

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 62 OF 2021

*(Originating from Kaliua District Court in Criminal Case No. 38 of
2020)*

MAJALIWA MAKOYE -----APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGMENT

Date: 6/3/2023 & 21/4/2023

BAHATI SALEMA, J.:

The appellant herein **MAJALIWA S/O MAKOYE** together with two others who are not part of this appeal was arraigned before the District Court of Kaliua for three counts of Breaking a House with the intent to commit an offence therein c/s 294 (1) of the Penal Code, Cap. 16 [R.E 2019], Stealing c/s 258 and 265 of the Penal Code, Cap. 16 [R.E 2019] and Receiving property stolen or unlawfully obtained c/s 311 of the Penal Code, Cap. 16 [R.E 2019].

On the first date of arraignment the 1st accused pleaded guilty to the 1st and 2nd counts, the 2nd accused pleaded not guilty to the 1st and 2nd counts and the 3rd accused person pleaded guilty to the 3rd count. After taking the accused pleas the trial magistrate proceeded with the hearing and reserved the conviction of the 1st and 2nd accused persons.

To prove its case, the prosecution called a total of four (4) witnesses and four (4) exhibits were presented by the prosecution. Upon hearing, all accused persons were found to be not guilty of the ^{first} and second offence; as to the second count, the appellant was found guilty of the offence of receiving property Stolen or unlawfully obtained contrary to section 311 of the Penal Code Cap. 16 [R.E 2019] and sentenced to serve ten (10) years in prison.

Aggrieved, the appellant appealed to this court couched with two grounds of appeal namely;

- 1. That the trial Magistrate erred in law and fact in convicting the appellant for the offence of receiving property stolen while the prosecution side failed to prove the case beyond reasonable doubt.*
- 2. That the trial Magistrate erred in law to pass the sentence which was harshly overlooked.*

He prayed this Court to allow the appeal and set aside the conviction and sentence meted against him.

On 06/03/2023 when the appeal was called up for hearing the appellant appeared in person, also in the legal representation of Ms. Stella Nyaki learned counsel. On the other hand, the Republic was represented by the State Attorney, Mr. Robert Kumwembe.

Submitting in support of the appeal, Ms. Nyaki stated that PW3 presented three exhibits which were a TV, Receipt and Yellow cloth but

nowhere in the proceeding shows that the said receipt was read aloud for the appellant to understand its content.

She contended further that, PW4 an investigator who tendered a certificate of seizure did not read it aloud as required by the law, she explained that the content of any documentary exhibit ought to be read, failure to do so is fatal and the said exhibit ought to be expunged from the record.

Ms. Nyaki argued further that if the two exhibits are expunged from the record the remaining exhibits which are Television and yellow cloth lacks proper description to show that the victim was the real owner of the same.

As to the ground on excessive punishment, Ms. Nyaki referred this Court to the Case of **Tofiki Juma vs R**, Criminal Appeal No. 418 of 2015.

In reply, Mr. Kumwembe admitted that the documents mentioned by the appellant's counsel were not read in court however he believes that the presence of TV which the victim identified was sufficient to prove the case against the appellant and that the appellant had a duty under section 311 of the Penal Code, Cap.16 [R.E 2022] to explain how he came to own the said property but he did not do so that is why he was found guilty.

As to the second ground, Mr. Kumwembe submitted that the law is clear that the sentence under section 381 of the Penal Code, Cap.16 as passed by the learned magistrate was correct and the learned

counsel has not convinced the court how the sentence ought to be. The learned State Attorney prayed for the Court to uphold the decision of the trial court and dismiss the appeal.

In a rejoinder, Ms. Stella reinforced that the sentence meted against the appellant was harsh and was overlooked by the trial magistrate.

Having considered the submissions made by both parties and the appellant's grounds of appeal. I have also gone through the trial Court record the question for determination is whether the appeal has merit or not.

To begin with the first ground of appeal, the appellant alleges that the trial Magistrate erred in law and fact, in convicting the appellant for the offence of receiving property stolen while the prosecution side failed to prove the case beyond reasonable doubt.

Addressing the first ground of appeal is to re-assess the evidence in line with the ingredients that form the offence of Receiving Property or unlawfully obtaining to see whether the prosecution case was proved beyond a reasonable doubt.

The offence of receiving stolen property as created by section 311 of the Penal Code, Cap. 16 [R.E 2022] has four important ingredients that must be proved for the offence to stand;

- (a) the property must be received;
- (b) it must have been previously stolen;

(c) the person receiving the property must know or reasonably believe it was stolen and;

(d) the receiver must intend to deprive the owner of his or her property.

In examining properly the first ground of appeal, I will merge the evidence adduced before the trial court with these four ingredients to see whether the offence was proved against the appellant to a standard required by law.

The record shows that the appellant was arraigned with other accused persons, the first accused pleaded guilty to the offence of stealing contrary to sections 258 and 265 of the Penal Code, Cap.16 but for the reason not explained in the record he was not convicted on that same day until the case for the remaining accused persons was completed, the trial magistrate ended up acquitting him for the reason that no evidence that showed that he was found breaking or coming out of the victim's house.


Coming to the offence that the appellant stood charged with, there is no doubt that a Television set purported to be the property of the victim was seized from the hands of the appellant. In his defence the appellant agreed to have bought a TV set from the 1st accused upon convincing him that the TV is his property and he was selling it due to family problems.

In her submission in support of the appeal, Ms. Nyaki, learned counsel informed the Court that the prosecution side did not read aloud two documentary exhibits that were received during the hearing, which are the Purchase receipt of the Television set and Certificate of seizure. Having examined the proceedings I fully agree with the learned counsel that the two exhibits were not read aloud as the law requires so they ought to be expunged from the record as I hereby do.

Having expunged the said two documentary exhibits, there is no other evidence that remains on record to establish whether the television set that was stolen from the victim is the same one seized from the appellant and later brought to the court as an exhibit. It is my considered view that the trial court was not afforded evidence to prove that the television that was seized from the appellant belonged to the victim because there is no evidence on record of the same.

Moreover, the *mens rea* for the offence of receiving stolen property is that the receiver of the property must know or believe that the property was stolen. In this case, the evidence does not show if the appellant had knowledge or reasonable belief that the Television set he bought from the first accused was stolen, the appellant's defence as it can be found in the trial Court judgment shows that the first accused made the appellant believe that he was selling the Television because of family problems that are why he agreed to buy the same for TZS:50,000 and that evidence was never challenged by the prosecution.

In consideration of the above observation, I fully subscribe with the appellant's counsel that the prosecution did not prove the offence beyond reasonable doubt. The conviction and sentence entered by the District Court against the appellant are hereby quashed. I further order the immediate release of the appellant from prison unless held for some other lawful cause.



A. BAHATI SALEMA
JUDGE
21/04/2023

Court: Judgment delivered in presence of both parties.



A. BAHATI SALEMA
JUDGE
21/04/2023

Right of Appeal is here by explained.



A. BAHATI SALEMA
JUDGE
21/04/2023