IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

CRIMINAL APPEAL CASE NO. 7909 OF 2024

(Originating from Criminal Case No. 73 of 2021

of the District Court of Mufindi)

STEVEN ADRIAN..... 1ST APPELLANT

ELIA JULIAS ..... 2ND APPELLANT

MESHACK KILATU ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 06/05/2024

Date of Judgement: 08/05/2024

LALTAIKA, J.

The appellants herein **STEVEN ADRIAN, ELIA JULIAS, MESHACK KILATU** and three others not a part of this appeal, were arraigned in the District Court of Mufindi at Mafinga charged with three counts: 1. Conspiracy to commit an offence c/s 384 of the Penal Code Cap 16 RE 2022 2. Breaking into a building and commit an offence c/s 296(a) and (b) of the PC 3. Stealing c/s 258(1) and 265 of the PC. When the charge was read over and explained

to them, they pleaded not guilty. This necessitated the conducting of a full trial.

Upon completion of the trial, the appellants were discharged for the 1st and 2nd counts. As for the 3rd count, they were convicted and sentenced to serve 5 years in prison. Dissatisfied, the appellants have appealed to this Court by way of a joint Petition of Appeal containing nine (9) grounds. I take the liberty to reproduce them for ease of reference:

1. *That the learned trial Magistrate erred in law and fact to convict and sentenced the appellants relying on the evidence of PW1, PW3 and PW4 which shows there was fabrication of the case.*
2. *That the learned trial Magistrate grossly erred in law and fact to convict and sentence the appellant while the prosecution side failed to justify whether the properties stolen owned (sic!) by Mufindi District Council.*
3. *That the learned trial Magistrate grossly erred in law and fact to receive and admits (sic) certificate of seizure without considering proper procedure.*
4. *That the trial Magistrate grossly erred in law and fact to convict and sentence the appellants basing on their presence in the scene of crime.*

5. *That the trial Magistrate grossly erred in law and fact to convict and sentence the appellants basing on the evidence adduced by PW4 who was one responsible (sic!) for security of stolen properties.*
6. *That the Magistrate grossly erred in law and fact to convict and sentence the appellants without considering properly the doctrine of recent possession.*
7. *That the trial Magistrate grossly erred in law and fact to convict and sentence the appellants without considering that DW5 did not mentioned (sic!) the appellants as the persons bought properties to his house.*
8. *That the trial Magistrate erred in law and fact to convict and sentence the appellants without considering that chain of custody was not filled and tendered in the Court as exhibited.*

When the appeal was called for hearing on the 6th of May 2024, the Appellants appeared in person, unrepresented. The respondent Republic, on the other hand, appeared through **Mr. Majid Matitu, learned State Attorney**. The Appellants indicated that since they were not learned in law, they had nothing substantial to add to their grounds of appeal. They chose to allow the learned State Attorney to proceed with responding to the grounds while reserving their rights to a rejoinder in case the need arose.

Taking up the podium, Mr. Matitu, announced boldly that he supported the appeal. He stated that he had gone through the grounds as well as the

proceedings and he chose to argue only the ninth ground, which centered on the lack of proof beyond reasonable doubt. He believed that this ground could dispose of the appeal.

Mr. Matitu condended that the prosecution side had tendered the exhibit of three bags of cement, marked as exhibit P1, P2, and P3. However, Mr. Matitu reasoned, the way these exhibits were impounded violated the law, namely section 38(1) and (3) of the **Criminal Procedure Cap 20 RE 2022.** He highlighted that the impounding of the bags lacked a certificate of seizure and independent witnesses, casting doubt on the validity of the impoundment.

Mr. Matitu pointed out further that there was the lack of a clear chain of custody for the exhibits from the date of impoundment to when they were produced in court. Additionally, the exhibit keeper of the police and the CRO in charge officer were not summoned to provide information on how the exhibits were kept and brought to court.

Faulting the prosecution's case further, Mr. Matitu raised concerns about the chain of custody of other exhibits, namely P4, P5, and P6, tendered by PW2, a Village Executive Officer. He highlighted the absence of an

explanation on how these exhibits were obtained and produced in court by an independent witness. He mentioned that PW5, a police officer who conducted the search, was not given the exhibits to identify and prove that they were the same items he had impounded.

Mr. Matitu went on to argued that the charge of breaking into a building and committing an offense was not proved due to contradictions among prosecution witnesses. He emphasized that if this offense was not proved, it cast doubt on the charge of theft. To buttress his argument, Mr. Matitu referred this Court to the Court of Appeal of Tanzania's case of **RAMADHANI MBOYA MAHIMBO v. REPUBLIV** Crim App No. 326 of 2017 CAT, Arusha p. 10, where doubts on the unbrokenness of the chain of custody led to the charge against the appellants being considered unproved.

Premised on the foregoing, Mr. Matitu prayed for the court to invoke section 366(1) of the Criminal Procedure Act to quash the conviction and set aside the sentences against the appellant, without praying for a retrial due to gaps in the prosecution's case.

In response, the 1st Appellant thanked the learned State Attorney for supporting the appeal, while the 2nd Appellant supported the arguments of the State Attorney. The 3rd Appellant also supported the Respondent's side

I have dispassionately considered the forceful submission by the learned State Attorney in the light of the lower court records. It is imperative to emphasize that although Mr. Matitu has indicated his e unwavering support of the appeal and has prayed that the appellants be set free, this does not impact my role as an appellate court to subject the evidence adduced to a critical scrutiny. An appellate court must warn itself against uncritically endorsing the Respondent's support of the appeal. The rationale was given by the Court of Appeal of Tanzania in **MARKO PATRICK NZUMILA AND ANOTHER V. R** CRIM APP 141 OF 2010 (Unreported) thus:

> *"Failure of justice has in more than one occasion been held to happen where an accused person is denied an opportunity of an acquittal but in our considered view, it equally occurs when the prosecution is denied an opportunity of conviction. This is because, while it is always safe to err in acquitting than in punishment it is also in the interest of the state that crimes do not go unpunishment."*

Mr. Matitu chose the 8th ground of appeal which is centered on the complaint that the prosecution case was not proved beyond reasonable doubt. What exactly do we mean by proof beyond reasonable doubt? The phrase is not defined in statute. However, in the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC [1993] TLR 219** the Court of Appeal of Tanzania provided the following insight:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

I have gone through the trial Court's proceedings, revisited the essential elements of the offence of stealing for which the appellants were convicted and sentenced, closely evaluated the testimonies of both prosecution and defense witnesses. More importantly, I have examined the evidence tendered. In addition to the evidential gaps and noncompliance to procedural requirements pointed out by Mr. Matitu, I think the appeal epitomizes failure to observe fairness in criminal law from arresting of

suspects, their arraignment in court and more importantly ensuring a fair trial.

In the light of the above, the Court subscribes to Mr. Matitu's reasoning and acknowledges the relevance of the precedent cited, specifically the case of **RAMADHANI MBOYA MAHIMBO v. REPUBLIV** (supra) which underscores the significance of an unbroken chain of custody in establishing guilt beyond reasonable doubt.

In the upshot, I allow the appeal. I hereby quash conviction, set aside the sentence and order that the appellants **STEVEN ADRIAN, ELIA JULIAS, MESHACK KILATU** be released from prison forthwith unless they are being held for any other lawful cause.

It is so ordered.

E.I. LALTAIKA

JUDGE

10.05.2024

Court

Judgement delivered under my hand and the seal of this Court this 10th day of May 2024 in the presence of Mr. Daniel Lyatuu, learned State Attorney for the Respondent and the 1st, 2nd and 3rd Appellants who have appeared in person, unrepresented.

E.I. LALTAIKA

JUDGE

10.05.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA

JUDGE

10.05.2024