IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 42 OF 2020

(C/F Criminal Case no 103 of 2018 of Nkasi District Court)

JAMES S/O KUSAYA ..... APPELLANT

VRS

THE REPUBLIC ..... RESPONDENT

02 & 09/08/2021

JUDGMENT

Nkwabi, J.:

The appellant James s/o Kusaya @ Jay was charged together with Baraka Thobias with two offences. The 1st one was burglary contrary to section 294(1)(a) of the Penal Code Cap. 16 R.E. 2002. The 2nd offence they were charged with theft contrary to section 258 of the abovementioned law. They were charged with burglary after the charge which contained house breaking offence was withdrawn on substitution with a new charge which had burglary offence.

During the trial, the prosecution brought 4 witnesses in an attempt to prove the charge they laid at the door of each accused person. The charge sheet was substituted twice and the last substitution was done after the prosecution had called all their witnesses, as a result, after substitution of the charge sheet from one of house breaking to burglary, the prosecution closed its case. The appellant and his co-accused person were called upon to enter their defence.

It was the prosecution evidence, which was denied by the appellant in this appeal and his colleague accused person in the trial court, that the burglary of the laboratory and theft of a microscope from Lake Tanganyika Laboratory happened on the night of 27 or 28/02/2018. The laboratory was the property of Kizitho s/o Deo @ Viance (PW2). PW2 got information of the offences having been committed on 28/02/2018. No person witnessed the offences being committed.

PW2 reported the offences to the police who mounted an investigation which led to the arrest of the appellant in this appeal and his co-accused person in

the trial court. PW3 A/Insp. Godfrey arrested the appellant on 05/05/2018 while allegedly selling the microscope. On 06/05/2018 the appellant showed PW3 where he was hiding the microscope. PW3 tendered the microscope, seizure note and chain of custody record which were admitted as exhibit P1, P2 and P3 respectively. PW4 F.6868 DC Kuleba tendered the caution statement of the co-accused of the appellant which was admitted as exhibit P4 wherein the co-accused person of the appellant exonerated himself while implicating the appellant.

In his defence, the appellant denied to have committed the offences and claimed that he was arrested in Mpanda and was found with nothing. He denied showing the police the microscope. He prayed the court to acquit him. This piece of evidence of the appellant was not cross examined upon. Nevertheless, the appellant was convicted and sentenced of stealing, the offence he is protesting his innocence in this court.

In this court the appellant paraded four grounds of appeal. For a reason that will be apparent shortly, I will deal only the 4th ground of appeal which is, *"the case was not proved to the required standard."*

At the hearing of the appeal, the appellant appeared in person while the respondent (the Republic) was represented by Mr. John Kabengula, learned State Attorney. The appellant, being a lay person adopted his grounds of appeal as his submission and rested his submission.

On their side, Mr. Kabengula supported the appeal citing procedural irregularities which vitiate the case. He said during tendering the exhibits, E.g., the Microscope, the witness did not describe it before it was tendered in court contrary to the law citing **Nasoro Mohamed v R [1967] HCD No. 446**.

Mr. Kabengula went on to submit that, even the seizure warrant (note) and chain of custody were not read over and explained to the appellant for him

to understand the same. He argued, the appellant was therefore not accorded a fair hearing. He referred this court to the case of **Matula v R. [1995] TLR 3.** He prayed the seizure warrant and the chain of custody be expunged from the record.

Mr. Kabengula further argued that the charge sheet was substituted several times and on the last substitution, one offence was changed from one of house breaking to burglary and the prosecution closed its case immediately after that substitution. He is of the view that the appellant was prejudiced as the ingredients of the offences differ. He prayed the appeal be allowed and the appellant be set free.

In rejoinder, the appellant concurred with the submissions of the learned State Attorney for the respondent.

I have carefully looked at the proceedings of the trial court and the submissions of both parties, I agree with Mr. Kabengula that the irregularities

in the proceedings of the trial court that he has outlined, are glaring in the record of the trial court and I agree that they are fatal to the case. In **Michael Luhiye vs. R. [1994] TLR 181** it was held inter alia:

> *(i) For a trial in a criminal case to be a nullity it must be shown that the irregularity was such that it prejudiced the accused and therefore occasioned failure of justice,*

Further, I am aware that in the case of **Joseph Kimera v. Idd Hemedi [1968] H.C.D. no., 355** Seaton J. as he then was, held that *"the combination of the various procedural irregularities amounts to a mis-trial and a failure of justice."*

In the present appeal the outlined irregularities by the Respondent which I accept are glaring in the record of the trial court make the conviction and sentence could not be rationally supported. The authority for this view is **Ibrahim Ahmed v. Halima Guleti [1968] HCD no. 76.** (PC), Cross J.:

> *"The District Court erred. The question for a court on appeal is whether the decision below is reasonable and can be rationally supported:"*

The procedural irregularities that are in the trial court's record which vitiate the trial as explained by Mr. Kabengula are that the witness did not describe the microscope (exhibit P1) prior to being shown it before tendering it, the seizure not and chain of custody (Exhibit P2 and P3) were not read over and explained to the appellant after they were admitted hence the exhibits should be expunged, the charge sheet was substituted and immediately after that substitution which substitution included a grave offence, and the prosecution closed its case and the appellant was not afforded his legal right to demand, if he wished, the prosecution witness(es) be recalled for cross-examination.

Having indicated and decided as I have hereinabove, with respect to the learned trial magistrate, I agree with the appellant that the case against him was not proved to the standard required (proved beyond reasonable doubt). It is because of this ground of appeal which disposes the appeal which made me not discuss the rest of the grounds of appeal set forward by the appellant. I am of the firm view that the trial of the appellant was a mistrial

and amounts to a nullity and the appellant was prejudiced. The conviction and sentence cannot be rationally supported. I therefore, allow the appeal as it has merits. I agree with the learned State Attorney and I am of the view that in the circumstance of this case conviction has to be quashed and sentence set aside. The appellant is to be set free unless he is otherwise held for other lawful cause(s).

It is so ordered.

DATED and signed at SUMBAWANGA this 9th day of August 2021.

J. F. Nkwabi

Judge