IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MOSHI
AT MOSHI

PC CRIMINAL APPEAL NO. 6 OF 2023

(Arising from Criminal Appeal No. 11 of 2023 at District Court of Moshi at Moshi, Originating from Criminal Case No. 289/2022 at Himo Primary Court)

HAWA HAMAD:.....APPELLANT

VERSUS

SALUM SAID MUHAMED:.....RESPONDENT

JUDGMENT

19th March & 23rd April,2024.

A.P. KILIMI, J.:

The appellant herein alleged the respondent herein for the offence of theft contrary to section 265 of the Penal Code Chapter 16 at Himo Primary Court 'the trial court' in a criminal case No.289 of 2022. There at the particulars of the offence were to the effect that on 28/10/2022 around 15:00 hours at Njiapanda in Moshi District Kilimanjaro Region the respondent did steal the appellant's properties to wit a freezer make Homebase valued at Tsh 730,000/= and a subwoofer make Sea piano value at tsh 200,000/= making total amount of Tsh 930,000/=. Upon a full trial, a trial court found the case was proved beyond reasonable doubt and henceforth the respondent was convicted and sentenced to five months imprisonment or to pay a fine of Tsh 150,000/= and further the trial court

ordered the respondent to compensate the appellant Tsh 930,000/= being the value of the properties.

Dissatisfied with the conviction and sentence of the trial court, the respondent appealed to the District Court of Moshi at Moshi in Criminal Appeal No.11 of 2023 with the following grounds;

1. That the learned trial Magistrate erred both in law and fact when failed to discover that the respondent failed to prove the offence of theft against the appellant on the required standard
2. That despite irregularities on the respondents' evidence, the learned trial magistrate proceeded to rule against the appellant's merit
3. That the judgment and proceedings of the trial court is tainted with irregularities which are incurably fatal on the eyes of the law.

The District Court having heard the above grounds on merit, quashed and set aside the trial Court decision by reasoning that the case was not proved beyond a reasonable doubt and that the charge was defective as the respondent ought to be charged with section 258(1) and 265 of the penal code and not only under section 265. Consequently, the respondent was acquitted.

The appellant being dissatisfied with the District Court decision, has appealed on this court praying the decision of the District Court be quashed and her appeal be allowed basing on the following grounds;

1. That the learned Magistrate in the Appellate court erred in law and fact by failing to discover that the case before Primary Court at Himo was proved on the required legal standard.
2. That the learned Magistrate in the appellate Court erred in law and fact by failing to consider the available evidence which led to unjust decision.

The respondent filed a reply to petition of appeal and maintained that the District Court was right to quash the trial Court decision.

Before I proceed further, in order to appreciate the context in which this second appeal emanates, I find it necessary to begin with a summary of the essential facts. The appellant and the respondent herein are wife and husband, on 30th November, 2022 the appellant went to a shop where the respondent works to take her NMB card. While there, the appellant noticed that a radio Subwoofer make Sea piano with its two speakers and a freezer make Homebase were not there. She asked the respondent who replied to her that they were at his house. She went to his house and found nothing and upon asking around neighbors if they saw the respondent bringing them home, they also replied that they did not saw

him. One Athuman Mfinanga (SM2) told the trial court that the respondent informed him through his phone that the appellant was the one who took the freezer after a misunderstanding arose in their marriage and that he once saw a freezer in a shop where the respondent works. Hamir Athuman (SM3) also testified to saw a freezer and a subwoofer radio in a shop where respondent works.

In his defence at a trial Court, the respondent testified that, what was between him and the appellant was all about misunderstandings of their marriage which geared the appellant to promise that she will take everything from him. He further defended that the appellant was the one who took the freezer and the said subwoofer.

When this appeal was placed before me for hearing, both parties stood unrepresented and prayed for the appeal be disposed by way of written submissions.

Submitting on the first ground, the appellant averred that, the case at a trial court was proved beyond the required standard. The appellant submitted that she was already divorced by the respondent as per Islamic

rites and after divorce she remained with her properties and continued to do business.

The appellant further submitted that, the said stolen freezer and a subwoofer were owned by her as the respondent had already obtained his shares from the divorce. The appellant then submitted that the case at a Primary court was proved beyond required standard as section 264 of the Penal code indicates that a husband can steal from a wife and a wife can also steal from a husband hence the act of the respondent stealing from the appellant while already divorced was proved at the trial court by the appellant. To buttress her point the appellant referred the decision of **Jonas Nkinze vs. Republic** [1992] TLR 213 and section 110(1) of the Evidence Act Cap 6 R.E 2019.

In regard to the second ground of appeal, the appellant submitted that the appellate court failed to analyze the evidence on record by simply quoting the primary court decision in its judgment at page 3 and 4.

In reply the respondent strongly argued against the appeal and submitted that the important elements sufficing the offence of theft against him were not proved at a trial court as required by the law. He submitted

that he and the appellant were still legally married as their marriage was not yet to be nullified by any court of law as it was only mitigated at BAKWATA. He submitted that the items that were given to the respondent by the appellant were due to their marriage relationship as husband and a wife.

The respondent further contended that the case was not proved beyond reasonable doubt as the charge sheet was also defective as he was charged under a section that provides only a punishment and not the section which establishes the offence as correctly argued by the appellate court. He submitted that such defective could have been cured by combining both sections 258(1) and 265 of the penal code Cap 16 RE 2019. To support his point he invited this court to the decision of **Zawadi Huruma @Mbilinyi and others vs. Republic** Criminal Appeal No. 210 of 2019.

He further stated that he did not commit the offence of theft as there was no direct evidence incriminating him with the crime and that the alleged stolen property was never taken by him rather the appellant herself took the properties when she was leaving after a dispute arose in their

marriage. He then prayed for the dismissal of the appeal and the district court decision to be upheld.

In her rejoinder the appellant stated that she was the solely owner of the stolen properties as they were not acquired jointly. The appellant further emphasized that husband and wife can steal from each other as section 264 of the penal code provides.

From the parties' submissions, the issue for determination which will suffice all grounds of appeal in this case is whether the offence of theft was proved beyond a reasonable doubt against the respondent. And before going further in determining the above raised issue, I find it necessary to address first, the holding of the District Court magistrate in her judgment at page 4 that the respondent/ defendant at a trial court was charged under a defective charge sheet hence fatally defective by citing only section 265 of penal code and not section 258(1) and 265 of CAP 16. In my view the particulars of offence were clearly described in a charge sheet and the respondent was in a good position to know what he was being charged. For ease reference the charge sheet at a trial court is hereby reproduced hereunder;

*"**KOSA NA KIFUNGU CHA SHERIA:** WIZI, KIFUNGU 265 SURA YA 16 K/A.*

***MAELEZO YA KOSA**: Wewe Salum s/o Said Mohamed unashitakiwa kwamba mnamo tarehe 28/10/2022 muda wa saa 15:00 huko njiapanda wilaya ya Moshi vijijini mkoa wa Kilimanjaro uliiba friza homebase rangi ya kijivu thamani Tsh 730,00/=, sabufa aina ya seapiano thamani Tsh 200,000/= vyote vikiwa na thamani ya Tsh 930,000/=mali ya mtu aitwaye HAWA d/o HAMADI kitendo ambacho ni kinyume cha sharia za nchi."*

Indeed, it is true the provision used above is section 265 only, nonetheless, being guided by the Court of Appeal (CAT) decision of **Jamali Ally @Salum vs Republic**, Criminal Appeal No.52 of 2017 which held that;

"..where the charge sheet shows clearly the particular of the offence which the accused is charged with, the missing section of the offence is not fatal, for the accused is in good position to understand the nature of the offence and the evidence given.."

From the excerpt above, I am settled the respondent was clearly informed about the offence he was facing. Therefore, it is my view the

defect appears in charge sheet of not citing the required provision is cured under section 388 (1) of the CPA Cap 20 R.E. 2022. (See **Jafar Salum @ Kikoti v Republic,** Criminal Appeal No. 370 of 2017, CAT at Dsm. (unreported).

Now back in determining whether this appeal has merits and by doing so I have considered the two grounds above, I am of the view its gist base on the first ground, thus, the main issue cutting across is whether the offence of theft against the respondent was proved beyond reasonable doubts at the trial court

The appellant submission was that a freezer and a radio subwoofer belonged to her as separate properties since were never jointly acquired with the respondent as they were already separated through BAKWATA. The respondent evidence was that it was the appellant who took herself the said properties due their marriage becoming sour but they were still legally married.

It is a trite law that a duty to prove the case in criminal cases always lies on the prosecution, thus the defence needs only to raise reasonable doubts. The prosecution evidence at a trial court was that SM2 and SM3 saw the alleged stolen properties at the respondent's shop on different

dates. Further their evidence proved that appellant and respondent lived as wife and husband. However, the evidence does not prove that the appellant acquired those properties separately or to the exclusion of the respondent, nonetheless the despite the fact she did not tender the evidence of separation from the BAKWATA, therefore the same was not proved to be voluntary separation or otherwise.

If it remained as above, in my view it may be assumed the same might be matrimonial properties, However, I am aware taking property without the spouse's permission could constitute theft, but if the prosecution proves the intent to deprive permanently co-ownership of their property. This means that, taking the property must not be temporary but the same must be manifested by intention of taking it away permanently.

The evidence adduced by SM2 and SM3 does not establish that the respondent had that intention, by mere saying that items were found in the respondent’s shop and later were not seen, thus did not establish any ingredient of theft as established by the definition of theft.

Section 258(1) of the Penal Code Cap 16 R.E 2019 provides clear the elements establishing the offence of theft and it provides that;

> *"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".*

According to the charge sheet, shows the above said items belonged to the appellant, but as said above, the appellant failed to bring any tangible evidence proving whether she was the owner of the said properties as the charge sheet revealed. Moreover, no any evidence was brought in the trial court to show if the parties were legally separated and no evidence presented to show on how the appellant and the respondent after their so-called separation by BAKWATA if at all existed, distributed their properties.

In the circumstances, I am of the view that appellant ought to have given evidence to show how those items were actually stolen by the respondent. Thus, being the owner of them, evidence from her was necessary to clear uncertainty on whether the same belong to her solely to the exclusion of the respondent. Nonetheless the facts that witnesses did not see them on the shop in my view cannot be concluded that respondent

has stolen them without proving the intention said of permanent deprive of the said items. With respect the trial court was not correct to draw the said conclusion while crucial ingredients of crime left behind.

It therefore my settled view that there was failure of proving that those properties belonged to the appellant as the charge sheet stipulates, but also if they were matrimonial properties the facts not in the charge, still no any prove that respondent has deprived them permanently from their matrimonial domain. In the absence of the said evidence, it is not therefore easy to say with certainty that appellant, was deprived of the said properties, thereby constituting theft within the meaning of the provision cited above.

Having said above, it is my considered opinion, the above doubts taint the prosecution case which cause me to concede with the District Court findings that prosecution at the trial court failed to prove the case beyond reasonable doubt.

From the foregoing, I find this appeal lacking of merits, the District Court decision is hereby upheld, and I proceed to confirm that the judgment of the trial court was legally quashed.

It is so ordered.

DATED at **MOSHI** this 23rd day of April, 2024.

4/23/2024

X

JUDGE
Signed by: A. P. KILIMI

Court: - Judgment delivered virtually this 23rd day of April, 2024 in the presence of both parties, appellant and respondent.

Sgd; **A. P. KILIMI**
JUDGE
23/04/2024

Court: Right of appeal duly explained

Sgd; **A. P. KILIMI**
JUDGE
23/04/2024