IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 46 OF 2022

(Originating from Criminal Case No. 30 of 2022, Songea District Court)

JAMES ARTHUR MSECHU ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

24/02/2023 & 07/03/2023

E. B. LUVANDA, J.

James Arthur Msechu the Appellant herein, is challenging the decision of the trial court which convicted and sentenced him to ten years in jail for committing stealing by person in the public service contrary to sections 265 and 270 of the Penal Code, Cap 16 R.E. 2019.

In the petition of appeal, the Appellant raised four grounds of appeal as follows: One, the trial court erred in law and fact to convict the Appellant on the offences which was not proved beyond reasonable doubt; Two, the trial court erred in law and fact to sentence the accused to suffer ten years imprisonment without considering the accused was a first offender hence deserving more leniency; Three, the trial court

erred in law and fact to convict the Appellant without considering the defence of the accused; Four, the trial court erred in law and fact for failure to evaluate evidence properly hence leading to wrong decision.

Mr. D.P. Ndunguru learned Counsel filed submissions for the Appellant Ms. Generosa Montano learned State Attorney filed reply submissions for the Respondent.

Arguing for the first ground of appeal, the leaned Counsel for Appellant submitted that the Accused was charged with stealing, however not even a single witness testified that he saw the accused stealing the said laptops, the court relied on circumstantial evidence to convict the Accused. He submitted that the fact from which circumstantial evidence is drawn must be proved beyond reasonable doubt, citing **Nathael Alphonce Mapunda & Another vs Republic**, (2006) TLR 395. He submitted that all persons alleged to have bought the laptops from the accused were complices (sic, accomplices) and persons with interest to save and their evidence was not corroborated with any evidence, citing **Lameck A. Massawe vs Republic**, (1998) TLR. That the evidence had contradiction which goes to the root of the case; example prosecution witnesses testified that the accused stated that he got those laptops as a gift. But a caution statement brings a different story. He cited

Mohamed **Said Matula vs Repbulic**, (1995). He submitted that the certificates of seizure exhibit PW1A, PW1B, PW1C tendered by PW1 were cooked, as the accused was found with only one laptop.

That exhibit PW5K was not signed either by the giver or receiver of laptop, making its authenticity wanting. He submitted that the caution statement which was heavily relied by prosecution side was not signed on every page as required under section 58(6)(a) of the Criminal Procedure Act, Cap 20 R.E. 2019.

In response the leaned State Attorney submitted that, the Appellant was found in possession of the property which was recently stolen where he was found in possession of one laptop and three of them were found from people who all claimed to have received from the Appellant. She was of the view that under the doctrine of recent possession, he is presumed to have committed the offence, citing **Joseph Mkumbwa and Another vs Republic,** Criminal Appeal No. 94/2007 C.A.T. Mbeya (unreported). She submitted that the Appellant was found with one laptop confessed and led police officers where he sold the remained three laptops which were later recovered by police. Cited **Miraji Idd Waziri @ Simwana & Another vs Republic,** Criminal Appeal No. 14/2018 C.A.T. Dar es Salaam (unreported); **Godfrey James Ihunya**

& Another vs Republic, (1980) TLR 197, for her proposition that a conviction is not necessarily illegal for being based or uncorroborated evidence of accomplice. She submitted that the Accused was not only convicted based on evidence of accomplices but because he was also found with a laptop which was recently stolen and his confession which led to recovery of three laptops.

She submitted that the contradictions stated by the Appellant are minor and did not go to the root of a case, citing **Mohamed Matula** (supra); **Alex Ndendya vs Republic**, Criminal Appeal No. 207/2018 C.A.T. Iringa (unreported). She submitted that the Appellant did not raise objection at a trial regarding certificate of seizures, exhibit PW5K and a caution statement, therefore he cannot raise at this stage.

It is true that there was no eye witness who appeared at trial adducing evidence of seeing the accused stealing. Indeed, even the store keeper cum procurement officer one Clara John Komba (PW5) only said on 5/7/2022 she discovered that four computers were missing in her stores. However, the trial court mounted conviction on the Appellant based solely on circumstantial evidence and the doctrine of recent possession. It was the evidence of prosecution in particular D/CPL Tryphone (PW1) and D/CPL John (PW2), that they arrested the Accused (Appellant

herein) at Sharp Corner Mfaranyaki Area on 5/7/2022, in possession of one laptop (exhibit PW1E) while the accused was at a verge of attempting and negotiating with Oscar Magalala (PW7) who is a computer technician. The said laptop was seized via a certificate of seizure exhibit PW1A. This fact was supported by PW7, adding that the Appellant negotiated a price of 350,000/=, but had no pass word for a laptop, henceforth failed to log in. Upon confession by the Appellant, other three laptops were surrendered to the police officer (PW1) by Alfred Chengula (PW6) one laptop exhibit PW1F alleged the Appellant pledgded as security for a loan of TZs. 120,000/= the same was seized through a seizure certificate exhibit PW1B; Kaoneka Hassan Kaoneka (PW8) surrendered one laptop exhibit PW1G alleged the Appellant placed as a bond for a loan of TZs. 150,000/= alleged given as a gift for best performance at work, and the same was seized via a seizure certificate PW1 A; Awami Hasan (PW10) surrendered one laptop, (exhibit PW1D) alleged the Appellant negotiated a price of TZs. 350,000/=, and was paid advance 180,000/= alleged given by a sponsor from Europe, the same seized via a certificate of seizure exhibit PW1C. With this all overwhelming and damning evidence, to my view the circumstantial evidence was watertight against the Appellant, and the doctrine of recent possession invoked by the trial court was well

grounded and relied. This is because the Appellant was found by PW1, PW2 and PW7, is possession of a brand-new laptop (exhibit PW4E) which ws among the laptops found by PW5 to be missing in her store. The Appellant failed to offer plausible and reasonable explanation as to how he come in possession of a laptop a property of Judiciary, indeed on the street at Sharp Corner Mfaranyaki Area, outside his working premises. Also, PW6, PW8 and PW10 all pointed a finger to the Appellant as the one who handed over those laptops to them. Therefore, a call for corroboration of the alleged accomplice to wit PW6, PW8 and PW10, was of no avail to the Appellant. This is because the circumstantial evidence above and his (Appellant) unaccounted possession of laptop recently stolen, was well founded and grounded, as aforesaid.

Regarding contradictions between prosecution witness who stated that the Appellant said he got the laptop as a gift for being a good singer in a quire (sic, choir), while a caution statement contains a different story, to my view this is a very minor contradiction, which has nothing to do with the main issue, and cannot said that it goes to the root of the matter. Therefore, the trial court was justified to ignore the same.

As to the argument that a seizure certificate exhibit PW1A, PW1B, PW1C were cooked or that exhibit PW5K was not signed. To my view these are afterthought. The trial court records reveal that these exhibits were all admitted without any objection from the accused. Indeed, at defence the Appellant (DW1) conceded signing the same. Therefore, a complaint is unmerited. Equally a mere fact that exhibit PW5K was not signed, that alone does not render the contents and entry in that receipt vouchers an unauthentic as alleged. This is because the Appellant did not even cross examine PW5 regarding missing signature in exhibit PW5K.

Regarding a complaint that a caution statement exhibit PW9L was not signed on each page. It is true that the caution statement exhibit PW9L was signed at the last page only, the rest pages were not signed by the Appellant. The leaned State Attorney, snabbed it on the explanation that it was not raised at the trial. Certainly true, but at the trial one of the grounds of objection by the Appellant, he disowned a signature in exhibit PW9L. Now, so far, the signature was contested and in view of the fact that the rest pages were not authenticated by the Appellant, to my view, this is fatal. Section 58 (6) (a) Cap 20 (supra), provide,

> *'Where a police officer is satisfied that there is no further additional statement, alteration or correction to the statement,*

he shall cause to be written at the end of the statement a form of certificate in accordance with prescribed form and shall-

(a) ask the person to sign the certificate set out at the end of the statement or ***if the statement extends to more than one page, sign each page of the statement'***
bold added

Herein exhibit PW9L its contents extended to more than one page and the extra pages were not signed, as such I rule the view that exhibit PW9L was wrongly admitted into evidence and therefore it is expunged from the records.

Ground number two, the leaned Counsel for Appellant submitted that the sentence of ten years imprisonment is too excessive because the Accused is a first offender, arguing that the court ought to have adopted the principles enunciated by Samatta, J in the Case of **Tabu Fikwa vs Republic**, (1988) TLR 46, for which non custodian sentence was fit than custodian sentence. He invited the court to assess the sentence afresh.

In response, the learned State Attorney submitted that the sentence is so lenient as the prescribed sentence under section 270 of Cap 16 (supra) is fourteen years.

It is true that the penal provision that is section 270 Cap 16 (supra) provide that the offender convicted for that offence is liable to imprisonment for fourteen years. And of course, a sentence of ten years meted to the Appellant is less to the maximum penalty prescribed by the penal statute. However, in passing sentence, a consideration is not on the penal statute alone, other factors must also be taken into account including jurisdiction of sentencing or passing sentence in respect of a sentencing magistrate.

Section 170 (1) of the Criminal Procedure Act, Cap 20 R.E. 2019, with margin sentences which subordinate court may pass, provide,

> *(1) A subordinate court may in the cases in which such sentences are authorised by law, pass any of the following sentences –*
>
> *(a)* ***Imprisonment for a term of not exceeding five years;*** *save that where a court convicts as person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment' bold* added

Again subsection (2) of section 170 Cap 20 (supra), at a proviso, has the following wording,

(2) Notwithstanding the provisions of subsection (1) –

(a) a sentence of imprisonment –

(i) --- N.A. ---

(ii)For any other offence, which exceeds tweive months;

(b) --- N.A.---

Shall not be carried into effect, executed or levied until the record of the case, or a certified copy of it, has been transmitted to the High Court and the sentence or order has been confirmed by a Judge

Provided that, ***this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank'*** *bold* added

Herein, the offence of stealing by a person in the public service, is not a scheduled offence; the penal statue does not proscribe a minimum sentence; a sentence was passed by a mere Resident Magistrate plain. Therefore, a sentence of ten years, cannot let to stand, as was on the higher side, in that it exceeded by far the sentencing power of the trial

magistrate. I therefore, invoke the provision of section 366(1)(a)(ii) of Cap 20 (supra), reduce the sentence of ten years to a lesser sentence of five years imprisonment for each count, which the trial magistrate had power to impose. The same shall run concurrently.

Ground number three, the learned Counsel for Appellant submitted that going through the whole trial and judgment there is nowhere the trial court had attempted to consider the defence of the accused, which to him was elementary wrong.

In response, the learned State Attorney submitted that at page 31 of the typed judgment indicate clearly that the trial court did consider the evidence of the Appellant.

Actually, this ground is without substance, at defence the Appellant (DW1) explained to have been arrested at Sharp Corner, then taken to Songea Police Station where he signed a seizure certificate, therafter charged in court, arraigned and dispelled. At his juncture the Appellant embarked to evaluate the prosecution evidence, pin pointing contradictions marred on prosecution witnesses. Indeed, at page 31 of the judgment, the trial court assessed the said discrepancies and ruled the view that were minor or slight which do not go to the root of the case. Therefore, this ground is unmerited.

On ground six the leading Counsel for Appellant, submitted in a nutshell that the caution statement exhibit PW8K was not examined on its authenticity. He submitted that the chain of the stolen items all searches were not conducted before the accused person, although it was filed *'nimetingwa na kazi nyingi'.* That he doesn't think if that was a way to conduct search and the accused was just a witness and suspected and a search was conducted at Songea Police Station. He cited **John Mgindi vs Republic**, (1992) TLR 377, to his proposition that suspicious however grave cannot ground conviction.

In response, the learned State Attorney, submitted that search and seizure of the laptops was conducted in accordance with the procedure in the presence of the accused and seizure of three laptops was conducted at the police station because the laptop were taken to the police station by PW6, PW8 and PW10. She submitted that the issue of a signature in a caution statement was determined by the trial court.

Regarding a caution statement, the same have been expunged when deliberating on ground number one above. In reference to the seizure certificates exhibit PW1A, PW1B, PW1C and PW2H. I have not seen any valid argument to fault the same. Exhibit PW2H depict a laptop was seized from the Appellant at Sharp Corner. The rest seizure certificates exhibit PW1A, PW1B and PW1C were recorded at Songea Police Station

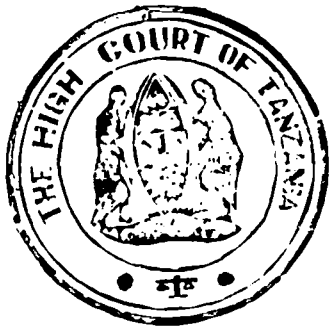
depicting seizure of laptops therein, in the presence of the Appellant including PW6, PW8 and PW10, respectively.

The justification to it, is as alluded by the learned State Attorney, it is because those three laptops were surrendered by PW6, PW8 and PW10 at Songea Police Station and the Appellant who was in remand thereat, accepted the explanations offered by each one regarding how the same laptop landed into their hands, being handed over by the Appellant. The phrase 'I am busy or engaged with other duties' endorsed at the search order, were made by the officer in-charge of the station indicating why he was unable to personally conduct the alleged search.

But in actual fact what was done was not a search per se, rather it was a seizure as depicted at item 3 titled certificate of seizure.

Save for the ground number one (partly) which ended up into expunging a caution statement exhibit PW9L and ground number two, reducing a sentence to five years for each count, the rest grounds are devoid of merit.

The appeal is partly allowed.



E.B. LUVANDA

JUDGE

07/03/2023