

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA

CRIMINAL APPEAL No. 35 OF 2022

(Originating from Criminal case No. 30 of 2022 of the District Court of Ukerewe at Nansio)

MASHAKA JUMA-----1st APPELLANT

MASALU MISANA-----2nd APPELLANT

MABULA MIPAWA-----3rd APPELLANT

LAZARO DONALD-----4th APPELLANT

VERSUS

THE REPUBLIC-----RESPONDENT

JUDGMENT

Last Order: 11.07.2022

Judgment: 25.07.2022

M.MNYUKWA, J.

The appellants **MASHAKA JUMA, MASALU MISANA, MABULA MIPAWA**, and **LAZARO DONALD** were jointly charged before the District Court of Ukerewe at Nansio for the offence of being found in possession of property suspected to have been stolen c/s 312(a) and (b) of the Penal Code Cap. 16 RE: 2019 (now RE: 2022). The prosecution case was that, on the 23rd day of September 2021 at about 1:00hrs at

Sambi Village in Irungwa Island within Ukerewe District, in Mwanza Region, the appellants were found with the police inspector Jafar S. Mfaume in possession of one boat engine machine make *Suzuki H.P 15 Serial number 2004-510265* July the property which was suspected to have been unlawful acquired.

The appellants denied the charge, so the prosecution called a total of four (4) witnesses, who proved the case against the appellant beyond a reasonable doubt, according to the judgment of the trial court. The accused entered their defence as DW1, DW2, DW3 and DW4 and they did not call any witnesses. At the trial, the accused were accordingly convicted followed by a sentence of three years imprisonment Dissatisfied, both accused has lodged the present appeal before this court appealing against the conviction and the sentence with the following grounds of appeal thus:

- 1. That the trial court erred in law and in fact by refusing to admit a receipt exhibit by the appellants and failed to demonstrate on the reasonable cause for his refusal despite the facts that the said exhibits form the basis of appellants defence case.*
- 2. That the trial court erred in law and in fact by failing to conduct a trial within a trial and make a ruling over the objection by the prosecution side to the admission of a*



receipt exhibit as tendered on the appellants defence case.

- 3. That the trial court erred in law and in fact by failing to recall that the reasons behind the failure by the appellants to bring one Ramadhan Kalemela (the owner of the property in issue) and the manner they got the copy of the purchase receipt while they were in custody was stated by the appellants during the trial reference should be made from the copy of case proceedings.*
- 4. That the trial court erred in law and in fact by failing to name the exhibits (an out-boat engine make Suzuki HP 15 with serial No. 2004-510265) which forms the basis of the case.*
- 5. That the trial court erred in law and in fact by failing to make the order over the above "un unnamed exhibit" (an out-boat engine make Suzuki HP 15 with serial No. 2004-510265) during the final determination of the case.*
- 6. That the trial magistrate erred in law and in fact to impose the excessive sentence as opposed to the gravity and circumstances of the offence.*

When the matter was called for hearing, the appellants appeared in person unrepresented while the respondent, (the Republic) was represented by Sabina Choghogwe, State Attorney. The appellants were



the first to submit and prayed this court to adopt their grounds of appeal and make it part of their submissions.

Replying to appellants' submissions, Ms. Sabina on the spot, supported the appeal for the reasons she gave forth.

On the 1st ground of appeal, she avers that the trial magistrate failed to admit the receipt when the appellants wanted to tender it as an exhibit referring to page 38 of the trial court's proceedings. She went on that, the receipt was denied on the mere reason that the same bears the name of Ramadhani Kalemala. The refusal was done without conducting any inquiry to know the legality of the receipt which would have enable him to state the reasons for the denial. She added that, the Ruling for refusal was delivered at the end of the Judgement. She was of the view that, this denied the appellants the right to know why the receipt was not admitted. She insisted that the trial was not fairly conducted and this ground has merit.

On the 2nd ground of appeal, she avers that the prosecution was duty bound to prove that the appellants were not the owner of the alleged stolen engine as required under section 119 of the Evidence Act, Cap. 6



RE: 2019. She insisted that failure to that, the prosecution case was not proved. Thus, she ends in supporting this ground of appeal.

On the 3rd ground of appeal, she submitted, the trial court erred for failure to recall that, the reasons behind the failure of the appellants to bring one Ramadhan Kalemela (the owner of the property in issue). She averred that, the fact that the appellants were in restraint, it was not proper for the trial court to ignore it and the records did not show if the said owner was summoned and failed to appear.

On the 4th ground of appeal the appellants alleged that, the trial court erred in law and in fact by failing to name the exhibits (an out-boat engine make Suzuki HP 15 with serial No. 2004-510265) which forms the basis of the case. In her submission, Ms. Sabina did not agree with the appellants, referring to page 21 of the trial court's proceedings, she stated that, the same was admitted and marked as exhibit P2. Therefore, she formed the view that this ground is not merited.

On the 5th ground of appeal, the appellants claimed that the trial court erred in law and in fact for failing to make an Order over the above exhibit during the final determination of the case. In this ground, Ms. Sabina avers that, since this is the first appellate court it can step into the



shoes of the trial court and give Orders. And since no other person is claiming ownership of the machine, the same can be given to the appellants.

On the 6th ground of appeal, the appellants challenged the sentence imposed by the trial court as excessive opposed to the gravity and circumstances of the offence. It is the submission of the learned state attorney, Ms. Sabina that, as reflected at page 9 of the judgment, the appellants were properly convicted and sentenced in accordance to the requirement of section 312(1)(a) and (b) of the penal code Cap 16 RE: 2019. She therefore finds this ground to lack merit as she stated that, the sentence imposed to them was proper.

Rejoining, all the appellants reiterated their submissions in chief and prayed this court to set them free.

In determination of this appeal, as submitted for and against the appellants, Ms. Sabina conceded to the appellant's main claims in their petition of appeal regarding trial court's decision which found them guilty and ended up supporting the appeal. To this end, I proceed to go through the parties' submissions and averments to find whether this appeal is merited.

Guided by the long-established principle in criminal justice as reflected under Section 110 and Section 112 of the Evidence Act, Cap.6 [RE: 2019], now [RE: 2022] that, the burden of proof in criminal cases, that the accused committed the offence for which he is charged with, is always on the side of the prosecution and not on the accused person. The same is reflected in **Joseph John Makune v R** [1986] TLR 44 where the Court of Appeal held that:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case, he must prove it on the balance of probabilities..."

The second principle, is that of the standard of proof in criminal cases, has to be beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) held that: -

"Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the



prosecution case and not on the basis of the weakness of his defence."

On the first, second and third grounds of appeal which are intertwined, the appellants claim that, the prosecution case was not proved to the required standard. They claimed that, they were not given a right to know why the receipt was denied and the respondent conceded insisting that, the court failed to hold a fair trial to the appellants. The other grounds as appears on the petition of appeal were argued and conceded by the respondent that, before the trial court, the prosecution case was not proved to hilt.

I agree with the appellant's claims on the 1st, 2nd and 3rd grounds of appeal that were not proved taking into consideration that, the denial by the trial court to admit the receipt without reasons and proper conduct of an inquiry denied the appellants their right to a fair trial.

Besides, the law regulating the procedure for conducting criminal trials speaks very loudly that the rules of procedure are the essence of the fair trial. As referred to in the case of **Misango Shantiel vs Republic**, Criminal Appeal No. 250 of 2007 which referred the case of **Musa Mwaikunda vs R**, Criminal Appeal No. 174 of 2006 the Court cited with approval the case of **Regina V Henley** (2005) NSWCCA126 (a case from



New South Wales Court of Appeal) which quoted **R vs Prosser** (1958) 45 at 48 which set out the minimum standard the trial court has to comply with, to show that the accused was afforded a fair trial. These are:

- 1. to understand the nature of the charge;*
- 2. to plead to the charge and to exercise the right of the challenge;*
- 3. to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged;*
- 4. to follow the course of the proceedings;*
- 5. to understand the substantial effect of any evidence that may be given in support of the prosecution; and*
- 6. to make a defence to the charge.*

It is important for any trial court to observe these standards in conducting the proceedings. Since the appellants wanted to tender an exhibit which was a receipt to prove their innocence, the trial court was duty bound to admit the exhibit and if for any reasons to be stated, and appears on the court records not to admit the same. These were the claims by the appellants which were the same conceded by the respondent that, the prosecution case was not proved beyond doubts. It is at this point, I proceed to rule that, the prosecution case was not proved beyond doubts and in the premise, I find the 1st, 2nd and 3rd grounds of appeal with merit.



As it appears on the court records, I agree with the respondent's findings that there is no fault on the 4th and 6th grounds of appeal as claimed by the appellants for the exhibit was properly named and the sentence imposed was according to the law as it is provided for under section 312(1)(a) and (b) of the Penal code Cap 16 RE: 2019.

As to the 5th ground of appeal, I agree with Ms Sabina that, since this is the first appellate court, it can step into the shoes of the trial court and give Orders. I am aware that, this being a first appellate Court, I am entitled to review the evidence on record to satisfy that the findings by the trial court were correct (See **Standard Chartered Bank Tanzania Limited v. National Oil Tanzania Limited and Another**, Civil Appeal No. 98 of 2008 (unreported) and **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (unreported)).

In the appeal at hand, the trial magistrate did not give orders as to whom the exhibit should go after the finality of the case. As stated by the appellants and conceded for by the respondent, no person who claims for the exhibit except for the appellants whose claims were not considered by the trial court.



In the fine, I find the appeal has merit and proceed to order that the appellants be released from the prison forthwith unless lawful held and consequently, the exhibit out-boat machine *make Suzuki HP 15 Serial No. 2004-5 10265 July* admitted as Exhibit P2 be handled over to the appellants.

It is so ordered.

Right of appeal explained to the parties.





M.MNYUKWA

JUDGE

25/07/2022

Court: Judgement delivered this 25th day of July, 2022 in the presence of parties.


M.MNYUKWA

JUDGE

25/07/2022