IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: JUMA, C.J., MWARIJA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 555 OF 2016

SOSPETER CHARLES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of High Court of Tanzania at Shinyanga)

(Ruhangisa, J.)

dated the 21st day of October, 2016
in
DC. Criminal Appeal No. 58 of 2016

JUDGMENT OF THE COURT

10th & 13th August, 2020

JUMA, C.J.:

The appellant, SOSPETER CHARLES, has come to this Court on second appeal. Despite the dismissal of his first appeal by the High Court at Shinyanga, he is still determined to appeal against both his conviction and the sentences in respect of two counts; of burglary contrary to section 294 (1) (a) of the Penal Code [Cap. 16 R.E. 2002], and stealing contrary to sections 258 (1) and 265 of the Penal Code, respectively.

The background to this appeal is that the house of the complainant Mussa Massanja (PW1) was broken into on 12/02/2015. He was away at the time of break-in. He had gone to visit his son, who was receiving treatment at his mother-in-law's house in another locality. When he returned to his house the following day, a rear window into his house had been broken into. Several items, including his red motorcycle (TOYO Reg T400 BHX), his solar lamp, two plastic chairs, one hoe, and his NMB Bank card which he used for accessing automated teller machines (ATM) had all been stolen. He immediately alerted his neighbours, who included his fellow teachers. An alarm that was raised attracted more villagers to his house. The Buhungikila village commander of the peoples' militia, alerted the other nearby villages like Maganzo village (in Kishapu District) about the break-in and theft.

Detective Corporal Qoda (PW3) testified how on 13th February 2015 while on duty at Maganzo Police Station, a confidential source informed him about a person who was selling his motorcycle. Because PW3 was aware of a break-in and theft of a motorcycle, he asked a police informer to pose as a buyer. The informer met the seller, who turned later out to be the appellant, and selling price of TZS 500,000/= was agreed. The informer left, ostensibly to look for

purchase money. He reported back to PW3, who in turn alerted his commanding officer. A team of police officers, who included PW3 and Detective Corporal Jonas (PW2), went to where the appellant had rented a room and arrested him when he opened his room to supposedly show the buyers the motorcycle that was up for sale. The arresting police officers searched the appellant. Apart from the motorcycle, an ATM Card in the name of Masanja M.M. was also found in his possession.

On 15th February 2015 the complainant (PW1) received a call on his mobile phone from Maganzo Police Station asking him to read over the details of his motorcycle, which he did. The following day he visited Maganzo Police Station where he identified his motorcycle.

In his defence, the appellant denied breaking and entering PW1's house and stealing a motorcycle. He explained how the motorcycle came into his possession. It was while he was collecting water for making bricks when, one Masunga Martin, asked him for a place to temporarily keep his motorcycle. The motorcycle had earlier broken down whilst Martin was travelling from Maswa to Shinyanga. That is how, according to the appellant, Martin transferred the

motorcycle from the garage to the appellant's room. Appellant explained that the ATM card must have been dropped down by Mr. Masunga Martin.

After convicting the appellant, the District Court of Maswa sentenced him to serve twenty (20) years in prison for the burglary count; and a term of seven (7) years imprisonment on the second count of stealing. The trial court ordered both sentences to run concurrently, amounting to serving twenty years in prison.

The appellant, aggrieved by his conviction and sentence, appealed to the High Court at Shinyanga. His first appeal was dismissed. Ruhangisa, J. agreed with the trial court's conclusion that it was the appellant who broke PW1's house, stole items which, hardly twelve hours after the burglary, were found in his possession.

In his memorandum of appeal to this Court, the appellant sets out four grounds of appeal. In the first ground, he contends that his conviction for burglary was not proper in law. He asserted that the two courts below erred to convict for burglary taking into account the learned trial magistrate stated that he did not know the time the burglary was committed.

The second ground faulted his imprisonment for twenty years for his conviction for burglary, describing it to be severely excessive and contrary to the law. Like in the first ground, in the third ground the appellant faulted the two courts below for failing to find that the time the complainant was away from his house was not proved, as a result, the prosecution evidence fell short of the required standard of proof. In the fourth ground of appeal, the appellant expresses concern over the caution statement (exhibit P2) which the trial and the first appellate courts relied on to convict him. The appellant insists that this statement was taken unlawfully since he was induced to make it.

At the hearing of this appeal on 10/08/2020 the appellant was not physically in Court. He was unrepresented and appeared remotely by video link between the High Court at Shinyanga and Shinyanga District Prison.

Mr. Tumaini Kweka, learned Principal State Attorney, Ms. Magreth Ndaweka, learned Senior State Attorney and Ms. Jukael Jairo, learned State Attorney, appeared for the respondent Republic.

In his submissions on the grounds of appeal, the appellant repeated the contents of his four grounds of appeal. He urged the Court to allow his appeal and set him free.

In her submissions, Ms. Ndaweka, learned Senior State Attorney, started by expressing that she supports the appellant's first, second and third grounds of appeal concerning his conviction on count of burglary. She however supported the conviction of the appellant in the second count of stealing.

Ms. Ndaweka expounded that the appellant was convicted on the strength of exhibits found in his possession, that is exhibit P4 (motorcycle) and ATM Card belonging to Massanja M.M. She submitted further that the appellant was convicted on the evidential basis of his cautioned statement (exhibit P3). The learned Senior State Attorney explained why these pieces of evidence lack probity and should be expunged from the record of appeal. She submitted that because these exhibits were tendered by a prosecutor, instead of witnesses, their exhibition violated the provisions of section 198(1) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA) which reads:

> *198.-(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act.*

She cemented her stance that a prosecutor should not be allowed to tender exhibits. She referred us to two decisions of the Court in **FRANK MASSAWE V. R.,** CRIMINAL APPEAL NO. 302 OF 203 OF 2012 and **DPP V. FESTO EMMANUEL MSONGALELI and NICODEMU EMMANUEL MSONGALELI,** CRIMINAL APPEAL NO. 62 OF 2017 (both unreported) which reiterate the legal position that under section 198(1) of the CPA evidence shall always be given on oath.

Upon a closer look at the record, the learned State Attorney is correct to question the way prosecutor who was not sworn as a witness, tendered exhibits. The record of the trial court shows that the prosecutor was Detective Corporal Timothy, who was not a witness. It was while PW3 was testifying on oath when the public prosecutor intervened and told the trial court: *"Your honour I pray that the motorcycle be tendered here in court as exhibit."* The appellant replied that he had no objection, whereupon the trial court ordered the motorcycle with Registration Number T400 BHX to be admitted as exhibit P4. We subscribe to what we restated in **FRANK MASSAWE V. R.** and **DPP V. FESTO EMMANUEL MSONGALELI and NICODEMU EMMANUEL MSONGALELI** (supra) to the effect that as long as the prosecutor is not a

witness sworn to give evidence, he cannot assume role of a witness as it happened during the course of trial subject of this appeal before us.

We agree that Detective Corporal Timothy being a prosecutor should not have been the one to tender exhibit P3 (caution statement) and exhibit P4 (motorcycle). Ms. Ndaweka also prays that we expunge these exhibits, which we hereby expunge from the record of this appeal.

Ms. Ndaweka next explained why she believes that despite expunging exhibits P3 and P4 from the record, there is still remaining evidence sufficient to secure a conviction of the appellant for stealing. She referred us to the admission of guilt which the appellant made in the memorandum of the matters which the appellant agreed to be undisputed during the Preliminary Hearing. The learned Senior State Attorney referred to paragraph 4 in the matters which the appellant did not dispute, and submitted as amounting to admitting the offence of stealing. We reproduce that relevant part of the Preliminary Hearing as follows:

> *"**PRELIMINARY HEARING STARTS***
> *Facts by the prosecution.*
> 1. *The accused's name is Sospeter Charles, 18 years old, peasant Sukuma by tribe, a resident of Matale in Bariadi District.*

2. *The accused is charged with two counts as per charge sheet.*
3. *...*
4. *That the accused after having stolen those properties went to sell them at Maganzo village within Kishapu District. And when he was about to sell those properties was arrested by E.9195 D/CPL Koda on 15/02/2015 and brought to Maganzo Police Station, on 16/02/2015 he was brought to Maswa Police Station. His statement was taken by E.3076 D/CPL Jonas where he confessed to have been arrested in possession of the motorcycle mentioned above.*
5. *On 18/02/2015 his charge was read before Maswa District Court and he denied the same.*

MEMORANDUM OF UNDISPUTED FACTS
Facts number 1, 2, 4 and 5 are not disputed."

Apart from memorandum of undisputed facts which, according to the learned Senior State Attorney amounted to admitting the offence of stealing, Ms. Ndaweka also submitted that the evidences of PW2 and PW3 which the appellant did not contest by cross examination, proves the offence of stealing. She referred us to the case of **EMMANUEL SAGUDA @ SULUKUKA & SAHILI WAMBURA V. R.**, CRIMINAL APPEAL NO. 422 "B" OF 2013 which quoted with approval the holding in the case of **BROWNE V. DUNN** [1893] 6R. 67, H.L.: *"a decision not to cross-examine a witness at all or on a particular*

point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear prior notice of the intention to impeach the relevant testimony."

The position taken by Ms. Ndaweka's being that the memorandum of undisputed facts and evidence of PW2 and PW3 is sufficient to prove stealing against the appellant; we do not, with due respect, agree. First, we pointed out to Ms. Ndaweka that the supposedly undisputed facts under paragraph 4 of the Preliminary Hearing, were not read over and explained to the appellant in a language that he understands as is required by section 192 (3) of the CPA which states:

> *"(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed* ***and the memorandum shall be read over and explained to the accused in a language that he understands****, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed."* [Emphasis added].

Mr. Kweka who briefly stepped in, conceded that the record of the trial court is silent about this statutory requirement to read over what the appellant

had agreed. While Mr. Kweka agreed with the general principle that whatever transpires in court during trials must always be recorded, he however was of the view that the statutory requirement that memorandum of undisputed facts be read over and explained to the accused in a language that he understands can be dispensed with where the appellant signs the memorandum. He submitted further that the appellant was not prejudiced by non-compliance with section 192(3) of the CPA.

We do not think conviction of the appellant for stealing can be sustained if the record does not show that contents of memorandum of undisputed facts were read over to the appellant, for him to understand the significance of the salient ingredients of the offence of stealing. Great caution is needed before a court can convict on the basis of the undisputed facts recorded during the preliminary hearing. Perhaps, before proceeding to convict on the basis of undisputed facts, trial courts should be minded to the analogy of how courts handle unequivocal plea of guilty. Guided by the provisions of section 192 (3) of the CPA and the decision of the East African Court of Appeal in **ADAN V. R.** [1973] EA 445, to convict the appellant for stealing on the basis of the memorandum of undisputed facts, the facts in question must disclose the essential ingredients of stealing. Apart from having not been read over to the

appellant, neither the memorandum of undisputed facts nor the evidences of PW2 and PW3 unequivocally disclose the ingredients of stealing as prescribed by section 258 (1) of the Penal Code, Cap 16. At very least, the evidences of PW2, PW3 and the appellant's own defence (DW1) point to possession. With the discounting of the count of burglary, the doctrine of recent possession cannot be invoked to link the appellant with a non-existent offence of burglary. Section 258(1) of the Penal Code illustrates the essential ingredients of stealing in the following way:

> *258.-(1) A person who* ***fraudulently and without claim of right takes*** *anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing."* [Emphasis added].

With expungement of his cautioned statement, convicting the appellant for stealing is not sustainable on the basis of remaining evidence. We considered the question whether the appellant can belatedly be convicted of any minor and cognate offence to stealing under the provisions of section 300 of the CPA. We think the nearest offence the appellant could have been convicted of, are either

the offence of receiving or offence of retaining stolen property contrary to section 311 of the Penal Code:

> *"311. Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe it to have been stolen, extorted, wrongfully or unlawfully taken, obtained, converted or disposed of, is guilty of an offence and is liable to imprisonment for ten years."*

We considered the offence of receiving or retaining stolen property is eventuality because the appellant does not deny possession of the motorcycle that was stolen from PW1's house. Similarly, the prosecution evidence of PW2 and PW3, shows that the appellant was found in possession of a motorcycle that had earlier been stolen from PW1's house. But, having earlier been charged, tried and convicted of stealing, section 300 of the CPA cannot be invoked to charge the appellant over an offence that is not cognate and minor to the offence of stealing. Section 300 of the CPA states:

> *"300.-(1) Where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is*

proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

(3) For the purpose of this section, the offences specified in section 222 of the Penal Code shall, where a person is charged with the offence of attempted murder under section 211 thereof, be deemed to be minor offence."

The offence of receiving or retaining stealing is not a cognate and minor offence to stealing. While conviction for stealing attracts a maximum sentence of seven years under section 265 of the Penal Code, the offence of receiving or retaining stolen property, is superior to stealing inasmuch as it attracts a maximum sentence of imprisonment for ten years under section 311 of the Penal Code.

Ms. Ndaweka next explained why the Republic conceded the first three grounds of appeal pertaining to the conviction of the appellant for the offence burglary. She submitted that the evidence of the complainant (PW1) does not prove that the offence of burglary was committed at his house while he was

away. She submitted that the complainant merely stated that he was not at his house on 12/02/2015 and returned on 13/02/2015 at 07:00 hours. He did not go as far as proving that breaking and entering into his house took place at night to sustain the offence of burglary.

With due respect, we agree with Ms. Ndaweka that on the basis of evidence of PW1, conviction for the offence of burglary under section 294 (1) (a) and (2) of the Penal Code cannot be sustained against the appellant. When read together, section 294 (1) (a) and (2) of the Penal Code create two distinct offences. First is the offence of breaking and entering, and secondly, the offence of burglary:

> *"294. -(1) Any person who-*
> *(a)* ***breaks and enters any building,*** *tent or vessel used as a human dwelling with intent to commit an offence therein; or*
> *(b) having entered any building, tent or vessel used as a human dwelling with intent to commit an offence therein or having committed an offence in the building, tent or vessel, breaks out of it,*
> ***is guilty of housebreaking and is liable to imprisonment for fourteen years.***

(2) ***Where an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years.****" [Emphasis is added]*

The offence of burglary is committed when the breaking and entering into any building, tent or vessel used as a human dwelling takes place at statutory night-time with intent to commit an offence therein. "Night or night-time" is defined by section 5 of the Penal Code to mean the period, between seven o'clock in the evening, and six o'clock in the morning.

The question of what time the house of the complainant was broken into, is a question of fact which must be proved by evidence. In his evidence, the complainant did not specify if he locked and left his house at night-time, meaning any time between seven o'clock in the evening and six o'clock in the morning. He only proved the time he returned to his house the following day, at about 07.00 hrs.

All in all, we agree with the learned Senior State Attorney that there is no evidence to prove that it was the appellant who burgled his way into the complainant's house to commit an offence therein.

We accordingly allow the appeal, quash the convictions on two counts of burglary and stealing recorded against the appellant, set aside the sentences imposed on the appellant and order that the appellant be released from prison forthwith, unless he is being held for some other lawful cause. It is ordered accordingly.

DATED at **SHINYANGA** this 12th day of August, 2020.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of August, 2020 the Appellant who was not physically in Court appeared remotely by Video link and Mr. Jukael Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

K. D. MHINA
REGISTRAR
COURT OF APPEAL