IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MOROGORO

AT MOROGORO

PC CRIMINAL APPEAL NO. 86 OF 2022

(Arising from the decision of Morogoro District Court in Criminal Appeal No.8/2022 dated 29th September, 2022, originating from the Decision of Mkuyuni Primary Court in Criminal Case No. 92 of 2021 dated 23rd July 2021)

MENGI LUBUWA ..... APPELLANT

VERSUS

STIVINI CHRISTIAN ..... 1ST RESPONDENT

MSEKWA SHABANI ..... 2ND RESPONDENT

SAIDI WAZIRI ..... 3RD RESPONDENT

SUDI MOHAMED ..... 4TH RESPONDENT

Date of last order: 14/12/2022
Date of judgment: 09/02/2023

JUDGMENT

MALATA, J.

This is a judgement in respect of the second appeal by the appellant who is trying to demonstrated his dissatisfaction of the judgement by the trial court and the first appellate court on allegations of stealing against the respondent herein contrary to section 265 of the Penal Code, Cap. 16. R. E. 2022. On 24th October, 2022, the appellant filed a petition of appeal with three grounds against the decision of Morogoro District Court in

Criminal Appeal Case No. 08 of 2022, which upheld the decision of Mkuyuni Primary Court in Criminal Case No.92 of 2021. The trial Court acquitted the respondents on the reasons inter alia, failure to prove the offence beyond reasonable doubt against the respondents.

The appellant's grounds of appeal before this Court stood as follows: -

1. *That, the trial Court erred in law and in fact in not convicting and sentencing the 1, 2, 3 & 4 accused persons/ Respondents while the appellant had proved the charge beyond reasonable doubt, the standard of prove required by the law.*
2. *That, the Honourable District Court grossly erred in law and in facts in not properly addressing grounds number 1, 2, and 3 of appeal and in interpreting section 258 (1) of the Penal Code [CAP. 16 R. E. 2022] as related to the prove of* ***actus reus*** *and* ***mens rea*** *in the circumstances.*
3. *That, the Honourable District Court erred in law and in facts in not properly interpreted the circumstances on which exhibit* ***"E" and "D"*** *were obtained and aimed to serve as related to* ***mens rea.***

In nutshell, the appellant sued the respondents at Mkuyuni Primary Court for the offence of theft contrary to section 265 of the Penal Code [Cap. 16 R.E. 2022]. It was alleged in the charge before the trial Court that, on 25th day of May, 2021 at around 9.00 am, the respondents jointly did steal the appellant's properties to wit; 27 pieces of timber wood @ mninga, 2 pairs of shoes, 3 hens, 1 panel solar, a harmer and 3 bags with cement.

Having heard both parties, the trial court get satisfied that the appellant failed to prove the charge against the respondents beyond reasonable doubts. He thus, acquitted the respondents and set them at liberty. Aggrieved thereof, the appellant preferred an appeal before the Morogoro District Court in Criminal Appeal Case No. 8 of 2022. On his appeal, he complained that the trial Resident Magistrate erred in law for acquitting the

respondents while the charge was proved beyond reasonable doubt. Having evaluated the evidence on appeal, the first appellate Court found that, the appellant failed to prove the case beyond reasonable. Finally, the first appellate court upheld trial court's decision and dismissed the appeal for want of merit. Aggrieved thereof, appellant filed an appeal before this court with three grounds of appeal.

On the hearing date, both parties were represented, the appellant appeared through Mr. Bartalomew Lewanga learned advocate while the respondents enjoyed the service of Mr. Jovin Manyama learned advocate.

At the commencement of the hearing of appeal, Mr. Lewanga conjoined grounds 1 and 2 and argued together and ground 3 was argued separately. Submitting on grounds 1 and 2 of the petition of appeal, Mr. Lewanga stated that, the trial court erred in law for not convicting the respondents while the evidences establishing the commission of the offence of theft was watertight and proved the case against the respondents beyond reasonable doubt. He further submitted that both District Court and Primary Court erred to interpret section 258(1) of the Penal Code. It was his submission in chief that, the two courts below did not consider the element of fraudulent taking which was *a mens rea* of the respondents for taking the appellant's timbers without his consent and with permanent intention of depriving the owner without justifiable course.

Mr. Lewanga while referring to the proceeding of the primary court he highlighted the so called respondents' evil intention which he claimed to constitute fraudulent taking as follows; ***one,*** the act of the 2nd respondent to prevent witness (SM2) to communicate with the owner of the timber shows fraudulent, ***two,*** taking of witness SM2 telephone also amounted to fraudulent, ***three,*** the act of threating of SM2, ***four,*** the respondents' act of searching the appellant's house without a search warrant and without a police officer, ***five,*** the act of arresting SM2 and rocking him in the village's

office.

In the opinion of Mr. Lewanga, the above proved nothing but the offence of theft. In winding up, Mr. Lewanga learned counsel submitted that, the lower courts failed to direct its mind on the above circumstances and evidences, thence finding them not guilty. It is on that ground, the appellant's advocate invited this Court to interfere with the lower courts' decision. As in respect to 3rd ground, Mr. Lewanga submitted that, the same was covered in the course of submitting grounds 1 and 2. He thus rested his submission by praying to the court to allow the appeal.

In reply thereto Mr. Jovin Manyama learned advocate submitted that, it was the duty of the appellant to prove the charge against the respondents beyond all reasonable doubts. He contended that the charge sheet against both respondents was not proved beyond reasonable doubt and both courts below were correct to hold as it did. Mr. Jovin submitted further that there was no element of fraudulent taking as the 1st respondent was an officer from TFS as indicated on page 16 of the trial court proceedings and the 2nd respondent was a Village Executive Officer thence they were acting in compliance with the law.

Mr. Jovin also submitted that, the charge against the respondents speaks of 27 timbers, the adduced evidence by the appellant and his witness is on nine (9) timber. The testimonies from the eye witness of the appellant SM2 is to the effect that, only nine (9) timbers were taken which is contrary to the charge that were read over against the respondents before the trial court which depict of the twenty-seven (27) timbers.

Mr. Jovin further submitted that, the appellant testified that a lot of properties were stolen including, 27 pieces of timber wood @ mninga, 2 pairs of shoes, 3 hens, 1 panel solar, a harmer and 3 bags with cement. However, the complaint was only in respect of stolen timber totaling nine (9) timber. Yet, there was no evidence proving that, the appellant had and

owned such properties. The testimonies and evidences of an eye witness who is SM2 do not mention any other properties which were mentioned in the charge sheet. It was Mr. Jovin humbly submissions that going through the entire evidences adduced by the appellant at primary court and first appellate court one may hesitate to believe that the elements of the offence of theft as enunciated under section 258 (2) (a), (b) and (d) to have been proved in this case. He therefore, invited this Court to upheld the concurring finds of the lower courts below and dismiss the appellant's appeal for lack merit.

In rejoinder, Mr. Lewanga after making a reflection to the charge sheet at the primary court, with deep conviction he admitted that the charge sheet mentioned several items to have stolen but there was no prove of any of them during the hearing of the case. He also admitted that the only eye witness was SM2 who was already locked in the village office when the timbers were taken. However, Mr. Lewanga insisted that, SM2 witnessed 13 timbers taken by the respondents and maintained that the respondents conducted the search without lawful authority.

In consideration of the rival submission by the parties and carefully examined the records and the impugned decisions of the lower courts, I find it important to point out the legal duty of the second appellate court deals with appeals. The Court of Appeal of Tanzania in the case of **Ludovick Sebastian Vs. Republic,** *Criminal Appeal No. 318 of 2007 [CAT-Tabora)* at page 5 held as follows;

> *"It is trite law that a second appellate court should not easily disturb the concurred findings of fact by the lower courts unless it is shown that there has been* ***a misapprehension of the evidence; a miscarriage of justice or violation of some principle of law or procedure". [Emphasize is added]***

In criminal Appeal No. 504 Of 2020 between ***Firmon Mlowe Vs Republic,*** the Court of appeal had these to state while making reference to its previous decision;

*"In this regard, in **Michael Elias v. Republic, Criminal Appeal No. 243 of 2009 (unreported)**, the Court stated as* follows:

> *"On a second appeal, we are supposed to deal with questions of law. But this approach rests on the premise that the findings of facts are based on a correct appreciation of the evidence. If both courts completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction, this court must, in the interests of justice interfere."*
>
> *We are equally alive to the settled position that where the first appellate court fails to re-appraise the evidence, since the first appeal is in effect a re-hearing of the case, this Court may step into its shoes and evaluate the evidence on record or remit the case back to the first appellate court for rehearing. Particularly, in **Hassan Mzee Mfaume v. Republic [1981] T.L.R. 167** the Court held as follows among others:*
>
> > *"(ii) A judge on first appeal should re-appraise the evidence because an appeal is in effect a rehearing the case; Where the first appellate court falls to re-evaluate the evidence and consider material issues involved in a subsequent appeal, the court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."*

It is therefore the duty of this court exercising appellate power of ***re-appraise* and evaluating the evidence** of the trial court and ascertain if the first appellate court correctly acted upon, thence the judgement.

Based on the above legal principles, this court therefore being a second appellate court is called to determine on whether there was enough evidence to prove the offence of theft beyond reasonable doubt the respondents herein, whether there was whether the Village Executive Office and TFS officers had authority to search and arrest the appellant without search warrant

The appellant stood charged for theft contrary to sections 258 and 265

The provision provides:

> *"258. (1) A person who fraudulently and without claim of right* ***takes anything capable of being stolen****, or fraudulently* ***converts to the use of any person*** *other than the general or* ***special owner*** *thereof anything capable of being stolen,* ***steals*** *that thing."*

Again, section 265 provides:

> *"265. Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years".*

The principles and purposes of charging the accused person is governed by *inter alia* the principle in the case of **Issa Juma Idrisa & Another vs. Republic** [2020] TLR 365, where it was held that:

> *"The charge is the foundation of all criminal trials. To ensure that a trial is fair, any person accused of committing an offence is entitled to know the nature and substance of the accusations levelled against him so as to enable him arrange for a focused defence".*

Before discussing the grounds of Appeal, this Court considered the decorum of the charge sheet itself. I have considered the provision used in charging the Appellant for the offences of stealing, that is to say, section 258(1) of Cap. 16. R.E.2022. Looking at the provision, I am settled that the same just provides for ingredients and definition of the what amounts to

"theft". It does not create the offence of stealing. Even the marginal note of the said section provides clearly for what it intended to aid, that is to provide for the definition of the term "theft". This position is cemented by the Court of Appeal's decision in the case of **Sospeter Charles vs Republic,** Criminal Appeal No. 555 of 2016 (unreported), where the Court had this to say:

"Section 258(1) of the Penal Code ***illustrates the essential ingredients*** of stealing..."

As such, the Appellant was not properly charged as he ought to have been charged under the relevant provision creating the offence committed. However, under section 258 (1) and (2) of the Penal Code Cap. 16 R.E.2022 for an offence of theft to be established, the complainant must prove that; ***one,*** commission of an offence of stealing by the accused, ***two*** no claim of right by the accused, ***three,*** taking and conversion of the property capable of being stolen other than the general or special owner, ***four,*** permanently depriving the general or special owner of use of the property in question. In other words, the thief must have stole the property with intention of permanently depriving the special owner.

In the present case, the appellant was arraigned for committing an offence of illegal possession of timbers. The respondents being the Government agents with all full mandate to ensure that nobody commits an offence, the appellant inclusive, discharged of their duty of arresting and inquiring the appellant on whether the he was in lawful possession of the timber in question.

For the respondents to be convicted, there must be a proof that, respondents have stolen ones properties, there was no claim of right, there is permanent convention of the properties from special to the respondents and that, the properties were taken for no any other legal ground.

In the case at hand, the timbers were taken from the appellant for

allegation of being illegally acquired by the appellant and were taken in the presence of SM2 who at the appellant's house. Timbers were taken pending the appellant's proof that the same were legally acquired. Theft or stealing is miracle to have been committed in the circumstances as per the ingredients stated in section 258(1) and (2) of the Penal Code and evidence adduced as to how the timbers fall into the hands of these Government officials, the respondents.

This court closely looked into the evidence by SM1 and SM2 and noted that the same negate the commission of the offence of theft/stealing as it elucidates how the timbers were taken and became under possession of the respondents. It is undisputed evidence on record that, the properties were taken by the respondents in connection with the alleged offence the same were illegally acquired by the appellant. The respondents took the properties with view of calling the appellant to submit proof that, he in legally acquired thence in lawful possession.

The submission by Mr. Lewanga that, there was *mens rea* and *actus reus* which proved commission of the offence of stealing is completely out of context.

As the allegation that the respondents had no authority to arrest, search and take the properties suspected to have been acquired illegally, it is the settled opinion of this court that, the Government works through its instrument at different levels, where in some areas have no police officers to conduct search, the respondents are proper authority at the village where no such service is available, they are mandated to do so in order to preserve peace, destruction or remove of evidence involved in commission of offence. Should they desist from arresting persons found committing offence for the purported lack of authority, thus waiting police officers to come, then many accused will have absconded and destroyed evidence at

the time of waiting for the police officers to come. As such, the respondents had mandate in the circumstances.

However, where the policers officers are available at a place, then the matter can be easily done in the assistance of police officers, though, it depends on the nature of offence at prevailing circumstances at a time.

Having considered the above principles and the evidence on record, I am of the settled view that, neither theft nor kindred offence was committed by the respondents.

This court is therefore satisfied that, based on the above principles of law and evidence on record, it is with no iota of doubt that, the courts below correctly evaluated the evidence and rightly arrived to the decision.

In the final analysis, I entirely agree with the Mr. Jovin Manyama learned advocate that this appeal lacks merit. Consequently, I hereby dismiss the appeal for want of merits.

It is so ordered.

DATED at MOROGORO this 9th day of February, 2023.

G. P. MALATA

JUDGE

09/02/2023

Rights to the appeal fully explained to the parties.

THE HIGH COURT OF TANZANIA

G. P. MALATA

JUDGE

09/02/2023