IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 97 OF 2019

CHARLES ISSA @CHILE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Mbeya Region at Mbeya)

(Herbert, SRM Ext. J.)

dated the 19th day of February, 2019
in
Criminal Appeal No. 3 of 2018

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JUDGMENT OF THE COURT

19th & 29th September, 2022

KOROSSO, J.A.:

This is a second appeal. Charles Issa @ Chile, the appellant together with one Japhet Godwin Mwampaja (then 2nd accused and not subject to the instant appeal) were jointly charged with the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2002, now R.E. 2022] (the Penal Code). It was alleged that on 24/9/2016 at Stamico area within the City and Region of Mbeya, the appellant and one Japhet Godwin Mwampaja (DW2) did steal Tshs. 10,000/=, one double line phone make Nokia, and one bag containing clothes, all being the properties of Emmanuel Francis and immediately

before and after stealing did use an iron bar to hit the said Emmanuel Francis on his head in order to obtain and retain the said properties. The appellant categorically denied the charges leveled against him. After a full trial, the appellant was found guilty as charged, convicted, and sentenced to thirty years imprisonment, whilst the second accused (DW2) was convicted of a lesser offence of receiving property unlawfully obtained and sentenced to three years imprisonment.

A brief background giving rise to the instant appeal as gathered from the record of appeal is that on 24/9/2016, Emmanuel Francis Rwangisa (PW2) traveled from Dar es Salaam to Mbeya by bus-Rungwe Bus Express. He disembarked at Makasini area which is between Uyole and Mbeya Bus stand. Carrying his black bag containing clothes, he decided to walk home afoot. His route included passing some shops in Mwashinga area, and soon after, while talking to someone on his mobile phone, someone, allegedly the appellant, hit him with a hard object on the back of his neck, and he lost consciousness. When PW2 came to his senses he realized his face was injured and bleeding and felt pain in his face and neck. He also noticed that his Nokia mobile phone which had two numbers 0789448947 and 0789448970 and his black bag were missing. PW2 proceeded home and

his wife on seeing his condition drove him to Mbeya Referral Hospital where he received medical treatment and was admitted for one week.

According to G3800 DC Joram (PW1) and F2717 D/Cpl. David (PW3) who investigated the incident, by tracing the PW2's stolen mobile phone communications, led to the arrest of DW2 who upon interrogation admitted to having purchased the alleged phone from the appellant. PW1 further adduced that it was the second accused's description of the appellant that assisted the police to arrest him. After his arrest, the appellant was interrogated and later charged jointly with the second accused on the charge which is subject to the current appeal. As already alluded herein, the trial court convicted the appellant of the offence charged and sentenced him accordingly.

The appellant was dissatisfied and appealed to the High Court, his appeal was heard by the Resident Magistrate's Court sitting in Mbeya by Herbert, SRM, Extended Jurisdiction and dismissed. Still dissatisfied, the appellant preferred an appeal to this Court premised on five grounds of appeal which state as follows:

1. *That the trial court erred in law in admitting the purported cautioned statement of the appellant without fully satisfying the following issues:*

(a) That the prosecution failed to prove beyond reasonable doubt that the purported cautioned statement was made by the appellant voluntarily.

In alternative to ground 1(a):

(b) The prosecution failed to prove that the purported cautioned statement complied with provisions of section 57(3)(a)(i) and 4(a) and (b) of the Criminal Procedure Act, Cap 20 RE 2002.

In alternative to ground 1:

2. *The honourable trial court erred in law in acting upon a repudiated confession without corroboration.*
3. *That the trial court erred in law and in fact for failing to evaluate the evidence and assessing credibility of witnesses in reaching decision.*
4. *The honourable trial court erred in law for failing to take into account the aappellant's defence.*
5. *That, the prosecution failed to prove its case beyond reasonable doubt.*

At the hearing of the appeal on 19/9/2019, the appellant who appeared in person and fended for himself, commenced by adopting his grounds of appeal and then sought and was granted leave by the Court to allow the counsel for the respondent to submit first in response to the grounds of appeal while he retained the right to rejoin thereafter.

Ms. Zena James learned State Attorney, who represented the respondent Republic, commenced by expounding the position of the respondent that the appeal was resisted and that she was supporting the conviction and sentence meted against the appellant by the trial court and confirmed by the first appellate court.

Ms. James then proceeded to urge the Court to disregard ground 3 of the appeal for reason that it was a new ground that was neither entertained nor determined in the first appellate court and thus she be allowed to only argue on grounds 1, 2, 4, and 5. After a short dialogue with the Court on the fact that the first ground of appeal entertained by the first appellate court was a ground of a general nature faulting the trial court for convicting the appellant though the prosecution failed to prove the case beyond reasonable doubt, and taking into consideration various decisions of this Court on the import of this, including the cases of **Robert Andondile v. Republic**, Criminal Appeal No. 465 of 2017

and **Rutoyo Richard v. Republic**, Criminal Appeal No. 114 of 2017 (both unreported). Similarly, in **Sabas Kuziriwa v. Republic**, Criminal Appeal No. 40 of 2019 (unreported), the Court stated that where there is no general ground in the first appellate court, the Court will outrightly discard new grounds which are not based on legal issues. Thus, upon further reflection, Ms. James changed gears and abandoned her prayer for ground number 3 to be disregarded. She then proceeded to respond to the appeal by arguing grounds 1 and 2 conjointly and grounds 3, 4 and 5 individually.

According to the learned State Attorney, the gist of grounds 1 and 2 was to fault the first appellate court for relying on the cautioned statement of the appellant admitted as exhibit P2. She contended that there was no flaw in its admissibility as the law was fully complied with by the trial court and thus it was proper for the first appellate court to also find so and rely on it. She argued that the conditions precedent for admissibility of the cautioned statement were met because the trial court found it was voluntarily taken and contained the truth and thus in compliance with the requirements for admissibility of a cautioned statement as pronounced in the case of **Ndalawa Shilanga and Another v. Republic**, Criminal Appeal No. 247 of 2008 (unreported).

Furthermore, Ms. James challenged the contention by the appellant that he was not a free agent when the statement was taken, arguing that even though the evidence on record shows that there were other police officers present when the statement was taken. She argued that the appellant was a free agent throughout the process of recording of his cautioned statement as the other police officers present in the vicinity were doing their own stuff at the time and thus not in any way involved in the recording of the statement. She asserted that if it was otherwise, then the appellant would have been unable to give all the details of what transpired on the date of the incident as discerned from exhibit P2. She thus urged us to find the two grounds of appeal to lack merit.

Regarding ground 3, Ms. James implored the Court to dismiss the complaint therein arguing that both the trial and first appellate court evaluated the evidence and assessed the credibility of witnesses as can be clearly discerned from the record of appeal. On ground 4, the learned State Attorney argued that the appellant's contention that his defence was not considered is not supported by the record of appeal. She maintained that the record shows that the defence was summarized and analyzed and then rejected by the trial and first

appellate courts as found in their respective judgments in the record of appeal. She further pointed out that the fact that the defence was rejected by the trial court and the rejection confirmed by the first appellate court does not mean it was not considered as alluded to herein. She concluded by imploring us to find that ground devoid of merit and deserving dismissal.

With regard to ground 5, which was a general ground faulting the trial and first appellate court for convicting the appellant whilst the prosecution failed to prove the case beyond a reasonable doubt, Ms. James contended that the appellant was charged and convicted of armed robbery with violence contrary to section 287A of the Penal Code, which came about upon having robbed PW2, and used a weapon, a piece of iron bar so as to steal and retain the stolen items. She argued that the evidence of PW2 being robbed of the items as specified in the particulars of the charge, and injuries sustained from being hit by the iron bar, together with the evidence of PW1 narrating his investigation that led to PW2's stolen phone being traced, and the arrest of the 2nd accused, and the appellant all proved beyond reasonable doubt the offence charged as against the appellant. The learned State Attorney argued further that apart from the 2nd accused's

evidence that clearly showed that he had bought the stolen phone from the appellant, the appellant had confessed before PW3, a confession which is the statement of the appellant himself, and undoubtedly, more reliable evidence. Thus, according to the learned State Attorney the prosecution did prove the case beyond reasonable doubt. She thus urged us to dismiss the appeal in its entirety.

The rejoinder by the appellant was brief, reiterating his prayer that we consider the grounds of appeal filed and have a critical analysis of the evidence on record and allow the appeal.

We have carefully considered the record of the appeal, the submissions before us from both sides together with the authorities cited, and what we discerned from the judgment of the trial court found in the record of appeal, is that the conviction of the appellant was upon it being satisfied that the prosecution proved the case to the standard required. The trial court relied on the evidence of PW2 and found proof that armed robbery was effected since there was evidence he was robbed and injured. The trial court also relied on the evidence of the 2nd accused on his acquisition of the phone Nokia 1050 phone with IMEI 337809067338730, which had also been previously used by PW1 to trace the whereabouts of the said stolen phone, whose details were

discovered during investigations. The trial court also invoked the principle of recent possession to link the appellant to the phone through the evidence of the 2nd accused person (DW2) who was alleged to have been found with the said phone and named the appellant as the one who sold it to him. Additionally, there was also placed much reliance on exhibit P2, the cautioned statement of the appellant leading to his conviction.

On the part of the first appellate court, it was satisfied that exhibit P2 was admitted procedurally and taken voluntarily and relied on the evidence of PW2 regarding the incidence and PW1 on the tracing of the phone leading to the arrest of the appellant and the medical report on the injuries sustained by PW2 to confirm the findings by the trial court.

We find it pertinent to commence our deliberations by considering ground 4 where the trial and first appellate court are faulted for failing to take into consideration the appellant's defence. We believe this does not have to take much of our time. It is well settled that the defence of the accused must be taken into account when determining his/her guilt or innocence in the commission of the offence charged. This position was well pronounced by the Court in the case of **Nyakwama Ondare**

@ **Okware v. Republic**, Criminal Appeal No. 507 of 2019 (unreported) that:

> *"Before we embark in considering the appellant's defence, we must state that as a matter of law, the trial court is bound to evaluate the evidence of both the prosecution and defence side before it arrives to the conclusion of the case for and against the issues framed for determination. Indeed, if this task is not performed by the trial court, the first appellate court has an obligation to consider it and come to the conclusion."*

Our scrutiny of the record of appeal has discerned that the trial court analysed the evidence of the appellant at pages 94-97 of the record of appeal. The trial court considered the fact that the appellant was not found with the phone alleged to have been stolen from PW2, but having considered the evidence of DW2, PW1 and exhibit P2, rejected the appellant's defence. The first appellate court also summarized and analyzed the defence evidence but was satisfied with the findings of the trial court also relying on the evidence of PW1, PW3, exhibits P2, P3 and P4 that the prosecution had proved their case beyond reasonable doubt and in the process rejecting the defence

evidence. Indeed, rejection of defence evidence does not mean the defence was not considered, as what occurred in the present case (see **John Stephano and 5 Others v. Republic,** Criminal Appeal No. 251 of 2021 (unreported). We have no doubt in our mind that the defence of the appellant was duly considered and rejected. Thus, ground 4 lacks merit.

In the determination of grounds 1 and 2 which are in the alternative, we are constrained to address whether the cautioned statement was admitted properly, focus being on whether it was recorded voluntarily in that the appellant was a free agent and whether there was non-compliance with section 57(3)(a)(i) and 4(a) and (b) of the CPA. The other matter to address is whether it was proper for the trial and first appellate courts to rely on exhibit P1 in sustaining the conviction of the appellant in the absence of any corroborating evidence and the import of such action.

Starting with the complaint on non-compliance of section 57 (3) (a) (i) and (4) (a) and (b) of the CPA, in essence, the concern is that in exhibit P1 there is no record that in the certification of the statement at the end, there is a record that the statement was read to the appellant and he was questioned whether he required to make any alterations or

corrections or that thereafter the record was read to him. Having revisited the record of appeal we agree with the learned State Attorney that this concern is misconceived. This is because according to exhibit P1 on page 72 and 76, its recording was under section 58(4) of the CPA and not section 57(3) and (4) of CPA. At the end of the cautioned statement, there is a confirmation by the appellant on the correctness of the statement and that it was read to him and also certification by PW3 on recording it in good faith and compliance with the law.

Having perused through exhibit P2, undoubtedly, the contents of exhibit P2 are a confession within the confines of section 3 of the Evidence Act, Cap 6 R.E 2002 (now R.E. 2022). On the issue of whether exhibit P2 was procured voluntarily, the record shows that upon it being retracted, there was the conduct of an inquiry that resulted in the trial court finding that it was recorded voluntarily. The finding was confirmed by the first appellate court. Nevertheless, having perused the record of appeal, we have discerned some issues which we believe require our further attention on whether the cautioned statement was taken voluntarily. On this issue the first appellate court observed as follows:

> *"I did go through the said caution statement (Exhibit P2) so as to satisfy myself whether it was made voluntarily as held by the trial court.*

On my perusal of the same I find that it was recorded within the prescribed time provided by the law after appellant arrest. Furthermore the trial court record reveal that, after objection as to its admissibility by the appellant, trial court did conduct inquiry and at the end trial court come to the conclusion that it was voluntarily made by the appellant. From the above scenario and reading the contents of Exhibit P2 I have no shadow of doubt with the findings of trial court that the appellant voluntarily made his caution statement hence ground one falls."

We find that had the first appellate court considered the fact that during the recording of cautioned statement of the appellant, other police officers were in the room, it might have reached a different conclusion.

The fact that PW3 was not alone with the appellant during the recording of the statement should have been considered. This Court has previously had an opportunity to address this concern. In **Kisonga Ahmad Issa and Another v. Republic**, Consolidated Criminal Appeals No. 171 of 2016 and Criminal Appeal No. 362 of 2017 (unreported) we held:

"*It is further noted that the cautioned statement of the 1st appellant was recorded by PW1 in the*

presence of the other police officers. That was yet another irregularity, as the right of privacy to the 1st appellant was infringed. We therefore, find merit on this ground of appeal and expunge all confessional statements from the record."

Again, in the case of **Bakari Ahmad @ Nakamo and Another v. Republic**, Criminal Appeal No. 74 of 2019 (unreported) on a similar concern, we observed that:

"indeed PW1 and PW2 who recorded the statements of the 1st and 2nd appellant did so while other police officers were also present in the same room, (pages 46 and 64 lines 18-19 and 4-5 respectively). It is our firm conviction that, the action of recording the appellants' statements in the presence of other police officers has prejudiced the appellants in two ways: First; it cannot be ruled out that the appellants were not free agents when recording their statements. Secondly; the appellants' right to privacy was infringed. The effect of both shortcomings is to have the respective statement expunged from the record."

In the instant case, PW3's testimony on what transpired when he recorded the cautioned statement of the appellant found on page 29 of the record of appeal, is that:

> *"Before I recorded his cautioned statement I introduced to him and informed his offence. I gave him a right to give his cautioned statement or decide to keep silent... At the office there were other police who were continuing with their duties.."*

This was also repeated during the conduct of the inquiry to determine the voluntariness of exhibit P2 where PW3 was IPW1 found at page 32 of the record of appeal he stated:

> *"At the investigation office there were other police who were continuing with their activities and at the outside there were other suspects."*

Therefore, this being the case, and applying the decisions of this Court above to the instant case, we agree with the appellant that the fact that there were other police officers during the recording of the appellant's cautioned statement by PW3, suggests that he was not a free agent when making it and vitiates the findings of the courts below that it was made voluntarily. Plainly, its admissibility into evidence was faulty and henceforth we expunge it. Thus, grounds 1 and 2 have merit.

The import of the above findings is that having discarded the alleged confession of the appellant, the evidence that remains to prove the charge against the appellant is that of DW2, a co-accused, and PW1 on the appellant's connection to the mobile phone alleged to have been stolen from PW2 on the date of the incident. This also leads us to determine ground 3, challenging the trial and first appellate courts for failure to properly assess the credibility of witnesses for the prosecution.

According to PW1, the arrest of the appellant was upon the evidence of DW2 that the Nokia mobile phone he had, suspected to have been stolen from PW2, he had bought from the appellant. In the trial court, DW2 stated that when he was interrogated by the police, he was asked about a used small Nokia phone with touch buttons and where he got it and he told them he had bought it for Tshs. 20,000/- from the appellant and gave them his phone number. DW2's evidence was a total denial of any involvement in the robbery and injury of PW2.

Undoubtedly, there was no evidence that DW2 was at any time privy to the phone alleged to have been stolen from PW2 to enable him to verify whether it is the one he had allegedly purchased from the appellant. The adduced evidence shows that DW2 was only provided

with the description of the alleged stolen phone by PW1 to acknowledge that it is the phone he purchased from the appellant. Additionally, there was no evidence from PW1 and PW2 to show whether the alleged phone was found and that it was identified by PW2. Examining the adduced evidence, we have failed to find any evidence that gave expanded details of the said stolen phone from PW2. According to PW1, he used the cell phone number of the stolen phone given by PW2 and the related IMEI numbers from the respective service providers of the two lines alleged to have been in the stolen phone to process its tracing. The question that tasked our minds is whether, in the absence of proper details of the phone allegedly stolen from PW2 given to DW2, and proper identification of the same by PW2, there was conclusive proof that the phone described to DW2 by PW1, and the one alleged to have been purchased from the appellant were one and the same.

Furthermore, when the judgments of the trial and first appellate courts are scrutinized, both courts considered the evidence of DW2 to determine the guilt of the appellant, without seeking other independent evidence to corroborate DW2's evidence, a co-accused of the appellant. DW2 was a co-accused of the appellant. The import of the evidence of a co-accused is settled that such evidence must be treated with

circumspection and thus requires corroboration (see, **Pascal Kitingwa v. Republic** [1994] TLR 65 and **Julius Charles @Sharabaro and 2 Others v. Republic**, Criminal Appeal No. 167 of 2017 and **Akiba Daudi v. Republic**, Criminal Appeal No. 81 of 2004 (both unreported). In consequence, plainly, in the instant appeal, the failure of the trial and first appellate courts to seek corroboration of DW2's evidence in the instant case was erroneous. Our perusal of the record has failed to gather any evidence to corroborate that of DW2 on material facts and thus we will not accord any weight to his evidence. We find that this ground has merit.

Suffice it to say, having disregarded exhibit P2 and DW2's evidence, there is only the evidence of PW1 and PW2 remaining to sustain the conviction of the appellant. PW2 adduced how he was robbed and injured, while PW1's evidence was on how he traced the whereabouts of a Nokia push-button phone. The evidence by PW2 and PW1 essentially on its own does not directly touch on the appellant as regards the offence he stood charged.

All in all, we find no evidence to link the appellant with the offence charged, which means that the prosecution failed to prove the charge against the appellant, and thus ground 5 has merit.

For the foregoing, we find and hold that the appeal has merit and allow it. The conviction of the appellant is hereby quashed, and the sentence of thirty years imprisonment set aside. We order that the appellant be released from custody forthwith unless otherwise held for other lawful purposes.

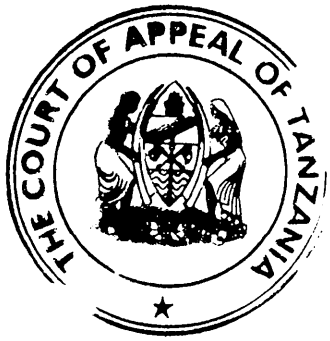
DATED at **MBEYA** this 28th day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This judgment delivered this 29th day of September, 2022 in the presence of the appellant in person and Ms. Hannarose Kasambala, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL