IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 122 OF 2021

(Arising from Criminal Case no 17 of 2021 in the District Court of Musoma at Musoma)

SOKOINE S/O MAGAFU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

2nd & 26th August, 2022

F. H. MAHIMBALI, J.

The appellant in this case was convicted by the trial court with one charged offence of stealing contrary to section 258 (1) and 265 of the Penal Code, Cap 16 R.E 2019. It was alleged by the prosecution that the appellant and his co-accused (not party to this appeal), on the 10th day of December, 2020 at Bukanga area within the District and Municipality of Musoma in Mara Region stole 90 fishnets each valued Tshs. 50,000/= making total value of Tsh. 4,500,000/=, the properties of PW1 Sebastian Mwita.

Upon hearing of the case, the appellant and his co-accused person were convicted and sentenced to 4 years imprisonment with an order of compensation of Tsh. 4,500,000/= to Mr. Sebastian Mwita.

The appellant was dissatisfied with the trial court's findings and verdict, thus the basis of this current appeal challenging both: conviction, sentence and an order of compensation ordered based on the following grounds of appeal, namely:

1. *That, the trial Magistrate erred in law and fact by failure to consider that the prosecution witness PW1 (victim) did not bear/produce confirmation receipt to prove the ownership of his properties as there was no evidence that he owned fishing boat and ninety (90) fishnets*
2. *That, the trial Magistrate erred in law and fact to convict and sentence the appellant without considering that no appellant's cautioned statement was taken to prove that appellant was cautioned in this case and no search was conducted to support victim's evidence.*
3. *That the trial Magistrate erred in law and fact to satisfy that the case was proved while he was based on weakness of the defense evidence than burden of its prove lies on prosecution side.*

4. *That, the trial Magistrate misdirected himself by failure to evaluate the evidence of PW1 and PW2 while were contradictory and uncorroborated and they were familiarity their evidence needs more corroboration.*

5. *That the trial court erred in law and fact convict and sentence the appellant by believing that appellant went with police Officer to Mr. Peter Chamota while no independent witness from Etaro village to prove the same.*

6. *That the trial court erred in law and fact to convict and sentence the appellant without proof of the case beyond all reasonable doubt.*

During the hearing of the appeal, the appellant appeared in person whereas the respondent was dully represented by Mr. Frank Nchanilla, learned state attorney.

On his part, the appellant had no more to add save that he prayed for his grounds of appeal be adopted by the Court to form part of his submission. He invited the respondent to reply first and reserved his right of rejoinder.

Mr. Frank Nchanila learned state attorney on the other hand resisted the appeal. He countered all the appellant's grounds of appeal.

With the first ground of appeal that there was no receipt for ownership of the said fishing boat and ninety (90) fishnets to Mr. Sebastian Mwita, he argued it as baseless ground. As per PW1's evidence, he was credible witness, thus his evidence must be given credence. As there is no dispute on their ownership, the appellant's, claims are baseless. He prayed that this ground of appeal be dismissed (see **Goodluck Kyando vs Republic** (1996) TLR 367 on credence to witnesses).

On the second ground of appeal, the appellant's grief is this that there was no cautioned statement tendered nor search done, thus the victim's evidence is unreliable. He argued that this ground of appeal is baseless. As there was no evidence that the appellant had admitted and recorded cautioned statement or that he was searched. Such evidence could not be tendered as it was not there. He was merely convicted on the available evidence of PW1 and PW2 who established the charges against the appellant. On this, ground of appeal, he argued that it is bankrupt of merit.

With the third ground of appeal, his grief is that there was no strong evidence by the prosecution and that the appellant was not convicted on the strength of the prosecution case but on the weakness

of his of the defense. He refuted this ground of appeal because the appellant's conviction was merely based on the strength of the prosecution's case and mainly the testimony of PW1, PW2 and PW3.

The fourth ground of appeal is centred on the basis that there was failure of evaluation of evidence of PW1 and PW2 and that there was contradictory evidence. In digest to the testimony of PW1 and PW2, he submitted that he could not find any contradiction in it. Since PW1 had established giving the fishing boat to the appellant, PW2 established how he saw the abandoned fish boat and that the appellant was spotted selling fishing nets. That the prosecution's witnesses were familiar to each other thus needed corroboration is a new phenomenon not recognized by law. The law does not recognize corroboration with familiar witnesses. What is needed is credibility and reliability of the witnesses.

On the fifth ground of appeal which is based on the independent witness in respect of the testimony of Mr. Peter Chamota, he contended that the fact of arresting accused person, does not require independent witnesses. The position would be different had it been search. Thus, the arrest of the appellant needed no independent witness as it not the legal requirement.

Lastly, on the general ground that the prosecution case had not been proved beyond reasonable doubt, he responded that as per testimony of PW1, PW2 and PW3; the prosecution's case has been proved beyond reasonable doubt. In his considered view, he contended that there is abundant evidence in court record.

Responding to the issue posed by the Court whether the length of sentence imposed by the trial magistrate of the rank of Resident Magistrate (not being senior Resident Magistrate) exceeding twelve months' imprisonment but not exceeding five years was lawful, he replied that, the trial magistrate being a mere resident magistrate, pursuant to section 170 of the CPA, he properly sentenced the appellant to four years as the sentence didn't exceed five years imprisonment. Had it exceeded five years imprisonment, the issue of illegality would have arisen.

The central issue for consideration now, is whether given the evidence by the prosecution, the case has been proved beyond reasonable doubt. In the case **Magendo Paul and Another Vs The Republic [1993] T.L.R 219 (CAT),** it was held inter alia that;

"..for a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the

accused person as to leave only a remote possibility in his favour which can easily be dismissed"

In the case of **Christian Kale & Another Vs. The Republic** (1992) T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296, which insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case not on the weakness of the defence case. In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of the case **of Mariki George Ngendakumana Vs The Republic,** Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

"*It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the Accused person who committed it*"

In this case, the evidence by prosecution proposes that the appellant and his fellow did steal the alleged fishnets (90) the property of PW1. In my considered view, according to the facts of the case, the offence charged ought to be stealing by agent and not a mere theft as opted. I say so because it was PW1 himself who entrusted the fishnets

and the fishing boat to the appellant and his fellow for fishing activities where then the appellant instead of fishing, he converted them into selling and deserted the fishing boat at the lake shore. Deeply digesting the testimony of PW1 and PW2, there is no nexus in their evidence and the charge. It was expected there to be evidence by PW1 entrusting the said fishnets to the appellant and his fellow. How possible is it for a person to give someone such instruments without there being concrete evidence for that. It was expected that the prosecution had provided evidence to prove the charge beyond reasonable doubt. In this case, it is astonishing that PW1 had not established how he had given the said fishnets and fishing boat to the appellant without there being evidence of the said handing over to the appellant. Entrusting such valuable equipment in the absence of any evidence, it is assuming your own risk. There is no one evidence that if those fishnets purported to be sold by the appellant to the said Peter Chamata as alleged belonged to PW1. For it to stand, it was first expected that PW1 gave the said fishnets to the appellant.

That said and considered, I find the prosecution's case as not proved beyond reasonable doubt. I hereby allow the appeal, quash conviction entered, set aside the sentence and the compensation order.

In its place, I order immediate release of the appellant unless lawfully held by other causes.

DATED at MUSOMA this 26th day of August, 2022.

F.H. Mahimbali

Judge

Court: Judgment delivered this 26th day of August, 2022 in the presence of Ms. Monica Hokololo SSA and Mr. Gidion Mugoa , RMA. Appellant is being absent.

F.H. Mahimbali

Judge