IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CONSOLIDATED CRIMINAL APPEALS NO. 88 & 89 OF 2017

[Appeal from the Judgment of the District Court of Kilombero in Criminal Case No. 118/2016, Hon. T. Lyon Resident Magistrate]

MAISALA JUMANNE MPANGILE ..... 1ST APPELLANT

ISMAIL ALLY MOHAMED ..... 2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

5th June & 18th June 2018

M.M. SIYANI. J.

Maisala Jumanne Mpangule and Ismail Ally Mohamed; the two Appellants were arraigned and charged at Kilombero District Court for Burglary c/s 294 (2) and stealing c/s 265 of the Penal Code Cap 16 RE 2002. The 1st Appellant was as well charged for Being found in Possession of Goods suspected to have been stolen c/s 312 (b) and receiving stolen property c/s 311 of the Penal Code. They were both convicted and sentenced to custodial punishment in all Counts. Aggrieved by the said decision, each of the Appellants preferred separate Appeals to this court against both conviction and sentence. In that regard, Criminal Appeals No. 89/2017 and 88/2017

were registered for the 1st Appellant and the 2nd Appellant respectively. For smooth control of the proceedings and quick disposal of the matters, I ordered that the two Appeals be consolidated. In this Judgment therefore, Maisala Jumanne Mpangile will be referred as the 1st Appellant and Ismail Ally Mohamed, the 2nd Appellant.

Before, I proceed with the merits of the Appeal, I wish to comment, though by way of passing that although the Appeal by Maisala Jumanne Mpangile (the 1st Appellant) was filed on 24th March 2017, the said Appellant, through her Advocate, lodged an amended Petition of Appeal on 29th November 2017. That was improperly done because as a latins says **"quae incipit in atrio per ordinem"** there was no Court Order to that effect. Once a case has been instituted in a Court of law, filing of any document in relation to a pending case must be subject of a court order. On 5th June 2018 when these Appeals came for hearing, Mr. Komeye, counsel for the 1st Appellant perhaps anticipating the consequences of presenting such a document, prayed to withdraw the filed Amended Petition on the reason that the petition lacks certification statements and doesn't indicate who drew the same. I, for

different reasons, I ordered the Amended Petition be expunged from the records as I noted above, the filing was done without any Order.

Through her memorandum of Appeal, 1st Appellant had four (4) grounds which however can be reduced into three (3) grounds as follow:

1. That the trial Magistrate erred in law and in fact by admitting a cautioned statement which was bad in law.
2. That the trial Magistrate erred in law in his determination by not considering that fact that all the Prosecution Witnesses denied to have seen the 1st Appellant at the locus in que.
3. That the trial Magistrate, erred in law and in fact for not considering the fact that the Appellant was cooperative and gave a reasonable explanation as to how the alleged stolen properties came to her possession.

The 2nd Appellant also preferred the following six (6) grounds of Appeal which can be summarized in the following three (3) grounds.

1. That the trial Magistrate erred in law by convicting the Appellant in a case where no identification parade was conducted.

2. That the trial Magistrate erred in law and facts when he relied on involuntary confession statements by co accused to convict the Appellant.
3. That the trial Magistrate erred in law and facts in his decision by convicting the Appellant in a case where the charge was not proved beyond reasonable doubts.

When the Appeals came for hearing on 4th June 2018, Ms. Neema Mbwana, the learned State Attorney appeared for the Respondent; the 2nd Appellant was unrepresented and learned counsel Komeye David appeared for the 1st Appellant. While the 2nd Appellant had nothing substantial to add from his grounds of Appeal, counsels for Respondent and 1st Appellant opted to argue the Appeals generally.

Submitting on behalf of the 1st Appellant, Mr. Komeye was quick to note that section 311 of the Penal Code Cap 16 RE 2002 which creates an offence of receiving stolen property with which the 1st Appellant was charged, required proof of knowledge on the party of the said Appellant.

He contended that the 1st Appellant had no knowledge that parts of the motorcycle she received from the convict who is not party of this appeal were stolen. The learned counsel was of the view that the trial court ought to have considered the issue of knowledge before proceeding to convict the Appellant on the count of receiving stolen property and cited in support of his arguments the case of **Masweda Adiga vs Republic (1992) TLR 140** where Chipeta J (as he then was) held that a charge under section 311 of the Penal Code can be satisfactorily proved where not only the fact that the accused received or retained the stolen property but he or she received or retain it with guilty knowledge that the same was a stolen property must be clearly established. Basing on the findings of this Court in **Martin Ernest Vs Republic (1987) TLR 130,** Counsel for the 1st Appellant argued further that the learned trial Magistrate ought to have reached a decision to convict her had she failed to satisfy the Court on how she came into possession of the said properties. In his view therefore, since the 1st Appellant gave a satisfactory account on how she came into possession of alleged stolen properties, it was wrong for the trial court to convict her for receiving stolen property.

Though for different reasons, Ms. Neema Mbwana, the learned State Attorney for the Respondent supported the Appeal. She contended that no proper inquiry was done by the trial court following an objection by the 2nd Appellant on the admissibility of a cautioned statements something which affected the entire proceedings of the trial court. The learned State Attorney highlighted the procedure for conducting inquiry as laid down by the Court of Appeal of Tanzania in **Selemani Abdallah Vs Republic, Criminal Appeal No. 384/2008** (unreported) and argued that the same was not followed by the trial Court.

Ms Mbwana was of the view that even if the trial court would have properly conducted the inquiry still it was wrong for it to base its conviction on uncorroborated cautioned statements by co accused person. According to the learned State Attorney, if the cautioned statements is disregarded, the only remaining evidence will be that of the motorcycle parts found with the 1st Appellant of which even its chain of custody is questionable as to how the said parts moved from where the same was recovered to the time the same was tendered in Court as exhibit.

In disposing this Appeal, I wish to state at the outset that I will take the same cause as both the learned State Attorney and counsel for the 1st Appellant has taken by analyzing the grounds of Appeal generally. I have gone through the trial Courts Records and I agree with Mr Komeye that there is no iota of evidence to suggest that the 1st Appellant had knowledge that parts of the motorcycle she received was stolen as a necessary ingredient of the offence of receiving stolen property under section 311 of the Penal Code Cap 16 RE 2002. For easy of reference I have reproduced the content of section 311:

> **311. Receiving property stolen or unlawfully obtained**
> **Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reasons to believe it to have been stolen, extorted, wrongfully or unlawfully taken, obtained, converted or disposed of, is guilty of an offence and is liable to imprisonment for ten years.**

The word **"Knowing"** as used in the section 311 above clearly requires knowledge that the received or retained property were stolen. It is not enough to establish that the accused persons were found with the alleged stolen property. In his reasoned Judgment, the learned trial Magistrate is recorded at page 13 -14 to have stated as follows:

> **The 3rd Accused admitted in her defense to have the said TOYO engine which was fixed into her motorcycle from the stolen motorcycle which was there at the scene of crime. She also signed the search order which was admitted as exhibit PE3 within which the motorcycle parts stolen were filed. This in my considered view, proves that the 1st and 3rd Accused's were found in possession of the stolen motorcycle parts together with the said motorcycle and also the 3rd accused received the said stolen motorcycle parts while knowing and having reason to believe that the said properties were illegally obtained.** [Emphasis supplied]

With due respect to the learned trial magistrate, the above reasoning doesn't indicate neither existence of knowledge on the party of the 1st Appellant nor reasons to believe that the property she received was a stolen one. As it was

the case in **Masweda Adiga vs Republic** (supra) cited by Mr. Komeye, guilty knowledge on the part of the accused person that the property received or retained are stolen one is essential in a count of receiving or retaining stolen properties under section 311 of the Penal Code. Indeed, the duty of the Appellant at the trial Court was to raise reasonable doubts of which I also agree with Mr. Komeye that, the same was satisfactorily discharged. For instance, at page 10 of the typed Judgment, the 1st Appellant was recorded to have stated that she knew the 1st Accused at the trial court one Aziz Ramadhan as a mechanical technician and that she was informed by the said 1st accused that he had brought her a motorcycle engine for the purpose of fixing her motorcycle. This piece of evidence can also be found in the cautioned statements of the very same 1st accused person who however is not party to this Appeal that they agreed to sell an engine of the motorcycle for Tshs 250,000/= to the 1st Appellant. Nothing in records shows that the 1st Appellant knew that the engine she received was a stolen item until arrested by the Police. This is the version of story which she maintained even when adducing her mitigation factors when she stated**." I pray for court's leniency. I did not know that they are stolen properties".** All that being said, I think the 1st Appellant despite being found with the alleged

stolen properties, gave a reasonable explanation as to how the alleged stolen properties came to her possession. The 3rd ground of Appeal therefore has merits.

As noted earlier, Ms. Neema Mbwana, the learned State Attorney for the Respondent supported the Appeal on the reason that the proceedings at the trial court were tainted with procedure irregularity by its failure to properly conduct inquiry proceedings following an objection by the 2nd Appellant on the admissibility of a cautioned statements. This argument by the learned state attorney was in reflection to the 2nd ground of Appeal by the 2nd Appellant that the trial Magistrate erred in law and facts when he relied on involuntary confession statements by co accused to convict the 2nd Appellant.

I wish to point out that a confession voluntary made by accused person in accordance with the law is admissible in evidence and the Court can rely on it in its decision. However, for it to be admitted as evidence, a Court of law before it a prayer to tender a confession statement has been made must first ensure that the same was voluntary made by requiring the accused person

to respond on whether he or she admits or object its tendering. As correctly pointed out by Ms Mbwana, once there is an objection on admissibility of a confession statements, a procedure for conducting a trial within trial for Inquiry must be followed. The case of **Selemani Abdallah Vs Republic, Criminal Appeal No. 384/2008** cited by Ms Neema, is relevant on how an inquiry should be conducted to ascertain whether or not the confession was voluntary made. The Court of Appeal highlighted the procedure as follows:

i. **When there an objection is raised as to the voluntariness of the statements intended to be tendered as an exhibit, the trial court must stay the proceedings**
ii. **The trial Court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of that aspect of voluntariness. The witnesses must be sworn or affirmed as mandated by section 198 of the Criminal Procedure Act. Cap 20 RE 2002.**
iii. **Whenever a prosecution witness finishes his evidences, the accused or his advocate should be given opportunity to ask questions**
iv. **Then the Prosecution to re-examine its witness**

v. When all witnesses had testified, the prosecution shall close its case

vi. Then the Court is to call upon the accused person to give his evidence and call witnesses, if any. They should be sworn or affirmed as in the Prosecution side.

vii. Whenever a witness finishes, the Prosecution to be given opportunity to ask questions

viii. The accused or his advocate to be given opportunity to re-examine his witness.

ix. After all witness have testified, the accused person or his advocate should close its case.

x. Then ruling to follow

xi. In case the court finds out that the statement was voluntary made (after reading the ruling) then the Court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. The Court then should accept and mark it as an exhibit. The contents should then be allowed to be read in Court.

xii. In case the court finds out that the statement was not made voluntarily, it shall reject it.

Having analyzed the inquiry procedure as above and having gone through the records, I agree with the learned State Attorney that the above procedure was not followed. The lower court record shows what happened as here under:

Date: 11/05/2016

Coram: T. A Lyon - RM

Prosecutor: A/Insp. Kinyage

Acc: Presenter

B/C: W. Ngwasi - RMA

PP: - The matter is for Inquiry hearing on the 2nd Accused's Statements.

Inquiry Hearing

2nd Accused: I object the same as it did not follow the procedures. I do not know the relevant laws on the said procedures

COURT: The objection is overruled for lack of merit.

SDG: T.A LYON
RESIDENT MAGISTRATE
11/05/2016

The procedure adopted by learned trial Magistrate as indicated above could not in my view assist the court to ascertain whether or not the statement was voluntarily made following the 2nd Accused's objection that he was forced to admit the offence. Neither the Prosecutor nor the 2nd accused person himself were accorded an opportunity to call their witnesses if any. The law under section 27 (2) of the Evidence Act Cap 6 RE 2002 place the duty of proving that a confession was voluntary made on the Prosecution. This entails that it is the Prosecutor who is supposed to address the Court first by calling his witnesses on inquiry proceedings. The trial Court proceeding shows the accused was called first as if he was the one who upon registering his objection had a duty to prove the same.

In the upshot, what was done by the trial court and termed as inquiry did not in my view amount to inquiry procedure as highlighted in **Selemani Abdallah** (supra). There is therefore merits in the 2nd ground of Appeal by the 2nd Appellant. The consequence of failure to ascertain voluntariness of the confession statements through inquiry proceedings is to make the said piece of

evidence of no value at all and as correctly again, argued by Ms Neema; if the 2nd accused's cautioned statement is disregarded, the evidence that remain cannot lead to any another conclusion but his innocence.

In conclusion and basing on what I have endeavored to discuss, the two grounds above suffice to determine this Appeal. I will therefore refrain myself from performing an academic exercise discussing the remaining grounds. Accordingly, I allow the Appeal, quash the conviction and set aside the custodial sentences imposed to the Appellants who should be released from prison forthwith unless held for other lawful cause.

Dated at DAR ES SALAAM this 18th June 2018

M.M. SIYANI
JUDGE