THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 46 OF 2020

(Originating from the District Court of Nanyumbu in Criminal Case No 68 of 2019)

NYENJE ISSA NYENJE ..... 1ST APPELLANT

REHEMA SAIDI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Hearing date on: 25/9/2020
Judgment on: 28/9/2020

NGWEMBE, J:

The two appellants Nyenje Issa Nyenje and Rehema Saidi, being dissatisfied with the conviction and sentence of eighteen (18) months imprisonment meted by the trial court of Nanyumbu District Court, preferred this appeal armed with four (4) grounds which can be summarized as follows:-

1. That in Meswaki Guest House there was a book for recording properties of guests, but the trial magistrate didn't call such documentary evidence to proof if the complainants were guests on that fateful night.

2. That the actual time of stealing that good was unknown and that about 23.00 hrs up to 23.30 hrs there was police patrol in Meswaki Guest House, but the incidence of stolen property was not reported.

3. The trial magistrate erred in law and fact by convicting us without considering that the prosecution case was not proved beyond reasonable doubt.

4. That the trial magistrate erred in law and in fact by convicting us without considering the circumstantial evidence which the prosecution side never produced fully in the court of law and it was the wife and husband.

Brief recap of the ordeal, originated on 25th August, 2019 at Kilimahewa village within Nanyumbu District in Mtwara Region, whereby the appellants being employees of one Rashid Said Mwatuka @ Mzee did fail to use all reasonable means to prevent the commission of the offence of stealing one Motorcycle make Baja – Boxer with registration No. 800 BCN having a chassis No. MD2A21BZ2EWM67256 valued TZS 2, 050,000/= property of Ahmad Hamis Sadiki.

In proving the offence against the two accused, the republic called two prosecution witnesses namely Ahmad hamis Sadicki aged 28 years old a complainant, and Zabibu Yahaya of 26 years old, also appeared as the second complainant. The two complainants are husband and wife thus had joint ownership of the alleged stolen motorcycle. In turn the accused appeared in persons and had no additional witnesses.

Briefly, the accused denied generally that they did not know the complainants and on the alleged fateful night of 24th August, 2019 the complainants were not among guests who slept in Meswaki Guest House even the guest register book their names were not there. Thus unknown to the accused persons.

In the contrary, the prosecution witnesses (PW1) narrated the story, briefly that the two moved from Chilunda to Mangaka Hospital to visit their patient while riding a motorcycle. He mentioned the 1st appellant as the one who received them at Meswaki Guest House. Also he alleged to have paid rental fees to the second appellant. The second appellant was the one who knocked the door of the complainants twice within that night. The last one informed them that the motorcycle is stolen. The same story was repeated by PW2.

Based on that evidences, the trial magistrate acquitted the accused on two counts of conspiracy to commit an offence contrary to section 384 of the Penal Code and Stealing contrary to section 258 (1) and 265 of the Penal

Code, but found them liable on Negligence to prevent commission of an offence contrary to section 383 of the Penal Code. Finally, the trial court proceeded to convict them and sentenced them to serve 18 months' imprisonment.

On the hearing date of this appeal, both appellants were not represented by learned advocates, the republic was represented by learned senior State Attorney Paul Kimweri. When the appellants were given the first right to argue their appeal, they opted such right be given to the learned Senior State Attorney, but reserved their right to reply thereafter. So this court invited the learned Senior State Attorney Mr. Paul Kimweri to address the court in this appeal.

The learned Senior State Attorney supported the appeal for reasons that the prosecution abdicated its noble duty to establish a prima facie case against the appellants and prove it beyond reasonable doubt.

That the prosecution had a duty to establish that the complainants PW1 & PW2 slept in the said guest house called Meswaki on the fateful night by producing guest register books. Secondly, the prosecution ought to establish and prove that the appellants were employees of Meswaki Guest House by calling the owner of that guest house as a witness in court. Above all the prosecution had a duty to establish that the appellants were the ones responsible to keep safe properties of those who sleep in the said guest house.

Further argued that, since all facts above were not established and proved, the only logical conclusion is that the complainants did not sleep in that guest house on the fateful night, he submitted.

Moreover, Mr. Kimweri pointed out another quite relevant point of law that the whole judgement is nullity for lack of essential element of court judgement. The trial court's judgement is lacking sentence to the appellants. In the whole court judgement, it appears the appellants were only convicted, but were not sentenced. Thus nullifying the whole judgement as if it never existed.

Another important legal point was on failure of the trial magistrate to consider the defence case in his judgement which is fatal. He referred this court to the cases of **Hussein Idd & Another Vs. R, [1986] TLR 166; Amir Mohamed Vs. R, [1994] TLR 134** in both cases, the court insisted on the requirement of considering the defence evidences in a balanced manner. He rested by a prayer that the trial court convicted the appellants contrary to law, hence be acquitted forthwith.

When the appellants were invited to respond to the respondent's submission, both conceded to that submission and prayed this court to do justice to them.

In disposing off this appeal, I better point out on the last point raised by the learned Senior State Attorney. That a court judgement must be balanced between the evidence adduced by the prosecution and the

defence case. Those evidences must be critically analysed with an open mind based with law applicable, facts of the matter and applicable precedents before arriving into conclusion.

It is a cardinal principle of judgement writing that a balanced court judgement must consider both evidences, that is, the prosecution case and the defence case. Failure to consider the defence case is fatal as was so decided in **Criminal Appeal No. 267 of 2006 Mkaima Mabagala V. R (Unreported),** where the court discussed at length on the reasoned judgement of a court of law:-

> *"For a judgement of any court of Justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. Such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at"*

In essence a judgement which does not contain an objective evaluation of the entire evidence of both parties, including proper evaluation and consideration of the defence case in a balanced manner against the prosecution case is fatal. Such evaluation is a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion before a formal conclusion is arrived. Therefore, failure of the trial magistrate to consider the defence evidence renders the whole judgement imbalanced, hence prone to fatality.

In respect to this appeal, I find the learned senior State Attorney is quite right to point that in the whole judgement of the trial court, the trial magistrate failed to consider the evidence of the defence in anywhere in the judgement. Thus, the whole judgement is prone to fatality.

On another important legal point, which is apparent on the face of the trial magistrate's judgement is the absence of sentence. In page 7 of the judgement there is only conviction, thereafter nothing is provided for contrary to sections **235 and 312** of the Criminal Procedure Act which provide clear road map and guidance towards proper **conviction** and **sentence.**

Section 235 (1):

> *"The court, having heard the complainant and the accused person and their witnesses and the evidence, shall convict the accused and **pass sentence** upon or make an order against him according to law..."*

section 312 (2):

> *"In the case of conviction the judgement **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**".*

These two sections are couched in a **mandatory language**, in that if at the end of the trial, the court is of the opinion that, on the strength of evidence adduced by the prosecution in court, the accused person is guilty, it must proceed to enter **conviction** and the subsequent **sentence.** It

goes therefore that, a judgment without proper conviction and sentence is not a judgment known by law.

In the case of Kelvin Myovela Vs. R, Criminal Appeal No. 603 of 2015 the Court of Appeal held:-

> *"It is not sufficient to find an accused guilty as charged. Failure to enter a conviction renders a **judgement invalid**. In fact, there is **no valid judgement** without a conviction having been entered, as it is one of the prerequisites of a valid judgement".*

Similar decisions were made in **Criminal Appeal No. 253 of 2013 Abdallah Ally V. R. (Court of Appeal) (unreported); Aman Fungabikasi Vs. R. Criminal Appeal No. 270 of 2008 (unreported); Shabani Iddi Jololo and three others Vs. R. Criminal Appeal No. 200 of 2006; Hassan Mwambanga Vs. R. Criminal Appeal No. 410 of 2013;** In all of these cases, the Court of Appeal had similar pronouncement that:-

> *"It is now settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgement and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction".*

In respect to this appeal, the sentence is missing in the judgement, but inquisitively perusing the trial court's proceedings, same is provided in page 19 of the court proceedings. Court proceedings are important court document, but is not a judgement. Judgement is different from court

proceedings. Therefore, mixing the two renders both documents that is judgement and proceedings nullity.

In the circumstances of this appeal and after pointing out those defects which cause the whole legal processes before the trial court nullity, I find no need to consider the first ground which goes to the evidence and proof of the offence alleged to have been committed by the appellants. Rather, I rest my consideration of this appeal by quashing the conviction and setting aside the sentence meted by the trial court. Consequently, order an immediate release of the appellants, otherwise lawfully held.

I accordingly Order.

Dated at **Mtwara** in chambers this 28th day of September, 2020.

P.J. NGWEMBE
JUDGE
28/09/2020

Court: Delivered at Mtwara in Chambers on this 28th day of September, 2020 in the presence of the appellants through Video Conference and Mr. Paul Kimweri, for the Republic/Respondent.

Right to appeal to the Court of Appeal explained.

P.J. NGWEMBE
JUDGE
28/09/2020