

TANZANIA / JUDGMENT

Judgement Joseph Ngonyani vs R

COURT
TANZLIIDECIDED
16 January 2025

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL APPEAL NO. 35482 OF 2024 (Originating from the District
Court of Mbeya at Mbeya in Criminal Case No. 35482 of 2024) JOSEPH
NGONYANI.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

Date: 16 January 2025 & 16 January 2025 SINDA, J.: The appellant was charged with and convicted of offences in three counts: the first count is stealing contrary to section 258 (1) and 265 of the Penal Code, Cap 16, R. E 2022 (the Penal Code), the second count is interfering with Necessary Services contrary to section 57 (1) and 60 (2) read together with paragraph 20 (1), (2) (a) of the First Schedule to the 1 Economic and Organized Crime Control Act, Cap 200, R.E 202 (the EOCCA) and the third count is Occasioning Loss to a Specified Authority contrary to section 57 (1) and 60 (2) read together with paragraph 10 (1) and (4) of the EOCCA. The District Court of Mbeya at Mbeya (the Trial Court) sentenced him to serve seven (7) years imprisonment for the first count, twenty (20) years imprisonment for the second count and twenty

(20) years imprisonment for the third count and all sentences to run concurrently. The particulars of the offence are that for the first count it is alleged that, on 5 September 2023 at K'S Hospital area within the District and Region of Mbeya, without any claim of right, he did steal 70 meters copper wire worth TZS 1, 540, 000/= from electrical transformer, the property of Tanzania Electric Supply Company Limited (TANESCO). For the second count, it is alleged that on 5 September 2023 at K'S Hospital area within the District and Region of Mbeya, without lawful excuse or authorization he interfered with the necessary service by illegally cutting the copper wire from the Electrical transformer, the property of TANESCO. 2 In the third count, it is alleged that on 5 September 2023 at K'S Hospital area within the District and Region of Mbeya, without lawful excuse or authorization did cut the copper wire from the Electrical transformer which is used for purpose of providing a necessary service by the TANESCO, and caused to the said specific authority to suffer loss of TZS 1, 540, 000/= The appellant challenges his conviction and the corresponding sentence on the following grounds:

1. That-the trial court erred in law point and fact in convicting and sentencing the appellant without observing that the charge against the appellant was not proved beyond all reasonable doubts as per law required standard.
2. That –the trial court erred in law point and fact in convicting the appellant without taking into consideration that there was incurably irregularities in seizing exhibit PE1,PE2 and PE3 where as:-
 - a) Those who arrested the appellant were not involved in filling the seizure note.
 - b) The occupier of the premises was not signed the seizure not.
 - c) No any independent witness was called to witnesses the seizure process. 3
3. That- the trial court wrongly acted on the hearsay evidence of Pw2,Pw3,Pw4,PW5 and Pw7 to convict the appellant while in law is not deserve.
4. That – the trial court erred in law point and fact in convicting the appellant relying on exhibit PE1,PE2,PE3 without taking into consideration that there was contravention of the procedural principles in tendering them before the court as exhibits as Pw1 and Pw2 were not shown even for identification so as to prove if are the same.
5. That- Exhibit PE5 the repudiated caution statement of the appellant was wrongly admitted as exhibit before the court as an inquiry (or trial within a trial) was not conducted. In conformity with the above point vide the case of SEIF OMARY NGWATA @KAZOLE/BABU AND 30OTHERS V. REPUBLIC CRIMINAL APPEAL NO.188 OF 2021 CAT (UNREPORTED) Pg.11-12 of judgment.
6. That- the evidence that the appellant confessed before Pw4 and Pw5 is baseless as the circumstance was not favoring the voluntarily confession. Please refer in the case of NDALAHWA SHILANGA AND ONE ANOTHER V. REPUBLIC,CRIMINAL APPEAL NO.247 OF 2008 CAT (UNREPORTED)Pg.19-20 of judgment.
7. That- the trial court erred in law point and fact in convicting and sentencing the appellant relying on exhibits PE1,PE2,PE3 and PE6 without taking into consideration that the documentation of chain of custody was broken- in conformity with above point vide the case of 4 PAULO MADUKA AND 4 OTHERS V. REPUBLIC, CRIMINAL APPEAL NO.110 OF 2007 CAT (UNREPORTED) Pg.18-20 of judgment.
8. That- the exhibit PE6 lacked its justification as it was not filled at the scene of crime. At the hearing of the appeal, the appellant was unrepresented. The respondent was represented by Mr. Salmin Zuberi, learned State Attorney. The appellant requested the Court to consider his grounds in the petition of appeal as presented in the Court. He opted for Mr. Zuberi to reply to them first so he could rejoin in case such need arose. In his submission, Mr. Zuberi supported the appeal and agreed with the first ground of appeal in the petition of appeal that the charge against the appellant was not proved beyond reasonable doubt by the prosecution as required by the law. Mr. Zuberi argued that, the incident occurred at night. He reviewed

the testimonies of PW1 and PW2 who were eye witnesses from page 7 to 9 of the proceedings of the District Court of Mbeya at Mbeya (the Proceedings) and stated that they failed to testify on how they visually identified the appellant at night as required by the law and as stipulated in the case of *5 Waziri Amani vs. Republic* [1980] T.R.L 250. He submitted that the evidence of identification did not prove beyond reasonable doubt that the appellant was properly identified. Mr. Zuberi opted not to submit on the remaining grounds of the appeal. In rejoinder, the appellant prayed the court to allow his appeal. I have considered the Trial Court's record and the parties' arguments. I have scrutinized whether the case against the appellant was proved beyond reasonable doubt. I have analyzed and evaluated the evidence of the prosecution's witnesses and I do agree with Mr. Zuberi that the visual identification evidence from PW1 and PW2 was not watertight. In line with the case of *Waziri Amani vs. Republic* (supra), it is a settled law on visual identification evidence that such evidence is of the weakest kind which in order to found conviction must be absolutely watertight. Factors that should be considered in determining whether visual identification evidence is watertight or not include; the time the witness had the accused under observation, the distance at which he observed the 6 accused, the conditions on which such observation occurred, if it was day or night time, whether there was good or poor lighting at the scene, whether the witness knew or had seen the accused before. It is also settled that although relevant and admissible, the eyewitness visual identification evidence is still of the weakest kind and most unreliable which should be acted upon with great caution. Before the court can act on such evidence, it must satisfy itself that the conditions were favourable for a proper identification. The evidence must be watertight and all possibilities of mistaken identity must be eliminated. It has to be insisted that the principle applies even in cases of visual identification by recognition as it is in the instant case - see *Issa s/ Ngara @ Shuka v. Republic*, Criminal Appeal No. 37 of 2005, *Magwisha Mzee Shija Paulo vs. Republic*, Criminal Appeal No. 467 of 2007 and *Shamir s/o John v Republic*, Criminal Appeal No. 166 of 2004 (all unreported). In *Shamir s/o John* (supra) the Court cited the case of *Philimon Jumanne Agala @ J4 vs. Republic*, Criminal Appeal No. 187 of 2015 (also unreported) in which it was observed, among other things, that: 7 "Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made." (Emphasis added) Guided by the above legal principles and pronouncements, I now turn to the evidence given by PW1 and PW2 relevant to the question of identification. My task is to objectively evaluate and scrutinize the evidence and satisfy ourselves if the said evidence is watertight to justify the Trial Court finding that it was the appellant who committed the offences. At page 7 of the Proceedings, PW1 stated that he was on patrol at KZ's Hospital around 00:30 and saw someone cutting copper wire on electrical transformer of TANESCO and arrested him and sent him to the police station. At page 9 of the Proceedings, PW2 stated that on 5 September 2023 he received a call from PW1 informing him that someone was arrested at KZ's Hospital for stealing copper wire of the transformer. He went to the scene and interrogated the person and sent him to the police station. 8 Amongst others, PW1 and PW2 evidence did not make

full disclosure of whether they witness knew or had seen the accused before, source of light and its intensity, explanation of the proximity to the culprit and the witness and the time they spent on the encounter, description of the culprit in terms of body build, complexion, size and attire. Looking at PW1 and PW2 evidence, it is clear that the guidelines on visual identification evidence as set in Waziri Amani (supra) are not met in instant case. The evidence given by PW1 and PW2 that it was the appellant stole the copper wire is not watertight to the required standard. From the evidence given by PW1 and PW2 the possibilities of mistaken identity or of someone impersonating the appellant cannot be ruled out altogether. As such, I find that the prosecution evidence was not water tight to secure conviction against the appellant and was definitely full of doubts. Therefore, the prosecution has failed to prove its case beyond a reasonable doubt. Sections 110(1) and (2) and 112 of Evidence Act Cap. 6 R.E 2022 (the TEA) states that, he who alleges must prove and the burden of so proving lies on him. See also the cases of Abdul Karim Haji vs. Raymond Nchimbi Alois and Another, Civil Appeal No. 99 of 2004, Nathaniel Alphonse 9 Mapunda and Benjamin Mapunda vs. Republic [2006] TLR 395 and Zombo Rashid vs. Republic, Criminal Appeal No. 7 of 2012 (CAT- unreported). Evidence must therefore be led by the prosecution in proving that, the offence was actually committed and so committed by the accused person. It is also trite law that, in all criminal matters the standard of proof is that of beyond reasonable doubt as provided under section 3(2)(a) of the TEA, as conviction cannot be grounded on mere suspicion. The standard was considered in the case of Nathaniel Alphonse Mapunda and Another (supra), when the Court observed thus:

- i) “As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said vs. Republic this court reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt. ii) Where circumstantial evidence is relied on, the principle has always been that facts which an inference of guilt is drawn must be proved beyond reasonable doubt. 10 iii) In criminal charge, suspicion alone, however grave it maybe it is not enough to sustain a conviction, all the more so, in a serious charge of murder.” Consequently, I allow the appeal, quash and set aside the conviction and sentence and order the immediate release of the appellant from prison unless held for another lawful cause. The right of appeal was explained. DATED at MBEYA on this 16 day of January 2025.
A. A. SINDA JUDGE 11

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