

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

**IN THE DISTRICT REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO 20 OF 2021**

**(Appeal from the decision of the Resident Magistrate Court of Kibaha at  
Kibaha in Economic Criminal Case No 3 of 2020**

**BETWEEN**

**HAJI SELEMANI MSHINDO.....APPELLANT**

**Versus**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**MRUMA, J.**

The Appellant **Haji Seleman Mshindo** was charged on 19/11/2013 with five counts as follows:

**Count 1:** Unlawful Possession of Government Trophy contrary to section 86(1) of the Wildlife Conservation Act, 2009 as amended read together with paragraph 14 of the First Schedule to and Section 57(1) of the Economic and Organized Crime Control Act [Cap 200 R.E. 2002] as amended.

The particulars of the offence are that on 21.7.2019 at Kazimzumbwi area within Kisarawe District in Coast Region was found I possession of 17 thorn 7of Porcupine (Pine) valued at USD 150 equivalent to T.shs 344, 995.50

the property of the United Republic of Tanzania without permit from the Director of Wildlife.

**Count II:** Malicious Injury to Property contrary to section 326(1) 6A(a) and 6B(f) of the Penal Code [Cap 16 R.E. 2002].

Particulars of the charge being that on 21.7.2019 at Kazi Mzumbwi area within Kisarawe District in Coast Region willfully and unlawfully destroyed railway destroyed railway the property of the Tanzania –Zambia Railway Authority worth USD 2040 by removing tie roads.

**3. Count III:** Theft contrary to section 265 of the Penal Code [Cap 16 R.E. 2002] as amended.

The particulars of the charge being that on 21.7.2019 at Kazimzumbwi area within Kisarawe District in Coast Region fraudulently and without claim of right did steal 36 tie rods 10 pieces of gauge blocks, ten pieces of washers and nine pieces of spring clips the property of Tanzania Zambia Railways Authority valued at USD 2250.5.

**4. Count IV in the alternative to 3<sup>rd</sup> Count:** Possession of Goods suspected to having been stolen or unlawfully acquired contrary to section 312 (1) of the Penal Code.

The particulars of the offence were that on 21.7.2019 at KaziMzumbwi area within Kisarawe District in Coast Region the Appellant was found in unlawful possession of 10 pieces of gauge blocks, ten pieces of washers, nine pieces of spring clips and two tie rods all valued at USD 210.5 the property of Tanzania-Zambia Railway.

**Count V** Possession of Small Quantity of Narcotic Drugs without Permit, contrary to Section 17(1)(a) of the Drug Control and Enforcement Act 2015 as amended read together with Regulation 3(1) (a) of the Drugs Control and Enforcement (General) Regulations, 2016. Particulars of the offence being that on 21.7. 2019 at Kazimzumbwi area within kisarawe District in Coast Region he was found in possession of 0.75 grams of Cannabis Sativa commonly known as bhang without a permit.

The appellant pleaded not guilty to all the counts. The prosecution conducted the trial by calling witnesses. After a full trial the appellant was convicted of all counts and sentenced to 20 years imprisonment in respect of Count 1, 20 years imprisonment in respect to count 2, and 5 years imprisonment in respect to count 3. For the 4<sup>th</sup> Count he was sentenced to 3 years imprisonment and for the 5<sup>th</sup> count he was sentenced to pay a fine of T.shs. 1,000,000/= or serve three (3) years imprisonment. Sentences were ordered to run concurrently.

The Appellant dissatisfied by the conviction and sentence of the learned trial Magistrate and has appealed to this court for quashing of the said orders.

The petition of appeal filed in court on 21<sup>st</sup> Day of January, 2021 contained eight grounds. However the reading and perusal of the grounds can be summarized into one. The Appellant is complaining that the prosecution didn't prove its case beyond reasonable doubt.

It is trite law that the duty of the first appellate court is to reconsider the evidence, evaluate it and draw its own conclusion. As an appellate court I

have to re-evaluate all the evidence on record and draw my own conclusions.

The prosecution at the trial called nine (9) witnesses:

**Halid Kingazi PW2** a Police Officer stationed at TAZARA as OC CID stated that on 21.7.2019 at around 10.00am he received instructions from RCO to prepare a police squad which would re-arrest the a suspect who had been apprehended by some TAZARA officials while attempting to unlock tie rods in a railway line at Kazimzumbwi . It was his testimony that in company of PW6 D/CPL Anyambilile and Tazara officers left for the scene of the crime at Kazimzumbwi area where the accused is alleged to have unlocked tie rod ends. In his testimony they continued with evidence gathering and led by the Appellant they arrived at appellant's home which is near the crime scene. PW1 further stated that they found an old woman who introduced herself as the Appellant's mother. They searched for three independent witnesses namely Asha Sozigwa and Adam Selemani and one TAZARA official by the name of Mr. Mzinga who witnessed search in the Appellant's house.

The search in the Appellant's house led to the recovery of one curl of bhang which was on the table and in another room they found 17 porcupine (thistle) thorns (Exhibit P4) attached to the wall. He further stated that they The Appellant was arrested together with the recovered items and taken to TAZARA Police Station where the seized items were handed over to exhibit keeper Sgt Bernard.

In cross-examination by the Appellant PW2 told the court that the Appellant was arrested by CPL Anyimbile (PW6). He denied to have said that he found the Appellant with tie rod ends, nuts and T. Spanners

**Laurence Nyapara Mtokambali (PW3)**, a civil engineer employed by TAZARA and attached to the Headquarters conducted an evaluation of items allegedly found in possession of the Appellant. In his testimony the examination confirmed the value of the stolen items. He prepared a report (Exhibit P5).

**DCPL ANYAMBILILE (PW6)** a police detective attached to TAZARA police station testified that he received a call from PW2 who instructed him to proceed to the scene of crime in order to re-arrest the Appellant who had been arrested by TAZARA officials. At the scene he was informed that the Appellant had been arrested for destructing the rail. He requested TAZARA officials to proceed to the police station with the Appellant. He filled certificate of seizure (Exhibit P6). On cross-examination PW6 said that when he arrived at the crime scene he found Appellant already arrested. He said that he searched the Appellant at police station and found him with all items which were produced in evidence as exhibit P9.

Godwin Edwin Libanda (PW5), Mechanics operator working with TAZARA testified that on 21.7.2019 he together with other officers of TAZARA were travelling in a trolley from Makanga station to Kazimzumbwi station. On arrival at Kizumzumbwi they saw the Appellant walking along the railway while carrying a gauge block tie rod. They stopped him but he doubled away while throwing away a bag commonly known as rasket which he was carrying. They pursued and managed to apprehend him. Inside the bag

they found 10 pieces of nuts, gauge block 10 and 9 washer. They then handed him over to the police

**Sgt Bernard PW6** who works as a general duty officer of police at TAZARA police station corroborated the testimony of PW1 and PW3. He confirmed that on 21.7.2019 the Appellant was arrested with several items suspected to be stolen. He received those items and kept them in his office. He stated that 23.7.2019 he handed over one curl of bhang to WP Theresia. WP Theresia PW7 confirmed PW6's testimony and stated that after she had received the bhang she took it to the office of the National Chemist Laboratory where it was medically examined and after five (5) minutes he received the results.

**Fidelis Segomba** (PW 9) is a government chemist working with National Laboratory. He gave evidence to the effect that he conducted chemical analysis of an exhibit which was presented to him by Theresia of TAZARA police station, his examination revealed that substance was cannabis sativa commonly known as bhang.

At the close of the prosecution case accused was placed on his defence. He gave a sworn testimony. He stated before court that on 21.7. 2019 while walking from his mother's homestead at around 0:08hours people he did not know went there and arrested him. He further stated that they took him to TAZARA Police station where he was locked in for 8 days. He further stated that on 1. 8. 2019 he was taken to Kisarawe Police and consequently he was charged at Kisarawe District Court.

At the hearing of this appeal the Appellant reiterated the contents of the petition of appeal. His main concern at the appeal was that the prosecution didn't prove its case beyond reasonable doubt. He urged this court to allow his appeal and order for his release from prison.

Learned Senior State Attorney Mr. Emanuel Maleko for the Respondent/Republic didn't argue the appeal. He said that he has realized that the charge sheet is problematic and said that had it being that this was a civil case he would have urged the court to invoke the overriding objective principle. Otherwise he said that he was 'leaving' it the court to decide.

I have carefully considered the evidence by the prosecution and defence offered by the appellant. The arguments of both parties to this appeal and submissions hereof taken into account, the main issue in this appeal is whether at the trial there was sufficient evidence to sustain the conviction and sentence of the appellant.

But before getting there, there is a pertinent issue regarding the charge sheet. Several offences of distinct character have been dumped and charged under one charge sheet.

The learned State Attorney conceded to the defect but left it to the court to decide. I will decide it. In law where a person is accused of having committed several offences such offences can only be charged in a single charge sheet if they were committed in the course of the same transaction or in one single act. Where offences were committed at different dates and places extending over a very considerable period of time and there is

nothing to show that they were continuous offences they must not be charged in the same charge sheet (See **B.D. Chipeta Magistrate's Manual Law Africa page 12**). In the case of Sultan Omary Kipenzi & 6 others Criminal Appeal No. 154 of 2017 Muruke, J (Unreported) this court held inter alia that:

“Charge sheet is the foundation of the trial defective charge renders the trial a nullity”

In the instant case, there is no likelihood that being found in unlawfully possession of government trophy, malicious injury to property (i.e. railway property) theft, possession small quantity of narcotic drugs and possession of goods suspected of having been stolen or unlawful acquired are acts committed in the same course of transaction or series of acts or transactions arising from the same course. I therefore find that the Appellant was convicted on a defective charge sheet in that there is misjoinder of charges. That alone would be sufficient to dispose of this appeal. However, I find no harm to discuss albeit briefly the merits of the evidence adduced by the prosecution.

In the case before me **PW2 Halid Kingazi** testified that on 21.7.2019 he received information that a criminal suspect had been apprehended by TAZARA officials. He mobilized his colleagues among them PW6, to visit the scene. It was their evidence that on arrival at the Appellant's home they found porcine thorns attached to the wall and a curl of bhang which was on the table. They seized them and filled a Seizure Certificate which was signed



by PW2, PW9 and the Appellant. That piece of evidence was corroborated by the testimony of **Asha Salum Sozigwa (PW9)**, the ten cell leader of the Appellant. However, it contradicts PW6's story that the Appellant was arrested by TAZARA officers for damaging railway gadgets and that he searched him and filled the certificate of seizure while at police station. It was further evidence of PW6 that he went to arrest the Appellant without carrying with him a certificate of seizure and that was the reason why he filled it at the police station. There is no possibility that all these prosecution witnesses are telling the truth. The undeniable fact is that either PW1 and PW9 did lie on oath or PW6 lied on oath. Thus, there was no cogent evidence from the prosecution's witnesses placing the Appellant at the scene of crime. Actually it is difficult for one to state exactly the location of the scene of crime as there was no evidence to suggest that the stolen items were recovered from the home of the Appellant. It was not on record where the recovery of stolen items was done or that the recovery of stolen items was in close proximity in time and day with incident of possessing government trophy. The recovery of the stolen items at the home of the appellant would have established the ingredient of intention.

It was therefore clear that prosecution didn't discharge the burden of proof beyond reasonable doubt on this count against the appellant.

In this first appeal having evaluated and scrutinized the evidence, I can only say there was no sufficient evidence upon which the learned trial magistrate could rely in convicting the Appellant. I am satisfied that the appellant was convicted on unsound evidence in respect of the five counts as indicted.

In view of the foregoing I am satisfied the appellant was not properly convicted on watertight evidence and the sentences imposed <sup>by</sup> all counts had no basis and therefore were unlawful. The appeal on both conviction and sentence has merit. Accordingly it is allowed. The conviction is quashed all sentences meted are set aside. The Appellant should be released from prison unless for any other lawful cause he is held

It is so ordered.



A.R. Mruma

Judge

Dated at Dar Es Salaam this 22<sup>nd</sup> day of March 2022.