

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO 51 OF 2021**

(Arising from Criminal Case No 65 of 2019 in the District Court of Musoma at  
Musoma)

**NASHON JOSHUA ..... APPELLANT**

***VERSUS***

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

2<sup>nd</sup> August & 2<sup>nd</sup> August 2022

**F. H. Mahimbali, J.**

The appellant in this case was charged before the trial court with two offences, namely: breaking into a building and committing an offence contrary to section 296 (a) and secondly, stealing contrary to section 258 (1) and 265 of the Penal Code Cap. 16, R. E. 2019. It was alleged by the prosecution that on 9<sup>th</sup> day of February, 2019 at Magunga village within Butiama District in Mara Region, the appellant together with other four accused persons (not parties to this appeal) broke into the shop of one Marwa Michael Mwita and then stole therefrom various – shop properties totalling 4,125,000/=.

The appellant and their fellow accused persons denied the charge, whereby prosecution paraded a total of four witnesses and the accused persons fended for themselves.

Upon hearing of this case, the appellant together with other two accused persons were dully convicted and accordingly sentenced to three years for the first count and one year for the second count. The sentences were ordered to run concurrently.

The appellant was not amused with the trial court's conviction and sentence, thus the basis of this appeal armed with a total of seven grounds of appeal. For reasons to be known shortly, the grounds of appeal will not be reproduced. But will lightly be touched by the Court in the course of this judgment.

It is in record that through Criminal Appeal No. 44 of 2021, High Court Musoma, his two fellow accused persons namely Marwa Michael @ Mwita and Mzori Mwikwabi had earlier appealed to this Court in which their appeal was allowed and thereby acquitted by the Court.

During the hearing of the appeal, Mr. Gervas Emmanuel learned advocate represented the appellant whereas Mr. Frank Nchanilla, learned state attorney represented the respondent.

In arguing his appeal, Mr. Gervas Emanuel first abandoned three grounds of appeal and remained with only four grounds, in which he argued them jointly contending that going by lower court records, the charge has not been proved beyond reasonable. The evidence adduced before the trial court was short of target. As per criminal appeal No 44 of 2021 in which the co-appellants (twin appeal to this case), this court had allowed the appeal and acquitted the appellants thereof on the basis that there was no sufficient incriminating evidence against the accused persons (appellants). He therefore called upon this Court to adopt the High Court judgment in Criminal Appeal No 44 of 2021 and allow this appeal as well for similar reasons.

On his part, Mr. Frank Nchanila learned state attorney, conceded with the appeal as per submission by Mr. Gervas Emmanuel. He contended that as per PW3's testimony (at page 29 of the typed proceedings), it is clear that the said exhibits were tendered by police prosecutor. On this he conceded that there was procedural irregularity in the admission of cautioned statement. As that was the only available incriminating

evidence, he submitted that the appeal be allowed and the appellant be acquitted.

As per submissions done by both counsel, I agree that in Criminal Appeal No. 44 of 2021, (High Court Musoma), the two appellants thereof were acquitted for apparent reasons that the only incriminating evidences available (Exhibits P3, P4, P5 and P6), were tendered by the prosecuting attorney. These were cautioned statements by the accused persons and their extra judicial statements.

I have considered the arguments and submissions by both sides. I agree the omission done by the trial court of allowing the prosecutor to tender exhibit during trial (not Preliminary hearing) and the same was dully admitted by the trial court, vitiated the trial court's proceedings. The legal stand is, such an error is not curable under section 388 of the Criminal Procedure Act, Cap 20 R. E. 2019. (see **Msengi Selemani Vs Republic Criminal Appeal No. 504 of 2019**, CAT at Dodoma, **Thomas Ernest Nsungu @ Nyoka Mkeya vs Republic, Criminal Appeal No. 78 of 2021** (unreported)).

*"A prosecutor cannot assume the role of a prosecutor and witness at the same time. With respect, that was wrong because in the process the prosecutor was not sort of a witness who could be capable of examination upon oath or*

*affirmation in terms of section 198 (1) of the Criminal Procedure Act. As it is, the prosecutor was not a witness he could not be examined”.*

What is the right course then under such circumstances, the Court of Appeal in the case of **Msengi Selemani vs Republic (supra)**, expunged those documentary exhibits which were wrongly admitted on procedural aspect. As I did in the former appeal, I likewise adopt the similar course and I hereby expunge exhibits P3, P4, P5 and P6 from the court record for being wrongly admitted.

Upon the expunge, I find no other remaining incriminating evidence remaining intact in the trial court record to maintain the guilty and conviction of the appellant.

That said and done, the appeal is allowed. Conviction and sentence meted out against the appellant is hereby quashed and set aside. In its place, I order immediate release of the appellant unless lawfully held by other causes.

DATED at MUSOMA this 2<sup>nd</sup> day of August, 2022.



F.H. Mahimbali

Judge

**Court:** Judgment delivered this 2<sup>nd</sup> day of August, 2022 in the presence of the Mr. Gervas Emmanuel, Advocate for the Appellant, Mr. Frank Nchanila, State Attorney for the respondent and Mr. Gidion Mugo, RMA.

Right of appeal is explained.



F.H. Mahimbali

Judge

2/8/2022