IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 70 OF 1997

(Original Criminal Case No. 178 of 1997 of Morogoro District Court)

MOHAMED SAID.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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# J U D G E M E N T

**KALEGEYA, J.**

The Appellant, Mohamed Said, was convicted together with three others by the Morogoro District Court, for stealing c\s 265 of the Penal Code. Each of the convicts was sentenced to three years imprisonment. The Appellant is trying to assail both the conviction and sentence.

Before the trial court the prosecution charged the Appellant together with 5 Others with stealing one oil drum valued at shs. 30,000/= and one general tyre size 75 x 16 valued at shs. 100,000/=, all valued at shs. 130,000/=, the property of the government. Two of the accuseds were acquitted. Three of the convicts have not bothered to appeal.

In his attack against conviction the Appellant charged,

"1. That there was no sufficient evidence to convict the appellant.

2. That the trial Magistrate failed to assess and evaluate evidence of the defence.

3. That the Magistrate was led by racism in convicting the appellant.

4. That the magistrate misdirected himself in law and infact by convicting the appellant with uncorroborated evidence.
5. That the Magistrate erred in law by admitting statements by accused which were obtained by force".

The appellant was represented by Sanze Advocate of Maira and Company, Advocates, while Iman Aboud, State Attorney appeared for Republic\Respondent.

On behalf of the appellant, in further elaboration of the grounds of appeal, it was argued that there was no evidence offered which linked Appellant with the offence because the two key witnesses, PW1 and 5, watchmen who worked with Ujenzi were interested parties for they were the ones who solicited for the market for spares and that their evidence being suspect evidence it should not have been relied upon by the court without warning itself of the danger of doing so (Paulo Mrimi v R (1977) LRT No. 34); that the court convicted him on circumstantial evidence by observing that as the spares stolen were of Mitsubishi vehicle, a type he owned, he should have been behind the deals and without warning itself of the danger nor being convinced of complainants' veracity (Miswahili Mulugala v R (1977) LRT No. 25); that the appellant was convicted only on mens rea, without actus reus as there was no asportation as defined under s. 258 (5) of the penal code; that the trial court did not evaluate the evidence produced both by the prosecution and defence; that by observing, in its judgement,

"It is therefore immaterial for the first accused Mohamed s\o Said (DW5) to deny any involvement in this plan as it was the only Arab to appear at the main gate for arrangements while in company of the 5th accused", the trial court displayed that in convicting it was influenced by racialism, and that as there was evidence that by the time Appellant's statement was being recorded his leg displayed injury

it was ample proof that it was forced out of him hence in admissible (Tuwamoi v Uganda (1967) EA 84). Responding, the State Attorney, countered by stating that the evidence of PW1 and 5 is elaborative of the whole episode from the point when the accuseds were preparing to commit the crime to the point of arrest; that if they had been participants in the crime i.e approached accuseds (2nd, 4th and 5th) for a market of the stolen property, they could not have reported the matter to the police; that it is dangerous to the machinery of justice to portlay an innocent citizen who reports a crime as a wrong doer; that the evidence of 2nd, 4th and 5th accuseds should not be given weight as it was not given on oath and was not corroborated as required (Omary Hassan v R 2 EACA 23); that there is no question of circumstantial evidence as the appellant first contacted PW1 and 2 on the mission, sent other accuseds to remove the spares and followed up to see how the mission was being accomplished as per his statement deposed upon by PW5,

> "Vipi jamani hawa wenzetu wapo? Msiwe na wasiwasi hela zenu mtapata".

The learned State Attorney insisted that both mens reus and actus reus do plainly exist. He disputed any element of racialism saying that reference to appellants' colour was only made to distinguish him from other accuseds; that the court evaluated and assessed the evidence hence the conclusion it arrived at; that PW1, 2 and 5's evidence did not require corroboration under the law, and that there is no evidence that the Appellants' and others' cautioned statements were obtained by force, for, by the time the statement was taken the alleged leg injury had already been caused and that in any case the witness who recorded his statement exhibited all elements of being friendly i.e by leading him to hospital.

In reply to the State Attorney's arguments, the Appellant's counsel reiterated his earlier stand, adding that Omary's case does not fall within the indicated citation; that in any case only 4th accused gave unsworn - testimony. On the latter point they argued that s. 293 (2) of CPA precribes drawing possible adverse inference where an accused decides to keep silent and not where he gives unsworn testimony. They insisted, that the prosecution case is full of holes which cannot support conviction.

The prosecutions version is that the Appellant and Abi (who was 5th accused) had approached PW1 and 5, watchmen at Ujenzi Technical Institute, Morogoro, with an offer that they would be paid 90,000/= (which later dropped to 45,000/=) if they allowed them to exchange old tyre and oil drum with new ones from a Ujenzi, Mitsubishi motor vehicle; that the watchmen fearing for their lives if they refused accepted the offer and fixed time on which the transaction would take place but meanwhile reported to their boss thence to Morogoro police who set up a trap. At the agreed time the 2nd, 4th and 5th accuseds arrived. They were led to the Mitsubishi vehicle and proceeded to remove the tyre and drums. Immediately after removal of the spares the 2nd, 4th and 5th accuseds were put under arrrest by police officers who were hiding in the same premises and watching the removal of the spares. Immediately thereafter there came a Taxi, m\v Reg. No. 5517, Toyota make. It parked near the gate. Its occupants, the 1st, 3rd and 6th accuseds were also put under arrest after the 1st accused had asked if the mission was smoothly going on as pre-arranged. They were all led to the police station where the day following they all made cautioned statements and charges subsequently preferred against them.

The defence side had varying statements. The 2nd, 4th and 5th accuseds admitted having been arrested as described by the prosecution. It is no wonder that they never appealed. They

however stated that they had gone there on invitation of the two watchmen who represented that the spare parts belonged to their boss. Regarding the other accuseds, including the Appellant, the defence was that they had a tyre puncture at the spot where they were found: near the gate to Ujenzi Technical Institute but denied being involved in the theft.

The prosecution called five witnesses. PW1 and PW5 who are the Ujenzi watchmen; PW2 and 3 police detectives who took down cautioned statements of the accuseds and PW4, one of the police officers who laid the trap and arrested the accuseds.

With that let us now turn to the attacks by the Appellant. I will dispose first the complaint regarding racial bias. With respect to the Appellant's Counsel, I am in full agreement with the Respondent's Counsel that this complaint is lodged without sufficient materials to back it up. Reading the relevant trial courts' statement no one can impute any element of bias. The wording clearly shows that the word "Arab" was included as an identifying element only. And again, as observed by the learned State Attorney, Appellant was convicted together with others who are not Arabs.

The above fate also befalls ground 5. There is no scintilla of evidence that the cautioned statements were obtained from any of the accuseds, including Appellant, by use of any force. PW2 and 3 are very elaborate on how they explained to each accused his rights before taking down the statements and how the accuseds freely gave the same. The record shows that none of the accuseds cross examined any of PW2 and 3 in a manner which would have suggested that they (accuseds) were retracting or repudiating their statements. In fact, PW3, who recorded their statements was not asked any question at all by 3rd, 5th and 6th accuseds, while PW2 who recorded the rest of the accuseds' statements was not

asked any question by 4th accused, and those who did (Appellant and 2nd accused) directed their questions only regarding whether or not he did find them injured which he answered positively. The extent of easeness, and friendly atmosphere in which the appellant's statement was recorded is exemplified by the way he was allowed to sip his soda brought to him by relatives while giving a statement at the sametime. I am satisfied that the allegations of force is a product of an after thought especially after convinction and sentencing.

The remaining grounds of appeal should be argued together - that the trial court did not assess and evaluate the defence evidence, acted on uncorroborated testimonies and that the evidence was not sufficient to found a conviction.

I have paid due attention to the said complaints but the evidence on record is far from supporting them.

The Appellant argues that PW1 and 5 should not be relied upon as they were interested parties. This cannot be, because these are the very persons who reported the planned theft, and Appellant has alleged no grudge or enemity between him (and for that matter any of the accuseds) and them which could have prompted them to hatch a scheme which would net the accuseds for no fault at all. The story that they (PW1 and 5) were the ones who went to solicite for a market is untenable, for, if that was the case why then go to the police. These witnesses were found credible by the trial court and I find no ground to decide otherwise. As rightly argued by the learned State Attorney I have failed to understand the legality behind the Appellants' contentions that such evidence should be corroborated.

Once we hold that PW1 and 5 are credible the Appellant's cries have no where to land. He approched them with an offer - to be allowed to exchange old mitsubishi spares with new ones from

a Ujenzi vehicle; he was in company of 5th accused; the said 5th accused led the 2nd and 4th accuseds to the site and all started working on the spares; after the later's arrest by PW4 they told him that their colleagues would soon follow with a vehicle; shortly after, Appellant arrived in a vehicle which contained old drums, and he uttered,

"Vipi jamani hawa wenzetu wapo",

adding,

"Msiwe na wasiwasi wowote juu ya hela yenu, mtapewa",

when he got a positive reply.

The story of having a tyre puncture at the very gate of Ujenzi is a subsequent hatchment by Appellant, 3rd and 6th accused simply to save their skins but it cannot stand before the evidence adduced by the prosecution. In his cautioned statement the Appellant clearly states how he had sent his driver (Abi), 5th accused, and his turnboy, Noel (2nd accused) to Ujenzi to get the tyre and drum for which he had negotiated with watchmen in the afternoon and this is supported in total by the cautioned statements of 2nd, 4th and 5th accuseds. The 3rd accused also stated how he was hired by Appellant in company of another person and how upon stopping at Ujenzi premises as per Appellants' instructions they were arrested - no question of puncture arises at all. *In view* of the totality of the evidenced adduced by the prosecution the complaints and authorities fronted by the Appellant are wholly unsupportable. And although the Appellant was not physically found with stolen property nor was he physically involved in the removal of the spares from the vehicle, his all round involvement in the issue squarely makes him a principal offender as defined under s. 22 of the Penal Code.

Before concluding however I should make reference to a misdirection made by the learned State Attorney regarding whether or not 2nd, 4th and 5th accuseds gave their evidence on oath and the effect or the consequences of giving unsworn testimony. First, as rightly pointed out by the Appellants' Counsel only 4th accused gave unsworn evidence. Secondly, it is nowhere provided under the law of the land that unsworn evidence carries less weight than sworn evidence let alone drawing adverse inference. Again, as rightly pointed out by the Appellant's counsel, it seems the learned State Attorney mixed two matters - keeping silent when called upon to give defence, which would indeed attract adverse inference, and, giving unsworn testimony, which no longer saves the accused from cross examination (as it used to be the case in the past), for, the law as it is now, whether one testifies on oath or not he would still be subject to cross examination. S. 293 of the Criminal Procedure Act is very clear on this, as it provides,

> "293 (1) .....
>
> (2) If the accused ..... elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence.
>
> (3) Notwithstanding that the accused accepts or gives evidence not on oath or affirmation he shall be subject to cross-examination by the prosecution".

The Appellants' Counsel's complaint on this issue was therefore wholly justified.

Save for the above, the appeal has no merit and it is accordingly dismissed.

(L. B. Kalegeya)
JUDGE

Judgement delivered today the 15\1\99 in the presence of Mr. Mdemu, State Attorney.

(L. B. Kalegeya)
JUDGE
15\1\99