

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

CRIMINAL APPEAL NO. 42 OF 2023

*(Originating from the criminal case No. 10 of 2022 in the District Court of Karatu by
Honorable E. E. MBONAMASABO- PRM)*

ANDREA THEOPHIL1ST APPELLANT
EMANUEL PASKAL @ EMA KIBAKA2ND APPELLANT
VERSUS
THE D.P.PRESPONDENT

JUDGMENT

01/11/2023 & 21/12/2023

GWAE, J

In the District Court of Karatu at karatu (hereinafter trial court), the appellants, Andrea Theopil and Emmanuel Paskal @ Ema Kibaka (herein 1st and 2nd appellant respectively) and another person one Antony Lenga not before this court were charged and tried of criminal offences. The offences in the charge against the appellants and another were in three counts.

The offence in the 1st count was against the all accused persons now the appellants and that other person was on house breaking contrary to section 294 (1) of the Penal Code, Cap 16, Revised Edition, 2019. The offence in the 2nd count was stealing c/s 258 and 265 of the Penal Code

(supra) against the appellants and that another. And in the 3rd count the offence was being found in unlawful possession of property suspected to have been stolen or unlawfully acquired c/s 312 (1) (b) of the Penal Code (supra) and it was only against the said Antony Lenga.

It was the prosecution allegations that, the on the 30th day of November 2012 at noon hours at Sumawe Street within Karatu District in Arusha Region, the appellants and another jointly and together did break the house of one Fatuma d/o Juma @ Mzalau. That, after such breaking they stole one Television make Hisense worth Tshs. 500,000/= one watch make smart worth Tshs. 100,000/= and cash money Tshs. 25,000/= all stolen properties worth Tshs. 625,000/= the lawful properties of the said Fatuma Juma @ Mzalau.

The substance of the prosecution evidence that, warranted the trial court to find the appellants guilty as charged was as follow;- that, after incidence, on the 6th day January 2022 the police officer, PW3 received an information where the stolen TV and other items suspected to have been stolen or unlawfully obtained were kept. After such information, police officers (PW3, PW5) proceeded to the house of the 2nd accused, Antony Lenga not party to this appeal at Gongali area. It is the version of the prosecution side that, said Antony Lenga was apprehended and on interrogation, he admitted being in possession of the said TV (PE4) and

revealed that, the same was sold to him by the 1st appellant. The police seized the TV (PE3) and filled the emergency certificate of seizure (PE2) and then arrested the 1st appellant who subsequently mentioned the 2nd appellant on interrogation with the police.

That, the 1st appellant also led police officers (PW4) to where the house breaking and theft occurred where they met the victim's husband (PW2) and the 1st appellant was able to show police how they broke open the door and stole from therein.

Being satisfied with the evidence adduced by the prosecution, the trial court found the 1st and 2nd appellant guilty and convicted them of the offences in the 1st and 2nd count and acquitted the said Antony Lenga of those offences. However, the guilt of the said Antony Lenga was found to have sufficiently been proved in respect of the 3rd count since he failed to prove that, he had no knowledge if the TV was unlawfully acquired by the 1st appellant whom he alleged to have sold it to him.

During defence, the appellants and that other person claimed their innocence for the offences leveled against them. Upon conviction, the trial court sentenced the appellants to five (5) and three (3) years jail for the 1st and 2nd count respectively and the imposed sentences were ordered to run concurrently. For the said Antony Lenga who was the 2nd accused was

sentenced to pay a fine at the tune of Tshs. 500,000/= or serve eight months' imprisonment.

Feeling aggrieved by the trial court's conviction and sentences, the appellants have knocked the doors of this court armed with fifteen grounds of appeal, which in essence they are four grounds of appeal as the same revolve in one or other grounds, these are;

1. That, trial court erred in law and fact by convicting the appellants on the count of house breaking while there was no evidence of house breaking
2. That, the trial court erred in law and fact for convicting the appellants while the TV was not properly identified
3. That, the trial court erred in law and fact when convicted and sentenced the appellants while they were not given an opportunity to comment on admissibility of exhibit P3 and P4
4. That, the trial court erred in law and fact when convicted and sentenced the appellants while the case was not proved beyond reasonable doubt

On 1st day of November 2023 when this appeal was called on for hearing before me, both appellants appeared in person, unrepresented whilst Ms. Alice Mtenga represented the Director of Public Prosecutions (DPP). The parties argued the appeal orally.

Arguing for the appeal, the 1st appellant prayed for court's adoption of his grounds of appeal and receipt of his written submission. However,

he briefly submitted that he did not lead to the arrest of the then 2nd accused, Antony Lenga neither he was found in the alleged possession of the stolen TV. He finally argued that, he did not commit the offence of house breaking.

On his part, the 2nd appellant supported his appeal by stating that he did not commit the offence that is why no prosecution witnesses who named him. He also argued that if truly he was named by the 1st appellant, the 1st appellant could not deny to have named him during trial. He added that, there was no tangible evidence that, the 1st appellant named him like the 1st appellant's cautioned statement naming him. He finally prayed for receipt of his statement.

On the other hand, Ms. Mtenga strongly objected the appeal against the 1st appellant. She however supported the appeal for the 2nd appellant. She then proceeded arguing that, both conviction and sentence meted against the 1st appellant were proper as the evidence adduced by DW2, Antony confessing to have bought the stolen TV, (PE4) from the 1st appellant is credible. The learned state attorney went on arguing that, the testimony of DW2 is corroborated by evidence adduced by PW3 when the 1st appellant led the police to the scene of crime and showed how they perpetrated the offences to PW1

Ms. Mtenga also argued that, the 1st appellant did not ask any question to the important issues raised by the prosecution during trial. She then invited the court to the case of **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010 (unreported-CAT) at Arusha.

It was her further submission that, there is abundant evidence incriminating the 1st appellant including the evidence adduced by the victim, PW1 who produced the receipt of the TV (PE1) without any objection from the 1st appellant.

Both appellants did not rejoin to the respondent's oral submission and that is what briefly transpired before the trial court and before this court on appeal, subject of this judgment. Herein under is the court's determination of the appellant's grounds of appeal.

In the ***first ground on whether***, there was evidence relating to the offence of house breaking adduced by the prosecution witnesses. This issue, in my view, was thoroughly determined by the trial court when evaluating the evidence of PW1. It is the PW1 who amply testified that, when she returned home she found her rear door/gate and room door broken and the TV was missing from the room. Moreover, PW1's evidence was corroborated by the established act of the 1st appellant of showing police (PW3) and PW2 how he broke the house and stole from therein.

Therefore, I find the 1st ground of appeal lacking merit and the same is dismissed.

Now to the 2nd ground of appeal, on whether the TV was properly identified. It is as complained by the appellants that, the owners of the TV (PW1 and PW2) did not identify it during trial. However, PW1 produced the TV's receipt (PE1) without any objection from the defence. It is however evident that, the TV in question was produced by PW4, an exhibits' keeper who testified to have received it through Exhibits' Register and the same was admitted as PE3.

I am alive of the principle of proper identification of an exhibit in the administration of criminal justice. By doing so, will assist the court to avoid from depriving a real owner of certain valuable item. The court of Appeal in **Ally Zubery Mabukusela vs. Republic**. Criminal Appeal No.242 of 2011 (unreported) where the claimant of the allegedly mobile phone did not give its detailed descriptions had these to say;

"The claimant should make a description of special marks on an item before it is shown to him and allowed to be tendered as an exhibit That way an identification of the item can be established to the court, beyond reasonable doubt."

In our instant appeal as earlier alluded, the owners were not shown the TV during trial so that they could identify it. Nevertheless, PW1

thoroughly explained where she purchased it on 5th July 2020 from “One pick point min super market”. She further explained that it is TV 32 Inches. Its sale receipt was received without any objection from defence. More so, the contents of the receipt, PE1 were read out and above all TV (PE4) was tendered by PW4 and duly received by the trial court any claim as to the ownership. The receipt and type of the TV indicated in the receipt cemented by Exhibits Register (PE3) and the date on which it was sold as well as absence of no claim from defence of ownership. These piece of evidence are sufficient in favour of the prosecution side. Perhaps I be guided by the decision of the Apex Court of the land in **Nyerere Nyague vs. Republic** (supra)

"We have scrutinized the evidence pertaining to the identification of exhibit P2. Although it is true that PW1 identified it by colour and the scratch marks, its ownership by her was not in dispute at all."

The Court of Appeal went on stating that;

"As a matter of principle, a party who fail to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

Basing on the precedent whose parts of its judgment are quoted above and in view of the evidence adduced before the trial court as

alluded herein above, I have no doubt that, the TV impounded from the 2nd accused before the trial one Antony, was that of the complainant or principal witness (PW1). I am of the decided view, that PE4 was the lawful property of PW1 notwithstanding the omission by the prosecution side to bring the TV when PW1 and PW2 appeared before the trial court for testimonial purposes. I am of the decided view simply because I have similarly considered the testimony of the DW2, Antony Lenga, which is found to be seriously incriminatory to the 1st appellant. I am not unmindful of the principle of law that, a conviction is not necessarily illegal for being based on an uncorroborated evidence of an accomplice. In the case of ***Godfrey James Ihuya and Another*** Criminal Appeal No. 14 of 2016 (unreported), the Court of Appeal observed that:

".....we agree in principle that the evidence of an accomplice needs corroboration for it to be acted upon against an accused. However, a conviction is not necessarily illegal for being based on an uncorroborated evidence of an accomplice."

Having explained as herein together with the above authority, the 2nd ground of appeal is also unsubstantiated, the same is hereby dismissed accordingly.

In the 3rd ground that the trial court erred in law and fact for not affording the appellant an opportunity to comment on the admissibility of PE2 and PE4. Examining the trial court proceedings, I have noted that, the appellant were not afforded such opportunity when the same were tendered in evidence except Mr. Panga, the learned advocate who was representing the said Antony Lenga (2nd accused). That was wrong on the part of the learned trial court magistrate since advocate Panga was not representing the appellant. This ground of appeal has merit and the same is hereby allowed.

In the last ground, considering all the pieces of evidence adduced by the prosecution witnesses and that of defence side and making re-evaluation of the same, I am satisfied that, there is sufficient evidence against the 1st appellant. I so hold because, there is enough oral evidence that, he sold the TV to the said Antony, the evidence of accomplice during trial (DW2). Correspondingly, I have considered the 1st appellant's acts of showing the modus of the commissions of the offences against him and his co-accused persons. Despite the fact that, the appellants were not given an opportunity to comment of the said exhibits (PE3 and PE4) yet they were accordingly availed an opportunity to cross-examine the witnesses (PW2 & PW4). However, the appellants did not ask any question on whether he (1st appellant) was the one who led the police to show the

modus operandi he used to commit the offences at the PW1's residence. It is also an observation of this court the appellants refuted asking any question on whether the TV was the property of PW1 or their properties (appellants' properties). Equally, during defence, both appellants did not claim ownership. Thus, it goes without saying that, the said Antony was found in possession of the stolen property, which is the lawful property of PW1 & PW2 and it was clearly established that, the one who brought it to him was the 1st appellant.


Nonetheless, I am not satisfied with the evidence adduced by the prosecution against the 2nd appellant, I find to be unsatisfactory to form the basis of his conviction as rightly and focusedly argued by Ms. Mtenga. The mere evidence that, the 1st appellant mentioned by the 2nd appellant before a police officer without tendering his cautioned statement to substantiate such evidence or any other incriminating pieces of evidence, this court is of the considered view that, this appeal is sustainable for the 2nd appellant.

All said, I entirely agree with the 2nd appellant and the learned state attorney that there is a scanty evidence against the 2nd appellant to warrant this court to uphold the trial court's conviction and sentences unlike the 1st appellant Andrea Theopil. Thus, the 1st appellant's appeal is dismissed save for the 3rd ground, which does not warrant to his release

since his guilt for both counts is confirmed. The 2nd appellant, Emmanuel Paskal @ Ema Kibaka is to be released from prison forthwith unless held therein for another lawful cause since his appeal is merited.

It is so ordered.

DATED at **ARUSHA** this 21st December 2023


M. R. GWAE
JUDGE

