

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 103 OF 2021

(C/f Criminal Case No. 19 of 2020 in District Court of Babati at Babati)

JUSTINE VARELIAN TEMBA @ MWAMAKULA.....APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

Date of last Order:22- 8-2022

Date of Judgment :26-9- 2022

B.K.PHILLIP, J.

At the District Court of Babati at Babati, the appellant herein was arraigned on the offence of theft contrary to section 258(1) and 265 of the Penal Code. In proving the charge against the appellant, the prosecution aligned five witnesses namely; Abuu Sebastiani (PW1), Assistant Inspector Aloyce Bwire (PW2), Wilbard Patrice @ Mzambia (PW3), Edmund Peter Mwakonde (PW4) , H. 5935 DC Fadhili (PW5) and tendered six exhibits, to wit; a contract of sale of a motor vehicle between Obedi Samwel Laizer and Aban Sebastian (Exhibit P1), motor vehicle registration card in respect of motor vehicle No. T 785 CVC , make Toyota, IST (Exhibit P2), request for release of a motor vehicle No. T 785 CVC , make Toyota, IST (Exhibit P3), A motor vehicle with Registration No. T.785 CVC , make Toyota-IST (Exhibit P4) ,seizure certificate (Exhibit P5) and a contract of sale of a motor vehicle between Edmund Peter and Leonard A. Chimwejo (Exhibit P6).The appellant defended himself. At the end of the day the trial Court found

the appellant guilty of the offence of theft and sentenced him to seven (7) years imprisonment.

A brief background to this matter is that; Aban Sebastian (PW1) purchased a car with registration No. T785 CVC, make Toyota, Model IST, Colour- black from one Obed Samwel Laizer of Arusha on 8th December, 2019 valued at Tanzania shillings six million. He paid Tshs. 5,800,000/= while Tshs. 200,000/= remained outstanding.

On 14th December, 2019 at around 17:00 hours PW1 went to Babati old bus stand with his car aforementioned. He parked it and went to attend the call of nature. Upon his return, he did not find his car. He asked one Wilbroad Patrice @ Mzambia (PW 3) who was around that area what happened to his car .PW3 told him that the person who was talking to him (PW1) when he was getting out of his car is the one who took it . PW1 reported the incidence to Babati Police Station. Investigation started basing on the information he provided to the Police. Consequently, the appellant was arrested in Kyela-Mbeya and taken to Oysterbay Police Station , Dar es Slaam. The information obtained from the appellant enabled the Police Officers to arrest of one Edmund Peter Mwakonde (PW4) who was entrusted with the said car by the appellant before it was sold to Leonard Adrian of Kigamboni in Dar es salaam. PW4 gave the Police the contacts of the said Leonard Adrian who upon being contacted by phone, admitted to have purchased the said car. He was directed by the Police to take that car to Oysterbay Police Station in Dar es salaam. Thereafter the car was seized and the journey to Babati started. As alluded earlier in this

judgment the appellant was prosecuted of the offence of theft and found guilty.

Aggrieved by the judgment of the District Court of Babati the appellant lodged this appeal on six of grounds. For convenience I will paraphrase them hereunder ;

- i) That, the trial Court erred in law and fact to convict and sentence the appellant on unreliable and contradictory evidence.*
- ii) That, the trial Court grossly erred in law and fact for convicting the appellant basing on poor identification.*
- iii) That, the trial magistrate grossly erred in law and fact for convicting and sentencing the appellant basing on the defective certificate of seizure and a contract of sale of the motor vehicle in which the appellant was not involved.*
- iv) That the trial Court erred in law and in fact for failure to properly evaluate evidence on record and therefore erroneously convicted and sentenced the appellant.*
- v) That, the trial Court failed to analyse evidences on record hence wrongly convicted and sentenced the appellant.*
- vi) That, the trial Court grossly erred in law and in fact for convicting and sentencing the appellant on a charge which was not proved beyond reasonable doubt.*

In this appeal, the appellant was represented by Mr. Kapimpiti Mgalula, learned Advocate whereas the Respondent had the legal services of the learned State Attorney Ms. Riziki Mahanyu. The appeal was disposed of by way of written submissions.

Submitting for the first ground of appeal, Mr. Kapimpiti contended that during the preliminary hearing the prosecution side stated that the incident of theft happened at Babati new bus stand whereas in their testimonies the prosecution witnesses testified that the incident of theft occurred at Babati old bus stand. Other contradictions alleged by Mr. Kapimpiti are as follows; that PW1 testified that on 14th December, 2019 he left his car in silence, that is, it was not switched off whereas PW3 told the trial Court that the car was switched off, and during cross examination PW1 said that he handed over the car to a toilet attendant namely Wilbroad. To cement his arguments Mr. Kapimpiti referred this Court to pages 10, 14 and 27 of the typed proceedings.

Mr. Kapimpiti was of the view that the contradictions on the scene of the crime that is, where the incident of theft occurred are fatal. They create reasonable doubts to the advantage of the appellant herein. To fortify his argument Mr. Kapimpiti cited the case of **Thomas Kimaro @ Mngonii Vs The Republic, Criminal Appeal No.45 of 2018** and **Jeremiah Shemweta versus The Republic (1985) TLR No. 228**, in which the Court held that discrepancy in various account of statements of witness give rise to reasonable doubt about the guilty of the accused.

In rebuttal, Ms. Mahanyu argued that, the prosecution's evidence was consistent and the prosecution witnesses stated categorically that PW1 left the car in question at Babati old bus stand. PW3 said the same. To cement her argument Ms. Mahanyu referred this Court to page 10 and 26 of the typed proceedings. She contended that the

preliminary hearing held pursuant to section 192 of the Criminal Procedure Act, ("CPA") is for the purpose of speeding up the hearing of the case only. Moreover, Ms. Mahanyu submitted that whether PW1 left the car switched off or not is immaterial.

In rejoinder, Mr. Kapimpiti, reiterated his submission in chief and went on arguing that the procedure stipulated in section 192 of the CPA is mandatory. He insisted that in the memorandum of facts the prosecution alleged that the scene of the crime was Babati new bus stand. During the hearing the prosecution witnesses changed the story and testified that the incident occurred at Babati old bus stand, thus prejudiced the interests of justice. Moreover, Mr. Kapimpiti contended that the issues on whether the car was left in silence or was switched off is material and raises reasonable doubts to the prosecution's case because if the car was switched off then it was not possible for a thief to enter into that car and drive it.

In determination of this ground I will be guided by the decision of the Court of Appeal in the case of **Rashid Mkonowatembo and another versus The Republic, Criminal Appeal No. 74 of 2015**, (unreported) in which the Court made the following observations;

"The only contradiction in evidence complained of, is the date the incident occurred. It is complained that while PW1 was informed that the incident was to occur on 14/1/2012, PW5 got report of the incident on 13/1/2012 and that, while PW2 complained to have been robbed Tshs. 200,000/= PW5 stated that PW2 was robbed Tshs. 120,000/=. With much respect, the contradiction did not water down the evidence of the commission of the offence".

In this case during the preliminary hearing the prosecution told the trial Court the following among other things;

"That, in 14/12/2019 at 17:00 hrs Aban s/o Sebastian packed car No. T. 785 CVC Toyota IST at new bus stand entered toilet and left it silence"

During examination in chief, PW1 said the following;

"On 14/12/2019 just six days after purchase it (sic) around 17:00 hrs at old bus stand at Babati the car was stolen..."

(See page 10 of the typed proceedings)

Whereas in his testimony in chief PW3 testified as follows

"On 14/12/2019 around 17:15 hrs I was in my normal business and parked at old bus stand where I also found one Aban packed also(sic) ..."

(See page 26 of the typed proceedings)

From the foregoing, it is apparent that both PW1 and PW3 testified that the car was stolen at Babati old bus stand which is in line with the charge sheet. It is only in the memorandum of facts presented before the Court during the preliminary hearing where it was stated that the incident of theft occurred at Babati new bus stand. In my opinion this discrepancy is minor. After all, what this Court is supposed to concentrate on in determination of a case is the charge sheet and the evidence adduced by the witnesses in support or challenging what is alleged in the charge sheet. The memorandum of facts presented in Court does not affect what is stated in the charge sheet and the testimonies of PW1 and PW3.

Also, I am inclined to agree with Ms. Mahanyu that whether the car was switched off or not, is not a material fact in this case since it does

change the vital fact that the car was stolen when PW1 left it and went to attend the call of nature. With due respect to Mr. Kapimpiti, I do not agree with his contention that if the car was switched off then it was not possible for someone to drive it in the absence of PW1. There is a difference between locking a car and switching it off. A car can be switched off, the keys left therein and remain unlocked in such a way that a person can open and drive it. In the upshot, on the strength of the decision of the Court of Appeal in the case of **Rashid Mkonowatembo** (supra), it is the finding of this Court that the contradictions alleged by Mr. Kapimpiti in this ground of appeal are trivial and did not water down the evidence on the commission of the offence. Thus, this ground of appeal lacks merit. It is hereby dismissed.

On the second ground, Mr. Kapimpiti submitted that since PW3 testified that the person who stole the car was a stranger and had never met him before, there was a need of conducting identification parade in order to identify the accused person (appellant). In addition, he argued that identification parade was necessary due to the fact that PW3 did not mention any specific marks and /or physical appearance of the appellant in identifying him.

Moreover, Mr. Kapimpiti argued that during cross examination PW1 told the trial Court that he left the car under the care of PW3 and then went to attend the call of nature. It is incomprehensible how come PW3 kept quiet when he saw the appellant driving the motor vehicle, contended, Mr. Kapimpiti and was of the view that the scenario presented by PW1 in his testimony raised doubts.

In rebuttal Ms. Mahanyu submitted that, so long as the crime was committed during daylight at 17:00 hours conditions for identification were favourable. There was no need of conducting identification parade. In rejoinder, Mr Kapimpiti reiterated his submission in chief.

I am alive that visual identification is easily susceptible to error as it was held in the landmark case of **Waziri Amani v The Republic [1980] TLR 250** in which the Court held as follows;

"...the evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, that no Court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight".

However, the circumstances in this case are quite opposite and therefore the case **Waziri Amani** (supra) is distinguishable owing to the reason that the time when PW1 parked his car at Babati old bus stand was daylight. So circumstances were very conducive to PW3 to identify the appellant and at the time PW1 was getting out from the said car he had some conversations with the appellant as testified by PW1. At Page No. 10 of the proceedings, PW1's testimony reads as follows;

"I recollect on that day and time I had a car and before I dropped down Justine the Accused came talked (sic) to me and I left a car came(sic) out of toilet I did not find a car it was already driven away. I asked one Wilbroad @ Mzambia and said a person you was (sic) talking with before enter toilet (Justine) is the one who drove the car away. I reported at police about that car

stealing(sic). Justine was not (sic) time to meet but (sic) I recollect on 26/11/2019 I met him at Magugu police Post as I went there to see one Aminiel Michael who was under arrest and met (sic) OCS and asked him but(sic) he said a complainant in (sic) Justine so I have to talk with Justine to (sic) I can know what transpired and what made him (sic) to be under arrest what proceeded (sic) was my relative Aminiel to be (sic) reliezed on bail”.

In addition and from the foregoing, it is apparent that it was not the first time for PW1 to see and/ or meet with the Appellant. They previous met at Magugu Police Post. Moreover, PW3 stated clearly that the person who was talking with PW1 before going to attend the call of nature is the one who took the car. Under the circumstances, I am inclined to agree with Ms. Mahanyu that there was no need of conducting identification parade.

The above aside, with due respect to Mr. kapimpiti, no evidence was adduced to the effect that PW1 left his car under the care of PW3. In the upshot, this ground has no merit. I hereby dismiss it.

Coming to the third ground Mr. Kapimpiti's submission is to the effect that Exhibits P5 and P6 do not show that the appellant was found in possession the car. He argued that the seizure certificate was filed in Dar es salaam whereas the appellant was arrested in Kyela, Mbeya. And upon being taken to Dar es salaam he was not involved in the process of seizure of the allegedly stolen car. According to the testimony of PW2 no search was conducted , the car was brought to Oysterbay Police station by Mr. Leonard after being contacted by PW2 by phone. Therefore, no seizure of the motor vehicle was done in accordance with

the requirements stipulated in section 38 of the Criminal procedure Act, (CPA) . To bolster his arguments , Mr. Kapimpiti referred this court to the case of **Samwel Kibundali Mgaya versus The Republic, Criminal Appeal No. 180 of 2020** and **Badiru Mussa Hanogi versus The Republic, Criminal Appeal No. 118 of 2020** (both unreported).

With regard to the contract of sale of the car, (Exhibit P6) , Mr. Kapimpiti argued that exhibit P6 is between Edmund Peter (PW4) and Leonard Chimwejo. Edmund Peter who purported to have bought the car from the appellant did not produce in the contract of sale of the car between him and the appellant as he alleged.

Furthermore, Mr. Kapimpiti contended that exhibit P6 was not signed by the seller (Edmund Peter, PW4) and the purported buyer (Leonard Chimwejo) never testified in Court to prove that he bought that car from PW4. PW4 never testified that he met the appellant. His testimony was to the effect that he went to Kinondoni to see the car and met two people who were dealing with the business of selling used motor vehicles , namely Jackson and Nchicha, argued Mr. Kapimpiti. Moreover, It was Mr.Kapimpiti's contention that PW4 did not produce in Court the contract of sale of the car between him and appellant.

In rebuttal, Ms. Mahanyu contended that, upon being arrested the appellant explain to the police how the stolen car was sold to PW4 who later on sold it to Mr. Tolu (Leonard Chimwejo). The information provided by the appellant enabled the police to get in touch with Mr. Edmund Peter who disclosed to them that the car was sold to one Tolu, the Bonafide purchaser, whom after being contacted and directed to

take the motor vehicle to Oysterbay Police Station obeyed. Finally the Motor vehicle was seized by the police.

Furthermore, Mr. Mahanyu was in agreement with Mr. Kapimpiti that the procedure stipulated in section 38 of the CPA on how search has to be conducted were not complied with. However, she contended that oral testimony available can prove facts contained in the certificate of seizure. To buttress on her arguments , she cited the case of **Emmanuel Mwaluko Kanyusi and 4 others versus The Republic, consolidated Criminal Appeal No. 110 of 2019 and 553 of 2020** (unreported).

With regard to the prosecution's failure to produce in Court the contract of sale of the car between PW4 and the Appellant, Ms. Mahanyu contended that the same is not fatal and cannot vitiate the prosecution's evidence presented in Court to prove the ingredients of the offence of theft.

On the failure to bring the contract of sale of the car between PW4 and the Appellant, Ms. Mahanyu was of the view that the same is not fatal because the absence of the said contract does not vitiate the ingredients of the offence of theft.

In rejoinder, Mr. Kapimpiti reiterated his submission in chief and went on submitting that PW2 did not follow the required procedure in seizure of the car in question. He had neither a search warrant nor written authority from the Police Incharge of Babati Police Station to make the follow up the car. Thus, he had no authority to travel from Babati to kyela and Dar Es Salaam for the purpose of conducting investigations on the stolen car.

Moreover, the fact that PW2 decided to handle this matter in a style he wished in contravention of the law, once the certificate of seizure is expunged from the Court's records, his oral testimony cannot be used in any way to support the prosecution's case, contended Mr. kapimpiti. Also, he was of the view that PW4's failure to produce in Court the sale agreement between him and the appellant is fatal and raises reasonable doubts on the prosecution's case. The prosecution was obliged to produce the allegedly contract of sale of the car.

There is no doubt that, the stolen car was found in possession of Mr. Leonard Chimwejo who bought it from Edmund Peter. Leonard brought the car to Oysterbay police station after being directed to do so by PW2 over the phone. So, it is apparent that there was no search conducted pursuant to the provision of section 38 of the CPA. Thus, it is obvious that procedures stipulated in section 38 of the CPA cannot be applicable under the circumstances in which the car in question was seized. I am of a settled opinion that all the arguments on the certificate of seizure raised by both Mr. kapimpiti and Ms. Mahanyu are irrelevant in this matter. Moreover, the appellant is not in position to challenge the way the seizure of the car was conducted since he was not involved in the process in any way. Similarly, appellant was not a party to the contract for sale of the car (Exhibit P6). The same was between Edmund Peter and Leonard A. Chimwejo. Thus, it is obvious that Exhibit P6 cannot in any way be a ground for conviction of the appellant. The trial magistrate conviction of the appellant was based evidence which proved the ingredients of theft. At page 3 of the proceedings the trial magistrate said the following;

"The evidence at hand supports the charge in a manner that the thing stolen is a car which is capable of being stolen, the accused transported it to Dar es salaam and sold it, this demonstrates the motive to deprive the owner permanently. There is ample evidence that the circumstances against the accused are overwhelmed".

From the foregoing, I find this ground lacks merit and I hereby dismiss it.

Grounds 4, 5 and 6 are all concerned with the analysis and evaluation of evidence. For convenience I will deal with them conjointly. Mr. Kapimpiti's submission that the trial Court's findings that it was the appellant who directed Edmund Peter and Leonard to take the car to Oysterbay Police Station is erroneous on the following grounds, that PW4's testimony is to the effect that he got the car from Jackson and Nchicha who were selling it not the appellant. He paid a sum of Tshs 500,000/= to Ally Zawadi and not to the appellant, though no evidence was produced in Court to prove the transaction for payment of the aforesaid amount. PW2 testified that he was communicating with PW4 and Leonard, and directed them to take the car to Oysterbay Police Station. Mr. Kapimpiti strongly argued that the prosecution failed to prove the case against the appellant beyond reasonable doubts. The evidence adduced by the prosecution's witnesses left a lot of doubts regarding the appellant's involvement in the commission of the offence charged against him since he was not found in possession of the car in question, there was no valid certificate of seizure, no sale agreement of the car in which he was involved was tendered in Court and there was

no evidence that he ever received any money for sale of the car in question.

On the other hand , Ms. Mahanyu's response was brief. She contended that the concerns raised by Mr. kapimpiti do not vitiate the fact that it was the appellant who stole the car and pointed out that according to section 143 of the Evidence Act, [Cap. R.E 2019] no particular number of witnesses is require in order to prove the case.

In rejoinder, Mr. kapimpiti submitted that the standard of proof in criminal cases is beyond reasonable doubts. He insisted that in this case PW4 testified that he met two brokers namely Jackson and Nchicha, but surprisingly in the course of giving his testimony he said that he met Justine (the appellant herein) and paid him Tshs 500,000/= .However, no any evidence was presented in Court to prove the alleged payment of Tshs 500,000/= as required in section 110 (1) of the Law of Evidence. In addition, Mr.Kapimpiti argued that his concern was not the number of witnesses but the prosecution's failure to prove that PW2 got Edmund's (PW4) cell phone number from the appellant.

In these three grounds Mr. Kapimpiti requests this court to re-evaluate the evidence adduced at the trial Court. There is no dispute that this Court being the first appellate Court has powers to reconsider and evaluate the evidence , and come to its own conclusion as it deems fit. [see the case of **Maramo s/o Slaa Hofu and 3 Others versus The Republic**, Criminal Appeal No. 246 of 2011, (unreported)].

In his arguments Mr. kapimpiti endeavored to show this Court that the evidence adduced by the prosecution witnesses do not connect the appellant with the car theft. However, upon perusing the Court's

records , I am of the view that the evidence adduced by the prosecution witnesses proved the case against appellant beyond reasonable doubt as I will explain hereunder .

PW1 testified that when he was getting out of the car at Babati old bus stand he talked to the appellant and that had met him previously at Magugu Police Station in Babati. PW1's testimony aforesaid was not challenged by the appellant in anyway. Thus, it is credible. Therefore, it means that PW1 knew the appellant and there is no any doubts on the identification of the appellant by PW1. PW1's testimony corroborates the testimony of PW3 who testified that the car was taken by the person who was talking to PW1 when he was getting out from his car. The evidence adduced shows that PW1 talked to one person only, that is the appellant. Under the circumstances, there is no any shadow of doubts that it is the appellant who took the car. It is noteworthy that the appellant was charged with the offence of theft. The evidence I have just elaborated herein above proves the ingredients of the offence of theft since the appellant took the car fraudulently and without any claim of right .As such whether or not there was valid contract of sale of the car either PW4 and one Leonard or PW4 and the appellant is immaterial as far as the prove of the offence of theft against the appellant is concern.

On the other hand, the testimony of PW2, proves that it was the appellant who ignited the process under which the car was recovered by giving PW2 the cell phone number of PW4 who he had entrusted with the car in Dar es Salaam. PW2 was a credible witness. His testimony on how he took the appellant from Kyela to Oysterbay Police

Station ,Dar es Salaam was consistent. At this juncture, let me point out that Mr. Kapimpiti's contention that PW2 went to Kyela to arrest the appellant without any authority is unfounded because PW2 testified that he found the appellant at the Police Station in Kyela, thus the appellant had been arrested already and if PW2 had no any instruction from his seniors in Babati Police Station he could not have been allowed to take the appellant from the Police Station in Kyela .

In short, the evidence of PW1, PW2, PW3 and PW4 corroborate each other and there is no scintilla of doubt that the appellant stole the car with registration number T785 CVC, model Toyota, make IST.

For the foregoing reasons, I hereby dismiss this appeal in its entirety for lack of merits.

Dated this 26th day of September 2022



A handwritten signature in blue ink, appearing to read "B.K. Phillip", is written over the printed name.

B.K.PHILLIP

JUDGE