IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 525 OF 2015

JUMA KUYANI.....1ST APPELLANT
MUSA DAUDI.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Mwaimu, J.)

Dated the 11th day of June, 2015
in
Criminal Appeal No. 74 of 2014

.....

JUDGMENT OF THE COURT

2nd & 5th August, 2016.

RUTAKANGWA, J. A.:

The appellants were convicted by the District Court of Babati district ("the trial court") of Breaking into a building and committing an offence therein (1st count) and stealing (2nd count). On the 1st count they were sentenced to five (5) years imprisonment, while they received a prison sentence of seven (7) years on the 2nd count. Aggrieved by the convictions and sentences, they preferred an appeal to the High Court at Arusha.

The appeal to the High Court was grounded on four grievances, namely:-

(a) That the prosecution did not prove the case beyond reasonable doubt.

(b) That the trial court did not scrutinize and evaluate the evidence of PW1, PW2, PW3 and PW4; and the defence evidence.

(c) That the trial court did not consider the provisions of section 198 (1) of the Criminal Procedure Act, Cap. 20.

(d) That the charge sheet was defective.

Although there was no direct evidence connecting the appellants with the alleged offences, the respondent Republic in the High Court found those grounds of complaint very frivolous and pressed the learned first appellate judge to dismiss the appeal in its entirety. The learned judge partly agreed. He dismissed outright the third and fourth grounds of appeal. We are satisfied that the fourth ground of appeal was rightly rejected. However, that cannot be said of the third ground of appeal.

The argument of the appellants in relation to the third ground of appeal was simple. They argued that the trial court had erred in law by partly predicating their convictions on the evidence of an adult witness, whose evidence was received without an oath/affirmation being

administered to her. This adult witness was PW4 Ziada d/o Akweso. We believe we have a duty to justify from the outset, our stated stance as to why we respectfully found ourselves differing with the position taken by the learned first appellate judge in disposing of the third ground of appeal.

There is no dispute on the fact that the trial court took the evidence of PW4 Ziada without administering an affirmation/oath to her. Since the trial of the appellants was conducted under the provisions of the Criminal Procedure Act, Cap. 20 R.E. 2002 ("the CPA"), the mandatory provisions of section 198 (1) of the C.P.A. governed the reception of all the witnesses in the case.

Section 198 (1) of the CPA, reads as follows:-

> *"Every witness in a criminal cause or matter* ***shall*** *subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*
>
> *[Emphasis supplied].*

In disposing of this particular ground of appeal, the learned first appellate judge, reasoned thus:-

> *"I have perused the proceedings in respect of the case before the District Court and found that it is true that the evidence of PW4 Ziada Akweso was taken without taking oath or affirmation. It is unfortunate that the appellant raised it at this stage when the evidence was already considered and used in convicting the appellants. I think where there is an omission by a trial court to commit a witness to adduce evidence on oath or affirmation that evidence would be considered as unsworn evidence. It is trite law that unsworn evidence can be relied on if it is corroborated by independent evidence. In* ***Saasita Mwanamaganga versus The Republic,*** *Criminal Appeal No. 65 of 2005 (HC TBR) (unreported) this Court held:*
>
> > *"... the law is settled that the omission to conduct a voire dire examination of*

a child of tender years brings such evidence to the level of unsworn evidence"

In the instant case, I think failure by the court to make the witness to swear or affirm rendered the testimony of the witness as unsworn evidence. And such evidence could be used to convict if the Court is satisfied that the witness is telling nothing but the truth. As it will be shown PW4's evidence was corroborated. Moreover, the appellants' conviction was not based solely on the evidence of PW4."

We appreciate, after going through the evidence on record, that the legal issue raised by this holding is not crucial in the determination of this appeal. However, as sections 198 (1) of the C.P.A. and 127 (2) of the Evidence Act Cap. 6 R.E. 2002, have great significance in the administration of criminal justice, we have found it apposite to give a detailed exposition of the law as we understand and accept it to be. This is all because, we are settled in our minds that there is, here, a clear confusion between the correct application of the two statutory

provisions. In discharging this duty, we shall not be sailing in unchartered waters as the law on the subject is well settled. We shall only take very recent examples to illustrate this.

In the case of **Godi Kasenegela v. R.,** Criminal Appeal No. 10 of 2008 (unreported), this Court lucidly held:-

> " *In order to* ***conduct fair trials and do justice according*** *to law, when trying accused persons, courts have been given certain powers. One such power is the power to summon witnesses under sections 142 (1) and 195 of the Act.*
>
> *For the proper determination of this appeal we have found section 198 (1) of the Act to be compellingly relevant. It reads thus:-*
>
> *"Every witness in a criminal cause or matter* ***shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation*** *in*

accordance with the provisions of the Oaths and Statutory Declarations Act."

[Emphasis is ours].

We have learnt that section 127 of the Evidence Act, Cap. 6, Vol. 1 R.E. 2002, (henceforth the Evidence Act) contains such ***explicit*** *"contrary provisions." The Evidence Act applies to all "judicial proceedings in all courts, other than primary courts, in which evidence is or may be given..." see section 2."*

Section 127 (2) of the Evidence Act provides thus:-

"Where in any criminal cause of matter ***any*** *child of tender* ***years*** *called as a witness* ***does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient***

intelligence to justify the reception of his evidence, and ***understands*** *the duty of* ***speaking the truth.*** *" [Emphasis is ours].*

Subsequent to this decision, the Court in **Anthony Mwita & Two Others v. R.,** Criminal Appeal No. 264 of 2010 (unreported) succinctly stated that :-

" *Section 198 (1) of the Criminal Procedure Act (Cap 20 – RE 2002) (the CPA) requires every witness in a criminal cause or matter (subject to the provisions of any written law to the contrary) to give evidence either on oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act. (Cap 34 – RE 2002) (the Act). Section 4 of the Act and the rules thereunder require that in judicial proceedings, courts administer oaths to witnesses professing Christianity and affirmations to those who are not Christians.* ***This Court has already taken the view that if evidence of any witness is taken without oath or affirmation, such***

evidence is no evidence at all and is to be ***discarded*** *(See* ***GODI KASENEGELA v. R.,*** *Criminal Appeal No. 10 of 2008* ***MINJA SIGORE @ OGORA v. R.,*** *Criminal Appeal No. 54 of 2008* ***MEMBI STEYANI v. R,*** *Criminal Appeal No. 300 of 2008 and* ***ATHUMANI BAKARI v. R,*** *Criminal Appeal No. 284 of 2008 (all unreported)). But if an oath or affirmation has been taken but administered irregularly it is curable under section 9 of the Act."*

The Court reiterated this stance in unambiguous words in the case of **Andrea Ngura v. R.,** Criminal Appeal No. 15 of 2013 (unreported). It instructively said:-

"It is an elementary rule of evidence that an exhibit, as part of evidence in a trial, can only be tendered by a competent witness. And in terms of section 198 of the Criminal Procedure Act, section 127 (1) of the Evidence Act, and section 4 (a) of the Oaths and Judicial Proceedings Act Cap. 34 R.E. 2002, ***a witness in any judicial***

proceeding must be sworn or affirmed..."

[Emphasis supplied].

We believe that from these authorities, it is clear that the two sections are independent of each other and apply under different sets of circumstances. Section 198 (1) of the C.P.A. mandatorily directs that every competent witness in criminal proceedings must be sworn or affirmed before testifying, unless there is another written law directing otherwise.

As clearly stated by this Court in **Godi Kasenegala** (*supra*), section 127 (2) of the Evidence Act is one of those very few written laws. It allows only competent children of tender years, that is, those of fourteen years of age or below, who do not understand the nature of an oath or affirmation to give evidence without taking an oath or affirmation if the court is satisfied that such a child witness is possessed of sufficient intelligence and understands the duty of speaking the truth, which conditions must exist conjunctively.

It goes without saying, therefore, that section 127 (2) of the Evidence Act does not cover competent adult witnesses of the category of PW4 Ziada. Her evidence was accordingly irregularly received by the

trial court. It was not evidence worth being acted upon in a criminal proceeding and the learned first appellate judge was enjoined by law to discount it as urged by the appellants. As he failed to do so, we are now constrained to expunge the unsworn/unaffirmed statement of PW4 Ziada from the record.

Regarding the remaining two grounds of appeal, the appellants had argued that the prosecution had failed to establish that the properties which had allegedly been found in their possession, a claim they had vehemently refuted, had been adequately established to be the stolen properties of the complainant (African Wildlife Foundation). The 1st appellant specifically complained that "*no special marks were explained by PW2 and PW3.*"

In resolving these complaints, the learned first appellate judge had this to say:-

> *"Going by the evidence on record, I found that there was no concrete evidence which showed that there was breaking at the premises of the African Wildlife Foundation. Neither the investigator told the trial court that he visited the*

scene of crime, nor an independent witness testified to have seen the broken building. The scanty evidence about breaking was that of PW2 and PW3. Both witnesses told the trial court that it was one George Patrice who discovered the breaking. However, this George Patrice.... was not called as a witness.... I would say the evidence of PW2 and PW3 on breaking of the office was hearsay and could not have formed the basis for conviction."

So the appellants were acquitted of the offence of Breaking into a building.

All the same, the learned judge dismissed the appeal against the theft conviction. This was because:-

"According to PW1, when the first appellant was arrested as a suspect, he was found with a cell phone which was identified by PW2 and PW3 to belong to their boss's wife. He led the police officers and PW2 and PW3 to the second appellant and third accused whom they arrested.

The stolen properties were found at the third accused's hidden under the bed..."

On the basis of this, he found the second count proved beyond reasonable doubt, hence this appeal.

The appellants filed a joint memorandum of appeal, containing three grounds of complaint. These are that:-

(a) The doctrine of recent possession was wrongly invoked.

(b) Their purported cautioned statements were illegally obtained.

(c) Their conviction was based on insufficient evidence.

The appellants lodged a written submission elaborating on these grounds of complaint.

The respondent Republic which was represented before us by Ms. Alice Mtenga, learned State Attorney, supported the appeal on similar grounds.

It was Ms. Mtenga's contention in support of the appellants, that the so-called cautioned statements of the appellants were illegally recorded in contravention of the mandatory provisions of sections 50 and 51 of the C.P.A. In elaboration of this, she pointed out that while the 1st

and 2nd appellants were arrested on 1st and 3rd June, 2013 respectively, their cautioned statements were recorded on 5th and 4th June, 2013 respectively, well beyond the mandatory statutory provided basic period of four (4) hours. She accordingly requested us to expunge them from the record.

We have found merit in the submissions of the appellants and Ms. Mtenga. Although, admittedly, the learned first appellate judge did not place much, if any, reliance on the three cautioned statements which were collectively received in evidence as Exh. P4, we have no flicker of doubt in our minds that they were recorded contrary to the mandatory provisions of sections 50 and 51 of the Act. This alone would have justified our acceding to the prayer that they be expunged. But we have another reason. This is that, the so-called cautioned statements were not read out to the accused persons in court. It goes without saying, therefore, that Exh. P4 were not only illegally recorded but also irregularly received as evidence. We accordingly expunge them from the record. See, for instance, **Roland Thomas @ Malangamba v. R.,** Criminal Appeal No. 308 of 2007, **Petro Teophan v. R.,** Criminal Appeal No. 58 of 2012, **Juma Myama Kinana & Another v. R.,** Criminal Appeal No. 133 of 2011 (all unreported).

According to the particulars of the second count, the following properties of African Wildlife Foundation, were allegedly stolen were:-

"One computer laptop make IBM valued at Tshs. 1,280,000/=, two digital cameras make Panasonic lumix valued at Tshs. 960,000/=, three range finder valued at Tshs. 1,440,000/=, one solar panel 10w valued at Tshs. 64,000/=, three receiver boxes valued at Tshs. 1,440,000/=, three binocular valued at Tshs. 1,440,000/=, two air mattress valued at Tshs. 448,000/=, two bags of clothes valued at Tshs. 320,000/=, two compasses valued at Tshs. 480,000/=, two geographical position system "GPS" valued at Tshs. 1,920,000/=, one DISC player make Philips valued at Tshs. 128,000/=, one video camera make JVC valued at Tshs. 800,000/=, one watch valued at Tshs. 15,000/=, three different clothes valued at Tshs. 87,000/=, one CD holder valued at Tshs. 24,000/=, one hard driver cover make

Icon valued at Tshs. 16,000/=, four parirs of shoes valued at Tshs. 320,000/=, forty one CD valued at Tshs. 65,600/=, two belts valued at Tshs. 20,000/=, one binocular cover valued at Tshs. 16,000/=, two adopter power covers valued at Tshs. 32,000/=, one Air matress cover valued ta Tshs. 20,000/=, one computer mouse valued at Tshs. 25,000/=, fifteen adopter connectors valued at Tshs. 24,000/=, one cellular phone make Motorola valued at Tshs. 112,000/= and two memory cards of digital camera and video camera valued at Tshs. 384,000/=, all total valued at Tshs. 11,880600/= the properties of AFRICAN WILDLIFE FOUNDATION."

We must quickly point out that we have found no iota of admissible evidence on record to prove the theft of these articles. What there is on record, is the hearsay evidence of PW2 Peter Prosper and PW3 Sailapo Maijo, which evidence the learned first appellate judge found lacking in cogency to support the first count. Admittedly, none of these two witnesses visited the scene of the alleged crime to ascertain the types

and quantity of the properties which had been stolen, if any breaking and theft occurred at all. They were recounting what they had allegedly been told by one George. We shall demonstrate.

PW2 Peter had this to say:-

> *"On 26/05/2013, one fellow George Patrick went there and found the doors and windows broken and various properties valued at Tshs. 11,880,600/= stolen. They include 3 receivers, 2 big one small, 1 digital camera, 1 laptop, 1 wall clock, 1 hard drive, 2 mattresses green in color, 1 big black bag, 2 wrists belts, 3 pairs of shoes & others – We reported at TANAPA office. We were advised to report at Minjingu Police. We were to say who we were suspecting."*

On his part, PW3 Sailapo, had this to tell the trial court:-

> *"On 26/05/2013 George Patrick went to do cleanness at our office. He found two windows broken and properties stolen. We reported at TANAPA. The stolen properties are a laptop,*

camera, mattress and others. We went to Minjingi Police..."

It is too evident from the above two extracts that no iota of evidence was given to the effect that a Motorola cell phone, allegedly found in the possession of the first appellant belonging to African Wildlife Foundation, had been stolen. Furthermore, none of the stolen properties allegedly recovered at the home of the third accused (in the trial court) were shown to either PW2 Peter or PW3 Sailapo for positive identification in court. The paucity of the evidence of PW2 and PW3 on what was actually stolen and failure to exhibit the recovered properties for the purposes of being identified, left the second count unproved and as such the doctrine of recent possession was wrongly invoked here. Indeed, the conviction for theft was grounded on purely hearsay evidence. We cannot safely sustain it.

In the light of the above findings, we allow the first and third grounds of appeal, and accordingly the entire appeal. We proceed to quash and set aside the conviction of the appellants for the offence of theft.

As shown at the outset, the appellants were sentenced to seven years imprisonment by the sentencing magistrate. We have chosen to use the phrase "*sentencing magistrate*" instead of the phrase "*trial magistrate*" deliberately. This is because, although the trial was conducted by one "*R. W. Chaungu, Senior Resident Magistrate*", who also composed and delivered the trial court's judgment, the sentences, for unknown reasons, were passed by one "*G. P. Ngaeja – Resident Magistrate.*" We have found this to be highly irregular in terms of section 214 (1) of the C.P.A. Reasons must always be given and recorded, in case of change trial magistrates, even for the purposes of passing sentence, for that matter. See, for instance, **Shabani Seif & Said Abdallah @ Cheka Cheka v. R.**, Criminal Appeal No. 215 of 2015, **M/S Georges Centre Ltd. v. The Hon. Attorney General and Another,** Civil Appeal No. 12 of 2015 (both unreported), etc.

Regarding the sentence imposed, we are not a shade unsure that it was beyond the sentencing powers of the learned Resident Magistrate. In terms of section 170 (1) of the C.P.A. he could not impose a sentence of imprisonment exceeding five (5) years. The seven year jail sentence was accordingly patently illegal.

All said and done, we allow this appeal in its entirety. As already shown above, the conviction for theft is quashed and set aside. As a corollary the prison sentence is also quashed and set aside. The appellants are to be released from prison forthwith unless they are otherwise lawfully detained.

DATED at **ARUSHA** this 4th day of August, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL