

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)
CRIMINAL APPEAL NO. 408 OF 2017

SHINJE JAMES APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Mwanza)**

(Gwae, J.)

**dated the 29th day of May, 2017
in
Criminal Appeal No. 218 of 2016**

JUDGMENT OF THE COURT

28th April & 5th May, 2021

LEVIRA, J.A.:

In the District Court of Magu at Magu District, the appellant, Shinje James and two others who are not party to this appeal were charged with armed robbery contrary to section 287A of the Penal Code, (Cap 16 R.E. 2002) and upon a full trial they were convicted. The appellant alone was convicted of armed robbery, sentenced to 30 years imprisonment and 12 strokes of the cane. Aggrieved, the appellant unsuccessfully appealed to the High Court, hence the current appeal.

The evidence on record has it that on 23rd August, 2015 at about 20:00 hours at Masanza Kona Village in Lake Victoria within Busega District in Simiyu Region one Phares Peter and Mayanga Thomas (PW3) who are fishermen working for Daniel Lukas @ Mayala (PW1) were on their regular fishing activities in Lake Victoria where they used a boat with engine. They set their fishing net into water and relaxed. Suddenly, they saw another boat with people (bandits) close to their boat. Those people ordered them to cover their faces, assaulted them and demanded money.

The said bandits managed to take the boat and its engine and forced PW3 and his fellow to board into their (bandits') boat which had no engine, they also made away with 10 litres of petrol, fuel pipe, one mobile phone and cash, Tshs. 32,000/= . PW3 and his fellow went up to Shimangiwe Island where they were rescued by the other fishermen who took them to Ijitu lake shore. Upon arriving there, they met PW1 to whom they narrated what had transpired at night. PW1 reported the matter to the Nyamunyange hamlet chairperson, one Paul Agero (PW2) and later to the police. The boat which was used by the bandits was later identified to be the one stolen from Kitongo village and was being tracked by the owner. It

transpired that the appellant and his fellows were said to be the ones who stole it.

An investigation was mounted and on 27th August, 2015 the 1st accused was arrested, taken to Kisesa Police Station and interrogated. He admitted to have committed the alleged offence with his fellows, the 2nd accused and the 3rd accused (the appellant herein). On 28th August, 2015 he led the police to the place where the engine was hidden, the same was recovered and the 2nd accused told the police that the said engine was the property of the appellant. In December, 2015 the appellant was arrested by people's militia in the presence of PW2 and taken to Busega Police Station. The charge was prepared and thereafter, the appellant and his fellows were arraigned before the District Court of Magu as earlier on intimated. All the accused persons pleaded not guilty to the charge. The prosecution called 8 witnesses and tendered several exhibits to prove their case against the appellant and his fellows. At the end of the trial only the appellant was convicted of armed robbery and sentenced as indicated above.

Following dismissal of his first appeal before the High Court, the appellant has presented before us a six-ground memorandum of appeal to

challenge the said dismissal order. Basically, all the grounds of appeal fall under two main complaints as follows:

1. That the first appellate Judge erred in law and fact by sustaining the appellant's conviction basing on retracted confession in both cautioned statement and extra judicial statement.
2. That the first appellate Judge erred in law and fact to sustain the appellant's conviction while the charge against him was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent Republic was represented by Mr. Juma Sarige, learned Senior State Attorney.

The appellant adopted his grounds of appeal as part of his oral submission and preferred to hear first from the respondent's side as he reserved his right to make a rejoinder.

In reply, Mr. Sarige submitted at the onset that the respondent supports this appeal, particularly, on the ground that the appellant was convicted wrongly by relying on the exhibits which were admitted improperly during trial. He mentioned those exhibits to be the appellant's

cautioned statement (exhibit P3) and extra judicial statement (exhibit P2), which he said, were admitted despite of the appellant's objection and without conducting an inquiry to prove their voluntariness or otherwise. According to him, there was a need for the trial court to ascertain the voluntariness or otherwise of the appellant in giving those statements because the appellant objected them by the time they were tendered. He referred us to pages 26 and 32 of the record of appeal where at page 26 of the record of appeal PW6, Sheila Manento tendered exhibit P2 (extra judicial statement of the appellant) and the same was admitted by the trial court despite the fact that the appellant objected saying that it was not voluntarily made. Also, at page 32 of the record of appeal the trial magistrate admitted the appellant's cautioned statement tendered by PW7 as exhibit P3 despite the appellant's objection.

Mr. Sarige submitted that both exhibits deserve to be expunged from the record. He observed that after expunging those exhibits, the remaining evidence on record is that of PW3 (Manyange Thomas), which he said, is not sufficient to sustain appellant's conviction. Mr. Sarige submitted further that, in terms of section 33(2) of the Evidence Act, Cap 6 R.E. 2019 (the Evidence Act) the confession of the 2nd accused to PW2 needed

corroboration but upon perusal of the record of appeal he could not find any other evidence to corroborate that evidence. The learned Senior State Attorney went on stating that, for armed robbery to be proved, theft also needed to be proved. But according to him, in the current case theft was not proved to the required standard because the ownership of the said stolen boat engine was not proved. He referred us to page 15 of the record of appeal where PW1 testified to the effect that, the stolen boat engine was the property of his boss one Kaswamire Charles but the said boss was not called to testify to prove ownership. Mr. Sarige argued that PW1 tried to tender a photocopy of the receipt to prove that the said engine was bought by his boss, but the same was not admitted as exhibit.

He added that, likewise, the evidence of PW2 cannot be relied upon because at page 21 line 18 of the record of appeal he testified that he narrated to the police about what had happened on the material day after reporting the incident to the chairperson. Unfortunately, there was no police called to testify in respect of the said stolen engine.

Regarding the evidence of PW6, Mr. Sarige referred us to page 25 of the record of appeal where PW6 narrated the contents of the extra judicial statement of the appellant before tendering it to be admitted in evidence.

He argued that, it was not proper for PW6 to narrate the contents of that exhibit before the same could be admitted. Thus, he said, such evidence cannot be relied upon to sustain the appellant's conviction.

Finally, Mr. Sarige urged us to allow the appeal, quash the conviction and set aside the appellant's sentence.

In a very brief rejoinder, the appellant supported the submission by Mr. Sarige and prayed to be set free.

We have carefully considered the submission by the counsel for the respondent, grounds of appeal and the record of appeal in general. Regarding the first ground the issue for our consideration is whether the first appellate Judge relied on retracted confession of the appellant to sustain the conviction. It is settled position that whenever voluntariness of accused confession is questionable, be it a caution or extra judicial statement, the trial court must conduct an inquiry to determine its voluntariness. In **Twaha Ali and Others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported) the Court while faced with an akin situation had this to say: -

*"If the objection is made after the court has informed the accused of his right to say something in connection with the alleged confession the trial court must stop everything and proceed to conduct an inquiry (or trial within trial) into voluntariness or not of the alleged confession. **Such an inquiry should be conducted before the confession is admitted in evidence.**"*[Emphasis added].

In the light of the above settled position of the law, we now proceed to examine what had transpired in the case at hand. It is apparent from the record of appeal that the appellant objected to the admission of both, the cautioned and extra judicial statements during trial but the trial magistrate proceeded to admit them in evidence. At page 26 of the record of appeal the trial court inquired from the appellant whether he had any objection when PW6 was about to tender his extra judicial statement. The following was his response: -

"3^d accused:

*I have objection because when I was taken to the justice of peace, I was not told that I was being taken to the justice of peace. Also, the justice of peace didn't identify herself that she was the justice of peace. **I confessed because the police officer who took me there induced me.** When my statement was recorded at police, they tortured me by*

*holding my private part using prize and they forced me to confess. **The policeman told me that "Nenda kaongee kama ulivyoongea kituoni."** I did not know that I was taken before the court. **I pray this court not to admit the extra judicial statement as exhibit.**"* [Emphasis added].

Immediately after that objection, the trial magistrate admitted it stating as follows:

"Court:

Let the extra judicial statement alleged to be stated by 3rd accused be admitted as exhibit but the court will judge later concerning the objections of 3rd accused."

Likewise, at page 31 of the record of appeal when PW7 (No. F. 7042 D/C Mwaluko) was about to tender the appellant's cautioned statement, the trial magistrate asked the appellant whether he had any objection and his response was as hereunder:

"3rd accused:

*I have objection, this caution statement not to be admitted as exhibit because **I didn't confess voluntarily.** But I confessed after being forced by the policeman. The names which are stated in the caution statement, I found the said names at police station.*

*Also, when I was being interviewed they used prize (sic) to press (kubonyezwa) my private parts. Also, the police station officer who recorded the statement didn't give me my rights as he has stated. If he gave me my rights, I could call the leaders of the said area. **I pray this court not to admit the said statement as exhibit.**" [Emphasis added].*

It can be observed at page 70 of the record of appeal that, the trial magistrate relied on the retracted confession of the appellant (cautioned statement) in his decision to ground the appellant's conviction. However, at page 71 of the record of appeal, he refrained from relying on the extra judicial statement on ground that it was not properly recorded. Whatever the case, we must insist here that it was not proper for the trial magistrate to admit those exhibits before conducting an inquiry because their admission was objected by the appellant. We should point out that it was even worse in the case at hand because the trial magistrate did not even bother to find the truth or otherwise of the appellant's allegation towards police officer who recorded his statement.

We observe further that, the High Court being the first appellate court was also caught in the same trap of relying on a retracted confession of the appellant to sustain his conviction. We take note that the first appellate

Judge considered even the disregarded extrajudicial statement of the appellant by the trial court to sustain the appellant's conviction, as it can be seen at page 95 of the record of appeal where he stated:

"I without hesitation hold even the appellant's extra judicial statement of the appellant (sic) was to be given its weight since it was recorded and clearly reveals what has been stated by PW2 as well as in the cautioned statement of the appellant himself To my view that extra judicial statement ought not to be discarded."

The learned Judge went on stating:

"Though the evidentiary (sic) value of a retracted confession is generally very little and it is a rule of practice as also a rule of procedure, that it is not safe to act on retracted confession of the evidence of the appellant in both cautioned statement (PE3 & PE5) (sic) and extra judicial statement (PE2) but the retracted confessions were sufficiently corroborated by the testimonies of PW1, PW2, PW4."

All in all, we have already stated that the appellant's cautioned statement and extra judicial statement were improperly admitted in evidence. Therefore, they could not be relied upon by both courts below to either ground or sustain the appellant's conviction. Consequently, we

expunge both, the extra judicial statement and cautioned statement (exhibits P2 and P3) from the court record.

We now revert to consider the appellant's second complaint. Specifically, we shall consider whether the charge against him was not proved beyond reasonable doubt to sustain his conviction. As intimated above, the appellant was charged with the offence of armed robbery. Arguing in this ground of appeal, Mr. Sarige stated that for the offence of armed robbery to be proved, it is mandatory that theft is also proved but that was not the case herein. He said, both the trial and first appellate court relied also on the evidence of other witnesses which he said, was not sufficient. At page 87 of the record of appeal, the first appellate Judge had this to say:

"it is also lucidly clear that the trial court relied on the evidence adduced by PW2 and PW7 in convicting the appellant of the offence of armed robberylooking at the evidence of PW2 in totality and that of PW7 I have no doubt that the testimonies of the said witnesses were exonerating the 2nd accused and at the same time incriminating the appellant that he was the one who hide the recently stolen machine where it was recovered under the lead of his young brother (appellant's young brother)".

We had an opportunity to peruse thoroughly the record of appeal. We have gathered from the testimony of PW2 that when the appellant was arrested by people's militia, he was present. They interviewed him and the appellant told them that he used to participate in stealing with other persons. However, it is not clear as to what were they stealing. Besides, PW2 testified that the appellant told them that he went up to the lake shore to take a bath with his young brother (2nd accused) and the said brother smelt petrol. He asked the appellant what was smelling and the appellant replied "*kuna mali yangu hapo*", informally translated to mean that "*there is my property there*". The police-men arrived at the scene of crime, PW2 handed to them the recorded statement of the appellant and they left with the appellant. Also, PW7 was the police officer who recorded the appellant's cautioned statement which we have already expunged from the court record.

It is apparent on the record of appeal, that evidence of PW2 did not prove that the appellant was the one who stole the alleged machine. The phrase "*kuna mali yangu hapo*", in our considered view was ambiguous because the said "*mali*" could be anything. For that reason, it cannot be concluded with certainty that when PW2 was testifying that the appellant

told the 2nd accused that there was his property at that place, he was referring to the alleged stolen boat engine. Besides, even if for the sake of argument, the 2nd accused was referring to the said stolen engine, still being a co-accused his confession to PW2 needed corroboration in terms of section 33(2) of the Evidence Act, as correctly, in our view argued by Mr. Sarige. However, there is no evidence on the record of appeal to corroborate the purported confession.

We have also considered the fact that the first appellate Judge based on the evidence of PW1 and PW4 saying that the same corroborated what was testified by PW2. We took liberty to glance at their evidence. In essence, PW1 was a fisherman whose evidence did not prove that the appellant stole the alleged engine. We note that PW1 participated to discover the engine with No. 09027059 and block No. 240 NO827050 which was hidden, the ones alleged to be stolen, saying that it was bought by his boss one Kaswamire Charles who handed it to him. However, he did not prove either that the said engine was handed to him or it was the appellant who stole it. We take note that, PW1 testified that the 2nd accused was the one who directed and showed them (PW1 and his fellows) where alleged stolen engine was hidden. However, it is our considered opinion that the said

piece of evidence was not sufficient and, in any way, did not corroborate PW2's evidence to prove that it was the appellant who stole the alleged boat engine. We therefore, agree with Mr. Sarige that after expunging the purported confession statements of the appellant from the court record, the remaining evidence is not sufficient to sustain the appellant's conviction.

In the upshot, we allow the appeal, quash the conviction and set aside the appellant's sentence. We order the immediate release of the appellant from prison unless otherwise he is held there for another lawful cause.

DATED at **MWANZA** this 5th day of May, 2021.

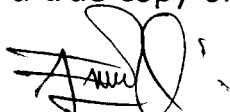
R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 5th day of May, 2021 in the presence of appellant in person and Gisela Alex, learned State Attorney for the respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL