IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: CHANDE, C.J, MJASIRI, J.A and JUMA, J.A)

CRIMINAL APPEAL NO. 282 OF 2011

HADIJA YUSTO MGONJA ..... 1ST APPELLANT
GIMSON FANUEL MOLLEL ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Arusha)

(Nyerere, J.)

dated the 28th day of September, 2011
in
Criminal Appeal No. 27 of 2011

JUDGMENT OF THE COURT

5th & 12th March, 2013

MJASIRI, J.A.:

In the District Court of Arusha District the appellant, Gimson Fanuel Mollel together with two others, Hadija Yusto Mgonja and Munira Hussein were charged with and convicted of two counts, on the first count they were charged with conspiracy to commit an offence contrary to section 384 of the Penal Code Cap 16, R.E. 2002 and on the second count with child stealing contrary to section 169 (1) (a) of the Penal Code. They were convicted as charged in the trial court and were sentenced to seven (7) years imprisonment on each count. The sentences were to run

concurrently. Their appeal to the High Court was unsuccessful. It was only Munira Hussein who was successful, hence the second appeal to this Court.

At the hearing of the appeal, Hadija Yusto Mgonja made an application to withdraw her notice of appeal as she no longer wished to pursue her appeal in this Court. Her application was duly granted by the Court.

The appellant, Gimson Fanuel Mollel was represented by Mr. John Materu, learned advocate and the Respondent had the services of Ms Veritas Mlay, learned Principal State Attorney. The appellant preferred five grounds of appeal. However, when the appeal was called on for hearing the appellant sought leave of the Court to abandon the first ground of appeal hence remaining with four (4) grounds which are reproduced as under:

1. *That, the learned Judge erred in law and in fact in relying on cautioned statement of the second appellant which has illegally been recorded and received by the trial court.*
2. *That, the learned Judge erred in law and fact in holding that the second appellant was properly convicted via his own confession.*

3. *That, the learned judge erred in law and fact in not finding that the charge against the second appellant was not proved on the required standard.*

Alternatively and without prejudice to the above grounds

4. *That, the learned judge erred in law and in fact in upholding the maximum sentence of seven (7) years imprisonment imposed on the second appellant.*

The background to this case is as follows. It was the prosecution case that the appellant together with Hadija Yusto Mgonja and Munira Hussein between September, 2009 and October 2009 at Kijenge area, within the Municipality of Arusha jointly and together conspired to commit an offence of child stealing. It was further alleged by the prosecution that on October 7, 2009 the trio, jointly and together did steal a child named Noela d/o Mbina who was aged four months. The child was taken to Vudee, in Kilimanjaro Region. All the accused persons denied any involvement with the said incident. The prosecution called two (2) witnesses, PW1, Nai Michael who was the mother of the child in question and PW2, D/Sgt Edith, a police detective.

In relation to the first ground of appeal, Mr. Materu attacked the cautioned statement of the appellant on various angles. He submitted that the cautioned statement was recorded contrary to law and procedure. He relied on the case of **Seko Samwel v Republic** (2005) TLR 371. He also complained that the statement was also taken out of time. He made reference to the case of **Sultani Salim Nassoro v Republic** (2003) TLR 231. Mr. Materu also complained that the cautioned statement of the appellant was not properly tendered and admitted in court and was therefore illegally received by the trial court. He submitted that the procedure used by the trial court was highly irregular and it was therefore wrong for the trial court and the High Court to rely on it. Even though there was no objection to the admission of the cautioned statement by the accused persons in the trial court and only a general objection was raised in the High Court, he urged the Court to rely on Section 6 (7) (a) of the Appellate Jurisdiction Act 1979 and to look into the irregularity since this relates to a question of law.

On ground No. 2, he submitted that as the confession was retracted by the appellant, there was need for corroboration. He cited the case of **Ally Salehe Msutu v Republic** (1980) TLR 1.

In relation to ground No. 3 on the offence of conspiracy, he argued that there is no evidence to establish that the appellant was present. Once the cautioned statement is expunged from the record, there is no other evidence implicating the appellant.

On ground No. 4 which was argued in the alternative, Mr. Materu was of the view that the sentence imposed was too high. Section 169 (1) of the Penal Code provides for a maximum sentence of 7 years but the courts below had no justification to impose and to uphold a maximum sentence as there were no special circumstances to do so. He brought to the attention of the Court the case of **Silvanus Leonard Nguruwe v Republic** (1981) TLR 66.

Ms Mlay on her part opposed the appeal. With regards to grounds No. 1. she submitted that there was no basis for the complaint on the cautioned statement. No objection was raised on the cautioned statement in the courts below. Objection should have been raised before the document was admitted. She concluded that since this issue is being introduced now, it is a mere afterthought. The appellant did not even cross examine PW2 on the statement. Relying on the case of **Nyerere**

Nyague v Republic, Criminal Appeal No. 121 of 2003 CAT (unreported), she submitted that there was evidence to corroborate what was in the cautioned statement. The stolen child was found through the aid of the cautioned statement.

On ground No. 2, Ms Mlay submitted that the appellant was properly convicted on his confession.

In relation to ground No. 3, she submitted that the charge against the appellant was proved. Even though Exhibit P.2 does not show that the appellant was present there was common intention. The evidence of PW1 and PW2 was relevant.

With respect to ground No. 4, the alternative ground on sentence, Ms Mlay stated that the offence of child stealing was a serious one, the appellant himself being a parent deserved the severe sentence imposed by the trial court and affirmed by the High Court.

The main issues for consideration in this appeal are as follows:-

1. *Whether or not the cautioned statement of the appellant Exhibit P.2 was properly tendered and admitted in court.*

2. *Whether the evidence on record was sufficient to ground a conviction of the appellant.*

A conspiracy involves the doing of an act by one or more of the parties, or the happening of an event, which constitutes an offence.

Section 384 of the Penal Code provides as follows:-

> *"Any person who conspires with another to commit any offence, punishable with imprisonment for a term of three years or more, or to do any act in any part of world which if done in Tanzania would be an offence so punishable, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of an offence, and is liable if no other punishment is provided, to imprisonment for seven years or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for seven years, then to such lesser punishment".*

The offence of child stealing is created under Section 169 (1) (a) of the Penal Code. This provision reads as follows:-

> *"Any person who, with intent to deprive a parent, guardian or other person who has the lawful care or charge of a child under the age of fourteen years, of the possession of that child–*

(a) forcibly or fraudulently takes or entices away, or detains the child; or"

According to Black's Law Dictionary (Abridged Sixth Edition) conspiracy is defined as under:

> *"a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted actions of conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful."*

This means that there must be evidence adduced on the existence of conspiracy and the involvement of both A and B and C.

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commitment its commission he does the following;

(a) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime or

(b) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

After carefully going through the record of appeal and arguments raised by learned counsel, we are of the considered view that the only evidence linking the appellant with the offences is the cautioned statement he made (Exhibit P.2). There is no direct evidence linking the appellant. This observation was also made by the High Court Judge. Given the circumstances, we need to determine whether the cautioned statement was properly tendered and admitted. In reviewing the record, we are inclined to agree with Mr. Materu that the cautioned statement was not properly tendered and admitted. The procedure to be followed is that before the examination in chief is finalized, the witness is supposed to seek leave of the court to tender the cautioned statement. This would then enable the accused person to raise an objection, if any, on the admission of the document. However this procedure was not followed. It was after PW2 concluded his testimony, that the Court asked the accused persons whether they had any objection. The relevant portion of the record on page 28 is reproduced as under:-

COURT: The 3rd accused and 1st accused are asked if they are willing that the caution statements to be taken as exhibits before this Court or not.

3rd accused I agree the statements to be taken as exhibits before this Court.

COURT: The caution statements of the 1st and 3rd accused are admitted by this Court and marked as Exhibit P. 1 for 1st accused and Exhibit 2 for 3rd accused.

It is evident from the record that PW2 merely spoke about Exhibits P.1 and P.2, but did not tender the said Exhibits in court. The record does not reveal who tendered them. The trial court admitted Exhibits P1 and P2 after the close of the evidence of PW2 despite the fact the said exhibits were not properly tendered in court. In view of this anomaly, the appellant was never accorded an opportunity to object to the tendering of the exhibit nor was he advised of his right to object.

Both courts below did not evaluate nor make a finding on the weight to be attached to such evidence given the circumstances of this case - See **Tuwamoi v Uganda** (1967) E.A. 91 and **Stephen Jason & Others v R**, Criminal Appeal No. 79 of 1999 CAT (unreported).

In the instant case there is no dispute that no objection was raised during the trial when the cautioned statement, Exhibit P2 was admitted.

However taking into account the circumstances surrounding the admission of the caution statement, this Court has the powers to evaluate the weight to be given to Exhibit P2.

In **DPP v Jaffari Mŕaume Kawawa** 1981 TLR 149, it was held that where a second appeal is brought under Section 6(7)(a) of the Appellate Jurisdiction Act, 1979 on a point of law, the second appellate court can evaluate evidence afresh and make its own findings of fact where there are misdirection or non directions by the first appellate court.

In **Juma Adam v Republic**, Criminal Appeal No. 79 of 2011 CAT (unreported) a cautioned statement was admitted in court without the appellant being given an opportunity to say anything about it. This court stated thus:-

> *"This was contrary to the procedure. Section 172 of the Law of Evidence Act [Cap 6, R.E. 2002] gives a party the right to see and express his views on any document before it is admitted in evidence against him/her, and the right for cross examination of the witness on that document. Since there was no compliance with the procedure in the admission of the caution statement, and its voluntariness was not even ascertained, it was wrongly admitted in*

evidence and it could not be relied upon as evidence for the conviction of the appellant. The caution statement, exhibit P1 is expunged from the record."

In the case of **Masiki Sosan and another v Uganda**, Criminal Appeal No. 7 of 2002, (CAU), a cautioned statement was admitted in evidence by the High Court without holding a trial within a trial because counsel for the appellants waited until the statement has been read to the court and then raised objections, that is the objection as to the admissibility was considered not to have been made in good time. The Court of Appeal held as follows:

"The accused must get a fair trial as provided by article 28 (1) of the Constitution. The law is now settled that in a case where the accused pleads not guilty, he or she is entitled to a full trial of all the facts in issue. If incriminating or prejudicial evidence is tendered and is not challenged by counsel, the court should not allow it in evidence without ascertaining from the accused person that he or she is aware of the consequences of the reception of such evidence.

The learned trial judge had the duty before allowing PW2 to testify on the charge and caution statement to ascertain from both appellants whether they were aware of the consequences of receipt of such evidence".

In **Stephen Jason and Two Others v R**, Criminal Appeal No. 79 of 1999 CAT (unreported) it was stated thus:

> *"It is common ground that the admissibility of evidence during the trial is one thing and the weight to be attached to it is a different matter."*

The Court stated further:-

> *"In the circumstances, having regard to the fact that the first appellant .....had sustained injuries on his back which he alleged were caused by police while in police custody, the judge should not have accorded any weight to the caution statement of the first appellant. That is, the caution statement should have been discounted as evidence against the first appellant".*

See **Tuwamoi v Uganda** (1967) E.A.91

In **Nyerere Nyague v Republic**, Criminal Appeal No. 67 of 2010 CAT (unreported) It was stated thus:-

> *"Even if a confession is found to be voluntary and admitted the trial court is saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case."*

It is settled law that if an accused intends to object to the admissibility of a caution statement/confession, he must do so before it is

admitted, and not during cross examination or during defence. See **Shihoze Seni and Another v R** (1992) TLR 330 and **Juma Kaulule v R**, Criminal Appeal No. 281 of 2006 CAT (unreported). In the absence of any objection to the admission of the cautioned statement when the prosecution seeks to have it admitted, the trial Court cannot hold a trial within a trial or inquiry *suo motu,* in order to test is voluntariness. See **Stephen Jason and Another v R**, *(supra).*

It was therefore incumbent upon the trial court and the High Court to be more cautious in the evaluation and consideration of the cautioned statement. In the light of the non compliance of the procedural requirements, and serious prejudice caused to the appellant affecting fair trial there was sufficient basis for the two courts below to attach little if not no weight at all to the cautioned statement. The cautioned statement (Exhibit P2) is therefore expunged from the record.

In all criminal cases, the burden of proof rests upon the prosecution to prove the charge against the accused person beyond reasonable doubt. The burden never shifts to the accused. See **Woolmington v DPP** (1935) AC 462 and **Matula v R** 1995 T.L.R. 3. Short of other evidence for the

prosecution to rely upon to prove the case against the appellant, there is no sufficient evidence to justify the conviction of the appellant on both counts. No conspiracy has been established nor is there sufficient proof of child stealing involving the appellant.

In the event, we find the appeal by the appellant has merit and we allow it. We quash the conviction and set aside the sentence. We also order the immediate release of the appellant from prison unless he is held for any other lawful purpose. It is so ordered.

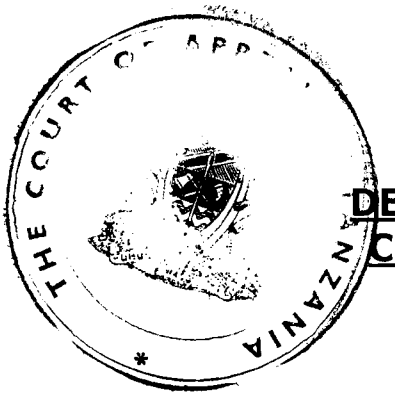
DATED at ARUSHA the 8th day of March, 2013

M.C. OTHMAN
CHIEF JUSTICE

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL