

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF TANGA**  
**(AT TANGA)**

**CRIMINAL APPEAL No. 68 OF 2020**

*(Originating from the District Court of Muheza at Muheza in  
Criminal Case No. 126 of 2019)*

**1. RASHID SUFIAN @ MTUNGUJA**  
**2. SOPHIA RASHID @ ABDALLAH** } ----- **APPELLANTS**

**Versus**

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

**JUDGMENT**

29.11. 2021 & 06.12.2021

**F. H. Mtulya, J.:**

An incident happened at around 11:00 hours on the 7<sup>th</sup> day of November 2019 at Ms. Asha Ally Msonge's (PW3) residence located at Gonja-Shambangeda village within Muheza District in Tanga Region. The incident is related to house-breaking and stealing of money at the tune of Tanzanian Shillings Eleven Million (11,000,000/=Tshs) (the money). In the house, PW3 found a hat commonly known as a *kepu* written *Simba Mnyama* whose owner was unknown to PW3.

However, upon inquiry from neighbours and friends, it was alleged that the hat belonged to the wife of Mr. Rashid Sufian @ Mtunguja (the first appellant), Ms. Khadija Karimu Abdallah, the

second accused person in the trial court, but was acquitted under section 235 of the **Criminal Procedure Act** [Cap. 20 R. E. 2019] (the Act). Following the incident, the first appellant, Sophia Rashid @ Abdallah (the second appellant) and Ms. Hadija Karimu Abdallah were arrested and charged at the **District Court of Muheza at Muheza** (the district court) in **Criminal Case No. 126 of 2019** (the case).

The three (3) named persons were accused of three (3) counts, *viz*: first, conspiracy to commit an offence contrary to section 384 of the **Penal Code** [Cap. 16 R.E 2002] (the Code) and it was alleged that the first and second appellants together with Ms. Hadija Karimu Abdallah on the 7<sup>th</sup> day of November 2019 around 11:00 hours at Gonja-Shambangeda village within Muheza District in Tanga Region, wilfully and unlawfully conspired to commit the offence of stealing the money; second, housebreaking contrary to section 294 (1) (a) (b) and stealing contrary to section 258 & 265 of the Code and it was alleged that the first appellant on the 7<sup>th</sup> day of November 2019 around 11:00 hours at Gonja-Shambangeda village within Muheza District in Tanga Region, unlawfully did break the dwelling house and entered with intent to commit an offence of stealing; and finally, stealing contrary to section 258 & 265 of the Code and it was alleged that the first and second appellants together with

Ms. Hadija Karimu Abdallah 7<sup>th</sup> day of November 2019 around 11:00 hours at Gonja-Shambangeda village within Muheza District in Tanga Region, unlawfully stole the money.

In a judgment that was handed down by the district court on the 21<sup>st</sup> day of July 2020 following a full trial, the first and second appellants were convicted with the offences of housebreaking and stealing and were acquitted on the offence of conspiracy. The first appellant was sentenced to serve 5 years imprisonment with regard to the first count and 5 years imprisonment with regard to the third count. The second appellant was sentenced to serve three (3) years imprisonment for the third count. The decision of the district court aggrieved the appellants hence protesting it in this court. In this court, the appellants filed a total of seven (7) grounds of appeal which are premised on the following grievances, in brief, namely, that:

- 1. the district court erred in law and fact in convicting the first appellant relying on the confession statement which was not tendered before the district court as exhibit;*
- 2. the district court erred in law and fact in failing to see the necessity of the prosecution to summon the person who identified the owner of the hat;*
- 3. the district court erred in law and fact in failing to realize that there was no eye witness;*

- 4. the district court erred in law and fact in failing to consider that PW3 did not disclose how and where she got the large amount of money;*
- 5. the district court erred in law and fact in failing to notice that there was no scintilla evidence which implicated the second appellant;*
- 6. the district court failed to notice contradictions in the names of the first appellant; and*
- 7. the prosecution did not prove its case beyond reasonable doubt.*

The appeal was scheduled for oral hearing on the 4<sup>th</sup> day of October 2021, but the parties agreed to argue the appeal by way of written submissions. The appellants in their written submission briefly faulted the district court for convicting them without the case being proved beyond reasonable doubt. In substantiating their submission, the appellants stated that police officer Salimu (PW5) alleged that the first appellant confessed commission of the offence, but declined to tender the confession statement to support his allegation. To the opinion of the appellants, the confession statement is important document as it is the only link between the first appellant and the offence, and similarly, a *nexus* between the first and second appellant.

The appellants submitted further that there were contradictions on words written in the hat which was found in the room of PW3 as to whether *Simba Mnyama* or *Arabic* as from the testimonies of PW3 and PW4. To the appellants' submission, the issue is important and cannot be resolved by the court as the hat was not tendered as exhibit at the district court.

The submission of the appellants received support from the respondent who submitted that the whole saga was based on circumstantial evidence, but principles regulating circumstantial evidence were not adhered to. According to Ms. Regina Kayuni, learned State Attorney, who drafted the written submission for the respondent, the case was full of contradictions on words written in a crucial piece of evidence of hat and in any case neither the hat nor the confession statement was tendered in the district court.

To her opinion, Ms. Kayuni, thinks that the evidences on record are not enough to render conviction to the appellants as they do not irresistibly point to the appellants' guilty in exclusion of any other person as per precedents in **Sikujua Idd v. Republic**, Criminal Appeal No. 484 of 2019 and **Shaban Mpunzu @ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002. Finally, Ms. Kayuni cited the statement in the precedent in **Sikujua Idd v. Republic** (supra) contending that the Court of

Appeal on several occasions restated that in a criminal case based purely on circumstantial evidence, the evidence must irresistibly point to the accused's guilt and exclude any other person.

I have perused the proceedings of this case as well as submissions produced by parties and noted that the parties are in agreement that there was no any eye witness testified during the hearing of the case at the district court in the case. The appellants' conviction was solely based on circumstantial evidence as displayed at page 14, 15 and 16 of the judgment, where the district court heavily relied on the presence of the hat which was found at the scene of crime and that the first appellant allegedly confessed commission of the crime. It is unfortunate that neither the hat nor confession statement was tendered as evidence during the trial.

I entirely agree with Ms. Kayani that the evidence leading to the guilt of the appellants was entirely circumstantial. I therefore think it is appropriate here to recapitulate briefly the law on circumstantial evidence. Simply to say that for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (see: **Simon Musoke v. Republic** (1958) EA. 715; **Ndalahwa Shilanga & Another v. Republic**, Criminal Appeal No 247 of 2008; **Sikujua Idd v. Republic** (supra); and

**Shaban Mpunzu @ Elisha Mpunzu v. Republic** (supra). The Court of Appeal in the case of **Ndalahwa Shilanga & Another v. Republic** (supra), has established three (3) tests to be looked unto to ground a conviction on circumstantial evidence, viz:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*
- (iii) the circumstances taken cumulatively, should form a chain, so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.*

In arriving at its decision, the district court had the usual holding and reasoning of the decision in the case as displayed at page 15 of the judgment:

*...as to the evidence above, there is no doubt that the first accused did break and enter in the dwelling house of the victim. The cap which was worn by the first accused being found in the room of the victim automatically establishes that the first accused person*

*did break and enter in the said room no way the cap could reach in the room without him being therein.*

However, the reasoning of the district court to render conviction to the appellants is what is protested in the present appeal and according to the appellants, the alleged hat was never tendered during the hearing of the case to authenticate veracity of the testimonies of prosecution witnesses on whether the hat was printed in Swahili words *Simba Mnyama* or *Arabic* words.

In my considered opinion, the complaint registered by the appellant is genuine. The cited text found in the judgment is obvious that the conviction emanated from the presence of the hat in PW3's room, which is allegedly belonged to the first appellant's wife. Looking at that facts and evidences produced at the district court and reasoning of the district court, it is evident that it does not pass the tests established by our superior court, the Court of Appeal in the previous cited precedents. In my opinion this evidence did not make a conclusion that within all human probability, the crime was committed by the first appellant and no one else.

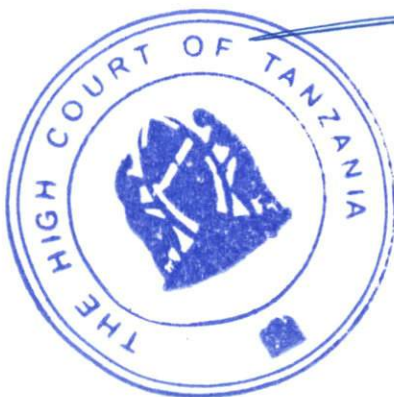
With regard to the second appellant, according to the judgment by the district court, she was arrested and

subsequently convicted basing on a confession made by the first appellant at the police post. The confession in which the appellants are complaining that it was never brought to the court to test its authenticity. However, the district court found her guilty of stealing contrary to section 258 & 259 of the Code and reasoned, at page 17 of the judgment, that: *the third accused person was arrested as co-accused after being mentioned by the second accused person*. That reasoning without evidence of the confession statement of the first appellant in the record, cannot be substantiated.

I therefore find this appeal to have merit. In the result, I allow the appeal, quash the conviction and set aside the sentence imposed on the appellants. I further order an immediate release of the first appellant from prison custody unless he is otherwise lawfully held. The second appellant, who is currently serving a non-custodial sentence is also released from the same according to the laws regulating non-custodial sentences.

Ordered accordingly.

Right of appeal explained



F. H. Mtulya

**Judge**

06.12.2021

This judgment is delivered in Chambers under the seal of this court in the presence of the appellants, Mr. Rashid Sufian @ Mtunguja and Ms. Sophia Rashid @ Abdallah and in the presence of the learned State Attorney, Ms. Elizabeth Muhangwa for the Respondent.



  
F. H. Mtulya  
**Judge**  
06.12.2021