

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 75 OF 2021

(Original Criminal Case No. 10 of 2020 of the District Court of Sengerema District at Sengerema)

FREDDY DOMINICK MAHUGIAPPELLANT

versus

VUMILIA SANGARESPONDENT

JUDGMENT

15th & 22nd July, 2021

RUMANYIKA, J.:

Following the conviction, and sentences of a fine of shs. 100,000/=, 6 months conditional discharge and shs. 150,000/= being compensation, but by its order dated 28/4/2021 of Sengerema district court (the 1st appeal court) conviction it maintained and enhanced it to shs. 3,375,000/= compensation, the 2nd appeal is built on seven (7) grounds which revolve around 6 (six) points, essentially;

1. That Sengerema urban primary court (the trial court) had no territorial jurisdiction except Bupandwa primary court.

2. That with respect to the fish, the trial court erred in not holding that the appellant was the bonafide purchaser.
3. That the trial court erroneously refused copies of the appellant's fishing and business licenses as exhibits.
4. That in terms of quantity of the fish, 675 or 41 kgs the appellant was wrongly convicted.
5. That against the appellant the the prosecution case wasn't beyond reasonable doubts proved.
6. That the trial court improperly evaluated the evidence.

When, by way of audio teleconference the appeal was called on 15/7/2021 for hearing, Messrs R. Ishengoma and B. Kessy learned counsel appeared for Freddy Dominick Mahugi and Vumilia Sanga (the appellant and respondent). I heard them through mobile numbers 0787004035 and 0784484740 respectively.

For some good reasons having had dropped ground no. one of the appeal, Mr. R. Ishengoma learned counsel submitted; **(1)** that in terms of the quantity of the fish stolen the particulars of the offence and the evidence adduced was at variance 675 or 41 kgs! That the variance was fatal, prejudicial to the appellant and incurable under Section 388 (1) of

the Criminal Procedure Act Cap 20 RE. 2019 (case of **Issa Mwanyiku v.R**, Criminal Appeal No. 175 of 2018 (CA) unreported **(2)** for the doctrine of recent possession to stand, the prosecution case did not meet the threshold therefore the fish belonged to the complainant the latter having had identified it, and the fish had recently been stolen from the complainant **(3)** that actually the appellant was the bonafide purchaser and the fish wasn't stolen (the case of **Suzana Waryoba v. Shija Dalawa**, Civil Appeal No. 44 of 2017 (CA) at Mwanza, unreported **(4)** that the copies of the appellant's fishing and business licenses were erroneously refused in evidence as he traded on fish and he had purchased it lawfully **(5)** the order for shs. 3,375,000/= compensation for the fish stolen it was not founded because no market value of the fish was in evidence established hence but for improperly evaluation of the evidence much as the appellant had no duty to prove his innocence therefore whether or not he owned a refrigerator it was immaterial. That is all.

Mr. Bahati Kessy learned counsel submitted; **(a)** that the appellant was not a bonafide purchaser because in the beginning he denied to have purchased the fish and, if at all he failed to bring the vendor in court as witness **(b)** the reason for refusal of the licenses was that the photostat

copies were contrary to the Act tendered in court **(c)** that variance of the quantity of the fish, 375 or 41kgs yes, but the appellant was circumstantially convicted **(d)** the doctrine of recent possession was properly invoked because unlike the respondent, in his evidence the appellant never owned a refrigerator but was found in possession of frozen fish **(e)** that the order of compensation of shs. 3,375,000/= it was as per charge sheet and particulars of the offence properly made out although the copy of the inventory talked about 10kgs and no one was sure of the market value **(f)** that the evidence actually was properly evaluated and adverse inference properly drawn. That is all.

A brief account of the evidence on record runs as under;

Sm1 Vumilia Malemi Sanga a businessman stated that on 9/7/2020 at about 22:00 hours one Masumbuko clement informed her that the appellant had just been arrested red handed breaking the fish container but in the cause confessed and asked to settle by paying shs. 2,000,000/= then he was bailed out by Elias Okoti and Osward Byamungu only that later on he turned hostile. That stolen was 675 kgs but the appellant was found in possession of 41kgs only.

Sm2 Hussein Gedi Francis stated that on 9/7/2020 night time he found the fish stolen, it appears by the appellant whom he saw and had just around identified then he reported the incident to the complainant.

Sm3 Masumbuko Clement Paschary stated that on 9/7/2020 at about 21:00 hours, through a mobile phone sm3 reported the incident to him and he suspected the appellant. That shortly thereafter they found the appellant in possession of sixteen (16) fish, he confessed, apologized and promised to pay the complainant shs. 2,000,000/= compensation but then he turned hostile.

Sm4 Sito William Nyasiwe stated that on 9/7/2020 at about 21:30 hours but shortly after the incident, Sm3 reported the incident to him and they found the suspicious appellant in possession of some frozen fish. That is all.

The appellant (Su1) is on record having had stated that on 9/7/2020 at about 21:30 hours, through a mobile phone one Jakamba offered, and he sold him 41 kgs of fish for shs. 224,000/= only shortly to be arrested and charged alleged it was stolen fish. That he led them to the vendor one Jakamba but they only met the latter's wife but then five (5) of them were arrested after appellant failed to pay compensation of shs. 2,000,000/=

imposed by the arresting men that he had not avoided arrest but was reporting the matter to relevant authorities namely the Ministry of Home Affairs, RPC Mwanza etc.

Su2 Fabian William Osiga militia man of Migongo camp he stated that following the incident of 9/7/2020 at about 22:00 hours having been dully assigned, he arrested the appellant but didn't see the fish.

Su3 James Ngoga Sahani he stated that as he was around the shores on 9/7/2020 at about 21:00 hours, he heard about the incident just having had been reported, and, the appellant was found in possession of some fish, one Jakamba and some others were also under arrest brought up. That is all.

The issue is whether against the appellant the complainant's case was beyond reasonable doubts proved. The answer is no for one main reason; However recently the fish may have had been stolen and the appellant was found possessing the same, not only the complainant did not identify the fish, but also she did not prove that against the rest of the world the fish only belonged to her. It means therefore, in order for the doctrine of recent possession to stand, the complainant did not meet the threshold (case of **Joseph Mkubwa and Another v. R**, Criminal Appeal


No. 94 of 2007 (CA)) much as remotely though, although, according to sm1 the appellant was red handed arrested no single witness led evidence of visual identification but only circumstantial which nevertheless as I shall herein after demonstrate it crumbles. Ground 5 of the appeal fails.

Identification of a stolen property by the complainant it needed be authentic more so where it is by special marks. The fish, 41 kgs of it that the appellant was found in possession of it might be the frozen one and the appellant owned no a refrigerator yes, but there was no evidence to show that the complainant exclusively owned a refrigerator. Whether or not, if at all out of 675kgs stolen the appellant was only found in possession of 41kgs it was immaterial in my considered view. Ground 4 of the appeal is dismissed.

The issue of the appellant's fishing and or business licenses being refused and discounted by the trial court it needs no further discussion, not only because the charges were not for illegal fishing or illegal fish business but also it wasn't in evidence established that fishermen and fish mongers they never steal fish. The appellant may, or may have not been a bonafide purchaser because, although he identified one and he knew the residence, the appellant did not have the respective vendor in court as witness, leave


alone the reasons for the failure. What an adverse inference! (Case of **Aziz Abdallah v. Republic** (1991) TLR 71 Ground 2 of the appeal also fails suffices the point, contrary to Section 311 of the Code to prove the alternative but cognate offence of being in possession of property suspected to have been stolen or unlawfully acquired. The conviction and sentence therefore are substituted as such. The order for compensation is set aside. It is so ordered.

Right of appeal explained.


S. M. RUMANYIKA
JUDGE
20/07/2021

The judgment delivered under my hand and seal of the court in chambers this 22/07/2021 in the absence of the parties.




S. M. RUMANYIKA
JUDGE
22/07/2021