

TANZANIA / JUDGMENT

jofa bosco haonga vs republic

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA DISTRICT REGISTRY AT MBEYA CRIMINAL APPEAL NO. 52 OF 2022 (Originating from the District Court of lieje at Itumba in Criminal Case No. 32 of 2021) Between JOFA BOSCO HAONGA..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 21st June, 2022 Date of judgment: 30th June, 2022 NGUNYALE, J. Jofa Bosco Haonga, the appellant, was arraigned before the District Court of Ileje at Itumba charged with two counts of house breaking contrary to section 294 (1) (a) and stealing contrary to sections 258 (1) and 265 (1) both of the Penal Code [Cap 16 R.E. 2019]. The prosecution alleged that on 31st October, 2021 at 20:00 hours at Sheyo Village within Ileje District in Songwe Region, the accused person broke into the house of one Shaban Julius Mwashimba and stole various items like chain saw worth i Tsh. 750,000/=, one mobile phone made itel valued at Tsh. 50,000/ and four litres of petroleum worth Tsh. 20,000/= being the properties of the said Shaban Julius Mwashibanda. The appellant denied the charge and as a result a full trial was conducted. It was PW1 (Shabani Mwashibanda) evidence that on 31st October, 2021 at 19:30 hrs he closed his house with locks and went to a nearby local market. At 20:00 hrs he received a call from his wife telling him that she found locks broken and doors open. He returned home, upon inspection he found a chain saw, four litres of petroleum and one mobile phone missing. The matter was reported to the village leaders, Itumba police station, nearby villages, ward and Rungwe District. Sometimes on 02/11/2021 he received information from Kiwira that one person has been arrested with a chain saw who was under police custody at Kiwira. He went there and identified the chain saw and the accused as they lived with him in the same village and on 31st October, 2021 they met at the village. In defence the appellant narrated that on 2/11/2021 at 16:00 hrs he was on his way to Mbeya by using a mini bus made coaster. When he reached at K.K. the car was stopped by police who mounted a search and managed to get a chain saw which was in the sack. They asked the owner without 2 reply. He sat near where the chain saw was retrieved and was then arrested and sent to Kiwira Police station. Upon full trial the trial Magistrate revisited the charge sheet and found it being defective in respect of the first count of house breaking. The appellant was

acquitted in that respect. Dealing with the count of stealing the trial Magistrate found it proved and the appellant was found guilty and accordingly sentenced to five years imprisonment. This findings in the count of stealing aggrieved the appellant, he filed petition of appeal through Ms. Nyasige Kajanja, learned advocate predicated on two grounds namely;

1. The trial court erred in law and fact when it exceeded its sentencing jurisdiction
2. The trial court erred in law and fact to convict the appellant in case that was not proved beyond reasonable doubt. When the appeal came for hearing on 21/6/2022 the appellant was represented by Ms. Nyasige Kajanja learned advocate whereas the respondent Republic appeared through Mr. Device Msanga learned State Attorney. Ms. Kajanja prayed to withdraw the second ground of appeal which was not objected by the respondent. Therefore, petition of appeal remained with ground one of appeal. Submitting on the ground Ms. Kajanja submitted that the trial Magistrate was Mr. Mwampashe as seen in the judgment and the appellant was 3 convicted and sentenced on the offence of stealing under section 258 (1) and 265 of the Penal Code to serve five years of imprisonment. She added that by imposing five years custodian sentence the Magistrate exceeded his sentencing powers prescribed under section 170 (1) (a) (b) of the Criminal Procedure Act [Cap 20 R: 2019] which is limited to twelve months. It was further submission that the offence in which the appellant was charged is not listed under the Minimum Sentence Act Cap 90. It was her submission that the trial Magistrate being not a Senior Resident Magistrate therefore his sentencing power was limited to twelve months and not five years which he imposed without confirmation by the High Court. In reply Mr. Msangi submitted that the sentence imposed is lawful. He added that although the offence of house breaking and stealing is not listed under the Minimum Sentence Act but are not petty offences. He argued that the sentence imposed is in conformity with section 170 (1)
 - (a) (b) of the CPA. I have considered submission for and against the sole ground of appeal. The question in controversy revolves interpretation of section 170 (1) (a)
 - (b) of the CPA which deal with sentencing powers of the subordinate court. While the appellant counsel holds the view that the sentencing power of a Magistrate below the rank of Senior Resident Magistrate is 4 twelve months, Mr. Msanga had a different view that the sentence of five years imposed was proper. In dealing with the controversy I will start with revisiting section 170 of the Criminal Procedure Act which provides that; 170(1) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences-
 - (a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;]

- (b) a fine not exceeding twenty million shillings. In terms of section 170(1) of the CPA if the offence is not one falling under the Minimum Sentences Act, subordinate court has no powers to impose a sentence of imprisonment for a period exceeding five years. The term subordinate court is defined under section 2 of the Criminal Procedure Act to mean any court, other than a court martial, which is subordinate to the High Court. Section 3 of the Act, makes it not applicable in the primary court or any matter originating from the primary court. Under the circumstances the subordinate court envisaged under the CPA is any court established under the Magistrates Courts Act Cap 11 save for the Primary Court. The complaint of the appellants counsel is rather centred on the rank of the presiding Resident Magistrate. 5 Currently the court employs court officers of the rank of Resident Magistrate who are posted either in Primary Court or District Court. Sentencing powers of the Resident Magistrate depends in the court he/she is presiding. In case a Resident Magistrate is presiding over the District Court his/her sentencing power will be subject to section 170 (1) of the CPA, that is imposing sentence not exceeding five years of imprisonment. This section was considered in the case of *Abdi Masoud @ Iboma & 3 others v Republic*, Criminal Appeal No. 116 of 2015 where the court held that; under section 170 (1) and (3) of the CPA, a magistrate of the rank below a Senior Resident Magistrate cannot impose a sentence of imprisonment of more than five (5) years, unless such sentence is confirmed by the High Court or falls under the Minimum Sentences Act.' In another case of *Yeremia @ Jonas Tehani v Republic*, Criminal Appeal NO. 100 OF 2017, CAT at Dar es Salaam, the court held that; 'In the case at hand, though stealing upon conviction attracts a jail term of seven years, since it is not a scheduled offence under the Minimum Sentences Act Cap 90, the trial magistrate ought to have imposed a sentence not exceeding five years in terms of section 170(1)(a) of the CPA.' In this appeal the appellant was charged with stealing which is not the scheduled offence under the Minimum Sentence Act. The appellant was sentenced to custodial sentence of five years by a District Court presided over by a Resident Magistrate. Under section 170(2) of the CPA which was 6 dealt in case of *Salum Said Matangwa @ Pangadufu v Republic*, Criminal Appeal No. 292 of 2018, CAT at Dar es Salaam sentencing power of the subordinate court is limited to five years where the presiding Magistrate is of the rank of Senior Resident Magistrate and above. Considering that the presiding Resident Magistrate was sitting in the District Court which is a subordinate court under the parameters of section 170(1) of the CPA, the sentence of five years imposed to the appellant was legal. The argument that it needed confirmation of the High Court becomes untenable so long as it did not exceed five years for which the trial Magistrate had jurisdiction to impose. To that end this appeal has no merits, it is hereby dismissed. 7

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