IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA SUB REGISTRY
AT DODOMA
CRIMINAL APPEAL NO. 72 OF 2022
(Originating from the Court of the Resident Magistrate for Singida in Criminal Case No. 129 of 2020)

REPUBLIC.....APPELLANT
VERSUS
JOYCE ADAM.....1ST RESPONDENT
MARIAM JACOB ..... 2ND RESPONDENT

JUDGMENT

Last order: 17/1/2024
Judgment: 23/2/2024

MASABO, J.:

Joyce Adaman and Mariam Jacob were jointly arraigned before the Court of the Resident Magistrate for Singida at Singida over four counts. In the first count, they were both charged with conspiracy contrary to section 384 of the Penal Code, Cap 16 whereas in the second and third counts they were jointly charged with theft contrary to section 258(1) of the Penal Code and in the last count they were charged with the offence of being armed with intent to commit an offence contrary to section 298 (d) of the same Act. The particulars of the counts were that, on 17th April 2020 at Matandani street Konkilangi Village, Iramba District in Singida region they conspired and stole one mobile phone, cash to tune of Tshs 660,000/= and 4.7 grams of gold properties of Makoye Bushu (PW2) and a mobile phone, Tshs 8,030,000/= and 5.2 grams of gold properties of Deborah Masunga (PW3). Further that,

on 18th April 2020, they were found at Nselembwe Village within Iramba District in Singida being in unlawful possession of housebreaking instruments to wit, a bunch of keys. When these charges were laid at their door, they all denied involvement hence a full trial after which they were both acquitted.

Aggrieved by the acquittal the Director of Public Prosecutions has knocked on the doors of this court with an appeal based on 5 grounds of appeal which I shall summarize as follows. **One,** the defense and the prosecution evidence were not properly evaluated. **Two**, the trial court erred in holding that the prosecution evidence was marred by discrepancies and contradictions. **Three**, the trial court misdirected itself in holding that there was no proof of ownership of the stolen mobile phones whereas the mobile phones were admitted in court and not objected to by the respondents. **Four,** the trial court erroneously omitted to make any order as to the exhibits received into evidence during the trial. **Five**, the trial magistrate wrongly stepped into the shoes of his predecessor without abiding by legal procedures.

Hearing of the application proceeded in writing and both parties were represented. The appellant was represented by Ms. Patricia Mkina, learned State Attorney whereas the respondents were represented by Mr. Juvenalis Rwegasira, learned counsel.

Submitting in support of the appeal Ms. Mkina consolidated the first and the 4th grounds of appeal and proceeded to argue that the trial court did not properly evaluate the defence and prosecution evidence. She argued that

the offence of stealing as constituted in the second and third counts were sufficiently proved. PW2, PW3, PW4, PW5, DW1 and DW2 were all in agreement that on the material date they were together and were having beer. There is also no dispute that DW1 and DW2 left the scene of the crime. They both admitted to have left the scene. PW2 and PW3 who were the victims stated that their mobile phones make LB7 and Nokia black in colour were stolen. According to PW4 and PW5, the respondents after being apprehended were searched and found in possession of the two mobile phones which were seized. A certificate of seizure was issued and admitted in court as exhibit P1. The stolen mobile phones together with other items were admitted as exhibited 2 collectively and their admission was not anyhow objected to by the respondents. Besides, although DW1 denied having been found in possession of the mobile phone, DW2 admitted that indeed DW1 was found in possession of such mobile phones. Thus, the denial by DW1 was just exculpatory.

The State Attorney added further that the conduct of the respondents and, in particular, their abscondment, proves that they stole the mobile phones. Thus, the acquittal was lucidly wrong. In support, she cited the provision of section 8 of the Evidence Act which states that facts that are not in issue but closely connected with the fact in issue are relevant. In the instant case, although the abscondment was not in issue, it was closely connected to the case hence relevant in proving that the respondents stole the alleged properties. She concluded that the appeal has merit because there was sufficient evidence that the appellants were at the scene of the crime. They

communicated and met with PW2 and PW3; they bought bears for PW2 and PW3; immediately after the incidence they left the scene and they were latter on found in possession of the stolen properties. All these proved the case against them beyond reasonable doubt.

On the second ground of appeal, it was submitted that as much as there were discrepancies and contradictions in the prosecution evidence, such discrepancies were minor and did not go to the root of the case hence excusable. In fortification, she cited the case of **Mohammed Said Matula v R** [19995] TLR 3 where it was held that minor discrepancies which do not go to the root of the case cannot weaken the prosecution's case. Amplifying the discrepancies and the effects thereof, Ms. Mkina argued that the fact that the respondents arrived together or separately at the crime scene is just a minor issue. It does not go to the root of the case and so is the duration during which PW2 and PW3 were admitted in hospital. Similarly minor is the discrepancies as to the person who said that PW2 and PW3 were drugged. None of these went to the root of the case or discredited the fact that the respondent was in the company of PW2 and PW3 and that they were found with the stolen mobile phones.

Submitting on the third ground, the learned State Attorney argued that the holding that the prosecution failed to prove the ownership of the phone was lucidly wrong because, much as DW1 denied to have been found with the phones, DW2 testified that DW1 was found in possession of the stolen phones. Also, PW1 and PW2 testified that the mobile phones belonged to

them as they had their lines and photos. Having submitted on these grounds, Ms. Mkina abandoned the fifth ground of appeal and concluded with a prayer that the appeal be allowed.

In reply, Mr. Juvenal Rwegasira submitted that the 1st and 4th grounds of appeal are with no merit as the court adequately evaluated the prosecution and the defense evidence. In the end the prosecution evidence was found contradictory and without coherence. For instance, PW1 stated that when she searched the respondents, she found them with Tshs 1,500,000/=, two mobile phones make LB7 and make Nokia and a bunch of keys while PW4 stated that they were found with two mobile phones and local and foreign currencies. These, he argued, were major contradictions and watered down the prosecution's case as they went to the root of the case. They also affected the credibility of the prosecution witnesses.

Furthermore, it was submitted that the prosecution failed to parade key witnesses who would have helped in proving its case. One of such witnesses is the Government Chemists who could have proved that the victims were drugged. The omission made the case fallacious. In fortification of his submission as to the duty of the prosecution to parade the material witnesses, he cited the case of **Denis Leonidas vs Republic** Criminal Appeal No. 52 of 2021 High Court at Mwanza, **Peter Mwafrika vs the Republic** Criminal Appeal No. 413 of 2013 CAT and **Aziz Abdallah v Republic** [1991] TLR 71 where it was stated that it is the duty of the prosecution to call all the key witnesses.

On the second ground of appeal, it was submitted that the discrepancies evident in the prosecution's evidence go to the root of the case. For instance, PW2 stated that they were admitted in the hospital for two days that is from 18th to 20th April 2020 whereas PW6 stated that PW2 and PW3 appeared at the police station on 18th April 2020 the day on which the respondents were arrested. Also, PW2 and PW3 stated that it was PW7 who told them that they were drugged whereas PW7 told the court that the victims were the ones who told him that they were drugged. These contradictions are major and go to the root of the case. He then cited the case of **Munziru Amri Mujibu and Dionizi Rwehabura Khakaylo vs R Criminal Appeal No.** 151 of 2012, Court of Appeal of Tanzania (unreported). On the 3rd ground, it was submitted that the appellant's averments are misconceived and baseless. The duty of proving ownership of the mobile phones rested on the prosecution and not the defence. To the contrary, the prosecution witnesses just referred to mobile numbers and photos as things identifying the mobile phones but they never revealed such numbers in substantiation of their case. In the foregoing, it was submitted and prayed that the appeal be dismissed. The appellant did not rejoin. Therefore, this marked the end of submissions.

I have considered the submissions by both parties alongside the trial court proceedings and I am now poised to determine the appeal. Following the abandonment of the fifth grounds of appeal I am left with 4 grounds for determination. Save for the fourth ground in which the appellant has challenged the trial court's omission to make an order regarding the exhibits admitted during trial as evidence, the rest of the grounds of appeal revolve

around two issues for determination, namely one at mid question namely whether the prosecution and the defense evidence were properly evaluated and two, whether the prosecution proved its case.

In determining these two questions I am implicitly required to navigate through the evidence on record, reevaluate it and make an independent finding. I will do so mindful that this is a first appeal and as a matter of law and principle it is akin to a rehearing. I am duty bound, as a first appellate judge, to reevaluate the evidence on record and make an independent finding. As instructively held by the Court of Appeal in the case of **Galous Faustine Stanislaus vs Republic** (Criminal Appeal 2 of 2009) [2011] TZCA 82 TanzLII, the first appeal is in the form of a re-hearing and the judge/magistrate must consider and re-evaluate the entire evidence and arrive at his conclusions of fact.

This being the case, I have scanned through the trial court record to see what transpired. As stated earlier, the respondents were jointly charged with four counts and when the same were read to them they both denied. When the trial commenced, the prosecution paraded 7 witnesses and tendered some exhibits. The evidence drawn from these witnesses is to the effect that, the offense happened on 17/4/2020. The complainants who are PW2 and PW3 were a married couple. They were residing in a rented room at PW5's guest house. On that day, the respondents went to the guest house looking for accommodation. They met PW5 who rented them a room and introduced them to PW3. After being introduced to PW3, they told her that

they were dealing in mines a business which PW3 and her husband were also doing and after a long conversation they planned to cooperate. By then, PW3 was in possession of Tshs 8,030,000/=, 5.2 grams of gold, and a small phone make Nokia.

Excited by the potential business cooperation, PW3 phoned PW2 who was away from home and notified him of the guests. When PW2 came back in the evening at around 19hrs, he found PW3 in the company of the respondents while drinking beer. He joined them and they all continued to drink beer and had dinner together. By 22 hours they were still drinking beer. Later on, PW2 and PW3 became unconscious and remained so until the next day when they finally regained their consciousness and found themselves in hospital and without their precious items. All of them had vanished. PW2 had lost his phone make LB7, Tshs 660,000 and 4.7 grams of gold and PW3 had lost her Tshs 8,030,000 shillings, 5.2 grams of gold and her small phone make Nokia.

It turned out that, the respondents drugged them and locked them in their room while they stole all the items above. In the very early morning of 18/4/2020, they hurriedly left the guest house and headed to Shelui. Meanwhile, PW5 noticed that some people were heavily snoring in the complainant's room. With the assistance of PW4 who is also a militia, they broke into the rooms where they found both complainants unconscious with foam oozing from their mouths. They rescued them and took them to hospital. Meanwhile, PW4 went in pursuit of the respondents at Shelui where

he managed to apprehend them as they were boarding a passenger bus. Upon apprehending them, he took them to Shelui police station where they were searched by PW1, PC Zawadi. During the search, they were found in possession of the stolen goods. The second respondent was found in possession of Tshs 500,000/=, bunches of keys and foreign currencies and the first respondent was found with Tshs 1.5 million, one black smartphone LB7, a Nokia phone black in color. The items were seized. The certificate of seizure issued was admitted in court as Exhibit P1 and the items seized were admitted as exhibit P2 collectively.

Testifying as DW1 and DW2, the respondents denied the allegations. While they admitted to have visited Mtandani, Konkilangi village and to have met PW3 and PW5, they stated that they did not rent a room at PW5's guest house as they returned to Shelui on the same day. They also denied having been found with the stolen items.

Back to the grounds of appeal, much as Ms. Mkina expressed to have consolidated her submission for the first and fourth ground, her submission was solely in support of the first ground. In view of this exclusivity, I have been made to believe that this ground was silently abandoned and I will therefore not dwell on it just like the fifth ground, which was expressly abandoned.

From the submission in support of the first, second, and third grounds of appeal which I have to determine, it would appear that the respondent's

disgruntlement concerns the acquittal orders in respect of the second and third counts of theft. Ms. Mkina is of the firm view that the prosecution's case was adequately proved and the acquittal was, therefore, lucidly wrong. Inversely, she made no complaints regarding the first ground on conspiracy as well as the fourth ground on being found with house breaking items implicitly suggesting that the acquittal in these two counts was in good order. I will, consequently, confine myself to these two counts. As per the evidence above summarized, there was no dispute that the respondents visited Mtandani, Konkilangi village and while there they met PW5 and PW3. The allegation that the respondents slept at PW5's lodge on the fateful night was refuted but having assessed the evidence, I have found this fact to have been proved through the evidence of PW1, PW2, PW3, PW4 and PW5 which outweigh DW1 and DW2's exculpatory testimonies. What remains unresolved is whether they stole the items above listed.

From the above-summarized record, the evidence in support of these two counts was mainly twofold, the first being the undisputed fact that the respondents were at the scene and met with the victim. The second is the testimonies of PW1, PW2, PW3, PW4 and PW5 from which the doctrine of the doctrine of recent possession is inferred. Ms. Mkina has argued that these pieces of evidence knitted together provided solid evidence sufficient to convict the respondents. Mr. Rwegasira, on the other hand, held a strong view that the proof rendered was materially wanting and incapable of warranting or sustaining a conviction as there were contradictions between

the prosecution witnesses and the allegedly stolen items were not properly identified.

In resolving this contention, I have found the decision of the Court of Appeal in **Kadumu Gurube vs Republic** (Criminal Appeal 183 of 2015) [2017] TZCA 217 enlightening. In this case, just like the case hand, the identification of the stolen items and the doctrine of recent possession were at issue. The Court instructively stated that;

> It is elementary that a court may presume that a man in possession of stolen goods, soon after the theft, may be implicated for theft on the doctrine of recent possession. The law on the subject is well settled and, in the unreported Criminal Appeal no. 56 of 1992 - **Mwita Wambura Vs. The Republic,** this Court laid down four prerequisites for the invocation of the doctrine:
>
> > *"1. The stolen property must be found with the suspect;*
> > *2. The stolen property must be positively identified to be that of the complainant;*
> > *3. The property must be recently stolen from the complainant and;*
> > *4. The property must* constitute the subject of the charge."

Guided, I have examined the record in ascertainment of the 4 prerequisites. Starting with the first prerequisite, the evidence available is that of PW1 who conducted the search, PW5 Penina who witnessed the search as an independent witness, the exhibit receipts and the certificate of seizure (Exhibit P1) and the stolen items. The certificates of seizure were signed by

respondents in acknowledgment that indeed the items were retrieved from them. Although in their testimonies both respondents denied having been found in possession of such items, the above evidence was not controverted in cross-examination and the denial was merely an afterthought and with no merit. The first prerequisite is, therefore, found to have been established. The third and fourth prerequisites were also credibly established. The evidence on record is prominently to the effect that the incident happened on the night of 17/4/2020 and the respondents were found with the items in the morning hours on 18/4/2020. Thus, it was quite recent. Also, the two mobile phones, the cash and the bunches of keys were all subjects of the charges against facing the respondents hence relevant.

Turning to the identification of the stolen item which is the second prerequisite, the complainant who claimed ownership of the seized items had an opportunity to identify them. Before being presented with the money and the phone for identification PW2 described his phone as LB7. He stated further that:

> My money Tshs 660,000/ were in 10,000 notes @. I can identify the phone as it has my line-voda it is black and it has my pictures.....
> I can identify the money as they were Tshs 10,000/= notes.

Thereafter, the prosecutor prayed for PW2 to identify the items. The prayer was granted, and the trial magistrate just recorded:

> "PW2 is availed the phone LB7 and identifies it to the court, he also identifies the keys thereof."

On her part, PW3 described her stolen items in the following terms:

> "I had a sum of 8,030,000/ all in 10,000/= notes. ....
> I can identify my phone- it is black, it has a broken screen,
> but also it still has my line in it Vodacom-0764-484041."

After this description, she was furnished with the exhibits for identification. Just as for PW2, the record does not provide the details of what transpired after PW3 was furnished with the mobile phone for identification. All what the proceedings contain is a simple summation by the trial magistrate stating that:

> "PW3 identifies the keys, her phone, and the facts it has.'

In the circumstances, I have asked myself if the money and the phone were properly identified as submitted by the learned State Attorney. While contemplating this question, I was once again drawn to the finding of the Court of Appeal in the case of **Kadumu Gurube vs Republic** (supra) where, just as in the present case, the complainant had to identify the stolen mobile phone. All she stated was that the phone was hers as when it was switched on prior to the trial, it displayed her name. The phone was, however, not switched-on during the trial and the photos were not presented to the court's viewing. When the appeal went to the Court of Appeal it held that the description was insufficient. It stated;

> Thus, in the peculiar setting of the matter at hand, the prosecuting officer ought to have led PW1 to explain how and when she installed the name "Mama Baraka" in her telephone device. Additionally, she ought to have been led to physically demonstrate the detail to the effect for the court's viewing. To

> the extent that the alleged detail that the phone displayed PWI's name was not physically exhibited in court, the claim that the phone was PW1's belonging is not of any material significance.

Similarly in this case, the prosecutor ought to have led PW2 to show the denomination of the money received in Exhibit P2 collectively and to show to the court's viewing that his phone was make LB7 and had the Vodacom line or number in the said phone but this was not done. PW3 had also to be led to demonstrate that her phone was nokia, black in colour, with a broken screen and a Vodacom number 0764-484041 and the record had to clearly demonstrate so but it did not. Also, as argued by the respondent's counsel, no other form of proof of ownership of the phones, such as a receipt for the purchase of the phones, was presented. The sole evidence connecting the complainants to the items above was the identification above discussed. In the foregoing and on the strength of the authority above, it is obvious that the allegations that the money and the mobile phones retrieved from the respondents belonged to PW2 and PW3, remained unproved.

The argument by Ms. Mkina that the evidence on record warranted a conviction fails because, as stated in **Mohamed Hassan Said v. R,** Criminal Appeal No. 410 of 2015, Court of Appeal of Tanzania (unreported), much as:

> [T]he possession by the appellant of the property proved to have been very recently stolen may support the charge. But in order for the principle to apply, the one who claimed ownership of that property, must show through evidence that the property belonged to him."

The failure by the prosecution to led PW2 and PW3 to substantiate their ownership of the allegedly stolen items was a serious omission with fatal consequences to the case. Needless to reiterate Mr. Rwegasira's submissions that, the duty to establish ownership rested solely on the prosecution not the defence.

In the advent, I am settled in my mind that the prosecution case was not proved beyond reasonable doubt against the respondents. I consequently find the appeal with no merit and, accordingly, uphold the trial court's judgment and dismiss the appeal in its entirety for want of merit.

DATED and **DELIVERED** at **DODOMA** this 23rd day of February 2024.

J. L. MASABO

JUDGE