IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL No. 72 OF 2022

(C/f criminal case No. 72 of 2021, District Court of Kararu at Karatu)

RAMADHANI s/o SHABANI @ MADODI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

22nd November & 18th December, 2023

TIGANGA, J.

In the District Court of Karatu at Karatu, the appellant, Ramadhani s/o Shabani @ Madodi, was charged with three offences to wit; stealing by agent contrary to 258 (1) (2) (a), 265 and 273 (b); Malicious Damage to property contrary to section 326 (1) and unlawful possession of property suspected to be stolen contrary to section 312 (1) (b) all provisions being of **the Penal Code**, [Cap 16 R.E. 2019] [now R.E 2022] (the Penal Code).

The particulars of the offence were that, on 20th February, 2020 at Marie Stopper's area within Karatu township in Karatu District, the appellant being a mechanic was entrusted by the owner Akonaay s/o

Hhawu @ Massong to keep various motor vehicle spare parts valued at Tshs—34,350,000/= which were to be used to repair the owner's motor vehicle with registration No. T. 947 AGG make Toyota Land Cruiser, instead, he converted the said spare parts to his own use. On 15th June, 2021, the appellant was arrested with a gearbox of the same motor vehicle of Akoonaay Massong which was suspected of having been stolen.

In the effort to prove its case the prosecution led the evidence to the effect that, on 20th February, 2020, PW5, Akonaay Massong took his three (3) motor vehicles all make Toyota Land Cruiser with registration Nos. T 740 AKB, T.554 APM, and T. 947 AGG to the appellant's garage for service. After doing some check-ups, the appellant told him that, the vehicle with Reg No. T. 947 AGG needed some new spare parts worth Tshs. 2,000,000/=. However, after being given such an amount of money, the appellant neither bought the spare parts needed for the repair nor fixed the said vehicle as agreed, instead he took parts from the said vehicle including a gearbox.

The matter was reported to the police and upon investigation it was discovered that the vehicle with Registration No. T. 947 AGG missed the

gear box, rim, tires, propeller excel, shock absorber, and alternator. Further investigation revealed that, the gearbox was removed and fixed in the motor vehicle of one Christopher Dodo and in a search conducted in that motor vehicle they found the gearbox fixed therein. The police also arrested him and charged him as the second accused person before the court.

In his defence at the trial, the appellant denied having been left with three motor vehicles but only two; the one with Reg. T740 AKB and T. 514 APM which were serviced and taken by the complaint, PW5. The latter, however, brought him another vehicle the one in dispute T. 947 AGG. According to him, the vehicle needed a change of lots of spare parts but the complainant told him to wait until he got money and the said motor vehicle had been in his garage for almost a year. He also claimed that the complainant had not paid him labour charges for the initial two cars serviced and when he reminded the complainant he told him he did not have time at the moment. In the course of asking follow-up on his monies is when he was summoned to the Police station and eventually charged with this offence. He claimed that the complainant was aware of the non-useful parts of his vehicle which were removed.

After the trial court had assessed the evidence, it found the appellant guilty and convicted him as charged. However, the second accused was acquitted for lack of evidence to prove his guilt. After the conviction, the trial Court sentenced the appellant to a custodial sentence of five years' imprisonment for each of the 1st and 2nd counts. The sentence was to run consecutively. Another accused person was acquitted and his motor vehicle with Reg. No. T 757 AMD was given back to him.

Aggrieved, the appellant preferred this appeal with six (6) grounds as follows;

1. That, the appellant was wrongly convicted by the trial court for the charge laid against him was not proved beyond reasonable doubt.
2. That, the appellant was wrongly convicted by the trial court without considering defence evidence and/or making thorough scrutiny of the entire evidence on record.
3. That, the judgment by the trial court is bad in law for being arrived at without considering arguments raised by the appellant in his final submission.
4. That, the appellant was wrongly convicted by the trial court on the second count based on a cautioned statement wrongly procured and admitted.

5. That, the evidence of PW8 was received in contravention of the law and hence improperly relied on by the trial court to convict the appellant.
6. That, the trial magistrate was bias in hearing and deciding Criminal Case No. 72 of 2021, hence a decision reached thereafter was bad in law.

During the hearing which was done by way of filing written submissions, the appellant was represented by Mr. Felichismi Baraka learned advocate while the respondent was represented by Ms. Adelaide Kasala, learned State Attorney.

Supporting the appeal Mr. Baraka started his submission with the 5th ground of appeal specifically on the evidence of PW8, G. 2763 CPL Mathias. He argued that, on page 51 of the trial court's proceedings, PW8 started to testify on 2nd November 2021 but he never finished up his evidence and on 4th April, 2022, the trial court proceeded with the testimony of PW9, hence the appellant was prejudiced as he was convicted without the right to cross-examine him.

On the 3rd ground of appeal, Mr. Baraka submitted that the appellant was given the right to file the final closing submission on 26th September,

2022, however the same were not considered which is as good as the appellant was denied the right to be heard.

As to the 2nd ground of appeal, learned counsel submitted that the appellant's defence was not considered and evaluated in the Judgment, instead, only a summary of the evidence of the appellant as per pages 11 and 12 was made. According to him, the appellant was convicted without his defence being considered.

The learned counsel went on submitting on the 4th ground that, the trial court erred in convicting the appellant based on the cautioned statement which was wrongly procured, admitted, and was not corroborated. More so, the appellant repudiated such a statement as the same did not prove the circumstances in which it was recorded and who was present when the statement was recorded. Since the appellant testified that, he was arrested twice and withheld for three days, the trial court should let the doubts benefit him. He referred the Court to the case of **Tuwamoi vs. Uganda** (1967) EA 84 where it was insisted that, before the court relies on the cautioned statement it is important for the court to satisfy itself that the statement is true. Also, there must be corroborating evidence and it should be in respect of all the ingredients of the offence.

Submitting on the 6th ground, Mr. Baraka averred that, the trial court was biased as the evidence was not analysed. Regarding the 1st ground, he submitted that the evidence by the Republic did not prove the case beyond reasonable doubt as no evidence in law proved how the appellant was PW5's agent. According to him, their relationship was nothing but a normal contract that could have been enforced by way of specific performance or any other civil measures.

More so, the appellant disputed being handed over the said items, even the prosecution evidence shows only items of Tshs. 2,000,000/= (two million only) and not Tshs. 34,350,000/= as claimed. To cement his argument, he cited the case of **Donald Kishoka vs. The Republic**, Criminal Appeal No. 81 of 2019 where this Court at Mtwara insisted on all ingredients to be proved. But in the present case, there is no proof that both offences were proved, as all the prosecution witnesses only proved that, the motor vehicles were taken for repair but the damage was not proved.

The learned counsel pointed out another prosecution hiccup as failure to call the persons who were sold the spare parts or the receipts. The trial

court did not verify the missing item and the complainant's statement, exhibit P.11 taken at the Police Station talks of the future which is proof that the same was backdated. Lastly is the fact that, there was no proof of ownership of the car in issue or of the damaged properties as a motor vehicle Registration card was not tendered following the law. He prayed for this Court to consider all these shortcomings and acquit, the accused from custody.

Opposing the appeal, Ms. Kasala started with the 5th ground and submitted that, on pages 73-75 of the proceedings, it shows that, PW8 returned to finish up his testimony and the appellant was accorded the right to cross-examine him.

On the 3rd ground regarding non consideration of the final submission, the learned State Attorney submitted that in criminal cases what is mandatorily required to be considered is the evidence tendered and not the final submissions for the same is not part of the evidence. Arguing further, she submitted on the 2nd ground that, even though the defence evidence was not analysed, this being the 1st appellate court, it can evaluate the evidence and reach its own findings.

As to the 4th ground, regarding the appellant's cautioned statement, she submitted that PW5 reported the incident on 15th June 2021 and PW9 in his evidence said that he interrogated the appellant and the cautioned statement, exhibit P6 shows that it was recorded on 15th June, 2021 within the prescribed time. Thus, even though the appellant repudiated the statement, he did not cross-examine PW9 in respect of his grievances, he is therefore barred from going against it.

On the 6th ground, she submitted that the court was not biased just because it did not consider the appellant's evidence rather, it was a normal error that can be re-edified by the appellate Court.

On the 1st ground that the case was not proved beyond a reasonable doubt, Ms. Kasala submitted that, the evidence of PW5 proved the 1st offence of stealing by agent which was also corroborated by the evidence of PW3 and PW6 who witnessed the appellant being handed over the car to service it.

As to the offence of malicious damage to properties, the evidence show that, when the car was inspected, the inspection report which the appellant signed was tendered as exhibit. The presence of his signature

proves that since he was the one who was handed over the car, therefore, he is the one who committed the offence. As to the ownership of the vehicle in issue, the same was proved by PW5. She prayed that this appeal be dismissed for want of merit and that the trial court's decision be upheld.

In his brief rejoinder, Mr. Baraka mostly reiterated his earlier submission and maintained that the case against the appellant was not proved at the required standard.

Having considered the parties' submissions and the trial court's records, I will now proceed to determine the appeal. The 1st ground will be determined last.

Starting with the 2nd and 6th grounds, the appellant's counsel challenged the trial court's decision for not considering defence evidence hence the same was biased. Going through the judgment, it is true that, after summarising the facts of the case, the trial magistrate did not scrutinize the defence evidence which was a mandatory task required of him as held in the case of **Mkulima Mbagala vs. The Republic,** Criminal Appeal No. 267 of 2006 (unreported) that:

> *"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an*

objective evaluation of the entire evidence before it. This involves a proper ***consideration of the evidence for the defence which is balanced against that of the prosecution to find out which case*** *.... is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at..." (emphasis added)*

However, since the trial Magistrate did not discharge such a duty and as rightly submitted by the respondent's counsel, this being the 1st appellate court, I am duty-bound to reassess the evidence. In carrying out that task, I will start by looking at his defence in which the appellant told the court that, he was handed three motor vehicles by PW5, he serviced two of them and he remained with one of Reg. No. T. 947 AGG as it needed major service and change of some spare parts. He was not, however, paid labour charges for the service he provided and as he kept on reminding the complainant, PW5, it was when he was arrested and charged for this offence while the car in question remained in his garage for more than one year and a half.

In analyzing his defence in relation to the prosecution evidence in this case, it is important to remind ourselves that, the appellant herein

stood charged with the offence of **Stealing by Agent** contrary to sections 258(1) 265, and 273 (b); malicious damage to property contrary to section 326 (1) and unlawful possession of the property suspected to be stolen contrary to section 312 (1) (b) all of the Penal Code. The last offence was however for another accused person, not party to this appeal, hence the offences against the appellants remain the first two. In law, the offence of Stealing by agent is provided under section 258 (1) of the Penal Code which provides that;

> *"(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.*

Section 265 of the same law provides

> *"Any person who steals anything capable of being stolen is guilty of theft, and is liable unless owing to the circumstances of the theft or the nature of the thing stolen; some other punishment is provided, to imprisonment for seven years."*

And section 273 (b) of the Penal Code stipulates that:

> *"Property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody*

or to apply, pay or deliver it or any part of it or any of its proceeds for any purpose or to any person"

For this kind of offence to be proved, it has to be established that, the property was entrusted to the accused person to retain in safe custody or to deliver it to the other person. In this case, before the trial court, the evidence is to the effect that, PW5 went to DW1's garage to repair his three motor vehicles however the one with Registration No. T 947 AGG, Toyota Land cruiser was not immediately repaired and returned to the complainant. It remained under the custody of the person entrusted with it, and the alleged mishandling escalated the matter to this level. As briefly narrated above, the appellant advised PW5 to buy new parts i.e. propeller tyres, rim hubs, shock absorber, engine oil, and foltens worth Tshs. 2,000,000/= which he did and handed to the appellant. However, according to the inspection report, such vehicle parts were never repaired and even the engine and gearbox were removed from the said vehicle.

The appellant claims that even the complainant knew that he took them out, however, it was to service the vehicle. Moreover, if that was the case, him being custodian of the said vehicle had to explain how the vehicle's gearbox ended up in another person's vehicle, the Toyota Land

Cruiser with Reg. No. T. 751 AMB. Again the inspection report, exhibit P9 proved the items that were removed from the motor vehicle to include the rejetor cap, element cleaned, air cleaner, engine mount, piston link, connection rod, front tyres, gearbox, alternator, propeller shaft, and battery.

Be as it may, the fact that he was handed over the new spare parts to fix as testified by PW5 and PW6 and he did not let alone remove the gearbox to another vehicle is enough proof that, the appellant was given a motor vehicle by PW5 for repair, instead he turned the spares his own.

Regarding the 2nd offence, as held above, the appellant removed all of the other parts missing as narrated above without the owner's consent while damaging the vehicle was also proved at the required standard. In the circumstances, the appellant's defence has not managed to cast any doubt on the prosecution evidence. These two grounds fail and consequently suffers dismissal for wants of merits.

As to the 3rd ground of appeal, I join hands with the respondent's counsel that, even though the trial court had the discretion to go through the appellant's final submission, non-compliance is not fatal because a

criminal case is proved by evidence received under oath in the court proceedings, and since final submissions are not evidence, their none consideration cannot adversely impact the judgment only on that account. This ground has no merit, the same also fails for lack of merits.

On the 4th ground, the appellant's counsel claimed that the appellant's cautioned statement was wrongly procured, he however did not expound further. The complaint on that ground is based on the evidence of PW9. That evidence however, explain how PW9 procured the statement from the appellant by following all legal requirements and procedures. moreover, during cross-examination, PW9 admitted to having not read the statement to the appellant a fact which was noted by the trial magistrate in his judgment on page 17 in the following terms;

> *"Third, the cautioned statement by Shaban Ramadhani which the prosecution wanted this court to rely upon was recorded in contravention of Police General Standing Order as the statement was not read to the witness after being recorded."*

This in my view makes it clear that, the trial magistrate did not rely on the said cautioned statement in convicting the appellant. This ground also fails and it is dismissed.

As to the 5th ground of appeal, this will not detain me much. The record is very clear that, PW8 testified for the first time on 2nd November, 2021, he did not finish, consequently he was deferred to 11th May, 2022 as seen on pages 51-53 and 73-76 of the typed proceedings respectively. The evidence is also clear that after his testimony, the appellant cross-examined him, therefore there was no way that he was prejudiced. This ground also fails, it is dismissed.

Back to the 1st ground of appeal, I am of the firm view that, the case against the appellant was proved to the required standard. However, the value of the items which the appellant id charged to have been damaged is proved to be only Tsh. 2,000,000/. As testified and proved by the prosecution, and not Tshs. 34,350,000/= as stipulated on the charge sheet. In the fine, the appeal fails, it is dismissed for wants of merits.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 18th day of December 2023.

J.C. TIGANGA

JUDGE