

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

(DC) CRIMINAL APPEAL No. 55 OF 2023

*(Originating from the decision of B.M. Ahmed, SMR, Mlele District Court in
Criminal Case No. 07 of 2023)*

BETWEEN

JOSEPH s/o THOMAS @ KASHINDYE

VERSUS

THE REPUBLIC

Last order: March 11th 2024
Judgement: March 13th 2024

JUDGMENT

NANGELA, J.:

The appellant Joseph Thomas @Kashindye together with one Kumba s/o Mwigula were arraigned before the District Court of Mlele at Mlele, Katavi Region facing two counts, namely: (a) personating a public officer c/s 100(b) and 35 of the Penal Code, Cap.16 R.E 2022 and (b) Obtaining money by false pretences c/s 302 of the Penal Code, Cap. 16 R.E 2022.

The particulars of the charge were such that on the 12th day of October 2022 at Majimoto Village within Mlele District the duo did, with intent to defraud falsely represented to Oscar s/o Christopher and Aniseth s/o Isdory as persons employed in the public service as investigators from Tanzania National Park

(TANAPA) while knowing it was not true and did handcuff the name persons by virtue of their claimed employment titles. It was also the particulars of the second count that based on the same false pretence, the Appellant herein and the named Kumba Mwigulu did, with intent to defraud obtain from the Said Oscar s/o Christopher and Aniseth s/o Isdory a total of TZS 600,000.

At the hearing of the case before the District Court, the Appellant herein and the said Kumba s/o Mwigulu were found guilty of the two counts they were charged with and each was sentenced to serve a 5year's jail term in respect of each count, a sentence which was to run concurrently.

Aggrieved by the conviction and sentence, the Appellant preferred this appeal before this court challenging his conviction and sentence. The other co-accused Kumba s/Mwigulu did not appeal. The appellant has raised five grounds in his appeal which he requested this court to consider and set him free. The grounds he raised in this appeal are as follows:

- (i) That the evidence procured by the prosecution was of persons from the same family.

(ii) That the trial magistrate failed to consider the Appellant's defence of alibi since, on the date when the crimes were alleged to be committed the Appellant was in a lock-up at Inyonga Police Station.

(iii) That, the trial court erred at law by admitting the evidence of Pw-4 who failed to prepare identification parade.

(iv) That, there was no evidence showing that the Appellant was arrested with money or handcuffs mentioned in the charge sheet.

(v) That the trial magistrate erred in law for not summoning one Simon s/o Luhende and motorist (Bodaboda) to support the evidence of Pw-1, Pw-2, and Pw-3.

On the 11th of March 2024 the appeal was called on for its hearing. The Appellant appeared in court unrepresented. This court took note in its immediate presence that the Appellant is also an epileptic, a fact which was confirmed by the prisons officers who brought the Appellant to the court. The Respondent (The Republic) enjoyed the services of two learned State Attorney's namely, Ms. Nyangawa and Frank Mwigune.

The appellant had little if any to say to the court only that he requested that his grounds of appeal be considered, and he be set free. In response, Mr. Frank Mwigune learned State Attorney, told this Court that the Republic want not interested in opposing this appeal. He therefore supported it though not based on the Appellant's grounds of appeal but on the ground that there is variance on the evidence offered at the trial court.

Mr. Mwigune submitted that while it is alleged that the incidents forming the basis of the charge took place on 12th day of October 2022 and PW-1, PW-2, and PW-3 attested to that fact, the reporting of such alleged offences to the Police was delayed for almost 6 days, a fact which creates doubt given that the accused was arrested even before the offence was reported. Based on that fact, the learned State Attorney submitted that, on the Republic's side, there is nothing on record as evincing what happened in between the arrest and the reporting.

Mr. Mwigune relied on the decisions of the Court of Appeal in the case of **Hassan Hussen vs. Republic**, Criminal Appeal No.41 of 2022 (CAT) (unreported), as well as the case

of **Ramson Peter Ondile vs. Republic**, Crim. Appeal No.84 of 2021 (CAT) (unreported). He told this court that, in both cases, it was emphasised that one should established how, when, and why was the accused arrested but in this present appeal before the court such information is lacking. For that matter, Mr. Mwigune urged this court to allow the appeal.

I have looked at the grounds of appeal, the proceedings, and the judgment of the trial court. I have as well considered the submissions made by Mr. Mwigune. As I intimated earlier hereabove, the Appellant is a kind of person suffering from epileptic fits, a fact which manifested itself even in the very presence of this court and was further verified by the prison officers who brought him to the court. That fact notwithstanding, should not be the real basis for allowing this appeal.

As correctly submitted by Mr. Mwigune, the learned State Attorney, the grounds advanced by the Appellant are not cogent enough to warrant this court allow his appeal. Rather, the reason for allowing this appeal is the fact that, although the incident alleged to constitute the offences alleged to have took place on the 12th of October 2022 as per the charge sheet and

the testimonies of Pw-1, Pw-2 and Pw-3, the testimony of Pw-4 does show that no reporting was made anywhere until the 17th of October 2022. No reasons were ever stated why there was such a lapse of time to report the matter to the Police.

Worst still, is the fact that by the time the incidents got reported to the Police, the Appellant was already in the custody of Police. Who arrested him, how and when was such arrests made to the extent of locking up the alleged offenders at the police lock-up are all matters which do not feature anywhere in the evidence offered to the trial court. On that account, it was not safe to convict at all and supporting this appeal as what Mr. Mwigune did was imperative given the circumstances.

In the earlier cited case of **Hassan Hussen vs. The Republic** (supra) (on page 11 thereof) the Court of Appeal observed as follows, concerning a delay in arresting an accused person:

"The delay in arresting the appellant leaves a lot to be desired. If the Appellant was well known to Pw-1, Pw-2 and Pw-3 and if he was recognized at the scene of crime, how comes it took a month to arrest him? Worse still, there is no evidence from the

prosecution on how and for what the appellant was arrested."

The above observation made by the Court of Appeal does also apply to the appeal at hand. Throughout the testimony offered before the trial court nowhere is it stated when exactly the appellant was arrested and how was he arrested. Worse enough Pw-4 told the trial court that the incident was reported on 17th of October 2022, while at that time the appellant was already in the custody of Police.

The delayed arraignment of the appellant was nowhere dealt with by those who testified before the trial court and the trial court never engaged its mental faculties to at extent either. The issued of unexplained arrest and delayed arraignment of an accused who is known to have committed a crime surfaced in the case of **Ramson Peter Ondile vs The Republic**, Crim. Appeal Case No. 84 of 2021 (unreported).

In that case the Court of Appeal was irked by such a fact, and this can be observed from the unreported typed judgement of the Court at page 12-13 where the Court stated as follows:

"Another thing which has troubled our mind is the delay to arraign the appellant in court for the said offence... There was ... no explanation why there was such a delay. In fact, there was no evidence to show when and how the appellant was arrested and what he said after the arrest."

Essentially, immediate reporting and arrest of an accused person is an important aspect which assists in not only preventing other possible criminal conducts from being perpetrated by the same offender, but it is also safe to the victim of the crime. Moreover, it helps the investigating machinery to switch on its gears immediately and if the criminals are found, the police will make arrests.

It is also a fact that courts are inclined to believe evidence relating to a prompt reporting of a crime and immediate arrest of the culprit rather than a delayed reporting and delayed arrest. Such may be deduced from the case of **Jafari Mohamed vs Republic** (Criminal Appeal 112 of 2006) [2013] TZCA 344 (15 March 2013) where the Court of Appeal observed as follows:

"Thirdly, from the evidence of both PW2 Victoria and PW3 Insp. Abubakar, PW2 Victoria **reported the**

incident to the police immediately and mentioned the appellant, leading to his instant arrest that night. For these reasons, we have no hesitation in dismissing these grounds of appeal.”
(Emphasis added).

Delayed reporting, however, is the opposite of the above and that is what made the same Court in the cases of **Ramson Peter Ondile** (supra) and **Hassan Hussien** (supra) to allow the two appeals. In my view, looking at the present appeal before me there are such cloudy or foggy circumstances which leaves a lot to be desired. As such, even if the trial court made a finding that the evidence of Pw-1, Pw-2 and Pw-3 was watertight it is my conclusion that trial it was not as the trial court magistrate misjudged.

Based on the above reasoning that I do share the views and submissions of the learned State Attorney that this appeal should be allowed. With that in mind, this court settles for the following orders:

- (i) That the appeal is hereby allowed.
- (ii) The conviction of the appellant quashed, and the sentence passed by the trial court against him set aside.

(iii)The appellant should immediately be released from prison and be free to integrate with his family.

(iv)Given the health condition of the appellant which this court observed when he appeared before me, the prison warden is directed to liaise with his relatives and ensure that his release and integration with his family members is made possible for the sake of his safety.

It is so ordered.



DATED ON THIS 12th DAY OF MARCH 2024

A handwritten signature in blue ink, which appears to read "Deo Nangela", is written over a horizontal dotted line.

DEO JOHN NANGELA
JUDGE