

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

HIGH COURT CRIMINAL APPEAL NO. 101 OF 2021

(Originating from Criminal Case No. 44 of 2020 in the District Court of Momba at Chapa)

WESTON MWAMANGA-----APPELLANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGEMENT

Date of last order: 24.04.2022

Date of Decision: 13.05.2022

Ebrahim, J.:

Initially, the appellant herein was charged with two counts of stealing contrary to **section 258 (1)(2) and 265 of the Penal Code, Cap 16 RE 2019**; and **negligence c/s 383 and 35 of the Penal Code, Cap 16 RE 2019**. It was alleged by prosecution side that the appellant had on 4th day of October, 2019 at night time at Chapwa area within Momba District at Songwe stole a motor vehicle starter with registration no. T.639 DPZ make scania valued at Tshs. 1,000,000/- which was under the custody of one Silaji Kuziwa. In the

alternative charge of negligence, it was said that the appellant being a watchman failed to use all reasonable means to prevent the stealing of the said starter.

After hearing the evidence from both sides, the trial court sentenced the appellant to five years imprisonment.

Aggrieved, the appellant has come to this court raising six grounds of appeal complaining about evaluation of evidence, none consideration of defence, weak prosecution evidence and that evidence does not support the offence. In essence, he is complaining that prosecution case was not proved to the hilt.

When the case was called for hearing, the appellant appeared in person, unrepresented. The respondent was represented by Mr. Baraka Mgaya, the learned State Attorney.

The appellant prayed to adopt his grounds of appeal and for the court to consider them with nothing else to add, understandably so.

Mr. Baraka hastened to support the appeal on the point of law under the provisions of **section 258(1) and (2) (a) of the Penal Code, Cap 16 RE 2019** under which the appellant was charged with. He

explained that in terms of the above cited law, one of the ingredients of the offence is to prove an intent of permanent deprivation of the property from the owner. He said therefore that in order to prove the offence, proof of ownership is paramount, the aspect missing in the instant case. He submitted that while the offence shows the stolen car starter was the property of one Siraji Luziwa, the said person was not called to adduce evidence and prove ownership. More so, no reason was assigned for the absence of the said owner. He was therefore of the views that in the absence of proof of ownership, the offence of theft was not proved and equally the same the second charge was also not proved.

Appellant had nothing to re-join.

Section 258 (1) and (2)(a) of the Penal Code, Cap 16 RE 2019 reads as follows:

*"258.-(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or **special owner** thereof anything capable of being stolen, steals that thing. (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is*

to say– (a) an intent permanently to deprive the general or special owner of the thing of it;

(b) NA

(c) NA

(d) NA; or

(e) ... and "**special owner**" means any person who has lawful possession or custody of, or any proprietary interest in, the thing in question." (**Emphasis is added**).

Indeed, it is correct that in order to prove deprivation, there has to be proof of ownership of the person who was in lawful possession of the property, or custodian or a person with proprietary interest.

The alleged stolen property is said to be under the custody of one Silaji who recorded his statement at the police. Records of the proceedings show that PW5 recorded his statement. This means, the said Silaji was available and he was a crucial witness to prove deprivation. However he was not called to adduce evidence and no reason for his absence was availed to the court.

It is trite principle that failure to bring important witness invites the court to draw adverse inference as to the evidence of the said important witness would have proven another adverse scenario. I

subscribe to the position of the Court of Appeal held in the case of **Samwel Joseph Kubaya V R**, Criminal Appeal No. 40 of 2017 pg 14-15 on failure to bring important witness and draw adverse inference that may be there is more than meet the eye!

Again, in going through the evidence adduced by prosecution witnesses, particularly PW1 and PW2, I find it to be contradictory on the reason that PW1 said he received a phone call in the morning hours of 04.10.2019 that Daniel Anyosisye left the work area without handing over the shift and that he traced the whereabouts of Daniel to no avail. Then he was informed a starter of the motor vehicle has been stolen. PW1 did not say who informed him and according to him it was Daniel Anyosisye who was on duty the night falling the morning of 04.10.2019 when the theft was discovered. However, Daniel Anyosisye said he assume work in the morning of 04.10.2019 and noticed that the starter has been stolen. He said he was inspecting the yard with the watchman who was on duty. The question now comes who exactly was on duty the previous night and according to PW2, the watchman was still around when he took over the shift and they did inspection together. Thus, it is not correct

that the watchman on duty left without handing over the post/shift. Further to that I went through the purported register and noticed that firstly it was a photocopy contrary to the requirement of **section 66 read together with the exceptions provided under section 67 and 68 of the Evidence Act, Cap 6 RE 2019**. Secondly, there are two pages showing the date of 04.10.2019 of which in one page it is blank on the time and signature column pertaining to the appellant and in another page, it is written "**mtoro**". Is it the same book filled on the same day?. The register leaves a lot to be desired? In one page, the particulars pertaining to the second day of 05.10.2019 do not correspond in respect of times filled in by other employees in respect of the same date of 05.10.2019. For example, while in one page it reads one Elick Tosifati signed at 17.30, in another page it reads the same person, on the same date signed at 18.36. Verily, it is not a document that proves the commission of the offence but rather it is contradictory and confusing.

Coming to the evidence of PW5 that he interviewed the appellant and he admitted the offence. As for the testimony that the accused admitted the offence before PW5, the law requires that since he is a

police officer, unless he had tendered the cautioned statement of the accused, the contents of the Appellant's admission would not be orally admitted in court. Once the accused admits the offence before the police, the provisions of **section 57(1) and (2) of the Criminal Procedure Act, Cap 20 RE 2019** requires the said police officer to immediately reduce such admission into writing. **Section 57(1) and (2) of the Criminal Procedure Act, Cap 20 RE 2019** reads as follows:

"57.-(1) A police officer who interviews a person for the purpose of ascertaining whether the person has committed an offence shall, unless it is in all circumstances impracticable to do so, cause the interview to be recorded.

(2) Where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes, during the interview, either orally or in writing, a confession relating to an offence, the police officer shall make, or cause to be made, while the interview is being held or as soon as practicable after the interview is completed, a record in writing,..."

This position has been extensively illustrated by the Court of Appeal in the case of **The DPP V Sharifu Mohamed@ Athumani and 6 Others**, Criminal Appeal No. 74 of 2017 when discussing the similar situation

and cited with approval the case of **Mashaka Pastory Paulo Mahengi@ Uhuru and 5 Others V Republic**, Criminal Appeal No. 49 of 2015 (unreported). That being the position therefore, I accordingly expunge from the record the testimony of PW5 pertaining to the admission of the offence by the appellant.

From the above background, apart from the support of the appeal from the learned State Attorney, still the evidence received raised a lot of reasonable doubt to justify a conviction against the appellant. I therefore hasten to agree that prosecution failed to discharge its duty of proving the case beyond reasonable doubt.

That being said, I accordingly find the appeal is meritorious and I allow it. I further order that the appellant be released from prison forthwith unless otherwise lawfully held.

Accordingly ordered.



A handwritten signature in blue ink, appearing to read 'R.A. Ebrahim', written over a horizontal line.

R.A. Ebrahim

JUDGE

MBEYA

13.05.2022

Date: 13.05.2022.

Coram: Hon. P.A. Scout, Ag -DR.

Appellant: Present.

For the Republic: Ms. Hanarose.

B/C: Gaudensia.

Ms. Hanarose – State Attorney:

Your honour, the case is coming on for Judgment we are ready to proceed.

Appellant: I am ready too.

Court: Judgement is delivered in the presence of the Ms. Hanarose, State Attorney, appellant and C/C in Chamber Court on 13/05/2022.

A.P. Scout

Ag-Deputy Registrar

13/05/2022

Court: Right of appeal explained.



A.P./Scout

Ag-Deputy Registrar

13/05/2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
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