

IN THE HIGH COURT OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 126 OF 2023

*(Arising from Criminal Case No. 48 of 2022, in the District Court of Arumeru, before
Hon. G.A Mwankunga date 7th day of July 2022)*

KARIM MUSSA MGANA APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 09/05/2024 & 23/05/2024

Before: D. NDUMBARO, J:

The appellant Karim Mussa Mgana was convicted by the District Court of Arumeru (trial court) of the offence of stealing contrary to section 258 (1) and 265 of Penal Code Cap 16 RE 2002 and sentenced to three years and a half imprisonment.

It was claimed that Karim Mussa Mgana and four others on diverse dates from the year 2019 to 2021 at the Ngaramtoni area within Arumeru District in the Arusha Region stole 13 golden bracelets worthy of Tanzanian Shillings sixty-two million (62,000,000), five (5) golden rings worthy Tanzanian Shillings seven million (7,000,000), ten (10) pair of golden

earrings worthy Tanzanian Shillings ten (10) million (10,000,000), eight (8) golden neckless worthy Tanzanian Shillings twenty-six (26,000,000), cash Euro 300, United States Dollar 300, Kenyan Shillings 2, 200, white kitchen towel, multi colours bedsheet, two white pillow case, a pair of multi colours kitenge fabric, a kitenge dress, 4 silver pendants, two silver necklaces, a Rado watch case, a pink earrings case and Tanzanite ring the properties of one SIJA D/O MURO@BATCHU contrary to law.

Dissatisfied with the Judgment of the trial court, appealed before this Court against conviction and sentence by lodging a petition of appeal with 3 grounds as follows; -

1. That, the trial court erred in law and fact when convicted and sentenced the appellant on the case which was not proved beyond reasonable doubt.
2. That, the trial court erred in law and fact when convicted and sentenced the appellant based on co-accused confession.
3. That, the trial court erred in law and fact by failing to analyse evidence tendered in court.

The appellant sought to set aside conviction and sentence and move the Court to set the appellant at liberty. At the hearing of the appeal, the parties agreed to dispose of the matter by way of written submission. The

appellant Karimu Musa Mgana enjoyed the service of Advocate Fridolin whereas Godfrey State Attorney represented Republic.

On the first ground, the appellant argued prosecution evidence contradicted each other which lender the case not proved beyond reasonable doubt contrary to section 3(2) of the law of Evidence Act RE 2022. Faulted that, on page 16 of trial court proceedings testified to have stolen a watch worth 50 USD while on page 31 testified to have stolen more than one watch. On page 19 PW1 claimed to have gifted all the stolen items but on page 31 testified the bracelets were bought by her son. On page 16 PW1 testified that the accused was employed as a house boy from 2018 to 2022 but on page 17 was employed on 17 July to August 2021. PW1 on pages 17-18 testified the accused was arrested and sent to the police station on 14/11/2021, PW2 on page 22 testified to have reported the matter on 15/11/2022, PW3 testified that the accused was arrested on 16/11/2021 and PW5 on page 41 testified to have reported the matter on 13/11/2021.

The appellant faulted that, the trial court erred in law and fact when convicted and sentenced the appellant have been stolen silver items but PW1 never testified to have silver items. PW1, in cross-examination, testified that her phone, bag and key had been stolen but the said items

were never shown in the list of properties claimed to be stolen. In support of his argument cited the case of **Dickson Elia Msamba Shapwata and Another Vs R** Criminal Appeal No.92 of 2007 Court of Appeal Tanzania on page 7

The appellant further faulted that; the chain of custody was broken beyond repair. It was testified that the kitenge and white towel were forgotten in the parking and prayed to be part of stolen property, further inside the exhibit bag there was another bedsheet not on the list of the items stolen. Argued The variation creates uncertainty as to the evidence to be accorded in the required standard and brings suspicion in the brokerage of a chain of custody. In support of the argument cited a case of **Paulo Maduka and 4 others Vs R** Criminal Appeal No. 110 of 2007 pages 18-19

On the 2nd ground, the appellant submitted that he was convicted based on a co-accused confession. The appellant was mentioned in the first accused caution statement and convicted contrary to **section 33(2) of the Law of Evidence Act** Cap 6 RE 2022 that, the conviction of the accused person should not be based on confession of co-accused person. In support of the argument cited a case of **Asia Iddi Vs R** (1989) TLR 174 that, the conviction should not solely rely on the confession of co-accused.

The trial judgment on page 7 analyzed, the co-accused confession collaborated with victim PW1 evidence that the appellant had stolen property, but the victim did not see the appellant stealing the said property. The fact was also observed by the trial magistrate on page 5 of the judgement that, none of the witnesses them stealing.

On the third ground, argued trial court failed to analyze the evidence. The victim failed to identify and prove ownership of the stolen items. The trial court relied on evidence from an independent witness who was not brought before the court, who testified that the property belonged to the victim without PW1 proving the ownership of the said properties. The trial magistrate relied on recent possession without considering the fact that, for the doctrine to apply the PW1 must prove that the property belongs to her.

Based on the above arguments, the appellant argued, that the appeal had merit and pray to be allowed.

In reply, Mr Geoffrey informed the court that they did not intend to argue in this appeal.

Having gone through the evidence of the trial court and the appellants' submission drawn from 3 grounds of appeal,

On the first ground, this Court analyzed the evidence as to whether the prosecution evidence contradicted to create doubt. The court visited on pages 16 and 31 of the trial court proceedings whereby on page 16 PW1 testified two watches were stolen and on page 31 testified more than two watches were stolen but only two were found. On page 19 of the said proceedings testified to have bought two bracelets but on page 31 in cross-examination testified it was bought by her son. Further, the evidence of PW1, PW2 and PW3 as to the date when the accused was sent to the police station contradict. PW1 claimed to have reported the matter to the police station on 14/11/2024, PW2 on 15/11/2024 and PW3 on 16/11/2024. Further in cross-examination, PW1 testified that her phone, bag, silver item and the key had stoles the fact never been on the list of properties claimed to be stolen in the particular of the offence. these create uncertainty.

However, I found that there were no contradictions in the fact that the accused was employed by the victim from 2018 to 2022 and the accused left home in 2021 when claiming that his mother is sick. It is my view that the fact that he left with reasons that his mother was sick does not mean the employment relationship ends.

On the 2nd ground of the trial court proceedings, the argument that the appellant was convicted based on a co-accused confession has merit. It is my view that the fact that the victim failed to prove ownership of stolen items by providing receipts, especially on valuable items such as gold, tanzanite and silver creates doubt to warrant this court to rule out that, it is contrary to section 33 (1) of Evidence Act Cap 6 that;

*“When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons **is proved, the court may take that confession** into consideration against that other person”.* Therefore, this ground has merit.

On the 3rd ground, I agree with the submission of appellant that the victim did not establish ownership of the stolen item that belonged to her. It is my view that we would expect her to have a receipt, especially for valuable items such as gold, tanzanite and silver bracelets showing she has

bought the said items, or to call her son to testify that she bought them for her.

Any reasonable doubt raised by the accused needs to be cleared by the prosecution. in the celebrated case of Pascal Yoya @Maganga Versus Republic, Criminal Appeal No. 248 of 2017(Unreported), it was held that: -

"It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence.

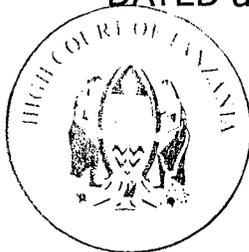
The evidence of witnesses contradicting each other, therefore given less weight before the Court. A contradiction of Pw1 Pw2 and PW evidence in a trial court proceeding on the item stolen, the date when the matter was reported to the police station and the date of arrest affects the credibility of the material substance of the case including the chain of custody. Slight doubt created benefit appellant if not proved by the prosecution. PW1 in the trial court proceeding claimed the appellant stole 2 watches worth 50 USD, but in cross-examination claimed more than two

watches. PW1 claimed to have reported the matter to the police station on 14/11/2024, PW2 on 15/11/2024 and PW3 on 16/11/2024. Those variations cannot be ignored and therefore the case is resolved in favour of the Appellant.

That being the case, I conclude that the offence was not proved in the required standard. I, therefore quash and set aside the judgment of the trial court on conviction and sentence imposed against the appellant. The appellant be released from prison unless lawfully held for any other lawful cause.

It is ordered accordingly.

DATED at ARUSHA this 23rd day of May 2024.



D. D. Ndumbaro
D. D. NDUMBARO
JUDGE OF HIGH COURT
23/05/2024