

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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IN THE UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF TANZANIA IN THE SUB-REGISTRY OF MTWARA AT MTWARA CRIMINAL APPEAL NO. 39535 OF 2023 (Arising from the decision of the District Court of Masasi at Masasi in Criminal Case No. 79 of2022) ALLY ISSA DADI @CHINGA..... APPELLANT VERSUS THE REPUBLIC.... RESPONDENT

JUDGMENT

18th and 29th April 2024. DING'OHI, J; Ally Issa Dadi @Chinga, the appellant herein, was charged with two others namely, Karimii Rashidi @ Kery and Steven Mathias Mussa, in the District Court of Masasi district at Masasi, for three counts; 1st count: Burglary C/s 294 (1) (a) of the Penal Code, Cap. 16 R.E.2019 (for the appellant and Steven Mathias Mussa), 2nd count: Stealing C/s.258 and 265 of the Penal Code, Cap. 1.6 R.E 2019 (for the Appellant and Steven Mathias Mussa), and the 3rd count which was for the 2nd accused thereat, Karimu Rashidi @ Kery, was the offence of Receiving stolen property contrary to section 311 of the Penal code [CAP 16. R.E. 2019]. P3ge 1 of 15 The brief facts of the case, as per the records of the trial court, are to the effect that, on the 15th day of December 2021 at about 05:00 hrs at Mkadaenda area, Masasi district and Mtwara region, the appellant and another person who is not subject to this appeal, did break into the dwelling house of one NO. WP 8548 CPL MGOLE CLAVER with the intent to commit the offence therein. It is further alleged that, after breaking, the appellant and STEVEN stole one Television make LG worth Tshs. 400,000/= the property of the said PW1, MGOLE. It was alleged, KARIM who was the second accused person at the trial, was implicated in receiving the properties stolen from the PW1. Later, the appellant, KARIMU, and STEVEN were arrested and arraigned before the trial court as explained herein above. At the end of the trial, the trial court found the appellant and those two others who were charged with him, guilty. The appellant and 3rd accused person (Steven) were sentenced to serve ten years imprisonment for the 1st count. They were also sentenced to serve seven years imprisonment for the 2nd count. The second accused person thereat was sentenced to pay a fine of Tshs.200,000/= or serve five years imprisonment for the third count. During the hearing, the appellant drove himself, unrepresented. On behalf of the respondent Republic Mr. Edson Lawrance Mwapili, learned State Page 2 of 15 Attorney came out. When the appellant was invited to argue his ground of appeal, he opted to hear from the respondent first. He said he would see if there would be a need to comment on anything, thereafter. Then, Mr. Mwapili came in. At the very beginning, he showed that he did not support

both the conviction and sentence meted out against the appellant. The learned state attorney gave the reasons for supporting the appeal by the appellant. He said the major and Substantive reason is that the prosecution side did not prove the charge against the appellant beyond reasonable doubt for the offence of stealing as illumined by the Court of Appeal in the case of Director of Public Prosecutions vs Shishir Shya Msingh (Criminal Appeal 141 of 2021) [2022] TZCA 357, According to the learned State Attorney, the above-mentioned case points out six ingredients necessary for establishing the offence of stealing First, there must be a movable property; Second, the movable property under discussion owns a person other than the accused; Third, there was an intention to move and take that movable property; Fourth, the accused moved and took out the possession of the possessor, Fifth, the accused did it dishonestly to himself or wrongful gain to himself or wrongful loss to Page 3 of 15 another; and Sixth, the property was moved and taken out without the consent of the possessor. Mr. Mwapili further contended that, based on the six elements mentioned herein above, they failed exactly to prove on second ingredient which required them to prove that the movable property under discussion was owned by a person other than the accused. He went on to submit that the effect of not proving the second ingredient led to two shortfalls. One, there was a variance between the evidence adduced by the prosecution side and the contents of the statement of the offence in the charge sheet. According to him, the amended charge sheet declares that the appellant and others broke into the house of the victim and stole from therein a TV made LG 24 inches but in evidence before the trial court, especially that of PW1, on Page 12 of the typed proceedings it is stated that the stolen TV was LG flat screen inch 32. Even the TV that was admitted in court as an exhibit was LG flat screen 32 inches; Two, as ordained by the learned State Attorney, there was a contradiction of evidence of the prosecution witnesses at the trial. For instance, when the PW1 was recorded he revealed that his stolen TV was made LG flat screen inch 32 that evidence contradicts the evidence given by the PW2 found on Page 4 of 15 pages 18,19, 20, and 21 of the typed proceedings. The PW2 was recorded saying that the seized TV which was taken to the police station and identified by the PW1 was inch 24. And when he tendered the certificate of seizure, the seized TV was named to be inch 24. Mr. Mwapiii thought that the evidence before the trial court was uncertain as to who was the owner of the stolen TV, thus doubtful. According to him, the doubt becomes sensitive, especially on page 14 of the trial court proceedings, the PW1 was cross-examined by the Appellant who wanted to know the size of the stolen TV, whether inch 24 or 32. The answer given was that the stolen TV was 32 inches. To cushion his arguments, he alluded to the case of Dickson Elia Nsamba Shapwata and Another vs Republic (Criminal Appeal 92 of 2007) [2008] TZCA 17. In the second place, Mr. Mwapiii preserves that they did not prove the charge to a required standard, especially on the Independent witness. He proclaimed that at the trial court, the prosecution contended that they invited two neighbors to come and witness the search exercise. However as rightly pointed out by Mr. Mwapiii, those witnesses were not called into the court to give their evidence. No reason was given for that failure. According to the learned State Attorney, that draws an adverse inference on the case against Page 5 of 15 the appellant. He suggested that this appeal be allowed and the appellant be set at liberty. In a brief rejoinder, the appellant did not have much to say. Rather he insisted and prayed the court to allow the appeal and set him free. Having heard the learned State Attorney and the appellant in

their submissions, it is plain that the determination of this appeal is based on one question; Whether the case was proved beyond a reasonable doubt. It is, of course, the cardinal principle of criminal law that the duty to prove the charge against an accused person always lies to the prosecution. The Court of Appeal of Tanzania in the case of Gaius Kitaya vs Republic (Criminal Appeal 196 of 2015) [2016] TZCA 301 makes approval with the case of John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika [2002] T.L.R. 296 the Court held inter-alia that: person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt." Page 6 of 15 I wish to start with the complaint regarding contradictions in the testimonies of material witnesses; PW1 and PW2. The learned State Attorney pegs this complaint on the fact that the witnesses gave a contradictory account regarding the alleged offence of stealing. While PW1 who was alleged to be the TV's] owner testified that "It was LG flat screen 32 inches" PW2 who arrested the Appellant testified that 'We found one TV, make LG 24 inches.....Thereafter, one Mgoie Ciavery came and identified TV LG 24..... and the property seizure of TV LG 24 inches." I have considered this evidence. There is a divergence in the testimony of these two material witnesses. It is trite law that in any case where there is a discrepancy in the testimonies of the witnesses, the court has to decide whether such contradictions are only minor and whether they go to the root of the matter. See Mohamed Said Matula v. Republic [1995] TLR 3. In Dickson Elia Nsamba (supra), the Court of Appeal of Tanzania while evaluating the issue of contradictions, makes an approval to the learned authors of Sarkar, The Law of Evidence 16th edition, 2007, have this to say on page 48; Page 7 of 15 "Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do." I am of the view that the contradictions found from the testimonies of PW1 and PW2 reached the level of material discrepancies. The records show that PW1 who purported to be the owner of the said TV in question insisted that the size of the stolen TV was inch 32. That is the owner. But, when he was required to identify her TV before the police station, she identified the TV as 24 inches. And, when PW2 tendered the certificate of seizure, the seized TV was named to be inch 24. Page 8 of 15 I expected PW1 to be conversant with details of her TV alleged to have been stolen by the appellant. The fact that she failed to recognize her TV details which is a subject matter of this case, Equals that the prosecution side has failed to meet their statutory requirement, that is proving the charge beyond reasonable doubt. Under the circumstances, I will agree with Mr. Mwapili that the offence of stealing was not proven to the required standard. On the second complaint, it was submitted that the witnesses who signed the certificate of seizure were not called before the trial court to testify, and no reason was assigned/ made for the failure. The records reveal that PW2 searched the house of Karim Rashid (who is not part of this appeal) in the presence of two witnesses (neighbors). However, as rightly submitted by the learned State Attorney none among these two witnesses were called by the prosecution to

testify. In my view, the contradiction in the size of the TV alleged to have been stolen could have been cleared by independent witnesses who according to PW2, witnessed the seizure in question and signed Exhibit P2. As I have said, these witnesses were not called to testify. I am aware that, the prosecution side has the discretion to call any witness whom they please for establishing their case, however where they refrain from calling a witness who would advance their case an adverse inference Page 9 of 15 may be drawn to them. The Court of Appeal of Tanzania in the recent case of John Mwendamaka vs Republic (Criminal Appeal No. 38 of 2021)

[2024] TZCA 260 stated that; "... The unkwon family member was a material witness to clarify if she or he did receive money from PW4 and handed it to the appellant and also explain its purpose. The absence of such material witness entitles the Court to draw an inference adverse to the prosecution.." In another case of Azizi Abdalah v. Republic [1991] TLR 71z it was observed by the Court of Appeal that; "The general rule and well known rule is that the prosecution is under prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts, If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution. " Page 10 of 15 See Riziki Method @ Myumbo v. Republic, Criminal Appeal No. 80 of 2008 CAT (unreported). With all these dissension, I am satisfied that this is a proper case where an adverse inference to the prosecution ought to have been drawn. In the out-turn, I find the learned State Attorney was right in supporting this appeal. Under the circumstances, the appeal is hereby allowed. The conviction and sentences of seven years and ten years imprisonment, respectively, imposed by the trial court are hereby quashed and set aside. The appellant is to enjoy his immediate release from prison unless otherwise lawfully held. Before I conclude, something more to say. First; I observed that the appellant was jointly charged with the 3rd accused person for the two offences he was convicted and sentenced to. Having found that those offences were not proved against the appellant, automatically the 3rd accused person who was jointly charged with the said appellant herein should not remain in, Likewise, since this court has found that, there was a contradiction in the evidence over the kind of stolen property that the second accused was alleged to have received, the accused person who was charged Page 11 of 15 with the offence of receiving stolen property should not remain in, as well. They all deserve equal treatment. Second; Having warmly traversed the records of the trial court, I have noted that the appellant was not properly convicted by the trial magistrate. To be specific and to avoid confusion the trial court had the following to say in convictions (in the words of the trial Magistrate); "From such analysis, the prosecution side has proved the case beyond reasonable doubt and I found all three accused are guilty and convicted them U/S 294 (1) (a) 258, 265 and 311 of the Penal Code Cap 16 [R.E2019]." As seen from the quoted part of the trial court judgment, the trial magistrate was not specific as to which accused person was convicted of which offence. I have already said that the accused persons were three. The trial court seems to have convicted all on all counts. But, the proceedings of the trial court indicate that the appellant and the 3rd accused person were charged with two counts (burglary and

stealing). The 2nd accused was charged with one count (receiving stolen property). But astonishingly, the trial court convicted all, the appellant, 2nd accused, and 3rd accused persons with all counts without considering that three counts as per Page 12 of 15 the charge sheet did not involve all. For instance, it was wrong to convict the appellant and the 3rd accused on the offence of receiving stolen property which they were not charged with. It was also wrong to convict the 2nd accused on the offences of Burglary and Stealing which he Was not charged with. According to the law, the accused person may only be convicted and sentenced on the offences he is charged with unless the court finds that there are circumstances where the alternative verdict may be entered. Failure of the trial court in this case to specifically convict the appellant is fatally incurably. It may mean that no conviction has been made. Section 312 (2) of the Criminal Procedure Act, [CAP.20 R.E. 2022] provides that;

- (2) In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced" (Emphasis supplied) In the case of *Kasiga Masanja @ Ntungwa vs The Republic* (DC Criminal Appeal No. 15 of 2022) [2023] TZHC 19233 this court approved the decision of the case of *Hassan Mwambanga V Republic*, Criminal Appeal Page 13 of 15 No. 410 of 2013 (Unreported) where the Court of Appeal had the following to say; "It is now a settled law that failure to enter a conviction by any trial court is a fatal and Incurable irregularity, which renders the purported judgment and imposed sentence a nullity and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction." Under the circumstances of this case, and in the exercise of my revisional powers, under section 373 (1) (b) of the Criminal Procedure Act [CAP 20 R.E. 2022], I quash and set aside the convictions and sentences imposed against KASIM RASHIDI @ KERY and STEVEN MATHIAS MUSSA (who were the 2nd and 3rd accused persons, respectively). I proceed to order their immediate release from prison unless lawfully incarcerated thereat in connection with other matters. If KASIM RASHIDI @ KERY has paid a fine, as ordered by the trial court, it is to be refunded to him. DATED at MTWARA this 29th day of April 2024 Page 14 of 15 S. R. DING'OHI JUDGE 29/04/2024 COURT: Judgment delivered this 29th day of April 2024 in the presence of Mr. Steven Aron Kandoro, the learned state Attorney and the Appellant, in person. S. R. DING'OHI JUDGE 29/04/2024 Page 15 of 15

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