

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

CRIMINAL APPEAL NO. 65 OF 2023

(Appeal from the Decision of the District Court of Nkasi at Namanyere in Criminal Case No. 49 of 2023)

MUSA S/O JUMA @ KALELEMBWA @ MHENGA 1ST APPELLANT
SHABANI S/O MRISHO @ SAID 2ND APPELLANT
PRISCA D/O JAMES @ MTIZA 3RD APPELLANT
ELIUD S/O MICHAEL @ KIPELO..... 4TH APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

26/11/2023, 22/11/2023

JUDGMENT

MWENEMPAZI, J:

The appellants are aggrieved by the decision of the District Court of Nkasi at Namanyere delivered on the 17th day of February, 2023 by Hon. D. G. Luwungu-SRM in criminal case No. 49 of 2023. In the trial court the appellants were charged with the offence of Stealing contrary to section 258(1) and Section 265 of the Penal code, Cap. 16 R.E. 2019. The particulars of the offence were that the accused persons named herein on the 16th day of May, 2022 at Mnadani in Majengo Village within Nkasi District in Rukwa

Region did steal Tshs. 2,000,000/= (Shillings Two Million only) from William S/O Shija, the property of William S/O Shija.

When the charge was read over and explained to them, they denied to have committed the offence. A plea of not guilty was entered. They also denied the facts which were read over to them under the provisions of section 192 of the Criminal Procedure Act, Cap. 20 R.E.2019. The case went for a full-fledged hearing and at the conclusion the trial Court magistrate found the accused persons guilty of the offence charged, convicted them with the offence of stealing contrary to section 258(1) and sentenced them to serve a term of four (4) years imprisonment.

The appellants are aggrieved with both conviction and sentence meted to them. They have filed a petition of appeal registering four grounds of appeal.

One, that the prosecution failed to prove the offence they were charged with to the required standard by the law.

Two, that the trial court erred in law and fact to convict the appellants relying on prosecution evidence while failed to make deep examination and evaluation of the same, something which is fatal, incurably and irregular in the provision of justice.

Three, that the trial court erred in law and fact to convict the appellant basing on the prosecution evidence while failed to observe that this case lacked proper investigation as no any caution statements of the appellants and police officer who investigated the case appeared before the court to prove the allegation in question; and

four, that the appellants' defence was not glanced on and wrapped in a black blanket without proper conclusion.

The appellants prayed that the appeal be allowed; both conviction and sentence be quashed; the appellants be discharged from the offence they have been charged with and they be released from prison.

At the hearing the appellants were unrepresented and the respondents was being represented by the Mr. Mathias Joseph and Mr. Frank Mwigune, learned State Attorneys. The appellants submitted briefly that they have nothing to submit but they prayed that their grounds of appeal be considered and the appeal be allowed.

On behalf of the Respondent, the submission was made by Mr. Frank Mwigune, learned State Attorney. He submitted that the appeal originates from Criminal Case No. 49 of 2022. The appellants were charged with the

offence of stealing contrary to section 258(1) and 265 of the Penal Code, Cap. 16 R.E.2019. the appellants were convicted with the offence and sentenced to serve a term of four (4) years. The counsel for the Respondent submitted that they are supporting the appeal basing on the 1st and 2nd ground of appeal. The two grounds have centered on the argument that the offence the appellants were charged with, was not proved to the required standard, that is beyond reasonable doubt.

The evidence relied by the trial court was mainly circumstantial evidence. It has many elements in order to prove the case beyond reasonable doubt. Among the elements to be proved are four. **First**, that the circumstantial evidence under consideration must be that the surrounding circumstances which by undesigned coincidence is capable of proving the proposition with accuracy of mathematics. **Second**, that each link in the chain of evidence must be carefully tested and if in the end it does not lead to irresistible conclusion of the accused's guilty the whole chain must be rejected. **Three**, the evidence must irresistibly point to the guilty of the accused person to the exclusion of any other person. **Four**, the facts from which an inference adverse to the accused is sought must be proved beyond reasonable doubt, and must be connected with the facts which inference has to be referred.

Fifth, the circumstances must be such as to provide moral certainty to the exclusion of any reasonable doubt.

In our case, some of the elements which were being dependent to prove the case were not properly proved. The elements which I have just mentioned were discussed in the case of Shilang Bunzali vs. The Republic, Criminal Appeal Case No. 600/2020, Court of Appeal of Tanzania sitting at Bukoba at page 14-15.

It is obvious the prosecution failed to prove the 1st and 2nd element in this case; and if we read page 13 of proceedings when PW1 was testifying, he said he arrested the fourth accused but failed to describe the other five perpetrators surrounding him. In his evidence he testified that:

"I chased them, they continued to run while throwing some of the money. I chased them but over suddenly I was caught by a person at the back. Then I managed to catch one of them who caught me."

It was submitted by the learned counsel for the respondent that the sentence is vague. The statement leaves a lot questions. If he was chasing them how did the fourth accused catch him on the back? PW1 failed to explain

how the fourth accused participated in the event of stealing. He did not explain why he caught him it is not clear or not known.

Where the chain will not be conclusive in respect of any accused, then it has to be rejected. That was the case in the present situation thus it must be rejected.

Parallel to that, there was a problem in identification. In this case it is clear at page 13. the victim did not identify the suspect at the event. The appellants were not arrested on the date of the event save for the fourth accused person. It is obvious at page 13, PW1 says he received a call from PW2 telling him that there were suspects arrest at the station. He was called for identification but PW1 did not go. That is confirmed by PW2.

PW1 identified the accused at the dock, the 1st, 3rd and 4th and failed to recognize the 2nd accused person. In most of the decision that it is a trite law that dock identification of an accused person by a witness who is a stranger to the accused has a 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. That principle was laid out in the case of **Richard Shirima@ Godfrey Daud @ Bakari Jabir**

**@Rich @ Godii vs. The Republic, Criminal appeal No. 285A of 2015,
Court of Appeal of Tanzania sitting at Dar es Salaam(unreported).**

The learned counsel submitted that there are two issues; one, the first accused was arrested but there is no explanation of his participation in the event. Second issue is in regard to the proper identification. There ought to have been an identification parade whereby in this case it was not conducted. The counsel finally submitted that for the circumstantial evidence to stand the chain of events must be conclusive. For that case the prosecution failed to prove the case beyond reasonable doubt. He prayed the appeal be allowed as prayed by the appellants. On their side, the appellants had no rejoinder to the submission by the respondent's counsel.

I have as well read the record of the appeal, the charge sheet, proceedings and judgement of the trial court. Also, I have had an opportunity to hear the submission made by the counsel for the respondent. The question is whether the appeal has merit to deserve it being allowed. In order to answer the question, there is a need to address the complaints raised by the appellants in the petition of appeal. That the prosecution did not fulfil their duty as

required by law to prove the offence the accused were charged with beyond reasonable doubt.

According to our criminal justice system, the prosecution has a burden and duty to prove the case beyond reasonable doubt. This is in accord to the provisions of section 3(2) (a) of the Tanzania Evidence Act, Cap. 6 R.E.2019.

In the case of **Daimu Daimu Rashid @Double D vs. The Republic, Criminal Appeal No. 5 of 2018, Court of Appeal of Tanzania at Mtwara(tanzlii)** quoted with approval the case of **Samson Matiga v.R, Criminal Appeal No. 205 of 2007** (unreported)where it was held that;

"A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence. (See also Yusuf Abdallah Ally v. Republic, Criminal Appeal No. 300 of 2009, (unreported)). The said proof does not depend on the

number of witnesses but rather, to their credibility (See section 143 of the Tanzania Evidence Act Cap 6 R. E 2002 and the case of Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003/ and Majaliwa Guze v. Republic/ Criminal Appeal No. 213 of 2004 (both unreported). "

In the present case the counsel has pointed out that the prosecution failed to prove the case facing the accused persons to the required standard prescribed by law. In the supporting the position he cited the case of **Shilanga Bunzali vs. The Republic, Criminal Appeal No. 600 of 2020, Court of Appeal of Tanzania at Bukoba**(tanzlii) where the principles for testing circumstantial evidence referred to herein above in the submission were provided and discussed. The Court held that:

*"We are aware about the settled position of the law that, **one**, the circumstantial evidence under consideration must be that of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. See: LUCIA*

*ANTHONY @ BISHENGWE VS THE REPUBLIC, Criminal Appeal No. 96 of 2016 (unreported); **two**, that each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. See; SAMSON DANIEL VS REPUBLIC, (1934) EAC.A. 154]; **three**, that the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. See: SHABAN MPUNZU @ ELISHA MPUNZU VS REPUBLIC, Criminal Appeal No 12 of 2002(unreported); **four**, that the facts from which an inference adverse to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. See ALLY BAKARI VS REPUBLIC (1992) TLR, 10 and ANETH KAPAZYA VS REPUBLIC, Criminal Appeal No. 69 of 2012 (both unreported); **and five**, the circumstances must be such as to provide moral certainty to the exclusion of every reasonable doubt- see SIMON MSOKE VS REPUBLIC (1958) EA 715."*

The counsel urged this court to hold that the prosecution failed to prove the first and second principle. The prosecution witness PW1 testified that he arrested the fourth accused person but was unable to describe the other three suspects. The description offered was vague and did not point to one conclusion as to render the evidence devoid of any doubt. He could not also testify and verify how the fourth accused was involved in the commission of the offence. The counsel invited this court to read the proceedings at page 13. It is clear even the identification was lacking in the precision required as not to render it doubtful. He also denied to have seen the 2nd accused among the people who surrounded him at the scene of event.

The testimony by PW2 is also wanting. He alleges that the 1st, 2nd and 3rd accused persons are the ones who stole the money. He even testified that they admitted to have committed the offence while being interrogated. Just that evidence was relied upon by the trial Magistrate to convict them of the offence they were being charged with. Their involvement in the charge started by the arrest when they went at the police to bail out the fourth accused person. In fact, the fourth accused person is the one who mentioned them. In this case, there was no any identification parade which was conducted to verify if at all the victim identified them. He did so at the dock.

It has been argued that dock identification of an accused person by a witness who is stranger to the accused has value only where there has been and identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial. The counsel cited the case of **Richard Shirima @ Godfrey Daud @ Bakari Jabir @ Rich @ Godii vs. The Republic, Criminal appeal No. 285A of 2015, Court of Appeal of Tanzania sitting at Dar es Salaam**. I do agree with the position of the law as pronounced as well as the argument that there was no proper identification of the culprits and lack of identification parade vitiated the whole evidence relied by the trial court to convict the appellants. For the reasons and arguments herein above, I find the appeal has merit. The appeal is therefore allowed. Judgment of the trial court is quashed and sentence is set aside. The appellants should be released forthwith unless otherwise they are being held for another lawful cause.

It is ordered accordingly.

Dated and signed at **Sumbawanga** this 22nd day of November, 2023.


T. M. MWENEMPAZI
JUDGE

Court: Judgement delivered in Judge's Chamber this 22nd day of November, 2023 in the presence of the appellant and Mr. Jackson Komba, State Attorney and Scolastica Mwacha, State Attorney for the Respondent.




T. M. MWENEMPAZI

JUDGE

22/11/2023

Right of further appeal explained.