IN THE HIGH COURT ZANZIBAR

HELD AT VUGA

CRIMINAL APPEAL NO. 12 OF 2010

FROM ORIGINAL CRIMINAL CASE NO. 426 OF 2004 OF REGIONAL MAGISTRATE COURT, VUGA.

AMINA ABDALLA SHARRIF + 2 OTHERS ... APPELLANT

VERSUS

D.P.P ..... RESPONDENT

Date of last Order: 31/10/2011

Date of Judgment: 30/01/2012

JUDGMENT

Mwampashi, J.

The appellants namely Amina Abdalla Sharif, Zubeda Abdalla Sharif and Kheri Maulid Kheri hereinafter to be referred to as the 1st, 2nd and 3rd appellants respectively were charged before the Regional Court at Vuga with two counts. The first count on which they were jointly charged with one Amour Mussa Ibrahim hereinafter to be referred to as the 1st accused, was of theft C/SS. 267(1) and 274(1) of the Penal Act, 2004, while the second count was of receiving property stolen or unlawfully obtained C/S. 314(1) of the Penal Act, 2004. The 1st accused was convicted of the first count on his own plea of guilty while the appellants, after full trial, were acquitted on that count but were found guilty on the second count and were sentenced to a fine of Tshs. 300,000/= or

in default serve a period of six month imprisonment. The appellants were also ordered to pay Tshs. 500,000/= the value of the stolen and received property, as compensation to the complainant. Being aggrieved by the conviction, sentence and the compensation order the appellant have now appealed to this court.

The particulars of the two counts the appellants were charged with as per the charge sheet preferred before the trial court were as follows;- On the first count of theft it was alleged that on 10/10/2004 at about 04.00 pm at Mwanakwerekwe within the Western District in the Urban West Unguja Region the appellants and the 1st accused did jointly steal the following golden items; two rings, two vidani, one bungle and bracelet and two pairs of earrings all valued at about Tshs. 915,000/- the property of Zuhura Issa Khamis. As on the second count of receiving it was alleged that on the same date, time and place the appellants did jointly receive and retain the above listed stolen golden items from the 1st accused while knowing that the same had been stolen.

The appellants' conviction by the trial court was mostly based on the evidence given by the 1st accused who was called by the Prosecution as PW2. This witness (PW2/1st Accused) told the trial court that he stole the golden items in question from his aunt the complainant (PW1) and that he sold the items to the appellants. The evidence from the complainant PW1 was that at one time in 2004 she realized that her golden jewelries were missing. Her first suspect was

the 1st accused who had spent the last weekend with her at the house. The 1st accused was questioned and he admitted having stolen the jewelries and he stated that he had sold the same at one jewelry shop at Kiponda street. Thereafter the 1st accused was reported to the police where he was required to take the officers to the shop in question where the appellant were arrested and later charged with the two offences.

In their defence the appellants denied stealing, receiving or buying anything from the 1st accused. They even denied knowing him. They also denied the allegations that they were arrested while negotiating on the price of the ring the 1st accused was about to sell to them and they explained to the trial court in their respective defences how they were arrested. The trial court, as it has been pointed out earlier, found the appellants guilty of the second count of receiving stolen property, convicting and sentencing them accordingly hence this appeal.

In support of the appeal a number of grounds have been raised as follows;-

1. That the Honourable RM's Court erred in law in not holding adversely against the prosecution when they did not call the arresting officer and solely depended on a kid and a witness who had interest to serve when giving his testimony.

2. That the Honourable RM's Court erred in law in entering the alleged plea of guilty as being an unequivocal plea of guilt without reading the particulars of the facts of the case to the extent of convicting PW2 making him the state witness without proper procedure to the injury of the appellants.

3. That the Honourable RM's Court erred in law in not critically analyzing the prosecution and defence case before making a conclusion against the appellants to their injury.

4. That the Honourable RM's Court erred in law in not satisfying itself of the ability and duty of stating the truth of a child witness of tender years and depended on him to convict the appellants contrary to the laid down procedures.

5. That the Honourable RM's Court erred in law in relying on contradictory testimonies of PW2 in his plea, examination in chief and his response to cross examination to the extent that he convicted the appellants on the same without legal basis.

6. Generally the RM's Court erred in law in convicting the appellants in violation of the principles of burden of proof as provided under the laws of procedures.

At the hearing of the appeal Mr. Mbwezeleni learned advocate who has represented the appellants has asked the court to allow the appeal and quash the conviction and sentence of the trial court firstly on the ground that the prosecution deliberately failed to call the arresting officer as a witness while the officer was a very material witness and that the trial court did fail to draw an adverse inference on that failure by the prosecution. Mr. Mbwezeleni has referred the court to the case of **Aziz Abdalla vs. R** [1991] TLR. 71 where it was held among other things that the prosecution is duty bound to call crucial witnesses and if it fails the court is bound to hold adversely against the prosecution. It has been further submitted by Mr. Mbwezeleni that the arresting officer was an important witness on the circumstance under which the appellants were arrested and would have corroborated the evidence given by PW2. Mr. Mbwezeleni has again referred the court to the case of **Lameck Masawe vs. R [1998] TLR. 72**.

On the second ground of appeal it has been argued by Mr. Mbwezeleni that PW2 the 1st accused was wrongly convicted and therefore improperly made a prosecution witness. He has explained that the facts of the case were not read to

the 1st accused before his plea of guilty was entered and that being the case his plea was not unequivocal plea of guilty. Here Mr. Mbwezeleni has cited the case of **Buhimila Mapembe vs.** R [**1998] TLR. 174** and that of **Bunus Nkya vs. R [1989] TLR**. **59,** as his authorities.

As on the third ground it has been Mr. Mbwezeleni's submissions that the trial court did not make a critical analysis of the evidence before it and in so failing it wrongly convicted the appellants on the evidence that did not defeat the defence evidence.

Mr. Mbwezeleni has prayed to withdraw the fourth ground and on the fifth ground he has submitted that PW2's testimony was contradictory to the extent that the trial court could not have relied on it. He has further argued that the prosecution did not prove the case to the required standards as material witnesses were not called. He has pointed out that even the investigation officer was not called as a witness and that all the witnesses who were called were relative who had their interest to serve.

Mr. Omar Sururu learned state attorney who has represented the DPP (respondent) has strongly opposed the appeal arguing that the evidence against the appellants was strong enough to support the conviction. He has pointed out that not calling the arresting officer as a witness had no negative effect to the

prosecution case because there were other witnesses who gave sufficient evidence to prove the case.

As on the ground in regard to the evidence given by PW2 it has been argued by Mr. Sururu that PW2's testimony needed no corroboration as it has been submitted by Mr. Mbwezeleni. He has referred the court to the case of **Discile Ngonga & 4 others vs. R.** Criminal Appeal No. 139/1993, CA at DSM (Unreported) where the Court of Appeal held that evidence from witnesses who are relatives does not need corroboration neither in law nor in practice.

Mr. Sururu has submitted on the ground relating to 1st accused plea of guilty that the plea was properly entered because the charge and particulars were clearly read over and explained to the 1st accused who admitted the same. He has therefore insisted that the 1st accused was properly used as prosecution witness that is as PW2.

On the third ground it has been argued by Sururu that the ground is baseless because the trial court magistrate properly analyzed the evidence and reached at a proper decision. Mr. Sururu has also pointed out that there is in fact no single style of writing judgment and he has referred the court to the case of **Ameir Mohamed vs. R** [1994] TLR, 13 where it was emphasized that every judge or magistrate has his or her own style of composing judgments.

Mr. Sururu has lastly submitted on the fifth and sixth grounds that there are no material contradictions on the prosecution evidence and further that in fact no reasonable doubt was left by the prosecution. He has therefore prayed for the appeal to be dismissed.

After hearing the submissions from both two parties I had an opportunity to thoroughly go through the trial court record and in so doing I have observed that the prolonged trial that started in late 2004 and ended in 2009 and that was presided over by five magistrate has a number of irregularities some of which are so fatal to the extent that the trial itself and the judgment emanating therefrom cannot be left to stand.

One of the serious procedural irregularities observed from the trial court record and which, unfortunately, raises a lot of questions on the validity of the evidence given by PW2 (1st accused) on which the trial court conviction was mostly based is that the conviction of the 1st accused Haroub Mussa Ibrahim who was convicted on his own plea of guilt and who was later called by the prosecution as PW2 was not properly entered. As it has been correctly submitted by Mr. Mbwezeleni on the second ground of appeal, material facts constituting elements of the charge the 1st accused was convicted of on his own plea of guilt were not read over for the 1st accused to admit.

According to the trial court record the 1st count i.e theft, was read over and explained to the 1st accused and the appellants on 22/12/2004. The appellants denied the charge while the 1st accused admitted the charge in the following words; "It is true that I have taken and given to this person (pointed the 1st appellant). Thereafter the trial court entered a plea of not guilty in regard to the appellants and as for the 1st accused the trial court proceeded as follows;

Court: Entered as plea of guilty for accused no. 1 and is
Explained to the substance of his plea and that judgment
Will be entered against him and he will lose his
right to appeal.

Sdg: Salma Maghimbi (RM)

22/12/2004

Accused; I agree and I hold my plea of guilty.

Thereafter the appellants were asked to plead on the 2nd count and they having denied to have committed the offence a plea of not guilty was entered and the prosecution is recorded making the following statement;

P/Pross: Investigation is incomplete, I pray for another mention

dated and pray further that the accused no. 1 is punished accordingly as he has pleaded guilty. However I pray for court to take into consideration the age of the accused person which is thirteen years and punish him according to his age and we have no objection as to that.

Then the trial court after making its order in regard to the appellant's bail and after fixing the date the trial for the appellants would proceed, delivered its short judgment convicting he 1st accused and releasing him with a warning.

Now from what transpired before the trial court as demonstrated above the trial court record does not show that a plea of guilty was entered after the 1st accused has pleaded guilty to the 1st count. However the worst thing is that the 1st accused plea that 'It is true that I have taken and given to this person' did not amount to the unequivocal plea of guilty. The 1st accused admitted to have taken not to have stolen. He did not even mention the items in question in his plea. It is always insisted that a plea of an accused should as near as possible be recorded as the accused says it and that the plea should show that the accused admits every constituent element of the charge. This was not the case in as far as the 1st accused plea is concerned.

Another fatal irregularity in as far as the 1st accused plea is concerned is that the prosecution did not give or did not outline material facts of the case for the 1st accused to admit and did not even produce any relevant exhibit for the identification by the 1st accused. This was a fatal irregularity in as far as the 1st accused conviction is concerned which makes the conviction null and void. In the case of **Stanslaus v. R (1969) HCD.** 150 it was insisted that material fact of the case must be given and must be unequivocally admitted before an accused is convicted on his own plea of guilty. The court held that,-

It is for the Prosecution to outline the facts which must

be agreed by the accused before he is convicted.

Because as it has been hinted above the 1st accused whose conviction has been held by this court to be not proper was called by the Prosecution as one of the witnesses and also since the trial court conviction was mainly based on this witness therefore the fact that his conviction was not proper makes even the appellants' conviction to be questionable. The appellants' conviction is questionable it is based on the evidence of the witness whose evidence is embedded in the wrong conviction on own plea of guilty. We do not know what could have been the 1st accused plea if material fact of the charge would have been given by the prosecution and we cannot assume that the 1st accused would

have maintained his plea of guilty. What is clear, however, is that if the 1st accused would not have admitted the material facts which was supposed to be given by the Prosecution then the he would not have been called as one of the prosecution witness and therefore the evidence he gave before the trial court against the appellants either would not have been there or would not have been the same.

Another problem is on the charge sheet. As it has been pointed out earlier on the first count of theft the appellants were jointly charged with the first accused i.e Haroub Mussa Ibrahim. The particulars were that the appellants and the first accused did jointly commit the theft in question at Mwanakwerekwe on 10/10/2004 at about 04.00pm. Surprisingly it was alleged on the second count that on the same date, time and at the same place the appellant did receive the alleged stolen property from the 1st accused. Here the first thing to be observed is that the appellants were wrongly charged with two charges. One cannot be accused of stealing a property and at the same time be charged with another charge of receiving the same property. This is duplicity of charges and it embarrasses and causes injustice to an accused subjected to such charges. From the evidence which I believe the prosecution had even before preferring the charge there was no need of charging the appellants with the first count. The evidence showed that if the appellant really committed any offence then the

offence was of receiving and not of stealing. At least it would have been proper if the second count would have been in the alternative.

The other inordinate thing that can be observed in the charge sheet is that while it was clear to the prosecution, as to my understanding, that if the offence of receiving was really committed by the appellants then it was committed at Kiponda street where the appellants' business place was and not at Mwanakwerekwe where the theft was alleged to have been committed the particulars on the second count of receiving was to the effect that the receiving was done at Mwanakwerekwe. It is surprising that those who prepared the charge sheet in question and even the trial court failed to notice such clear faults and make necessary rectification at earlier stages.

In the final analysis because the 1st accused was not properly convicted as above demonstrated though this appeal at hand was not against the said conviction this court invoking its supervisory and reversionary powers under S. 8 of the High Court Act, 1985 do hereby quash the 1st accused conviction and set aside the sentence imposed upon him. Either, for the reason that the appellants' trial was full of irregularities as pointed and explained above the whole trial is therefore hereby declared a nullity and it is ordered that the case be remitted to the Regional Court for retrial before another magistrate of competent jurisdiction.

Sdg: Abraham Mwampashi J.

30/01/2012.

Delivered in Court this 30/01/2012 in the presence of the 1st appellant with Mr. Suleiman Shaaban (Adv) holding brief for Mr. Mbwezeleni and in the presence of Mr. Mohamed Khamis (SA) for the respondent DPP.

Sdg: Abraham Mwampashi J.

30/01/2012.

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

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REGISTRAR

HIGH COURT ZANZIBAR.

Mbs/.