IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB-REGISTRY

AT SONGEA

CRIMINAL APPEAL NO. 47 OF 2023

(Appeal originating from the decision of the District Court of Mbinga at Mbinga in Criminal Case No. 29 of 2023)

ISIDORY JOSEPH KAPINGA ..... 1ST APPELLANT

EGNO KAPINGA @ KABONGA.....2ND APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Dated: 18th March and 2nd May, 2024

KARAYEMAHA, J.

Isidory Joseph Kapinga and Egno Kapinga @ Kabonga (hereinafter the 1st and 2nd appellants) were arraigned before the District Court of Mbinga (trial Court) along with Emmanuel Edmund Mgaya (2nd accused before the trial Court) charged with three counts of, **one,** burglary contrary to section 294(1) of the Penal Code [Cap. 16 R.E. 2022] (the Penal Code), **two,** stealing contrary to section 258(1) and 265 of the

Penal Code allegedly committed jointly and together by them and **three,** being in unlawful possession of properties suspected to have been stolen contrary to section 312(1)(b) of the Penal Code allegedly committed by the 2nd accused alone.

By a substituted charge sheet lodged in the trial Court on 14/06/2023, it was alleged in the 1st count that the appellants together with the 2nd accused did break in the store of one Kalister Mwinuka on 17/3/2023 at Mission Street within Mbinga District in Ruvuma region with intent to commit an offence therein, to wit, stealing.

The allegations in the 2nd count were that the appellants together with Emmanuel stole nine (9) gallons of cooking oil worth Tshs. 900,000/=, twenty-seven (27) bars of soap worth Tshs. 18,000/=, two (2) tins of rice worth Tshs. 120,000/=, ten (10) liters of cooking oil worth Tshs. 50,000/=, one bag of maize worth Tshs. 150,000/= and cash Tshs. 250,000/= the properties of Kalister Mwinuka. The offence was committed at Mission Street within Mbinga District in Ruvuma region on 17/3/2023.

It was further alleged in the 3rd count that on 17/3/2023 at Mission Street within Mbinga District in Ruvuma region the 2nd accused was found in possession of stolen property, to wit, five (5) gallons of cooking oil being the property of one Kalister Mwinuka. It is contended that having regard to all circumstances he had all the reason of suspecting the same to have been stolen or unlawfully acquired.

The background and facts of this case, largely undisputed are these. Kalister Mwinuka is a business woman. She owns a retail shop and sells different goods. Some of them are cooking oil. On 14/3/2023 she bought 20 gallons sunflower cooking oil of 20 litres each at a price of Tshs. 1,520,000/= from Theresia Mpeti at Njombe and received the consignment on 15/3/2023. She tendered the NMB pay in slip as an exhibit. The same was admitted as exhibit P1. On 17/3/2023 in the morning, she found her kitchen door opened and stores door where she kept the purchased cooking oil opened. She then realised that one bag of maize worth Tshs. 150,000/=, nine (9) gallons of cooking oil equivalent to 180 liters worth Tshs. 900,000/=, one box of white wash

bar soap valued at Tshs. 81,000/=, two (2) tins of rice equivalent to 40 kilograms valued at Tshs. 120,000/=, one (1) box of bar soap and cash Tshs. 250,000/= all stolen. PW1 immediately reported to the street chairman and later to police station.

Investigation conducted by PW3, J1598 D/C Seko in a company of PW2, Assistant Inspector Bosco Kilumbe, led to the recovery of five (5) gallons of cooking oil from the house of the 2nd accused person and through informers, eventually, arrested the appellants. PW3 testified that the 1st appellant denied participation in breaking in PW1's house but was simply hired to carry on his motorcycle the stollen items. It was the first appellant who confirmed to the police officers that the stolen properties were sold to the 2nd accused. All the same, the 2nd appellant denied all the allegations.

The 1st appellant denied participation in committing any of the charged offences. He also denied having knowledge that what he transported under the direction of the 2nd appellant was stolen properties.

The 2nd accused admitted to purchase five (5) gallons of cooking oil from the 2nd appellant on 17/3/2023 at about 9:10am. He informed the trial Court that the agreed price was Tshs. 350,000/= but first paid Tshs. 200,000/=. He defended himself that he could not have known if the 2nd appellant stole it because the latter told him that he processed it at Lusonga. Since he was in dire need of money, he was selling it. On the other hand, 2nd accused needed cooking oil because his wife had a restaurant.

The 2nd appellant's explanation is that on 17/3/2023 in the morning he travelled to Masasi village to visit his mother-in-law and returned at 21:00hrs. Immediately before he could take bath, he was arrested by police officers who were in a company of the 1st appellant. The allegations mounted on him were stealing sunflower oil. In a nutshell, he completely disconnected himself from the commission of the offences.

In her judgment, the learned trial Magistrate found, reasonably, that PW1's house was burgled in. She also found, reasonably, that PW1's nine (9) gallons of cooking oil were stolen. On her findings that

the 2nd appellant was connected with the commission of the offence and convicting him, she brushed off the defence of *alibi* terming it as an afterthought for being raised in contravention of law. The 1st appellant was also found guilty and convicted. In short, whereas the 1st and 2nd appellants were convicted, the 2nd accused was acquitted. Finally, the appellants were sentenced to suffer three (3) years imprisonment for the 1st count and one (1) year imprisonment for the 2nd count.

Each appellant filed his petition of appeal. The same can be conveniently consolidated because they emanate from one case and same facts. The substantive parts of the appeals are the criticisms that, **one,** the prosecution case was not proved beyond reasonable doubt; **two,** the appellants' defence evidence that they were not owners of the stolen properties was not considered; **three,** the 2nd appellant was convicted and sentenced basing on uncorroborated evidence of DW1 (Isidory Kapinga) and on his bad character contrary to the law of evidence and **four,** the 2nd appellant was convicted without any exhibit which was tendered.

When the appeal came for hearing, the appellant appeared in person (unrepresented) while Mr. Gaston Mapunda, learned State Attorney represented the respondent Republic. The appeal was argued orally argued.

When invited to expound their grounds of appeal, the appellants simply recited their concerns in the petition of appeal. They complained generally that the republic failed to prove that they participated in committing the offences and that the 1st appellant's defence evidence was not considered.

Addressing the court in reply, Mr. Mapunda hurriedly supported the conviction and sentence imposed on the appellants. He also chose to respond on two grounds of appeal, to wit, the prosecution case was not proved beyond reasonable doubt and that the 1st appellant's defence was not considered. He rejected the rest of the grounds on the reason that they were casually raised.

Submitting with respect to the 1st ground, Mr. Mapunda appreciated the cardinal principle of law that the prosecution has a duty to prove any

criminal offence beyond reasonable doubt. The learned counsel contended that the prosecution case was mainly dependent on three (3) witnesses marshaled for testimony and four (4) exhibits which all handed down an information that the stolen properties belong to PW1.

Evaluating the evidence of PW1, Mr. Mapunda argued that the same is certain. He asserted further that by producing a sunflower payment receipt (exhibit P1), PW1 proved that the stolen properties were hers having purchased them from Theresia Mpati at Njombe. He argued that at page 13 of the typed proceedings, appellants conceded to the contents of exhibit P1 by a single reason that they did not raise any objection against it during the trial.

Capitalizing on PW2's evidence, Mr. Mapunda asserted that the police seized five gallons of sunflower (exhibit P2) from the 2nd accused. Making reference to pages 20 and 21 the learned counsel submitted that the appellants did not raise any objection to the admissibility of gallons and the seizure certificate.

Highlighting the prosecution's evidence, Ms. Mapunda contended that PW3 arrested and interrogated the 2nd appellant. In the course of interrogation, the 2nd appellant informed them that the stolen properties were sold to the 2nd accused. Cementing further that the offence of burglary was committed, Mr. Mapunda explained assisted by the evidence of PW1 that the offence was committed at night. He submitted further that PW1 managed to list the stolen properties and identified them assisted by a paper attached on the lid and gallons themselves and did identify them in court.

The learned counsel was fully convinced that the offence of theft was proved. He relied on the evidence of the 2nd accused who informed the trial court that he purchased the sunflower from the 1st Appellant to cement his position. The learned counsel boosted his belief arguing that the 1st appellant failed to cross-examine the 2nd accused on that fact. Overall, the learned attorney submitted that the prosecution proved all elements of the offence facing the appellants. He prayed the first ground of appeal to be dismissed for want of merit.

With respect to the 2nd ground of appeal, Mr. Mapunda contended

making reference to pages 4 and 5 of the typed judgment that the appellant's defence evidence was considered by the trial court. The learned State Attorney contended further that the 1st appellant knew that he was transporting stolen sunflower oil to the 2nd accused and would benefit. Therefore, Mr. Mapunda pressed that he liable for his action and expectations.

Citing pages 4, 5 and 8, Mr. Mapunda submitted that the 2nd appellant's defence was considered including his defence of *alibi*. He added that a failure to comply with the requirement of giving a notice was the reason for the trial court to reject the defence of *alibi*. Finally, he prayed this Court to dismiss the appeal in its entirety, sustain the conviction and sentence.

Rejoining, the 1st appellant attacked Mr. Mapunda's submission by asserting that he capably cross-examined the 2nd accused by asking him three questions. **One,** was whether there was communication between them; **two,** number of houses he bypassed before getting to his house

and **three,** whether the 2nd accused knew him. He averred that the 2nd accused failed to answer the first two questions. He firmly stated that the 2nd accused testified that he did not know him for a long time.

With respect to exhibit P1, the 1st appellant argued that it was NMB pay in slip not a receipt for transporting goods. According to him this exhibit did not show if PW1 was the owner of the sunflower oil. He pressed further that he objected to the admissibility of exhibit P1 because it was illegible but his objection was disregarded. He complained further that the police officers refused to go and search his house because they knew there was nothing.

In his rejoinder, the 2nd appellant remarked that he did not cross-examine the 2nd accused because his evidence did not touch him. Responding on exhibit P1, he said that he did not object because it did not connect him with the offence.

To begin with, the grounds of appeal, the record before this Court and the submissions made by either party, boil down to mainly one issues, that is, whether the prosecution case was proved beyond

reasonable. My keen examination of evidence leads me to singular conclusion that, this issue will dispose of the entire case.

Customarily, it is a cardinal principle that in criminal cases the prosecution side must prove the case beyond reasonable doubt, see the case of **Mohamed Said Matula vs. Republic**, [1995] T.L.R. 3. In this case it is trite that the prosecution is duty bound to prove three important elements in discharging its duty of proving the case beyond reasonable doubt. **One,** the prosecution must prove that there is breaking and entering into any building; **two,** must prove that the offence was committed during the night and **three,** the accused intents to commit it.

In this case it is the prosecution word against the appellants' word. Whereas the prosecution is alleging through PW1 that on 17/3/2023 in the morning, he found the kitchen and store doors opened and gallons of sunflower and other properties missing, the appellants are denying that fact. I have painstakingly gone through PW1's evidence. Her evidence gives no certainty on when her kitchen and store were broken in. There is no indication as to when she closed doors of these two

rooms the day before the incident and when she departed from the scene. Was it 15/3/2024 or 16/3/2024 or 17/3/2024. Reading this version together with the charge sheet, I am convinced that the prosecution was not sure of what transpired and what offence was actually committed by the appellants. For easy of refence let me reproduce the particulars of the offence with regard to the offence of burglary:

> ***ISIDORY JOSEPH KAPINGA, EGNO KAPINGA @ KABONGA*** *and Emmanuel Edmund Mgaya jointly and together on 17/3/2023 at Mission Streer within Mbinga District in Ruvuma region did break the store of one Kalister d/o Mwinuka with intent to commit an offence therein, to wit, stealing.*

Although the statement of the offence mentions burglary, the particulars of the offence do not reflect that fact. I say so because the charge sheet neither disclosed the time when the offence was committed nor stated that the offence was committed at night. What I gather from the particulars of offence depict a mere breaking of a store.

To my understanding breaking alone does not necessarily mean burglary, as breaking can be committed either at night or during the day time.

It is a common knowledge that burglary is said to be committed if the offence is committed at night hours. This is the import of section 294 of the Penal Code which provides as follows:

> *"Any person who –*
>
> *(a) break and enters any building, tent or vessel used as a human dwelling wit, Intent to commit a felony therein, or*
>
> *(b) ... NA....*
>
> *is guilty of the felony termed "'house breaking" and is liable to imprisonment for fourteen years.*
>
> *If the offence is committed in the night, it is termed "burglary" and the offender is liable to imprisonment for twenty years."*

The condition precedent, as gleaned from the above cited provision is that in order to be burglary the breaking must be done at night hours. Short of that that is not it.

Since it is settled law that, the charge is the foundation of any trial, the mode of framing the charge is prescribed and regulated by the

provisions of section 132 and 135 (a) (ii) of the CPA. While the former provision requires the offence to be stated in the charge along with specific particulars stating the nature of the charged offence, the latter one requires the statement to be described together with the essential elements of the offence and reference to the section creating the offence. In that context, the charge sheet in this case ought to have disclosed that the offence was committed at night. Above all, PW1's too had to state in no uncertain terms that breaking of her store was done at night hours.

In this case, I am constrained to hold that the appellants were required to know clearly the elements of the offence from the charge sheet in order to set up their defence. In the end, I find and hold that apart from lacking evidence that the offence of burglary was committed, the appellants were prejudiced by the charge sheet tainted with shortcomings.

The position is now settled that variance in the particulars of the offence vis-a-vis an un-amended charge sheet, renders the charge or

count for that matter, as good one as unproved. I am not alone on this position. The Court of Appeal of Tanzania guided in the case of **Abel Masikiti vs Republic,** Criminal Appeal No. 24 of 2015 (unreported) that:

> *"If there is any variance or uncertainty in the dates then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal."*

I asked myself if the omission could have been remedied. Apparently, this was possible before the conclusion of the trial if the prosecution had sought leave of the trial court to amend the charge in terms of section 234 (1) of the CPA which provides that:

> *"234 (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required*

amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just"

In the event, this did not happen, it follows that, the charge remained defective throughout the pendency of the proceedings. This vitiated the trial rendering the proceedings and judgments of the trial court to be a nullity. In this particular case the omission to amend the charge not only occasioned a miscarriage of justice but also it rendered the prosecution case not proved at the required standard. In the premises, assuming that the charge had no flaws as earlier pointed out, still the charge against the appellants was not proved to the hilt.

All said and done, I find the appeal merited and it is hereby allowed. In the result, the conviction is quashed and sentence set aside and the appellants should be set free unless if held for some other lawful cause.

It is so ordered.

DATED at **SONGEA** this 2nd day of May, 2024.

J. M. KARAYEMAHA
JUDGE