

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA SUB - REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 46 OF 2023

(Originating from Tunduru District Court, Criminal Case No. 61/2023)

AKANDU ALLY KACHANDA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 07/11/2023

Date of Judgment: 18/12/2023

U. E. Madeha, J.

It is worth considering that, before the District Court of Tunduru in Ruvuma region, the above-named Appellant, was charged with two (02) counts. The first count was burglary contrary to section 294 (1) (a) and (2) of the *Penal Code* (Cap. 16, R. E 2022) and the second count was stealing contrary to section 265 of the *Penal Code* (Cap. 16, R. E. 2022).

On the first count, it was alleged that the Appellant on the 8th day of March, 2023; during night hours at Ujenzi Village within Tunduru District in

Ruvuma Region; did broke and entered into the dwelling house of one Salma Kalim Makanjila with intent to commit the offence therein.

On the second count, it was alleged by the prosecution that, on 8th day of March, 2023, at Ujenzi Village within Tunduru District, the Appellant stole one smart phone with IMEI Number 356249324367062 and 356249324367070 valued at TZS. 700,000.00 the properties of Salma Kalim Makanjila.

When the charge was read, the Appellant denied to have committed the offences he was charged with. The prosecution was ordered to prove the charges against the Appellant. At the end of the trial, the Appellant was found guilty, convicted and sentenced accordingly. On the first count he was sentenced to serve ten years imprisonment and for the second count he was sentenced to serve five years imprisonment. The sentences were ordered to run concurrently.

The Appellant was aggrieved by both conviction and sentence of the trial Court and he knocked the doors of this Court on appeal. His petition of appeal has seven grounds of complaints which can be consolidated into two as follows: **One**, whether the prosecution side proved the case beyond reasonable doubt. **Two**, whether the evidence produced before the trial

Court was based on the offence of being found in possession of goods suspected to have been stolen and not burglary or stealing.

During the hearing of this appeal, the Appellant had no representation; that is to say, he appeared in person whereas, the Respondent was represented by Mr. Elipidi Tarimo the learned State's Attorney. Submitting in support of his appeal, the Appellant has nothing to stated rather than prayed for his grounds of appeal to form party of his submissions and for the Court to allow this by setting him free from incarceration.

While resisting the appeal, Mr. Elipidi Tarimo, the learned State's Attorney, told this Court that, the first, second third, fourth, fifth as well as the sixth grounds they all fall in a single ground of appeal that, the charge laid against the Appellant was not proved beyond reasonable doubt since the evidence given was too circumstantial. He added that, on the seventh grounds of appeal, the Appellant complains that the evidence proved the offence of being in possession of goods suspected to be stolen and not the two counts of burglary and stealing of which he was charged and convicted with.

Therefore, he prayed for the seven grounds of appeal filed by the Appellant to be consolidated into two grounds of appeal. Submitting on the first ground of appeal, he argued that; it is a cardinal principle that, the duty of proving criminal charges is on the prosecution side and the standard of prove is beyond reasonable doubt. He invited this Court to be guided by the decision made in the case of **Jonas Nkize v. Republic** (1992) TLR 213.

He went on submitting that, criminal charges can either be proved by direct evidence or by circumstantial evidence. To cement his stance, he referred this Court to the decision made in the case of **Malk Kasimili v. Republic**, Criminal Appeal No. 39 of 2017, in which the Court of Appeal of Tanzania demonstrated on how circumstantial evidence can be used to convict the accused person.

He argued that, in this appeal, it is true that the evidence was circumstantial but it is crystal clear that, the two counts which the Appellant was charged with the prosecution failed to prove beyond reasonable doubt. He averred that, as stated and argued by the Appellant in the seventh ground of appeal, the available evidence proved the offence of being found in possession of goods suspected to be stolen or unlawful

acquired contrary to section 312 of the *Penal Code* (supra) and not burglary or stealing. Thus, he found there is no need to continue arguing on the first ground of appeal and he prayed to argue only on the second ground of appeal which is the seventh ground of appeal in the Appellants' petition of appeal.

Arguing on the second consolidated ground of appeal, which is the seventh ground of appeal in the petition of appeal, he stated that, the offence of being found in possession of goods suspected to be stolen under section 312 of the *Penal Code* (supra) was proved rather than the offences he was charged and convicted with. He added that the offence of possession of goods suspected to be stolen is the lesser offence to the offences the Appellant was charged and convicted with. He argued further that the evidence given by the prosecution side, specifically on the exhibit tendered during trial which were not objected by the Appellant, the prosecution proved the offence of being found in possession of properties suspected to have been stolen and not burglary and stealing.

He contended further that, since this Court is the first appellate Court it has a power to go through the evidence given before the trial Court and come up with its own decision. To buttress her stance, he made reference

to the decision of the Court of Appeal of Tanzania in the case of **Philimon Mlowe v. Republic**, Criminal Appeal No. 504 of 2020, in which the Court stated that, the first appellate Court can hear and determine an appeal in the circumstances of rehearing the case. He added that, even the Appellant in his seventh ground of appeal, has admitted that the evidence given by the prosecution side proved the offence of being found with possession of property suspected to be stolen rather than the offence of burglary and theft. He further stated that, since the offence which was proved is a minor offence, this Court can convict the accused for that minor offence of which the Appellant admitted in his cautioned statement which is the best evidence as it was stated in the case of **Mohamed Karuna Mtupeni & Another v. Republic**, Criminal Appeal No. 259 of 2007.

In addition, he contended that, even in this appeal, the Appellant has requested for the seventh ground of appeal to be part of the proceedings in this appeal confirming that he was found in possession of property suspected to be stolen. He prayed for this Court being the first appellate Court to go through the evidence in record and come up with its decision and convict the Appellant to the lesser offence of being found with a

property suspected to be stolen or unlawfully acquired contrary to section 312 of the *Penal Code* (supra).

As far as I am concerned, I will respond all the grounds of appeal together by consolidating them. First of all, I agree with the submissions made by the learned State Attorney for the Republic that, the available evidence proved the offence of being in possession of property suspected to be stolen and not burglary or stealing.

Having gone through the records of this case, I find the Appellant in his cautioned statement, which was admitted during trial before the trial Court, the Appellant confessed to have committed the offence of being in possession of properties suspected to be stolen contrary to section 312 of the *Penal Code* (supra). Also, in his petition of appeal, in the seventh ground of appeal the Appellant has clearly stated that the trial Court erred in law and in fact in convicting him with the offences he was charged with while the evidence proved the offence of being in possession of properties suspected to be stolen. At the hearing of this appeal, the Appellant prayed his grounds of appeal, including the seventh ground of appeal to form party of his submission in support of his appeal.

The learned State's Attorney representing the Republic concurred with the Appellant that the offence which was proved is being found in possession of the property suspected to be stolen and not those the Appellant was charged and convicted with. He argued that, this Court being the first Appellate Court to step into the shoes of the trial Court and re-evaluate the evidence in record and come with its decision.

On my party, I have gone through the evidence on record and find that, there is no single witness who testified to have seen the Appellant taking the stolen phone. The available evidence shows that the Appellant was found to be in possession of the phone which was stolen. In such circumstance, I find the two counts which the Appellant was charged and convicted for the offences which were not proved. The available evidence proves that the Appellant committed the offence of being found in possession of a property suspected to be stolen, since even the Appellant himself has no dispute that he was found with a smart phone which was not his property.

Therefore, in terms of section 366 (1) of the *Criminal Procedure Act* (Cap. 20, R. E. 2022), I allow the appeal by setting aside the convictions and sentences given by the trial Court and substitute a conviction for the

lesser offence of possession of property suspected to be stolen contrary to section 312 (1) (b) of the *Penal Code* (supra).

The Appellant is to serve the term of three years in prison for the substituted offence of possession of property suspected to be stolen. The sentence is to run from the date he was convicted and sentenced by the trial Court. it is so ordered.

DATE and DELIVERED at SONGEA this 18th day of December, 2023.



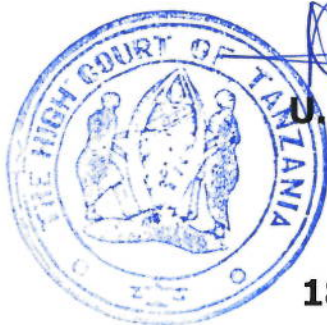
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U. E. MADEHA

JUDGE

18/12/2023

COURT: Judgment is delivered in the presence of the Appellant and Mr. Elipidi Tarimo, the learned State Attorney for the Respondent. Right of appeal explained.



A handwritten signature in blue ink, appearing to read "U. E. Madeha", is written over the seal.

U. E. MADEHA

JUDGE

18/12/2023