IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 249 OF 2015

1. **PHINIAS WILSON**
2. **NDITI RUGAKINGILA** .....**APPELLANTS**
3. **FELIX FREDERICK**

VERSUS

THE REPUBLIC.....**RESPONDENT**

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

(Mwangesi, J.)

dated the 14th April, 2015
in
Criminal Appeal No. 15 of 2014

JUDGMENT OF THE COURT

24th & 25th February, 2016

KILEO, J.A.:

This appeal has its genesis in RM Criminal Case No. 3 of 2013 of the Resident Magistrate's Court of Bukoba at Bukoba whereby the appellants were convicted of receiving stolen properties contrary to section 311 of the Penal Code. They were sentenced to five years imprisonment each. Initially the appellants had been charged with armed robbery contrary to section 287A of the Penal Code. The charge of receiving stolen property of which

they were convicted was in the alternative. They lost their appeal to the High Court and they are now before us on a second appeal.

The brief facts of the case as they were brought to light at the trial by the prosecution are to the following effect: PW1,PW2 and PW3 were each employed to operate fishing boats belonging to one Nestory Kanathy under a company known as Banywana. PW4 was the company's supervisor. Sometimes during the night on 23.12.2012 and early hours of 24.12.2012 when the fishermen were taking some rest from the day's work they were invaded by people whom they did not recognize. These people unfastened the engine boats and made away with them. They also made away with life jackets and phones. When PW4 got information about what had befallen the employees under his management he made arrangements for a boat to rescue them. The matter was reported to the police and a man hunt was mounted which led to the arrest of the appellants. According to PW5, when they arrested the appellants they were in a boat in which the three engines were found. Subsequently, according to PW5, two more engines were recovered in a banana farm belonging to the first appellant at Lushonga Island- Mass village. The engines were taken to the police station and were allegedly identified by the owners. Cautioned statements

which all appellants were said to have made to PW6 were tendered in court after the trial court decided that they were voluntarily made. These statements formed part of the evidence upon which the appellants were convicted.

In their defence the appellants denied culpability. The second appellant claimed that when he was arrested he was first accused of selling fish *"below the standard."* He was put in the police lockup and asked to give shs 200,000/- which he did not have. The appellants insisted that the cautioned statements were not voluntarily made. From their defence it appears that they were each arrested on different dates. Whatever the case, if we are to go by what is on record from the prosecution side it will appear that they were arrested on 12/01/2013 and taken to court ten days later on 22/01/2013. All appellants tendered in the trial court medical reports to reiterate their claim that they were tortured and that the cautioned statements were never voluntarily made.

The appellants who appeared before us in person with no legal representation filed a joint memorandum of appeal consisting of four grounds which they asked us to adopt. Essentially the decision of the

1st appellate court and the trial court is challenged for having based conviction on hearsay and contradictory evidence.

When we called upon appellants to address the Court on their grounds of appeal they opted that the respondent addresses us first.

The respondent Republic was represented by Mr. Hashim Ngole learned Principal State Attorney at the hearing. In resistance of the appeal he submitted that the evidence tendered upon which the appellants were convicted was not hearsay but direct as given by PW5. Citing this Court's decisions **in Kalebi Elisamehe v. Republic**, Criminal Appeal No. 315 of 2009,**Robbin Jaffer Mwatujobe v. Republic**, Criminal Appeal No. 45 of 2013 and **Sonda s/o Deus @ Mayombi v. Republic**, Criminal Appeal No. 75 of 2009 (all unreported) the learned Principal State Attorney urged us to be wary of interfering with the finding of the subordinate courts' on credibility of PW5. The gist of the decisions of those cases as well as many other decisions of this Court is that a second appellate court should not interfere with concurrent factual findings of the subordinate courts unless there are misdirection or non- direction on the evidence.

While conceding that the case for the prosecution stands or falls on the evidence of PW5, a police officer, Mr. Ngole however submitted that

the evidence was sufficient to sustain a conviction. The learned Principal State Attorney was also quick to concede that the cautioned statements were wrongly admitted in evidence as there was evidence that they were obtained after the appellants had been tortured.

We find it opportune at this moment to make some observations to the manner in which the cautioned statements were admitted in evidence and relied upon.

Before the admission in evidence of the appellant's cautioned statements each of the appellants lamented that they were tortured and did not give the statements voluntarily. In admitting the statement of the first appellant this is what the trial magistrate said:

> "***Court***: *PW6 have said to have informed the accused of his right and that he was a free agent, that there was no any force used against him the accused's allegation that he was only forced to sign after being beaten and injured in that he was taken to hospital when he was taken to prison is a lie, in the first place if real he was taken to hospital this court expected him to bring the medical reports, and still when the accused was brought to court he did not complain to the same if real he had serious injuries, and he was normal when*

brought to this court. Also it cannot be agreed that the witness just found the accused's background and of the offence, yet he find the weapons as alleged by the accused simply because he want the accused to be convicted. The objection is therefore overruled; the accused was a free agent when recording the statement the same is therefore admitted as exhibit P3."

As for the second appellant he said:

*"**Court**: it cannot be agreed that PW6 just took his own statements from nowhere and required the accused to sign the same without him being told. The issue that the accused's fingers were pressed by a prize so that he can sign is immaterial, the statement has a source and it is the accused are explained the same. The objection is therefore overruled and the accused's caution statement his hereby admitted exhibit PW4."*

Concerning the third appellant the magistrate made a short statement as follows:

***Court**: Objection is overruled. It cannot be greed that the witness took the statement from nowhere, it is the accused who told him what he recorded the same is admitted exhibit P. 5"*

The first appellate court confirmed the finding of the trial court in the following words appearing at page 84 of the record:

"..It is correct as averred by the appellants, that they did resist the tendering of the caution statements as exhibits on the bases that, it has not been obtained voluntarily from them. As a result, the learned trial magistrate did conduct an inquiry to establish the voluntariness and admissibility of the said caution statements.

In her ruling which she did give after conducting such inquiry, was to the effect that, they had been voluntarily obtained and hence admitted them as exhibits in court. The trial resident magistrate was the one placed in a better position of assessing what was stated before her and in the circumstance this court has no any justification whatsoever, to challenge her findings. It is thus my holding that, the challenge by the appellants on the evidence contained in the cautioned statements is without founded basis and has to fail."

It is to be noted that though the appellants in the course of their defencetendered in court medical reports as evidence to substantiate that they were tortured and that the statements were not voluntary, neither the trial magistrate nor the first appellate court, in their judgments referred to

the medical reports that formed part of the evidence on record. We think that the failure to refer to those medical reports resulted in a miscarriage of justice in so far as the appellants were concerned. There is no doubt the trial magistrate's finding and what he stated on record concerning the cautioned statements was very unfortunate. No wonder Mr. Ngole without any hesitation conceded that the caution statements were wrongly admitted in evidence.

In her finding on the voluntariness of the statements the trial magistrate considered that the statements had to have a source and that the source had to be the appellants. She considered the claim that the 2nd appellant's fingers was pressed by pliers to have been of no consequence.

The first appellant testified in the inquiry that when he was called into PW6's office he was asked his name, age, and where he was born. This was background information. Such information may be only to the knowledge of an accused who gives it to the person taking down a statement of the accused. It is wrong, in our view, to lump everything together and say as the trial magistrate said that *"it cannot be agreed that the witness just found the accused's background and of the offence, yet he find the weapons as alleged by the accused simply because he want the*

accused to be convicted." The possibility of unscrupulous police officers taking advantage of background information given by a suspect and adding to it other information not actually supplied by the suspect cannot completely be ruled out. In any case, it baffles us why the appellants had to be tortured into making the caution statements if the stolen property had been recovered in the appellants' possession and the police had evidence to that effect.

A trial court has a duty to thoroughly study a caution statement and all the evidence from both the prosecution and the defence about its taking and the surrounding circumstances before satisfying itself that the statement was indeed voluntarily made. The trial magistrate found the 1st appellant to have been a liar, because according to her, *"if he real was taken to hospital this court expected him to bring the medical reports, and still when the accused was brought to court he did not complain to the same if real he had serious injuries".* We think this finding was not proper. For the ends of justice, and bearing in mind that the appellants were lay persons, the court should have gone the extra mile to give an opportunity to the appellants at the inquiry stage to make available the medical reports they claimed they had showing that they sustained injuries and that the

appellants were taken to hospital once they were taken to the prison. But that apart, the medical reports were tendered by the appellants in the course of their defence. This means that the trial magistrate became aware, before preparation of the judgment, of the torture that the appellant's were subjected to in the course of recording of the cautioned statements. There was nothing to prevent her, at that stage, to have disregarded the caution statements. It should also be borne in mind that it cannot be ruled out completely that there are occasions, few as they may be, where innocent citizens are framed up with criminal charges.

So much for that.

Mr. Ngole was of the opinion that even if the caution statements were expunged, as they ought to be, the evidence of P5 was sufficient to found a conviction. Mr. Ngole argued that there were no contradictions in the case for the prosecution as claimed by the appellants in the appellants'second ground of appeal as reflected in their memorandum of appeal.

The appellants on the other hand argued that the prosecution case was full of contradictions and was not sufficient to sustain a conviction.

They argued that PW5 should not have been relied upon given the whole circumstances of the case.

Referring to inconsistencies in the prosecution case, the first appellant started with pointing out at what was admitted in the Preliminary Hearing with regard to his residence compared to what PW5 said was his home where he was taken and some boat engines discovered. At the Preliminary Hearing his residence was given as Bumbile Island. PW5 stated in evidence that the appellants were taken to the first appellant's home at Lushonga Island. It is obvious that the evidence of PW5 on this aspect contradicted what had been agreed upon and hence taken to have been established at the Preliminary Hearing. Neither the trial court nor the first appellate court addressed or resolved this inconsistence. The first appellant also wondered, if his home was in Mass village within Lushonga Island which must have leaders, why none of those leaders ever testified to give credence to the prosecution case. The first appellant further submitted that the prosecution case was highly suspect and the subordinate courts ought to have found so. He pointed out that according to the charge sheet the crime was committed on 24/12/2012. However, he claimed that according to PW4 who was the supervisor of the company whose boat engines were

stolen they received information nine days later that the boat engines had been recovered. Nine days from 24/12/2012 would put the recovery date at 02/01/2013, a date they had not yet been arrested. The first appellant said that he was arrested on 08/01/2013. PW5 did not give the arrest date, however PW6 gave the date as 11/01/2013. He also said the appellants were taken to him for recording of the cautioned statements on 12/01/13. The first appellant rightly questioned how they could have been found with the stolen engines if the said engines were recovered much earlier than the dates of their arrest? The courts below ought to have found the prosecution case to have been dubious on this aspect. The first appellant further pointed to contradictions between the evidence of PW5 and PW6 as to where they were arrested. While PW5 said that they were arrested at LushongaIsland, PW6 said that they were arrested at Kerenge Island. What the appellant complained of is borne out by the record at pages 17 and 21.

The second appellant argued that the High Court and the trial court erred to have convicted them in the absence of the evidence of the owner of the stolen boats. He pointed out that even though the owner was said to be one Nestory Kanathy he was never called in evidence and even the receipts which were tendered in court never bore his name as the owner,

the receipts having been issued to one Nestory Kulimba. We also noted that though PW4 tendered in court the book from which the receipts were taken, the maker and owner of the receipts book was never called to testify. PW4 was not the right one to tender the book as he did not author it. Unfortunately also the book was returned to its owner before the matter was brought to final completion thus denying the first appellate court and this Court the opportunity of scrutiny.

The second appellant wondered why the number of the boat they were found in with the stolen engines was never mentioned nor was its colour given. We think his query was justified. If the boat they were found in was being used in the furtherance of the commission of a crime one would have expected that it would have been impounded and tendered in court as an exhibit. The fact that it was not described or tendered in court further cast doubt on the prosecution case. The appellant also questioned why not a single civilian witness was called. He further wondered why none of the other policemen, who were allegedly in the company of PW5 at the time of their arrest testified in court.

The third appellant echoed what his co-appellants had submitted.

The issues raised by the second appellant with regard to the failure to summon the owner of the stolen boat engines are indeed quite valid. We find it rather strange, in the circumstances of this case that the owner of the stolen engines never testified in court. According to the evidence on record he went to the police station to identify his stolen engines. If indeed he did so it would normally have been expected of him to appear in court as well to testify that he had received report of the theft of his property and had gone to the police station to identify it upon recovery. But this is not all. The receipts which were tendered in court did not bear his name. Unfortunately neither the trial court nor the High Court addressed this incongruity. Possibly it escaped their attention. In our considered view, the owner of the stolen boat engines was an indispensable witness in the circumstances of this case. The failure to summon him rendered the case for the prosecution hopeless especially considering that the receipts proving ownership did not bear his name. The Court in **Aziz Abdallah v. Republic** [1991] TLR held as follows with regard to failure to call a crucial witness:

> *"(iii) the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection*

with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

As we have shown earlier, the appellants also wondered, and we share their doubts, as to why neither of PW5's colleagues testified in court. Much as we are mindful of the fact that no particular number of witnesses shall in any case be required for the proof of any fact, (See section 143 Evidence Act) nevertheless, the circumstances of this case dictated the need of calling, at least, one of PW5's fellow policemen. The holding in **Aziz Abdallah v. Republic** above equally applies to the failure by the prosecution to call at least one of PW5's fellow police men who were allegedly with him in the arrest of the appellants.

Given the whole circumstances of the case, we cannot help but observe that there were undertones of a framed up case in so far as these appellants were concerned. Judicial officers have a duty to be extra careful in dealing with cautioned statements when there is indication of torture in obtaining such statements. Much as the evidence of a single witness may suffice to sustain a conviction, a trial court should take extra care and

satisfy itself on the creditworthiness of that single witness before arriving at a conviction.

Having said as above we find that the appeal by the three appellants was filed with sufficient cause for complaint. We accordingly allow it.

We quash conviction entered against the appellants and set aside the sentence imposed. The appellants are to be set at liberty forthwith unless they are held therein for some lawful cause.

DATED at **BUKOBA** this 25th Day of February 2016

E. A. KILEO
JUSTICE OF PPEAL

S. MJASIRI
JUTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.F.FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL