IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO 184 OF 2022

SHABANI ABDALLAH.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MKWIZU, J:

The appellant (who was the 1st accused) at the District Court of Ilala at Kinyerezi, was charged with stealing contrary to sections 258 and 265 of the Penal Code [Cap 16 R.E. 2002.His colleague , who was appearing as a 2nd accused at the trial court (and who is not subject to this appeal) was charged, convicted and sentenced of being found in possession of properties suspected of having been stollen or unlawful obtained c/s 312(1)(b) of the Penal Code (Cap 16 RE 2002. It was alleged that on 18/3/2020 at the store located at Muhonda and Nyamwezi Street within Illala District in Dar es Salaam Region, the appellant stole 49 bales of clothes (sweaters) worth Tsh 53,900,000/= the properties of Atuganile Ahazi. The appellant denied the charge laid against him. Six witnesses were called by the prosecution to prove their case, while the appellant relied on his own defence.

PW1 is a businessperson, owning a shop store at Mhonda Street and Agrey / Nyamwezi Street in the Kariakoo area. She on 18/3/2020 at

around 3.00 am received a call from her watchman, Charles Gabriel (PW2) informing him that they have arrested a thief stealing sweaters from the store and that police have taken him to the police together with the stolen items. She visited the scene and reported to the police station where her statement was recorded. At the police, she found 195 pieces sweater stolen and other 38 pieces recovered from the 1st accused friend (2nd accused) at Tandamti street in a search conducted by the police in assistance of the appellant. During the investigation, it was discovered that the accused were stealing the bales of sweaters in piecemeal and at that moment a total of 49 bales valued at 53,900,000/= were stolen. The stolen items together with the seizure certificates were tendered in court as exhibits. The appellant and his colleague pleaded not guilty to the charges.

Having heard both sides, the trial court was satisfied that the prosecution has proved the case against the appellant, convicted, and sentenced him to five (5) years imprisonment while the 2nd accused was sentenced to do public duties under the community service Act.

Aggrieved by the decision of the trial court, the appellant processed an appeal to this court through the memorandum of appeal with ten (10) grounds of appeal expounding the following complaints: ***one,*** that the conviction was based on a defective charge which is at variance with the evidence by PW1 on the number and value of the alleged stolen properties ; ***two,*** reliance by the trial court on the search and seizure that was conducted contrary to section 38(1) (2) and (3) of the Criminal Procedure Act; ***three***, grounding the conviction on unestablished chain of custody of exhibit;***four,*** failure to draw an inference adverse to the prosecution by failing to parade the material witnesses namely, the appellant's aunt

and Kefas Peter; ***Five***, that the conviction was based on the contradictory and inconsistency evidence of PW1, PW2, PW3, PW4, PW5, and PW6; ***six,*** failure by the trial court to properly evaluate the evidence and ***seven***, failure by the prosecution to prove the case beyond reasonable doubt.

On the day the appeal was called for hearing, the appellant appeared in person, unrepresented and the respondent /Republic was represented by Mr. Lighton Muhesa, learned Senior State Attorney. The hearing was on that very day ordered to proceed by written submissions.

Amplifying complaint number one, the appellant contended that the charge against him is incurably defective. The evidence on the records is at variance with the particulars of the charge in relation to the number of the stolen property and its total value. He argued that while the particular of the charge refers to 49 bales of sweaters worth Tshs. 53,000,000/= stollen on the material date, the evidence given refers to the 53,900,000/= as a total sum of the stollen good without mentioning the price of each stolen item and whether the appellant was found in possession of all 49 bales as alleged casting doubt on the reliability of the prosecution case. He relied on the case of **Donald Joseph Nzweka and 3 Others V R,** Criminal Appeal No. 464 of 2019 (Unreported).

Arguing grounds 2nd and 3rd together, the appellant said, Exhibit. PE 2 was obtained contrary to sections 38 (1) (2) (3) and 40 of the Criminal Procedure Act, (Cap 20 RE 2019) hence illegal. He maintained that the evidence on record is weak, insufficient, incredible, and unreliable to prove the alleged theft, search, seizure and chain of custody in the sense that no independent witness was called by the prosecution to establish whether the said search was conducted by leave of the court and/or the

report of the said search was taken to the magistrate; no paper trail and/or documentation led to establish the chain of custody. He thus urged the court to expunge exhibits PE.1, PE.2, PE.3, and PE.4 from the record. He cited the decision in **Julius Matama @ Babu @ Mzee Mzima V.R,** Criminal Appeal No. 137 of 2015 (unreported).

The appellant's submission on ground 4, is an invitation to the court to find the trial court in error for failure to draw an inference adverse to the prosecution who failed to call the appellant's aunt and Kefas Peter to testify in court. He on this point relied on the cases of **Boniface Kundakira Tarimo V R**, Criminal Appeal No. 350 of 2008 (Unreported) and **Aziz Abdallah V.R** [1991] T.L.R 71 where emphasis on the need of the prosecution to call the vital witnesses to establish its charge against the appellant was given.

He went further on ground five to challenge his conviction for being grounded on contradictory and inconsistent evidence by PW1, PW2, PW3, PW4, PW5 and PW6. He said, the named witness's evidence was not cogent and coherent to prove the items stolen and its value and explain how the appellant managed to carry 49 bales named in the particulars of the offence.

In ground seven, he faulted the learned trial magistrate for disregarding defence evidence without assigning any reasons for so doing. He said, his defence of alibi was ignored without any reason rendering the entire judgment a nullity. The cases of **Shafii Abdallahaman Mbonja V.R** Criminal Appeal No. 104 of 2017 and **Goodluck Kyando V.R** [2006] T. L. R 363 were cited on this ground.

On grounds 8, 9, and 10 the prosecution was faulted for having miserably failed to prove its case beyond reasonable doubt. He stressed that the prosecution evidence was silent on the status of the stores, whether they were locked or not and nothing was said as to how he got into the said stores without keys. He lastly urged the court to allow the appeal, quash the conviction, set aside the sentence, and set him free.

The learned State Attorney on the other hand submitted that the evidence on the records shows that the appellant was found in possession of the 49 bales stolen and therefore the difference in figures of the total amount from Tshs. 53, 000,000/=mentioned in the charge sheet to Tsh. 53,900,000/= is a slip of the tongue and therefore not fatal as it doesn't go to the root of the case.

The leaned State Attorney moved the court to find the complaints over the search and seizure claimed to have been conducted contrary to section 38 (1) (2) (3) and 40 of the Criminal Procedure Act baseless. He contended that the search and seized of the stolen properties were done under emergency under section 42 of the Criminal Procedure Act [cap 20 RE 2022]. Elaborating on this he said, the theft incident was reported at night hours, police were notified and rushed to the scene where they apprehended the appellant with the stollen properties necessitating search and seizure of the same during the same night. The learned State Attorney was of the view that paper trail to establish chain of custody was not necessary since it was proved orally by the prosecution witnesses. Reference was made on Marcelina **Koivogui V Republic**. Criminal Appeal No. 469 of 2017 (unreported)

Responding to ground four, the State Attorney argued that there is no number of witnesses needed to proof a fact as stipulated under section 143 of the law of evidence Act [Cap 6 R.E 2022] and therefore the claim that appellant's aunt and Kefas were to be called lacks merit.

He went further to argue that the complaints that the prosecution case was not established to the tilt raised in grounds 5, 6, 7, 8, 9 and 10 is a misconception because the analysis of evidence on the records established the basis of the appellant's conviction. That, in terms of the trial court's records the stolen property was tendered in court without any objection and no cross examination was preferred to discredit the said evidence. He cited the case of **Damian Ruhele V. Republic**, Criminal Appeal No. 501 of 2007 (unreported) insisting that the prosecution case was proved beyond reasonable doubt. He lastly prayed for the dismissal of the appeal for want of merit.

I have carefully considered the grounds of appeal, the parties' submissions, and the cited references on appeal from the appellant and the learned State Attorney, the first issue requires this court to investigate whether there is a serious variance between the information on the particulars of offence and the evidence on the records to render the charge incurably defective. Sections 132 and 135(a)(ii) of the Criminal Procedure Act, Cap 20 R.E. 2002, now 2019 (the CPA) provide on how a charge should be framed. Section 132 of the CPA provides for what the charge should contain, that is, a statement of the specific offense or offenses for which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. And section 135(a)(ii) of the CPA provides on how the statement of offence should be framed and section 135 (a)(iv)

expounds on the contents of the particulars of the offence and that they should be set out in ordinary language with avoidance of technical terms.

I have revisited the charge in this case. In short, it is the finding of this court that the charge in respect of the 1st count, subject of this appeal was properly drafted. It contained all prerequisite information including the specific law and particulars of the offence. I understand that the appellant's doubt is not on the drafting of the charge sheet. His complaint lies on variance between the particulars of the charge and the prosecution evidence particularly on the value of the stolen properties. While the charge quantifies the stolen properties at 53,000,000, PW1 pegged them at 53,900,000/=. I do not find substance in the complaint either because, the essential element of the offence of stealing, that is a 'dishonest appropriation of property belonging to another with the intent to permanently deprive the other of it, were disclosed in the charge sheet such that the appellant was able to appreciate the nature and gravity of the offence he was charged with. Mere variance in the amount charged and that proved doesn't make the charge incurably defective, more so in this case where the appellant knew the accusations as he thoroughly defended the accusations.

The second issue is a complaint over the search and seizure allegedly conducted contrary to section 38(1) (2) and (3) and 40 of the Criminal Procedure Act. The learned State Attorney contention was that the search and seizure in this case was conducted at night immediately after the apprehension of the accused who was arrested ready handed and therefore it was an emergency search done in terms of section 42 (1) of the CPA.

I have revisited the cited provisions of the law. Sections 38 (1) of the CPA provides that a search warrant has to be issued where it is not an emergency, and sub section (3) of section 38 of the CPA provides that after the seizure a receipt must be issued while under section 42 (1) of the same Act a police officer is authorized to enter and search in any premise, vessel, vehicle or land and seize therefrom anything which is connected with an offence without a warrant, if such police officer believed that there is reasonable ground to do so due to the urgency of the matter.

The review of the evidence shows that the incident happened during the night hours. The watchman who was guarding the store (PW2) told the court that the appellant had arrived at the building at around 23.00 hrs and was found stealing few minutes later.PW4 a police officer at Msimbazi police received the information of the theft incident at around 00.00 hrs. They visited the scene and found the accused already arrested by the watchmen with a bale of clothes (sweaters). They rearrested the accused seized the stolen items and filled a seizure certificate. Both the stollen sweaters and the seizure certificate were admitted in court without objection from the accused persons. I agree with the learned State Attorney that the complained search and seizure was within section 42 (1) (b) (i) and (ii) of the CPA. I find this complaint without merit.

About the appellant's complaint on the chain of custody, I am in agreement with the learned State Attorney that the chain of custody was not broken. The testimony of PW1, PW2, PW3, PW4, PW5 and PW6 proved that the appellant was found in possession of the exhibits tendered in Court. He was arrested at mid-night and taken straight to Msimbazi

Police station in the same night. All the stolen items were seized by PW2 and PW4 through a certificate of seizure admitted as exhibit PE3 and PE4. The seized 195 sweaters were taken to the police where they were handled to the PW5 at around 2.00 am who kept them in the charging room before he handled them to the exhibit Keeper, E 2630CPL Johnstone (PW6). In support of the above evidence Pw6 said he on 18/3/20202 at around 7.00 hrs received the exhibit from PW5 and he registered the exhibit with the exhibit Number 198/2020 and kept it in the exhibit room. At 14. Hrs, of the same day he received another batch of exhibits in respect of the same offence from PC Chengele (PW3) which was also registered as 198/2020 and kept them in the exhibit room. The said exhibits were on 11/9/2020 picked by DC sukari to be tendered in court as exhibit. The chain of custody of the stolen items in this case is intact. After all the exhibits were admitted without any objection from the appellant a signal that he accepted the evidence that was being adduced in respect of the said items and their respective seizure reports. The appellant's contention that the chain of custody was broken because there was no document showing that he handed over the exhibits to the police who arrested him is unfounded and misconceived.

The remaining issues are intertwined as are all based on analysis and sufficiency of the prosecution evidence in proving the case against the appellant. I will thus determine them jointly. I have perused the proceedings and the trial court's decision. It is proper in my view to begin with the issue of improper evaluation of evidence posed in the seventh ground of appeal but featuring as a sixth issue in this decision. In the record before me, apart from the trial court making a narration of the parties' evidence as reflected at pages 2 to 8 of the trial court judgment,

the appellant's defence was neither evaluated nor considered. The trial court dealt with the prosecution evidence on its own and arrive at the conclusion. However, this being the first appeal, the court is permitted to step into the shoes of the trial court and do what it ought to have done. That is to analyse and evaluate the entire evidence and come to its own findings if need be. I will thus resort into that duty and do the needful to test the trial court's findings.

According to the trial courts records, the case was instigated by PW2. He found the appellant with the stolen items. The appellant showed PW2 and his fellow where he had stolen the goods. The matter was reported to the police and PW1, the owner of the stolen goods. PW4, police officer and his fellow rushed to the scene, rearrested the appellant, and seized the stolen goods. A seizure certificate was filled and tendered in court as exhibit P4.PW3 also a police officer was involved in searching the 2nd accused upon being mentioned by the appellant where they found 38 pieces of the stolen sweaters. All the stollen items were handled to PW5 who later handled to PW6 an exhibit keeper. Both the stollen items and the seizure certificates were tendered and admitted in court without any objection from the appellant. There was no serious cross examination of the prosecution witnesses in this case.

I have heard arguments directed at the alleged inconsistencies and contradictions in prosecution evidence in ground 5 the of appeal. But the analysis of evidence has spotted no material contradictions on the prosecution case raising reasonable doubt in the appellant's guilt. The contradictions pointed out by the appellant particularly on the number of the bales alleged to have been stollen is too minor to dent the prosecution case.

I have also analysed the appellant's defence. In my opinion the same is a sham, did not shake the prosecution's case in any way. In his defence, the appellant associated his arrest with his shoes business at Kariakoo. His evidence was to the effect that he was arrested by city security officers on 18/3/2020 in view of disciplining him from his pride. He was later taken to Msimbazi police station and was on 29/3/2020 required to provide his personal particulars and sign a paper. The appellant's story was to the effect that he had been since 2019 living at Kibangu area and before that he was living with his aunt at Tandika. This defence had nothing detrimental on the prosecution case.

In one of his grounds, appellant insists that non calling of the appellant's aunt and Kefas Peter to testify in court was fatal. The law on this point is settled. Where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible. See for instance the decision of **Boniface Kundakira Tarimo vs. Republic**, (supra) cited by the appellant.

In this case, the appellant's aunt was mentioned as a person with whom the appellant was staying with in the same storey building in which the theft had happened. She was also informed of the theft by PW2 and his fellow after they had arrested the appellant on the same night. But as the records would show, she did not witness the said theft and therefore her evidence would not have added any value to the prosecution's case.

Kefas peter is a watchman who together with Pw2 participated in the arrest of the accused/now appellant. PW2 evidence was very categorical

on their involvement in the incident. Pw2 is the first person to suspect the appellant who had carried an empty sack, he left the appellant and found him shortly thereafter with Kefas Peter holding the stollen items before he showed them where he had stollen the items. Fortunately, the trial court has sought of the importance of Kefas Peter but at the end of its analysis found that his absence in the case would have not left any question unanswered. The trial court's analysis of evidence on this point was as follows:

> *"Hurriedly, through it was also important to parade the said Kefas Peter as a witness but considering that PW2 and Kefas Peter were led to the store where the theft occurred by the first accused and considering that the first accused was found somewhere in the storeys holding the stolen items. meaning that: not at the very store owned by very PW2, then: sufficed for PW2 to testify for the purposes of establishing the preferred charge considering that it was the very first accused Person who led PW2 and Kefas Peter to PW1's store where the theft occurred.*
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> *In other words, before the accused led PW2 and Kefas Peter to the very PW1's store, it was still unclear as to the very scene of the Crime in consideration to the allegations by the first accused that he had stolen the said luggage from an Indian. Thus, parading Kefas Peter as well on the same subject would serve no other purpose above what PW2 did hence a multiplication or rather repetition. …"*

I do not find any fault on this finding. PW2's evidence in this case left no gap that would require explanation from Kefas Peter. This finding is justified by the legal position expressed under section 143 of the Evidence Act that it is not a number of witnesses that makes the story credible, but the credibility of witnesses. **See: Yohanis Msigwa V.R Republic** [1990] T.L.R 148. This issue also crumbles.

From the foregoing, I do not see any plausible reasons to fault the lower court's findings. In the upshot, this appeal is hereby dismissed in its entirety.

DATED at **DAR ES SALAAM** this **20th** day of **November** 2023.

E. Y Mkwizu
Judge
20/11/2023

COURT: Right of appeal explained

E. Y Mkwizu
Judge
20/11/2023