

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA DISTRICT REGISTRY**  
**AT MUSOMA**  
**PC CRIMINAL APPEAL NO 21 OF 2020**

**BETWEEN**

**HARUNI JUMA** \_\_\_\_\_ **APPELLANT**

**VERSUS**

**HURUMA AZA FOYA** \_\_\_\_\_ **RESPONDENT**

*(Arising from the decision and orders of the district court of Musoma at Musoma Hon. Bigambo RM, in criminal appeal no 23 of 2020 dated 29.06.2020)*

**JUDGEMENT**

*7<sup>th</sup> December 2020 & 29<sup>th</sup> January 2021*

**GALEBA, J.**

The appellant, **Mr. Haruni Juma** together with **Mr. Matete Maregesi**, were jointly charged for stealing and burglary at Nyambono primary court. The allegations of the complainant, **Mr. Huruma Aza Foya** were that at around 4.00 o'clock in the morning of 05.02.2020 at Bukima ward within Musoma district in Mara region, **Mr. Maregesi** called him and told him that **Mr. Haruni Juma** and **Mr. Pai Juma**, who are brothers, had broken into his motor truck with registration no T677 ASY and stole fish worthy Tshs 3,800,000/= . Consequently, **Mr. Pai Juma**, was arrested by the police but he escaped them. **Mr. Juma**, the appellant was arrested

10 days later at his home and charged as above. **Mr. Maregesi** was joined to the charge as a security guard who was guarding the truck in which the stolen property was stored but failed to arrest the thieves. Whereas **Mr. Malegesi's** defence was that the thieves were **Mr. Haruni Juma** and **Mr. Pai Juma** and not him, the appellant's defence was that the case was fabricated against him by **Mr. Maregesi** because there were grudges between the two since 2015.

Nevertheless the primary court found both the appellant and **Mr. Maregesi** guilty and convicted then as charged. **Mr. Maregesi** was ordered to pay Tshs 500,000/= in fine or serve a term of six (6) months in jail and the appellant was sentenced to six (6) months imprisonment without an option of fine. Both the accused persons were further ordered to pay Tshs 3,800,000/= to compensate **Mr. Foya** of the loss of fish and the swim bladders in the fish. The appellant filed criminal appeal no 23 of 2020 in the district court at Musoma but his appeal was dismissed with the sentence of six (6) months earlier imposed enhanced to one (1) year imprisonment. This appeal is challenging the above orders of the district court.

The appellant raised 4 grounds in the petition, but when the case came up for hearing he abandoned the 4<sup>th</sup> ground and sought to add 2 new grounds. The three (3) retained grounds were *first* that the respondent failed to prove the case against the appellant beyond reasonable doubt, *secondly* that both subordinate courts (sic), (hopefully the trial court), failed to record the opinion of assessors in the judgement and *thirdly* the trial court erred to convict the appellant based on the evidence of the co-accused and without taking into account the fact that the co-accused had grudges with the appellant.

The two additional grounds are hereby refused without even referring to them because the appellant during the hearing admitted that the complaints in those grounds were not raised in the first appellate court. It is now a clear position of law in Tanzania that a matter not raised in the lower court cannot be challenged on appeal, see the judgments in **Hassan Bundala Swaga v Republic** Criminal Appeal no 416 of 2014 and **Diha Matofali v Republic**, Criminal Appeal no 245 of 2015 both being unreported decisions of the Court of Appeal.

The issue in this appeal arises from the 1<sup>st</sup> and the 3<sup>rd</sup> grounds of appeal which is whether a conviction based solely on the evidence of a co accused was lawful.

According to the evidence tendered in the primary court was that **DW1 Mr. Matete Maregesi** while on duty guarding the truck loaded with fish, the subject matter of the crime, he noted two people who he disclosed to be the appellant and his brother having broken the motor truck and were stealing the fish from the parked vehicle. He then reported the matter to the police.

**PW1, Huruma Aza Foya** and **PW2 D 8983 Sargent Mtuyu** both testified that they got information of the theft from **DW1, Mr. Matete Maregesi**. This means the evidence of **PW1** and **PW2** was hearsay evidence which is no evidence in law. The only evidence that remained was that of **DW1 Mr. Matete Maregesi** who was a co-accused to the appellant. According to law, evidence of a co accused needs to be corroborated see **Augustino Mponda v R [1991] TZHC 14 (Tanzlii)**. However if the court is minded to convict the accused based solely on the evidence of a co-accused it must warn itself of the dangers of so convicting the accused without corroboration, see **Pascal Kitigwa v R [1994] TLR**

**65** where the Court of Appeal held that the court can convict an accused person based on accomplice evidence without corroboration only if the court is satisfied that such evidence is true and also by warning itself of the dangers of convicting based on such evidence without corroboration.

In the present case, the court did not warn itself of the possible dangers of convicting the accused based on the sole evidence of a co accused without corroboration. Such warning was important in this case **first** because, the offence took place at night, and although the co accused stated that he had a torch which he lit to identify the thieves but he did not describe the intensity of the light and the distance between him and the thieves. **Secondly** it was important for the court to warn itself or demand corroboration because the appellant stated that he had grudges with the co-accused, whose evidence was solely used to convict him.

It is therefore the holding of this court that the case in the primary court was not proved beyond reasonable doubt which means the appellant's conviction was unlawful. That said, the 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal are upheld and this court makes the following orders.

1. The findings, the conviction, the sentences and all orders including those for compensation as imposed upon **Mr. Haruni Juma** by both the district court at Musoma and Nyambono primary court are hereby quashed and set aside.
2. This appeal is allowed and the respondent may appeal to the Court of Appeal of Tanzania to challenge this judgment.

DATED at MUSOMA this 29<sup>th</sup> January 2021



  
Z. N. Galeba  
**JUDGE**  
**29.01.2021**