IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 4 OF 2023

(From the District Court of Masasi at Masasi, in Criminal Appeal No. 5 of 2023, Originated in Criminal Case No. 33 of 2023 in the Primary Court of Masasi District, at Lisekese).

SAMWELI AJALI AJALI ---------- APPELLANT

VERSUS

ELLAI ANAHERI MTUA ---------- RESPONDENT

JUDGEMENT

Date of last order: 19.02.2024
Date of Judgement: 05.04.2024

EBRAHIM, J.:

In this second appeal Samwel Ajali Ajali (the appellant) appeals against the decision of the District Court of Masasi District, at Masasi, in Criminal Appeal No. 5 of 2023. The matter originated in Criminal Case No. 33 of 2023 in the Primary Court of Masasi District, at Lisekese. The background

of this appeal according to the record can be briefly narrated as follows;

the respondent was the complainant before the Primary Court and he instituted a criminal case against the appellant. The appellant was charged with the offence of theft contrary to **sections 258 and 265 of the Penal Code, Cap. 16 R.E 2022**. It was the respondent's case that the appellant was **"mpiga ganji"** (middle man) calling for customers for his shop. The respondent had two workers. On 07.10.2022 the respondent realized that his office was not doing good. Upon asking one of his workers who disappeared while the case was still on going, informed him that he was give money to the appellant who directed them to transfer the money in his (appellant) phone. The amount deposited ranged between TZS 80,000/- and TZS. 200,000/=. The respondent confronted the appellant who agreed to have been taking the money and that it has been going on for four months. It was discovered therefore that the total value taken by the appellant was TZS 6,000,000/-. When the respondent told him that he would report the matter to the police, the appellant surrendered his motorcycle to the respondent

which had a value of TZS. 1,280,000/=. As for the remaining amount, on 09.10.2022 they entered into an agreement for payment before the Ward Executive Officer where it was agreed that the remaining amount shall be paid by the appellant's grandfather on 31.11.2022. The appellant defaulted, hence the instant appeal.

On the other side, the appellant denied the allegations but admitted the fact that his grandfather promised to pay the remaining amount on 31.11.2022.

In the end, the Primary Court found that the respondent failed to prove his case beyond reasonable doubt; and the appellant was therefore acquitted.

Aggrieved, the respondent successfully appealed to the District Court where the first appellate court quashed the decision of the Primary Court and the appellant was convicted and sentenced to serve a term of five (5) years imprisonment.

Dissatisfied by the decision of the first appellate court, the appellant appealed to this court raising five grounds of appeal as follows;

1. *That, the agreement in the ward executive office was made under intimidation;*
2. *That, the appellate court erred both in law and facts by allowing the appeal under weak evidence;*
3. *That, the appellate court considered the affidavit of the 2nd respondent which was totally cooked to be used as evidence in court of law;*
4. *That, in the primary court of Lisekese, the appellant (now the respondent) failed to produce any documentary evidence when required to do so.*
5. *That, the documents were forged after the decision of the Primary Court to be used as a sword in appellate court (District Court).*

At the hearing, both parties appeared in person, unrepresented.

The appellant prayed for the court to consider his grounds of appeal and argued before the court that in law for the for the accused to be found guilty he must be found with what he has been accused of. He argued further that the respondent said that it was the houseboy who gave money to the appellant but the said houseboy was not brought before the court to prove such contention. Speaking about the agreement for payment that he admitted to have signed on 09.10.2022, he said people made him sign but he did not have a witness. More so,

the agreement was not a legal document because it was not prepared by a lawyer.

Responding on the arguments advanced by the appellant, the respondent told this court that his houseboy had sworn an affidavit before a lawyer explaining how he deposited money to the appellant's phone. As for the payment agreement, he responded that the same was signed at the Ward Executive Officer's office and there were seven people from the appellant's side. He added that the **WEO (SM3)** testified before the court and the appellant handed his motorcycle as part of the payment.

Rejoining, the appellant came up with another argument that they entered into an agreement after the case has been planted on him and he was forced to surrender the motorcycle as part payment.

Having considered the grounds of appeal and the parties' oral submissions, it is my considered view that this appeal can be determined by resolving the following issue:

(i.) Whether the respondent proved the case by adducing sufficient evidence to ground the conviction of the appellant.

Starting with the third ground which is a complaint about the affidavit **(exhibit SMK2).** The appellant argued that the first appellate court relied on the said affidavit as evidence to convict him. I went through the said affidavit (SMK2) of one Yonick E. Mlelwa which was among the evidence used to convict the appellant because he was mentioned to be given the stolen money.

Section 196 of The Criminal Procedure Act [CAP. 20 R.E. 2019] provides thus;

> *"Except as otherwise expressly provided, all evidence taken in any trial under this Act shall be taken in the presence of the accused, save where his personal attendance has been dispensed with."*

The law is therefore clear that evidence has to be taken in the presence of an accused and not by filing an affidavit. The relation all is provided under **section 207 of The Criminal Procedure Act [CAP. 20 R.E. 2019]** that after adducing his evidence, the witness is supposed to be examined

by the parties. Therefore, the admission of exhibit SMK2 was a fatal irregularity. I therefore expunge exhibit SMK2 from the court record.

On the 1st, 2nd, 4th, and 5th grounds of appeal, the appellant is complaining on the agreement **(exhibit SMK1)** that he was forced to sign the agreement (exhibit SMK1)and that the same was forged after the decision of the Primary Court. Thus, the decision of the first appellate court based on the weak evidence and the respondent failed to tender any documentary evidence to prove his claim.

Dissapationately, I perused through the trial court records with a keen eye on the prosecution's case. The records reveal that after the had respondent had told the appellant about the stolen money TZS. 6,000,000/=, the appellant agreed to have taken the money. They went further by entering into an agreement for payment at the Ward Executive Officer's office where the appellant surrendered to the respondent his motorcycle valued at TZS. 1,280,000/=. The remained balance to be paid by the appellant was TZS. 4,720,000/=. Again, according to the records the appellant promised to pay the remained balance on 31.11.2022 as per **exhibit SMK1** which was signed on

09.10.2022 which was witnessed by **SM2** and **Mussa Manyerere.** Moreover, the appellant in his defence admitted that his grandfather had promised to pay the remaining amount on 31.11.2022. Furthermore, exhibit SMK1 was tendered by SM3 and it was admitted at the trial court before the delivery of the decision. Again, the appellant during the prosecution case, neither raised the issue of being forced to sign the said agreement nor torture. He did not even cross-examine SM3 an act which in the eyes of the law means that he has accepted the truth of what the witness said. Therefore, bringing this issue at this stage of appeal is an afterthought and I find that there was no any forgery of the said agreement as claimed by the appellant and I dismiss the second ground of appeal.

I am inspired by the holding of a persuasive case of **Yoseph s/o Timotheus Mapunda vs Republic** (DC Criminal Appeal Case No. 53 of 2022) [2023] TZHC 16090 (14 March 2023) where it was held that;

> *"Herein the gist of the testimony of PW2, PW3 and PW4 was hinged on oral confession by the Appellant, but the later never asked any question. Therefore, to plead torture on defence or at this stage, is obvious an afterthought."*

I further subscribe to the principle illustrated by the Court of Appeal in the cited case of **Martin Misara vs Republic** (Criminal Appeal 428 of 2016) [2018] TZCA 318 (13 December 2018) where it was held as follows:

> *"It is the law in this jurisdiction founded upon prudence that* ***failure to cross-examine on a vital point, ordinarily, implies the acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought...*** [emphasis is mine].

From the above analysis of evidence from the record, I find that there is damning evidence tendered by prosecution witnesses which proves the guilty of the appellant. The overwhelming prosecution evidence leaves no doubt that the appellant stole the respondent's money. Owing to the above observations, I find the 1st, 2nd, 4th, and 5th grounds of appeal to be untenable and I dismiss them.

That being said, I uphold the conviction entered by the first appellate court.

However, I have observed and raise a concern regarding the imposed sentence of five years. I am mindful of the position of the law that

sentencing is the province of the sentencing court. However, the Court of Appeal had in the case of **Silvanus Leonard Nguruwe V Republic** (1981) TLR 66 illustrated the factors upon which can necessitate an appellate court to interfere there with. Those factors are:

1. *The sentence imposed was manifestly excessive or*
2. *The trial judge in passing sentence ignored to consider important matter or circumstances which he ought to have considered.*
3. *The sentence imposed was wrong in principle.*

I have noted that the first appellate court considered the factor that the appellant has admitted to have stolen the money as per exhibit SMK1. However, in considering the fact that the purpose of sentencing is to rehabilitate and that the appellant in his mitigation said he has three children who are dependent on him; I find that two years in jail would be enough to teach him a lesson. In the circumstances, therefore, I reduce the sentence from five years inprisonment to two years.

Thus, the appeal succeeds only to the extent that the sentence is reduced from five years to two years imprisonment from the date of sentencing at the appellate court.

Ordered accordingly.

R.A Ebrahim

JUDGE

Mtwara
05.04.2024