IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 30 OF 2020

(C/O Criminal Case No. 185 of 2018 Mpanda District Court)

JUSTINE S/O RICHARD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

12 & 16/08/2021

JUDGMENT

Nkwabi, J.:

Pained by the decision of the district court of Mpanda in Criminal Case No. 185 of 2018, the appellant lodged a petition of appeal to this court. The petition of appeal has 4 grounds of appeal as set hereunder:

1. That the trial court erred at law and facts when failed to discover that the appellant was never been found in possession of motorcycle having been suspected to have been stolen.
2. That the trial court erred in law and facts when failed to discover that the evidence testified in court by PW3 (H 311 DC Emmanuel) was hearsay evidence.

3. That the trial court erred at law and facts when failed to discover that the evidence testified in court by PW4 in the court where wrong and cooked in court were wrong and carried evidence. Why he failed to produce a written and signed documents in court.
4. That the trial court erred at law and facts by convicting and sentencing the appellant on the offence which were not proved beyond reasonable doubt.

The appellant obtained the leave of this court to lodge a notice of intention to appeal as well as to file his petition of appeal. In the trial court, the appellant was charged with other accused persons who were acquitted by the trial court. The other accused persons in the trial court were Omary s/o Abdallah and Shija s/o Kulwa. Richard Justine and Omary Abdallah faced with first count namely, conspiracy to commit an offence c/s 385 of the Penal Code. Justine Richard was also charged with stealing c/s 258(1)(2)(a) and 269(a) of the Penal Code. The appellant in this appeal and the 2nd accused in the trial court were also charged with forgery contrary to section 333, 334 and 337 of the Penal Code.

The fourth, which was the last count was against Shija Kulwa where as he was charged with possession of goods suspected of having been stolen.

After hearing both the prosecution and the defence, the trial court composed its judgment and delivered it where it found the appellant who was the 1st accused person guilty of stealing and sentenced him to serve 5 years imprisonment as he was found to be a habitual offender. The learned trial magistrate formulated four issues for determination and in the end, he determined in the affirmative the 2nd issue which was whether the 1st accused person did steal the said motorcycle as stated in the charge sheet. The rest of the issues were decided in the negative hence the 2nd accused person and the 3rd accused person were found not guilty of the offences they were charged with and ultimately were acquitted respectively.

The hearing of this appeal was conducted by way of oral submissions. The appellant appeared in person while the Respondent was represented by Ms. Marietha Maguta, learned State Attorney. In his submission, the appellant prayed to adopt his grounds of appeal as his submission and rested his submissions.

In deciding this appeal, I will deal with one ground of appeal after the other. I will start with the 4th ground of appeal which is to the effect that the trial court erred at law and facts by convicting and sentencing the appellant on the offence which were not proved beyond reasonable doubt.

The appellant had indicated that the ground of appeal be taken as his submission.

In rebuttal submission, Ms. Marietha argued that the prosecution had 4 witnesses. The 1st witness is the owner of the motorcycle that was stolen as shown at Page 16 of the proceedings. The evidence of PW1 is supported by the evidence of PW2 as seen at P.22 of the proceedings.

She contended that at Page 24 PW3 said that the appellant confessed the offence and mentioned the person he gave that motorcycle. A trap was set in collaboration with the appellant with DW3 at page 44 where he admitted he got the motorcycle from the appellant. The evidence is sufficient DW3 was the 3rd accused person in this case in the trial court, she added. She referred this court to the evidence of PW4 at page 34 of the court proceedings they went and got the motorcycle from DW3.

She additionally argued that all prosecution witnesses were reliable. Reference is to **Goodluck Kiando V.R. [2006] TLR 365**. The prosecution/Respondent proved the case beyond reasonable doubt. There was no contradiction in their evidence. She prayed this ground of appeal be dismissed.

In rejoinder the appellant argued that he does not know DW3. He does not know the motorcycle. He prayed the court to do justice to him as I did not commit the offence. He was not arrested in possession of the motorcycle.

I do not purchase the argument of the appellant in this case in respect of the 4th ground of appeal. I accept Ms. Maguta's contention that the prosecution had credible witnesses whose evidence/testimony was not shaken by the defence of the appellant.

When the appellant was giving evidence, he even said that the said motorcycle belonged to Masabula Mabula and that he gave it to Kulwa. This is an admission in some way in what happened to the motorcycle. This cements the prosecution evidence. This is because, if words spoken on plea which are not taken under oath are taken into account in deciding the guilty of the accused person, I think, words spoken in defence under oath are taken even more seriouslyt, see **Safiel Mrisho v Republic [1984] TLR 151** (HC)

> *"Words spoken by an accused in his plea can be used as evidence against him."*

R. v. Sebastiano s/o Mkwe, [1972] HCD no. 217 (E.A.C.A.) SPRY, AG. P.

> *Where the accused chooses to testify, the court may take his evidence into consideration in coming to the conclusion that his*

guilt has been proved beyond reasonable doubt, and need not confine itself to the evidence of prosecution witnesses.

Substantial, the evidence of these witnesses is consistent and the trial magistrate found them to be witnesses of truth. ... Once an accused person has been called on to make his defence, any evidence he gives or calls is evidence in the trial and it is the duty of the court to consider the evidence as a whole.

See also **Ali s/o Mpaiko Kailu v. R. [1980] TLR 170** Kisanga, J.

"... and it is the appellant himself who in his defence made a disclosure of the broken engine mount. But this did not amount to saying that the trial magistrate relied on the weakness of the defence. What really happened was that the appellant in his own defence gave evidence which substantively supported an affirmative prosecution case. I am of the view that where the prosecution has made out an affirmative case against the accused person and the accused in the course of his defence gives evidence which carries or advances the prosecution further, the court would be entitled to take into account such evidence of the accused in deciding on the question of his guilt.

Then, I discuss the 1st ground of appeal which states that the trial court erred at law and facts when failed to discover that the appellant was never been found in possession of motorcycle having been suspected to have been stolen.

In counter argument, Ms. Maguta submitted that the 1st, 2nd and 3rd grounds are related to the 4th ground of appeal. The appellant assisted the motorcycle be recovered from the DW3. That the motorcycle was not found at his premises is baseless.

Rejoining, the appellant, in respect of this ground argued that he does not know DW3. He does not know the motorcycle. He prayed the court to do justice to him as he did not commit the offence. He was not arrested in possession of the motorcycle.

I think that the argument by the appellant in respect of this ground is an afterthought in order to exonerate himself from guilty. The circumstances and other corroborative evidence prove that the appellant is the one who stole the motorcycle, that he was not arrested in possession of the motorcycle does not show that he is not guilty of the offence of stealing the motorcycle. I accede to the view of Ms. Marietha that the 1st ground of appeal is baseless and is dismissed.

The appellant also tabled before this a ground of appeal, the 2nd one on the petition of appeal which goes, that the trial court erred in law and facts when failed to discover that the evidence testified in court by PW3 (H 311 DC Emmanuel) was hearsay evidence.

The reply from the learned state Attorney for the Respondent was that he claims that PW3 is a hearsay witness. At page 24 of the proceedings, this witness interrogated the appellant and the appellant told him where the motor cycle was. He heard direct it from the appellant. This ground of appeal is baseless.

I readily subscribe to the submission by Ms. Maguta. Even if assuming that the evidence of PW3 was hearsay evidence, still there is strong evidence from other prosecution witnesses who prove the offence was committed by the appellant. The ground of appeal therefore is unfounded and it is dismissed.

Eventually, I address the 3rd ground of appeal couched by the appellant to this effect, that the trial court erred at law and facts when failed to discover that the evidence testified in court by PW4 in the court where wrong and cooked in court were wrong and carried evidence. Why he failed to produce a written and signed documents in court.

On this ground Ms. Marietha argued that the prosecution had 4 witnesses. The 1st witness is the owner of the motorcycle that was stolen as shown at Page 16 of the proceedings. The evidence of PW1 is supported by the evidence of PW2 as seen at P.22 of the proceedings.

The claim by the appellant that the evidence of PW4 was wrong and cooked has no bearing. I second the argument of Ms. Maguta on this ground and

dismiss this ground for lack of merits. As to the his demand for documentary evidence, he did not event mention what documentary evidence was required for proof in the circumstances of this case. The relevant case law in this ground is **Shamir John v. Republic Criminal Appeal no. 166 of 2004** (CAT) at Mwanza (Unreported), Rutakangwa, J.A at p.14

> *.... The appellant never challenged this evidence at all in his defence. .... Indeed their evidence which was not disputed by the appellant, ... The appellant has not attempted to show why these independent witnesses chose to align themselves with PW2 Zacharia to victimize him. We think the appellant was drawing a red herring in his defence."*

See also **Julius Billie v R. [1981] TLR 333**

> *The appellants suggested no reason why first appellant's nephew should have given false testimony against them. There is nothing on the record of the case to warrant this court suspecting, leave alone concluding, that the witness had an axe to grind in this case. Even if there were some misunderstandings between the witness and the appellants or either of them, there would still be the evidence of the member of the guardian of law who effected the arrests for the appellants to grapple with.*

In the end, the appeal is found to be lacking in any merit(s). I subscribe to the submissions of the learned State Attorney for the Respondent that this appeal ought to be dismissed. This appeal is dismissed. Conviction and sentence are upheld.

It is so ordered.

DATED and signed at SUMBAWANGA this 16th day of August 2021.

J. F. Nkwabi

Judge

Court: Judgment is delivered in open court this 16th day of August, 2021 in the presence of Mr. Fadhili Mwandoloma, learned Seniour State Attorney for the respondent and the appellant present in person.

J. F. Nkwabi

Judge

Court: Right of appeal is explained.

J. F. Nkwabi

Judge

16/08/2011