IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 29 OF 2022

1. MBUSULE S/O NDAZI
2. PASCHAL S/O DAUDI @ KATEMI .....APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of Bariadi District Court)

(C.E. Kiliwa, SRM)

Dated the 29th day of March,2022

In

Criminal Case No. 9 of 2021

JUDGMENT

9th February & 30th March, 2023

A. MATUMA, J.

The Appellants were charged in the District Court of Bariadi at Bariadi for Store breaking contrary to section 296 (a) and (b) and stealing contrary to section 258 (1), (2), (a) and 265 both provisions of the penal Code, Cap. 16 RE. 2019. The first appellant Mbusule Ndazi was further charged for Unlawful Possession of property suspected of having been stolen or unlawful acquired contrary to section 312 (1) and (b) of the same code supra.

They were alleged to have on the 1st day of January, 2021 during night hours at Itilima District Council area within Itilima District in Simiyu Region break a store and subsequently thereat steal twelve boxes of tiles valued at Tshs. 768,000/= the property of Itilima District Council.

The first appellant was further alleged that on the 2nd day of January, 2021 at Lagangabilili area within the same district and region was found in possession of three lamps make TYWIT, nineteen batteries, two torches, five switches, one prize and nails which were suspected of having been stolen or unlawful acquired.

At the end of their trial the appellants were found guilty as stood charged and convicted accordingly. They were sentenced to serve seven years for the offence of store breaking and seven years for stealing. The first appellant was further sentenced to one year imprisonment for the offence of unlawful possession of property suspected of having been stolen or unlawful acquired. The sentences were ordered to run concurrently.

The Appellants being aggrieved with the conviction and sentence opted to file this appeal with four grounds mainly complaining that;

i. *They were not properly identified at the crime scene.*

ii. *That the prosecution had weak evidence that could not warrant their convictions*

iii. *That the trial magistrate failed to properly evaluate the evidence on record.*

At the hearing of this appeal, the Appellants appeared in person while the Respondent Republic was represented by Jukael Jairo learned State Attorney. The Appellants adopted their grounds of appeal and the second appellant further argued that there was no tangible evidence from the prosecution on the identification of the assailants, intensity of light was not established and that the cautioned statement of the 1st accused was tendered in evidence without according him opportunity to object it.

The learned Senior State Attorney for the Respondent Republic, in his submission opposed the appeal. He argued that in accordance to the appeal, it is basing on the evidential value and identification.

He submitted that as far as the identification of the appellants is concerned, they were properly identified because they were not strangers to the identifying witness (PW1) Manyanya Mbasa and prior to the crime the 1st appellant went at the locus in quo and talked to PW1. That soon as the 1st appellant left it is when PW1 the watchman detected that there was unusual event going on. He switched on his

torch and saw the appellants holding the boxes of tiles which they threw and run away. The learned state attorney cited to me the case of ***Tabu Sita versus The Republic, Criminal Appeal no. 297 of 2019*** to the effect that recognition is more satisfactory than identification of a stranger.

The learned state attorney further argued that the 1st accused confessed in his cautioned statement which was tendered in evidence without objection and in accordance to the case of ***Dickson Eliya Shambwa Shapwata versus The Republic, criminal appeal no. 92 of 2007,*** the caution statement may ground conviction even without corroboration.

The learned state attorney then stood firm that the evidence of the prosecution was water tight against the appellants and that the appellants what they did in their respective defences was to make a general denial which did not cast any doubt to the prosecution case. In that regard he cited the case of ***Godson Dani versus The Republic, criminal appeal no. 54 of 2019.*** He finally prayed that this appeal be dismissed.

When I probed him to address on whether there is evidence on record to show that prior to the alleged stealing the alleged stolen boxes

of tiles were really in the store and if there is evidence relating to asportation, and further whether the search without warrant was lawful, the learned state attorney submitted that there is no evidence on record to show what items were in the store up to the time when the stealing was committed. On the asportation, the learned state attorney submitted that the stolen boxes were twelve. Six of them were found on the locus in quo and six others totally missing. Therefore there was no asportation for six boxes while there was asportation for the other six boxes hence a complete theft. He further admitted that there was no search order.

Having carefully considered the grounds of appeal by the Appellants, submission of the parties and the evidence on record, I find this appeal to have been brought with sufficient cause. I will start with the issue of the cautioned statement. It is true that the cautioned statement of the first accused was tendered without objection by him. It is however the law that admissibility of the cautioned statement is one thing but the weight of such admitted evidence is another thing. In the case of ***Ndalahwa Shilanga and Another versus The Republic, Criminal Appeal no. 247 of 2008***, the cautioned statement of the accused was admitted without objection like in the instant case. The

court of appeal however held that irrespective that there was no objection to admissibility of the statement, the same must be treated with circumspection regard being on the peculiar circumstances of the case.

In the instance case there are two factors rendering the cautioned statement exhibit P5 illegal that cannot be relied upon to find the guilty of either accused. First, it is on record that the said statement at the time it was tendered in evidence the second appellant was not invited to object it while it is incriminatory evidence against him as well. It was thus admitted in evidence against the rules of procedure regarding to fair trials. Secondly, the first accused was arrested on 02/01/2021 but the cautioned statement was recorded on 07/01/2021. The statement was therefore inadmissible and was wrongly admitted merely because there was no objection from the accused. I do hereby expunge the same from the records.

I now move to the search and seizure. The certificates of seizures were admitted in evidence as exhibits P1 collectively. It is however plainly true that the purported search was conducted without any warrant as mandated under the provisions of section 38 of the Criminal Procedure Act upon which exhibit P1 supra was drafted. The learned

state attorney admitted at the hearing of this appeal that they do not have the search order on record. The search was thus illegal because search in the instance matter was not that of emergency. It was a prepared search which required the search order dully issued by the police officer incharge of the police station.

There is the question of identification. The appellants argued that there was no evidence of proper identification against them. The learned state attorney maintained that there is abundant evidence on the identification of the appellants because they were familiar to the identifying witness and they were identified by the aid of torch light.

Going by the records of the trial court, I find that the only identifying witness in this case is Manyama Mbasa (PW1) who was the watchman on duty on the crime date. According to his evidence PW1 stated that the first appellant Mbusule Ndazi was his fellow watchman who was in the day shift that day. When it got evening he entered on duty and relieved the first appellant after making a safe handover. That when it got at about 07:30 the first appellant came back and asked the whereabouts of one Alex Boniface the co-watchman at that night. They talked a bit then the first appellant left. Sometime later PW1 heard certain fracas of a falling grill. He went to check what was going on only

to find that the appellants were holding boxes which they dropped and run away. That he saw them by the aid of his torch light.

Unfortunately and as rightly argued by the appellants, the witness did not exhaust all the ingredients of proper visual identification. He did not mention the distance he was at the time of his observation, time used in the observation and the intensity of light and whether there was no any impediments to his visibility. Visual identification has always been taken to be the weakest sort of evidence as at times witnesses may with the honest belief mistake the identity of assailants. See ***Waziri Amani versus The Republic (1980) TLR 250.*** It has even been decided in a number of cases that even when the witness is purporting to recognize someone whom he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made. See ***Shamir John versus The Republic, criminal Appeal no 166 of 2004.*** For visual identification to be a basis of conviction such identification should eliminate all possibilities of mistaken identity and, the court should satisfy itself that the evidence is absolutely watertight. Evidence on conditions favoring a proper identification is of utmost importance that must be given. In this case the conditions favoring proper identification were only given to the

extent that the appellants were not stranger to the identifying witness and the witness's source of light was a torch light. These two conditions are not enough. The witness ought to have testified further on the distance, intensity of light among other ingredients for correct identification. In the case of ***Issa s/o Magara @ Shuka V R, Criminal Appeal No. 37 of 2005*** (unreported) the Court Appeal speaking on the needful to have the source of light and its intensity held:

> *"In our settled minds, we believe that* ***it is not sufficient to make bare assertions that there was light at the scene of the crime...****Hence the overriding need to give in evidence sufficient details the intensity and size of the area illuminated.....We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger,* ***clear evidence on sources of light and its intensity is of paramount importance".***

In the circumstances, the evidence of PW1 could have not been as watertight.

Finally there is no evidence on record to prove the items which were in the store up to the night of the crime date so that we are able to determine the missing boxes by way of theft as alleged. It is on record that the place where theft is alleged is a store for the ongoing construction. Stock verification report is not enough to prove theft.

There must be other documents upon which the stock verification was made such as stock ledgers. The stock verification report exhibit P3 does not speak of the items which were in the store that night. It is a general conclusion of the items received in the store and those used in the construction. It is very dangerous to rely on this document to find the appellants guilty on the allegation of a specific date. I therefore find that the prosecution failed to prove the presence of the alleged stolen properties in their store on the night of the alleged theft.

But again there is a question of credibility of PW1. In his evidence he alleges to have seen and identified the appellants at the crime scene. He testified that when he went around to the window after having heard unusual sounds of the falling grill he saw the appellants and another third person whom he could not identify. The appellants dropped the boxes of tiles they had carried and run away. But according to PW2 ASP Enock, when he interviewed PW1 about the crime, PW1 told him that after hearing such unusual sounds he went around to see what was happening. It was at the backyard. When he reached there he saw two people in the bush.

From the evidence of these two witnesses the true position is uncertain. Did PW1 see the appellants in the bush or by the window at

the backyard? Did he saw two people or three? What was the distance from where PW1 stood to the bush where the appellants were? All these unanswered questions leave the prosecution case unproved to the required standard.

But again, it was PW2 who seized exhibit P4 the 3 lamps, ¼ kilogram of nails, 5 pcs of electric switches, 2 pcs of torches and 1 prize. But the one who tendered these items in evidence was PW4 DC Abuu without the seizing officer to identify them in court. Therefore, there is a breaking chain between the items seized and the one which were finally tendered in evidence.

With all these anomalies and the analysis, I have made, I find this appeal to have been brought with sufficient cause. The same is hereby allowed. The Appellants' conviction is quashed and the sentences meted against them in all counts are hereby set aside. I order their immediate release from prison unless held for some other lawful cause. Right of appeal to the court of appeal is explained. It is so ordered.

THE HIGH COURT OF TANZANIA

A. MATUMA
JUDGE
30/3/2023