IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

(DC. CRIMINAL APPEAL NO.01 OF 2020)

(Originating from the decision of Nkasi District Court in Criminal Case No. 26 of 2019)

FRANK S/O MIPATA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25th February-24th March, 2020

MRANGO, J.

The District Court of Nkasi at Rukwa passed judgment on Frank Mipata, the appellant, to serve a sentence of two (2) years in prison for the offence of theft contrary to Section 258 of **the Penal Code [CAP 16, R.E 2002]**. He was, together with another person namely Fadhili Mwendapole were both charged with two counts of burglary contrary to Section 294(1)(a) and (2) of the Penal Code Cap 16 and also theft contrary to Section 258 read together with Section 265 of the Penal Code Cap 16. It was alleged by the Prosecution side that on the 11th day of February, 2019 at about 00:00 hours at Isunta village within Nkasi

District in Rukwa Region, the accused persons did break and enter into dwelling house of one Janemary Kiwalaka with intent to commit an offence therein. After breaking in, it was alleged that the accused persons did steal one matress, one chair, one pan and two (2) radios properties of one Janemary Kiwalaka.

As it were, the trial court found both the accused persons not guilty in the first count, but did convict the first accused person in the second count and acquitted the second accused person after being satisfied that he did not commit the offence. Aggrieved by the decision, the appellant preferred the present appeal to this court.

The appellant presented a total of three grounds which for the purpose of this appeal are singled out into one major ground of appeal to wit that the trial court erred to convict the appellant while the prosecution side failed to prove the case beyond all reasonable doubts.

During the hearing, the appellant was represented by Mr. Deogratius Sanga learned counsel and he argued for the three grounds of appeal filed to this court. Whereas he argued for the 1st and 2nd grounds firstly and for the 3rd ground separately. In so doing, he insisted that the prosecution side in the trial court failed to prove their case beyond reasonable doubts and he cited two cases to support his arguments, the first case was **Azizi Abdallah v. Republic (1991) TLR**

71 where it was held that the prosecution are primafacie to call due witnesses otherwise the adverse inference is to be drawn. The learned counsel used this reference to relate the failure of the prosecution side to summon the victim of the said theft one Janemary Kiwalaka to testify against the appellant whilst she was at the scene of the crime. In their 3rd ground of appeal, the learned counsel argued that the trial court failed to consider the coherent defence case whereas it was its duty to do so in order to reach a fair decision, failure vitiates conviction, he supported his argument with the case of **Ahmed Said v. Republic Criminal Case No. 291 of 2015 (Arusha)(unreported)(CAT)**, where it was held that the trial court should keep in mind the defence testimony, failure of it will vitiate the conviction (Pg. 15-16).

On those grounds, the learned counsel prayed for this appeal be allowed and the conviction be quashed and the appellant be released from custody.

The respondent side, the Republic was represented by Ms. Irene Mwabeza learned State Attorney, and she was in support of the appeal by the appellant under the reasons that, the prosecution side failed to beckon the victim one Janemary Kiwalaka to testify and that there was no reason given as to why she was not among the witnesses summoned and the learned State Attorney cited the case of **Bukenya & Others v.**

Uganda 1972 EALR 549 in support of her arguments, where it was held that, the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent and even if the evidence of the uncalled witness may be adverse to the prosecution. She also cited the case of **Henry Gervas v. Republic HCD 1967, 129**, which held that the witness ought to have been called to identify what was alleged to have been stolen, ownership must be established beyond reasonable doubt. Lastly, the learned State Attorney also supported the 3rd ground of appeal that, the trial court failed to consider the defence case, hence supporting this appeal by the appellant.

In this instant appeal it is my observation that the victim of the incident was the key witness in identifying the properties stolen from her house. In **Joseph Mutua and another Vs Republic Criminal Appeal No. 166 of 2011 (unreported),** the appellants were found with stolen mobile phones few hours after they were stolen. The complainant identified them because they had serial numbers which matched with the receipts that were in his possession. The Court observed that mobile phones are common items. It held:

"...in our evaluation of the evidence we do not see a linkage in the case between PWI and PW2 and the mobile phones. We say so

because the evidence on record does not disclose that PWl and PW2 looked at the mobile phones in court in the presence of every body and then matched the numbers in the said phones with the numbers in the receipts. It was not enough for the witnesses to say that the phones bore the numbers appearing in the receipts without more. In the absence of clear evidence to that effect, it was possible that the mobile phones that were produced and admitted in evidence were not necessarily the same as those which were robbed from PWl and PW2.

However, it cannot be argued that the appellant was convicted under the principle of recent possession because the prosecution side did not sufficiently identify the stolen properties as the properties of the victim one Janemary Kiwalaka. The properties alleged to be stolen by the appellant are items that could be possessed by anybody and therefore it was important for the prosecution side to give further details distinct to the stolen properties. The effective approach of succeeding in this was to summon the victim of the incident to testify and identify the stolen properties, to my disappointment this was not done.

The same fate befell the case before this court. The evidence adduced by witnesses of the prosecution side before this court was not sufficient identification to prove that the stolen properties were the ones

stolen from the house of the aforementioned victim because she was not among the witnesses summoned. The standard of proof in criminal cases as must always be beyond reasonable doubt. See the Court of Appeal decision of **Horombo Elikaria V Republic, Criminal Appeal No. 50/2005, CAT at Mtwara (unreported).**

Since the prosecution side evidence did not prove its case to this standard, I have a sufficient reason for interfering with the findings of the trial court. In that reflect, I join hands with the submissions made by Mr. Deogratius Sanga, learned counsel for the appellant and Ms. Irene Mwabeza, learned State Attorney who represented the respondent, I allow this appeal and quash the conviction and set aside the sentence of two years imprisonment that was imposed on him. I order his release from prison unless he is held there for other lawful purpose.

It is so ordered.

D.E. MRANGO

JUDGE

24/03/2020

Date - 24.03.2020

Coram - Hon. D.E. Mrango – J.

Appellant - Present & represented by Mr. Mathias Budodi – Adv.

Respondent - Mr. Simon Peresi – State Attorney

B/C - Mr. A.K. Sichilima – SRMA

COURT: Typed judgment delivered today the 24th day of March, 2020 in presence of the Appellant, Mr. Mathias Budodi for the Appellant and Mr. Simon Peresi – Learned State Attorney for the Respondent/Republic.

Right of Appeal explained.

D.E. MRANGO

JUDGE

24.03.2020