IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SU-REGISTRY OF MWANZA
AT MWANZA
CRIMINAL APPEAL NO. 122 OF 2023

(Arising from Criminal Case No. 174 of 2022)

ABEID NASSORO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

15th March & 12th April, 2024
ITEMBA, J.

In the District Court of Ilemela at Mwanza, the appellant, Abeid Nassoro was charged with the offence of Stealing contrary to sections 258(1) and 265 of the Penal Code Cap 16 R.E 2019. As per the charge sheet, it was alleged that, the appellant, on 24th August, 2022, at Kangae area within Ilemela District in Mwanza, stole 750 iron bars with a value of TZS 19,500,000/= the properties of one Emmanuel Zabron Lukuba.

At the trial, the prosecution case was that, the complainant Emmanuel Zabron Lukuba (PW2), is a resident of Arusha but prior to that he was living in Mwanza. Upon moving to Arusha, he left his house under the supervisory of his friends named Successor Anania Kimenyi (PW1) and one Elias. That, on 30/7/2022, PW2 found the tenant named Suraiya Awadhi Suraiya who lived at the premises with her family including her

son, the appellant. Either, PW2 did not know the appellant before. That, upon moving to Arusha, PW2 had left two 'brick machines' and 750 iron bars in the said house. That, PW2 had bought the iron bars because he had plans to construct a school. The said iron bars were kept outside the house, tied with a chain and locked with a padlock. Later, PW2 was informed by PW1 that the iron bars were stolen. PW3 who lives in the same Kangae street and also a wife of a ten-cell leader, told the court that, on the incidence day, she saw the appellant moving the iron bars from the scene and packing them in the vehicle. The matter was reported to police and by then, the appellant was at large. However, on 8/9/2022 the appellant went to Kirumba Police Station and reported to F. 2214 D/SGT Maiga (**PW4**), a police officer who was assigned the case and upon interrogation, he admitted to have allowed someone to take the iron bars from the scene.

In his defence, the appellant admitted that he lived with his mother and they were tenants of the complainant but he totally denied to have stolen the said bars. That, he went to the police station because he was informed that he was 'wanted'.

Upon full trial being conducted, the appellant was convicted and he was sentenced to a conditional discharge of 2 years. The trial court also ordered the appellant to return the stolen iron bars within six months. The appellant is aggrieved with the said decision and he has lodged this appeal with a single ground thus:

i. The learned trial magistrate erred in law and facts by convicting the appellant herein named without considering the prosecution case was not proved beyond reasonable doubt.

When the appeal was set for hearing, the appellant was absent but he was ably represented by Mr. Erick Mutta learned counsel. The respondent had the services of George Ngemera and Evans Kaiza both learned state attorneys.

The appellant's counsel rolled up the ball by submitting that the sole ground of this appeal has main three issues that:

i. There was no establishment of the existence of the properties alleged to have been stolen.
ii. The evidence of the eye witness alleged to have witnessed the theft was weak to amount to conviction.
iii. The republic could not summon as a witness, one Mama Shadya who is alleged to have been living in the house where the properties were stolen.

Starting with the first ground, the learned counsel expounded that, PW2 told the court that he left 750 iron bars in the hands of PW1. While PW1 in cross examination at page 12, he said he never counted those iron bars at the scene and there is no evidence showing there were iron bars in the house of PW2. He referred the court to page 18 of the typed proceedings that PW2 said he never handled the house to PW1. That, PW2 was informed of theft so all his evidence was hearsay. He concluded that, existence of the stolen property was not established.

Moving to the second ground, he argued that, the alleged eye witness, PW3 claimed to have seen the appellant who was by himself, with a vehicle whereas, he entered in the house and started parking the iron bars in the vehicle at around 14:00hrs. Then, PW3 talked about the people who were at the scene in plural '*aliwaona, wakichukua wakaondoka'*. That, there is a contradiction between the appellant being alone and the other people whom PW3 did not mention. That, PW3 stated that she was informed about theft later on by the mother of the appellant. He then referred at page 6 of the judgement where the trial court considered that the appellant was accompanied by his fellows, an aspect which does not feature in the proceedings.

Lastly, the learned counsel submitted that, one '*mama Shadya'* is mentioned by both PW1 and PW3 but she was not called as a witness. She was the one living in the house where 750 iron bars were kept. She is the appellant's mother and the one who entered the rent agreement with PW2 and the one who reported the theft to the ten-cell leader. He stressed that the court should draw adverse inference that if she would have been called as a witness her testimony would have favoured the appellant.

In reply, Mr. Ngemera SA, fervently opposed the appeal. At the outset, he submitted that, he supports the conviction and sentence against the appellant because the case against him was proved beyond reasonable doubts.

In respect of the first ground, he submitted stated that, it is weightless because there was proof of stolen properties at page 11 of proceedings where PW1 explained that PW2 left different items in his house, including brick machines and 750 iron bars. That, the same was mentioned by PW2 in his testimony. He added that, on the claims that PW1 did not hand over the house to PW2, he agreed that PW2 was only given a house to supervise he was not handled. He added that there was an eye witness PW3 who saw the appellant moving the stolen properties from the

scene, therefore the iron bars were there. To him, based on the testimony of PW1, PW2 and PW3 the stolen properties were present at the house of PW2.

The learned counsel insisted that, the evidence of these 3 witnesses was believed by the court through their credibility and that each witness has a right to be trusted until there is a reason to doubt them. To support his argument, he cited the case of **Goodluck Kyando v R** criminal appeal 118/2003 TLR 2006 363.

As for the second ground, he stated that, PW3 testified that she was outside and she saw the appellant moving in with the vehicle. That, the one who entered with a vehicle is the appellant and it is the same person, who left the scene carrying iron bars, together with other people. That, the incidence took place at daytime, the appellant and those other people did not close the gate and they spent more than 2 hours. He stated that, if PW3 said they were many people it is not a contradiction. He referred the court to page 6 of the trial court's Judgement where the court said that, the appellant was accompanied by his fellows.

In the last ground, he submitted that under **section 143 of The Evidence Act,** there is no number of witnesses required to prove a case.

That, PW2 and PW3 were enough to ground conviction without '*mama Shadya'* being called because she is the appellant's mother. That, even if she would have come there would have been bias in her testimony. He went further that according to **Anord Mtuluva v R** Criminal Appeal no. 511/2020 Court of Appeal Iringa, failure to call material witnesses is not fatal if there are other witnesses to prove the said offence.

The learned counsel insisted that all the ingredients of theft were established because the appellant dishonestly took the iron bars without consent of PW1 or PW2. That, even in his defence, the appellant would have brought one of the family members to prove that the house was empty and there were no iron bars but he did not.

Mr. Mutta in his brief rejoinder insisted that looking at the chargesheet, existence of 750 bars was not established. That PW1 testified that he was given 750 iron bars but in cross examination he says he never counted them. That, there is no evidence showing if the vehicle left the scene and if so, it was the appellant who left with it. The evidence says 'he left alone' and the witnesses said they saw more than one person at the scene.

Having appraised the rival submission by the parties, the issue is whether the case was proved beyond reasonable doubt against the appellant.

In the course of composing the judgment, I noted that, in reaching its decision, the trial court did not consider the appellant's defence at all. This being a mandatory duty in terms of section 312(1) of the Criminal Procedure Act, I moved the parties to submit on the aspect. Mr. Mutta learned counsel, submitted that, for a judgment to be lawful the defense must be considered as it was held in **Abdallah Seif v R** Cr. App 122/2020 CAT Dar es salaam. He went on that, at page 28 of the proceedings the appellant defended himself and he told the court that the house, which is a scene of crime was empty. While, PW1 and PW2 stated that there were iron bars at the scene. That, basically, the appellant raised a doubt in which, if his evidence would have been considered, the court would have reached a different decision. He therefore moved this court, being the first appellate court, to step in the shoes of the trial court, analyse the evidence including the appellant's defence.

On the other side the Mr. Ngemera learned state attorney, agreed that based on the records, the trial court did not consider the appellant's

defence, yet, he argued that, non-consideration did not vitiate the prosecution case because the appellant's defence was mere general denial. He joined hands with the appellant's counsel that this being the first appellate court, it has a duty to step into the shoes of the trial court and evaluate the evidence. He supported his submission with the case of **Jafar Musa v DPP** Criminal Appeal no. 234/2019 CAT Mbeya.

I respectful agree with both parties in stepping in the shoes of the trial court, I will therefore consider the appellant's defence in the course of tackling the grounds of appeal.

The offence of stealing which the appellant was charged with is created by section 258 of the Penal Code which states as follows:

> *'258.- (1) A person who* ***fraudulently and without claim of right takes*** *anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.'*

Section 265 thereof provides for punishment where the convict is liable to imprisonment for seven years.

Therefore, this court has a duty to find out if the appellant fraudulently and without claim of right stole the alleged iron bars from the scene, or not. Based on records and submissions from parties, there is only

one ground of appeal. According to the appellant's counsel, the prosecution did not establish on the stolen properties, that they were 750 iron bars. Logically, the one who had to establish this fact is the owner (PW2). Looking at the evidence of PW2 he says that upon moving to Arusha, he rented the house to Suraiya Awadhi Suraiya and among the properties therein, they were iron bars 'about' 750. He explains that the said bars were tied with a chain and a padlock. By this evidence it means the iron bars were at the scene. The appellant's counsel challenged the fact that there was no evidence on whether the bars were 750 or not. The learned appellant's counsel also insisted that PW1 who is alleged to have been left to supervise the iron bars, told the court during cross examination that he did not count them. What I am getting from the appellant's counsel is that there is a possibility of the iron bars being stolen or damaged and its' number being reduced by some other people different from the appellant. According to the appellant, basically he is denying the allegation against him. He is also stating that the house was empty. However, PW3 testified to have seen the appellant at the scene, stealing. It does not matter if the appellant knew him or not. I find that, mere denial that the iron bars were not at the scene, does not shake the evidence from PW2 who is the owner and PW3, the eye witness. I will agree with the respondent's counsel that

the appellant's defence does not raise any serious doubt which goes to the root of the case.

As regards the number of the iron bars, first, I have noted in the testimony of PW2, he mentioned the number was 750 iron bars and about the value he mentioned more 'than 12,000,000/=' and then he mentioned '20,000,000' which is also 'more than 12,000,000/=. The currency is not stated. I think so long as there was consistency that the bars were 750, the value may vary as it mostly depends on market price. Much as the accused person should not be convicted on the weakness of the defence but the strength of the prosecution, I would expect more reason in challenging the existence of the stolen properties and not just stating that they were not counted. As said, PW2 who is the owner of the stolen iron bars and is the best person to state what exactly he left at the scene. He is a competent witness who has a right to be believed by the court as rightly submitted by the learned state attorney. There is evidence also that the iron bars were tied with a chain and a padlock, this reduce the chances of them being tampered with. Therefore, so long as there is no evidence to the contrary on the number of iron bars, then the number remains 750. Therefore, through the words of PW2, it was established that the stolen properties were 750 iron bars.

As to the issue of what was stated by the eye witness, and the presence of other people at the scene, indeed, PW3 said that she did not know about theft until when she was informed by the appellant's mother. That, the applicant's mother went to report the theft because PW3 is the wife of the ten-cell leader. At that moment, it is when PW3 disclosed that she saw the appellant taking the iron bars from the scene packing them in the vehicle. I think, it was at this stage when PW3 was learning that actually, what she witnessed was theft PW3 also mentioned that there was a house maid at the scene and 'one man'. The key issue here is whether PW3 eye witnessed the appellant stealing the iron bars. Records show that the incidence took place in a broad daylight and it took place for about two hours. These are favourable conditions for visual identification in terms of **Waziri Amani v R** (1980) TLR 250. I have noted from the appellant's defence that he told the court that he never knew PW3. Although it is not vivid from the records on whether the PW3 knew the appellant before, it is in evidence that, the appellant and PW3 were neighbours. In mentioning the rest of the people who were present at the scene, it might be true those people were there, it might be true that they were supposed either to be joined as accused persons or as witnesses. Because the appellant was seen at the scene, this implies that, either he conspired with those

other people or he at least knew them. Otherwise, he would have reported them to the police. Yet, those other people not featuring in the proceedings does not cause any contradiction nor does it exclude the appellant from liability because criminal liability is quite an individual and personal aspect. Therefore, the evidence by PW3 that she saw the appellant at the scene stealing the iron bars was watertight and I see the evidential value in it.

The last issue of the need to parade '*mama Shadya'*, as a witness. Basically, she would have testified on whether there were iron bars at the scene or not an aspect which was established by PW2. I am certain that there was no necessity to for her to appear as a witness in terms of section 143 of the Evidence Act. I agree with the respondent's counsel on the cited cases of **Anord Mtuluva v R** Criminal Appeal no. 511/2020 Court of Appeal Iringa in that failure to call material witness is not fatal if there are other witnesses who have established what transpired at the scene. I also agree with the fact that '*mama Shadya'* being the appellant's mother, she had interest to serve.

That being said. I find no justification to alter conviction and sentence of the trial court. The appeal has no merit and it hereby dismissed. It is so ordered. Right of Appeal fully explained to the parties.

DATED at **MWANZA** this 12th day of April, 2024.

L.K. J. ITEMBA
JUDGE

Judgment delivered this 12th Day of April 2024, under my hand and seal of the court, in the absence of the appellant, in the presence of Ms. Jenifa Kahema holding brief for Mr. Eric Mutta learned counsel, Mr. Benedicto Ruguge, State Attorney and Ms. Glady Mnjari, RMA.

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MWANZA DISTRICT REGISTRY

L.K. J. ITEMBA
JUDGE