IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 73 OF 2020

(Original from District Court of Bagamoyo at Msoga in Criminal Case No. 241 of 2018)

JAMES PETER ---------- APPELLANT

VERSUS

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

Date of Last Order: 20/09/2021

Date of Ruling: 22/09/2021

J U D G M E N T

MGONYA, J.

The Appellant **JAMES PETER** being dissatisfied with the Judgment and orders passed by the District Court of Bagamoyo at Msoga by Hon. H. A. Makube, RM delivered on 27th February 2019; do hereby appeal against the whole of the said decision to this Honorable Court on following grounds:

1. ***That, your Honourable Judge the trial magistrate grossly erred in convicting the Appellant where there was variance between PW2 evidence and the charge in regard to the quantity of litres of fuel allegedly loaded to the vehicle entrusted to the Appellant. Subject of this matter.***

2. *That, the learned trial magistrate grossly erred in holding to vehicle. Inspector Report Exhibit "P1" tendered by PW5 and admitted unprocedurai where he was not led to identify the same prior to tendering, worse still its contents was not read over loud in count for verification.*
3. *That, the trial magistrate erred in holding to Appellant conviction based on suspicion where he did not warn himself that suspicion however great/strong cannot form the basis for conviction.*
4. *That, the trial magistrate erred in convicting the Appellant based on unjustified corroborated prosecution evidence.*
5. *That, the learned magistrate erred in failing to appraise credibility of the prosecution evidence objectively before relying on it as basis for the Appellant conviction.*
6. *That, the learned trial magistrate grossly erred in holding that prosecution proved its case beyond reasonable doubt as charged.*
7. *That, the trial court magistrate erred in iaw and fact to rely on the prosecution evidence only and proceed to convict me without considering my defense evidence.*

Therefore, the Appellant prays that this Honourable court allow the appeal, quash the conviction, set aside the trial court's judgement / sentence and acquit the Appellant forthwith.

In the cause of hearing, the Appellant requested the court to adopt his grounds of Appeal advanced before the court for determination.

Responding to the grounds of Appeal, Ms. Mushi, the learned State Attorney, informed the court that Republic supports the Appeal through the sole ground that Prosecution failed to prove their case beyond reasonable doubt.

Referring to the trial court proceedings, the learned Counsel averred that the testimony of PW2 states that the car which was driven by the Appellant loaded **37,500** litres being a total of petrol and diesel. However, there is no any evidence nor proof which was tendered before the court that the said car had that much content. From that position, it is the Republic's concern that they doubt the said allegation which was not proved and if at all it was the Appellant who stole the same.

Further, the Counsel stated that, the Vehicle Inspection Report which was tendered and admitted as **Exhibit P1** was not read before the Court in accordance to the law. It is from there, Ms. Mushi prayed the same to be expunged as Exhibit before the Court.

On the other hand, Ms. Mushi the learned Counsel informed the court that, the trial Magistrate misdirected himself by not considering the defence testimony; contrary to the law and declared the omission injustice to the Appellant. In support of this assertion, the counsel referred this court to the case of ***FIKIRI KATUNGE VS REPUBLIC, Criminal Appeal No. 552/2016 (Unreported)*** where it was stated that failure to take into consideration the defence testimony is as well that the defence was not heard.

From the above anomalies, the State Attorney had a firm view that the offences that the Appellant was charged was not proved beyond reasonable doubt hence the proceedings deserves to be declared nullity and pray the court to set aside the decision and allow the appeal forthwith.

Before I proceed with determination of this appeal, I wish to state the brief history of the original case up to this stage. From the record and especially from the Charge Sheet.; the Appellant herein, **JAMES PETER** was convicted on two counts: **1st Count:** Stealing by Agent 19,600 Litres of Diesel and 1,200 Litres of Petrol **c/s 273 (b) of the Penal Code, Cap. 16 R.E 2002,** while in the **2nd Count,** the Appellant was sued for Malicious damage to property **c/s 326 (1) of the Penal Code, Cap. 16 R.E 2002** and sentenced to seven (7) and three (3) years imprisonment respectively running concurrently.

As this is the Appellate Court, I have also gone through the trial court's record. Further, I have also gone through the Appellant's grounds of Appeal and the learned Counsel's respective submission.

As I have rightly heard from the learned State Attorney, the Appellant's Appeal is suggested to be allowed due to the anomalies that took place during the trial.

In the cause of going through the trial court proceedings, I have also noted that the Appellant's defence was not taken into consideration by the trail court Magistrate in the cause of composing the judgement. In that sense, and the interpretation from this omission is that the Appellant was not provided with the fair judgement. This alone is a grave anomaly of which could declare the judgement nullity, but also set aside the same as a result of unfair determination.

I have to remind the Magistrates and the entire legal fraternity stakeholders that every party to a trial is entitled to a fair trial and fair judgement. It is possible that the learned Magistrate had in mind the Appellant's Defence without writing the same in the judgement; unlike he has done to the Prosecution side. To be fair the Magistrate had to be demonstrated both case's evidence in the judgement so as the reader who was not at the trail can also see the fairness and balance in determination of the case. It is not enough for the Magistrate to have a quite knowledge about the Defence case

and leave the same in the case file and take away that evidence from the readers who were not at trial. Omitting the party's evidence in the judgement insinuates that the Magistrate was not fair.

In the case of ***KABULA D/O LUHENDE V. REPUBLIC, Criminal Appeal No. 281 of 2014 (CAT at Tabora) (Unreported)*** *(Rutakangwa, Mandia & Mussa, JJAs),* it was held that:

> ***"Fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. Fair trial also envisages that the court or tribunal hearing the parties' case should be fair and impartial without it showing any degree of bias against any of the parties. So, a fair trial, first and foremost, encompasses strict adherence to the rules of natural justice, whose breach would lead to the nullification of the proceedings."***

If that is the case then, there is a legal requirement of the Magistrate during composition of the judgement also to take into consideration and record both sides' evidence and conclude the decision after the determination of the same.

On a very serious note, the Magistrate's failure to consider the defence evidence is a grave misdeed of which is quite

unfair in the eyes of law. As said, the failure can result into invalidation of the judgement. This was observed in the number of case and among them, are: The case of ***AMOS PAULO AND ANOTHER v. THE D.P.P, Criminal Appeal No. 308 of 2009 at Arusha, Feb, 2012 (Unreported)*** and in the case of ***HUSSEIN IDD AND ANOTHER VS. REPUBLIC (1986) TLR 166***, where the first Appellant together with another person were convicted of murder. The trial court dealt with the Prosecution evidence implicating the first Appellant and reached the conclusion without considering the Defence evidence. The Court held:

> ***"It was a serious misdirection on the part of the triai judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence".***

Further in the case of ***CHARLES SAMSON VERSUS REPUBLIC, Criminal Appeal No. 29 of 1990,*** it was held that: ***failure to consider the defence case is a serious error.*** Whereas in the case of ***LOCKHART-SMITH V. UNITED REPUBLIC, (1965) EA at page 217*** the court observed that:

> ***"...failure to take into account any defence put up by the accused will vitiate conviction."***

In the event therefore and for the foregoing precedents and reasons, I respectively join hands with the Republic's findings that the appeal is meritious as there were some serious legal irregularities and anomalies at the composition of the trial court's judgement.

Consequently, **I further find the appeal commendable and allow it.** From the above, I proceed to **quash the conviction and set aside the Judgement and sentence therein imposed against the Appellant.**

Accordingly, I proceed to order that the Appellant be released from prison forthwith unless held for any other lawful cause.

It is so ordered.

L. E. MGONYA

JUDGE

21/09/2021

Court: Judgment delivered in chamber in the presence of the Appellant and Ms. Edith Mauya State Attorney for Republic.

L. E. MGONYA

JUDGE

21/09/2021