

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT ZONE

AT MTWARA

CRIMINAL APPEAL CASE NO 38 OF 2022

*(Originating from Criminal Case No 91 of 2019 in the District Court of Lindi
at Lindi)*

BAKARI ISSA MSANGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

27/7/2022 & 17/10/2022

LALTAIKA, J.

BAKARI ISSA MSANGA (the appellant) was arraigned in the District Court of Lindi at Lindi charged with the offence of Stealing Contrary to Section 265 of the Penal Code Cap 16 RE 2002. It was alleged that the appellant had stolen a car make TOYOTA ALLION SALOON worth 14,900,000 and a mobile phone make NOKIA 105 Valued at 100,000.

When the charge was read over to the accused, he denied wrongdoing. Consequently, it was upon the prosecution to the allegation beyond reasonable doubt. To achieve this, the prosecution marshaled a total of five (5) Prosecution Witnesses and eight (8) exhibits. The prosecution managed to establish that the appellant (then accused) had a case to answer hence they closed the prosecution case.

The defense case had two witnesses, the appellant (DW1) and his mother (DW2). There was no exhibit tendered. The trial lasted from 12/12/2019 to 5/11/2020. The learned trial Magistrate was convinced that the prosecution had left no stone unturned in proving their case beyond reasonable doubt. She convicted the appellant as charged and sentenced him to four years imprisonment and to pay compensation of TZS 14,000,000 (fourteen million Tanzanian shillings)

Dissatisfied and aggrieved, the appellant has appealed to this court by way of a five-ground petition of appeal. I take the liberty not to reproduce the grounds of appeal here.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, was represented by Mr. Enosh Kigoryo, State Attorney. The appellant, not being learn in law, had nothing substantial to add to his petition of appeal. He therefore requested that the learned State Attorney proceeds with his submission and the appellant would rejoin on specific issues of contention should the need arise.

Mr. Kigoryo stated on the outset that the respondent objected the appeal. Before addressing the court on the grounds of appeal raised by the appellant, the learned State Attorney provided a background of the matter. It is Mr. Kigoryo's submission that the source for the arrest of the appellant was a stolen cell phone as per PW3. Based on the phone stolen from the victim (PW2) the information was used to locate PW5's whereabouts. It was PW3's testimony that the phone was being used by PW5.

PW3 had stated that they made a follow up and discovered that the phone was in Dar es Salaam and were able to obtain the number of PW5 that was using the said phone.

The learned State Attorney went on to provide that PW3 stated further that they could apprehend PW5, but he informed them that she was given the phone by the appellant who was her lover by then. PW5 stated further that by that time the phone had been stolen. According to PW3 the information that led to the arrest of PW5 were obtained from Airtel [A Telephone Company] Dar es Salaam Office.

Mr. Kigoryo provided further that pursuant to the information given by PW5, PW3 was able to arrest the appellant. Thereafter, Mr. Kigoryo stated, the appellant was searched and found with a handset make TECHNO. The said handset contained a sim card "chip" that according to Airtel had been used in the stolen handset NOKIA. The learned counsel referred this court to page 40-44 of the lower court proceedings and PW6's report that was admitted in court.

Mr. Kigoryo argued that there was evidence that upon being arrested, the appellant was interrogated at Chang'ombe Police Station where he confessed that he had committed the offence in Lindi Region in collaboration with his fellow colleagues.

The learned State Attorney averred that a cautioned statement to that effect was admitted as P5 and the same could be seen on page 33 of the lower court's proceedings.

It is Mr. Kigoryo's submission that pursuant to his own plea of guilty, corroborated by another evidence namely circumstantial evidence the appellant was convicted as charged. The learned State Attorney averred that it is the position of the law that confession of an accused can be considered if corroborated by another evidence whether circumstantial or otherwise. To buttress his argument, Mr. Kigoryo referred this court to the case of **Paschal Kitigwa v. Republic** [1994] TLR 65. Based on the above introduction, Mr. Kigoryo averred, he was going to argue against each of the nine grounds and it was his prayer that this court disregards them.

On the first ground, Mr. Kigoryo stated that it was the appellant's contention that since he was not arrested in the scene of crime, he was not guilty of the offence. The learned State Attorney submitted that My lord I submit that the ground was baseless because in law, being arrested away from the scene of crime does not take away one's offence.

Moving on to the second that the investigator did not tender evidence that he had worked with the cyber unit, Mr. Kigoryo was insistent that the same was baseless. Without citing any authority to that effect, Mr. Kigoryo asserted that absence of that person did not affect the proceedings.

On the third ground that the court had erroneously believed that the sim card the appellant was arrested with had been used in the stolen phone while it bore the name of Mwanaidi Nahonyo, Mr. Kigoryo argued that the ground was equally baseless because the appellant was the one who was found with the sim card which turns out to be the one used in the stolen phone.

Moving on to the fourth ground of appeal that there was no report from the cyber unit to show that his name appeared anywhere in the communication, Mr. Kigoryo had nothing substantial to argue.

On the fifth ground, Mr. Kigoryo stated that the appellant was faulting the lower court's reliance of the cautioned statement contrary to section 58 of the Criminal Procedure Act Cap 20 RE 2019. To this, the learned State Attorney argued, the lower court was convinced that the same was in line with the procedural laws.

On the sixth ground Mr. Kigoryo stated that the appellant had complained that the victim had tendered a receipt providing that PW2 was the owner of the said stolen phone, but the seller of the phone was not summoned to testify that he had sold the phone. It is Mr. Kigoryo's submission that the same was unnecessary pursuant to section 143 of the **Evidence Act Cap 6 RE 2019.**

On the seventh ground of appeal that the appellant was sentenced to pay a fine while the offence was not proven beyond reasonable doubt, Mr. Kigoryo argued that he had already explained that the offence was proven beyond reasonable doubt.

The learned State Attorney moved on the eighth and ninth grounds that he prayed to argue them jointly. It is Mr. Kigoryo's submission that the appellant was simply complaining that the case was not proved beyond reasonable doubt. Taking into consideration his earlier submission, Mr. Kigoryo averred, he was convinced that the offence was proven beyond

reasonable doubt. The learned State Attorney concluded his submission by arguing this court to dismiss all the nine grounds of appeal as baseless.

It was the appellant's turn to address the court. It is the appellant's submission that he was serving a four year's sentence in jail. He was aggrieved and hoped that this court allows his appeal.

The appellant averred that the lower court had erred in law and fact for convicting him based on the apprehended phone with IMEI number 3590070904345 and 35900709104344 which was not found in his possession. The appellant insisted that the offence was on Stealing of a car, but the prosecution alleged that while stealing the car, the phone whose numbers he had mentioned were in that car.

The appellant averred further that while the car was stolen in Lindi alongside the phone, he was arrested in Dar es Salaam while in his daily activities. He prayed that this court takes cognizance of this ground and accept his appeal.

On the second ground, the appellant submitted that the lower court had erred in law in considering and believing that PW3 had communicated with the cybercrime's unit. The appellant averred that the witness who had testified that she knew him, and he was the one who had given her the phone explained that, by then, the phone was not with her as it had been stolen. To this, the appellant wondered, if the cybercrimes unit had facilitated his arrest, why didn't they facilitate the location and arrest of those who had stolen the phone. The appellant added that when the expert witness from Airtel testified, he explained that the phone was later used by

seven (7) different persons. To this he also wondered why they were not arraigned in court.

On the third ground, the appellant asserted that the prosecution alleged that he was arrested with a sim card with registration name of One Mwanaidi Nahonyo. However, the appellant reasoned, the prosecution failed to summon the said Mwanaidi Nahonyo to prove that she was the one who used her Identity Card (ID) to register the sim card on his behalf. The appellant denied to having known Mwanaidi Nahonyo. He emphasized that the laws in this country require that sim cards are registered in line with NIDA Identification Cards. He prayed that he is set free because he was tracked by a phone that doesn't belong to him.

Moving on to the fourth ground, the appellant averred that neither PW3 nor PW6 ever came across the name of Bakari Issa Msanga as having communicated with anyone who was linked to the stealing of the car. To this end, the appellant prayed that the court considers these grounds and allow the appeal.

Arguing on the fifth ground which was centered on the Cautioned Statement, it is the appellant's submission when he was arrested in Dar es Salaam (Mwembeyanga Area, Mzia Street) he was taken to Chang'ombe police station. The appellant averred further that he inquired of his offence he was told that he was a suspect of stealing. His personal particulars were taken, and he was locked up. Three days later, the appellant recounted, he was jokingly taken to a separate office in the police station and was told to sign a document in order to be admitted to bail. The appellant insisted that

since it was his first time to be arrested and locked in the police and I did not know my rights. Therefore, the appellant asserted, he signed the documents anxious of meeting his relatives who had come to bail him out.

Contrary to what he was promised, the appellant averred, he spent three more days and was told that he was supposed to be transferred to Lindi because the offence he was suspected of took place in Lindi. He insisted that he did not confess at the police station but rather, he was tricked by a police officer into signing the documents that he knew nothing about.

Moving on to the sixth ground, the appellant argued while PW2 had said that he bought a phone from a famous person in Lindi, the trader was not summoned. He averred that while PW2 had said in the police station that he bought the phone for TZS 40,000 in court, he changed the story and stated that the phone was bought for TZS and said he 100,000. He argued further that he did not understand the inconsistency and prayed that the ground be allowed, and he is set free.

Arguing on the seventh ground, the appellant maintained he was convinced that the prosecution case was not proved beyond reasonable doubt. It is the appellant's submission that the order for payment of compensation of fourteen million was made by the court irrespective of the fact that the prosecution had failed to prove that all the grounds were met. It was not immediately clear what the appellant meant by grounds not being met.

Arguing for the eighth ground, the appellant submitted that the law requires that the prosecution is given all the opportunities to build their case.

They brought the witnesses and all the exhibits while he was just in custody. To that end, the appellant averred, the prosecution used this weakness against him.

Moving on to the ninth and last ground of appeal, the appellant averred that the prosecution evidence was full of contradictions. He argued that there was a witness who had explained that she knew the person who had given her the phone. He wondered if that was the case why the court did not convict the person who was tracked down and found with the phone. Based on these reasons the appellant prayed that his appeal be allowed, and he is set free.

I have dispassionately considered the rival submissions by both parties. I have to say that the evidence used to sustain conviction is by and large circumstantial evidence. I am alive to the fact that when it comes to circumstantial evidence, the law in our jurisdiction requires that such evidence irresistibly leads to the conclusion that it is the accused and no one who committed the crime. See **Bahati Makeja v. The Republic**, Criminal Appeal No. 118 of 2006, CAT (unreported) and **Mathias Bundala v. The Republic**, Criminal Appeal No. 62 of 2004, CAT (unreported)

In the instant matter the offence was on stealing of a car make TOYOTA ALLION SALOON and a mobile phone make NOKIA 105. The appellant was arrested with a totally different handset TECNO TECHNO which is associated with a sim card "chip" that according to Airtel, had been used in the stolen handset NOKIA. I don't see that link. The TECNO handset was never in the stolen car. Linking the two needed the prosecution to go

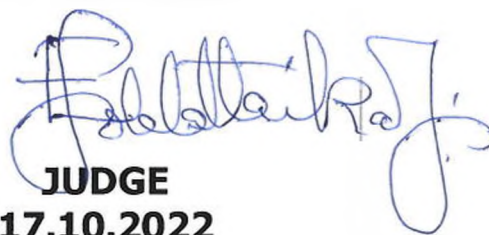
an extra mile. The facts must be so clearly connected to the incident to enable this court to draw a negative inference to the appellant (**See Seif Seleman v. Republic**, Criminal Appeal No. 130 of 2005, CAT (unreported))

It is worth emphasizing here that in Tanzania there is no law regulating sell of handsets. If we are not careful in restricting criminal liability on who is found with a handset, many people will be in trouble because secondhand phones are plenty in the market. Their IMEI numbers can be traced and connect an otherwise innocent person to a criminal case he or she is unaware of. The prosecution must go an extra mile to establish actual use of the gadget for furtherance of a crime. In this case evidence of the expert from airtel indicated that the phone was used by 7 more people. I think there must be a way of reducing the chain.

All said and done. I allow the appeal. I quash the conviction, set aside the sentence of 4 years imprisonment and the order to pay compensation of 14,600,000/=. I hereby order that Bakari Issa Msanga be released from prison forthwith unless he is being held for another lawful cause.

It is so ordered

E.I. LALTAIKA



JUDGE
17.10.2022

Court

This Judgement is delivered under my hand and the seal of this court this 17th day of October 2022 in the presence of Ms. Florence Mbamba, learned State Attorney and the appellant who has appeared in person, unrepresented.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the printed name.

**JUDGE
17.10.2022**

The right to appeal to the Court of Appeal is fully explained.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the printed name.

**JUDGE
17.10.2022**