IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 267 OF 2017

(Originating from Criminal Case No 451 of 2016 at District Court of Kinondoni)

JONATHAN JULIUS KALONGA..... APPELLANT

VS

REPUBLIC ..... RESPONDENT

JUDGEMENT

22 JUNE, 2018

MWENEMPAZI, J.

Jonathan Julius Kalonga was charged and convicted with the offence of stealing contrary to section 258 and 265 of the Penal Code, Cap. 16 R.E.2002. He was sentenced to serve a term of five years imprisonment. He is appealing against conviction and sentence. In his petition of appeal the appellant filed six grounds of appeal, namely; that, the trial magistrate grossly erred in law and fact by convicting and sentencing the appellant on the basis of uncategorized provision of the Penal

Code; that the exhibit PE3 (caution statement) was admitted wrongly as the same was retracted; that, the trial magistrate erred in law and fact by considering Exh. PE2 against the appellant and admitted it without following proper procedure for not giving the appellant an opportunity to object or to say otherwise; that the trial magistrate erred in law and fact by taking into account incredible visual identification of PW1 against the appellant allegedly committing the offence; that the trial magistrate erred in law and fact by convicting the appellant in a case where the prosecution failed to summon person(s) to whom it is alleged the motor vehicle was seized; and the final ground is the general one that the trial magistrate grossly erred in law and fact by convicting the appellant in a case where the prosecution failed to prove his guilty beyond any shadow of doubts as charged.

At the hearing the appellant was unrepresented. He wholly adopted his grounds of appeal and prayed that this court releases him as he is innocent. The Responded was represented by Clara Charwe, learned State Attorney who was being assisted by Joseph Mbasha, a State Attorney Trainee. In her submission, she supported the appeal by the appellant on the reason that generally the prosecution did not prove their case beyond reasonable doubt.

She submitted that the appellant was arraigned for the offence of stealing a motor vehicle registered with numbers T. 892 CZM, Make IST, the property of one PW1, Frida Moshi. In her testimony, PW1 testified that she was owning the motor

vehicle after she had purchased it from Sishe Edwin Simbeye on 10th December, 2015. She had a motor vehicle registration card No. 6329573 which was tendered as Exh. P1. Also, she is a business partner of Julius Bernard Kalonga, PW2. The latter is also the father of the appellant. They jointly operate a business of a restaurant. She uses the space at the residence of PW2 to prepare bites and juices which are products she sells at her restaurant. So, every day in the morning at around 6:00 and 7:00 would go to the residence of PW2 to prepare bites for their business. On the date of the event, namely 18th day of May, 2016 she went there to take juice for her business, when she (PW1) came out from the house she did not find the motor vehicle. When Julius Bernard Kalonga (PW2) made an inquiry to the neighbours around, they told him that it was the appellant who has taken the car and driven it off to unknown destination. He came on a motor cycle, wearing a Maasai sheet to hide himself. In the words of PW2, Julius Bernard Kalongo, the event took place at around 13:00 Hours. The matter was reported to the Police Kawe and the investigation ensued. In the testimony of PW4, the motor vehicle was found at Arusha with the registration numbers already changed to T716 CVX and the chassis number tempered with. This time the motor vehicle was in the ownership of another person, by the name ANDREW MKUBENE. He told the police that he bought the motor vehicle from the appellant. They signed a contract of sale before a lawyer.

The motor vehicle was then simply taken/ seized by the police at Arusha and handed over to the Police at Dar es salaam. From the record, the tempering was discovered after forensic examination by Assistant Inspector Elia Jekeza (PW3). It is unfortunate however; no certificate of seizure was tendered in court. Even the advocate said to have witnessed the sale was not called to testify.

In the account of evidence tendered in court, the learned State Attorney rightly submitted that there is no contract of sale which was tendered nor certificate of seizure according to section 38 of the Criminal Procedure Act, Cap. 20 R. E.2002 to link the events and the person concerned. The evidence does not connect the appellant with what is being alleged against him. In the case of ***Julius Matama@Babu@Mzee Mzima vs. The Republic***, Criminal Appeal No. 137 of 2015 Court of Appeal of Tanzania at Dar es salaam. In that case, the court of appeal stated as follows: -

> *"where physical evidence is to be used in a criminal trial there must be evidence establishing an adequate foundation on where and how the object being offered in evidence is indeed the object that it is claimed to be."*

Further the court stated that: -

"it must include detailed information on the persons collecting and handling the evidence, timing of various actions by such persons, conditions under which the actions took place and the precautions taken to prevent tempering with the evidence. The intention is to avoid the use of evidence that could be the subject of tempering, substitution or contamination."

Another piece of evidence which was tendered is Exh. PE3 which is a cautioned statement of the appellant. In the evidence of PW4 testified that the appellant confessed to have stolen the motor vehicle in question. The appellant objected to the statement using the following words: -

"Your honour, I have objection... I was never interrogated. Witness came with this sheet and told me that my family is outside to bail me..."

The court overruled the objection and admitted the exhibit as Exh. PE3. The question is whether the trial court was right to admit it and act upon it to convict the appellant despite of the fact that it was objected to by the appellant. In my view, the trial court was wrong to proceed admitting the cautioned statement and as such it was illegal to act upon it. The court of Appeal of Tanzania in the case of

Manyangu Mang'wena@Mlugaluga and Another vs. The Republic, Criminal Appeal No. 227 of 2012(DSM) (unreported) held that: -

> *"When admissibility of a cautioned statement is objected to on the ground of voluntariness, the trial court has to stop the main trial, and conduct an inquiry or a trial within trial. After a trial within trial, the court would then decide whether the statement was voluntary made, in which case, it, will admit it or that it was not voluntarily made, in which case, it will reject it. That would be the end of the matter as far as that statement is concerned. But of, and only if, the cautioned statement is admitted, the court would then have to consider whether or not, it is true and act on it with or without corroboration bearing in mind whether it is repudiated or retracted and after taking the necessary cautions. Like any other evidence, this is the stage when this and the rest of the evidence is evaluated together".*

In the case at hand, it was also testified in general that the appellant was seen by neighbours leaving the residence of PW2 with the motor vehicle belonging to PW1. No other independent witness was called to testify on that fact. PW2 is the only witness who said it. He did not see the appellant leave with the motor vehicle. Thus, it is hearsay evidence with no corroboration. There is no connection or link

of the stolen car, Toyota IST with Registration T.892 CZM and the one which was recovered Toyota IST registered as T.716 CVX. It is not easy as well to link the appellant with the offence. There is therefore doubt as to whether the appellant is the one who stole the motor vehicle. This must be resolved in favour of the appellant.

Under the circumstances the appellant was wrongly convicted and sentenced. His appeal is therefore allowed, a sentence is set aside and the appellant should be set free unless otherwise is lawfully held.

T. M. MWENEMPAZI

JUDGE

22nd JUNE, 2018