IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 74 OF 2023

(Original Criminal Case No. 43 of 2021 of the District Court of Masasi at Masasi before Hon. B.K. Kashusha, SRM)

IMRAN ISMAIL @ZOMBI.....1ST APPELLANT

ALOYCE THOMAS THADEI.....2ND APPELLANT

YAHAYA MASOUD.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

8th & 28th February, 2024

DING'OHI, J;

The appellants, **Imran Ismail @Zombi**, **Aloyce Thomas Thadei**, and **Yahaya Masoud** were jointly and together charged with the offences of Conspiracy to commit an offence contrary to section 384 of the Penal code [CAP 16 R.E. 2019] now R.E 2022, Burglary contrary to section 294 (1) (a)

and 2 of CAP 16, Stealing contrary to section 258 and 265 of CAP 16, and Receiving property stolen contrary to section 311 (1) of CAP 16.

The factual background of the incident which gave rise to the instant appeal, is that; On the 11th day of April 2021 in Mantakini area within Masasi District, at night hours, the appellants and other persons who are not parties to this appeal conspired, and broke the dwelling house of **No. G. 8939 PC JAZIRU**. Thereafter, they stole from therein one TV flat screen 32 inches, make Samsung, one mattress 5x6, different domestic and wearing items, foot mats, a pair of police uniforms, shoes, and a raincoat. On the following day, that is on 26th April 2021, the appellants were found in possession of one t-shirt, underpants, trousers, police uniform, and white shorts having the *"Arsenal logo"*. They were then all taken to Masasi District Court, charged with the offences mentioned herein above.

At the end of trial, the first appellant (**IMRAN ISMAIL @ZOMBI**) and the third appellant (**YAHAYA MASOUD**), were convicted for the second and third counts of burglary and stealing. They were sentenced to serve twenty years imprisonment each for burglary and to pay a fine of Tshs. 500,000/=

or serve ten years in jail each for stealing. The second appellant (**ALOYCE THOMAS THADEI**) was convicted of the third count of stealing. He was sentenced to pay a fine of Tshs. 500,000/= or to serve ten years imprisonment.

Dissatisfied with both convictions and sentences the appellants jointly challenged the trial court decision on the five grounds which when boiled together they fall into one complaint that the charge against the appellants was not proved beyond reasonable doubt.

On the day the appeal was called on for hearing, the appellants appeared in person, un-represented. They prayed that their grounds of appeal be adopted as their submissions. On behalf of the respondent Republic, Mr. Steven Aron Kandoro showed up.

When took the floor Mr. Kandoro right away supported the appeal based on the single ground that the prosecution case was not proven to the required standard. He was of the view that upon scrutinizing the entire proceedings in the trial court records, he fished out four legal irregularities that indicate that the charge was not proved to the standard as required by the law.

First, the trial court magistrate convicted and sentenced the appellant without mentioning the provision of laws to support the conviction. According to him, that was against the law. He referred me to pages 12 and 13 of the trial court judgment.; **Second**, the cautioned statements relied upon by the trial magistrate in convicting the appellants were not corroborated by any other piece of evidence to attract the conviction of the appellants. **Third**, the prosecution did not exhibit seizure receipt to the properties allegedly seized from the appellants as required by the mandatory provision of section 38 (3) of the Criminal Procedure Act [CAP 20 R.E 2022] and as made clear in the case of **Shabani Said Kindamba vs Republic** (Criminal Appeal 390 of 2019) [2021] TZCA 221; and, **Fourthly**, Mr. Kandoro submitted that, during the seizure of the stolen properties, the owner of the seized property (PW3) was participated in the process of seizure and signed in the seizure certificates which is contrary to section 38 (3) of Criminal Procedure Act [CAP 20 R.E 2022].

On those grounds, as stated above, the learned state attorney declined to support the conviction and sentences made by the trial court against the present appellants. He invited me to set the appellants free.

On their side, the appellants were happy with the support of the Republic to their joint appeal. They prayed, under the circumstances, that they be released.

Having heard the parties' submissions and considering the evidence in the trial court's record the crucial issue is whether the prosecution side had managed to prove the charge against the appellants satisfactorily. Fortunately, both parties are at issue that the charge was not proven and there are some irregularities in the trial court's record. I will start by considering the submissions by the Respondent on the alleged irregularities.

Starting with the first legal irregularity Mr. Kandoro, the leanrned state attorney, submitted that the trial court magistrate convicted and sentenced the appellants without specifying the provision of laws for the conviction.

I have respectively considered that submission. In the trial court record, especially on page 13 of the typed judgment, the trial magistrate had the following words to say (I verbatim quote);

> *"....These, the prosecution has proved the case beyond reasonable doubt against them and I found them guilty*

again the 1st accused Imrani Ismail @Zombi, and the 4th accused Yahaya Masoud, the prosecution side proved the case beyond reasonable doubt that, they involved in commission of offence of house breaking and stealing during night time to the victim, and it is burglary offence. Therefore I found them guilty and I convicted them for burglary, and also I convicted 2nd accused and 3rd accused for receiving stolen properties. Order accordingly."

The record is very clear that the trial court magistrate convicted the appellants without specifying any section of the law for conviction.

Section 312 (2) of the **Criminal Procedure Act [CAP 20 R.E. 2022]** provides the following;

*"312 (2) In the case of conviction, the judgment **shall** specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced." (Emphasis supplied)*

Based on the mandatory language used under section 312 (2) of the CPA, there will be no valid judgment without a proper conviction. In the case of **Salimu Mohamedi Sungi Vs Republic** (DC Criminal Appeal 103 of 2021) [2023] TZHC 19377I Honourable Hassan, J observed *inter alia* that;

> *".....Section 312 (2) (supra) is coached with mandatory rule "shall", hence, non- compliance of it will definitely condense the judgment to become defective. As it stands, the appellant has never been convicted, and therefore, he should not suffer for nothing."*

Failure to specify the provision of laws under which the appellants were convicted, as in the instant case, is not a mere irregularity curable under section 388 of the Criminal Procedure Act, but fatal.

Secondly, Mr. Kandoro argued that the only evidence relied upon by the trial court in finding the convictions of the appellants was from the cautioned statements allegedly made by them (appellants). According to the learned state attorney, there was no other corroborative evidence that led to the conviction of the appellants.

I will agree with Mr. Kandoro that, the trial court relied on the cautioned statements allegedly made by the appellants as the sole evidence led to the conviction. There was no other corroborative evidence linking the appellants with the counts charged. I find that, under the circumstances of this case, where almost all witnesses who testified against the appellants might have an interest in serving, it is more than dangerous to rely on their evidence in convicting the appellant. The fairness may be questionable.

The sole allegation in evidence that the appellants were found in possession of the stolen property cannot by itself stand. It is in want of corroborative evidence to support that. As I have hinted somewhere herein above the corroborative evidence in this case is wanting.

I will now proceed to the third point raised by the learned State Attorney. He contended that there was no seizure receipt issued when seizing the alleged stolen properties. According to him, that was contrary to the requirements of section 38 (3) of the Act. To support his stance the learned state attorney cited the case of **Shabani Said Kindamba** (supra). I am live however that the principle established in Shabani's case was overruled by the recent decision of the Court of Appeal of Tanzania in the case of **Ramadhan Idd Mchafu vs Republic** (Criminal Appeal 328 of 2019)

[2022] TZCA 723. *See also;* **Jibril Okash Mohamed vs Republic** (Criminal Appeal 331 of 2017) [2021] TZCA 13.

Mr. Kandoro, yet raised another point against the trial court's proceedings. He contended that during the seizure of the stolen properties, the owner (PW3) acted in the process. He signed the seizure certificates as a witness contrary to section 38 (3) of the Act. According to the learned state attorney since the PW3 who was mentioned as the owner of the stolen properties fully participated in the seizure of the stolen property, could not be an independent witness because he had an interest to serve.

The record indeed provides that PW3 (the owner of the properties) fully participated in apprehending and seizing the stolen properties. He signed all seizure certificates as a witness to the seizure exercise. I am of the view that the PW3 could not qualify to be an independent witness as required. Since the PW3 who is the owner of the seized property was so involved in the process of seizure on the way it was done, the whole process of seizure, under the circumstances of this case, was unsafe. Section 38(3) of the Criminal Procedure Act provides that;

"38 (3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

In the case of **Ndima Kashinje @ Josep vs Republic** (Criminal Appeal 466 of 2017) [2021] TZCA 398. The Court of Appeal of Tanzania had this to say;

"As if that was not enough, the certificate of seizure (exhibit P2) was signed by PW1, PW2 and PW4 who are the motorcycle owner,

motorcyclist and the landlady of the searched premises respectively, as witnesses to the search. In our view, all these had interest to serve.....To say the least, the conducted search was illegal and consequently the seizure, as such it was wrong to ground conviction of the appellant basing on exhibit P2."

It is for the foregoing reasons, that I find the learned State Attorney was right in refusing to support this appeal.

The appeal is therefore allowed. The conviction and sentence imposed by the trial court on the appellants are hereby quashed and set aside. I order the immediate release of the appellants from the prison unless lawfully held.

It is so ordered.

Dated at Mtwara this 28th February 2024.

S. R. DING'OHI
JUDGE
28/02/2024

COURT: Judgment delivered this 28th day of February 2024 in the presence of Mr. Edson Laurance Mwapili State Attorney for the Republic and the Appellants in persons.

S. R. DING'OHI
JUDGE
28/02/2024