IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

CRIMINAL APPEAL NO. 103 OF 2022

(Arising from original Criminal Case No. 20 of 2022 of Manyoni District Court)

JUMA MAKELESIA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

4th & 28th August, 2023

KHALFAN, J.

In this appeal, Juma Makelesia, the appellant was charged before the Resident Magistrate Court of Manyoni at Singida in Criminal Case No. 20 of 2022 for the offence of Cattle theft contrary to section 258 (1) and 268 (1) (3) of the Penal Code, [CAP. 16 R.E 2022].

Having been charged with the offence at the trial court, the appellant denied to have committed the said offence. However, after a full trial, the appellant was convicted and sentenced to serve five (5) years in prison. Dissatisfied with the conviction and sentence, the appellant appealed to this Court. The appellant is challenging the decision of the Resident Magistrate Court on the following grounds:

1. *That, the trial Magistrate erred in law and in facts by convicting and sentencing the appellant while the*

prosecution side failed to submit the motor vehicle used by the PW4 to load the stolen cows, as an exhibit to prove the case beyond reasonable doubt.

2. *That, PW1 in his evidence adduced before the court asserted that he was seriously assaulted by the 5th accused and two other bandits but no any PF3 was used as a medical report to support his evidence adduced before the court.*
3. *That, the trial magistrate erred in law by basing on the evidence adduced by PW1 without making an identification parade which could enable the PW1 to identify the accused without making any mistake.*
4. *That, PW2 adduced the hearsay evidence before the court which is the weak evidence.*

At the hearing of this appeal on 4th of August 2023, the appellant appeared in person without legal representation, whereas the respondent, Republic had the services of Mr. Gothard Mwingira, learned State Attorney. While at the hearing, the appellant being a layman, he prayed that, his grounds of appeal be considered and be adopted accordingly by this Court without adding anything further.

Mr. Mwingira for the respondent, on the other hand, stated that; they had read all four (4) grounds of appeal and that they observed that there was irregularity on the judgment which was delivered by the trial

court. The irregularity was concerned with section 312 (2) of the Criminal Procedure Act, [CAP. 20 R.E 2022] which states that:

> *"In the case of conviction, the judgement shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced".*

By looking at page 8 of the judgment in the last paragraph, the words used state that:

> *"Having resolved point for determination by this court affirmatively, it follows that the prosecution evidence has sufficiently established the charge against the 5th accused person Juma s/o Makelesia beyond all reasonable doubts and accordingly the 5th accused person is found guilty for the offence of cattle theft and therefore convicted as charged".*

It was in his view, in leu of the above provision that the judgment was required to be rectified since it did not comply with the said provision by its omission of the section under the Penal Code on which the accused person was charged with.

Continuing with his submission, Mr. Mwingira, conceded with the appellant's first ground that the prosecution side failed to bring the motor vehicle Registered by No. T 781 BQH, Scania used by PW4; and

for not having the said exhibit, it makes the prosecution case to be weak. On the second ground, the prosecution found that it had no base since the accused person was charged with the stolen cows.

The prosecution also, conceded with appellant on his third ground that, there was no any identification of parade as stated under section 60 (1) of the Criminal Procedure Act, [CAP. 20 R.E 2022]. In the circumstances of this case, the 5th accused person was identified by PW2 through dock identification. He contended likewise that, there is no evidence in the proceedings which reveals how the accused persons were arrested and sent to the police station.

After considering the evidence of the accused person PW2, who submitted that there were three (3) persons and after that incident, he was also attacked, lost his consciousness only to become conscious later. Mr. Mwingira, averred that, in that case, the parade identification would have been very important, as it would have assisted the investigator that the arrested accused persons were the ones who were involved in this offence. Mr. Mwingira thus maintained that; the lack of the parade identification had weakened the prosecutions' case.

On the fourth ground, he argued that, PW2 was the only one who was the victim in that case, and so his evidence was not hearsay evidence.

He did testify before the court himself so this ground was mistakenly submitted as a ground of his appeal.

The appellant was given a chance to make a rejoinder, but he lamented that he had nothing to add.

Having considered the grounds of appeal, submissions of both parties against and in support of the appeal and the records; this Court finds only one issue which requires to be determined; that is whether the prosecution proved its case beyond reasonable doubt.

This issue calls upon this Court to find out whether the trial court properly assessed the evidence before it and if the prosecution proved its case at the trial court beyond reasonable doubt. Basically, the appellant has appealed to this Court that he was wrongly convicted and sentenced. Hence, he is faulting the decision of the trial court for failure to evaluate the evidence before it.

It is trite law that in criminal cases, the burden of proof has always remained on the prosecution throughout to establish the case against the accused person beyond reasonable doubt. This position was clearly clarified by the court in the case of **Milburn v. Regina** [1954] TLR 27 where the court noted that:

"It is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".

The law as cited above requires the charges against the accused person to be proved beyond reasonable doubt by the prosecution. This implies that the prosecution's evidence must be strong to leave no doubt as to the criminal liability of an accused person.

Failure of the prosecution to bring the motor vehicle registered by No. T 781 BQH, Scania used by PW4 as an exhibit, makes the prosecution evidence to be weak.

Section 62 (2) of The Evidence Act, [CAP. 6 R.E 2019] enumerates that:

"If oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection".

In the case of, **Mashaka Juma @ Ntatula v. The Republic**, Criminal Appeal, No. 140 of 2022, CAT at Shinyanga; it was held that:

"On our part, we think that the law is now well settled. Where material exhibits, particularly which were recovered during investigation are not produced in court, and no

reason is advanced for such failure or omission taints the prosecution case with a serious doubt - (see ***Kurwa Mohamed Mwakabala and Another v. Republic****, Criminal Appeal No. 542 of 2017 and* ***Matusela John Balimi and Another v. Republic****, Criminal Appeal No. 755 of 2010 (both unreported). However, it all depends on the prevailing circumstances".*

In that case, I agree with both parties that, for the prosecution's failure to tender the motor vehicle as an exhibit, taints the prosecution case with a serious doubt as it failed to prove their case beyond reasonable doubt.

Mr. Mwingira conceded that there was no any identification parade done as stated under section 60 (1) of the Criminal Procedure Act, [CAP. 20 R.E 2022].

In the famous case of **Waziri Amani v. The Republic** [1980] TLR 250, the qualities for the evidence of visual identification have been listed as follows:

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of dispute identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of

all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions such as the following posed and resolved by him: ***the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not****". (Emphasis added).*

Further to that, in the case of **Frank Michael @ Msangi v. The Republic,** Criminal Appeal No. 323 of 2013, CAT at Mwanza, the case of **Musa Elias and Two Others v. The Republic,** Criminal Appeal No. 172 of 1993 was cited where it was held that:

> *"...It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial".*

Accordingly, the court should be so keen in dealing with identification of the accused persons as put forward in the case of **Stuart Erasto**

Yakobo v. The Republic, Criminal Appeal, No. 202 of 2004, CAT at Dar es Salaam (unreported) where the court held that:

> *"...visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight".*

Without forgetting the case of **Shiku Salehe v. The Republic** [1987] TLR 193, the Court held that:

> *"It is now trite law that before basing a conviction solely on evidence of visual identification, such evidence must remove all possibilities of mistaken identity and the court must be fully satisfied that the evidence is watertight". (See the case of* ***Republic v Eria Sebwato*** *[1960] E.A 174.*

Regarding the case at hand, the prosecution side conceded that there was no any identification of parade made as stated under section 60 (1) of the Criminal Procedure Act, [CAP. 20 R.E 2022], failure of which, proves that the prosecution failed to prove their case beyond reasonable doubt.

In this case, PW2 was able to identify the 5th accused person through dock identification in court however, on the proceedings, there is no evidence which enumerates how the accused persons were arrested and sent to the police station. Also, there is a contradiction on the PW2 evidence who submitted that, there were three (3) persons and that after that incident, he was also attacked and lost consciousness and regained consciousness later.

In this respect, the parade identification would be critically important in order to assist PW2 and the investigator that arrested the accused persons involved in the offence. Therefore, the absence of the parade identification weakens the prosecution's case. In addition, there is an issue of irregularity on the judgment which was delivered by the trial Court for non-compliance of the mandatory provisions of section 312 (2) of the Criminal Procedure Act, [CAP. 20 R.E 2022], which states that:

> *"In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced".*

It is apparent from the quoted provision that a judgment must inter alia, specify the offence and the section of the Penal Code, [CAP. 16 R.E 2022] or other law under which the accused person is convicted.

There are several judicial pronouncements in support of the proposition. Amongst them is the case of **John Charles v. The Republic**, Criminal Appeal No. 190 of 2011, CAT at Tabora (unreported) which held that:

> *"Judgment writing in subordinate courts is governed by sections 235 and 312 of the Criminal Procedure Act, Cap. 20".*

In the instant case, on page 8 of the judgment, in the last paragraph which contains the conviction statement, the trial magistrate stated that:

> *"Having resolved point for determination by this court affirmatively, it follows that the prosecution evidence has sufficiently established the charge against the 5th accused person Juma s/o Makelesia beyond all reasonable doubts and accordingly the 5th accused person is found guilty for the offence of cattle theft and therefore convicted as charged".*

Therefore, the judgment is silent on the provision of the law on the offence the accused person is convicted as it has not specified the section of the law under which the appellant was convicted.

This Court is of considered view that, the trial court was obliged to specify the section of the law that the accused person had violated.

Omission to comply with the respective provision of the law is fatal to the conviction and sentence.

For the above reasons, I therefore, allow the appeal. In the circumstance of this case, the conviction is hereby quashed and the sentence is set aside. The appellant is to be set free unless he is otherwise held for another lawful cause. It is so ordered.

F. R. KHALFAN

JUDGE

28.08.2023