IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 22 OF 2022

(Originating from Criminal Case No. 79 of 2021 before the Resident Magistrate Court of Kibaha.)

PATRICK RAPHAEL MWASHIGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

22nd March & 19th April, 2023.

MWANGA, J.

In the Resident Magistrate Court of Kibaha, the appellant **PATRICK RAPHAEL MWASHIGA** was charged and convicted of Destroying Evidence contrary to Section 109 of the Penal Code [Cap. 16 R.E 2019], currently [R.E 2022]. The particulars of the offence against the appellant were that; on 29th day of September 2018 within Kibaha District in Coast Region being an employee of Tanzania Police Force, while under custody of the Tanzania Forest Services Officers did intentionally destroyed evidence to wit; the appellant escaped with a motor vehicle with registration No.T.365 ACK make

TOYOTA HIACE intending to prevent the said motor vehicle from being used as exhibit for illegal transportation of harvested forest produce. The appellant subsequently, arraigned in court and charged accordingly.

At the trial court, the prosecution produced a total of ten (10) witnesses and, upon their testimonies the appellant was convicted and sentenced to pay a fine of Tshs. 1,000,000/= or serve two years imprisonment in default thereof. The appellant was not contented by the whole Judgement of the Resident Magistrate's Court at Kibaha, hence this appeal on the grounds that: -

1. the learned trial magistrate erred in fact and law in holding that the prosecution case was proven beyond reasonable doubt as against the appellant while there are lots to be desired.
2. the learned trial magistrate erred in law and fact in failing to properly evaluate the evidence tendered before it.
3. the learned trial magistrate erred in law and fact by not considering the defense of the appellant.
4. the whole proceedings during the trial were tainted with a number of irregularities.

Basing on the grounds of appeal, the appellant is requesting this court to allow the appeal, quash and set aside judgment, conviction and sentence. To appreciate what transpired at the trial court, a brief back ground of the case is necessary.

The charge against the appellant was that, on the material date the appellant while having his own motor vehicle with Registration No. T 365 ACK was arrested together with two other persons offloading timber from Toyota Hiace at Old Mruma Hotel area, Mailimoja area within Kibaha District. Upon interrogation, it was revealed that the appellant had no license to harvest and transport such forest produce. Thereafter, the appellant was ordered by the TFS officers to re-load the timber into the vehicle where he was taken to the TFS Check point at Kiluvya Bwawani. The appellant and his colleague were handed over to the guardsmen who were at that particular check point, where admission form was filled and the appellant was ordered to pay a fine at the tune of Tshs. 12,840,000/=. During the afternoon of the same day, the motor vehicle contained timbers on board was taken away from where it was parked at that checkpoint. On the basis of such facts, the appellant was arraigned in court on the charge of destroying evidence.

In the course of hearing, the appellant enjoyed representation by the learned counsel Mr. Tumaini Mgonja while the respondent was represented by Mr. Maleko, the learned Senior State Attorney.

When the submission was to be made, the appellant abandoned fourth ground of appeal. In his submission on the first ground of appeal, the counsel contested the trial court's decision that, the prosecution failed to prove its case beyond reasonable doubt as it is provided for under Section 110(1) of the Evidence Act, Cap. 6 R.E 2019, which in essence provides that;

> ***"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".***

The counsel contended that the prosecution is bound to prove element of the charge beyond reasonable doubt and that whenever any reasonable doubt arises benefits shall be resolved in favour of the accused person. The counsel asserted further that, since the thing allegedly to be destroyed by the appellant was a motor vehicle with the registration Number T365 ACK together with the forest produce (72 pieces of timber), such objects which are said to be destroyed by the appellant ought to be tendered as exhibits in court. The alleged 72 pieces of timbers, motor vehicle be it physical or

registration card of the same were not tendered and there is no explanation as to where about those objects. The counsel also told the court that, evidence of PW8 one **Kishai** who purportedly to have bought the said car from the appellant failed to come in court with the same. Also did not bring to court the registration card or sale agreement.

The appellant's counsel contended further that PW6 admitted to have recorded 72 produces of the timbers in the log book but also failed to bring them in court. Therefore, in those circumstances, the question of destruction of the evidence cannot arise. Also, PW6 admitted that it is the procedure that when the vehicle enters the TFS check point premises at Kiluvya Bwawani to record the particulars of that vehicle but he also failed to produce a logbook where he recorded the same.

Additionally, it was argued that another doubt seen at the particulars of the offence where it states that on 29th day of September 2018 the appellant did intentionally destroy evidence. PW6, a police officer who purported to have handed over the said car testified that the vehicle was handed over to him on 28th September 2018 at 6:00 am. According to the counsel, such variance raises doubt. It was the contention further that the prosecution failed to call key witnesses because in their evidence they stated

that the appellant admitted before OCCID and OCD to have destroyed the evidence, but the same were not called to testify. Also, failed to call **Juma Omari** who was alleged to be arrested with the appellant.

In support of the appeal, the appellant cited the case of **Aziz Abdala Vs R [1991 TLR]** which states that the prosecution is under *prima facie* duty to call witnesses who are important to the case and if not called the reasons has to be advanced. That being the case, an inference ought to be drawn averse to the prosecution.

The counsel continued arguing that, at page 10 of the judgment the appellant was ordered to fill in admission form to pay a fine of Tshs. 12,840,000/= but even that purported form was not brought to the attention of the trial court. Also, PW7 at page 5 of the judgement stated that during interrogation accused admitted to be found in possession of the exhibits but no evidence to that effect.

Attending the third ground of appeal, the appellant's counsel stated that the trial magistrate failed to consider defence of the appellant. According to the counsel, page 8 of the of the copy of the judgment shows that the appellant denied the allegation and that he never owned such a

motor vehicle. The prosecution did not produce any document in respect of timber and motor vehicle which was seized from him. And that no documentary evidence to prove the claims by the prosecution that the appellant was found with a motor vehicle carrying pieces of timber. Having said so, the counsel for the appellant stated that they have found a lot of doubts which can be decided in favour of the appellant. Henceforth, the counsel prayed that the appeal be allowed.

Per contra, Mr. Maleko learned Senior State Attorney opposed the appeal in its entirety. According him, the threshold set out in Section 110 of the Evidence Act, Cap. 6 R.E 2022 was met by the prosecution by producing 10 witnesses. It was his view that, PW6 who was at the guard on that particular day saw the appellant came and collected the motor vehicle while packed at TFS – Kiluvya.

On top of that, the learned State Attorney contended that PW8, PW9 and PW10 testified to the effect that, the alleged motor vehicle was sold by the appellant in Morogoro. Hence, the above prosecution witnesses were credible, reliable and therefore entitled to credence. In support of his argument, the learned State Attorney referred this court to the case of **Goodluck Kyando Vs Republic** [2006] TLR 363.

In furtherance to his submission, the learned State Attorney cited Section 143 of the Evidence Act to support his contention that, failure to call the OCCID and OCD to testify has not affected the case of prosecution.

In the second ground of appeal, the learned State Attorney made reference at page 8, 9 and 11 of the judgment of the trial court that the witnesses gave the detailed account of the event.

In the last and third ground of appeal, the learned State Attorney was of the considered view that the appellant's defense was considered by the trial court. He moved this court to see such truth at page 7 of the typed proceedings where the court highlighted that the case of the prosecution was stronger than the defense case.

In rejoinder, the appellant's counsel submitted that, the number of prosecution witnesses who testified, however big, does not matter for the prosecution, what matters is the prove of the case beyond reasonable doubt. According to him, there was no prove on arrest of the appellant and that the car was stored at TFS. He added that, if the prosecution witnesses admitted that there was a log book where the same was recorded, such documentary evidence ought to be brought to the attention of the trial court. He reiterated

the position that since the defense case was not considered the appellant was not accorded with right to be heard.

I have carefully considered the evidence on records and submission of the learned counsel and the State Attorney for and against the appellant case.

In consideration of the authorities cited before me, it is the established position of the law that, in criminal cases, the burden of prove lies to the prosecution, and the same shall be proved beyond reasonable doubt. I am equally of the same view that every witness is entitled to credence unless there is reason to disbelieve him. See the case of **Goodluck Kyando Vs the Republic** (supra). The court, in the case of **Trazias Evarista @ Deusdedit Aron Versus The Republic**, Criminal Appeal No. 188 Of 2020(Unreported) had this to say:-

> ***"It is a peremptory principle of law that every person, who is a competent witness in terms of the provisions of section 127 (1) of the Evidence Act, Cap 6 R.E 2019 is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not be believed. See, for example Goodluck Kyando v. Republic [2006] TLR 363".***

The whole case against the appellant lies under Section 109 of the Penal Code [Cap. 16 R.E 2019], currently [R.E 2022]. The thrust of that section reads as follows: -

> ***"S109-A person who, knowing that any book, document, device or thing of any kind whatsoever is or may be required in evidence in a judicial proceeding, willfully removes or destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of an offence."***

When interpreting the provision of the law above in the case of **Director of Public Prosecutions Versus Norbert Enock Mbunda,** Criminal Appeal No. 108 Of 2004, the court of appeal provided guidance as to what amount to "destroying of evidence". The court adopted the definition of the word "destroy" in the Oxford Advanced Learners Dictionary 6th Edition to mean: -

> ***"to damage something so badly that it no longer exists, works, etc . . ."***

In light of the above, the prosecution ought to produce evidence necessary to show that the appellant destroyed the motor vehicle which was seized with the appellant carrying 72 pieces of forest produce (timbers) at

the TFS-Check point, Kiluvya with the requisite intention of ensuring its non-exhibition in evidence in the case at the Resident Magistrate Court of Kibaha.

The evidence produced by PW8 (businessman who purchased the motor vehicle), PW9(TRA Officer) and PW10(motor vehicle inspector) at the trial court shows that the alleged motor vehicle was sold by the appellant in Morogoro. On the other hand, PW7(PCCB Officer-investigator) and the rest of other prosecution witnesses had established that the said motor vehicle was seized at Kiluvya TFS Check point where the appellant drove it away with intent thereby to prevent it from being used in evidence. The fundamental question now is whether the conduct of the appellant amount to destroying of evidence, and whether it was done unlawful.

I hasten to state that, on the basis of the available evidence the respondent did not destroy the motor vehicle in issue in the meaning of the word destroy as per section 109 of the Penal Code. The said provision has many options which the prosecution could charge the appellant and establish that, the appellant had either willfully **removed or destroyed or rendered** the motor vehicle illegible or undecipherable or incapable of

identification. However, according to the particulars of the offence which I have already shown it above, the appellant was accused of: -

> ***"... intentionally destroyed evidence to wit the Appellant escaped with a motor vehicle with registration No.T.365 ACK make TOYOTA HIACE intending to prevent the said motor vehicle from being used as exhibit for illegal transportation of harvested forest produce"(Emphasis is mine).***

In the circumstances, no any prosecution witness testified that the respondent destroyed the motor vehicle within the meaning given in the above definition of the word "destroy." That position is articulated clearly in the case of **Director of Public Prosecutions Versus Norbert Enock Mbunda**(supra). In the cited case, where the subject matter was the ''money" the court had this observations: -

> ***"In other words, no positive evidence was forthcoming to show that the respondent damaged the money so badly that it no longer existed. Three, the fact that the money was not damaged, or destroyed, is explained by the fact that the respondent gave it to DW2, as stated above". Four, in the absence of evidence to the effect that the money was destroyed it will follow that likewise no positive evidence was adduced to show that the requisite intention to destroy the money existed. Therefore, in the absence of evidence of intent the prosecution case was not advanced to the expected standard".***

The fact that there was evidence that the motor vehicle was sold in Morogoro and the purchaser (PW7) came to testify in that respect and, the transfer proceeded at TRA, nothing shall be inferred as destroying evidence. Apparently, nobody ever testified of any effort, if any, made by anyone to retrieve it from PW7 for purposes of being tendered in evidence at Kibaha Resident Magistrate Court. The court, in the case of **Pascal Yoya @Maganga** Vs **The Republic**, Criminal Appeal No. 248 Of 2017(Unreported), held that: -

> ***"It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence".***

Again, in the case of in **Mwita and Others v. Republic** [1977] TLR 54 the court when hearing a criminal appeal put emphasis that:-

> ***"The appellants' duty was not to prove that their defense was true. They were simply required to raise a reasonable doubt in the mind of the magistrate and no more."***

After carefully examination of the evidence on records and in consideration of the submissions at hand, judgement and the proceedings of the trial court, this court has found out that; the charge of Destroying evidence against the appellant contrary to Section 109 of the Penal Code was not proved to the required standard.

In the results, this appeal must succeed. The conviction of the appellant and sentence is quashed and set aside.

Order accordingly.

H. R. MWANGA

JUDGE

19/04/2023

COURT: Judgement Delivered in Chambers this 19th day of April, 2023 in the presence of Sofa Mwambiga, learned State Attorney and advocate Tumaini Mgonja for appellant.

H. R. MWANGA

JUDGE

19/04/2023