IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 39 OF 2021

(Original Criminal Case No. 313 of 2019, In the District Court of Kilombero, at Ifakara – Before Hon. L. O. Khamsini, SRM)

1) NARASCO EMIRIUS
2) MIRAJI JUMA
3) HASHIM SAID
4) SEIF MOHAMEDE
5) OMARY SIMBA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

26th July, 2021 & 12th August, 2021

CHABA, J.

The appellants and one another namely Kibwana Abdul then the first accused person, were arraigned before the District Court of Kilombero, at Ifakara with one count of malicious damages to property contrary to section 326 (1) and one Count of stealing contrary to section 258 (1) and 265, both of the Penal Code [Cap. 16 R.E. 2002] now [R.E. 2019].

The prosecution alleged that the six accused persons jointly and together on between 4th day of October, 2019 and 7th day of November,

2019 at Kiberege village within Kilombereo District in Morogoro Region wilfully and unlawfully disassembled Mkasu Cotton Ginnery roof which have Asbestos iron sheets and wooden kits "Kenchi za Mbao" the property of Ulanga - Kilombero Cooperative Union. Upon removed the said asbestos iron sheets and wooden kits "Kenchi za Mbao" at Msaku Cotton Ginnery, the accused persons fraudulently and without claim of right did steal 200 asbestos iron sheets valued at Tsh. 4,000,000/= and wooden kits "Kenchi za Mbao" valued at Tsh. 6,000,000/= the properties of Mkasu Cotton Ginnery. The total value of the damages and the stolen properties are TShs. 10,000,000/=.

Having denied the charge, a full trial was conducted and in the end the appellants were found guilty and accordingly convicted in all counts. Each of the appellant was sentenced to serve three (3) years imprisonment in each Count. That means each of the appellant was sentenced to serve six (6) years in total. It was ordered that the sentence had to run concurrently.

Dissatisfied with the decision of a trial court, the four convicts preferred instant appeal to this court. Hence, in a bid to challenge the impugned decision, they jointly filed a petition of appeal armed with eleven (11) grounds of appeal which for purposes of brevity can be summarized together into the following grounds of appeal:

1. That, there was no proper identification of the appellants.
2. That, the trial court did not comply with the mandatory provision of section 231 (1) of the Criminal Procedure Act [Cap 20 R.E. 2019].
3. That, the appellants were never afforded an opportunity to cross-examine DW1 who testified that the stolen iron sheets were sold by them to Beneke and later on, he, DW1 purchased the same from Beneke;

4. That the case against the appellants was not proved beyond reasonable doubt.

Before I proceed further, I find it pertinent at this stage to reproduce the facts of the case from both sides as it were unfolded at the trial, starting with the prosecution side. The prosecution version was unfolded by three (3) witnesses, but the only eye-witness to the commission of the offences was the ginnery technician one Faraji Magwila (PW2) who resides nearby the Cotton Ginnery. His testimony shows that on the fateful date he heard some voices coming from the Cotton Ginnery and he decided to go there. When was nearer to the place he saw the appellants through the torch light and clear moonlight. He mentioned their names as Hashim Kandomba, Seif Kitunda, Miraji, Narasco and Omary Koba. When he saw them, the appellants ran away. While far apart from him, they took some stones and started throwing towards him. Afterwards, he reported the matter to the suburb chairman and thereafter to the nearest police station. PW2 claimed that, on the material date it was not his first time to see them while at the crime scene. He said, the appellants made several attempts to steal the asbestos iron sheets and he had once reported them to their families. PW2 also asserted that he finds a wallet just around the crime scene with a broken zip having a sim card registered with the name of Bakari Kitunda and a piece of paper with a name of Seif Kitunda. He stressed that he knew Bakari Kitunda as close relative to the 4th appellant. He further stated that the said wallet was tendered in evidence and admitted as exhibit PE.2.

Following the report of the incident, the appellants were arrested by the police officers. PW1, a police officer No. E. 4631 CPL Benson recorded a cautioned statement of the 1st accused (DW1) namely Kibwana Abdul

who after a full trial was acquitted. According to PW1, he confessed that he bought 28 stolen asbestos iron sheets from the appellants at the price of Tsh. 4000/= each. Thereafter, he sold it to one Beneke. The cautioned statement was admitted in court as exhibit PE.1. The last prosecution witness is a police officer No. F. 3302 CPL Thobias (PW3) whose evidence shows that upon received information in respect of the incident, he immediately rushed to the scene of crime while in company of the OCD and other policemen. Thereby they visited the scene of crime and witnessed the physical harm occurred. Afterwards, they traced the Village Executive Officer within the locality who assisted them to manhunt the suspects. At the end of the day, the suspects were arrested one after the other.

A remark is, perhaps, well worth that the iron sheets which were alleged to have been stolen and found in possession of Beneke, were never tendered in court for one reason that the same had been already tendered in another Criminal Case No. 32 of 2019.

On defence, Kibwana Abdul (DW1) who was acquitted at the end of trial, admitted buying the alleged stolen iron sheets from Beneke and added that the appellants were the ones who sold them to Beneke. On the other hand, the 1st, 2nd,3rd, 4th and 5th appellants respectively, all denied the allegations. However, they admitted the facts that they were arrested while at their homes in connection with the offences levelled against them, but unjustly.

As alluded to earlier, after a full trial, the first accused Kibwana Abdul (DW1) was acquitted for both counts on the ground that PW2 did not mention his name as one among the culprits who he saw them on the

fateful night while at the crime scene. Relying on the evidence adduced by PW2, an eye witness whose evidence was corroborated by the evidence of PW1 and PW3, the trial court believed these witnesses and convinced that the said asbestos iron sheets were stolen by the appellants and later on sold to Beneke. Beneke also sold them to DW1. The appellants were convicted on both counts and sentenced as indicated above.

When this appeal was called on for hearing, the appellants appeared in person, unrepresented; whereas Mr. Ramadhani Kalinga, learned State Attorney entered appearance for the respondent Republic.

Upon being given an opportunity to amplify on the grounds of appeal, the 1st appellant adopted his grounds of appeal and pleaded the court to consider the same, allow his appeal and set him free. The 2nd, 3rd, 4th and 5th appellants also gave similar prayers.

On his part, Mr. Kalinga commenced by stating that he was supporting the appellant's conviction and sentence passed by the trial court. He gave the following reasons for his stance. First, as to the first complaint that the trial court did not comply with the provision of section 231 of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA), Mr. Kalinga submitted that all appellants were properly addressed in terms of section 231 of the CPA. He invited this court to revisit page 19 of the typed trial court proceedings.

Second, as to the question of identification parade, he submitted that at pages 14 – 17 of the typed trial court proceedings the evidence of PW2 is clear that before the incident, he knew the appellants by their names and that on the fateful date he managed to establish the identity of the

appellants with the aid of a torch light. He added that, considering the fact that he mentioned the names of the culprits as Hashimu Kadomba, Seif Kitunda, Miraji Ngude, and Omary Koba and reiterated at police station, that was sufficient to prove that he saw them committing the offence on the material night. He contended that when PW2 saw the appellants, they all ran away towards the railway where they picked up some stones and started throwing against PW2. He submitted further that on the fateful date it was not his first time to see them and that he once reported their behaviour to their families. He concluded that this complaint has no merit.

Third, whether the matter was proved to the required standards or not, Mr. Kalinga contended that the prosecution case was proved beyond reasonable doubt. He explicated that, PW2 was an eye and truth witness who actually observed the appellants committing the offences. It was Kalinga's contention that PW2 seen and reported the incident to the police station. His evidence was corroborated by PW1 and DW1 (who was the 1st accused). He argued that upon interrogation, DW1 admitted that he bought the said iron sheets, i.e., 28 in number for Tsh. 4000/= each which were later recognised as the properties of Ulanga – Kilombero Cotton Ginnery which source were the appellants. He closed his submissions on this fact by stating that the cautioned statement of DW1 supports this contention.

The learned State Attorney underlined that since the appellants were convicted and sentenced to three (3) years in each count contrary to the provisions of the law, he therefore requested this court to invoke its powers vested under section 388 of the CPA and raise the sentences on each count to seven (7) years imprisonment.

Following the respondent's submissions, the appellants did not have anything else in rejoinder. They only said, (we) let the court decide for herself.

I have objectively considered the grounds of appeal and the submissions made by the learned State Attorney and the appellants as well. Having so done, I am in a position to decide the appeal.

As to the first ground of appeal, the prosecution side heavily relied on the evidence of PW2 who was an eye-witness to the incident. His evidence shows that he was the one who mentioned the names of the appellants at the scene of crime and police station. He also managed to establish the identity of each culprit on the fateful night through torch-light and moon-light as well. However, upon a careful scrutiny of the testimony of PW2, I noted that nothing was transpired in respect the intensity of the light employed to identify the appellants at the scene of crime. As indicated at pages 15 and 17 of the typed proceedings of the trial court, his evidence shows that he identified the appellants by using a light illuminated from the torch, which left a lot to be desired as to whether it was intensity enough for him to recognize rightly the people he met at the crime scene. But again, he didn't even bother to tell the trial court from which distance he stood and where the appellants were seen standing at the material time, for proper recognition, using the said torch light.

The law on visual identification is settled. There are numerous decisions made by this court underscoring that the evidence of visual identification is of the weakest kind and no court should act on such evidence unless all possibilities of mistaken identity are eliminated, and

the court is fully satisfied that the evidence before it is absolutely watertight. See: **Waziri Amani v. Republic,** [1980] TLR 250 and **Raymond Francis v. Republic,** [1994] TLR 100.

In **Richard Mawokoa and Another v. Republic,** Criminal Appeal No. 318 of 2010 (CAT) at Mwanza (unreported), the Supreme Court of the Land had this to say:

> "It is however, now well settled, that if a witness is relying on some source of light as an aid to visual identification **such witness must describe the source and intensity of such light in details."** [Emphases added].

A remark was prior made in **Issa Mgara v. Republic;** Criminal Appeal No. 37 of 2005 (unreported) where the Court of Appeal of Tanzania when encountered with similar circumstances of the case, among other things it held:

> "...Even in recognition cases where such evidence may be more reliable than identification of a stranger, **clear evidence on source of light and its intensity is of paramount importance.** This is because / as occasionally held, even when the witness is purporting to recognize someone whom he knows / as was the case here mistakes in recognition of close relatives and friends are often made." [Emphasis added].

Under these circumstances of this case, I cannot state with certainty that the conditions were favourable for a correct identification of the appellants at the scene of crime, hence the appellant were never properly identified by PW2.

Second, the conviction of the appellants was based on the testimony given by PW2 which of course as articulated above it has been discredited for improper identification. The conviction was based on the said

testimony, supported by the evidence adduced by DW1 who happened to confess that he bought the stolen sheets whose source were the appellants, and his caution statement was admitted as an exhibit PE1. I have come across the proceedings of the trial court, but I have noticed a material irregularity which was committed at the time of tendering the same as it was introduced in evidence by a public prosecutor.

The Court of Appeal of Tanzania in **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic**, Criminal Appeal No. 78 of 2012 (unreported), when confronted with alike situation had occasion to make the following pertinent observation:

> "A prosecutor cannot assume the role of a prosecutor and a witness at the same time. With respect that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in terms of section 198 (1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined."

Since the prosecutor was not a witness, he could not be examined or cross-examined on the said cautioned statement. I am settled in my mind that exhibit PE.1 was improperly admitted in evidence. Moreover, the trial court record is clear that when the exhibit was received in evidence and admitted, the same was never read aloud in court upon admission. Therefore, I do hereby proceed to expunge it from the record.

Third, the appellants have raised a complaint that there was violation of section 219 (3) of the CPA which I am in agreement with Mr. Kalinga that they ought to have meant section 231 of the same Act which is relevant for proceedings under the subordinate court. However, I am not

in agreement with Mr. Kalinga at all that the trial court did comply with the said provisions of the law. The records are clear under page 19 of the proceedings of the trial court that all the appellants addressed their will to call their witnesses when defending themselves, but the records do not show anywhere, that they were afforded with such a right.

It is also apparent in record, specifically at page 21 of the typed proceedings of the trial court that DW1 when testifying against the appellants (co-accused by then), the respondent was afforded a right to re-examine and nothing transpired that the appellants were afforded their rights to cross-examine him, this was a pure violation of law.

In **Mattaka and Others v. R** [1971] E.A 495 pp.502-503 the defunct Court of Appeal for Eastern Africa stated:

> **"It is well established that where accused person gives evidence that is adverse to a co-accused, the co-accused has a right to cross-examination** (See, **Ndania Karuki v. R.** (1945) 12 E.A.C.A 84 and **Edward Msengi v. R.** (1956) 23 E.A.C.A. 553);"

And it went on to further lay down:

> **"It is well established that where an accused person gives evidence, that evidence may be taken into consideration against a co-accused, just like any other evidence. Evidence which is inconsistent with that of the co-accused may be just as injurious to his case as evidence which expressly seeks to implicate him, should we think, give rise to a right of cross-examination where an accused wishes to cross- examine his co-accused, he should be permitted to do so as of right,** subject of course, to the overriding power of the court to exclude irrelevant or repetitive questions" (Emphasis added).

That aside, section 155 of the Tanzania Evidence Act [Cap. 6 R.E. 2019] which is governing cross-examination, it provides that:

> **"Section 155 - When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend:**
>
> (a) **to test his veracity;**
>
> (b) to discover who he is and what is his position in life; or
>
> (c) **to shake his credit,** by injuring his character.
>
> although the answer to such questions might tend directly or indirectly to incriminate him, or might expose or tend directly to expose him to a penalty or forfeiture." (Emphasis added).

As clearly depicted by the record, **first**, the appellants were denied the right to cross-examine DW1 namely, Kibwana Abdul to test his veracity of the testimony or shake his credibility. **Second**, the omission to allow the appellants to cross-examine DW1, meant that they were deprived of their rights to put before the court their full answer and defence to the charge.

In these circumstances, it was unfair and premature for the trial court to find that the DW1's finger pointing at the appellants had not raised a reasonable doubt. The truth of his evidence had not been properly tested by cross-examination of other co-accused (appellants).

By not granting the appellants with rights to cross-examine DW1 to test the veracity of his rival evidence, the trial court denied itself and the parties an opportunity of ascertaining the truth of the testimonies advanced before it, which is one of its primary functions, hence this ground has merit.

Nonetheless, I am reluctant to make an order for a re-trial much as I take the position that, on the adduced evidence, the prosecution fell short of establishing its case. This is because upon discrediting the evidence of PW2 on pure identification of the appellants, expunging the cautioned statement tendered by DW1 from the records, discrediting the testimony of DW1 on the ground that he was not cross-examined, then there is no other evidence stood as worth for trial of the two counts against the appellants, since PW1 and PW3 gave their evidence relying on the words presaged by PW2 as the records reveals. Thus, it is prudent to state at this juncture that the evidence adduced by the prosecution witnesses is not water-tight and thus unsafe to rely on for re-trial.

Given the totality of the evidence before hand and considering the fact that there are still doubts left as to the identification of the appellants at the scene of crime, as well the stolen items that were recovered but never tendered before the trial court, I am satisfied that the case against the appellants has not been proved beyond reasonable doubt.

Also, studying the ingredients of the two offences; I am of the considered opinion that, a person cannot be charged for stealing the same property whose malicious damage charge was based on.

In the final analysis, I allow the appeal, quash the conviction on both two counts and set aside the sentences imposed on two counts respectively. Thus, the appellants namely, Narasco Emirius, Miraji Juma, Hashim Said, Seif Mohamed and Omary Simba herein featured as the 1st, 2nd, 3rd, 4th and 5th appellants respectively, are to be released forthwith from prisons unless otherwise lawfully held therein.

It is so ordered.

DATED at **DAR ES SALAAM** this **12th day of August, 2021.**

M. J. CHABA,

JUDGE

12/ 08/2021

COURT: Judgement is delivered under my hand and Seal of the Court in Chambers this 12th day of August, 2021 in the presence of the appellants who appeared in persons, unrepresented and Mr. Ramadhani Kalinga, learned State Attorney represents the Respondent Republic.

M. J. CHABA

JUDGE

12/08/2021

Rights of the parties have been explained.

M. J. CHABA

JUDGE

12/08/2021