IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAAM SUB REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 102 OF 2022

(Originating from Criminal Case No. 230/2020 of the District Court of Ilala at Kinyerezi)

ALLY GURU NANJI ..... **APPELLANT**

VERSUS

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

JUDGMENT ON APPEAL

S.M. MAGHIMBI, J:

Before the Ilala District Court at Kinyerezi (Hon. Nkwera, RM), the appellant along with another person not a party to this appeal, were charged with two counts, the 1st Count was house breaking contrary to section 293 (a) and (b) of the Penal Code Cap. 16 [R. E. 2019] and the 2nd count was stealing contrary to section 258 and 265 of the Penal Code. It was alleged in the particulars of the charge that on 7th day of December, 2019 at Upanga area Olympio Street within Ilala District, the accused person did break and entered into a house of Anash Patel with an intent to steal. Again, on the same day the accused did steal properties of the value of Tshs. 14,700,000/= which were bracelet value Tshs. 1,700,000/=, gold chain valued Tshs. 1,500,000/=, two gold rings valued Tshs. 1,600,000/=, earings valued Tshs. 500,000/=, Laptop make dell valued at $ 700 equivqlent to Tshs. 1,600,000/= and gold ornaments with total value of Tshs. 7,780,000/= which made a total of Tshs. 14,000,700/=.

The Prosecution paraded six witnesses tendering 2 exhibits. On the other side the accused persons had no witnesses other than themselves and had no exhibits. After full trial the accused's version was not bought by the trial Court, since the trial Court found it that the prosecution's case was proved beyond reasonable doubt. At the conclusion of trial, the trial Court convicted the accused persons and sentenced hiom to two years imprisonment for each Count; the said sentences were to run concurrently. Aggrieved by the conviction the appellant has lodged this appeal raising 5 grounds appeal that;

1. That, the Honourable trial Magistrate erred in law and in fact in convicting and sentencing the Appellant to two years imprisonment without sufficient evidence involving the Appellant in the offence of house breaking and stealing.
2. That, the Honourable trail Magistrate erred in law and in fact by improperly analysing and evaluating the evidence adduced on record by both the prosecution and the defence.
3. That, the Honorable trial Magistrate erred in law and in fact by convicting the appellant relying on an incredible and unreliable evidence of PW1 to establish that the appellant was the one that who broke into the house and stole the properties of PW 1, Avanash Patel.
4. That, the Honourable trial Magistrate erred in law and in fact by convicting the appellant where she disregarded the appellant's defence which raised reasonable doubt and shifted the burden of proof upon the defence contrary to the procedures and requirement of the law.

5. That, the Honorable trial Magistrate erred in law and in fact for failure to observe that the case was not properly investigated leading to wrong findings and conclusion.

The appeal was heard by way of written submission as ordered by the court. The appellant, under the service of Mr. Patrick Malewo, learned advocate adhered to the order and so did the State Attorney who represented the respondent.

Submitting on the first ground of appeal it was stated by Mr. Malewo that there was no sufficient evidence to convict the appellants of the offences charged. That in the first count, the prosecution was required to prove three ingredients; the accused broke into a dwelling house, having so broken entered the same and they did so with intent. Moreover, he submitted, in the second count again the prosecution was required to prove that, there was a thing capable of being stolen, there was conversion and that the accused did so with fraudulent intent.

Mr. Malewo submitted further that under section 10 of the Criminal Procedure Act [Cap. 20 R. E. 2022] ("the CPA") the law requires a proper investigation to be done by the police. That in the circumstances of this case, it was different as the investigator one Sergeant Msase arrested the accused on the basis that he was the one left with the keys to the said house. He argued that this led the investigator to draw inference that the appellant was responsible hence arrested him.

On the second ground of appeal Mr. Malewo submitted that there was improper analysis of evidence adduced in record by the prosecution and defence. That there was no exhibit that was tendered

in Court that implicated DW 1 to have participated in the crimes. All the evidence adduced in court was against the appellant and that the Court based on suspicion rather than real evidence in making its findings. It is the spirit of law no one is to be convicted on suspicion, supporting his submissions by citing the case of **Agness Nyamuhanga Vs Republic, Criminal Appeal No. 341/2018**. He then submitted that the Court heavily relied on unsubstantiated and uncorroborated state of the appellant being left with keys to the house by the complainant while there was no cogent evidence that the appellant broke into the said house and stole the alleged properties.

With regards to the third ground of appeal, He claimed that the court erred in relying on uncredible and unreliable evidence of PW 1 who was believed to establish that it was the appellant who broke and stole the alleged items from the house. He argued the evidence available is to the extent that PW 1 left the keys to the ground floor of the house which in itself is not enough to prove that the Appellant broke into the house.

It was Mr. Malewo's assertion on the fourth ground that, the Court erred in convicting the appellant while in his defence he raised reasonable doubt whereas it was alleged that there was a master key that was found on the lock within the premises. This fact was testified by PW 1 and PW2 and that the presence of a master key and the fact that the appellant came to the house to open the door for the cleaning lady raised serious doubts on the prosecution case. He then argued that the burden of proof is upon the prosecution, no matter how weak the defence is. The case of **Anthony Kinanila & Another vs Republic Criminal appeal No. 83 of 2021** was cited to support the

contention of the appellant. He then emphasized that none of the witnesses nor the exhibits disclosed the involvement of the appellant in committing the offence.

On the last ground of appeal, Mr. Malewo submitted that the case was not properly investigated hence leading to wrong findings and conclusion. That the prosecution based their case solely on the fact that the appellant was left with the key which was used to open the doors. He then argued that it was duty of the prosecution to prove involvement of the appellant in the offence and the same was not proved as required. He then prayed for the appeal to be allowed, the judgment of the trial court be quashed and set aside and the appellant be left free.

In their reply submissions, the respondent supported the grounds of appeal on the ground that the trial magistrate erred in convicting and sentencing the appellant based on circumstantial evidence that is full of doubts which is contrary to the position held in the case of **Shabani Mpunzu @ Elisha Mpunzu Vs. Republic, Criminal Appeal No. 12 of 2002** (unreported).

In my determination of the appeal, I will begin with ground 1,3 and 5, where the respondent stated that the trial Magistrate erred in convicting and sentencing the appellant without sufficient evidence implicating the appellant to the omission of the offence of house breaking and stealing by relying on the unreliable evidence of PW 1. Further that the case was not properly investigated and hence lead to wrong findings.

Having dispassionately considered both parties submission and accorded it with the deserving weight, and the evidence adduced, it is undisputed fact that this case hinges on proof beyond reasonable doubt. I do join hands with the respondent in their support of the appeal. I will state the reasons as to why I join hands with the respondent as alluded in the above in the same way argued by the respondent by consolidating ground 1,3 and 5. Taking a close glance at these three grounds they all are based on insufficient evidence and hence call for the principle of proof beyond reasonable doubt in criminal cases.

It is a well bloomed principle that has been groomed and has strong roots through law and case law that, in criminal cases the standard of proof is beyond all reasonable doubt. *Section 3 (2) (a) of the Evidence Act [Cap. 6 R. E. 2022]*, states that;

(2) A fact is said to be proved when-

(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;

Not only that, but the law is very concise again in the provisions of section 110 (1) and (2);

110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In the appeal at hand the appellant has confronted the trial Court to have made a decision based on insufficient evidence, contradicting circumstances in the evidence, improper evaluation and analysis of evidence available and all this is based on poor investigation.

It was in the prosecution evidence that the appellant was alleged to have broken in a dwelling house and after breaking in to have stollen properties worth Tshs. 14,700,000/=. All this was heavily vested to the appellant on the reason that the key of the house where properties were alleged to have been stolen were left with the appellant. The prosecution evidence revealed that since the key was with the appellant, he was the one that committed the offence as the door for the ground floor had no signs of being broken but the door heading to the upper floor of which he had no keys were the doors that were broken.

It was also the prosecution's evidence that a key was found in the premises on the lock a key believed to have been a master key. This was stated in Court by PW 1 and PW2. And during his defence the appellant stated not to have gone to the said premises since PW1 travelled until on the day he was returning when he had gone to open for the maid. There was no evidence that was adduced to have spotted the appellant in the premises any time before that. So, in absence of such evidence and in presence of another key believed to be a master already exonerated the appellant from being believed to be the one that committed the offence of house breaking.

Moreover, going through the records the second accused one Benard Edes Adams (not party to this appeal) from exhibit P1 and P2

he is observed to have claimed that two persons by the name of Gervas and Mwarabu visited the premises while he was the watchman on duty and induced him into letting them into the premises to see whether there was money. The latter never mentioned to have seen the appellant being one of the culprits nor to have been within the premises. This content in exhibit P1 and P2 further reveals that the appellant had no incriminating evidence against him and therefore a conviction was not his portion.

As per the records, the decision of the Court was based on suspicion of PW1 who claimed to have left keys to the ground floor door with the appellant. Since the door was not broken, PW1's suspicions led to the inference that it was the appellant who opened the door with the said keys. This was backed up by the investigator who concluded the same basing on the fact the appellant was left with the keys. It is undisputed that the evidence on record was purely circumstantial evidence as there was no evidence directly indicating the appellant to have been at the crime scene or to have stollen the alleged properties.

It is trite law that in convicting an accused based on Circumstantial evidence, such evidence available has to be irresistibly pointing at the accused's guilt and must exclude all other persons or any possibility of having multiple conclusions. This position was held in the case of **Shaban Mpunzu @ Elisha Mpunzu vs Republic Criminal Appeal No. 12 of 2002** (unreported) which also was referred in the case of **Sikujua Idd vs Republic, Criminal Appeal No. 484 of 2019** (unreported). The question is whether the evidence adduced by the prosecution during trial established that standard as required. This will take me to grounds 2 and 4 of the appeal.

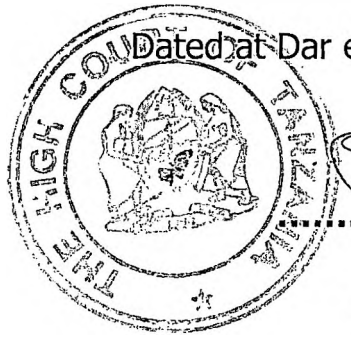
On ground 2 and 4, the respondent averred that, the Court erred in improperly analysing and evaluating the evidence adduced on record by both the prosecution and defence by convicting the appellant and disregarding his defence. There was no evidence or exhibit that was tendered to implicate the direct involvement of the appellant in the participation of the offence charged. It is apparent that One Bernad Edes Adams who is not party to this appeal admitted both in his cautioned statement and extra judicial statement that Gervas and Mwarabu were the ones that broke into the house of PW1 and stole properties and that he was given Tshs. 500,000/= as proceeds from the house breaking and stealing. So, it was an error to convict the appellant in presence of such evidence full of doubts.

I would also not leave out on the aspect of proof beyond reasonable doubt with regards to the offence of stealing. The objects alleged to have been stollen were a bracelet value Tshs. 1,700,000/=, gold chain valued Tshs. 1,500,000/=, two gold rings valued Tshs. 1,600,000/=, earings valued Tshs. 500,000/=, Laptop make dell valued at $ 700 equivalent to Tshs. 1,600,000/= and gold ornaments with total value of Tshs. 7,780,000/= which made a total of Tshs. 14,000,700/=. All these properties were never proven by PW 1 to have been in the premises before the stealing nor to have owned the same. One of the ingredients of the offence of stealing is to have something being capable of being stollen and asportation to have taken place. PW1's mere words of the properties claimed to have been stolen without proof of evidence of their existence and being owned by him is contrary to the provision of *section 110 (1) and (2) of the evidence Act (supra).*

It is from the above three discussed grounds that I find the trial court erred in convicting and sentencing the appellant on the 1st count of house breaking contrary to *section 293 (a) and (b) of the Penal Code Cap. R. E. 2019]* and the 2nd count was stealing contrary to *section 258 and 265 of the Penal Code*.

On those findings, this appeal is allowed. The judgment and conviction of the appellant by the trial court is hereby quashed and the sentence so meted against him is hereby set aside. The appellant is to be set free unless he is being held for other lawful cause.

Dated at Dar es salaam this 14th of August 2023.



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S. M. MAGHIMBI

JUDGE