IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL NO. 112 OF 2021

(Arising from Karagwe District Court at Karagwe in Criminal Case No. 79 of 2019)

MALISELI ELIA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Judgment: 06.10.2022

A.Y. Mwenda, J

Before the District Court of Karagwe, at Kayanga, the appellant together with other three co-accused were charged with store breaking and committing an offence contrary to section 296(a) and (b) of the Penal Code [Cap 16 Vol.1 RE 2019].

It was alleged by the prosecutions side that on the 17th of December, 2018 they broke and entered into the store of Aristotle Secondary School, Kayanga at Karagwe and stole from therein 13 laptops computers make DELL, valued at TZS. 12,000,000/=, the property of the said school.

Upon being called to enter their respective plea to the charge, they pleaded not guilty. The prosecution's side was then tasked to prove its case where six (6)

witnesses were lined up and two documentary exhibits tendered. Upon closure of the prosecution's case, the appellant and his co-accused were then called to defend themselves and at the end of the judicial day, the Hon. Trial Magistrate was satisfied that the prosecution's side discharged its duty of proving its case. The appellant was thus convicted and sentenced to serve a term of seven (7) years.

Aggrieved by the conviction entered against him, the appellant has come before this court with a memorandum of appeal containing six (6) grounds. At the hearing of this appeal, the appellant had no legal representation while the respondent (the republic) was represented by Ms. Magili, learned State Attorney.

Invited to submit in support of his grounds of appeal, the appellant opted to flow in sequence of the raised grounds.

In respect to the first ground, he faulted the trial court's failure to have the certificate of seizure read in court. He went further to state that since the stolen items were laptops, then the certificate of seizure ought to have indicated each laptops' code number.

With regard to the second ground of appeal, the appellant submitted that his arrest and connection to the offence he was charged with was based an allegations that there was a mobile phone communications between him and the first (1st) accused, the watchman of Aristotle Secondary School. However, he said, the prosecution's

side failed to bring in court the evidence to show what exactly were they communicating about.

As for the third (3rd) ground of appeal, the appellant faulted the search which was conducted at his home without a search warrant.

The appellant went further to inform the court that he abandons the fourth (4th) ground of appeal and in respect of the fifth (5th) and sixth (6th) ground of appeal, the appellant faulted the trial court's findings that he was guilty while the prosecution's side failed to prove its case to the standard required. He then concluded his submission praying this appeal to be allowed.

On their part, the respondent through Ms. Magili, learned State Attorney informed the court that they are in support of the appellant's appeal.

The learned State Attorney submitted that, the purported stolen properties were not described by any of the prosecutions' witnesses. She said, even PW1, the headmaster of Aristotle Secondary School, did not describe special features of the stolen laptops.

Further to that, she submitted that when the certificate of seizure was tendered in court, its contents were not read thus the same should be expunged from records. She added in that if the said certificate is expunged, then there is no stolen property in the record as the purported stolen laptops were not tendered in court. That being the case, she said, the link between the appellant and the offence is

lacking. The learned State Attorney concluded her submission praying this appeal to be allowed.

That being the summary of the submissions by the parties, it is now my turn to determine the fate of this appeal. Before I go into that, it is pertinent to point out that the duty of proof in criminal cases lies on the prosecution's side and the standard of which is beyond reasonable doubts. This principle was stated in the case of SAID HEMED V. REPUBLIC [1987] TLR 117, where the court held inter alia that;

> *"...it is elementary rule of the law that the burden of proof in criminal cases is on the prosecution's side and the standard is beyond reasonable doubt."*

Before the trial court, the appellant was arrested and charged based on two grounds. One, that when the store to Aristotle Secondary School was broken into, the first accused who was the watchman reported to the school Headmaster (PW1). The evidence shows, when the said incident was reported before the police, the first accused's mobile phone was impounded and upon search, it was discovered that he (the 1st accused) had communicated with the appellant and this led to the appellant's arrest. After that, PW6, testified how the appellant's home (room) was searched and six laptops were impounded.

While challenging this evidence, the appellant was of the view that PW1 ought to have described the special features of the said laptops and the same ought to have

been recorded in the seizure certificate. This position was also supported by the learned State Attorney. I have considered the arguments by both parties and I am in agreement with them that PW1 ought to have described special marks or features of the impounded laptops. It was expected PW1 to go further as to state the laptops' code numbers and not merely stating their make that they are DELL laptops (as he did). This would assist the court to satisfy itself regarding the proof of ownership of the stolen laptops. Failure to do so dents the prosecution's case as DELL laptops are many in the markets and anybody can own them. Faced with a similar scenario, the court of appeal in the case of HASSAN SAID TWALIB V. THE REPUBLIC, CRIMINAL APPEAL NO. 92 OF 2019 held inter alia that;

> *"This court has always been insistent that description of the stolen item should be sufficiently given even in circumstances where the stolen item if found in possession of the culprit."*

In the same case, the court while citing the case of DAVID CHACHA AND 8 OTHERS V. REPUBLIC, CRIMINAL APPEAL NO. 12 OF 1997 (unreported) held that;

> *"It is a trite principle of law that properties suspected to have been found in possession of accused person should be identified by the complainant conclusively. In a criminal charge it is not enough to give generalized description of the property."*

In the present case, since PW1 neither described the stolen properties nor tendered any proof of ownership, and bad indeed, the said laptops were not tendered in court, then the same watered down the prosecution's case.

Even if the description of the laptops was provided, still the prosecution case is faced with another shortfall. As it was submitted by both parties, the seizure certificate was tendered without having its contents read in court. This was fatal as in the case of HASSAN SAID TWALIB (supra) the court held that;

"It should suffice to state that exhibit was not read out in court after admission which is a fatal irregularity."

Regarding consequences, the said exhibit is thus expunged from the records. Having expunged the certificate of seizure, then there is no link between the appellant and the offence charged.

From the foregoing observation, I find merits in this appeal and it is thus allowed. The conviction meted by the trial court is quashed and the sentence entered is set aside. I direct the appellant to be discharged forthwith unless otherwise lawfully held.

It is so ordered.

A.Y. Mwenda

Judge

06.10.2022

Judgment delivered in chamber under the seal of this court in the presence of the Appellant and in the presence of Ms. Magili, the learned State Attorney for the Respondent and assisted by Mr. Alex Francis State Attorney trainee.

A.Y. Mwenda

Judge

06.10.2022