

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB-REGISTRY

AT SONGEA

CRIMINAL APPEAL NO. 47 OF 2023

(Originating from Criminal Case No. 82 of 2023, Tunduru District Court at Tunduru)

1. GASTOR LAURENCE FABIAN..... APPELLANT

2. CHARLES KASSIM NDEMANGA..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Dated: 19th February, & 11th March, 2024

KARAYEMAHA, J.

This judgment is in respect of an appeal instituted by the appellants against the decision of the District Court of Tunduru at Tunduru, which sentenced them to serve terms of five years in the second count each and the 1st appellant to serve a term of 3 years imprisonment in the third count respectively. The terms of sentence meted against the 1st appellant were ordered to run concurrently. This followed a conviction on two counts of stealing and unlawful possession of goods suspected of having been stolen allegedly perpetrated against Rashid Bakari Namalo.

The appellants were arraigned in Court on 13/4/2023, vide Criminal Case No. 82 of 2023 in which three counts of house breaking, stealing and unlawful possession of goods suspected of being stolen were read over. They were acquitted of house breaking at the end of the trial.

With respect to stealing, the allegation was that on 29/1/2023 at Nakayaya Bias within Tunduru District in Ruvuma region, the appellants stole one mobile phone, to wit, Infinix Hot 11 valued at Tshs. 300,000/= and 2,500,000/= cash money all properties valued at Tshs. 2,800,000/= the properties of Rashid Bakari Namalo. This act was contrary to section 265 of the Penal Code, [Cap. 16 R.E. 2019]. With respect to unlawful possession of goods suspected of having been stolen the prosecution's allegation is that upon being stolen, the mobile phone, to wit, Infinix Hot 11 was found in unlawful possession of the 1st appellant contrary to the provisions of sections 312(1)(b) of the Penal Code.

The conviction and the sentence imposed by the trial Court have utterly aggrieved the appellants, hence their decision to institute the instant appeal. Their petition of appeal has eight grounds.

In disposing off this matter, I feel constrained not to consider grounds of appeal but buy whole sale the submissions by Mr. Elipid Tarimo, learned State Attorney for the respondent republic. The apparent reason is that there are noted. I think, it will be superfluous to decide the appeal on merits.

Mr. Tarimo predicated his submission on two spotted anomalies. **One**, the trial court basing its decision on new facts not part to the present case and **two**, custodial sentence imposed against the 2nd appellant while he is under 18 years old.

As correctly submitted by the learned counsel the trial court's judgment embedded facts which were not part of the case. Citing page 41 of the typed judgment the learned counsel explained that facts relating to stealing a woman's mobile phone who purchased it on credit and was still paying on installment were new to this case. I unequivocally agree with Mr. Tarimo because as deciphered from the record, it was Rashid Bakari Namalo's mobile phone make Infinix Hot 11 stolen. I have painstakingly gone through his evidence. There is no statement that he bought the said mobile phone on credit and that he was still paying the balance. I am strengthened by his evidence particularly exhibit P1, a receipt, which reveals that the victim fully paid

for the mobile phone. In the same vein, the victim of the incident is a male person not a woman. These facts form the substantive part of the sentence passed by the trial court whose rectification cannot be by chalking them off and leaving the decision perfectly in order. I am perfectly aware that the trial Magistrate was influenced by these facts in sentencing the appellants.

Essentially, in sentencing the appellants, the trial learned Magistrate considered the Public Prosecutor's aggravating factors which part of it is reproduced here with its grammatical challenges as follows:

"... your honour I am very sure that stiff and severe sentence will be imposed it will be a lesson to them and other energetic man who uses (sic) their energy given by God in evils (sic) activities and finally decrease the economy of individuals in the society as what the convict (sic) did to the victim a woman who I believe that she spent a lot of time to get the money to buy such mobile phone. As it appeared that she had borrowed the phone and not yet finished paying. Since she was paying on installments..."

Heeding to the invitation to pass stiff sentence, the trial learned Magistrate pre-ambled his sentence by stating that:

"In passing this sentence this court have (sic) considered mitigation of both sides in this case, prosecution side as well as defence side together with aggravating factors advanced by the Public Prosecutor."

The learned trial Magistrate underscored further that:

"The conducts of the convicts are so reprehensible as to attract sufficiently deterrent sentence for their clearly a mercifully to the victim. Generally speaking, and to be sincerely (sic) the behaviour of the convict persons (sic) in this case is intolerable in the society."

Not unconscious to the fact that Mr. Tarimo is at his dismay at what the learned trial Magistrate indulged himself in, I wish to reiterate the obligation that judicial officers have in deciding the case depending on the evidence and facts before them. Failure to do so constitutes a serious infringement of the procedure and the impact is enormous. It gets unpleasant and intolerable if such breach leads, as is in the present case, to dwelling on facts not expounded by evidence and not subject of the case but leads to influencing the trial Magistrate to pass the sentence. With due respect to the learned trial Magistrate, he embarked on the non – existing facts and evidence. I find that he made a fatal error. I am satisfied that there was a failure by the trial court to base the sentencing hearing on the facts of the case at hand and fished out other facts. As I said earlier, it cannot escape one's mind that that act influenced the learned trial Magistrate to pass the sentence as he did. It follows, therefore, that the inevitable consequence is to have it removed on the way. Guided by the decision of **Kashaga v Ernest Kahoya**,

[1976] LRT No.10, this court do hereby regrettably remit the case to the trial magistrate and direct him to compose a proper judgment whose final decision should reflect the facts of this case.

Let me now turn to the issue of age of the 2nd appellant. Essentially, Mr. Tarimo's contention is that the 2nd appellant's appearance, posture and his answers upon being probed reveal that he was under eighteen years (18) and not 20 years (20) at the time of commission of the offence as claimed by the prosecution having been born in 2006. He contended that the 2nd appellant was 17 years old.

The learned State Attorney contended further that the law of the Child Act, [Cap13 R.E. 2019] together with the Rules of 2019 section 113 read together with rule 12, imposes a duty to the court to interrogate the accused about his age when he appears to be a child. This requirement was elucidated in **Patrick Hezron v R**, DC Criminal Appeal No. 51 of 2020, (unreported) HC-Kigoma, he said. He, therefore, urged this court to invoke its powers under section 373(1) and (2) of the Criminal Procedure Act [Cap 20 R.E. 2022] exercise its revisionary powers and remit this case to the trial court to compose the judgment reflecting the facts of this case and consider the 2nd appellant's age during the sentencing.

Having heard the learned Counsel and gone through the record and considered the law, it behooves me to hold that whenever there is any doubt with regard to the age of the accused, the trial court has unalienable duty to inquire into it. The rationale behind is to avoid custodial sentence to be passed against children. The law is clear on this aspect and no authority is required to prop it up.

In consequent of all the above discussion, I quash and set aside the judgment of the trial court dated 27/7/2023, and remit the matter back to Tunduru District Court for writing of a new judgment which will reflect the facts and age of the 2nd appellant.

It is so ordered.

DATED at SONGEA this 11th day of March, 2024.




J.M. KARAYEMAHA
JUDGE