earlier in this judgment that the appellant was convicted basing on the principle of being found in possession of property suspected to have been stolen recently the court has found that, as rightly stated by the counsel from both sides the trial court was not required to convict the appellant in the

second count which was preferred as an alternative count to the first count after convicting him in the first count.

To the view of this court the second count was laid against the appellant to enable the trial court to see if there will be no sufficient evidence to convict him in the first count he would have been convicted in the second count if it would have been found the evidence available is sufficient to establish he was found in possession of the two drams of tarmac which had been stolen recently as an alternative to the first count of stealing. Therefore the trial court magistrate erred to convict the appellant in both counts while the second count was preferred as an alternative count to the first count.

Basing on all what I have stated hereinabove the court has found the appeal of the appellant deserve to be allowed partly to the extent that, the appellant was properly convicted in the first count of stealing but he was not properly convicted in the second count of being found in possession of a property suspected to have been stolen recently as the second was preferred as an alternative count to the first count.

Consequently, the conviction entered against the appellant in the first count of stealing and the sentence of twelve months imprisonment imposed to him in the first count are hereby found to be proper and are

left without any alteration. The conviction entered against him in the second count is quashed and the sentence imposed to him in the second count is set aside. The appellant to continue serving the sentence of twelve months imprisonment imposed to him in the first count. It is so ordered.

Dated at Songea this 28th day of April, 2021

I. ARUFANI
JUDGE
28/04/2021

Court:

Judgment delivered today 28th day of April, 2021 in the presence of the appellant in person and in the presence of Mr. Hamimu Nkoleye, learned Senior State Attorney. Right of appeal is fully explained to the parties.

I. ARUFANI
JUDGE
28/04/2021