IN THE HIGH COURT OF TANZANIA

SUB – REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 85 OF 2023

(Arising from the Proceedings, Conviction and Sentence of the District Court of Sengerema in Criminal Case No. 57 of 2022)

ABDALLAH RAMADHANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last order: 31st October 2023

Date of Judgement: 3rd November 2023

MTEMBWA, J.:

In the District Court of Sengerema, the Appellant, together with Elisha Kisinza who was acquitted, were jointly charged with the offences of stealing contrary to ***sections 258 (1) and 265 of the Penal Code Cap***

16 [RE 2019] in the first count and of receiving property stolen or unlawfully obtained contrary to ***section 311 the Penal Code Cap 16 [RE 2019]*** in the second count.

In the first count, it was alleged that on 18th May 2022 at 9:00 hours at Nyamasale Village within Sengerema District in Mwanza Region, the Appellant and his co-accused did steal 400 liters of diesel valued at Tsh. 12,000,000/=. In the second count, it was alleged that the appellant and his co-accused at the same place and time was found to be unlawfully in possession of 400 liters of diesel valued at Tsh. 12,000,000/=. The Appellant together with his co-accused pleaded not guilty to the offences charged. Consequently, prosecution paraded six witnesses and tendered five exhibits.

Having evaluated the evidence adduced during hearing, the trial court acquitted the Appellant's co-accused in all counts. The Appellant was convicted in the second count of receiving property stolen or unlawfully obtained contrary to ***section 311 the Penal Code Cap 16 [RE 2019]*** and was sentenced to serve five years in prison. Dissatisfied, he has filed before this Court a Petition of Appeal with the following grounds;

1. *That the learned Senior Resident Magistrate made a grave error in law and in fact by convicting and eventually sentencing the Appellant herein on an alleged count of receiving stolen property or unlawfully obtained, contrary to the fact that the prosecution side miserably failed to prove the offence beyond reasonable doubts.*

2. *That the learned Senior Resident Magistrate made a grave error in law and in fact by convicting and eventually sentencing the Appellants herein on an alleged count of receiving stolen property or unlawfully obtained, contrary to the fact that the prosecution side miserably failed to prove all the ingredients of the doctrine of recent possession against the Appellant as per the law.*

3. *That the learned Senior Resident Magistrate made a grave error in law and in fact by failing to find and hold that since the Appellant was not involved at all in any way when the samples of the alleged diesel were being collected, and since the same was done without his knowledge and participation, then the alleged report from the government chemist was full of doubts and so should not have been used to convict the Appellant.*

4. *That the learned Senior Magistrate made a grave error in law and in fact by shifting the burden of proof on the Appellant on account that the Appellant did not produce any receipts to prove that he had purchased the allege, contrary to the fact that it was the responsibility of the prosecution side to prove their case against the Appellant.*

During hearing of this appeal, the Appellant was represented by Mr. Yona Shekifu, the learned counsel and the Respondent Republic was represented by Mr. Japhet Ngusa, the learned State Attorney. Hearing proceeded orally.

Staging the floor, Mr. Yona Shekifu, the learned counsel for the Appellant elaborated on the grounds of appeal. On the first ground of appeal, he narrated that the trial court erred by convicting and sentencing the Appellant without evidence on records. He added further that there was no evidence exhibiting when the said 400 liters of diesel (Exhibit P3) were actually stolen. He faulted the evidence of PW1, PW2 and P3 who failed to testify as to when the said liters of diesel were stolen. He submitted further that the said witnesses failed even to give descriptions of the alleged diesel. He submitted on the issue of the doctrine of recent possession and

added that there was no report from police evidencing that there was theft of 400 liters of diesel. As such, there was no complainant, he said.

Arguing on the second ground, Mr. Yona Shekifu submitted that prosecution failed to prove all elements of the offence as enunciated in the case of ***Augutino Mgimba v. Republic*, Criminal Appeal *No. 436 of 2019, CA* at Iringa**. He referred me to page 10 of the cited case where the court said that for the offence to be proved, the following elements must be proved, **one,** that the property must have been found with the accused person, **two**, that the property must have been recently stolen from the complainant and **three**, that the stolen thing should constitute the charge against the accused person. He said, the third element was not proved.

On the third ground of appeal, Mr. Yona Shekifu submitted that the said 400 liters of diesel were taken to Government Chemist but the appellant was not involved. He doubted the movement of the exhibit and added that the chain of custody was not established by records. He said, since there was no record on the movement of the exhibit, chain of custody was broken. He added that even SGT Echikaka, the exhibits keeper, was not called to testify. He referred to me to Police General Order No. 229. Mr.

Yona Shekifu also cited the case of ***Illuminatus Mkoka v. Republic (2003) TLR 245*** where the Court said that in the absence of proper chain of custody there is a possibility of tempering with the exhibit.

On the fourth ground of appeal, Mr. Yona Shekifu narrated that the Honourable trial court misdirected itself by shifted the burden of proof from prosecution to the accused when required him to produce the receipts from Tabasamu Filling Station. That the absence of receipts did not mean that the said 400 liters of diesel were stolen. He lastly implored this court to find that the appeal has merits.

Replying to what was submitted by the counsel for the Appellant, Mr. Japhet Ngusa, the learned State Attorney for the Respondent argued generally. He submitted that the Respondent Republic supports the conviction and sentences meted against the Appellant. He added further that the Appellant was convicted in the second count of receiving property stolen or unlawfully obtained contrary to ***section 311 the Penal Code Cap 16 [RE 2019]*** and was sentenced to serve five years in prison. He said that, Prosecution failed to prove the offence of theft.

Mr. Japhet Ngusa submitted further that prosecution proved the offence beyond reasonable doubts by parading six witnesses. That according to PW6, he filled in the certificate of seizure on the seized 400 liters of diesel and the same were kept by exhibit keeper at Sengerema Police Station. Thereafter, the diesel liters and the sample from the JPM bridge Construction site were taken to the Government chemist for examination who concluded that the seized diesel matched with the sample from the JPM bridge Construction site. He added further that the certificate of seizure (Exhibit P1) and the report from the Government Chemist (exhibit P2) were admitted without objection.

Basing on that Mr. Japhet Ngusa highlighted that the Appellant did not even cross examine on the said exhibits tendered and that was tantamount to admission. He cited the cases of ***Nyerere Nyaguge v. Republic*, Criminal Appeal No. 65 of 2010** and ***Chacha Mwita & Others v. republic*, Criminal Appeal No. 302 of 2013, CA at Mwanza** where the Court made reference to the case of ***Joseph Mkumbwa & Another v. Republic, Criminal appeal No. 94 of 2007***. He observed that, in the cited case, the court assigned a proper meaning of the doctrine of recent possession. He referred me to page 8 of the Judgement of the trial court.

To fortify that the offence was proved to the required standards, Mr. Japhet Ngusa added that the diesel used by the complainant is unique with special features. The appellant therefore failed to prove that the 400 were bought from Tabasamu Filling Station.

As to whether the chain of custody was broken, Mr. Japhet Ngusa submitted that the same remained intact. He narrated further that not all the time when the chain of custody is broken leads to acquittal. He cited the case of ***Joseph Leornald Manyota v. Republic, Criminal appeal No. 485 of 2015*** (Tanzlii case No. 261).

In rejoinder, Mr. Yona Shekifu submitted that it is not true that the chain of custody was not broken. He said the movement of the 400 liters of diesel from Sengerema Police Station to Government Chemist left loopholes as the appellant who by then was under custody, was not involved. That in order for the person to be found in possession of the stolen property there must be a report on theft. Lastly, he said that it is not a general rule that failure to cross examine is tantamount to admission. It depends on the circumstances.

Having heard the rival submissions by the counsels, the issues here is whether the offence of receiving property stolen or unlawfully obtained contrary to ***section 311 the Penal Code Cap 16 [RE 2019]*** was proved to the required standards of the law, that is, beyond reasonable doubts.

It must be noted here that cases in criminal law, cases are proved beyond reasonable doubts. In ***Ahmad Omari v. Republic*, Criminal Appeal No. *154 of 2005, Court of Appeal at Mtwara (unreported)*,** the court noted that in a criminal case, the burden of proof is on the prosecution to prove beyond reasonable doubt. This is in consonant with ***Section 3(2) (a) of the Evidence Act Cap 6 [RE 2019]***. In the famous case of ***John Makolobela Kulwa Makolobela & Another*** *alias* ***Tanganyika Versus Republic (2002) TLR 296***, the court noted;

> *A person is not guilty of a criminal offence simply because his defence In not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which established his guilty beyond reasonable doubts.*

Arguing on the first ground of appeal, Mr. Yona Shekifu narrated that the trial court erred by failure to see that the offence was not proved

beyond reasonable doubts. He added further that there was no evidence exhibiting when the said 400 liters of diesel (Exhibit P3) were actually stolen. That PW1, PW2 and PW3 failed even to give description of the alleged diesel. He submitted on the issue of the doctrine of recent possession and added that there was no report from police evidencing that there was theft of 400 liters of diesel. He said there was no element of ownership of the alleged stolen diesel. Mr. Japhet Ngusa was of the view that the offence was proved to the required standards.

At page 16 of the typed script of the proceeding, PW1 testified that;

> *Mafuta tuliokamata yalikua na rangi ya damu ya mzee nyekundu nyekundu ambayo haijachakaa ila yakikaa sana mafuta hubadilika rangi.*

At page 18 of the proceedings, PW2 testified that;

> *... mafuta yake yanafanana na mafuta ya mradi wetu mafuta hayo hua yana msamaha wa VAT kutoka TRA. Hivyo yanawekwa rangi.*
>
> *.....Mafuta yalikuwa ya rangi ya ugoro inayokaribiana na damu ya mzee. Huwa yanabadilika rangi yakikaa muda mrefu rangi inaanza kufifia na kukoza.*

At page 13 of the type Judgement the Trial court resolved that;

> *The 2nd count of receiving property stolen or unlawfully obtained in examine the evidence adduced by the prosecution witnesses no doubts that both accused found in possession 400 liters of diesel alleged to be stolen from the project of JPM bridge the property of CCECC, whereas the 2nd accused alleged to be found carry 20 drums of diesel @ carry 20 liters total of 400 liters and 1st accused introduced as the owner of the 400 liters alleged to be stolen. (sic)*

From the above passages, the trial court resolved that the Appellant was found in possession of 400 liters of diesel the property of China Civil Engineering Corporation. According to the Charge, the owner of the alleged 400 liters was China Civil Engineering Corporation. According to PW1, the guard from JKT, on 18th May 2022, he was called by his secret informer and was accordingly informed of the sported motorcycle carrying diesel drums. According to him theft on the diesel was rampant at the site and it was leant that the drivers normally sell diesel to outsiders. As such they made a follow-up together with PW2 (HR officer) and PW3 (security officer) as a result the appellant and his co-accused were apprehended. Then the 400 liters of diesel together with the 5 liters sample from the site were

submitted to the Government Chemist for examination and a report revealed that the two samples resembled. Then it was resolved that the seized 400 liters of diesel belonged to China Civil Engineering Corporation.

From the above, it cannot be safely arrived at that the said China Civil Engineering Corporation owned the said 400 liters of diesel alleged to have been stolen. Nor it can be established that there was theft of the alleged diesel. PW1 testified that he received a call from his informer and was informed that there was a bodaboda carrying the alleged diesel then, with PW2 and PW3 rushed to the area of the scene. No one testified as to whether there was theft and when the same occurred. Such evidence would have at least brought into existence the element of ownership. It was a double standard on the part of the trial court to resolve that the Appellant failed to produce receipts from Tabasamu Filling Station while in fact, even prosecution did not produce anything warranting the ownership and or how or when the said diesel come to be owned by the said China Civil Engineering Corporation.

Equally there was no evidence that the said China Civil Engineering Corporation, the alleged owner, happened to complain to any authority on theft of 400 liters of diesel. Before PW1 was called and informed of the

diesel drums, it could appear everything was okey. No information regarding theft was filed anywhere. With that, it was unsafe to convict without evidence on records.

The fact that the two samples resembled after examination, in my considered opinion, did not warrant the fact that China Civil Engineering Corporation owned the 400 liters of diesel. Even if we are to agree with the report, still, that did not warrant ownership. It must be noted that the report from Government Chemist evidenced the resemblance of two samples and not the ownership. There was no evidence that it was only China Civil Engineering Corporation who happened to own the described diesel within the locality. I find therefore that this ground has merit and I allow it.

On the second ground of appeal, Mr. Yona Shekifu opined that the ingredients of the doctrine of recent possession were not fully proved by prosecution. However, I went through the Judgment of the trial court and noted that the Appellant was not convicted basing on the doctrine of recent possession. I find therefor that this allegation is misplaced. In the circumstances, this ground has no merit and I proceed to dismiss it.

On the third ground of appeal, it was submitted that the said 400 liters of diesel were taken to Government Chemist but there was no record on the movement of the exhibit and that the chain of custody was broken. He cited the case of **Illuminatus Mkoka (supra)** where the Court said that in the absence of proper chain of custody there is a possibility of tempering with the exhibit.

On this the appellant brought the issue of chain of custody. PW5 testified that on 18th May 2022 was instructed by SSP Masogolya to submit the seized 400 liters of diesel (exhibit P3) and five liters sample diesel from China Civil Engineering Corporation (Exhibit P4) to Government chemist for examination. That he submitted the same as instructed. Thereafter the exhibits were remitted to exhibits keeper one SGT Echikaka of Sengerema Police Station.

But then PW6 seems to be the one who seized the alleged property and he was the one who prepared a certificate of seizure (exhibit P1). PW6 also seems to be the one who tendered the said 400 liters of diesel (Exhibit P3) alleged to have been stolen. In this circumstance, the chain of custody was broken. I say this because the one who seized the said 400 liters was PW6. It is not established how the same found way to SGT Echikaka

(exhibit keeper), then to PW5 to the government Chemist, then again to PW5, then to SGT Echikaka and lastly to PW6 who tendered it. In ***Paul Maduka and 4 others V. Republic, CA of Tanzania at Dodoma, Criminal Appeal No. 110 of 2007***, the court said;

> *The chain of custody requires that from the moment the evidence is collected, it very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.*

However, I understand that chain of custody can be established by oral account of witness. In ***R V. Mussa Hatibu Criminal Appeal No. 131 of 2021, CA at Tanga*** said;

> *On our part, we agree that there was no proper documentation in respect of exhibits P4 (a) and (b). We are also of the view that, chain of custody can be established by oral account of witnesses as we have held in our previous decisions, some of which have been cited to us by the learned State Attorney.*

I have passed through the records of the trial court and I'm of the considered opinion that the chronological movement of Exhibit P3 and P4

was not documented. There was also no oral account on that by witnesses. PW5 testified that after examination by the Government chemist, he returned the said exhibits to SGT Echikaka of Sengerema Police Station (exhibit keeper). But the records are silent on how the same exhibits reached PW6 for tendering.

There was another anomaly. It was submitted by the counsel of the Appellant that the said SGT Echikaka of Sengerema Police Station (exhibit keeper) was necessary to give an oral account on how the exhibits moved from one place to another before found their way to the court through PW6. Prosecution did not call him to testify. This court hereby draw an inference adverse to prosecution. In ***Azizi Abdallah Versus Republic (1991) TLR 71*** at page 72 the court noted;

> *The general and well-known rule is that the prosecutor is under prima facie duty to call those witnesses who, from their connection with the transaction in question are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reasons being shown, the court may draw an inference adverse to the prosecution.*

With what I have narrated above, the third ground of appeal also has merit and I proceed to allow it. Exhibits P3 and P4 are expunged because the chain of custody was broken.

On the fourth ground of appeal, it was alleged that that the Honourable trial court misdirected itself by shifted the burden of proof from prosecution to the accused when required him to produce the receipts from Tabasamu Filling Station. From page 14 to 15 of the Judgement the trial court noted that;

> *In short 1st accused failed to raise doubt against prosecution evidence because he fails to tender receipt used to purchase diesel which alleged to be stolen and found in possession and alleged to be his property. (sic)*

From the above quoted passage, it is evident that tendering of the receipt was a conditional precedent on the part of the Appellant before his defense could have been believed. In fact, that was shifting the burden of proof to the Appellant. As said before even the prosecution failed to tender any evidence of ownership. It was therefore double standard on the part of trial court. As said before a person is not guilty of a criminal offence simply because his defence in not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution

evidence against him which established his guilty beyond reasonable doubts. This ground too has merit and I allow it.

In the end, I differ with the learned state attorney that the offence under ***section 311 the Penal Code Cap 16 [RE 2019]*** was proved to the required standards. I therefore agree with the Appellant's learned counsel that the matter was not proved beyond reasonable doubt.

In the upshot, the appeal is allowed. The conviction, sentence and orders meted against the Appellant are quashed and set aside. The appellant is to be released from prison forthwith unless lawfully held.

I order accordingly.

Right of appeal fully explained.

DATED at **MWANZA** this 3rd November 2023.

H.S. MTEMBWA
JUDGE