IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

HIGH COURT CRIMINAL APPEAL NO. 15 OF 2021

(Originating from Criminal Case No. 219 of 2018 at the District Court of Chunya at Chunya)

JOSEPH DESU PARAFESTO----------APPELLANT

VERSUS

THE REPUBLIC ----------RESPONDENT

JUDGEMENT

Date of last order: 16.08.2021
Date of Decision: 27.09.2021

Ebrahim, J.:

The appellant herein was charged and convicted of the two counts namely shop breaking contrary **296 (a) and (b) of the Penal Code, Cap 16 RE 2002 (now RE 2019);** and theft contrary to **section 258 and 265** of the same law. He was also charged with the

alternative count of receiving stolen property or unlawfully obtained **c/s 311 of the Penal Code, Cap 16 RE 2002**. He was sentenced to serve ten years imprisonment.

The brief facts of the case could be gathered from the testimony of PW1 who told the court that she is operating a hardware business at Uhindini, Chunya Urban. On Monday, the 5th November, 2018 when she opened the shop after the weekend sale, she discovered that the ceiling board has been cut and the all the sales money amounting to Tshs. 18,000,000/- that she left in the shop has been stolen. On looking at the CCTV Camera, she found out that the same has been switched off on 04.11.2018. She reported the theft to the police where they were told that there is a suspect who was found with a huge amount of money. On 07.11.2018 while at Mbeya Central Police, the appellant was brought and he said he was given the money by his brother one Martin Desu working at Makongolosi – Chunya. The accused had said that he was given the money to send to his sister in-law at Rukwa. Police, the appellant and PW1's husband went to Rukwa but they could not find the said sister

in law or even a neighbour. PW1 said she identified the appellant as a person who came to her shop a day before the incident of theft.

On the other hand, the appellant testified that he came from Makongolosi and on reaching Chunya town, he hired a motorcycle (PW3) to take him to Mbeya. They were stopped by the police and he told them that he was given the money by his brother Martin Desu at Makongolosi and he is taking it to Sumbawanga to his sister in law (wife of his brother). However, they were taken to police station where he was arrested and the money seized. The appellant stated that on 07.11.2018 a lady with the police went there but she could not identify any accused person. He raised a number of contradictions on the testimonies of prosecution witnesses.

The trial magistrate after hearing the evidence of all witnesses, he was convinced that prosecution managed to establish their case at the required standard and accordingly convicted and sentenced the appellant.

Aggrieved, the appellant lodged an appeal at this court raising six grounds of appeal that the trial court erred to convict the

appellant on the alternative charge of receiving unlawful obtained property; that there was no any documentary exhibit from PW1 and PW2 to prove that the alleged stolen money was theirs; and that the trial magistrate did not consider doubts in prosecution evidence. He complained also that the trial magistrate was biased to the prosecution side; the trial magistrate did not give reasons for his decision and that the sentence imposed was heavier than the nature of the case.

When this case was called for hearing, the appellant appeared in person through virtual court while in Ruanda Prison. The Respondent was represented by Mr. Davis Sanga, learned State Attorney.

The appellant prayed for the State Attorney to begin while reserving his right to re-join. He however prayed to adopt his grounds of appeal.

Mr. Sanga opted to submit on the 1st to 5th grounds of appeal together and contended that their case was proved beyond reasonable doubt. He contended further that the appellant was

found with Tshs. 17,916,000/- the property of PW6 hidden in his bag which he said it was his brother's money but could not call him to prove that exhibit P3 was his. He referred to the case of **Chacha Mwita & Others V R**, Criminal Appeal No. 302 of 2013 page 8. He also referred to the evidence of PW5 – a motor cyclist who identified the appellant as he was present when he was searched. On the issue of excessive sentence, Mr. Sanga said that under **section 311 of the Penal Code**, **Cap 16 RE 2019** the maximum sentence for the charged offence is 10 years. Thus, the sentence was correct.

In rejoinder, the appellant argued that there was neither direct or circumstantial evidence that the shop of Ayubu Omary was broken nor evidence proving theft. He commented on the evidence of PW2 as analysed by the trial court that it was evidence on receiving a stolen property and the testimony of PW6 was a hearsay. He challenged also that there was no proof that it was their money and that PW1 did not say how she bundled Tshs.10,000/- and Tshs.1,000/-. He said there was no one who said to be present when he received the money and that the sentence was illegal so was the order to refund the money. He prayed for the appeal to be allowed.

Verily, going the evidence on record, the appellant was convicted for receiving and retaining stolen money contrary to **section 311(1) of the Penal Code, Cap 16 RE 2002 (now RE 2019)**. The trial court premised the conviction on the doctrine of recent possession that the appellant was found with the stolen amount of money and he had no explanation as to how he obtained such money. The issue for determination by this court is whether prosecution managed to prove their case beyond reasonable doubt.

It is the position of the law that in order to prove a charge under **s.311(1) of the Penal Code**, it must be established that the accused received or retained the property in question, and that he received or retained the same with guilty knowledge in the sense that he knew or had reason to believe that the same had been stolen or otherwise feloniously obtained or disposed of.

The issue here comes, did the facts and evidence in this case prove the offence of receiving and retaining the stolen/illegally obtained money? I am posing this issue in mind of the fact that

being the first appeal, I am obliged without fail to put the entire evidence into objective scrutiny and come up with my own findings of fact if the need be.

PW1, Shamim Gabriel, the wife of **PW6 Ayubu Omary Simwanza** told the court on how on Monday 5th November 2018 in opening the shop in the morning, she realised that the ceiling board has been cut and all the sales money for 3rd and 4th November 2018 that she left in the shop amounting to Tshs. 18,000,000/- has been stolen. She reported to the police. When her husband came, PW6, they went to the police on 07.11.2018 and found the appellant who was already arrested by PW2 on 04th November 2018 at around 2200hrs at Mwansekwa area which is outside Mbeya Town. **PW2, F3826** said he arrested the appellant and **PW5**-the motor cyclist while in routine patrol after suspecting them. On searching them they found the appellant with a knife **(exhibit PE1)**, torch **(exhibit PE2)**, clothes **(exhibit PE5)** and Tshs. 17,916,000/- **(exhibit PE3),** black bag **(exhibit PE4),** blue slippers found in the appellant's bag **(exhibit PE6),** and search and seizure certificate **(exhibit PE7).** On interrogation, the appellant said he was given the money by his brother Martin Desu

who works as Hassan Ramadhani at Chunya- Makongolosi mining to send it to his sister in law at Sumbawanga. The appellant also said that the said Hassan Ramadhani owns a crusher at Makongolosi. Following his story on how he obtained the money, PW1, PW2, PW6, PW7 and the appellant went to Chunya and Rukwa, Sumbawanga. At Chunya they met **PW3- a secretary of Mbeya Region Miners Association –** who testified that they do not know such a person named Martin Desu or Hassan Ramadhan. **PW4, Joyce Chrisant Mtemba** of Malangali Sumbawanga testified that when the police went to her house at Sumbawanga with the appellant, she did not know him and neither is the appellant's acclaimed sister in law Anastazia who he said was living in her house six months back. PW4 said even the neighbours did not know the appellant. **PW7, Inspector Raymond Rukomwa- an investigator** testified that the appellant gave him the number of his brother Vodacom No. 0755020329 but when they searched the name it read Joyce Luhende and when he tried to call the number, it was not reachable. **PW5, Enuelo Rungwe,** the motorcyclist who was hired by the appellant confirmed that that the appellant hired him to take him to Mbeya Central Station. They

were arrested by the police and the appellant upon being asked he said he has Tshs. 18,160,000/- which he received from his brother Martin at Makongolosi and he is sending the money to Sumbawanga. **PW6, Ayubu Omary Simwanza,** testified that after being informed by his wife that the money has been stolen, he went to Mbeya and together with the police they went to Makongolosi to look for Martin Desu to no avail and again to Rukwa looking for the appellant's sister in law namely Anastazia Priska, also to no avail. PW6 said at Rukwa, the appellant could not show the said Anastazia or even neighbours.

The appellant in his defence admitted to have been arrested by the police on 4th November 2018 on a motorcycle he has hired for Tshs. 35,000/- so that he can go to Mbeya. He said he was coming from Makongolosi- Chunya. He admitted also that he was found with Tshs. 18,041,000/- which he was given by his brother Martin Desu to take it to Sumbawanga to his sister in law. The appellant further commented on the evidence of PW1 that she was not at the crime scene when the incident occurred but at home. He mostly challenged prosecution evidence on identification.

As intimated earlier, the appellant's conviction was based on the doctrine of recent possession.

The Court of Appeal has in a number of cases illustrated the cumulative principles guiding the invocation of the doctrine of recent possession as a base of conviction. In the case of **Joseph Mkumbwa & Another V Republic**, Criminal Appeal No. 94 0f 2007 cited with approval in the cited case of **Chacha Mwita and 2 Others V R, (supra)**, the Court of Appeal held that: -

> *"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved **first,** that the property was found with the suspect, **second**, that the property is positively proved to be the property of the complainant, **third**, the property was recently stolen from the complainant and **lastly**, the stolen thing constitutes the subject of the charge against the accused".*

Court of Appeal, on discussing the same issue in the case of **James Kisabo @Mirango and Another V The Republic**, Criminal

Appeal No. 261 of 2006, quoted with approval the case of **Alhaj Ayub @ Msumari & Others V R**, Criminal Appeal No. 136 of 2009 (Unreported) which held that for a doctrine of recent possession to apply; *it must be positively proved that the property was found with suspect; property is positively the property of complainant; property stolen from the complainant; and that it was recently stolen.*

It was further held in the cited case above that:

> *"In order to prove possession there must be acceptable evidence as to the search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice, no matter from how many witnesses".*

Tailoring the principles of the above cited cases with the facts of this case, PW1 reported to the police that the money she had left in the shop on 4th November, 2018 amounting to Tshs. 18,000,000/- has been stolen. She described the money to be in the bundles of Tshs 5,000/-, 10,000/-, 2,000/- and 1,000/- notes. PW2 said he found the appellant with the money in bundles of Tshs, 10,000, 5,000, 2,000 and 1,000/- and the appellant told him he has Tshs. 18,000,000/-. Tshs. 17,916,000/- was admitted without objection as exhibit PE3. The

appellant did not cross examine at all on the issue that the money was found in the ascribed bundles neither did he challenge it on his defence. If at all, he explained thoroughly how he used the money that he had of Tshs. 18,041,000/- when arrested by the police to the remaining balance of Tshs. 17,916,000/- that was tendered in court. Furthermore, the appellant failed completely to account for the money suspected to have been stolen from PW1's shop when PW1 closed the shop on 4th November, 2018 in the evening. The appellant was arrested by PW2 with the same amount of money on the same night of 4th November, 2018 at 2200hrs and he failed to give plausible explanation as to where and how he obtained the said money. Again, the prosecution together with the appellant went to all places that the appellant claimed to have been given the money by the people he named but none was found and even at Sumbawanga where he said he was living, no one knew him. It is clear that the appellant was found with the money that was identified by PW1 to have been recently stolen and he could not give an account of how he obtained the same. Moreover, exhibit P3 constitutes the subject of the charge against the accused on the

alternative count. The trial magistrate found out that there is no direct or circumstantial evidence linking the appellant with the breaking of shop or stealing but rather that he received stolen property. I would say that the trial magistrate went through that route following the evidence of the appellant that he was given the said money by his brother namely Martin Deus. That notwithstanding, in forging the principle stated by the cited cases above on the doctrine of recent possession and the prosecution evidence, the appellant is equally guilty of the offence of shop breaking and theft.

In his evidence, the appellant did not deny to have been found with Tshs. 18,000,000/-, neither did he deny or challenged that they were in bundles. His explanation of how he came to have all that amount money did not add up and he lied as those people that he mentioned were fictitious. I am abreast of the position of the law that an accused is not required to prove his innocence, however at the same time, a lie of an accused person may corroborate the evidence of prosecution. I associate myself with the holding of the Court of Appeal in the case of **Nkanga Daudi Nkanga V Republic,** Criminal Appeal No 316 of 2013, that, *"a lie of an*

accused person corroborates prosecution case". I am firm that the defence by the appellant has lend credence to prosecution witnesses in this case. I therefore, also find that the appellant was illegally found with the stolen money and I would also add that he is guilty of the offences of shop breaking and theft.

However, the appellant raised a concern on his sixth ground of appeal that the sentence imposed is heavier in consideration of the nature of the offence. **Section 170 (1) (a) of the Criminal Procedure Act, CAP 20, R.E. 2019**, provides that the maximum sentence which the subordinate Court can impose to the accused in offences which are not scheduled is five years. The provision is worded thus:

> *"(1) A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences–*
>
> *(a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act * which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;"* ***(Emphasis supplied)***.

A proviso to the section, allows sentences of more than the limit set by **section 170(1)(a) of the Criminal Procedure Act, Cap 20 RE 2019** above passed by a Senior Resident Magistrate of any grade or rank. The fact that the offence which the appellant stood charged with was not a scheduled offence, in the light of what is stipulated in the above quoted provision of law, it was improper for the learned trial Resident Magistrate to impose a jail sentence of ten years without seeking for confirmation from the High Court as per the requirement of section **171 (1) of the Criminal Procedure Act, CAP 20**. The sentence of 10 years imposed by the trial magistrate was un-procedural and illegal contrary to the argument by the learned State Attorney that the sentence was proper. Thus, this court ought to interfere as the factors fits with the position illustrated by the Court of Appeal in the case of **Shida Manyama V. R**, Criminal Appeal No. 323/2014. In that case, Court of Appeal, quoted with approval the case of **Silvanus Leonard Nguruwe V Republic** (1981) TLR 66 which listed the factors to be considered before the Court can interfere with the sentence of the trial Court. Those factors are:

1. *The sentence imposed was manifestly excessive or*
2. *The trial judge in passing sentence ignored to consider important matter or circumstances which he ought to have considered*
3. *The sentence imposed was wrong in principle.*

It follows therefore that, the trial Magistrate imposed sentence which was wrong in principle. More so regard is also on the principle of sentencing which requires the maximum sentence to be imposed to the commission of the offences worst of its kind; and that the purposes of sentencing is to deter as well as to rehabilitate.

That being the position therefore and following the circumstances of the offence, I reduce the sentence imposed as such it would result in the appellant's immediate release from prison unless otherwise lawfully held. Ultimately therefore, the appeal by the appellant partly succeeds as demonstrated above.

Order accordingly.

R.A. Ebrahim

JUDGE

MBEYA

27.09.2021