IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 30 OF 2022

(Originating from Criminal Case No. 101 of 2017 of Mwanga District Court)

HUSSEIN S/O SHABANI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

21/02/2023 & 22/02/2023

SIMFUKWE, J.

The appellant, Hussein Shaban was charged before the District Court of Mwanga (trial court) with the offence of burglary contrary to section **294 (2) of the Penal Code**, Cap 16 R.E 2002 (now R.E 2019). It was alleged before the trial court that on 15th day of July 2017 at 05:15hrs at Reli Juu within Mwanga district in Kilimanjaro region the appellant did unlawfully break into the dwelling house of one Petro Gerald with intent to commit an offence therein.

The trial court found the accused guilty as charged, convicted and sentenced him to 15 years imprisonment. The appellant was dissatisfied

with the conviction and sentence. He filed the instant appeal on nine grounds:

1. *That, the learned trial magistrate grossly erred both in law and fact in accord (sic) the Appellant with an unfair trial. Since, when the Appellant was arraigned before her, the prosecution objected the Appellant's bail and the trial magistrate granted the objection and denied the Appellant with bail without furnish him with an opportunity to be heard, comment or saying anything concerning the prosecution's objection to bail.*
2. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant basing on insufficiency (sic) evidence from prosecution witnesses particularly PW3 as he stated to have only seeing (sic) the Appellant standing on the door and not seeing him breaking his house.*
3. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that, no certificate of seizure/Receipt produced, issued and tendered in evidence of alleged breaking tools said to be in Appellant's possession. (sic)*
4. *That, the learned trial magistrate grossly erred both in law and fact in convicting the Appellant basing on a purely fabricated case as the prosecution witnesses alleged to have found the Appellant with the breaking tools but none of the alleged tools were produced and subsequently being tendered in evidence as exhibit.*

5. *That the learned trial magistrate grossly erred both in law and fact in failing to draw an adverse inference to the prosecution as they never summoned the very crucial and important witnesses i.e., the re-arresting police officers who could have testified whether the Appellant was really found in possession of the alleged breaking tools.*
6. *That, the learned trial magistrate grossly erred both in law and fact in convicting the appellant basing on an irregular proceeding which flouted the mandatory provisions of section 231(1)(a) and (b) of the CPA Cap 20 R.E 2002 now 2019. Since the appellant was never addressed under the above cited section of law, after prima facie case being shown against him.*
7. *That, the learned trial magistrate grossly erred both in law and fact in fact in shifting the burden of proof to the Accused (Now the Appellant before you) by requiring him to ought have corroborated his defence evidence. Hence the burden never shift it remains throughout the prosecution. (sic)*
8. *That, the learned trial Magistrate grossly erred both in law and fact in relying upon weak tenuous contradictory, incredible and wholly unreliable prosecution's evidence from prosecution witnesses to convict and sentence the Appellant.*
9. *That the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt*

against the appellant and to the required standard by the law.

The appeal was ordered to be argued by way of written submissions. The appellant had no representation while the respondent was represented by Ms Grace Kabu, learned State Attorney.

On the second ground of appeal, the appellant lamented that he was not properly identified since the complainant said that he saw a person standing and not that he saw the person breaking the house. The appellant believed that he was not properly identified since the incident occurred at 05:00hrs in the morning. To insist on the point, he cited the case of **Raymond Francis vs Republic [1994] TLR 100** in which the Court of Appeal held that:

> *"It is elementary that in a criminal case whose determination depend essentially on identification evidence on conditions favouring a correct identification is of the utmost importance."*

It was submitted further that PW3 never disclosed the kind of light which facilitated his recognition and never explained if there was light at all. It is unknown at what distance was this observation done as it was not disclosed how far was the appellant standing to where PW3 was. In the case of **Aburahamu Daniel vs Republic, Criminal Appeal No. 6 of 2007** (unreported) where the intensity of moonlight was not explained, the Court of Appeal held that:

> *"……the distance of seven paces at which the witness claimed he was able to identify the appellant was not so close in the circumstances of the case as to rule out the possibility of mistaken identity. Intensity of the moonlight was not explained and, in such*

circumstances, extra care should have been taken prior to making a decision to rely on the evidence of identification to find a conviction."

In the instant matter the appellant was of the view that since the kind of light and its intensity was never mentioned, then there is possibility of mistaken identity.

In addition, the appellant averred that PW3 never witnessed the appellant breaking the alleged padlock as he just saw the appellant standing at his door. Also, PW2 never saw the broken padlock or reached the scene of crime until when cross examined where at page 16, he said that they went to the scene and found the padlock broken. It was the opinion of the appellant that this information ought to be raised at examination in chief where relevant matters are discussed.

The appellant elaborated that no witness saw PW3 chasing him since all witnesses said that they found PW3 and the appellant holding each other somewhere far from the scene.

Supporting the 3rd and 4th grounds of appeal, the appellant argument was that the alleged tools used to commit the offence were not produced and tendered in evidence as exhibit and much more there is no certificate of seizure to that effect.

Also, it was explained that there was contradiction on the type of instruments alleged to have been found with the appellant since PW1 at page 16 of the typed proceedings said that the appellant was found with a big scissor, an iron and spanner, PW3 at page 17 of the typed proceedings said that the appellant had a scissor, iron spanner and pipe rangers while PW3 at page 20 said that the appellant had a scissor, pipe ranger and *'koleo'*. The appellant alleged that though there were such

contradictions, the said instruments were not tendered in evidence. PW3 alleged the same to be with the police but no police witness testified to confirm the said allegations. PW3 said that the broken padlock made *'woco'* was silver in colour and he tendered the same as Exhibit P1.

The appellant elaborated that it is disturbing to see that it is PW3 who tendered his own padlock and it is not known where exactly he got it. He questioned why the same was in possession of PW3 for a year until when he tendered it before the court. It was also averred that if the tools used to break the padlock were given to the police, then why was the padlock not given to the police who would testify to ascertain if at all it is the same padlock which was broken.

It was also stated that in the circumstances where it is alleged that the police were called immediately after the incident, it was necessary for the investigator to testify since he was a material witness who could explain the items seized and why they were not tendered in court and why the alleged broken padlock remained in possession of the complainant. He said that this could not only explain the circumstances in which the appellant was arrested but also if he was the one who committed the alleged offence as it was stated in the case of **Baya Lusana vs Republic, Criminal Appeal No. 593 of 2017;** Court of Appeal of Tanzania, in which it was held that:

> *"Furthermore, it really taxed our mind as to why the investigator was not called to testify on such a serious offence which posed a threat to the life of PW1. It is the investigator who would have shed light as to what precipitated the appellants arrest. Failure to call material*

witness entitles this court to draw an inference adverse to the prosecution…"

The appellant emphasized that the investigator was material witness and failure to call him as a witness leaves the court with an option to draw an adverse inference to the prosecution.

The appellant also noted that the chain of custody of the alleged padlock was broken as it is not known where it was stored, under whose custody and if the one tendered was exactly the one broken. In those circumstances, the appellant believed that there is no assurance that the tendered padlock was exactly the same which was broken since no police officer came to testify.

The appellant also lamented that the prosecution introduced evidence of the bad character as stated by PW2 at page 17 and also as stated by the prosecutor during mitigation. The appellant believed that this prejudiced the mind of the trial magistrate to believe that the appellant committed the crime he was charged with. In those circumstances, the appellant said he could not have a fair trial to which he was entitled.

In his conclusion, the appellant submitted that there is no cogent evidence to find that the charge was proved beyond reasonable doubt against him and to the standard required in criminal cases. He prayed the court to find that the appeal has merit and allow it.

In reply to the first ground of appeal that the appellant was accorded with unfair trial as he was denied bail unheard, the learned State Attorney conceded on that and argued that in the line of the case of **National Housing Corporation vs Tanzania Shoes and Others [1995] TLR 251** violation of right to be heard is considered to be a breach of natural

justice. However, the learned State Attorney had different opinion in respect of this, she said that bail consideration does not constitute an integral part of the trial. Thus, it cannot vitiate the whole trial proceedings. It was stated further that when it occurs that the court refuses to grant bail then the remedy is to appeal to the High Court as per **section 149 of the CPA**. In the instant case, the appellant did not ask the court to grant him bail and even after being denied bail, the appellant did not appeal. Thus, raising this grievance at this stage is an afterthought.

The learned State Attorney responded to the second, third and fourth grounds of appeal to the effect that PW3 gave an eye witness account which falls under the best evidence rule as provided for under **section 61 and 62 of the Evidence Act, Cap 6 R.E 2002**. That, PW3 testified on what he saw as he caught the appellant ready handed committing the alleged offence. Thus, as it was held in the case of **Goodluck Kyando vs Republic, [2006] TLR 363** there was no clear and cogent reason to discredit his evidence. It was added that PW3 chased and successfully caught the appellant as witnessed by PW1. Also, the padlock which was broken by the appellant was tendered in evidence as Exhibit P1. Ms. Grace, was of the opinion that, that was sufficient to establish that the appellant committed the offence.

Responding to the issue of failure to tender seizure certificate and the breaking tools which were found with the appellant, Ms Grace submitted that the arrest was done by civilians and not police officers. Thus, the strict rule of compliance to **section 38 of CPA** is generally relaxed under section 42. Thus, the appellant was not prejudiced anyhow by the procedure of arresting and seizing. Reference was made to the cases of **Matata Nassoro and Another vs Republic, Criminal Appeal No.**

329 of 2019 (unreported) and **Nyerere Nyaguhe vs Republic, Criminal Appeal No. 67 of 2010** which held that not every apparent contravention of CPA would result in the automatic exclusion of evidence in question. Also, she referred to the case of **Julius Billile vs Republic [1981] TLR 333** which held that non production of a thing which is a subject matter of the court proceedings goes only to the weight and not to the admissibility of the testimony concerning or relating to it.

On the 5th ground of appeal on failure to summon the investigator to testify, Ms. Grace submitted that the appellant did not show how he was prejudiced. That, the prosecution has no obligation to call each and every witness. She added that under **section 143 of the Evidence Act**, Cap 6 R.E 2019 number of witnesses is immaterial what matters is credibility. She cited the case of **Hamisi Shabani @ Ustadhi vs Republic, Criminal Appeal No. 259 of 2010** to buttress her position.

In reply to the 6th ground, the learned State Attorney submitted that as per page 24 of the typed proceedings the appellant gave the reply to the trial court in compliance with **section 231 (a)(a)(b)** by notifying that he will defend himself on oath and that he will call one witness and he had no exhibits. Thus, the omission to record the provision is not fatal and the appellant was not prejudiced any how so long as the record shows that he defended himself in compliance of **section 231 of the CPA.**

Responding to the seventh, eighth and nineth grounds of appeal, the learned State Attorney replied that nothing in the proceedings suggests that the trial court shifted the burden of proof to the appellant. That, the prosecution evidence as adduced by PW1, PW2, PW3 was direct, credible and consistent and had credence. The witnesses were worth to be

believed as the appellant was found ready handed committing the offence. Through these witnesses the trial magistrate found the prosecution case proved beyond reasonable doubt.

The learned State Attorney implored the court to dismiss the appeal in its entirety as it lacks merit.

I have keenly considered the grounds of appeal, submissions by both parties and the lower court's records. The issue is ***whether the prosecution proved its case beyond reasonable doubts.***

On the first ground of appeal the appellant was of the belief that he was not accorded fair trial since he was not given chance to say anything when the prosecution objected his bail. Ms. Grace for the respondent conceded to that fact but she was of the view that bail consideration does not constitute an integral part of the trial and the remedy was for the appellant to appeal to the High Court.

Without further ado, I do concur with the learned State Attorney. **Section 149 of the Criminal Procedure Act** (supra) gives this court powers to vary terms of bail imposed by lower courts. In the circumstances where the appellant was of the view that he was curtailed bail unheard, then I expected him to move this court under **section 149 of the CPA**, something which he did not do. I am of the same opinion like the learned State Attorney that raising such grievances at this stage is an afterthought. Moreover, I am of settled opinion that, at this stage, the issue of bail is overtaken by events.

On the second ground of appeal, the appellant faulted the trial magistrate for convicting him basing on insufficient evidence from the prosecution. He argued that PW3 who alleged to have identified him, never disclosed

the intensity of light which enabled him to identify the accused as the offence was committed at night. Also, PW3 never witnessed the appellant breaking the said padlock apart from saying that he saw him standing at his door. Also, other witnesses did not see the appellant breaking the padlock.

On the other hand, Ms. Grace replied that PW3 testified on what he saw at the material night and he caught the appellant ready handed committing the offence.

Basing on this debate, I had to revisit the testimony of PW3 to see what he stated. At page 19 and 20 of the typed proceedings PW3 had this to say:

> *"…I passes by my parents' house to say helo (sic) to my mother, when leaving I took (sic) at my house which is nearby and I saw a person standing at my door, I returned to my place, looking at my door the padlock was already broken, I asked that person, accused in court, as to what he was doing at my door and he run away.*
> *I decided to chase him while screaming thief I was able to apprehend him, the first to come due to my scream was Abdallah…"*

From the above quoted paragraph, with respect, I wish to differ with the learned State Attorney who said that the appellant was caught ready handed committing the offence. The above paragraph suggests that even PW3 did not witness the appellant breaking the padlock since he said he saw him standing at the door. From the entire evidence of the prosecution, the quick picture is that no one saw the appellant committing the offence.

In other words, the prosecution relied on circumstantial evidence which the trial court did not discuss. Thus, this being the first appellate court, I am obliged to re-evaluate the evidence to see if the available circumstantial evidence warrant conviction against the appellant.

PW3 in his evidence stated that he saw the appellant standing at his door. However as grieved by the appellant he did not tell the court how he managed to identify the appellant as it was night. Courts in a number of occasions have insisted that evidence of visual identification is of the weakest kind and before basing conviction on it, the court must be sure that the same is watertight. See the cases of **Waziri Amani vs Republic [1980] TLR 250** referred in many cases for instance the case of **Wilson Elisa @Kiungai vs Republic, Criminal Appeal No. 449 of 2018.**

It has been testified by PW3 that he chased the appellant and caught him. However, the witnesses who supported his evidence argued that they found the appellant and PW3 holding each other. PW3 informed them that the appellant was breaking his house. In his defence before the trial court, the appellant alleged that he was on his way to the market with his son Shaban when they heard the screams of a thief. They ran to the house of his sister where they were caught and taken to the police station.

From the above evidence, it may be concluded that no one testified that he saw the appellant breaking the said padlock. In addition, the said padlock which was alleged to be broken by the appellant was left there at PW3's house. This is evidenced by the words of PW1 during cross examination, who at page 16 of the typed proceedings stated that:

"We later went to the scene and found the padlock broken."

It has been alleged that the appellant was found with the instruments which he had used to break the padlock. The appellant on the 4th ground alleged that neither the instruments nor certificate of seizure were tendered before the court. The appellant also told the court that there was contradiction in those tools, that PW1 said the appellant was found with big scissor, an iron and spanner, PW2 said the appellant was found with scissor, iron, spanner and pipe rangers while PW3 said that the appellant had scissor, pipe ranger and koleo.

While replying this grievance, the learned State Attorney argued that the arrest was done by the civilians and not police officers. Ms. Grace cited the case of **Julius Billile** (supra) which emphasized that non production of a thing goes only to the weight and not admissibility of the testimony.

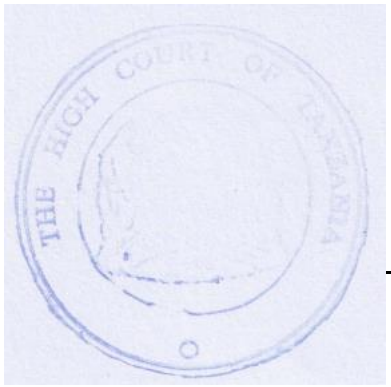
I have examined the proceedings and noted that the alleged items which were alleged to have been used by the appellant to break the padlock were not tendered in court, even the certificate of seizure was not tendered in court. In the circumstances where there is the said discrepancy, the certificate of seizure or the said items were required to be tendered.

I am of considered opinion that the noted discrepancy in respect of the tools alleged to have been found in possession of the appellant touches the root of the case. Thus, the offence was not proved beyond reasonable doubts.

It is on the basis of the above reasons that I allow this appeal. Conviction against the appellant is hereby quashed and sentence set aside. I hereby order the immediate release of the appellant from custody, unless held for other lawful reasons.

It is so ordered.

Dated and delivered at Moshi this 22nd day of February 2023.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE