

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 72 OF 2020**

(Original Lindi District Court Criminal Case No. 93 of 2019)

**SHABAN SALVATORY MILANZI.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

26 May & 23 August, 2021

**DYANSOBERA, J.:**

The appellant herein was arraigned before the trial District Court for an offence of two counts. In the first count, he was charged with breaking into a lodge c/s 296 (a) and (b) of the Penal Code [Cap. 16 R.E.2002]. It was alleged that the appellant, on 15<sup>th</sup> day of November, 2019 at Sunrise Lodge within Lindi District in Lindi Region, did break and enter into the room of one Ally Salum and commit an offence therein namely stealing. In the second count, the appellant was charged with stealing contrary to section 265 of the Penal Code. The particulars of the offence in this count alleged that the appellant, on 15<sup>th</sup> day of November, 2019 at Sunrise Lodge within

Lindi District in Lindi Region, having entered into the said room, did steal therein one phone make iPhone 6 plus valued at Tshs. 600,000/=, one Flash make Toshiba valued at Tshs. 20,000/=, one watch make Rolex valued at Tshs. 100,000/= and cash money amounting to 70,000/= all make total value Tshs. 790,000/= the property of Ally Salum.

A brief background of the matter is that Ally Salim (PW 3), a resident of JKT Mbweni at Bunju in Dar es Salaam is a procurement officer working with Cassava Starch of Tanzania Cooperation (CSTC) in Dar es Salaam; however, the Headquarters of the company is at Lindi. On 14<sup>th</sup> day of November, 2019 he was at Lindi executing his duties and had put at Sunrise Lodge situated in Lindi near the bus stand. There he was received by Shariff Kassim Uledi (PW 4), a guest house attendant who, after registering him, gave him room No. 6. PW 3 went to the room and had a rest but fell deep asleep. He woke up at 0000 hrs and went outside in search for food. At 0145 hrs went back to his room and slept. At 0245 hrs, he woke up, looked for his cell phone but it was missing. Missing also was his hand bag which was on the table. He was worried and went to the door but found it intact. The window was, however, open. On looking outside through the opened window, PW 3 spotted his hand bag thrown down and things which were

inside were scattered on the ground. PW 3 opened the door and reported to PW 4. Upon opening the handbag, PW 3 found his cell phone make iPhone 6 plus valued at Tshs. 600,000/=, a watch make Rolex silver in colour valued at Tshs. 150, 000/=, a flash make Toshiba valued at Tshs. 20,000/= and Cash Tshs. 70,000/= which was inside the wallet missing. PW 3 reported to Lindi Police Station whereby PW 1 one G.4652 DC Eliasa was assigned to do the investigation. During the investigation, PW 1 had clues of stealing habits of the appellant who was a son of their fellow police officers as he had been involved in theft of cell phone incidents and used to be around 'vijiwe'. The appellant was, therefore, his prime suspect. PW 1 and his fellows managed to apprehend the appellant at Kongo Street in Lindi Municipality. He was sitting with his fellow friends. PW 1 told him, *'Shaban umeshaharibu, kuna simu ya Huawei na Nokia ndogo, naomba'*. The appellant denied to have taken those cell phones and retorted, *'brother, unanifuatilia sana maisha yangu'*. PW 1 replied that he will stop from pursuing his dealings provided he stops committing theft. The appellant was taken to Lindi Police Station but on the way he started crying asking for forgiveness while admitting that he had those cell phones. The appellant then led PW 1 and DC Peter at his home. There, they unsuccessfully looked for a Street Chairperson. They,

however, managed to access the retired Street Chairperson one Mariam Selemani (PW 2). A search was conducted in the presence of PW 2 and the appellant's wife and mother. They retrieved a small bag with brown colour on the bed which was covered with clothes. PW 1 opened the bag and found nine cell phones, four flashes a watch and one phone charger. PW 1 prepared a certificate of seizure (exhibit P 1). Among the retrieved items were one cell phone make iPhone 6 plus with IMEI 359318061423516 silver in colour, a flash make Toshiba 16 GB with No. 1906QE5009M5ARHAIMU202 white coloured and a watch make Rolex, white in colour. These items were tendered in court and admitted, respectively as exhibits P 2, P 3 and P 4. PW 1, later notified all investigators who had cases concerning theft of cell phones. DC Gasper identified exhibits P 2, P 3 and P 4. PW 3 was called and did identify those exhibits to be his property which had been stolen on the material time. PW 5 one G5771 DC Hamisi Zuberi went to the crime scene and drew a sketch plan (exhibit P.5).

In his defence, the appellant told the trial court that on 13.12.2019 he was arrested at the market area while taking some food by two police officers including PW 1. He produced to them his cell phone, a small ITEL and a bit one Huawei Y9. He was handcuffed and taken to the police station where he

was required to give them the receipts and was beaten. The appellant admitted a search to have been conducted at his home in the presence of PW 2 whom he called Mama Latifa, his mother and wife. He argued that the items he was alleged to have stolen were put inside his bag by the police officers during the search. In court, the appellant tendered a charge sheet, summary of facts and the victim's statement (exhibit D 1, collectively),

The appellant admitted PW 2 to have witnessed the search conducted at his (appellant's) home. He also admitted that both he and PW 2 signed on exhibit P 1.

The trial court analysed the evidence and was satisfied that the case against the appellant was proved to its hilt. It convicted him on both counts and sentenced him to three years term of imprisonment in each count.

Aggrieved, the appellant has appealed to this court and has filed a total of twelve grounds of appeal. His main complaint is found at ground No. 6 of his main petition of appeal that,

'6. That the trial court erred in law and in fact to convict and sentence the appellant while the prosecution side failed to prove the charge beyond reasonable doubt.

At the hearing of this appeal, the appellant appeared in person while the respondent was represented by Mr. Meshack Lyabonga, learned State Attorney. The appellant opted the learned State Attorney to start responding the grounds of appeal first.

Mr. Lyabonga, in his submission, told this court that all the ground of appeal boil down to one complaint, that is, the prosecution failed to prove the case beyond reasonable doubt. He supported the conviction and sentence relying mainly on the fact that the appellant's confession led to the recovery of the stolen items which were found by PW 1 and witnessed by PW 2 in the appellant's room and which items were amply identified by the victim that is PW 3. He supported his argument by referring this court to the case of **Mabala Masasi Mongwe v. R.**, Criminal Appeal No. 161 of 2010 on the appellant's oral confession leading to the recovery of stolen items.

On his part, the appellant maintained that there was no search warrant and no evidence was led to prove that he was found at the crime scene. Further that PW 3 failed to produce receipts to prove ownership of the items he managed to identify.

Having perused the record of the trial court and after taking into account the grounds of appeal and the submission of either sides, I entertain no any doubt that the case against the appellant was proved beyond reasonable doubt.

In the first place, it was not disputed that PW 3 who had put up at Sunrise Lodge was robbed of the itemised articles as indicated in the charge sheet. This is according to the evidence of PW 3 himself, PW 4 who is a guest house attendant and PW 5 who drew the sketch plan. According to PW 3 and PW 5, theft was committed through pole fishing. These witnesses were supported in this by the sketch plan (exhibit P 5). The appellant supported this by exhibit D 1 he tendered in court.

Second, PW 1 and PW 2 were clear that when searched, the appellant was found with exhibit P 2, P 3 and P 4 which were not only amply identified by PW 3 to be his property that had been stolen but also featured in the charge sheet which the appellant produced in court and was admitted in evidence as exhibit D 1. The appellant did not lay any claim of ownership on them. The necessity of PW 3 producing receipts did not arise as the ownership by him was not disputed.

Third, the appellant did not account for the possession of those items. After all he admitted to have been searched in presence of his mother, his wife and PW 2, the retired Street Chairperson. There is nothing on record indicating that the search conducted by PW 1 in the presence of PW 2 and the appellant's mother and wife was illegal.

The conviction was in accordance with the evidence given and received by the trial court and there is no material to fault it.

The sentence of three years in each count was not excessive.

The appeal is, in consequence, disallowed. It is dismissed in its entirety.



A handwritten signature in blue ink, appearing to read "W.P. Dyansobera".

**W.P. Dyansobera**

**Judge**

**23.8.2021**

This judgment is delivered under my hand and the seal of this Court on this 23<sup>rd</sup> day August, 2021 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney for the respondent Republic and in the presence of the appellant.



A handwritten signature in blue ink, appearing to read "W.P. Dyansobera".

**W.P. Dyansobera**

**Judge**

**23.8.2021**