IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC. CRIMINAL APPEAL NO. 08 OF 2023

(Originating from Criminal Case No. 238 of 2022 of the District Court of Mufindi at Mafinga)

ADAM LAZARO MWAINUNU----------1ST APPELLANT

ONESMO ZEPHANIA @ FAKAFAKA----------2ND APPELLANT

VERSUS

REPUBLIC----------RESPONDENT

JUDGEMENT

Date of Last Order: 13/03/2023

Date of Judgment: 24/03/2023

A. E. Mwipopo, J.

Adam Lazaro Mwainunu and Onesmo Zephania @ Fakafaka were charged in Criminal Case No. 238 of 2022 at Mufindi District Court for the offence of stealing contrary to section 258 (1) and 265 of the Penal Code, Cap. 16 R.E. 2019. It was alleged that on 24th November, 2020, at Kinyanambo "B" area within Mafinga Township in Mufindi District appellants

did steal one power tiller Kubota Makeworth 11,800,000/= the property of Michael Mahuvi. The prosecution called total of 5 to prove its case. Appellants and other accused persons were found with a case to answer and they defended themselves on oath. The trial Court delivered its judgment on 11th October, 2021, where appellants were convicted for the offence charged and were sentenced to serve 6 years imprisonment.

Both appellants were aggrieved by the decision of the District Court and filed the present appeal against the decision. In the petition of appeal, each appellant raised seven grounds of appeal. The 1st appellant's grounds of appeal were as follows:-

1. *That, the trial Court erred in law and fact by convicting the appellant in absence of water tight evidence from the prosecution side in the circumstances of the case.*
2. *That, the trial Court Magistrate erred in law by convicting the appellant in not holding that the evidence adduced by PW1 contradicted the evidence adduced by PW3 on the issue of engine number of the power tiller as seen in page 31 line 7, page 31 line 22, and page 21 line 3 of the proceedings record.*
3. *That, the trial Court Magistrate erred in law and facts to convict the appellant without noticing that the charge was unfair and defective*

as the charge sheet was in disparity with the evidence in record on how the alleged crime was committed.

4. *That, the trial Court erred in law by convicting the appellant based on the cautioned statement – exhibit PE 5 which was tendered by improper person as the person who tendered it was Public Prosecutor which is contrary to section 198 (1) of the C.P.A. Cap. 20 R.E. 2019.*
5. *That, the trial Court judgment is defective as there is no provision of specific law to which the appellant was convicted and sentenced as required by section 312 (2) of the C.P.A. Cap. 20 R.E. 2019.*
6. *That, the trial Court erred in law and facts to convict the appellant based on all republic exhibits which were not properly tendered and for not following procedures as the person who tendered it did not show how the exhibits were collected, stored and handed from time to time until the exhibits were admitted by Court (chain of custody) as required by P.G.O. No. 229 and section 38 (3) of the C.P.A. Cap. 20 R.E. 2019.*
7. *That, the prosecution failed totally to prove the charge without reasonable doubt as required by law.*

The 2nd appellant's grounds of appeal are as follows hereunder:

1. *That, the trial Court erred in law and fact by convicting the appellant in absence of water tight evidence from the prosecution side in the circumstances of the case.*

2. *That, the trial Magistrate wrongly proceeded to hear and determine the case especially the whole prosecution witnesses without the charge being read over and reminded to the appellant as required by the law.*
3. *That, the trial Court Magistrate erred in law and facts to convict the appellant without determining the defense case as required by law.*
4. *That, the prosecution failed totally to prove the charge without reasonable doubt as required by law.*
5. *That, the trial Court did not consider that PW1, PW2, PW3 and PW4 had never seen the appellant at locus in quo (at the scene of crime).*
6. *That, the trial Court judgment is defective as it contains no specific provision of law to which the accused person was charged with which is mandatory requirement of the law.*
7. *That, the trial Court Magistrate erred in law and facts to convict the appellant without noticing that the charge sheet is defective for citing non-existing law.*

On the hearing date, appellants appeared in person and the respondent was represented by Ms. Jackline Nungu, State Attorney. The 1st appellant said in his brief submission that the victim of the crime (PW1), PW3, PW4 and PW5 did not identify him and they don't know him, so the trial court erred to convict him for the offence while he was not identified by witnesses. 1st appellant prayed for the court of consider all of his grounds of the appeal.

On his side, the 2nd appellant said that the prosecution failed to prove the case against him without doubt. The testimony of PW3 and PW4 contradicted each other as seen at page 30 of the typed proceedings on how they were able to identify him. PW4 said 2nd appellant was not present where power tiller was caught. The certificate of seizure was filled at police station after the power tiller was caught. It was filled at police station. All the prosecution witnesses did not recognise him, save for the PW5 who said he was at farm. But PW5 was in two farms at the same date, at Mufindi and at Mbalali. This raises doubt on the credibility of this witness. He added that the trial court did not admit his exhibits which are PF3 and bus ticket without sufficient reasons. The 2nd appellant prayed for the court to consider his grounds of appeal which are found in the petition of appeal.

In response, Ms. Jackline Nungu, State Attorney, opposed the appeal. She replied first to the grounds of appeal of the 1st appellant. It was her submission that ground No. 2 of the 1st appellant is about the difference of the engine the number of power tiller. The ground has no merits as PW1 mentioned the engine number of the power tiller as it seen in page 20 of the proceedings. Also PW3 mentioned the same engine number of the Power

tiller. The trial Court observed the engine number and there is no difference in the engine number of the power tiller to all witnesses.

On the 3 ground of appeal of the 1st appellant, she said that there is no difference between the evidence adduced by prosecution witnesses and charge sheet. The charge sheet show that appellants were charged for stealing power tiller valued at 11 million the property of Michael Mahuvi. All witnesses' testimony proved that the power tiller which was stolen by appellants belongs to Michael Mahuvi and it is worth 11 million. The said power tiller was admitted as Exhibit P2. PW2 tendered seizure certificate at page 26 of typed proceedings of the said power tiller. There was no contradiction to all 5 prosecution witnesses between their testimony and the particulars in the charge sheet. This ground has no merits.

She said on the 4th ground of appeal of the 1st appellant that at page 44 of the typed proceedings it is the prosecutor who tendered cautioned statement of the 1st appellant. This was not correct as prosecutor was not a witness. The said cautioned statement was admitted, but was not considered at all by the trial court. She prayed for the cautioned statement of the 1st appellant be expunged from the record.

The counsel said on the 5th ground of Appeal of the 1st appellant that the trial court stated in page 16 of the judgment that it has convicted accused persons according to the law. Thus, the trial court imposed them the provision of the law they were convicted for.

On the 6th ground of appeal, it was her submission that the 1st appellant said the chain of custody of Exhibit P2 (Power tiller) was broken. However, the evidence in record show that the said power tiller was caught at Rujewa and was taken to police station by PW3. PW3 informed PW2 who came to take exhibit and appellants to Mafinga. PW2 handled the power tiller to the owner to keep it until it is needed by the trial court. Thus, the record of the up keeping of the power tiller was fine and during all this time before it was brought to court it was known where the exhibit was kept. It is not easy to temper with the power tiller, thus even if the chain of custody was breaking somewhere, still the same does not prejudice the appellant in anyway.

The counsel submitted jointly on the ground No. 1 and 7 of the 1st appellant's grounds of appeal. It was her submission that the prosecution proved the case against the 1st appellant without any doubt. Both appellants were convicted for the offence of stealing on the doctrine of recent

possession. There is no witness who saw appellants stealing the power tiller. The appellants were found in possession of the power tiller and they failed to say how the power tiller was found in their possession immediately after it was stolen. This prove that they are the thieves of the power tiller. The prosecution proved without doubt all elements needed for the doctrine of recent possession to apply. The prosecution proved that the power tiller was stolen, the said power tiller belongs to PW1 and the said power tiller was found in the possession of appellants. No one among the appellants who testified that they are the owner of the power tiller and they failed to give explanation on how the power tiller was found in their hands. It was stolen on 24/11/2020 at 01:00 hours within Kinyanambo "B" in Mafinga and was found in their possession around 09:00 hours of the same date at Rujewa. This position was stated by the Court of Appeal in the case **of Mabula Arbto @ Runeke vs. Republic**, Criminal Appeal No. 430 of 2015, CAT at Tabora, (unreported). The 1st appellant was caught red handed with the said power tiller as it was the testimony of PW3.

The state attorney turned to the ground of appeal of the 2nd appellant. She started to reply to the 1st ground of appeal that the charge sheet was

not defective as it provided the statement of the law which 2nd appellant was charged with and the penalty for the offence.

In the second ground of appeal, she said the typed proceedings shows at page 16 that on 11/08/2021 the charge sheet was substituted. Then, it was read over to the appellant, they pleaded not guilty, and hearing of the case commenced. Thus, procedure was proper.

Regarding to the 3rd ground of appeal of the 2nd appellant, the counsel said that the appellant's defense was considered by the trial Court in its judgment. She said that at page 11 and 12 of the judgment the trial court considered 2nd appellant's defense, but it was satisfied that the prosecution case was strong and proceeded to convict him.

The counsel submitted jointly on the 2nd appellant's ground no. 4 and 5. She said that the 2nd appellant was caught by villagers after he did run away from the scene after power tiller was caught. The 2nd appellant did not provide sufficient explanation on for being found with the stolen power tiller.

It was her reply to the 6th ground of Appeal of the 2nd appellant that the trial court convicted the 2nd appellant after it was satisfied the

prosecution proved the offence of stealing contrary to section 258(1) of the Penal Code against 2nd appellant. Thus, the ground has no merits.

On the 7th ground of the appeal, she said that appellants were charged with the offence of stealing contrary to Section 258(1) and 265 of the Penal Code Cap. 16 R.E. 2019. So, 2nd appellant's claims that they were convicted for non-existing offence is not correct. The prosecution proved the case without doubt.

The 1st appellant did not have a rejoinder. But, the 2nd appellant said in rejoinder that he was not arrested where the power tiller was found. There is no witness who testified that he boarded in the said power tiller. The evidence did show that those who were in the power tiller did run away and as they do not know those who were running from the power tiller he was arrested. It is only PW5 who said he was caught with a bag with piece of iron bar and screw driver. Thus, he is not responsible and there is no evidence against him.

From the submissions, the Court is invited to determine whether or not the present appeal has merits.

Appellants' grounds of appeal are mainly based on three issues. That, the charge sheet was defective, the judgment of the trial court was defective, and the evidence in record is not sufficient to prove the offence without doubt. Both appellants raised a ground of appeal that that the charge was defective. 1st appellant said the charge is in disparity with the evidence in record on how the alleged crime was committed. The 2nd appellant said that the charge was not read over and reminded to him, and for citing non-existing law.

It is a statutory requirement under section 132 of the Criminal Procedure Act, Cap 20 R.E. 2019, that a charge in criminal case has to contain statement of the specific offence with which the accused is charged together with such particulars necessary for giving reasonable information as to the nature of the offence charged. It is settled that the particulars of the charge shall disclose the essential elements or ingredients of the offence. In the case of **Leonard Mwanashoka vs. Republic**, Criminal Appeal No. 226 OF 2014, Court of Appeal of Tanzania, at Bukoba, (Unreported), the Court of Appeal held that:-

"It is settled law that where the offence charged specifies factual circumstances without which the offence cannot be committed, they must be included in the particulars of the offence."

From above cited case, it is the duty of the prosecution to specify factual circumstances of ingredients of the offence in the charge sheet and prove during hearing that the accused person committed the unlawful act of the offence charged with the necessary intention if required.

The record available shows that appellants were charged for the offence of stealing contrary to section 258 (1) and 265 of the Penal Code, Cap. 16 R.E. 2019. The particulars of the offence in the charge sheet states that appellants and 2 other persons on 24.11.2020 at Kinyanambo "B" within Mafinga Township in Mufindi District they did steal power tiller Kubota Make worth Tshs. 11,800,000/= which is the property of Michael Mahuvi. The offence which appellants were charged with is known to our laws. The particulars of the offence has shown what property was stolen and its worth, and the owner of the property was named. The appellants' claim that the charge sheet was defective has no merits.

The typed proceedings shows in page 17 to 18 that on 11.08.2021 prosecutions substituted the charge. Then, the charge sheet was read over

to all accused persons who pleaded not guilty. Thereafter, preliminary hearing was conducted and prosecution's case was opened where prosecution's witnesses proceeded to testify. This prove that the charge sheet was read over to the appellants after it was substituted. Thus, the allegation by the 2nd appellant that the charge was not read over to him has no basis.

The 2nd appellant alleged in his 6th ground of appeal that the judgment is defective as it contains no specific provision of law to which the accused person was charged with. However, looking at the judgment of the trial Court, it revealed in the first paragraph that appellants and their fellow accused persons were charged for the offence of stealing contrary to section 258 (1) and 265 of the Penal Code. Also, the court found appellants are guilty of the offence of stealing contrary to section 258 (1) of the Penal Code and convicted them for the offence in page 14 of the judgment. Even, when it was sentencing the appellants for the offence of stealing they were convicted with mentioned the offence and cited section 258 (1) of the Penal Code. It is clear that the judgment was full of provision of the law which appellants were charge with, convicted and sentenced. This ground ground of appeal has no merits.

Appellants said in their grounds of appeal that the evidence in record is not sufficient to prove the offence without doubt. They stated that they were not identified by PW1, PW2, PW3 and PW4. There was contradiction in the testimony of PW1 and PW3 on the engine number of the alleged stolen power tiller, the cautioned statement of 1st appellant – PE5 was improperly tendered by the prosecutor, chain of custody of prosecution exhibits was not proved before the said exhibits were tendered as evidence, and defense case was not considered by the trial Court in the judgment.

In her reply, the counsel for the respondent admitted that cautioned statement of the 1st appellant – exhibit PE was improperly tendered and she prayed for the same to be expunged from the record. On other evidence, she said that the evidence was watertight and proved that appellants were arrested with the stolen power tiller. There was no contradiction over the ownership and engine number of the stolen power tiller. Appellant were arrested during a day time after they run away when the power tiller was caught. On the chain of custody, it was her submission that the evidence available proved how those evidence changed hands before they were tendered as evidence.

The evidence available in record shows that the power tiller Kubota make with engine number RT 140 – 284934 the property of Michael Mahuvi – PW1 was stolen on 24.11.2020 at 01:00 hours. PW3, and PW4 did make follow up and were able to find the said power tiller at Manyenga Village in Rujewa on the same date around 09:00 hours. The power tiller stuck in the sand and four people who were inside it jumped and run away. PW3 was able to arrest 1st appellant at the spot where power tiller was. PW4 testified that he chased and caught the driver of the power tiller. 2nd appellant was arrested by the villagers and PW5 said he found him already arrested. When he asked the 2nd appellant what is the problem he replied that he got lift in the power tiller. From this evidence, there is no contradiction whatsoever between the testimony of witnesses on how appellants were arrested.

Appellants alleged that PW1, PW2, PW3, PW4 and PW5 did not know them and did not identify them as the people boarding inside the power tiller at the time it was caught, hence it was wrong to arrest them. However, the evidence of PW3 and PW4 shows that it was around 09:00 hours when the power tiller was caught stuck in the sand. The appellant's jumped from the power tiller and tried to run away. The 1st appellant was arrested by PW1 close to the power tiller and the 2nd appellant was caught by villagers. The

testimony of PW5 shows that after he was arrested, 2nd appellant said that he got lift in the power tiller. In such circumstances of the case, there was no need for the witness to know or identify appellants as they were caught with the stolen power tiller and it was a day time when they were arrested while running away from the power tiller. This evidence proves without doubt that appellants were found with the stolen power tiller at Rujewa few hours after it was stolen at Mafinga. They provided no explanation on how they were found with the stolen property. The trial Court properly applied the doctrine of recent possession in this case as it was stated in the case of **Selemani Mussa @ Vitus and Another vs. Republic**, Criminal Appeal No. 7 of 2019, Court of Appeal of Tanzania at Mbeya, (unreported). The prosecution evidence proved all the elements for the doctrine of the recent possession to be applicable as it was held in the above cited case.

Appellants said that the chain of custody of prosecution's tendered exhibits was broken and there is no explanation of how exhibits changed hands. There is no dispute that it is essential to prove those fact establishing that the chain of custody for the prosecution's exhibits was intact. The prosecution must prove the chain of custody of the items found, with regard to the person who took care of the items from when they were found up to

the point when they were tendered as exhibits. In the case of **Illuminatus Mkoka vs. Republic [2003] TLR 245** it held that:

> *"In view of those missing links in the instant case, we are of the considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 and P4 leaves open the possibility for those exhibits being concocted or planted in the house of the appellant."*

In this case, the testimony of PW3, PW4 and PW5 reveals that after appellants were arrested with the power tiller, they took all suspects and the power tiller to Rujewa Police station. PW2, who is police officer from Mafinga, went to Rujewa. Suspects and exhibits were handled to him. As it was PW3, PW4 and villagers who arrested the appellants and other suspects with the stolen power tiller, the certificate of seizure was prepared at police station. The appellants and the exhibits were taken to Mafinga Police Station. The police handled the power tiller to PW1 for safe keeping on 24.11.2020 according exhibit PE4 on condition that he shall not change anything until it is tendered as exhibit in Court. The said power tiller was tendered by PW1 as exhibit PE2. PW2 tendered certificate of seizure – exhibit PE3. This evidence from PW1, PW2 and PW3 provided in details how the said exhibits changed hands before they were tendered in Court as exhibits. The chain of

custody was complete, it was never broken. Thus, the claims that the chain of custody was broken has no merits.

The 1st appellant said that his cautioned statement was improperly admitted as it was tendered by the Public Prosecutor. The counsel for the respondent admitted that this was wrong as the Prosecutor was not a witness and the cautioned statement which was admitted as exhibit PE5 was supposed to be expunged. I agree 1st appellant and the counsel for the respondent that it was wrong for the Prosecutor to tender cautioned statement of the 1st appellant as the proceedings revealed. The said cautioned statement was tendered when Prosecutor was cross examining the 1st appellant. Moreover, after the cautioned statement was admitted, it was not read over to the Court so that accused persons could hear its content. This has prejudiced the 1st appellant and the same is expunged from the record. However, even after expunging cautioned statement of the 1st appellant still there are other evidence which prove the offence against appellants.

It was appellants' grounds of appeal that their defense was not considered by the trial Court in its judgment. The 2nd appellant said in his submission that his documentary exhibits were not admitted when he

tendered without sufficient reason. On the other side, the counsel for the respondent said in her reply that the defense case was considered in the judgment of the trial Court.

Failure to consider defense case in the judgment is fatal. In the case of **Jonas Bulai vs. Republic**, Criminal Appeal No. 49 of 2006, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), it was held at page 10 of the judgment that:-

> *"It is settled law that failure to consider the evidence of the defense is fatal to the trial or proceedings: see for example, JAMES BULOW & OTHERS v. R [1981] T.L.R. 283. It is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty."*

However, the judgment of the trial Court shows at page 13 that the trial Court considered defense case. It was the holding of the trial Magistrate that the defense side failed to raise reasonable explanation on how they came into possession of the stolen power tiller. The Court even found in page 12 of the judgment that defense evidence was corroborating prosecution's case that appellants were arrested at Manyenga Village in Rujewa. I find that the trial Court considered the defense case.

On the 2nd appellant's claim that his exhibits were not admitted, the record says otherwise. Typed proceeding shows at page 48 that the 2nd appellant tendered bus tickets from Mbeya to Dar and from Dar to Mbeya. The said tickets were admitted as exhibit DE1. 2nd appellant also tendered PF 3 which was admitted as exhibit DE2. The trial Court said nothing about those exhibits. But, one of the ticket shows that the 2nd appellant travelled from Dar to Mbeya on 23.11.2020. Unfortunately, the 2nd appellant admitted in his defense that he was arrested at Manyenga Village in Rujewa on 24.11.2020 which put him in the place where the stolen power tiller was caught. Concerning the PF3, there is nothing showing that he was treated after it was issues. Also, the evidence shows that the villagers did assault the 2nd appellant after they arrested him. Thus, I'm of the same position with the trial Court that the defense evidence does not raise any doubt to the prosecution's case.

Therefore, I find the appeal to be devoid of merits and I proceed to dismiss it. It is so ordered accordingly.

A.E. MWIPOPO

JUDGE

24/03/2023