IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CRIMINAL APPEAL NO. 91 OF 2023

(FROM CRIMINAL CASE NO. 127 OF 2020

(REGIONAL MAGISTRATE COURT, MWERA)

YAZID ABDALLA ABDALLA..... APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

JUDGMENT

Dated 20th February, 2024

BEFORE: K. SHAMTE. J

The appellant **YAZID ABDALLA ABDALLA** was charged with the offence of Breaking into a building and committing a felony therein, contrary to section 291 (1)(a) and (2) of the Penal Act No. 6 of 2018. The particulars of the offence alleged that the appellant on 19th to 20th March 2020, during the night time at Makunduchi did break into the house of Haji Makame Khamis.

The second offence is theft contrary to section 251 (1)(2)(a) of the Penal Act No. 6 of 2018, namely that on 20th March 2020 at Makunduchi the appellant stole two cartoons of soda and a radio worth Forty Thousand Tanzania Shillings (TZS. 40,000/=)therein the property of the said Haji Makame Khamis.

The Regional Magistrate (Hon. A. Marika) convicted the Appellant on both counts and sentenced him to serve three years in the Education Centre for the first count and three years in the Education Centre for the second count. Both sentences were ordered to run concurrently.

In this Court, the Appellant appeared in person and was unrepresented while the Respondent (DPP) was represented by learned State Attorney Naima Mussa. The Appellant filed his Memorandum of Appeal which contained six grounds of appeal which can be summarised as follows:

1. That the Hon. RM erred in law and fact as his decision was based on the evidence of PW2 who was a child of ten years and the learned RM didn't conduct a voire dire test.
2. That the Hon. RM erred in law and fact as his PW1 states that the radio is worth TZS. 40,000/= while PW3 states that radio is worth TZS. 30,000.
3. That the Hon. RM erred in law and fact by considering weak evidence of PW1, PW2, and PW3 which all failed to prove the commission of the offence.
4. That the Hon. RM erred in law and fact by using the weakness of DW1 in defence.
5. That the Hon. RM erred in law and fact in delivering judgment which failed to prove the commission of offence and the act of housebreaking and theft.

With regard to the first ground of appeal, the learned State Attorney has correctly stipulated the position in law regarding the admissibility of evidence of a child of minor age by referring to the Evidence Act and section

379 of the Criminal Procedure Act No. 7 of 2018. The learned State Attorney concedes this ground.

The question, however, is whether the child was competent to testify, as demonstrated by the proceedings. This Court finds that it was incumbent on the trial court to determine whether PW2, a witness of tender age had the knowledge and understanding of the nature of what an oath is.

The issue of the necessity of a "*voire dire*" in Zanzibar has been discussed in the case of **Muhamad Suleiman Hassan V. DPP, Criminal Appeal No. 5 of 2016** (unreported) in which the Court held that under section 118 of Evidence Decree, a child is competent to testify if it understands the questions put to it and gives rational answers thereto.

This Court examined the proceedings and found that the records do not show that the Trial Court did consider or determine this issue. I rely on the case of **Rungu Juma V. Republic** [1994] TLR 177 in which it was decided that the testimony of a child could be corroborated by the defence of the accused. In the present case, the admission of PW2 Salum (10 years) is corroborated since PW2 stated that he heard Masoud (a friend of the Appellant) when he was talking to his father that Yazid had given that radio to Masoud and the radio was in Masoud's house, the place where they found it.

Based on those grounds, I agree that the evidence was not admitted according to procedure and I am of the opinion that that since PW1 evidence of PW2 has no greater impact in this case, it is a mere hearsay evidence, it should be expunged from the record.

With respect to the second ground of appeal, State Attorney Naima submitted that the Appellant was convicted of theft which has to be proved in terms of section 251 (1) and (2) of the Penal Act No. 6 of 2018, and therefore the issue of pricing of TZS. 30,000 or TZS. 40,000 is not material in this appeal and cannot be considered as a discrepancy. She did not provide reasons for this submission.

The Court has to consider whether the price (TZS. 30,000 or TZS. 40,000) discrepancy is fatal to the prosecution case. It is settled law that to ground conviction under section 251(1) and (2) of the Penal Act No. 6 of 2018, the prosecution shall demonstrate that the stolen property was entrusted to the Appellant to perform the acts and to unlawfully convert it to his use. See for instance the decision in **Paschal Mwita & 2 other V. R**, 1993 TLR 295 CA.

During the trial, PW1 was honest enough to state during cross-examination that the radio as identified belonged to him and that Yazid (the Appellant) stole that radio. Another reference is cited from the case of **Director of Public Prosecution V. Shihir Shya Msingh** (Criminal Appeal 141 of 2021) TZCA 357 (16 June 2022), the Court held that "A mere omission by the Appellant to indicate the name of Kihalumba should have not been taken to rebut that such amount was from him. There should have been independent strong evidence to establish the source of such amount if the Appellant was to be disbelieved..."

I have closely examined the evidence for both sides in the record of appeal, and I entertain no doubt that the difference in amount has no rise in any discrepancy during the trial. Accordingly, this ground lacks merit and is dismissed.

With regard to the remaining grounds, the learned State Attorney merged grounds three and five which raised the issue of grounds of evidence of PW1, PW2, and PW3 and the legality of Judgment. State Attorney in her submission states that PW3 (F7583), and PW4 have explained that it was Yazid who stole the radio and gave it to PW4 for sale, the same has been explained by PW3 (F7583) and PW 4 that it is Yazid who stole the radio and handed it over to PW 4 to assist him in selling that radio. Referring to the Criminal Procedures Act No. 7 of 2018, the Appellant failed to prove the ownership of that radio. SA Naima argued that since the Appellant failed to prove the ownership of the radio, he is guilty under the Criminal Procedures Act and the evidence of PW1, PW2, and PW3 were corroborated.

On Ground five the issue of whether the judgment meets all the requisite conditions, the learned State Attorney referring to section 290 of the Criminal Procedures Act stated that a judgment should be based on the quality of determination and page 4 of the Judgment shows that the Judgment meets all conditions as provided for under the law.

In these two grounds, this Court has examined the appropriate legal position and referred to the case of **Bushuu Elias Domich Nyerobi & Another V. Republic** [1995] TLR 97. The Court of Appeal explained that the purpose of corroboration is to validate or strengthen the evidence to ensure it is sufficient, satisfactory and credible.

The submitted third ground challenges the circumstantial evidence. The Appellant submitted that the criterion for proof of circumstantial evidence did not meet the standard required for a conviction. This Court relied on the

case of **Simon Museke V. Uganda** [1958] E.A 715 page 716 which is to the effect that, in cases of circumstantial evidence the court must ensure that such evidence provides an irresistible inference on the guilt of the accused. The general rules of admissibility of relevance, materiality, and competence, apply to all those types of evidence. However, In the present appeal, real evidence such as radio was considered to convict the appellant.

On pages 23-24 of the proceedings, PW4 explained that he received a radio from his friend Yazid (who is the Appellant). This is corroborated by the admission of the Appellant on page 10 of the proceedings. He further proves that he saw the exchange of the radio from Yazid to another person (whom he didn't know his name) and received the radio from the Appellant who allowed him to take that radio to his house. PW 4 stated further that when he heard that the radio had been stolen, he took PW1 to his house and proved that the radio belonged to PW1.

On the issue of Judgment writing, which has been addressed in ground five. The Court finds that the issue of judgment writing is dealt with in the case of **Amiri Moh'd V. Republic** [1994] TLR 139 in which the Court of Appeal explained that every judge has its own style of writing judgment. What is essential is that the ingredients of the judgment should be there. The ingredients are found in section 290 of the Criminal Procedure Act No. 7 of 2018, which provides:

> *"290. (1) Every such judgment shall, except as otherwise expressly provided by this Act, be written by the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and*

shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

(2) in the case of a conviction the judgment shall specify the offence of which and the section of the Penal Act or other law under which the accused person is convicted and the punishment to which he is sentenced.."

The Judgment was written by the Trial Magistrate and was in the language of the Court, which is Kiswahili. The Trial Magistrate has his own style of writing, but this Court finds that the judgment in question considers the key issues of the case in each count of offence. I dismiss the third and the fifth grounds which lack merit in this Appeal.

The fourth ground of appeal against conviction seeks to impeach the prosecution evidence and discrepancies in the evidence of certain witnesses. Regarding the sentence, the Appellant claimed no witness had seen him at the time of the theft as a part of his defense. This Court has noted that the appellant was provided with adequate information for his defense. It is sufficient to say that this evidence carries some weight in respect to the second count.

The learned State Attorney contended on the fourth ground that the trial Court had analyzed all the evidence to reach its decision. She prayed that the appeal be dismissed.

In **Ally Kinanda and Three Others V. Republic**, Criminal Appeal No. 206 of 2006 (unreported) it was held that: "It is settled that where the property has

been stolen and that soon thereafter a person is found in possession of the said property, that person may be held liable for the commission of the offence, unless he can prove his innocence. The Appellant has not provided the court with a defence to this evidence. Therefore, the elements of theft as defined under section 251(2) of the Penal Act are met. Hence, the Appellant was found with possession of the radio as proved by PW1, PW, 3, and PW4.

The Appellant has been convicted of theft, and this Court agrees that he failed to explain where he acquired the stolen goods. This decision is in line with the case of **Mwita Wambura V. Republic** [1992] TLR 118, where the court held that the accused also failed to explain the acquisition of the goods.

I understand that the Appellant was convicted for being found with stolen property based on the second count of theft. However, there seems to be a minor discrepancy regarding the details of the conviction in the second count. The Trial Court did not determine whether it was one cret or two crets of sippy soda, and the value of radio which were identified by PW1 and PW2 on pages 4 and 5 of the judgment respectively. This issue was framed by the Trial Court and remains unresolved.

On the **first count** which the Appellant was convicted of housebreaking; the main issue to be considered is whether the prosecution evidence irresistibly points to the guilt of the appellant. Having perused the judgment of the trial court, I do not agree with the trial Magistrate on the first offence and that the magistrate did not analyse the evidence to arrive at the decision that the appellant was guilty of the offence charged. PW 3 (F7583)- proves to see a hole where the appellant used to enter the house on page 21 of proceedings which read:

"Kosa ilikua ni la kuvunja nyumba na kuiba. Baada ya kupokea jalada hilo nilifika eneo la tukio Makunduchi na kuona tobo kwa nyuma kwenye nyumba ya Mlalamikaji. Tobo hilo lilitobolewa kwa kisu kwenye uzio wa nyumba hiyo"

That, the trial Magistrate erred in law and fact by ruling that PW3 F.7583 Corporal Muombwa is only a competent witness to prove the first offence of housebreaking was committed by the Appellant. On the other hand, there was no other evidence that involved the appellant and housebreaking. Thus, the evidence is doubtful, and this appeal should be allowed, as cited in the case of **DPP V. Jaffar Mfaume Kawawa** [1981] TLR 149.

I understand that it is a universal practice, in the absence of good reason to the contrary, to order sentences for related offences, such as housebreaking and theft to run concurrently, or where counts, attracting convictions, arise out of a single transaction, or are part and parcel of the same transaction, or are part and parcel of a single plan of campaign as was decided in the case of **Musa s/o Bakari V. R.** [1968] H.C.D. No. 239.

In this appeal, PW 4 is the only witness who admits to receiving the radio from Yazid (pages 23-24 of the Court proceedings), however, I have doubts with regard to the commission of housebreaking due to the statement of PW4 which reads:

"Tarehe 21/3/2020 majira ya saa 1.00 za usiku nilifuatwa na Yazidi na tukatembea Mwera/Makunduchi. Baada ya kufika huko alizungumza na kijana mmoja jina nimelisahau baadae alipewa mfuko na huyo kijana na baadae mfuko huo alinipa mimi nikakamata. Mfuko ule nilienda nao nyumbani"

"Baada ya siku mbili nilienda dukani Kijini kwa Haji Rubea huko Makunduchi na Haji alinipa taarifa kuwa kumeibiwa redio pamoja na "sipi" hivyo aliniuliza nimepata Habari za redio hivyo nilikwenda nyumbani kuangalia ule mfuko alonipa Yazidi na kukuta redio hiyo".

It was on this evidence of PW3 and PW4 that the Appellant was convicted of housebreaking.

I have read through the Court's Judgment and the main issue at hand is whether the evidence presented by the prosecution clearly proves the guilt of the accused. After going through the Judgment, I agree with the Appellant that the Trial Magistrate did not properly analyze the evidence to conclude that the accused was guilty of the first charge, which is housebreaking.

This Court is of the view that the prosecution has failed to prove its case beyond a reasonable doubt on the count of housebreaking, and on that basis, the appeal should be allowed. As submitted by the Appellant, the evidence produced could only have led the Trial Court to convict the appellant of being found with stolen property and not housebreaking. In this case, I find that if the trial magistrate had properly analysed the evidence, he would have undoubtedly reached the same conclusion.

Based on the observations made, I agree with the Appellant's argument that the evidence of housebreaking was not conclusive. Therefore, it cannot be stated with certainty that the Appellant was guilty of the charge.

Having already made a finding, I have decided to allow the appeal by overturning the judgments of the trial court. Therefore, the conviction

against the Applicant is hereby quashed and the sentence is set aside in the first count of housebreaking. In the meantime, the Appellant shall remain in Education Centre pending finalisation of his sentence for the crime committed in the second count, which is theft.

It is so ordered.

KHADIJA SHAMTE MZEE

JUDGE

Dated at Zanzibar this date 20th February 2024.