IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 290 OF 2020

(Originating from Criminal Case No. 144 of 2017; In the District Court of Kilombero, at Ifakara)

TYSON MHAGAMA ..... APPELLANT

JUMA MOHAMED .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

10th & 30th Nov, 2022

CHABA, J.

Formerly, according to the court record, the appellants, **Tyson Mhagama** and **Juma Mohamed** who featured as the 2nd and 3rd accused persons and other two accused persons (Nicolaus Vitus and Kelvin Yahaya) who are not subject to this appeal, were arraigned before the District Court of Kilombero, at Ifakara and charged with three counts as follows: **First Count;** House breaking and stealing contrary to sections 296 (a) of the Penal Code [Cap. 16 R. E, 2002], Now [R. E, 2022] in which the particulars of the offence shows that on the 1st day of June, 2017 about 05:00hrs at Mhola area within Kilombero District, the accused persons broke into the shop and stole the properties of Raphael Edward @ Sule worth 1,500, 000/=.

In the **3rd Count:** The appellants were charged with the offence of retaining stolen properties or unlawfully obtaining contrary to section 311 of the Penal Code (Supra). It was alleged by the prosecution that on the 1st day of June, 2007 at about 11:00hrs at Shengena Guest House at Ifakara township, the appellants retained the stolen properties while having reasons that the same were stolen. The 2nd and 4th Counts touches the other two accused persons who are not subject of this appeal.

After a full trial, the appellants were convicted and sentenced as follows: For the **1st Count:** the two appellants were sentenced to serve a term of five (5) years imprisonment, and

For the **3rd Count:** the appellants were sentenced to serve a term of five (5) imprisonment.

The trial Court ordered further that the sentences imposed against the 2nd and 3rd accused persons, herein the appellants on the **1st Count** had to run consecutively.

Dissatisfied with the trial court decision, the appellants preferred this appeal armed with eight (8) grounds of appeal. On scrutiny of these eight (8) grounds of appeal, I noted that all grounds dictates that the prosecution did not prove their case beyond a reasonable doubt.

At the hearing of the appeal, which conducted through video conferencing (virtual court), the Respondent / Republic was represented by Mr.

Emmanuel Kahigi, learned State Attorney, whereas the appellants appeared in remote linked with the video conferencing but in persons, unrepresented.

Arguing in support of the appeal, the 1st appellant commenced to argue his appeal stating that, since he does not know how to read and write, the court should consider his grounds of appeal as presented in court and analyze them accordingly, and find him not guilty of the offences he stands charged before this court. He added that, if the court will find him not guilty, then should not hesitate to set him free.

As for the 2nd appellant, had nothing useful to tell the court, rather than echoing what the 1st appellant submitted before the court. He finally prayed to be set free.

In reply, Mr. Emmanuel Kahigi, learned State Attorney did not seek to oppose the appeal. In other words, he supported the appellants and counted for the reasons pushed him to support the appeal. Generally speaking, the learned State Attorney accentuated that the prosecution side failed to prove the case beyond all reasonable doubts. Reinforcing his stance, Mr. Kahigi submitted that the appellants were charged with the offence of house-breaking and stealing contrary to section 296 (a) and retaining stolen goods contrary to section 311 both of the Penal Code (Supra). He averred that, according to the evidence adduced by PW1, the appellants were found while retaining stolen properties and accordingly were inspected. Afterwards, the certificate of seizure

was prepared and during trial the same was admitted and marked Exhibit PE.1 as shown at pages 13 of the typed trial court proceedings without being read out (audibly) before the court contrary to the procedural law requirement.

He contended further that, the remedy for failure to comply with the legal requirement of reading out the exhibit before the court is for the same to be expunged from the court record. And once the same will be expunged from the court record, there is no other cogent evidence that links the appellants with the offence they stood charged.

In rejoinder, both appellants reiterated their submissions in chief.

Having considered the oral submissions from both parties, the only issue for consideration and determination is whether the Exhibit PE.1 tendered at trial was properly admitted and warrant conviction of the appellants.

It is the established principle of the law that, once the exhibit is cleared for admission in court, a person tendering the exhibit is obliged to read out (audibly) in court all contents recorded therein to enable the opponent side to understand the contents of the document and afford him with an opportunity to raise the necessary questions or objections, if any.

The rationale behind this procedure is to allow the appellant to fully assess the facts he or she is being called upon to accept as true or reject as untruthful. Failure to adhere to this crucial legal requirement, it tantamount to prejudice the accused on his/her right to a fair hearing and consequently the

document may be expunged from the court record.

This position was repeatedly insisted by our Apex Court in many precedents including the case of **Mathias Dosel @ Adriano Kasanga vs. R,** Criminal Appeal No. 212 of 2019 (Unreported) when their Lordships referred the cases of **Mbagga Julius vs. R,** Criminal Appeal No. 131 of 2015 [CAT at Mwanza] (unreported) and **Rashidi Kazimoto & Masudi Hamisi vs. R,** Criminal Appeal No. 458 of 2016 (Unreported). The Court held:

> "Failure to read out documentary exhibits after their admission renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record".

Similar holding was repeated in the case of **Mathias Dossera @ Adriano Kassanga vs. Republic,** Criminal Appeal No. 212 of 2019 HCT (Unreported) where this Court observed that:

> *"Besides the said documents were admitted without objection, it is necessary to read out the contents of the documents after their admission as exhibits".*

Having reviewed the position of the law, and upon analysed and assessing the typed proceedings of the trial court, in particular page 13, I have noted that the record is very clear that Exhibit PE.1 (Certificate of Seizure) was not read out before the trial court after being cleared

and admitted as exhibit. Applying the principles set out in the cases cited above, I am certain that the only available remedy the fact in issue is to expunge the exhibits from the court records, as I hereby do.

Upon expungement of the Exhibit PE.1 from the record, it is my considered opinion that the remaining or available evidence are unsafe to rely on, to sustain the appellants conviction for one reason that the same does not support the allegation levelled against the appellants as shown in a charge sheet. Suffice it to say that this ground is sufficient to allow the appellants' appeal.

Accordingly, I allow the appellants' appeal, quash the conviction and set aside the sentence meted out against the appellants. I order the immediate release of the appellants, namely; Tyson s/o Mhagama and Juma s/o Mohamed from prison unless his incarceration is in relation to some other lawful cause. **It is so ordered.**

DATED at **MOROGORO** this 30th day of November, 2022.

M. J. Chaba

Judge

30/11/2022