IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUSSA, J.A., KWARIKO, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 49 OF 2019

SEMENI MGONELA CHIWANZA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mansoor, J.)

dated the 31st day of March, 2017
in
(DC) Criminal Appeal No. 73 of 2016

JUDGMENT OF THE COURT

17th & 24th September, 2019

KWARIKO, J.A.:

Semeni Mgonela Chiwanza, the appellant, and two others who are not parties to this appeal were arraigned before the District Court of Kongwa with two counts, namely; burglary contrary to section 294 (1) (2) and stealing contrary to section 265 both of the Penal Code [Cap 16 R.E. 2002] (the Penal Code). The prosecution alleged that the three jointly and together on 22/10/2015 at about 02:00 hours at Morishen- Kongwa area within Kongwa District in Dodoma Region, broke and entered in the house of one Mohamed Ituli Makera and stole one motorcycle with registration number MC 244 AST make Bajaj, Model number BM 150 Boxer red in

colour Chassis number MD221BZ8FWA51197 Engine number pfzwfa35668 valued at Tzs. 2,100,000/= the property of the said Mohamed Ituli Makera.

Having denied the charge, the appellant and his co-accused were fully tried. In the end, the appellant's co-accused were acquitted while the appellant was convicted of a substituted offence of being found in possession of property suspected of being stolen or unlawfully acquired contrary to section 312 (b) of the Penal Code. He was sentenced to three years imprisonment. The appellant's appeal before the High Court was dismissed. Undaunted, the appellant is before this Court on a second appeal.

Brief facts of the case from the prosecution can be recapitulated as follows. Mohamed Ituli Makera (PW1), woke up for a call of nature at 02:00 hours on 22/10/2015 and found doors to his house broken and his motorcycle with registration number MC 244 AST make Boxer red in colour, missing from sitting room where it was kept. Subsequently, he informed his neighbours and relatives including Zuberi Idd Mlolo (PW3) and reported to the police station. A search was conducted in vain. However, on 23/10/2015 between 18:00 hours and 19:00 hours, while a police officer No. E 9101 D/CPL Moses (PW2) was on his private motorcycle passed through Mguli Petrol Station to fuel. Whilst there, PW2 saw three

motorcycles one of them bearing the description of the said stolen motorcycle which was being driven by the appellant. Upon inquiry, the appellant mentioned his name but thereafter abandoned the motorcycle and ran away. With assistance from civilians, PW2 managed to arrest the appellant and took him to the police station.

At the police station, PW2 interrogated the appellant who was said to have confessed to the allegations and mentioned the co-accused as his accomplices. His caution statement was recorded and despite the appellant's objection that he did not know the statement, it was admitted in evidence and marked as exhibit P3.

The following day PW1 was summoned to the police station and identified the motorcycle to be his stolen property. The motorcycle's registration card, motor vehicle licence, insurance licence and a receipt were admitted as exhibit P1 collectively whilst the motorcycle was tendered, admitted and marked as exhibit P2.

In his defence, the appellant denied the allegations and told the trial court that, he left Laikala village on 24/10/2015 and went to Kibaigwa area for shopping. When he finished, he went to Sagara bus stand to wait for transport. Whilst there, one motorcyclist who introduced himself as a police

officer, called his name and when he responded he asked him to go to the police station where he complied. He was interrogated on 26/10/2015 and forced to sign a paper whose contents he did not know and subsequently, he was sent to court. As shown earlier the appellant was convicted and sentenced as such.

Before this Court the appellant has filed five grounds of appeal which we have conveniently paraphrased as follows:

1. *That, the appellant was convicted on the basis of uncorroborated evidence.*
2. *That, double standard was applied in convicting the appellant.*
3. *That, the appellant was not given opportunity to say anything when exhibits were tendered contrary to section 172 of the Evidence Act [Cap 6 R.E. 2002]*
4. *That, the charge against the appellant was substituted unprocedurally.*
5. *That, the appellant's defence was not considered.*

When the appeal was called on for hearing, the appellant appeared in person fending for himself, whilst Ms Judith Mwakyusa, learned State Attorney, represented the respondent Republic.

In arguing his appeal, the appellant opted for the State Attorney to respond first to his grounds of appeal before he could say anything, if need be.

In reply, at first, Ms Mwakyusa opposed the appeal. Further, before she tackled the appellant's grounds of appeal, the learned State Attorney raised the following legal issues. One; that the appellant's caution statement (exhibit P3) was admitted in court illegally because the trial court did not conduct an inquiry after the appellant had raised an objection against it. Two; the caution statement (exhibit P3) and exhibit P1 were both not read over to the appellant after they were admitted in evidence which was contrary to the law. She contended that the omission was fatal and thus the exhibits deserve to be expunged from the record of the appeal. Despite expulsion of exhibits P1 and P3 the learned State Attorney was still resisting the appeal.

Arguing the first ground of appeal, Ms Mwakyusa submitted that the appellant was found in possession of the stolen motorcycle and the complainant proved that it was his property, hence there was no need for any corroboration to that evidence.

In the second ground, the learned State Attorney contended that the evidence against the appellant was not similar to the one adduced against his co-accused who were not found in possession of any stolen property, hence there was no any application of double standard. Ms Mwakyusa did not find need to argue the third ground of appeal for the reason that, it has been overtaken by events with the expulsion of exhibits P1 and P3 from the record.

Ms Mwakyusa argued the fourth ground of appeal that, the trial court did not err to substitute the charge because the offence of being found in possession of property suspected of having been stolen or unlawfully acquired is minor and cognate to the offence of theft.

As regards the fifth ground of appeal, the learned State Attorney conceded that the trial court did not consider the appellant's defence in its judgment, which omission vitiated the conviction. For that omission, Ms Mwakyusa changed her earlier stance and supported the appellant's appeal. However, despite supporting the appeal, Ms Mwakyusa urged us to order for a retrial of the case because according to her, there is sufficient evidence against the appellant.

In rejoinder, the appellant opposed the learned State Attorney's prayer for retrial of the case for the reason that he has already served a substantial part of the sentence and he is due to be released from prison on 12/10/2019.

We have considered the grounds of appeal and the submissions of the parties. We are now posed to decide the appeal. To start with the legal issue raised by the learned State Attorney, we are in agreement that the trial court erred in law when it failed to conduct an inquiry after the appellant's objection to his caution statement (exhibit P3) as required under section 27 (2) (3) of the Evidence Act [CAP 6 R.E. 2002]. Regarding case law, this Court has, in many instances stated that upon an objection being taken against a confession, the trial court should stop everything and conduct a trial within a trial or an inquiry. Some of these instances are in the cases of **Twaha Ally and 5 Others v. R,** Criminal Appeal No. 78 of 2004, **Paulo Maduka and 4 Others v. R,** Criminal Appeal No. 110 of 2010, **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010, **Makelele Kulindwa v. R,** Criminal Appeal No. 175 "B" of 2013 and **Zakaria Kazembe v. R,** Criminal Appeal No. 236 of 2013 (all unreported). For example, in the case of **Twaha Ally v. R** (supra) it was said thus: -

> *".....If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the court must stop everything and proceed to conduct an inquiry or trial within trial into the voluntariness or otherwise of the alleged confession.* ***Such an inquiry should be conducted before the confession is admitted in evidence."*** (Emphasis supplied).

Additionally, exhibits P3 and P1 were not read over in court after their admission. This omission prejudiced the appellant because he did not know the contents of the caution statement as well as the motorcycle's registration card, motor vehicle's licence, insurance licence and a receipt. This was a fatal omission and we are supported in this stance by the Court's earlier decisions in **Robinson Mwanjisi v. R** [2003] T.L.R 218, **Lack s/o Kilingani v. R,** Criminal Appeal No. 402 of 2015, **Mbaga Julius v. R,** Criminal Appeal No. 131 of 2015, **Kurubone Barigirwa & 3 Others v. R,** Criminal Appeal No. 132 of 2015 and **Ramadhani Mboya Mahimbo v. R,** Criminal Appeal No. 325 of 2017 (all unreported). In the case of **Robinson Mwanjisi and Three Others v. R** [2003] T.L.R. 218 three stages were outlined before documents are received in evidence where it was said thus: -

> *"...Whenever it is intended to introduce any document in evidence, it should* ***first be cleared for admission, and be actually admitted, before it can be read out****."*

Following the above stated position, in the case at hand, after exhibits P1 and P3 were introduced and cleared for admission they did not complete the third stage of being read out in court so that their contents could be heard by the appellant. The foregoing omissions make exhibit P1 and P3 to lack evidential value and we hereby expunge them from the record.

As regards the first ground of appeal we are in agreement with the appellant that, PW2's evidence ought to have been corroborated by independent witnesses to prove that, it was he (the appellant), who was found in possession of the stolen motorcycle. Because PW2 testified that civilians assisted him to arrest the appellant, there is no reason given why any of them did not come to testify to give credence to PW2's evidence. It was therefore not proved that; the appellant was found in possession of the stolen motorcycle. This ground of appeal has merit.

In the second ground of appeal, we agree with Ms Mwakyusa that, the evidence against the appellant's co-accused was not similar to the evidence which was tendered against the appellant. There was no evidence which showed that the co-accused were found in possession of stolen property as it was the case with the appellant. We therefore hold that no any double standard was applied in this case. This ground of appeal fails.

We have considered the third ground of appeal and found that, the appellant was given opportunity to comment when exhibits P1, P2, and P3 were tendered in evidence. That is why for instance, the appellant was able to object the caution statement. This ground of appeal has no merit.

In respect of the fourth ground of appeal, we are satisfied that the trial magistrate did not err in law when she substituted the offence of stealing to that of being found in possession of property suspected of having been stolen or unlawfully acquired under section 312 (1) (b) of the Penal Code. Section 306 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002] provides thus: -

> *When a person is charged with stealing anything and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence in respect of that thing under one of the sections 302,*

304, 311 and 312 of the Penal Code, he may be convicted of that offence although he was not charged with it.

We are thus settled that; had there been sufficient evidence against the appellant, we would not have found that the said substitution was wrongly done. This ground of appeal also fails.

It is not disputed that the trial court did not consider the appellant's defence evidence in its judgment which forms the basis of complaint in the fifth ground of appeal. There is plethora of pronouncements by the Court that non- consideration of defence evidence is fatal and it vitiates the conviction. Some of such pronouncements are in the decisions of **Moses Mayanja @ Msoke v. R,** Criminal Appeal 56 of 2009, **Yustin Adam Mkamla v. R,** Criminal Appeal No. 206 0f 2011 and **Simon Aron v. R,** Criminal Appeal No. 583 0f 2015 (all unreported).

Non-consideration of the defence case is also violation of the right to be heard which is safeguarded in the Constitution of the United Republic of Tanzania, 1977. Article 13 (6) (a) thereof provides in the official version thus: -

(6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba–

(a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika.

Literally translated, the sub-article in English reads: -

(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

Despite the conviction being vitiated, the learned State Attorney urged us to order for the retrial of the appellant because, she argued that,

there is sufficient evidence against him. The law regarding retrial is well settled. That, a retrial would only be ordered if it is in the best interest of justice. We have considered this case whose evidence has several shortcomings as it has clearly been shown above. We are therefore settled that an order of retrial will only help the prosecution to fill in gaps and it will not be in the interest of justice. Additionally, the appellant has served a substantial part of his sentence as shown earlier, hence an order of retrial will not be in his best interest. Our stance find support in the case of **Fatehali Manji v. R** [1966] E.A 343 where it was held thus;

> *"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."*

[See also our decisions in **Shaban Said v. R,** Criminal Appeal No. 267 of 2009 and **Kanisilo Lutenganija v. R,** Criminal Appeal No. 25 of 2010 and **Mussa Abdallah Mwiba and Two Others v. R,** Criminal Appeal No. 200 0f 2016 (all unreported)].

In fine, we find merit in the appellant's appeal and we hereby allow it, quash the conviction and set aside the sentence. We therefore order for the release of the appellant from prison forthwith unless his continued incarceration is related to some other lawful cause.

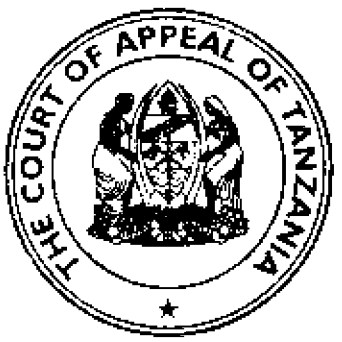
DATED at **DODOMA** this 23rd day of September, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 24th day of September, 2019 in the presence of the appellant in person and Ms Judith Mwakyusa, State Attorney is hereby certified as a true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL