IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SUB REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 142 OF 2023
(Originating from Criminal Case No. 133 of 2022 Shinyanga District Court)
EMMANUEL SHINDIKA@ MULIMU.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

26th February&15th March, 2024.

MASSAM, J.

Before the District Court of Shinyanga at Shinyanga, one Emmanuel Shindika @ Mulimu, the appellant was convicted of Stealing contrary to Section 258 and 265 and Possession of goods suspected to be stolen or unlawful acquired Contrary to Section 312 of the Penal Code Cap 16 R; E 2022.

Before the trial Court, it was alleged that, on 10th day of Dec, 2022 at around 19:30 the appellant together with one Said Ally, while riding a motorcycle at Bugweto area, they grabbed a hand bag of the complainant which had Tsh. 120,000/= cash, four dresses worth Tsh. 64,000/=, a phone make villaon worth Tsh. 25,000/=, all valued at Tsh. 209,000/= the property of Rose Dickson.

The matter was reported to the police station and upon investigation which lead to the search, the appellant was found in possession of a female hand bag with two dresses, one kitenge, one kanga and one mobile phone make Villaon, and were identified to be the properties of the complainant.

At the trial, the prosecution succeeded to prove both the offences against the appellant, and subsequently was convicted and sentenced to serve five years imprisonment for the 1st offence and two years for the 2nd offence and the sentence has to run simultaneously.

Aggrieved therein, the appellant appealed to this court with 3 (three) grounds of appeal, which raises the following issues, that,

1. The prosecution case was not proved beyond reasonable doubt, and,
2. That, the trial court erred in law and in facts by accepting the evidence of a witness who was not mentioned during the preliminary hearing.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas Mr. Goodluck Saguye learned State Attorney represent the respondent and the appeal was urged orally.

In his submissions, the appellant prayed this court to adopt the contents of his petition of appeal and invited this court to allow this appeal as he had nothing suitable to submit.

On his reply to the appellant submission, the learned state attorney addressed the grounds of appeal by stating that, he is not supporting this appeal but the conviction and sentence given, Also he informed this court that he will argue grounds number 1 and 2 jointly, while the 3rd ground will be argued separately.

Submitting on the 1st and 2nd grounds as complained by the appellant that, the evidence tendered did not validate conviction against the appellant, he stated that, when a person is found in unlawful possession of any property which is unlawfully found, is presumed to have been committed an offence after the properties found have been connected with the accused person and the place where they have been found.

He contended that, in this case, the prosecution was only required to show that, the properties were found in possession of the appellant, that the properties were positively identified, were stolen from the complainant

and was not belongs to the appellant, and that, the stolen properties constitute the subject of the charge sheet.

He claimed that, in this case, the appellant did not claim the ownership of the said properties hence the prosecution managed to prove that, the stolen properties belong to the claimant. Again, the stolen properties were found with the appellant and were properly identified by the complainant and were stolen from her.

With regards to the offence of possession of stolen goods the prosecution was required to prove that, there was theft and the appellant was found in possession of the stolen properties, hence the appellant failed to give explanation on how he got the said properties or how the said goods came to his house. He referred this court to the case of **Ally Bakari Versus Republic,** TLR 1992, at Pg 10, and therefore these grounds have no merit.

On the 3rd ground, which was complained by the appellant about a witness who was not listed during preliminary hearing, he submitted that, it is not the requirement of the law that, a witness who was not mentioned during Preliminary hearing is not required to be called to testify but rather, the law must be complied with. Also, the provision of Section 192 of the

Criminal Procedure Act directs on how Preliminary Hearing should be conducted and it does not limit the number of witnesses to support the case. Therefore, if there was a witness who was not listed during Preliminary Hearing but later was called to testify is not fatal as per the case **of Leonard Joseph @ Nyanda Versus Republic** at Pg No. 11-12 hence this ground has no merit and this appeal need to be dismissed for lack of merit.

In his rejoinder the appellant had nothing to add but rather he prayed to this court to consider his grounds of appeal and left him free.

Having heard the submissions from both parties, this court will now make a determination on the merit of this appeal, and the issue for determination is **whether these offences were proved beyond reasonable doubt.**

To start with grounds number 1, and 2 as argued jointly by the respondent, it was from the appellant that, the evidence testified by the prosecution did not justify conviction against him. The prosecution replied to it that, both offences were proved against the appellant to the required standard. To begin with the offence of theft, it is a settled law from the case of **DPP V. Shishir Shyam Singh,** Criminal Appeal No.141/2021 at

Pg 11that, for an offence of stealing to be established the prosecution should prove that, **one,** *there was movable property*, **two,** *the movable property under discussion is in possession of a person other than the accused*, ***three,*** *there was an intention to move and take that, movable property,* ***four****, the accused moved and took out the possession of the possessor,* ***five*** *the accused did it dishonestly to himself or wrongfully gain to himself or wrongful loss to another* ***six,*** *the property was moved and took but without the consent from the possessor.*

Again the **Section 258 of the Penal Code Cap 16 (supra)**also provides that,

> ***"a person who fraudulently and without claim of right takes anything capable of being stolen, fraudulently converts to use of any person other than the general or specific owner thereof anything, capable of being stolen|is said to steal that thing."***

It is in this regard that under Section 258(2) of the Penal Code it is explicitly provided that the taking or conversion of something capable of being stolen must be done fraudulently, (dishonestly). Thus, and from the above provisions of law, it is also clear that, in order to convict an accused

for the offence of stealing or theft, it must be proved that the act was done fraudulently and without claim of right.

In the case at hand, and according to the particulars of the offence of theft as explained herein above, I have visibly examined the evidence from both sides and the records from the trial court and observe the followings, the evidence of PW1 reveals that, when the accused person grabbed her properties, at first she did not properly identify him, but later on at the police station she managed to identified him as it was her second time to see him and also at the time of the commission of the offence there was solar light hence it was bright.

Again, the police had made investigation after they had been informed by an informer that, there are people who are suspected to be robberies, and upon their arrival to the house of the appellant, they managed to find the stolen properties which was identified to be owned by the complainant.

Further to that, the evidence from the prosecution also reveals that, when search was conducted, PW3 was with PW2 who is a Street leader, and his evidence confirmed that, upon their search in the house of the appellant they managed to found two dresses, two African print kitenge,

one pair of kanga and a small phone make villaon which were tendered as exhibit P1and P2.

Likewise, the evidence on record also shows that, the appellant had no woman in that house, thus he failed to explain about the legality of having women clothes in his house as the complainant properly managed to prove that the properties found in the appellant's house belong to her.

From that evidence, this court is well satisfied that, it was the appellant who committed the said offences because, the said properties were movable as per the particulars of the charge sheet, yet, the contents of exhibit P1and P2 discloses that those properties were in possession of the appellant, and this is according to the search conducted by PW2and PW3 and the issued certificate of seizure to wit, exhibit P3, moreover, the appellant purposefully move and take that movable properties as he was possessing them unlawfully, again, the appellant took the possession of the complainant without her consent.

Upon concluding on these grounds, this court is of the opinion that, the prosecution managed to prove both the offences properly as per the provisions of, ***Section 110 (1) which offers that,***

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Therefore, the contents of the 1st and 2nd grounds of appeal are found to be useless to the extent explained above.

With the third ground, which states about a witness who was not mentioned during Preliminary Hearing, but testified, it was from the respondent that, the law does not bar a witness who was not mentioned in the preliminary hearing, from testifying but only the law is required to be followed.

From the proceedings at Pg 21, it discloses that, PW4 – WP 12778 Ester produces a statement of Monica Anthony who failed to appear before the court to testify, but neither PW4 or the said Monica Anthony or her statement were listed as witness or exhibits at Pg 7 of the trial proceedings.

The provision of Section 192 of the CPA and Section 289are the same which provides for the procedures to be followed after the charge has been read over to the accused person and pleaded not guilty.

Again, if it happens that, the statement or substance of the evidence of the witness was not read at the Preliminary hearing the prosecution is

barred to call such witness or to bring such statement of evidence unless they have complied with the provision of section 289 (1) of the CPA which provides that:

> ***"289 (1) No witness whose statement or substance of the evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."***

From the above provision it is therefore clear that, a witness whose statement or the ingredient of evidence was not read to the accused person and not listed in the preliminary hearing, such witness is not competent to adduce both oral or any documentary evidence at the trial court unless the prosecution has given a prior notice within a reasonable time to the accused person or his advocate that it intends to rely on additional evidence of the said witness or statement of such witness who is nowhere to be found.

This was properly debated in the case **Ndaisenga s/o Vicent Versus Republic**, Criminal Appeal No. 523 of 2021 at Pg. 11 and 12 while

citing the case of Hamisi **Meure v. The Republic** [1993] T.L.R. 213, the Court said:

> ***"It having been accepted by the prosecution and the Judge himself that PW2 did not feature in the record of committal proceedings, he should have not been allowed to give evidence in contravention of the provisions of section 289 which are mandatory."***

Again, in the case of J**umanne Mohamed & 2 Others v. The Republic,** Criminal Appeal No. 534 of 2015 (unreported), the Court held that, such evidence ought to be expunged. It said:

> ***"We are satisfied that PW9 was not among the prosecution witnesses whose statements were read to the appellants during committal proceedings. Neither could we find a notice in writing by the prosecution to have him called as an additional witness. His evidence was thus taken in contravention of section 289 (1) (2) and (3) of the Act ...In case where evidence of such person is taken as is the case herein; such evidence is liable to be expunged ...We accordingly expunge the***

evidence of PW9 including exhibits P6 and P7 from the record."

From the above reference this court is of the view that, since PW4 was not listed as a witness during preliminary hearing, she was then precluded from tendering a witness statement of one Monica Anthony, who was also not listed as a witness as the records at pages 7 specifies the names of the intended prosecution witnesses whose statements or substance of their evidence was made known to the appellant during Preliminary hearing.

Again, it was only a notice to produce such a statement was issued by the prosecution and not a notice to bring a witness who could tender such a statement, in that respect, the evidence tendered by PW4, at the trial was against the required orders of the provisions of section 289 of the Criminal Procedure Act as it was taken contrary to the law, therefore this court is expunge it from the record.

However the evidence of PW4 is expunged from record, the remaining evidence, preferably that of PW1, PW2, PW3 and exhibits P1,P2 and P3 are enough to prove both the offences against the appellant as explained earlier in the contents of the 1st and 2nd ground of appeal.

At the end, this court is convinced that the prosecution's case was properly proved beyond reasonable doubt. Accordingly, I find the appeal without merit and dismiss it in entirety. The conviction and sentence of the trial court is hereby upheld.

It is ordered.

DATED at **SHINYANGA** this 15th day of March, 2024

R.B. Massam

JUDGE.

15/03/2024.