**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**(DAR ES SALAAM REGISTRY)**

**CRIMINAL APPEAL NUMBER 358 OF 2016**

**(ORIGINATING FROM CRIMINAL CASE NUMBER 83 OF 2013 FROM ILALA DISTRICT COURT AT SAMORA BY HON MSAFIRI, RESIDENT MAGISTRATE,)**

**HASSAN MORIS SHIFTA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

Date of last order: 14/06/2018.

Date of judgment: 28/06/208.

**JUDGMENT**

**MAGOIGA, J**

The appellant and one, IPYANA AUSTIN BUGALI (not in this appeal) were charged in the district court of Ilala within Dar es salaam city on two counts of conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap 16 (R.E.2002) and stealing good on transit contrary to sections 258 and 269 (c) of the Penal Code, Cap 16 (R.E.2002). At the end of the trial the appellant and IPYANA AUSTIN BUGALI were all acquitted on the first count of conspiracy and the appellant alone was convicted on the second count of stealing good on transit and sentenced to 10 years' imprisonment, hence this appeal.

The facts of the case, goes that on 26th September, the appellant and IPYANA AUSTIN BUNGALI (not in this appeal) conspired to commit an offence of stealing bags of wheat floor. On the same day jointly they stole 1330 bags of wheat flour valued at Tshs 39,425,000/= the property of SALUM RAMADHAN which were on transit from Dar es salaam to Tunduma. In accomplishing their stealing, they used a motor vehicle with registration

number T.604 ARU make Scania with trailer number T. 187 ARS driven by unknown driver. The stealing was reported to police and investigations were carried leading the appellant and his allies to be arrested and charged accordingly but denied charges against him.

Aggrieved and dissatisfied with conviction and sentence, the appellant preferred four grounds of appeal namely: -

1. That the learned trial magistrate grossly erred in law and fact by convicting the appellant in a case where the prosecution failed to lead direct evidence linking him to the offence charged.
2. The learned Resident Magistrate erred in law and fact by convicting the appellant in a case where the prosecution failed to lead investigatory evidence as to how he was arrested to ascertain whether he was on the run as asserted by PW1 and PW 2.
3. That the learned resident magistrate erred in law and fact by not assessing exhaustively contradictory evidence between PW1 and PW2 as to how got the alleged motor vehicle.
4. That the learned trial magistrate erred in law and fact by drawing an adverse inference against prosecution case for not having got owner of the alleged motor vehicle in question in order to trace for the driver.

Equally the appellant filed a supplementary petition of appeal of appeal containing three ground of appeal couched thus: -

1.That the appellant was tried and convicted on the defective charge as there is variance between charge sheet and state by the prosecution witnesses during trial, as the appellant charged with and convicted of stealing goods on transit, but the evidence for the prosecution sides state the offence of obtaining good by false pretense contrary to section 302 of the Penal Code. This is one, renders the charge defective. It cannot therefore be said that the prosecution case was proved beyond reasonable doubt in the circumstances.

2.That the prosecution case was shaky, there is a problem as to why the prosecution took about forty-two days (42) from 7/2/2013 when the appellant was arrested to 22/03/2013 when the appellant was to send to court for the first time to answer his charge. This alone, creates doubt the

prosecution case as to what the appellant was doing in custody of police all the time.

3.That the trial court erred in law and facts in admitting the retracted and illegally recorded statement of the appellant which also was not read over to the appellant.

During the hearing of this appeal the appellant appeared in person, unrepresented and ready to hearing of the appeal. Briefly he cried for justice to prevail. Submitting, the appellant told the court that his seven grounds of appeal are self-explanatory and prayed the court consider them and do justice by setting him free.

The respondent, Republic was represented by Ms. Selina Kapange, learned state attorney. She did support conviction and sentence of the appellant. The learned State Attorney submitted collectively on grounds numbers one of both main and supplementary appeal by saying the Republic was able to prove the offence of stealing properties on transit. PW1, PW2 and PW3 testified that the appellant brought motor vehicle to transport wheat flour from Dar es salaam to Tunduma. The appellant was the one who came with the driver and agreed with PW1, the owner of the luggage, to transport to the agreed destination. The appellant was paid Tshs. 1,700,000/=. She went on submitting that after stealing the appellant excommunicated PW1 and PW2, who were looking for him. But even when arrested he failed to explain where the cargo is. By this conduct, Ms. Kapange, concluded it was the appellant and him alone was really a thief.

Submitting jointly on grounds number 2 of both main and supplementary of appeal the learned State Attorney, told the court that according to evidence on record shows PW1 and PW2 are the ones who assisted the police to have the appellant arrested. At page 21 of the typed proceedings they testified that the appellant was arrested at kitumbini, she submitted. And there was a printer out from Tigo during tracking of the appellant showing how he was evading the law enforcement machinery, she concluded and ask the court to see no merits in this grounds.

Submitting further on ground number three, the learned State Attorney, said PW1 and PW2 testified clearly at page 33 of the typed proceedings to the effect that it was the appellant who brought the motor vehicle. But at all

material time he was in control of everything. At page 23, she submitted, in re-examination PW1 said the motor vehicle was brought by the appellant.
In reply to the last ground of appeal on supplementary of appeal, the learned State Attorney as to his cautioned statement she agrees with the appellant that same was received in evidence in contravention of the law. He urged this court to expunge it from the court record. But the learned state attorney was quick to point out that despite cautioned statement being expunged from the record yet still there is strong evidence on record to warrant further affirmation of his conviction and sentence, she concluded on the part of the republic.
In rejoinder the appellant replied that he was not given any money. The whole case, according to him, was not proved to the standard required by law. Responding to the printer out he said the printer out did not prove it was him. In conclusion he insisted the court to do justice and this marked the hearing of both parties.
The matter was scheduled for the delivery of judgment on 14/06/2018, but during the composition of the of the judgment I realized that one of the appellant's complaint is the charge sheet. This prompted me to deferred my judgment and ordered same be traced and put before me so that I may get satisfied and be able to do justice. On 21/06/2018, the said charge sheet was found and brought to court by learned State attorney paving way for the judgment, which was set for its delivery today.
The task of this court now is to see whether this appeal has merits or not. The prosecution evidence as tendered in court and the ground of appeal and submission of parties will guide the court to arrive at a fair and just decision. In the first place there is no dispute that the appellant's cautioned statement was admitted in evidence without following the laid down procedures of admitting retracted or repudiated cautioned statements. Once an objection is taken like in the instant appeal (see pages 41-42 of the typed proceedings when PW4 introduced the tendering of the same) the trial court was mandatorily required to conduct an inquiry to clear of its voluntariness before same is admitted. There is plethora of decisions on how to conduct the inquiry in lower court and trial within trial in the high court. In the case of SELEMAN ABDALLAH AND TWO OTHERS V. REPUBLIC, CRIMINAL APPEAL NO 384 OF 2008, (Unreported) Dar es salaam (CAT) quoting the case of

RASHID AND ANOTHER V. REPUBLIC (1969) EA 138 useful guidance was underscored for the lower courts and high court to follow in case of admission of cautioned statement that has been objected and there is a need to clear its admission. It is trite law that non-compliance with such procedure is fatal and render the said cautioned statement to be discarded. The remedy available is to expunge the cautioned statement of the appellant as correctly submitted by the learned state attorney. In the event I hereby expunge the cautioned statement of the appellant from the court record, in determining this appeal.

The learned state attorney in his submission in reply to memorandum of appeal submitted on grounds 1 of the main and supplementary jointly. But looking seriously they don't relate at all. The first ground on the main hinges on failure of the prosecution to prove their case and the one on the supplementary is on defective charge as against the evidence tendered. This has prompted this court to discuss them separately in order to do justice in this appeal.

However, I have resorted to start with ground number three of the main ground of appeal which hinges on contradiction of the testimonies of PW1, PW2 and PW3 on how the alleged motor vehicle was brought. Going by the trial court record in deed there are notable contradictions on the testimonies of PW1, PW2 and PW3 on how the said motor vehicle was brought to take the alleged stolen wheat flour. PW1 at page 20 of the typed proceedings is recorded to have said this:

> ***"On 26/09/2012 my trusted auctioner YUSUF SAFUNDI brought to us a lorry,we know each other for 5 years. He brought us a car via his friend HASSAN MORRIS CHIFUTA. He assured us that the car is safe, make Scania driven by his driver.....YUSUF called Hassan who told YUSUF to pay the money to his driver who is not in court. It was tshs 1700000/=. I am the one who issued the*** *money, then we allowed the said lorry to start the journey which* ***is T604 ARU –trailer T.187 ARS make Scania 1-2-4 ....."***

When cross examined by the appellant he had this to say:

> ***" I have a proof that it is you who brought the motor vehicle. I know you through YUSUF SAFUNDI. YUSUF said he can bring***

*the said motor vehicle. I had no worries with YUSUF. He* ***assured us that they have been together from Kidongo Chekundu. I know my dalali(auctioner). I trusted him, he told us it is your motor vehicle.....***"

From the above testimony one cannot fail to grasp that it was YUSUF SAFUNDI who actually brought the said motor vehicle. And according PW1 YUSUF SAFUNDI assured PW1 that the motor vehicle belongs to the appellant. However, there was no document tendered in evidence to prove that actually the said motor vehicle belonged to the appellant. This leaves a lot to be desired.

I know come to the testimony of PW2- YUSUF SAFUNDI. PW2 had this to say in his testimony:

***".....on 26/09/2012 I remember that at 10:am I was called by Hassan Moris my friend (Auctioner). He is my colleagues in business. He asked if I have any goods to export from Tanzania to other country. He told me he can find a car per 70000/= in each tonne. It was wheat flour from Dar to Tunduma boarder. The customer was ALBERT MAYOMBO in total of 1330 and 25 kgs it was 33 tonnes..... I saw the motor vehicle and I gave Salum the number. The driver was Said.***

But when cross examined he said this;

***"... it is the driver who brought the said motor vehicle, you came late. i made an agreement as per your instructions.....***"

What can be gathered from the testimony of PW2 is that, it is true appellant assisted to get the motor vehicle but was he in control of all the transaction? Definitely No! According to the testimony of PW1 it seems it was PW2 who brought the motor vehicle but according to PW2 it was the appellant who brought the motor vehicle. This contradiction and the circumstances of this case PW2 knows more than what can be gathered from his testimony. According to PW2 the luggage was of ALBERT MAYOMBO but according to PW1 it was his cargo. This ALBERT MAYOMBO was not called to testify and

at least to show that the luggage never reached its destination. This doubt is to be resolved in favour of the appellant.

PW3 according to his testimony it was Hassan who brought the car. PW2 says the car was brought by the driver and mentioned his name as SAID but according to PW3 it was Hassan who brought the car. It is in the totality of these notable contradictions that I find merits in this ground. PW2 in fact was supposed to be a co accused to the appellant and know more than not.

According to learned State Attorney in her submission submitted that PW1 PW2 and PW3 all together testified that the appellant brought a motor vehicle to transport wheat flour form Dar to Tunduma. The learned State Attorney submitted the money was paid to the appellant. The submission by the learned State Attorney that appellant was paid the money is not supported by any iota of evidence on record. I have read the testimonies of PW1 and PW2 who testified the money was paid to the driver of the motor vehicle in the absence of the appellant. Yet again the state attorney submitted that even when appellant was arrested he failed to explain where the cargo was and concluded that the conduct of the appellant proved that he was a thief. I declined to buy this kind of submission that a conduct of the appellant, which the trial court never noted can the basis of his conviction from the submission of the republic. That said and done I find this ground has merits and by the very contradiction as noted above I declined to agree with the learned state attorney that is a hopeless ground of appeal.

This now takes me to his first ground of appeal in the supplementary ground of appeal that the evidence on record is talking of obtaining good by false pretense contrary to section 320 of the Penal Code contrary to charge sheet that convicted the appellant that it was stealing goods on transit. This ground raises a very serious irregularity on the case for prosecution. If we go by the evidence of PW1, PW2 and PW3 the appellant was entrusted with the luggage to make sure it reached its destination Tunduma from Dar. There is no dispute that the appellant was charged and convicted of stealing goods on transit. The offence of obtaining goods by false pretense and stealing goods of transit are two different offences and have their own way they are committed. For easy of reference will produce the two sections that create these offences and revisit the evidence to see if there are at variance to

create such an irregularity as raised by the appellant and see its effect in this appeal.

***Section 269. Stealing from the person, etc. Ord. No. 49 of 1955 s. 11; Act No. 2 of 1972 Sch.***

***If a theft is committed under any of the following circumstances, that is to say, if –***

***(a) the thing is stolen from the person of another;***

***(b) the thing is stolen in a dwelling house and its value exceeds one hundred shillings or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling house;***

***(c) the thing is stolen from any kind of vessel or vehicle or place of deposit;***

***(d) the thing stolen is attached to or forms part of a railway;***

***(e) [Repealed by Ord. No. 49 of 1955 s. 11.];***

***(f) the offender, in order to commit the offence, opens any locked room, box or other receptacle by means of a key or other instrument,***

***the offender is liable to imprisonment for ten years.***

WHEREAS

***Section 302. Obtaining goods by false pretences Act No. 2 of 1980 Sch.***

***Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, is guilty of an offence and is liable to imprisonment for seven years.***

This ground has prompted the court to revisit the evidence on record and the charge sheet the subject of this appeal. This ground on the face value and after revisiting the evidence of the prosecution witnesses has merits. There is no single witness for prosecution who exactly testified that while the goods were on transit the appellant intervened the said motor vehicle and stole the goods. What can be gathered from the prosecution witnesses (PW1,PW2, and PW3) is that they trusted the appellant with the goods and the motor vehicle for transporting to Tunduma. Now the question is, was it proper to charge the appellant under section they charged him? Definitely NO! The next question is what is the effect of this irregularity in the instant appeal? In the case of MASHALA NJILE V. REPUBLIC, CRIMINAL APPEAL NO

179 0F 2014, (unreported) Tabora (CAT) quoting the cases of MASASI MATHIAS V. REPUBLIC, CRIMINAL APPEAL NO 274 OF 2009, it was held that the variance between what is stated in the charge sheet as against the evidential facts from the testimony of the prosecution witness renders the charge defective.

The learned state attorney when submitting on grounds number on in the main and supplementary appeal had it that the appellant was the one who came with the with the driver and agreed with PW1, the owner of the luggage to transport to the agreed destination. He was paid the advance. To her this was proving stealing goods on transit. But going by the above provision of the law they were proving a different offence of obtaining good by false pretense. On that am constrained to disagree with the learned state attorney that first ground of appeal in the supplementary of appeal that it has no merits. She underrated this ground but it is serious ground that goes to the root of the trial court proceedings, judgment, conviction and sentencing of the appellant.

Guided by the above holding in the case of cited above am constrained to hold that the trial proceedings, judgment, conviction and sentencing of the appellant was suffers from serious irregularity that cannot spare the conviction and the sentence meted out against the appellant. In the event I declared the proceedings a nullity and proceed to set aside the judgment and sentence meted out against the appellant for reasons I have endeavored to explain above.

This ground suffices to dispose off this appeal without looking into other grounds because they won't make sense to proceedings that have been declared a nullity.

That said and done, I further order the appellant to be released from prison unless held otherwise for a lawful cause.It is so ordered.

Date at Dar es salaam this 28 day of June 2018.

**S.M. MAGOIGA.**

**JUDGE.**

**28/06/2018.**