IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 132 OF 2022

JAIBI ISMAIL MANZI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

18th July & 30th August 2023

MWANGA, J.

The appellant, **JABI ISMAIL MANZI**, appeared before the District Court of Mkuranga at Mkuranga on 14th February 2022 to answer a theft charge contrary to Section 258(1) and 265 of the Penal Code, Cap. 16 [R.E 2019].

It was alleged that on the 28th day of January 2022 at about 11:00hrs at Kisemvule Village within Mkuranga District in Coast Region, different clothes were valued at Tshs. 8,000,000/= the properties of one Ahmed Mohamed Abdulaziz.

He denied the charges. After his trial, he was found guilty as charged and convicted accordingly. Therefore, he was sentenced to serve five years imprisonment in default to pay back eight million Tanzanian shillings to the complainant.

Believing innocent, he lodged this appeal against conviction and sentence to this court on the following grounds:

1. That the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution failed to prove the alleged THEFT against the appellant beyond reasonable doubt as the alleged Exhibit P.1 (clothes and two pairs of shoes collectively) were not retrieved at the appellant's premises.
2. That the learned trial magistrate erred in law and fact in convicting the appellant when the alleged Exhibit P.1 (clothes and two pairs of shoes collectively) were seized in contravention of Section 38 (1) (2) (3) of the Criminal Procedure Act, (Cap 20 R.E 2019) as there was no independent witness during the alleged search.
3. That the learned trial magistrate erred in law and fact in convicting un procedurally admitted in court without being read out aloud in court to enable the appellant to know its contents.

4. That the learned trial magistrate erred in law and fact in convicting the appellant when this case was poorly investigated, as the scene of the crime was never visited by the investigator (PW4) to prove the veracity of PW1 and PW2.
5. That the learned trial magistrate erred in law and fact in convicting the appellant when the same failed to draw an inference adverse to the prosecution for failing to parade the said ten cell leader mentioned by PW1, the omission which cast doubt on the prosecution, case in respect to the said theft.
6. That the learned trial magistrate erred in law and fact in convicting the appellant based on the defective charge as the evidence adduced by the prosecution witness in court was at variance with the particulars of the offence regarding the incident date/material date.
7. That the learned trial magistrate erred in law and fact in convicting the appellant evidence of PW1 and PW2, who alleged that the appellant told them that he sold the said clothes at BUZA Temeke without proving their allegation by ascertaining the said place and person who bought the said clothes and where the remained clothes exhibit P1 were kept.

8. That the learned trial magistrate erred in law and fact in convicting the appellant based on exhibit P3 (cautioned statement of the appellant), which was illegally taken and admitted in court as the same was taken in contravention of Sections 53 (c) (ii) and 54 (1) of the Criminal Procedure Act, (Cap 20 R.E 2019) and admitted in court during Ruling stage without being retendered at the main trial after inquiry.
9. That the learned trial magistrate erred in law and fact in convicting the appellant when the same wrongly rejected and disregarded the defense evidence, which was more compelling, coherent, and raised a reasonable doubt on the prosecution case without making a critical evaluation, analysis, weighing and considers the defense evidence sufficiently the omission which resulted to a severe error amounting a miscarriage of justice and constituted a mistrial.
10. That the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution has grossly failed to prove its charge against the appellant beyond reasonable doubt as required by law.

In the first ground of appeal, the appellant raises several contentions. **One,** that theft was not proved beyond a reasonable

doubt. **Two,** the evidence of PW2 and PW2 shows a variance between the chargesheet and the evidence adduced. It is the appellant's submission that it is displayed on page 3 that he stole the clothes and pair of shoes in exhibit P1 on 23 January 2022, while the particulars of the offence show that the theft occurred on 28 January 2022. **Three**, there is no reason why he was not arrested and searched at his homestead for the seizure of the alleged stolen properties. **Four,** there is no coherent evidence that he stole and sold the clothes at Buza, Temeke. In conclusion to this ground of appeal, the appellant contended that the case was not proven under sections 3(2) and 110(1) (2) of the Evidence Act, Cap. 6 R.E 2022.

In the second ground of appeal, the appellant raised the issues relating to the procedures used to seize exhibit P1(clothes and shoes) that were contrary to section 38 (1)-(3) of the CPA. The appellant contended that there was no established ownership of the stolen clothes and two pairs of shoes. Again, there is no independent witnessing of the search and seizure. There is no evidence of where the alleged stolen properties were stored or retrieved. In his conclusion, he invited this court to expunge the certificate of seizure from the record and dismiss the grounds of appeal.

In the third ground of appeal, the appellant raises the issue that the certificate of seizure in exhibit P2 was not admitted according to the law as it was not read aloud to the court. He, therefore, called and asked the court to expunge it from the record because of lack of evidential value.

In the 4th ground of appeal, the appellant stated that the case needed to be better investigated. He contended that the investigator did not visit the crime scene to prove whether the door was broken or not, as alleged by PW1.

The 6th and 7th ground of appeal is similar to the 1st ground round of appeal. There is a variance between the chargesheet and the evidence adduced, and there is no evidence that the appellant stole and sold them at Buza, Temeke. Therefore, I find no need to reproduce it here.

The eighth ground of appeal concerns procurement and reliance on his cautioned statement. The appellant contended that the caution statement in exhibit P3 was wrongly recorded in the presence of another police officer, hence infringing the right to his privacy. And that it was not voluntarily recorded.

On the 9th ground of appeal, the appellant contended that the trial court did not evaluate, analyze, or consider his evidence. He raised the issue that he was given the said clothes to sell and compensate for his salary, which PW1 did not pay him.

The 10th ground of appeal is similar to the 1st found of request. I see no importance in reproducing it again here.

Mr. Maleko, who represented the respondent in this matter, submitted the 1st, 2nd, 3rd, 4th, 7th, and 10th grounds of appeal, stating that all are based on the primary grounds of appeal of the failure of the prosecution to prove the case beyond a reasonable doubt.

In essence, the learned Senior State Attorney opposed the appeal. He submitted that grounds of appeal are baseless, with no legal legs to stand. He says they deserve to be dismissed, and this court shall disregard them. He contended that the evidence from PW1, PW2, PW3, and even PW4 all showed the alleged clothes and two pairs of shoes were received back or retrieved from the appellant himself so soon after a trap made by PW1, one **Ahamed Mohamed Abulazizi**. He refers to the evidence of PW1, who stated that the appellant came with those clothes packed in the sulphate bag, whereby the militia officer arrested him while bringing him the same clothes.

However, he agreed with the appellant's submission that the certificate of seizure and cautioned statement lack evidential value. Hence, they are liable to be expunged from the record. According to the submission, a certificate of seizure in **exhibit P2** was not read over to the court likewise, the cautioned statement in exhibit P3.

He also argued that there was no need for independent witnesses since no investigation was conducted on the appellant’s premises. It was the State Attorney's submission that on page 11 para 2 of the proceedings clearly, the exhibit mentioned above (P2) cleared for admission and then recorded into evidence where the trial court ruled out the appellant’s objection. However, the same was not read over to the court.

Despite all that, he emphasized that the prosecution's oral testimonies show that the appellant had seized clothes and shoes after returning them to the complainant.

Furthermore, he believed there was no need for the investigator to visit the crime scene since the number of witnesses managed to prove the offence of theft. He added that it was also unnecessary to parade him since Section 143 of the Evidence Act provides no particular number of witnesses to be called.

The learned State Attorney relied on evidence of PW1 and PW2, whom are wife and husband, who testified what they knew about the incident on which the trial court believed them. According to him, their evidence was reliable, credible, truth worthy, and supposed to be given credence as per the case of **Goodluck Kyando Versus Republic** (2006) TLR367. Hence, the events in the case have all the unbroken chains proving his guilt.

Additionally, he submitted that the evidence showed the appellant was trusted to look after the house. He said all the keys were with him except for the one room where clothes and shoes were stored. He also referred to the trial court's words on page 4 of the trial court's judgment para 2, where the court said;

> *"**Taking into account the evidence given by the prosecution, there is no doubt that the accused was found in possession of exhibit P1.***

On issue relating to the variance between the chargesheet and evidence, the learned State Attorney contended that they are two different things. According to him, the defectiveness of the charge can be cured as per Section 388 of the CPA and the landmark case of **Jamal**

Salum All Versus Republic. (Criminal Appeal 52 of 2017) [2019] TZCA 32 (28 February 2019)

In reply to ground 9, the learned state Attorney argued that the only reason for the defense to be rejected was that the evidence of the prosecution's side was so convincing that no reasonable person would ever question the appellant's guilt. It was his view that the prosecution case was more substantial than that of the defense, the circumstances which point fingers at the appellant, who stole the alleged properties of PW1.

I have reviewed the trial court proceedings and submission of the respective parties. It is a well-settled principle of law that, in all criminal cases, the burden of proof lies upon the prosecution and is beyond a reasonable doubt, and the burden never shifts to the accused. See **Wool mington Versus DPP** (1935) AC 462 and **Matula v R** 1995 T.L.R. 3. That was also the position in the case of **Pascal Yoya @Maganga** Versus **the Republic**, **Criminal** Appeal No. 248 Of 2017(Unreported), where it was held that: -

> ***"It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, the prosecution must prove its case beyond a reasonable doubt. The burden never***

shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case, and he need not prove his innocence".

For constituting the offence of theft, several elements must be satisfied. If any essential is absent, it will not amount to theft. The relevant section, thus, 258(1) provides:

258.-(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.

From the above provision, the necessary ingredients of the offence are that there was taking of movable property, with the dishonest intention, out of the owner's possession and movement of the property to take it away.

In the present case, it is observed that the evidence adduced is purely circumstantial because no witness saw the appellant breaking the house and stealing the clothes as alleged. As contended by both parties, the certificate of seizure (exhibit P2) and the cautioned statement are evidential values for the reasons stated.

That being the case, and as rightly contended by Mr. Maleko, the only evidence remaining is that of oral evidence. Since the accused was found to possess the properties, the case is based on the doctrine of recent possession. In this principle, four elements must be proved to convict the offender. See the case of **Mkubwa Mwakagenda Versus R,** Criminal Appeal No 94 of 2007(Unreported). In the cited case, the court established the elements; -

> ***"For the doctrine of recent possession to apply as a basis of conviction, it must be proved, first, that the property was found with the suspect; second, the property is positively proved to be the property of the complainant; third, that the property was recently stolen from the complainant, lastly that the stolen thing constitutes the subject of the charge against the accused..."***

Based on the above decision, the complainants (PW1 and PW2) must prove that the clothes and shoes belonged to him/her. On perusal of the trial court proceedings, the owner has never tendered any evidence to confirm that the properties subject to this matter belong to him. Again, there is no evidence, as alleged by the complainants, that the room with the stolen clothes was broken. As rightly contended by the appellant,

no investigator visited the crime scene to witness the same, the absence of which is solely based on assumptions.

Based on the principle that the prosecution has to prove its case beyond a reasonable doubt, there was a need for an investigation to be conducted where the properties were stored. That would negate the claim by the appellant that he was given the clothes and shoes to sell and recover his salary.

This was important, particularly after a bag of sulfate in exhibit P1; the certificate of seizure exhibits P2 and caution statement exhibits P3 are to be expunged from the record because of the lack of evidential value; the only evidence available is based on oral evidence of the PW1 and PW2 without any support. Subsequently, the grounds of appeal have sailed through enough to dispose of this appeal.

As a result, I am confident that the appeal will succeed. In that regard, the conviction and sentence of the trial court are quashed and set aside, and the appeal is, at this moment, allowed. The appellant shall be released from prison unless lawfully held.

Order accordingly.

H. R. MWANGA

JUDGE

30/08/2023

COURT: Judgment delivered in Chambers this 30th day of August 2023 in the Appellant's presence in person and absence of the Respondent.

H. R. MWANGA

JUDGE

30/08/2023