

TANZANIA / JUDGMENT

Deogratius Ishengoma sc

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IN THE HIGH COURT OF TANZANIA DODOMA SUB - REGISTRY AT DODOMA DC. CRIMINAL
APPEAL NO. 10616 OF 2024 (Arising from Criminal Case No. 28 of 2023 in the District Court of
Chemba at Chemba) DEOGRATIUS ISHENGOMA.....APPELLANT VERSUS
THE REPUBLIC..... RESPONDENT

JUDGMENT

14hJune & 19th July, 2024 MUSOKWA, J. On 4th April 2024, the District Court of Chemba (trial court) convicted and sentenced the appellant herein on the count of stealing contrary to the provisions of sections 258 (1) (2) (a); and 265 of the Penal Code, Cap.16, R.E. 2022 (Penal Code). According to the particulars of the offence and the evidence adduced during the trial, it is stated that on 19th January, 2023 the appellant stole one drum of electricity wire, 100MM valued at Tshs. 15,000,000/=, the property of Multi Cable Limited. The offence was allegedly committed by the appellant at Madaha Village within Chemba District in Dodoma Region. The trial court having heard the prosecution witnesses and the defense case, convicted the appellant and sentenced him to serve five (5) years imprisonment. Being aggrieved by both conviction and sentence, the appellant has approached this court with a petition of appeal comprising of seven (7) grounds of appeal. In a nutshell, the basis of the appeal is that the prosecution case was not proven to the required legal standard. This appeal was scheduled for hearing on 13th June, 2024. The appellant appeared in person, unrepresented, whereas the respondent had the service of Mr. Abdulkheri Sadiki, learned state attorney. In support of the appeal, the appellant simply prayed that this court should adopt his grounds of appeal, without detailed submission. However, the appellant further prayed to re-join after the respondent's submission. In reply, the learned state attorney argued that, at the trial, the prosecution was required to adduce evidence in order to prove whether or not the alleged offence was committed. Mr. Sadiki submitted that in order to prove the offence of theft, the elements of the alleged offence must be established. Proceeding to submit on the said elements, the learned state attorney averred that first, the property must be capable of being stolen. Mr. Sadiki stated that the testimonies of PW1 and PW2 established that the stolen item 2 was one drum of electricity wire, measuring 100MM; hence this ingredient was established by the prosecution. The 2nd ingredient is that there must be asportation without the consent of the owner. In addressing this ingredient, the counsel for the respondent referred to the testimony of PW2, Insp. Emmanuel Maduhu who conducted the arrest of the appellant. This witness testified that subsequent to the arrest, the appellant himself led the inspector to the place

where the stolen item had been stored. The said drum of electricity wire was stored at Msalato. This is reflected at page 14 of the typed trial proceedings. The respondent's counsel asserted in emphasis that the prosecution was able to establish the offence of theft. The appellant, under the 1st and 2nd grounds of appeal further challenges the legality of the search that was conducted, stating that it was contrary to section 38 (3) of the Criminal Procedure Act, Cap. 20, R.E. 2022 (CPA). The said provision requires the issuing of a receipt upon seizure of an exhibit. According to the respondent, this ground is unfounded. The learned state attorney referred to the records of the trial court which indicate that the certificate of seizure was tendered at the trial, admitted and marked as exhibit P2, as recorded at page 15 of the typed trial proceedings. Mr. Sadiki, contending the assertions by the appellant, averred that the procedure for procuring the certificate of seizure was flawless and accordingly, in compliance with section 38 (3) of the CPA. The respondent argued further that at the trial, the appellant did not object to the admission of the said exhibit which was tendered by PW2. The appellant also opted not to cross examine PW2. The learned state attorney submitted that, it is the position of the law that failure by a party to cross examine a witness, implies acceptance of the evidence adduced and the accused shall be estopped from questioning the said testimony. In support of his position, the learned counsel cited the cases of Damian Luhele vs Republic, Criminal Appeal No. 501 of 2007; and Nyerere Nyague vs Republic, Criminal Appeal No. 67 of 2010; which were cited in the case of Issa Hassan Uki vs Republic, Criminal Appeal No. 129 of 2017, deliberated by the Court of Appeal of Tanzania (CAT) sitting at Mtwara. The learned state attorney further submitted on the allegation by the appellant, challenging compliance with requirements on the chain of custody with reference to exhibit PI, the electricity drum wire. Mr. Sadiki stated that the principle of the chain of custody varies from one exhibit to another. This is due to the fact that in certain circumstances, the changing of hands of the exhibit is more difficult. In addition, certain exhibits are prone to be tampered with easily, as compared to others, if chain of custody is not observed. For exhibits which can be easily tampered with, the law clearly provides for strict adherence to the chain of custody. On the other hand, for exhibits which cannot be easily tampered with, the chain of custody can be relaxed and therefore cannot be a basis of an objection against the admission of the exhibit as evidence. The cases of Paulo Maduka and 4 Others vs Republic, Criminal Appeal No. 110 of 2007; and Makoye Samwel @ Kashinje and 4 others vs Republic, Criminal Appeal No. 32 of 2014 cited in the case of Issa Hassan Uki vs Republic, Criminal Appeal No. 129 of 2017 were preferred to cement this point. Mr. Sadiki submitted that, as per the records, the exhibit in question was excessively heavy, being an electricity drum wire measuring 100 cubic meters. Due to its weight, it was necessary for this exhibit to be transported using special trucks. Considering the weight of the said exhibit, swapping it with another one was unlikely. The learned state attorney asserted that due to the weight of this exhibit, the trial court was compelled to temporarily re-locate to the place of storage of the said exhibit. On that basis, the respondent submitted that the 2nd ground of appeal was unfounded. 5 The 3rd ground of appeal challenges the testimony of PW1, for reason that no eye witness was summoned to corroborate the testimony of this witness. The appellant further states that the Police Officer No. H.4777, namely Enos Henos, was an eye witness whose testimony should have been procured to corroborate the testimony of PW1. The counsel for the respondent argued that under the law, the prosecution is

at liberty to procure any number of witnesses which are considered necessary to prove their case. Mr. Sadiki vehemently objected that this ground lacks merit and in support of his submission, he preferred the CAT case of Kennedy Owino Anyachi and 2 Others vs Republic, Cr. Appeal No. of 48 of 2006. In rebuttal of the 4th, 5th, and 6th grounds of appeal, the respondent's counsel stated that these grounds were repetitive. Thus, he adopted his previous submissions on the 1st, 2nd and 3rd grounds. On the 7th and final ground of appeal, Mr. Sadiki stated that the irregularity that was pointed out by the appellant was not fatal. The appellant challenged the variation between the information in the charge and the evidence adduced by the prosecution relating to the rightful owner of the stolen drum of electricity wire. The learned state attorney explained that the names that appear in the charge sheet and in the evidence adduced during trial are, Sagemen Company and Sugemcom Energy & Telecom, respectively. In the circumstances, Mr. Sadiki submitted that this anomaly is curable under section 388 of the CPA. In addition to the aforementioned, the respondent argued that the appellant has failed to convince this court, that such anomaly was prejudicial to his case. The counsel for the respondent reiterated that all the grounds of this appeal are devoid of merit and prayed that this court should uphold the decision of the trial court and consequently, dismiss this appeal. The appellant, in his rejoinder submission, restated his prayer that his grounds of appeal be adopted and that this court should decide in his favor for the interests of justice. This marked the end of the submissions from parties. In resolving this appeal, the submissions of parties and the records have been considered. The pertinent issue to be determined is whether or not the evidence on record suffices to sustain the conviction and the resultant sentence of (5) five years imprisonment that was entered by the trial court against the appellant. This being a charge of stealing, the principle is that, theft is committed where a person, without any claim of right, takes or converts property capable of being stolen aiming at depriving the owner of the said property. Section 258(1) of the Penal Code provides that: - "A person who fraudulently and without claim of rights takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing." In criminal cases, it is a cardinal principle of law that, the burden lies upon the prosecution to prove the case beyond reasonable doubt. Thus, in the present matter, the prosecution at the trial, ought to have proven the case against the appellant in accordance with the standards set by the law as provided under section 3 (2) (a) of the Evidence Act, Cap. 6, R.E. 2022 (Evidence Act). The 1st ground of appeal is that the search was conducted contrary to section 38 (3) of the CPA. For clarity, the provision of section 38 (3) of the CPA provides that: -

- (3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing; being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search; if any." [emphasis added] The aforementioned provision requires the issuing of a receipt upon seizure of an exhibit. In the submission of the learned state attorney, he asserted that the certificate of seizure was tendered in the trial court and marked as exhibit P2, and further submitted that the procedure was in compliance with section 38 (3) of the

CPA. The respondent invited the court to take note that the appellant, did not object to the admission of the said exhibit which was tendered by PW2. Additionally, the appellant did not cross examine the evidence of PW2. Page 15 of the typed trial court proceedings clearly indicates that PW2 testified that he prepared the certificate of seizure and prayed the same to be admitted as an exhibit. Following no objection from the appellant, the trial court admitted the said certificate of seizure as exhibit P2. Accordingly, and concurring with the respondent's counsel, I am of the view that the certificate of seizure (exhibit P2) was procured in compliance with section 38

- (3) of the CPA. Thus, this ground of appeal fails for lack of merit. 9 The 2nd ground of appeal alleges that the chain of custody was not established. In buttress, the respondent submitted that the principle pertaining to the chain of custody varies from one exhibit to another. Therefore, the principle should not be applied in a blanket manner without having due regard to the nature of the exhibit in question. The position of the law governing this subject matter is well established. The law provides that for a seized substance to be relied upon by the court and form the basis of a conviction, the chain of custody from the time of its seizure to the moment it is tendered in court as an exhibit has to be reasonably established. In the famous case of Paulo Maduka and Another vs. Republic, Criminal Appeal No. 110 of 2007 (unreported), the CAT stated as follows regarding the principle of chain of custody: - "By chain o f custody we have in mind the chronological documentation and/or paper trail showing the seizure, custodycontrol\ transfer, analysis and disposition o f evidence be it physical or electronic. The idea behind recording the chain o f custody is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone appear guilty... The chain o f custody requires that from the moment the evidence is collected its every transfer from one person to another must be 10 documented and that it be provable that nobody else could have accessed it". In light of the cited decision, the rationale behind the principle is to establish the relationship between the exhibit and the alleged crime, therefore curbing the fabrication of an exhibit to the detriment, and possible unlawful incrimination of the accused person. Notably,there has been a progressive development on the law governing the chain of custody. Previously, the chain of custody had to be strictly established by documentation in all cases. However, in recent years, the scope of the principle was relaxedfor exhibits which cannot be easily tempered with. In the case of Issa Hassan Uki vs. Republic,Criminal appeal No. 129 of 2017 (unreported), it was stated at page 11 that: - 7/7 the instant case, the items under scrutiny are elephant tusks. We are o f the considered view that elephant tusks cannot change hands easily and therefore not easy to tamper with. In cases relating to chain o f custody' it is important to distinguish items which change hands easily in which the principle stated in Paulo Maduka and followed in Makoye Samweli @ Kashinje and Kashindye Bundala would apply. In cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in the above case can be relaxed "[emphasis added] li The subject matter in this ground of appeal, to wit, the drum of electricity wire measuring 100MM, falls under the category of items that cannot change

hands easily. Needless to state that, even for such an exhibit, the custody thereof, requires proper handling in order to ensure that justice is served. Failure of which, the rights of the accused person may be prejudiced. Going through the records, I find nothing to suggest that there was improper handling of the said exhibit. I hereby wish to refer to the testimony of PW1, as recorded at page 8 of the trial court proceedings. The proceedings provide as follows: - "PW1 H. 3689 CPL PeterI am a police man working at Chemba police station. I am a driver and keeping the exhibit drum o f wire, the said exhibit is at Chemba police station. It was admitted on 5/4/2023. The said date is recorded in the exhibit register book. It is PC Enos who received it on that material date I was at the course and as per now the said Enos is attending his course. I managed to identify the said exhibitit has the label o f CHE/IR/59/2023. It is exhibit no. 25 as it is registered with the offence o f stealing. I have the register book which we are using to register exhibit the said exhibit register is PF16 o f 2020-2023. The said drum o f wire is at Chemba Police Station for we have no chombo for carrying it I may identify it. S/A- We pray to move this court up the Chemba police station in order to see the said exhibit o f which we faced (sic) to bring it to the court. 12 CRT- Prayer granted. The court is moved up to Chemba police station to see the exhibit they testified about Sgd: EA. Mwakaiinga- PRM 26/7/2023 Later on at 14: 40 hrs..... S/A- Your honour we are ready to proceed. PW1- This is the drum o f wire I was testifying about....I pray to tender it as exh. Accd-1 have no objection. CR T- Drum o f wire is admitted and marked as exh P. 1. Sgd: EA. Mwakaiinga- PRM 26/7/2023 " From the above trial court proceedings; I am of the view that the chain of custody was maintained. Further, the guiding principle in criminal investigations, laid down in the case of Issa Hassan Uki (supra) was observed and enforced. Regarding the 3rd, 5th and 6th grounds of appeal, the appellant argues that there was no eye witness who was summoned to corroborate the testimony of PW1. In addressing this ground of appeal, I will refer to section 143 of the Evidence Act which reads as hereunder: - 'Subject to the provisions o f any written law, no particular number o f witnesses shall in any case be required for the proof o f any fact.' According to the provision above, and as correctly submitted by the respondent's counsel, no specific number of witnesses are required for the 13 proof of any fact. Looking at the records, PW1 stated that exhibit PI had been under his safe custody. The witness extensively narrated on the date of admission, the item number, and the register book number of the said exhibit. This is proof that PW1 was well acquainted with the exhibit in question. The prosecution properly relied upon the testimony of PW1, including the testimonies of other witnesses which they paraded in court to prove their case. The 7th and final ground of appeal, is on the variation between the charge and the evidence adduced by the prosecution on the name of the rightful owner of the stolen property (drum of electricity wire). It was the submission of the learned state attorney that, two different names appear. The said names are Sagemen Company and Sugemcom Energy & Telecom. The learned state attorney submitted that this was a mere typing error, and that the same is curable under section 388 of the CPA. The section that has been relied upon by the counsel for the respondent reads as follows: - "388. Subject to the provisions o f section 387, no finding sentence or order made or passed by a court o f competent jurisdiction shall be reversed or altered on appeal or revision on account o f any error\ omission or irregularity

in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, 14 omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable." [emphasis added] This court is of the view that such irregularity has not prejudiced the rights of the appellant, and consequently has not occasioned a failure of justice. On that stance, it is the holding of this court that the prosecution proved their case to the required legal standard. Accordingly, the entire appeal is hereby dismissed for lack of merits. It is so ordered. Right of appeal explained. DATED at DODOMA this 19th day of July, 2024. Judgment delivered in the presence of the appellant and in the presence of Ms. Margareth Tlegray, counsel for the respondent. I. D. MUSOKWA JUDGE 15

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