IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA SUB – REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 68 OF 2023

(Originating from the decision of the Resident Magistrates' Court of Mbeya at Mbeya in Criminal Case No. 256 of 2020)

OSCAR AFWILILE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

31st October & 17th November, 2023

MPAZE. J.:

Oscar Afwilile, the appellant in this appeal, together with Geofrey Boniphace Mwakakima and Emmanuel Kenedy (who are not parties to this appeal), was brought before the Resident Magistrates' Court of Mbeya in Criminal Case No. 256 of 2020. They were charged with the offences of burglary and stealing. The burglary charge was contrary to sections 294 (1) (b) and (2) of the Penal Code [Cap 16 R.E. 2019, now R.E. 2022] (the Penal Code), and the stealing charge was contrary to sections 258 (1) and 265 of the Penal Code.

Particulars of the offence of burglary, according to the charge sheet were that on the 18th day of April, 2020 at an old forest area within the District and Region of Mbeya Geofrey Boniphace @Mwakakima, Oscar Afwilile and Emmanuel Kenedy @Francis jointly and together did break and enter in FQ Hotel with intent to commit an offence therein to wit, stealing.

As for the count of stealing, the allegation was on the same date and placed the appellant and the other two stoles from the said FQ, two(2) Televisions make Hometech value at Tshs 1, 500,000/= and seven (7) blankets valued at Tshs. 1, 350, 000/=.

The charge sheet does not specify the time at which the offence of burglary and stealing was committed. However, based on the testimony of Joseph Jackson Mwaipaja (PW1), the Manager of FQ Hotel, it was revealed during an inspection on 18th April, 2023, in the morning that two Televisions and seven blankets were missing. Subsequently, he reported the incident to the police.

On 23rd August, 2020, PW1 was summoned to the police station to identify the stolen properties. During this identification process, PW1 recognized a blanket with mixed colours and a hotel mark bearing "FQ."

The blanket was admitted as Exhibit PE1. Additionally, PW1 stated that he found all the accused persons in police custody who confessed to him that they were the ones responsible for stealing the mentioned items.

Johanacy Jacob (PW2), an employee of FQ Hotel, informed the court that on 23rd August 2023, while she was at her workplace at FQ, the police arrived with the 2nd accused (the appellant). They questioned her about the stolen items, which were a blanket and two Televisions. The appellant admitted that he was the one who stole the said properties. Moreover, the appellant pointed out the window through which they entered and committed the offence of stealing.

ASS/INSP Boniface Luambano,(PW3) the investigator of this case stated that on 18th April, 2023 PW1 reported the offence of burglary and stealing that occurred at FQ Hotel, involving the theft of seven blankets and two Televisions. During the investigation, he visited the scene of the crime and found that the burglars entered through the window to commit the offence.

On 28th August 2023, as per the testimony of PW3, the appellant was apprehended through their informant. During interrogation, the appellant confessed to committing the offence and implicated his

accomplices, including Geoffrey Boniphce Mwaikima, who was also arrested on the same date and confessed to the crime. The duo according to PW3 provided information about the stolen properties, revealing that some were sold to Emmanuel (3rd accused), who was subsequently arrested with a radio, blanket, and subwoofer. A seizure note was filled and admitted as Exhibit PE2.

Bilali Hamza Haji (PW4), the chairman of Mtoni Street, informed the court that on 22nd August ,2023 he received a call from the police officers to go to Damas' house. Upon arrival, he was informed that a search needed to be conducted at the residence of the 3rd accused who is a tenant in that house. He recounted that a search was carried out in his presence, in which various items such as blankets and a TV stand were discovered. A form was filled out, and he signed it.

D/C 4140 Charles (PW5) testified that on 21st March 2023, he took the caution statement of the appellant, who confessed to committing the offence. On 23rd March 2023, he interrogated the 1st accused, who also confessed, and the 3rd accused, who admitted that the blanket he was found with was purchased from the 1st accused at the tune of Tshs 251,000/=. The caution statements of all accused were collectively admitted as Exhibit P3 after passing an inquiry test.

All accused persons vehemently denied committing the offence, and they also disclaimed any knowledge of each other.

After a full trial, the court found the appellant guilty of both offences and subsequently convicted him accordingly. He was sentenced to three years imprisonment for the offence of burglary and a two years sentence for stealing. The 3rd accused was found guilty of the offence of being unlawfully found in possession of stolen property and was sentenced to 12 months conditional discharge. Meanwhile, the 1st accused was acquitted.

Unhappy with both the conviction and the sentence, the appellant filed an appeal to this court. He presented seven (7) grounds of appeal to contest the trial court's decision, although these grounds could be consolidated into two main contentions. **Firstly**, he asserted that the prosecution failed to establish its case beyond a reasonable doubt and **Secondly**, he contended that the trial court omitted to order the sentences to run concurrently.

During the appeal hearing, the appellant represented himself without legal representation, while the respondent/Republic was represented by Ms. Imelda Aluko, the Public Prosecutor.

Supporting his appeal without legal representation, the appellant generally asserted that the case against him was not proven beyond a reasonable doubt. Firstly, he highlighted that he was not arrested at the scene of the crime, and no one witnessed him committing the offences of burglary and stealing. Secondly, he emphasized that he was not apprehended with any stolen properties. Thirdly, he contended that the trial court made an error by relying on his confession statement, which was not obtained in accordance with the law.

Additionally, he argued that the court erred by not adequately considering his defence had it been considered, he believes he would not have been found guilty of the offences. Lastly, he claimed that the trial court made an error in sentencing him on two counts without ordering the sentences to run concurrently. Thus, he prayed the court to allow his appeal.

In her response, Ms Aluko argued that the case against the appellant was proven beyond a reasonable doubt, citing the testimonies of PW1, PW2, and PW3. According to Ms Aluko, their evidence collectively demonstrated that the appellant committed the offences of burglary and stealing.

Addressing the appellant's claim that he was not found in possession of stolen property, Ms. Aluko contended that this argument lacked merit. She pointed out that the appellant was charged with the offences of burglary and stealing, not with the offence of being unlawfully found with stolen property.

Concerning the reliance on the confession statement, Ms. Aluko argued that it was appropriate for the court to consider it, as it was admitted after a thorough inquiry, indicating that the caution statement was properly recorded.

Regarding the complaint that the appellant's defence was not considered, Ms. Aluko argued that upon reading page 10 of the challenged judgment, it is evident that the appellant's defence was indeed taken into account. Based on her submissions, Ms Aluko requested the court to dismiss the appeal, upholding both the conviction and the sentence imposed by the trial court.

In his rejoinder submission, apart from reiterating his plea for the appeal to be allowed, the appellant did not provide any substantive counterarguments to what was presented by the Public Prosecutor.

It is a fundamental principle that when the court identifies an irregularity in the matter at hand, instead of unilaterally deciding on it, it should involve the concerned parties. In adherence to this principle, upon recognizing a defect in the charge sheet, this court invited the parties to address the issue.

In discussing the appropriateness of the first count, Ms. Aluko acknowledged that the section under which the appellant was charged was incorrect. She asserted that the proper section should be section 296(a) of the Penal Code. However, she promptly pointed out that this defect is remediable under section 388 (1) of the Criminal Procedure Act [Cap 20 R.E 2022], 'the CPA.'

According to Ms. Aluko, the appellant was not adversely affected in any way by the incorrect citation of the proper section with which he should have been charged. She urged the court to rectify the defect by invoking section 388(1) of the CPA.

In response, the appellant, being a layman, did not present any substantial submissions on the issue raised by the court.

Having considered the arguments from both parties, I find it necessary, before delving into the grounds of appeal, to address the legal

point that I raised *suo motto* on 14th November ,2023 regarding the propriety of the charge.

The court concurs with the submission made by the Public Prosecutor that the section pertaining to the first count was inaccurately cited. For clarity and easy reference, I reproduce the charge herein.

STATEMENT OF THE OFFENCE

1st Count: *Burglary contrary to section 294(1) (a) and (2) of the Penal Code, [Cap 16 R.E 2022]*

PARTICULARS OF THE OFFENCE

'That on or about the 18th day of April, 2020 at Old Forest area within District and Mbeya Region Geofrey Boniphace Mwakakima, Oscar Afwilile and Emmanuel Kenedy Francis did break and enter into FQ Hotel with intent to commit an offence therein to wit, stealing.

2nd Count: *Burglary contrary to section 294(1) (a) and (2) of the Penal Code, [Cap 16 R.E 2022]*

PARTICULARS OF THE OFFENCE

On or about the 18th day of April 2020 at Old Forest area within District and Mbeya Region Geofrey Boniphace Mwakakima, Oscar Afwilile and Emmanuel Kenedy Francis jointly and together steal two(2) Televisions make Hometech valued Tshs 1,500,000 and

seven (7) blankets valued at Tshs 1, 350,000/= all total shillings 2, 850, 000/= the properties of FQ Hotel.'

It is evident that concerning the 1st count, the appellant was charged with burglary, contrary to section 294 (1)(a) and (2) of the Penal Code, which reads:

'294 (1) Any person who

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein; or

(b) N/A

(2) Where an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years.'

Examining the particulars of the 1st count, the appellant was alleged to have committed burglary at FQ Hotel. The question arises as to whether FQ Hotel qualifies as a human dwelling. Section 5 of the Penal Code defines a dwelling house as;

*'**dwelling house** includes any building or structure which is for the time being kept by the owner or occupier **for the residence therein of himself, his family or servants or any of them**, and it is immaterial that it is from time to time uninhabited; **a building***

or structure adjacent to or occupied with a dwelling house *is deemed to be part of the dwelling house if there is communication between that building or structure and the dwelling house, either immediate or using a covered and enclosed passage leading from the one to the other, but not otherwise;'* [Emphasis added]

Certainly, according to the definition of a dwelling house (human dwelling) provided above, FQ Hotel does not fall within this definition. Consequently, it was inappropriate for the appellant to be charged under section 294(1)(a) and (2) of the Penal Code. Ms. Aluko, however, expressed the opinion that the defect can be curable under section 388(1) of the CPA.

In the case of **Yeremia Jonas Tehan v. Republic**, Criminal Appeal No.100 of 2017(unreported), the appellant was charged with the offence of burglary contrary to section 295 of the Penal Code. However, the proper section under which he should have been charged was section 296(a) of the Penal Code, considering that the particulars of the offence indicated that he did break into an office. The Court made the following observation;

'... *the follow-up question is whether with such state of affairs, can it safely be vouched that the appellant was sufficiently made aware of the charged offence of burglary? Our answer is negative on account of the incompatibility in the statement of the offence which refers to breaking into the dwelling house in the night while the particulars indicate breaking into the complainant's office'*

The Court went further;

'*We thus agree with the learned State Attorney that, the charge in respect of the count of burglary was not in conformity with the provision of sections 132 and 135 of the CPA. Thus, a failure of justice was occasioned. The omission is fatal and it cannot be cured by the provision of section 388(1) of the CPA.*'

Guided by this authority, and acknowledging the fact that FQ Hotel does not qualify as a dwelling house, I cannot definitively affirm the propriety of the appellant's conviction on the 1st count. The critical question now arises, can this defect be remedied under section 388(1) of the Criminal Procedure Act?

The cited case above has already provided the answer. Without much hesitation, I am firmly convinced that the defect cannot be cured

under section 388(1) of the CPA. As a result, the appellant's burglary conviction cannot be upheld.

Moving to the 2nd count, which pertains to stealing, the particulars of the offence specified the items stolen as seven blankets and two Television make Hometech. Despite the evidence presented during the trial, none of the witnesses testified witnessing the appellant committing the offence of stealing.

The trial magistrate's decision to find the appellant guilty was based on the testimony of PW1, who informed the court that the appellant confessed, while in police custody, to committing the offence of stealing at FQ Hotel.

Further, the court relied on the testimonies of PW2 and PW3, who stated that the appellant's act of accompanying the police to FQ was sufficient to implicate him in the offence. The trial magistrates questioned why the appellant alone accompanied the police, leaving the other accused behind, leading her to conclude that it was the appellant who committed the offence.

I hold a different perspective on this matter. The records indicate that all accused persons admitted to committing the offence while in

police custody. If this is the case, the question arises, why did the police choose to accompany only the appellant to FQ hotel, leaving the other suspects behind? This leaves a lot to be desired. Furthermore, the act of the appellant going to the FQ Hotel with the police does not substantiate the offence of stealing in any meaningful way.

The trial magistrates also linked the appellant with the stolen property found in possession of the 3rd accused. However, it's crucial to note that PW5 testified that, during interrogation, the 3rd accused claimed to have purchased the blanket from the 1st accused. This piece of evidence indicates that the one supposed to be connected with the stolen property is not the appellant but the first accused, who has already been acquitted. Consequently, it was improper for the trial magistrate to base the conviction on this piece of evidence.

The appellant also argued that the court wrongly convicted him based on his confession. Upon examining the impugned judgment, it is clear that the trial magistrate did not consider the appellant's confession in making the decision instead the decision was grounded on other reasons, as outlined above.

After thoroughly examining the trial court record and the presented evidence, I have been unable to ascertain evidence proving the appellant is guilty of stealing. With all considerations taken into account, this court grants the appeal.

The convictions for the charged offences of housebreaking and stealing are hereby quashed, and the imposed sentences are set aside. The appellant is ordered to be released immediately unless held for another lawful cause.

It is so ordered.

Dated at **Mbeya** this 17th November, 2023.

M.B. MPAZE

JUDGE

Court: Judgment delivered in the presence of the appellant in person and Mr. Augustino Magesa this 17th day October, 2023.

Right of Appeal fully explained.

THE HIGH COURT OF TANZANIA

M.B. MPAZE

JUDGE

17/11/2023