IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

(PC) CRIMINAL APPEAL NO.12 OF 2022

(Arising from the decision of the District Court's Criminal Appeal no. 17/2021 dated 29/10/2021, Original Criminal Case No. 35 of 2021, Katoro Primary Court)

ATHUMAN SADRU..... APPELLANT

VERSUS

MUTTA THEMISTOCLES.....RESPONDENT

EX PARTE JUDGMENT

Date of last Order: 21.06.2023
Date of Judgment: 23.06.2023
A.Y. Mwenda, J;

This is the second appeal. It emanates from the decision of the District Court's Criminal Appeal No. 17/2021 dated 29/10/2021.In the said Appeal, the 1st appellate Court allowed the respondent's appeal in which he challenged the trial Court's decision which found him guilty of theft. The 1st appellate Court quashed the conviction meted by Katoro Primary Court and set aside the sentence which was passed. The 1st appellate Court also ordered for an immediate release of the appellant (now the respondent).

Aggrieved by the said decision, the Appellant preferred the present appeal with four (4) grounds. When the summons was served against the respondent, he

declined to accept it. As a result, the Court ordered this appeal to proceed ex-parte against him.

Before going any further, this Court found it prudent to narrate the brief historical background of the matter. From the records, the present appellant owned a shop at Ibwera center, Katerero Ward at Bukoba Rural District in Kagera Region. On the 25/05/2021, the appellant's shop was broken into, and an assortment of items was stolen. Following the said incident, three suspects were arrested. These are the present respondent (MUTTA THEMISTOCLES), BENEZETH SWEETBERT and NOVAT DEUSDEDIT. All the three suspects were arrested and arraigned at Katoro Primary Court facing two counts, to wit, shop breaking with intent to commit an offence therein C/S 296(a) of the Penal Code, [CAP 16 RE 2019] and Stealing contrary to Section 265 of the same Act.

When the charge was read over to them, save for the present respondent who pleaded not guilty, the rest entered a plea of guilty. They were thus convicted and sentenced to serve a term six (6) Months jail sentence for the 1st Count and one (1) year jail imprisonment. As the present respondent pleaded not guilty, the trial commenced and at the end of the judicial day, as hinted above, he was convicted and sentenced to serve a term of one (1) year jail imprisonment. This findings were however reversed by the District Court of Bukoba on appeal.

At the hearing of this appeal, the appellant was present unrepresented. He chose to argue his grounds of appeal in sequence. For ease of reference, the Court decided to reproduce the said grounds as follows, that:

1. That, the 1st appellate court erred in fact and law for reversing the trial court decision without putting into consideration the weight of the evidence tendered by the Appellant side.
2. That, the 1st appellate court erred in fact and law for reversing the trial court decision without putting into consideration the respondent admitted to have participated in the theft.
3. That, the 1st appellate court erred in fact and law for reversing the trial court decision whereas there was a corroborating evidence of co-accused who named him.
4. That, the 1st appellate court erred in fact and law for reversing the trial court decision without taking note of the fact that the respondent participated in the theft right from the beginning and even though he knew he concealed the information a fact that establishes his blame worth mind.

Regarding the 1st ground of appeal, the appellant submitted that the evidence against the respondent was sufficient/watertight to warrant conviction against him. According to him, the respondent admitted that he was hired by his co accused to carry the stolen items which he knew that they were stolen goods. The

appellant added in that the said admission by the respondent was also made before the police officer who was also summoned to testify in that regard.

Further to that, the appellant submitted that in his defense, the respondent alleged that he was hired by his co culprits in his capacity as a boda-boda rider while in fact he is not and does not even own the said means of transport(boda-boda). Having so submitted, the appellant prayed the present appeal to be allowed and prayed the decision and orders of the District Court to be reversed.

The said, having marked the end to the appellant's submission, the issue before me is whether the appellant discharged his duty of proving his case beyond reasonable.

At the outset, it is apposite to point out that in criminal trials, the burden of proof lies on the prosecution side and standard of which is beyond reasonable doubt. This legal position is stated under the Law of Evidence Act, S. 3(1) and 110 [Cap 6 R.E 2019] and various decisions of this Court and the Court of Appeal. In the case of MOHAMED MATULA V. R, [1995] TLR.3, the Court held inter alia that:

> *"In Criminal Cases the burden is always in the prosecution, it never shifts, and no doubt is cast on the accused to establish his innocence, the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the*

prosecution, is part of our law, and forgetting or ignoring

it is unforgivable, and it is peril not worth taking."

In a bid to prove his case before the trial Court, the appellant testified that after he noted the breaking and stealing in his shop, he notified the relevant authorities and later in the evening he was informed that a good Samaritan had found a dropped mobile phone at the scene of crime. He said that when the said mobile phone was given to him, an attempt to call it showed it belonged to one of the accused persons (NOVAT DEUSDEDIT).He testified further that they tracked its owner (NOVAT DEUSDEDIT) whom , upon being questioned, confessed committing the said crime with his co-culprit one BENEZET SWEETBERT).According to him the said BENEZET SWEETBERT was also found and upon being questioned he also confessed. The appellant went on to testify in that the said accused persons, i.e., NOVAT DEUSDEDIT and BENEZET SWEETBERT told them that after they had broken and stole items in the shop, they contacted the present respondent (MUTTA THEMISTOCLES) so as to hire him after they have told him that they had stolen the said items from the appellant's shop. According to the appellant, the said accused told them that the present respondent was given TZS 20,000/= in order to hide their motorcycles which had no fuel, but he disappeared and never came/went back and their efforts to track him proved futile. In his defense, the respondent testified that NOVAT DEUSDEDIT and BENEZET SWEETBERT approached him at around 03.00 hours at told him that they wanted

to involve him in a deal. He said that they gave him TZS 20,000/= but when he asked what was it for, they told him they would show him. According to him they led him near the mosque where he found shop items in two bags. While there at they wanted him to assist them in ferrying them. They then left him to go for another consignment, but he decided to leave the scene as he did not know where the said items had gotten them from.

That being the summary of the evidence, it is apparent that the evidence against the respondent was hearsay. This is so because the appellant testified what he heard from /was told by the respondent's co-accused. The law is very clear that the facts, except the content of documents, may be proved by oral evidence which must be direct. [See S.61& 62 of Evidence Act [Cap 6 R. E 2019]. On the other hand, hearsay evidence is not admissible in evidence. In the case of NDAISENGA s/o VICENT VERSUS THE REPUBLIC, CRIMINAL APPEAL NO. 523 OF 2021, CAT (unreported), the Court held inter alia that:

> *"Beginning with the evidence of PW1, his evidence is pure hearsay. The same goes to the evidence of PW6 that it is hearsay. It is trite law that the court cannot rely on hearsay evidence to find a conviction because it has no evidential value-see: Vumi Liapenda Mushi v. The Republic, Criminal Appeal No. 327 of 2016 [2018] TZCA 197 (12 October 2018; TANZLII)."*

Even if the Appellant's evidence was direct evidence, which is not, still the same, by itself does not prove the respondent's participation in the said crime. What is apparent from the record is that his co-culprits, after they had stolen the said items, approached him with a view to assist them to ferry them away, something which he declined and left. On that basis, he knew of the incident but that by itself cannot be said he participated in its commission. In other words he does not even qualify to be described as an accessory after the fact.

From the foregoing observation, this court is of the view that there is no scintilla of evidence which points accusing fingers to the respondent. The Hon District magistrate was justified in her findings of not guilty to the respondent. On that basis this appeal is dismissed.

Right of appeal is fully explained.

It is so ordered.

A.Y. Mwenda

Judge

23.06.2023

Judgment delivered in chamber under the seal of this court in the presence of Mr. Athuman Sadru the Appellant and in the absence of the Respondent.

A.Y. Mwenda

Judge

23.06.2023