THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA
CRIMINAL APPEAL NO. 124 OF 2021
(Originating from Criminal Case No. 185 of 2018 at the Resident Magistrate Court of Mbeya at Mbeya)

ASAJILE JUMA MWANDIGA............................APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

6th & 27th June 2022

KARAYEMAHA, J

The appellant, namely, Asajile Juma Mwandiga, was charged and convicted along with Nicolous Charles Sinka and Musa Edson Mswima (the 2nd and 3rd accused persons) who are not part of this appeal for the offence of Stealing Goods in Transit contrary to **section 258, 265 and 269(c) of the Penal Code, Cap 16 RE 2019**.

The allegation, as gathered from the charge sheet is that, on 05/10/2018 at Mlima Iwambi area along Mbeya Tunduma road in the District and Region of Mbeya the appellant and co – accused persons jointly and together did steal shoes worth Tshs. 850,000/= the property

of Yona Serania Nyambo from the motor vehicle with registration number T. 849 AUL make FUSO.

The appellant pleaded not guilty as was to the 2nd and 3rd accused persons to the charge leveled against them. That event led to a full trial whereupon ten (10) witnesses testified for the prosecution. They were: Eusebius Mwalongo (PW1), ASP Boniface Venant Luambano (PW2), Yona Serania Nyambo (PW3), E6619 D/SGT Gilbert (PW4), Andrew John Mwambeje (PW5), E 6098 DCPL Damas (PW6) and F8695 D/CPL Gervas (PW7). In addition 5 exhibits were tendered and admitted in evidence respectively. They are certificate of seizure, gum boots, and cautioned statements.

The brief facts of the case are that in the morning of 04/10/2018 while driving a lorry make Fusso and coming from Kamsamba to Mbeya, **PW1 (Eusebuis Mwalongo)** was carrying sacks of paddy and three parcels of gumboot at the back of the said motor vehicle. The gumboots were the properties of one **Yona Sefania Nyambo (PW3)** whom they had agreed that PW3 would pay PW1 Tshs. 20,000/- for transporting his parcels. PW1 said one of the parcels was stolen at the Mlima Iwambi by a group of about five people who climbed on top of the said motor vehicle. The said gumboots were found later on 10/10/2018 following

the complaint filed at the police by another person who was hijacked at Igawilo area. The said complainant informed the police that his propertied were about to be sold by the suspect. The police followed the lead which ended to the house of the appellant. It was during the search that the gumboots were found. The certificate of seizure was admitted without objection as **exhibit P1.** PW2 further tendered 57 pairs of different coloured gumboots which were admitted without objection as **exhibit P2.** It was the appellant mentioned the 2nd and 3rd accused persons as his accomplice the event that led to their arrest.

In their defence, the appellant vigorously disassociated himself with the offence. He, however, generally denied to have been involved on the crime and that he did not know when the crime was committed. He focused much on how he was arrested and denied. He also denied being found with any stolen goods and challenged the evidence of PW5 that it was him who said the gumboots were found in his house. He, however, admitted to have his house searched by the police assisted by PW5 the chairman who signed on exhibit P1.

After hearing the evidence from both sides, the trial court found that prosecution managed to prove the case beyond reasonable doubt on the account that the appellant admitted the offence and convicted

him. Consequently, the appellant was sentenced to serve a jail term of five (5) years.

Utterly dissatisfied with the decision that convicted and sentenced him, the appellant took an appeal to this Court. He has raised eleven (11) grounds of appeal. However, on keenly looking at them they mean only six grounds and will be referred to as grounds one to six. The six grounds are paraphrased as follows, that **one,** the prosecution case was not proved beyond reasonable doubt. **Two,** his cautioned statement was admitted in evidence without conducting trial within trial. **Three,** the appellant was convicted relying on the evidence of search while no search warrant (receipt) was tendered in court. **Four,** the appellant's defence evidence was not considered. **Five**, the appellant's cautioned statement was recorded by PW7 a police officer of detective constable rank whereas the PGO requires the police officer with a rank of Corporal and above to record the same. **Six**, the appellant was not reminded charge before he was called upon to enter his defence.

The appellant prosecuted the appeal in person whereas the respondent was represented by Mr. Davius Msanga, learned state Attorney.

On being invited to expound his grounds of appeal, the appellant prayed for his grounds to be considered by the court and opted to let Mr. Msanga to respond first while reserving his right to rejoin later, if need arose.

Mr. Msanga's submission began by making his position clear that he was in support of the trial court's decision that convicted and sentenced the appellant.

Responding to the first ground that the prosecution failed to prove the case beyond reasonable doubt, Mr. Msanga said that the case was proved beyond reasonable doubt because the stolen goods were found in the appellant's house after the police had conducted the search. After explaining how they landed in his hands, he took the police officers to his companions, he said. Mr. Msanga submitted adding that goods recently stolen were found in his house and had no explanation. He argued further that goods were stolen during the night by unknown people who on their arrest explained how they participated. According to Mr. Msanga, the appellant and his colleagues had common intention. In his endeavour to elucidate on his point, Mr. Msangi cited the case of **Hassan Twaha @ Ramadani vs. Republic,** Criminal Appeal No. 290 of 2017. The learned State Attorney submitted further that the appellant

explained clearly how he committed the offence in his confession hence a best witness. To illustrate his position he cited the case of **Msafiri Jumanne & 2 others vs. Republic,** Criminal Appeal No. 187 of 2006.

On the issue of identification Mr. Davis responded that PW1 testified that he did not identify thieves at the scene but they were four. I agree with him that PW1 did not identify any body at the scene. Under these circumstances identification parade was useless. This complaint is misconceived as rightly observed by Mr. Msanga.

Responding to the complaint that there was no proof that exhibit P2 belonged to PW3 for failure to produce receipts, Mr. Msanga said that PW1 who parked the gumboots in the car properly identified them and PW3 identified them to be his. I agree with him because there is no dispute that it was not PW3 who handed the stolen goods to PW1 at Kamsamba to transport them to Mbeya. I have no reason to doubt PW1 that it was that goods which was stolen when he was ascending Iwambi mountain. Therefore, non-tendering of receipts or documents to prove ownership does not mean that the goods were not identified by the owner under the circumstances of this case. More-so, I don't see any prejudice in this.

Responding on the issue that the trial court relied on the evidence of PW1 while they were two, Ms. Msanga admitted that there were two people in the car but since no bandit was identified; the prosecution relied on PW1 only. On none calling the other person who was with PW1, Ms. Msanga responded that **section 143 of the Evidence Act, Cap 6 RE 2019** gives no particular number of witnesses to prove a fact. I agree with Mr. Msanga and dismiss this complaint because PW1 elaborated clearly that he simply saw people on top of his car who stole the goods but did not identify any.

I have dispassionately gone through the evidence on record. Surely, exhibit P2, the stolen goods, were found in possession of the Appellant was not identified or found at the crime scene as per the testimony of PW1. Therefore, as per the testimonies of PW2 and PW4, it follows that the appellant herein was arrested and prosecuted after he was found possessing exhibit P2 and mentioning his companions. However, as proceedings and the evidence would show, there is the cautioned statements of both the 2nd and 3rd accused persons which were admitted in court after an inquiry was conducted i.e., **exhibit P3 and P4** respectively. The same pieces of evidence were used by the trial court to form basis of conviction of the Appellant. In going through

the above two exhibits, it is firstly noted that in-fact the actual stealing was done by them and there after they called the appellant to go and collect them from Iwambi where the theft occurred. The 2nd and 3rd accused persons admitted to have stolen the gumboots and sell them to the appellant at the price of Tshs. 350,000/=. They similarly admitted in their cautioned statements that they stole from FUSO the fact that is corroborated by the evidence of PW1.

Again, going through the appellant's defence, he generally denied to have been involved on the crime and that he did not know when the crime was committed. He denied being found with any stolen goods and challenged the evidence of PW5 that it was him who said the gumboots were found in his house. He however admitted to have his house searched by the police assisted by PW5 the chairman who signed on exhibit P1. In reading his own confession through his cautioned statement and in considering the testimonies of prosecution witnesses particularly PW1 and PW3, like the trial court, I also find that prosecution case has not been shaken. More so, the appellant had knowledge that exhibit P2 was a stolen property. He, however, carried it from Mwanafyale area to his house. In view of the evidence on record, i

find and hold that the prosecution proved its case beyond reasonable doubt as required by the law.

As regards the second ground that his cautioned statement was admitted in evidence without conducting trial within trial, Mr. Davis responded that before it was admitted, a trial within trial was conducted. I have closely examined the proceedings. The appellant was represented by Mr. Maurice Seleman Mwamwenda, learned advocate. When PW7 prayed to tender the appellant's cautioned statement, he objected. The trial court then conducted a trial within trial as reflected at page 93 through 103. This complaint is misconceived as correctly submitted by Mr. Msanga.

With respect to the complaint appearing in ground three, that the appellant was convicted relying on the evidence of search while no search warrant (receipt) was tendered in court, Mr. Msanga submitted that goods were found in his home stead and that there was no dispute. I have dispassionately considered Mr. Msanga's argument. Surely, there was no search warrant tendered. In view of PW2's evidence, it is crystal clear that the search was not emergence because after being tipped, he informed by the PW3 that his goods were kept at Nzovwe, he connected him (PW3) with police officers. Later he went and searched the

appellant's house. Therefore, the search contravened section 38 (1) of the Criminal Procedure Act, [Cap 20 R.E 2019] (the CPA). Briefly, what section 38 (1) of the CPA entails is that it is the police officer in charge of a police station who search or issue a written authority to police to search the premises but it is only when he is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property. The trite law is that no search should be conducted without there being a search warrant. Nevertheless, there are exceptions to this general rule. The exceptions were developed by the Court of Appeal in the case of **Jamali Msombe and Nicholaus Bilali Muyovela,** Criminal Appeal No. 28 of 2020 (unreported). In view of that case when the search is conducted in the appellant's presence and he admits that goods or properties were taken from his house/room the procedural flaw is not fatal. Notwithstanding the said ailment, the question I have asked myself is whether, under the circumstances of the present case, the omission was fatal and that the conviction cannot be sustained despite the omission. Having carefully examined the evidence on record, I am of the considered view that under the circumstances of this case the fact that the appellant's house was searched without search warrant cannot vitiate the conviction.

I am pushed to that conclusion by a reason that, the search was conducted in the appellant's presence in his house. PW5 the independent witness was also present. Besides, the appellant admitted through exhibit P4 that exhibit P2 (stolen gumboots) was retrieved from his house and explained how it got in there. More so, the after the certificate of seizure (exhibit P1) was prepared he signed on it as a person who was searched. Above all exhibit P1 was admitted in evidence without any objection. In consideration of the above, I am settled that such procedural flaw is rendered irrelevant when it is not disputed that by the appellant that exhibit P2 was taken from his house. His confession recorded in exhibit P5 which was ruled out by the trial Magistrate in his ruling that it was voluntarily made, makes him the best witness. I am abreast of the position of law under section 3 (1) (a), (b) and (c) of the Law of Evidence Act [Cap. 6 R.E. 2019] which guide that, in criminal cases, confession to a crime may be oral, written, by conduct, and or a combination of all these or some of these. The prosecution's lone duty is to prove that there were confessions made and the same was made freely and voluntarily. I have no doubt in my mind to hold that the appellant was free when confessing and the cautioned statement was voluntarily made. In fact, I respectfully borrow the words of wisdom by Rutakangwa JA (as he then was) in **Mohamed Haruna**

Mtupeni & another vs. Republic, Criminal Appeal 259 of 2007 (Unreported (CAT – Tabora).

> *"... the very best witness in any criminal trial is an accused person who freely confesses his guilt."*

Going through his defence it cannot be said that the appellant generally denied having his house not searched. He also simply stated that it was PW5 who told him that his house was searched and exhibit P2 retrieved. This defence has not outweighed what his confession and the testimonies of the prosecution witnesses. Therefore, what I have considered above has not been shaken by his defence. For the above reasons I also find the three ground of appeal baseless and dismiss it.

Ground four raises the issue of failure to consider the defence evidence. This issue should not detain me much. I have read the trial court's judgment and noted that the defence evidence was summarized at page 11 of the typed judgment. It is further reflected from the same judgment, that the trial magistrate analysed the defence case and evaluated the evidence before reaching to the conclusion. In this I defer with Mr. Msanga who, with due respect, seemed unprepared. After weighing the defence evidence against the prosecution evidence, he concluded that the same had no spine to disturb the central story of the

prosecution case. In the event, I find no substance in the complaint hence nothing faulty in the trial court's judgment. The unmerited ground is rejected.

In ground five, the appellant complains against PW7 a police officer of detective constable rank recording his cautioned statement while the PGO requires the police officer with a rank of Corporal and above to record the same. Mr. Msanga submitted that the ground was unfounded because PW7 (Gervas) was a police officer with a rank of corporal. I have also read the typed proceedings at page 88. PW7 introduced himself as F.8695 D/CPL Gervas a police officer working in the Criminal Investigation Department. With this result, I find this ground unmerited too and dismiss it.

Responding to ground six, which raised the complaint that the appellant was not reminded charge before he was called upon to enter his defence, Mr. Msanga responded that first it is not a requirement of the law. Secondly, the charge was read over to him at the commencement of the trial during Preliminary hearing. He held the view that being represented by an advocate he is deemed to have understood the charge and defended himself properly on the charge. I have no hesitation to go along with Mr. Msanga. As much as I agree with the

appellant that the charge was not read over to him prior defending himself, there is no such requirement. However, the appellant spectacularly defended himself on the charge laid on his door. There is nothing showing that when he was led by his learned advocate get outside the scope of the charge sheet. In my view therefore, where the appellant defends himself properly on the ingredients of the charge, I cannot invite any idea of vitiating the trial merely because the charge was not read over at the defence stage. The appellant had to show the degree of prejudice and that miscarriage of justice occasioned in failing to read the charge sheet at that stage. This ground is also without merit and it is dismissed.

In the circumstances, I hereby dismiss the unmerited entire appeal and uphold the trial court's conviction and the sentence passed of five (5) years imprisonment.

Appeal dismissed.

DATED at **MBEYA** this **27th** day of **June, 2022**

J. M. KARAYEMAHA
JUDGE