THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 15 OF 2023

(Originating from the District Court of Tandahimba at Tandahimba in Criminal Case No. 35 of 2021.)

SALUM SEIF MBONDE ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

16th & 28th June 2023

LALTAIKA, J.

The appellant herein **SALUM SEIF MBONDE** was arraigned in the District Court of Tandahimba at Tandahimba (the trial court) charged with two counts of (i) Burglary c/s294(1)(a) and (2) of the Penal Code Cap 16 RE 2019 and (ii) Theft c/s 258 and 265 of the Penal Code. It was alleged that on 7/11/2021 around 23:00 hours at Matogoro Village, Tandahimba District, Mtwara, the appellant broke into the house of one **Karim Selemani Sadala** with the intention of committing an offence. He got into the house and stole therein properties of the victim including a motorcycle with registration **No. MC940 AZL.**

When the charge was read over and explained to the appellant (then accused) he denied the offence. The trial court entered a plea of not guilty and proceeded to conduct a full trial. To prove the allegations levelled against the accused, the prosecution paraded a total of 6 witnesses. The appellant was also accorded the chance to enter his defence and he was the only defence witness.

Having been convinced that the prosecution had left no stone unturned in proving the case to the required standard, the trial court convicted the appellant as charged and sentenced him to 5 years in jail for all counts running concurrently.

Aggrieved, the appellant has appealed to this court on the following grounds:

1. *That the trial Magistrate erred in points of law and fact when he convicted the Appellant while the prosecution side failed to prove their charge to the standard as required by the law that is beyond any reasonable doubt as per section* ***3 (2) (a) of*** *the* ***Tanzania Evidence Act.***
2. *That the trial Magistrate erred in law and fact by convicting and sentence the appellant, while his failed to analyse the evidence properly.*
3. *That, the trial Magistrate erred in law and fact by convicting and sentence the Appellant relying the evidence of PW1 (victim) while knowing that PW1 was not a credible and reliable witness.*
4. *The trial Magistrate Court erred in law and fact by convicting and sentence the appellant while the prosecution side failed to call the interest witness* ***"informer*** *in order to prove the charge.*
5. *That the trial Magistrate erred in law and fact to rely on improperly exhibited documentary evidence Pl and P2 (motorcycle and registration card) to convict the Appellant.*
6. *That the trial Magistrate Court erred both in law and fact by convicting and sentencing the Appellant while failing to consider the defense evidence as required by section 235 (1) of the Criminal Procedure* ***Act Cap 20, RE 2019).***
7. *The trial Magistrate erred in both law and fact Dy convicting and sentencing the Appellant and admitting the exhibit Pl and P2 and acting upon it while such exhibit was not proved beyond reasonable doubt by the authority with such mandatory of registering all motorcycle in order to clear such doubt that such document admitted*

therefore the Court of law was produced by ***Tanzania Revenue Authority - TRA.***

8. *The trial Magistrate erred in both law and fact by convicting the Appellant while knowing that the evidence produce by PW1 was unprocedural admitted as the witness testifies that he witnessed or he participate in the interrogation of DW1 (Appellant) Such act must have resulted to mental touring.*
9. *The trial Magistrate erred in both law facts by convicting the appellant basing on the evidence adduced by PW1 as the owner of the stolen motorcycle with registration number* ***MC 940 AZL*** *without producing any evidence I document from authority with such mandatory of proving ownership of such motorcycle which is Tanzania Revenue Authority -****TRA*** *such evidence should be expunged out from the Court records leaving the prosecution side with no leg to stand and set aside the conviction and leave the Appellant at liberty.*
10. *The trial Magistrate erred in law fact by convicting the Appellant basing on the evidence adduced by PW3 and exhibit P3 while such exhibit was not fright listed in the list of exhibits and no exhibit which show that it was admitted before the Court of law and there is no request from prosecution side to add exhibit.*
11. *The trial Magistrate erred in both law and fact by convicting Appellant and admitting the exhibit P3 chain of custardy and such document lack merit since the exhibit custodians of police at Mtama who received such exhibit does not explain where he received from who and how if reaches to Tandahimba police and such should be proved by the PF 16. Also, the police officer of Tandahimba who received such exhibit does not tell where how he got such exhibit.*

When the appeal was called on for hearing, the appellant appeared in person, unrepresented while Mr. Melchior Hurubano, learned State Attorney, appeared for the respondent Republic. The appellant prayed that the court considers his grounds of appeal. He requested that the learned State Attorney be allowed to proceed while he reserved his right to a rejoinder.

Mr. Hurubano accepted the proposal and declared that the respondent did not support the appeal. He emphasized that the respondent Republic supported both sentence and conviction of the trial court.

Mr. Hurubano stated that he would address the grounds of appeal in a specific order. He mentioned that the 1st, 3rd, 7th, and 9th grounds of appeal all revolved around the complaint that the prosecution had failed to prove the case beyond reasonable doubt. Regarding the 1st count of burglary, he pointed out that PW1 had clearly stated that upon returning home at 23:00 on the fateful day, he discovered that several items, including a motorcycle, had been stolen. However, the witness did not mention the time he had left his home or whether his house had been broken into.

On the second count, Mr. Hurubano referred to PW1's evidence, which indicated that after discovering the theft, PW1 reported the matter to the police, and investigations commenced. During their patrol activities, the police entered a nearby garage owned by DW3, a co-accused. Inside the garage, they came across a motorcycle without a license plate. When they inquired about it, DW3 informed them that the motorcycle had been left by the appellant, who had promised to return with spare parts. Subsequently, the police seized the motorcycle and took it to the police station. DW3 was instructed to report to the police when the appellant returned.

Later, the police received information about someone selling a motorcycle, and posing as potential buyers, they discovered that it was the appellant. However, the appellant was selling a different motorcycle, not the one in question. After being interrogated, he confessed to stealing PW1's motorcycle and taking it to DW3's garage. The police requested the appellant to lead them to the location of the motorcycle, but upon arrival, the police had already taken possession of it.

Mr. Hurubano argued that DW3's explanation aligned with the appellant's confession, where DW3 claimed to have given the appellant TZS 100,000 and retained the motorcycle as collateral. The registration card was presented to the police, who were convinced that the chassis matched. Based on this, Mr. Hurubano believed that the second count had been proven beyond reasonable doubt.

Regarding the appellant's complaint on the second count, Mr. Hurubano expressed that the court had failed to properly evaluate the evidence. However, upon examining pages 7 to 10 of the criticized judgment, he believed that the court had sufficiently analyzed the evidence from both sides. He further argued that since this was the first appellate court, it had the authority to review the case comprehensively, as established in the CAT case of Leonard Mwanashoka v. R. Crim App. 226 of 2014.

Regarding the 4th ground, Mr. Hurubano addressed the appellant's complaint about the prosecution's failure to call an important witness, the informer. He argued that this ground lacked merit because the informer was not considered material, and the court had measures in place to protect informers. Citing the case of Paulo Andrea @Mbwilangi and Another v. R. Crim App 613 of 2020, he explained that the failure to call the informer did not invalidate the case. Consequently, he requested that the ground of appeal be dismissed.

Mr. Hurubano addressed the 5th ground of appeal, in which the appellant complained about the court's failure to read exhibit P1 and P2. He pointed out that on page 9 of the proceedings, it could be verified that the

exhibit was indeed read out loud. Consequently, he requested that the ground be dismissed.

Regarding the 6th ground, Mr. Hurubano mentioned the appellant's complaint about the court's failure to consider the appellant's defense. He expressed the belief that this ground had no merit and argued that on pages 6, 7, 9, and 10 of the criticized judgment, the court had indeed taken the defense evidence into consideration. He further highlighted that the accused was a habitual offender, having been convicted of a similar offense in Crim Case No 44 of 2014. He prayed for the ground to be dismissed.

Moving on to the 10th ground, Mr. Hurubano mentioned the appellant's complaint about the admission of exhibit P3, which was not listed in the exhibits. He stated that the respondent believed this ground had no merit and explained that there was no legal requirement for listing exhibits.

Regarding the 8th ground, Mr. Hurubano addressed the appellant's complaint that PW1 was involved in the interrogation and argued that it violated the appellant's rights. However, the respondent, the republic, believed that this ground had no merit. He stated that if the conviction and sentence were based on a cautioned statement, it could have been a valid ground, but since that was not the case and it did not affect the appellant's defense, the ground had no merit.

Lastly, Mr. Hurubano discussed the appellant's complaint in the last ground, which focused on the alleged failure to maintain the chain of custody. He expressed the view that this ground had no merit and pointed out that the prosecution had tendered the chain of custody of exhibit P1. He

referred to the testimony of witnesses indicating that P1 was seized from DW3 and passed on to PW5, who subsequently handed it to PW3. He concluded that this ground had no merit.

The appellant began by stating that first and foremost, he prayed for his grounds to be considered as part of his evidence. Secondly, he expressed his objection to the statement made by the learned state attorney. He acknowledged that he was arrested on 12/5/2021 in Lindi and clarified that he was not found with any motorcycle, contrary to what the state attorney had suggested.

According to the appellant, on the day of his arrest, he traveled from Tandahimba to Lindi to visit his former wife, with whom he is now divorced. Upon reaching Lindi, he went to a nearby Kibanda to have some tea. It was at that moment when he noticed the police approaching, accompanied by Azam Nakutimba, also known as Biko. One of the police officers got out of the police vehicle and asked if he was Kiduku. The appellant replied in the negative, but the officer insisted that he needed to go to the police station.

Agreeing to comply, the appellant was taken into custody without being subjected to any interrogation. After approximately 5 minutes, he was released from the cell and questioned about the seized property. They then proceeded to Kiwalala, where they met an informer named Oliver, and together they went to Mtama to retrieve a motorcycle. Subsequently, they returned to Tandahimba.

The appellant recounted that he was taken to the police station in Tandahimba, where he was subjected to severe beatings, resulting in

significant damage to his private parts. He claimed that the sole purpose of these beatings was to force him into admitting his involvement in motorcycle thefts. The following day, he was taken for another round of interrogation, during which he was presented with a piece of paper. Realizing that he would face further beatings unless he agreed to sign and go to court, he reluctantly accepted the proposal. In court, he pleaded not guilty.

I have dispassionately considered the grounds of appeal, submission by the learned counsel and court records. I will deal with the first ground of appeal only for I am convinced that it is capable of disposing of the entire appeal. The complaint is on proof of the prosecution's case beyond reasonable doubt. It is an established principle of law that the duty to prove the case lies with the prosecution. See **YOHANIS MSIGWA V. R. [1990] TLR 14.**

But what are the parameters for the case to have been proved beyond reasonable doubt? This question was addressed by the Court of Appeal of Tanzania in in **MAGENDO PAUL AND ANOTHER V. REPUBLIC [1993] TLR** 219 thus:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

I have reevaluated the entire evidence adduced in the trial court to see whether it leaves a remote possibility of the appellant's wrongdoing. As correctly submitted by the learned State Attorney who indicated unquestionable ownership (and mastery) of the trial court's proceedings,

PW1's evidence was to the effect that after discovering the theft, he reported the matter to the police, and investigations commenced. During their patrol activities, the police entered a nearby garage owned by DW3, a co-accused. Inside the garage, they came across a motorcycle without a license plate. When they inquired about it, DW3 informed them that the motorcycle had been left by the appellant, who had promised to return with spare parts. Subsequently, the police seized the motorcycle and took it to the police station. DW3 was instructed to report to the police when the appellant returned.

Later, the police received information about someone selling a motorcycle, and posing as potential buyers, they discovered that it was the appellant. However, the **appellant was selling a different motorcycle**, not the one in question. After being interrogated, he confessed to stealing PW1's motorcycle and taking it to DW3's garage. The police requested the appellant to lead them to the location of the motorcycle, but upon arrival, **another group** of police had already taken possession of it.

As can be seen, the evidence is wholly circumstantial. I am not saying that circumstantial evidence is an inferior form of evidence, not at all. In the word of Sir Udo Udoma, Former Chief Justice of Uganda, the same can prove a case with precision of Mathematics. Nevertheless, in dealing with a case where evidence is wholly circumstantial the court must warn itself. See **SIMON MUSOKE V. REPUBLIC [1958] 1 EA 715**, the Court of Appeal for East Africa, held:

> *"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction,*

find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

It is quite interesting to learn that the detectives posed as potential buyers of a motorcycle. Not only did they find that the appellant was, allegedly, selling a different motorcycle than the one they had in mind but also failed to distinguish between an offer and invitation to treat. In my opinion, it was not an offence for the appellant to suggest that he was selling a motorcycle unless he produced it and the same turns to be a stollen motorcycle. The wisdom in the familiar English case of case **PARTRIDGE V CRITTENDEN [1968] 2 ALL ER 421, HC QBD** comes to mind.

In that case the appellant placed an advertisement in a magazine: **"Bramblefinch cocks and hens, 25s. each".** He was charged with offering for sale a wild bird, contrary to statute, but the High Court said he must be acquitted. The advertisement was an invitation to treat, not an offer to sell.

It appears however that the police in this case had the name of the appellant in their books. He had committed a similar offence before and therefore they thought it would be simply a matter of connecting the dots. Unfortunately, they faced a rather steep climb because the appellant consistently denied having committed the offence and the evidence produced, as hinted above does not suffice grounding conviction.

In the case of **JOHN MAKOLOBELA KULWA AND ANOTHER V. R. [2002] TLR 296** it was stated categorically that:

"A person is not guilty of a criminal offence simply because his defence is not believed. Rather a person is found guilty and convicted of a criminal offence because of the strength of the prosecution case that has proved the case beyond reasonable doubt"

No doubt, the prosecution found it difficult to believe that the appellant was not involved in the stealing of the motorcycle they had in mind (Reg. No. MC940 AZL) when he allegedly told them that he was selling another motorcycle. Unfortunately, that is not how criminal justice works. It is not upon the court to believe the accused but rather upon the prosecution to prove their case beyond reasonable doubt.

Said and done, I allow the appeal. I quash the conviction and set aside the sentence of the lower court. Further, I order that the appellant **SALUM SEIF MBONDE be released from prison forthwith unless he is being held for any other lawful cause.**

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I.LALTAIKA
JUDGE
28.06.2023

Court

Judgement delivered on this 28th day of June 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney and the appellant.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
28.06.2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
28.06.2023