IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

CRIMINAL APPEAL NO. 06 OF 2022

(Arising from the District Court of Tabora - Criminal Appeal No. 12 of 2022, Originating from Tabora Urban Primary Court in Criminal Case No. 162 of 2020)

SHABAN DAUD..... APPELLANT

VERSUS

PASCHAL SHIJA @ MACHUMU ..... RESPONDENT

JUDGMENT

Date of Last Order: 08/05/2023
Date of Judgment: 12/06/2023

KADILU, J.

This case emanated from Tabora Urban Primary Court where the appellant was the complainant against the respondent together with his co-accused one, Salumu Nasoro. They were jointly charged with the offence of theft contrary to Section 265 of the Penal Code, [Cap. 16 R.E. 2019]. The appellant alleges that on 23/09/2019 at 1:00hrs in Inara Village, Ndevelwa Ward within Tabora District and Region, the respondent and Salumu Nasoro stole a bicycle make phoenix and motorcycle SANLG make with registration number MC 429 APN the property of the appellant, all with a total valued of Tshs. 1,100,000/=.

At the conclusion of the trial, Salumu Nasoro was acquitted whereas the respondent was convicted for the charged offence and sentenced to probation together with payment of compensation to the appellant at the

tune of Tshs. 1,000,000/=. Dissatisfied with the conviction and sentence, the respondent appealed successfully to the District Court of Tabora whereby proceedings and decision of the Primary Court were nullified for the reason that they were vitiated by procedural impropriety. Aggrieved with the decision of the District Court, the appellant filed the present appeal based on the following grounds:

1. *That, the learned trial Magistrate of the appellate court erred in law and facts by ignoring correct records of the trial court in which the appellant had proved his case to the required standard.*
2. *That, the learned trial Magistrate of the appellate court erred in law and facts by raising a procedural technicality which was not among the grounds of appeal and ignored merits of the case in which the appellate court could order a retrial.*

The appellant prayed this court to allow the appeal, quash and nullify decision of the appellate district court, or order retrial of the case so as to ensure substantive justice. The respondent filed a reply to the petition of appeal in which he maintained that the appellant had failed to prove the accusation against him to the required standard. He explained that the Primary Court convicted and sentenced the respondent wrongfully while leaving the actual offender walking away freely. He prayed the appeal to be dismissed with costs on the ground that the appellate court rightly considered the procedural irregularity which surrounded the proceedings of the trial court.

The appeal before me was disposed by way of written submissions. The appellant enjoyed drawing services of Mr. Amosi Japhet Gahise, Advocate and the respondent was represented by Mr. Charles Livingstone Ayo, also the learned Advocate. Mr. Gahise reiterated that the appellant managed to prove the case beyond reasonable doubt before the primary court as he called witnesses and tendered exhibits to prove his case. He stated further that the procedural irregularity raised and relied on by the trial court did not end on the dispensation of substantive justice. According to Mr. Gahise, if the first appellate court could order retrial of the case, it would enable it to penetrate and see what is in the innermost part of the case.

On his part, Mr. Ayo opposed the appeal generally and stated that the case before the trial court was not proved beyond reasonable doubt. He holds that view because the trial Magistrate did not indicate the reasons as to why she had chosen to convict and sentence the respondent while DW4 stated clearly that he was the one who gave the respondent the bicycle alleged to be stolen for the purpose of exchanging it with rice. According to Mr. Ayo, DW4 was the one who was in possession of the bicycle after having purchased it from the people who he mentioned during the trial.

The learned Advocate submitted that despite a clear indication of the offenders in this case, neither DW4 nor the people he mentioned as the sellers of the complained bicycle were arrested, arraigned before the court and tried for the offence. For this reason, he concluded that the respondent was wrongfully convicted and sentenced while the actual offenders were let

to walk away freely. It is Mr. Ayo's opinion that for the appellant to be considered as having proved his case beyond reasonable doubt, he ought to have established that it was the respondent who had stolen the alleged motorcycle and the bicycle. The learned Advocate elaborated that being found in possession of a stolen property does not make a person a thief where another person has admitted that he was the one who gave it to a person who was ultimately found with it.

Mr. Ayo opined that the appellate court was justified in discovering the discrepancy in the trial court's proceedings and refraining from ordering a retrial because doing so would give an opportunity to the appellant to fill in gaps in his evidence. He added that one of the identified weaknesses was lack of proper identification of the stolen properties. According to him, ownership of the alleged motorcycle and the bicycle was not cogently proved as well. He explained that if the court could order retrial, the appellant would rectify these anomalies. He prayed the court to dismiss the appeal for lack of merits.

Having presented the background of the case and considering submissions of the learned Advocates for both parties, I now determine whether or not the appeal is meritorious. I will be guided by the principle set forth under Section 110 of the Evidence Act, [Cap.6 R.E 2019] which places the burden of proof on the party wishing the court to believe his testimony and pronounce judgment in his favour. The Section provides:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."

Therefore, the burden of proof is on the shoulders of a person who alleges and, in criminal cases, the standard of proof is beyond reasonable doubt. I have observed that in the trial court, the respondent was charged with theft contrary to Section 265 of the Penal Code, but at the end of the trial he was convicted of the offence of being found in possession of the property alleged to be recently stolen. The provision for which the respondent was charged stipulates as hereunder:

"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."

I have carefully examined the proceedings of the trial court and found in nowhere that evidence was led to show how, when and from who the alleged motorcycle and the bicycle were stolen. Notwithstanding, at page 3 of the impugned judgment, it is shown as follows:

"... mashahidi wote upande wa mlalamikaji wanamtaja SU1 pekee kwamba ndiye aliyekamatwa na baiskeli ya wizi... Hivyo basi, Mahakama hii kwa pamoja inamtia hatiani Mshitakiwa Na. 1 ... kwani upande wa mashitaka umethibitisha shitaka lake pasipo kuacha shaka yoyote ..."

From the extract above, it is evident that the trial court invoked the doctrine of recent possession in convicting and sentencing the respondent.

Indeed, all the witnesses testified in relation to recent possession, not the theft itself. The respondent was not charged with receiving property alleged to be recently stolen. The doctrine of recent possession is not provided under the Penal Code. The doctrine has been developed through case law. It applies where a person is found with an article recently reported to be stolen and that person has failed to adduce reasonable explanations about how he came into possession of the article alleged to be stolen.

Under such circumstances, a person found in possession of the said property is presumed to be the actual thief. It is a mere presumption which may be rebutted by elaborating reasonably on the manner in which possession was acquired without being involved in the alleged theft. In the case of ***Alhaj Ayub @ Msumari and Others v R.***, Criminal appeal No. 136 of 2009, the Court of Appeal stated that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, it must positively be proved, **first** that the property was found with the suspect; **secondly,** that the property is positively the property of the complainant; **thirdly** that the property was stolen from the complainant, and **lastly** that the property was recently stolen from the complainant.

In the instant case, it was not positively proved that the property belonged to the appellant and that, it was the respondent who had stolen it from the appellant. The respondent complained in his grounds of appeal that, the case against him was not proved beyond reasonable doubt because ownership of the motorcycle and a bicycle alleged to be stolen was not

cogently proved. At pages 3 and 4 of the trial court's judgment, it is shown that the bicycle was taken to the court as an exhibit. However, the proceedings are completely silent about the identification and ownership of the complained motorcycle.

As for the ownership of the bicycle, there is no evidence in the case file indicating that the appellant is the owner of that bicycle. Additionally, the proceedings are silent about whether or not there were exhibits tendered or oral evidence which was presented before the trial court to establish the appellant's ownership of the bicycle alleged to be stolen. Under Section 258 (1) of the Penal Code, one is required to establish ownership of the stolen property if he is to prove the offence of theft. The appellant alleges that the motorcycle and the bicycle belong to him, but there were no purchase receipts, elaborations on how the appellant became the owner thereof or a registration card in respect of the motorcycle, that were admitted by the court as exhibits during the trial.

Thus, there is nothing to convince the court to hold that the appellant had proved that the alleged bicycle and the motorcycle were his property. Generally, the linkage between the stolen property and the appellant is missing. I therefore agree with the view by the Advocate for the respondent that it was crucial for the appellant to establish clearly that the stolen property belonged to him as contended. In the absence of such proof, I find the first ground of appeal devoid of merit and I dismiss it accordingly.

The second ground of appeal need not to detain me so much as it is now settled position of the law that the court is not justified to raise and determine its own point without engaging the parties. In ***Said Mohmed Said v Muhusin Amiri & Another***, Civil Appeal No. 110 of 2020, Court of Appeal of Tanzania at Dar es Salaam, it was held that a judge is duty bound to decide a case on the issues on record and if there are other questions to be considered, they should be placed on record and the parties be given opportunity to address the court on those questions.

The Court of Appeal went on to insist that a decision of the court should be based on the issues which are framed by the court in consultation with the parties and failure to do so results in a miscarriage of justice. In the instant case, it is apparent at pages 5 to 7 of the impugned judgment that, the learned appellate Magistrate when composing the judgment, raised and determined the issue of correctness of the proceedings of the trial court. The Magistrate found that in between the trial, the charge was substituted but the appellant was not called to plead to a substituted charge.

The learned Magistrate ruled that the omission had the effect of rendering the trial court's proceedings and decision a nullity. In arriving at the conclusion, he had at page 6 of the judgment, reasoned that:

> *"I do not see the reasons for deeply proceed with other grounds of appeal as it will be wastage of precious time for both this court and parties. However, before I wind up this task, as a general rule always when the matter becomes a nullity the remedy is for*

the same to commence afresh, but I hesitate to do so basing on the fact that ... the offence was not proved to the required standard."

I wish to point out here that it is not always whenever there are irregularities in the trial court's proceedings that the remedy is a trial *de novo* in which the whole case is retried as if a trial had never been conducted in the first instance. Section 388 of the Criminal Procedure Act [Cap. 20 R.E. 2022] provides that where on appeal or revision, the court is satisfied that there was an error, omission or irregularity in the proceedings of the trial court occasioning a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable.

As such, the determinant factor on whether or not to order a retrial is a miscarriage of justice. Where the irregularity did not occasion failure of justice, the court may make such other order as it may consider just and equitable. The principle as to whether or not to order a retrial was laid down in the case of ***Fatehali Manji v R.***, (*supra*) in which it was stated that:

In general, a retrial will be ordered when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of a trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order

for retrial should only be made where the interests of justice require it."

In my considered opinion, this is not a fit case to order a retrial because as correctly observed by the district court's Magistrate, the case against the respondent before the trial court was not proved beyond reasonable doubt. For that reason, an appropriate order is not a retrial, but dismissal of the appeal. I thus dismiss the appeal, quash decision of the district court and set aside conviction as well as the sentences meted on the respondent.

Order accordingly.

KADILU, M.J.,
JUDGE
12/06/2023

Judgement delivered in chamber on the 12th Day of June, 2023 in the presence of Mr. Shaban Daud, the appellant. The respondent is absent.

THE HIGH COURT OF TANZANIA

KADILU, M. J.
JUDGE
12/06/2023.