

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 133 OF 2021

MAN'GERA HASSAN MWITA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

*(Originating from the judgment of the District Court of Mkuranga in
Criminal Case No. 62 of 2020)*

JUDGMENT

Date of last order: 13/10/2021

Date of judgment: 15/12/2021

LALTAIKA, J.

The appellant, **MANG'ERA HASSAN MWITA** and another were charged before the District Court of Mkuranga with the offence of theft contrary to section 258 (1) and 265 of the Penal Code, Cap. 16 R.E.2019. The particulars of the charge were to the effect that, on the 17th, 18th and 19th January 2020 at Mwanambaya village within Mkuranga District in the Coast Region, the appellant and that other person did steal one excavator machine valued at 75,000 the property of Leah William Samike.

Subsequent to the said allegation, a court trial was conducted. The prosecution side paraded five witnesses and fronted a handful of exhibits,

all in the quest to prove the case beyond any reasonable doubt as the law requires. Needless to say, that the appellant was found guilty, convicted and sentenced to seven years' imprisonment. The co-accused, hitherto referred to as the other person was acquitted.

Aggrieved by both conviction and sentence, the appellant has approached this court in its appellate jurisdiction challenging both the sentence and conviction. Initially the appellant had put forward a total of eight grounds of appeal. With leave of this court, he later on filed two supplementary grounds. The grounds of appeal are summarized as hereunder;

1. That, the learned trial Resident Magistrate grossly erred in law and fact by convicting the appellant for the offence of theft whereas there was no relevant evidence given by the PW1 to establish the alleged offence against the appellant.
2. That, the learned trial Resident Magistrate grossly erred in law by holding on the evidence of PW1 who failed to summon Mkosamali who handed over the said excavator.
3. That, the learned trial Resident Magistrate erred in holding on the mere allegation that he communicated with PW1 through a mobile phone.
4. That, the learned trial Resident Magistrate grossly erred in law and fact in convicting the appellant for the offence which was poorly investigated.
5. That, the learned trial Resident Magistrate erred in law and fact in convicting the appellant without considering the defence of Alibi.
6. That, the learned trial Resident Magistrate erred in law and fact in convicting the appellant on circumstantial evidence.

7. That, the learned trial Resident Magistrate erred in convicting the appellant basing on grave suspicion
8. That, the learned trial Resident Magistrate erred in law and fact for failure to observe that the prosecution case was not proved beyond reasonable.

The supplementary grounds of appeal are paraphrased below;

1. That the learned trial Magistrate erred in law by holding on the sales agreement (Exhibit P1) which was unprocedural (sic!) admitted (sic!) on evidence.
2. That, the learned trial Magistrate erred in holding on the contradictory testimonies of PW1 and PW5.

When this matter was called for hearing the appellant appeared in person whereas Ms. Gladness Mchami learned State Attorney appeared for the respondent Republic. The appellant opted to argue on grounds one, seven and ground one of the additional grounds of appeal simultaneously. Granted, he stated that the evidence adduced during the trial is fettered with uncertainty and contradictions on the actual time upon which the excavator machine was stolen. He explained that PW1's story is contradictory where in different occasions she stated the excavator machine was stolen. Referring to page 12 of the court proceedings he maintained that PW1 testified that the said excavator was stolen on 17th, 18th and 19th of January 2020.

The appellant drew the attention of the court to page 13 of the typed proceedings indicating that PW1 had testified that the excavator was stolen on the 5th of July 2020. Basing on such contradictions, the appellant is of the opinion that the contradictions on PW1's testimony renders her

evidence unreliable. The appellant opines further both the evidence adduced by PW1 and PW2 fall short of connecting the appellant with the offence as he was absent from the scene.

With regards to exhibits, the appellant contended that Exhibit P1 was improperly admitted and regarded as part of the evidence in the case since the contents of the same were never read out loud in court to allow the appellant to prepare his defence accordingly. Having thus contended, the appellant prayed that such evidence be expunged from court records. To buttress his argument, the appellant cited the case of **Sumni Amna Awenda vs R, Criminal Appeal No.393 of 2012, CAT.**

Moving on to the second ground of appeal, the appellant based his arguments on Section 110 of the Tanzania Evidence Act 1967. Referring specifically to the cited section, the appellant averred that the prosecution team ought to have summoned one Felix Mkosamali whom PW1 had testified to have handled over the stolen excavator to. The appellant expounded that had the Mkosamali been summoned, he could have assisted the court in connecting the material facts. Such failure to summon the said witness, the appellant asserted further, invites the court to draw an adverse inference towards the prosecution. In support of his submission the appellant cited the case of **Aziz Abdallah vs Republic (1991) T.L.R. 71 (CA)**

With regards to ground three and ground two of the additional grounds of appeal (argued simultaneous), the appellant submitted that the prosecution had failed to discharge its duty of proving the allegation beyond reasonable doubt. The appellant went on to substantiate his assertion thus, in his considered view, the testimonies of PW1 and PW5

differed on the number of the cell phone used by the appellant to communicate with PW1. The appellant averred that whereas it is evident on court record that PW1 mentioned the appellant's number 0717 459 165, PW5 had stated that the appellant's number was a different airtel number. To this end, the appellant opines that such imaginary communication was fraudulently planted to make the appellant appear guilty.

Arguing on ground four, the appellant faulted the evidence of PW3 and PW5 as mere allegations. He asserted that there was no any proof that the appellant had sold the stolen spare parts to Furjian Industry. He added that the evidence of DW2 was equally unclear as the appellant was also among the people taken to the scene of the crime. Expounding on this point, the appellant asserted that upon receiving the information from DW2 on the alleged crime, PW3 and PW5 did not make any investigation. Making inference to such inadequacy, the appellant faulted the trial court for finding that the prosecution had proved the case beyond reasonable doubt.

Finally, on grounds six and eight, the appellant submitted that the circumstantial chain of evidence was not clearly established to support his conviction. To substantiate the assertion, the appellant opined that there was discrepancy on the testimony of PW1 reporting the matter to PW2 in total contrast to what it is reflected on particulars of the offence described in the charge sheet. The appellant went on to assert that as per the court record, PW1 and PW5 had stated that the excavator was found dismantled but the alleged dismantled parts were not tendered before the court. In conclusion the appellant prayed for this court to allow the appeal.

Time was ripe for counsel for the republic to respond to the arguments raised by the appellant. Ms. Mchami, learned State Attorney, started off by announcing that she was in total support of the appeal. However, instead of taking a longer route of addressing each point raised by the appellant, the learned State Attorney chose to focus on two issues that centre on connectivity of evidence and proof of the case beyond reasonable doubt.

On connectivity of evidence, Ms. Mchami submitted that the evidence linking the appellant with the offence was merely circumstantial. Ms. Mchami asserted further that upon perusal of the proceedings, it came to her knowledge that the prosecution witnesses had left too many gaps in their testimonies making it cumbersome to link up the appellant with the offence. Ms. Mchami went on to submit that PW1 had testified on his involvement with the excavator including handing it over but failed to explain to whom the said machine was passed to.

Ms. Mchami opined that, as a result of such inadequacy, the evidence adduced does not irresistibly point to the guilt of the accused. To buttress her argument, Ms. Mchami cited the case of **Shabani Mpunzu Elisha vs Republic, Crim Appeal No.12 of 2012** specifically at page 7.

On the duty of the prosecution to prove the case beyond reasonable doubt, Ms. Mchami is in agreement with the appellant that the same was not achieved. The learned State Attorney averred that PW1 named one person called Felix Mkosamali whom he stated, was present when he (PW1) handed over the said excavator to PW3. Ms. Mchami is in agreement with the appellant further that the Mkosamali was supposed

to be summoned and appear before the court to testify whether or not the machine that had been stolen was actually in a good condition prior to the incidence.

On gaps that have been left out by the prosecution witnesses, Ms. Mchami explained that upon perusal of the court record, she learnt that PW4 had testified in the trial court that some people informed him that the excavator was removed from its place. However, the learned State Attorney contended, he (PW4) did not mention who those people. Expounding on this particular argument, the learned State Attorney states that although it was repeatedly stated that the said excavator was at the appellant's place, the evidence at the trial court does not reveal who took it there. In the final analysis Ms. Mchami is of the view that the prosecution has not been able to prove the case beyond reasonable doubt. To this end, she prays that the appeal be allowed and the appellant be acquitted.

I have given due consideration to submissions by both parties. I take the liberty to confine my analysis to the aspect of circumstantial evidence. I have chosen to do so because both parties have spent so much time (and energy) trying to convince this court that since the conviction was centred on circumstantial evidence, the appeal should be allowed. I wish to state that both circumstantial and direct evidence invite the court to assess their evidential value.

Whereas in direct evidence the reasoning is direct circumstantial evidence requires an altogether different reasoning centred in avoidance of any temptation to jump into a conclusion. Instead of treating circumstantial evidence as falling into a larger box of rejection in criminal

trials, efforts must be exerted in connecting the dots and filling in the gaps required for proving a case beyond reasonable doubts. To state the obvious, complexities of criminal law does not always provide the prosecution with a smooth meetup with direct evidence. Such dots or others would call links must be so connected or linked up to the extent that the prosecution case is proven beyond reasonable doubt. This was articulated in the case of **Sikujua Idd vs Republic, Criminal Appeal No.484 of 2019, [2021] TZCA 427**, www.Tanzlii.org where the court held that:

"Where the prosecution case relies on circumstantial evidence, proof of oral confession is only one of several links in the chain of circumstantial evidence requiring proof beyond reasonable doubt. It cannot stand alone to sustain a conviction".

In the matter at hand, however, it goes without saying that the links remain too disjointed to enable the prosecution case meet the legal requirement of proof beyond reasonable doubt.

All said and done, I find this ground of appeal sufficient to dispose of this matter on merit. I allow this appeal in its entirety. I quash the conviction and set aside the sentence of 30 years' imprisonment. The appellant is to be released from prison immediately unless otherwise lawfully held.



E.I. LALTAIKA, JUDGE
JUDGE

E.I. Laltaika

15/12/2021