IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO. 340 OF 2017

(Originating from The District Court of Morogoro at Morogoro, Criminal Case No 72 of 2016 Before: Hon. Kimaze– RM Dated 02th October, 2017)

BETWEEN

HOSEA SANGA---------- APPELLANT

VERSUS

THE REPUBLIC---------- RESPONDENT

JUDGMENT

Last order date: 6th June, 2018
Judgment date: 22nd June,2018

MLYAMBINA, J.

Before the District Court of Morogoro at Morogoro, the appellant together with other accused persons namely Bujira Paskali, Yusuph Hamis Kandoro, Hamis Willium and Asha Hamisi were jointly charged for breaking into a building contrary to Section 297 and stealing contrary to Section 258 and 265 respectively. The third count was of receiving stolen property contrary to

Section 311 of the Penal Code Cap 16 (R.E. 2002) as an alternative to the second count for Yusuph Hamis Kandoro only. The fourth count was of receiving stolen property contrary to Section 311 as an alternative to the second count for the appellant herein and the fifth count was for receiving stolen property contrary to Section 311 and as an alternative to the second count for Asha Hamisi.

After hearing, the offences against the other four accused persons were not proved beyond reasonable doubt and they were acquitted forthwith, the appellant was found guilty and he was convicted of an offence of receiving a stolen property contrary to Section 311 of the Penal Code Cap 16 (R.E.2002) and sentenced to serve a term of three years and six months (3.5) imprisonment. Being aggrieved with the conviction and sentence, the appellant lodged this appeal on seven grounds namely; -

1. That, the trial Magistrate erred in law and fact in not considering the fact that the prosecution had failed to discharge their duty of proving the case beyond reasonable doubt.
2. That, the trial Magistrate erred in law and fact in not considering the fact that the complainant did not participate in the search to identify the refereed fridge but was

summoned four days at police station to identify in the absence of the appellant.

3. That, the trial Magistrate erred in law and fact in not considering chain of custody and documentation after seizure of the fridge alleged to have been stolen.
4. That, the trial Magistrate had erred in law and fact in invoking the doctrine of recent possession after the lapse of six months from the day of the crime.
5. That, the trial Magistrate erred in law and fact in not considering the fact that the complainant did not have any document to prove ownership of the refereed fridge.
6. That, the trial Magistrate erred in law and fact in holding that many people purchase properties without having receipts and they use the properties at their houses.
7. That, the trial Magistrate erred in law and fact in not considering the defence evidence and the exhibit No. D1 which gave reasonable explanation as to how he came into possession of the refereed fridge.

WHEREFORE, the appellant prayed for the appeal to be allowed and conviction and sentence be set aside.

During hearing, the appellant being a layman, simply asked the court to adopt all his grounds of appeal, the conviction and

sentence be quashed and set aside and he be let at liberty because he never committed any offence.

In response, learned State Attorney Zawadi Mdegela for the respondent conceded with the appeal for one obvious reason; that is, the prosecution never proved their case beyond any reasonable doubt.

The learned State Attorney submitted that; **one**, the republic through PW1 up to PW5 did prove that the property was stolen from the hands of PW2 (the complainant). That can be seen from the evidence of PW2 from page 27. **Second**, PW2 did prove that the property stolen belonged to him. PW2 mentioned a fridge and exhibited it. PW2 mentioned the serial and compressor numbers. The fridge was admitted as exhibit P1. **Third**, the republic proved the property was stolen from whom.

The learned State Attorney went on to submit that, PW1 showed how he arrested the appellant. They followed all the procedures of making search including of introducing themselves to the street chairman. They were allowed to make search. They managed to find the refrigerator in the residence of the appellant. That means, the appellant was in the possession of the refrigerator.

The learned State Attorney was of submission that PW1 who was leading the search process, made the procedure for seizing, he

seized and documented as required under Section 38 (3) of the Criminal Procedure Act. Later the Certificate of seizure was uncontested tendered before the Court. It was admitted as exhibit P2. Thus, up to that point there was no dispute that the property was in the hands of the appellant.

It was maintained by the learned State Attorney that, since it is the requirement of law for the prosecution to prove their case beyond any reasonable doubt, the prosecution side was therefore required to prove their case as per the legal requirement.

The learned State Attorney was of submission that, at defence hearing, the appellant tendered a purchase receipt of the refrigerator. It was admitted as exhibit DE1. According to the learned State Attorney, the procedure requires the defence side to issue notice for documents to be relied upon. That, such notice has to be issued prior closing of prosecution case. Thus, the republic had ample time to examine the legality of the receipt (exh. DE1) but it never did so. The appellant proved receipt, PW2 alleged that the receipt was destroyed by rain when shifting to Mtibwa (see page 31-32 of the proceedings). That, the defence of the appellant left doubt to the prosecution side of which they had to work upon.

The learned State Attorney was of further submission that, taking into consideration that the ownership has to be proved with documents, and taking into account that ownership of the appellant of the refrigerator was un-shakened, the republic had a legal duty to prove beyond reasonable doubt.

On adverse possession, the learned State Attorney was of submission that the person found with the property should have genuine explanation as to how he got such property. In this case the appellant brought a documentary receipt to prove ownership. Thus, the republic ought to have come with reasonable explanation to discredit the ownership.

In view of the learned State Attorney, the Court never gave strong reasons when convicting the appellant. It dismissed his evidence very lightly.

From the afore grounds of appeal and the submissions of both parties, I'm mindful of the principle governing appeals enunciated in a number of Court of Appeal decisions including that of **Majuto Lungwa (appellant) vs the Republic, Criminal Appeal No. 269 of 2015 (unreported)** where the Court held that; -

> *"the role expected for the first appellate Court...We are expected to conduct a re-hearing of the evidence, and to re-evaluate the same in order to determine ourselves*

whether, the conclusion reached by the Principle Resident Magistrate who heard the trial part on extended jurisdiction, should after our re-evaluation, be left to stand..."

One of the major issue to be re-evaluated in this matter is whether the prosecution side did prove their case beyond reasonable doubt. **In Jonas Nkize v Republic (1992) TLR 213,** the Court was of findings that the prosecution has to prove all the ingredients and unless it discharges that onus the prosecution cannot succeed. In this case the appellant was found guilty and he was convicted of an offence of receiving a stolen property contrary to Section 311 of the Penal Code Cap 16 (R.E.2002). The question is; **did the prosecution side establish beyond shadow of doubt that the refrigerator found in possession of the appellant was stolen or was the property of the appellant?** Here there are two sub-issues to be answered; **first** whether the appellant unlawfully possessed the refrigerator; **two**, to whom the refrigerator belonged?

As regards the first sub-issue, when deciding the case on unlawful possession, the court of Appeal had this to observe in **Moses Charles Deo versus the Republic [1987] TLR 134;**

> *"..... for a person to be found to have had possession, actual or constructive of goods,* ***it must be proved either that he was aware of their presence and that he exercised some control over them, or that the goods came, albeit in his absence, at his invitation and arrangement****. But it is also true that mere possession sometimes denotes knowledge and control" (Emphasis added)*

It follows that the requisites elements in proving unlawful possession of a property or some goods are existence of *knowledge and control of the property*. In this case, the prosecution never established beyond any reasonable doubt that the appellant was aware that the refrigerator was stolen from PW2. A mere possession cannot be deemed to qualify as unlawful possession.

Coming to the second sub-issue, it is our finding that the prosecution side never proved on balance of probabilities that the refrigerator belonged to PW2. A mere mentioning of the serial and compressor numbers does not confer ownership of the property to a person. If PW2 wanted to prove his case on the yard stick required by law he ought to have exhibited the purchase receipt of that property. Indeed, the mere allegation by PW2 that the receipt was destroyed when shifting to Mtibwa

(page 31-32) do not prove that PW2 had such receipt and it got destroyed. The Court would at least rely on such evidence if it was backed up with a Police loss report. To the contrary, PW2' s evidence remains a mere allegation.

As correctly argued by the learned State Attorney, in this case the appellant brought a documentary receipt to prove ownership (see last paragraph of page 84 of the proceedings). The evidence of the appellant remained un-discredited as far as the issue of ownership of the refrigerator is concerned. A mere allegation that the refrigerator was stolen from PW2 could not shake the one who possessed a receipt. Worse, the prosecution side never bothered to discredit the genuine of the appellant's receipt. For that reason, I agree that the prosecution side never proved their case at the yardstick of proof required in criminal cases.

Consequently, the conviction and sentence are quashed and set aside. The accused be set free immediately unless otherwise lawfully held. Appeal allowed.

Y. J. Mlyambina

Judge

22/06/2018

Dated and delivered this 22nd day of June, 2018 in the presence of the appellant in person and learned State Attorney Adolf Ulaya for the respondent.

Y. J. Mlyambina

Judge

22/06/2018