

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 365 OF 2018

FRED MGAYA @ SHARO APPELLANT

VERSUS

REPUBLIC RESPONDENT

Date of last Order: 09/10/2019

Date of Judgment: 04/11/2019

J U D G M E N T

MGONYA, J.

Aggrieved by the decision of **KILOMBERO District Court at IFAKARA in Criminal Case No. 145/2017**, the Appellant in this matter sought for an Appeal before this court with 6 grounds of appeal against the conviction and sentence, as herein below:-

- 1. That the learned trial Magistrate erred in failing to realize contradiction between PW1 and PW2 as to the actual of occurrence of the offence;***
- 2. That the learned trial Magistrate erred in embarrassing PW1 and PW2's evidence where both***

did not identify exhibit P1 – 6 before the court for its verification;

- 3. That the learned trial Magistrate erred in not evaluating validity of caution statement exhibit P8 where it was obtained by PW4 against the Appellant contrary to mandatory provision(s) of Criminal Procedure Act Cap. 20 R.E. 2002;***
- 4. That the learned trial Magistrate erred in holding to exhibit P 1 – 6 where the prosecution failed to establish their movements and storage before disposition in court (chain of custody);***
- 5. That the learned trial Magistrate erred in convicting the Appellant based on un-justified corroborated prosecution evidence; and***
- 6. That the learned trial Magistrate grossly erred in holding that the prosecution proved its case against the Appellant beyond reasonable doubt as charged.***

When the parties to this case appeared before this Honorable Court, the Appellant appeared in person while Ms. George learned State Attorney appeared for the Republic. The Appellant addressed this Court by submitting that he has six

grounds of Appeal and prays the Court to consider them and set him free. Further, he would like to offer a case in support of his third ground of Appeal.

On the other hand, the Prosecution submitted to have gone through the grounds of Appeal and they have to declare that they support his conviction and sentence.

Submitting on the 1st ground that the Magistrate erred by relying on the PW1, PW2 testimony and interdiction on dates. The prosecution averred that they strongly object that there was contradiction on the date of offence. PW1 said the offence took place on **30/5/2017** (see page 6) and PW2 said on **31/5/2017**. However, they have gone through the original records and they came to know that PW1 said the offence occurred on 31/5/2017. So this could be the typing error. Hence this ground is meritless.

On the 2nd ground, Ms George learned State Attorney stated it is that PW 1, PW2 did not identify the breaking tools that the Accused was with. Under the circumstance, Ms. George told the court that, this does not affect evidence that they were in the car where they saw such tools and also testified to see the accused was apprehended with the same. In this event also, the omission

of identification does not have any effect to the evidence of this case which was light. Hence this ground is considered **meritless**.

On the 3rd ground, the Republic objected this ground since when the cautioned statement was tendered before the Court by PW4 (Det Coplo Mhite) see page 12, the Appellant was asked if he has any objection to the same, and he asked that they had no any objection and the same should be taken for evidence. So Exh. P3 was legally admitted. From the same, it is the Republic's view that. Further, the Republic said that, the case that the Appellant brought is distinguishable since the accused in that case objected and inquiry was conducted contrary to the matter at hand. Hence this ground too is **meritless**.

On the 4th ground on the failure to show chain of custody, Republic strongly objected that it is not proper saying that the chain of custody was not showed in those exhibition.

It was further the Republic's assertion that, those items were tendered by PW3 Act Sg. Abdallah; as seen at page 9-10, wherein his testimony he declared that he is the one who apprehended the accused since they tricked him in the car – Noah.

Further, after apprehension he seized the same and prepared the certificate of seizure. This witness is the one who

tendered the same before the court. In the event therefore, it is Mr. George's view that there is no any shortfall with the chain of custody, hence this ground too is considered meritless.

On the 5th, and 6th grounds of appeal on failure of Republic/prosecution failure to prove the case without leaving any reasonable doubt. It is the Republic's observation that the case was duly proved through **PW1** and **PW2** who were eye witnesses. Further is **PW3** who apprehended the accused and tender his breaking tools before the court for evidence.

On the same line, Ms. George the learned State Attorney said that there also cautioned statement which was tendered by **PW4** before the Court which was not objected even by the accused himself. From the same, it is Republic's view that, in the event therefore, these two grounds too are to be considered **meritless**.

Having gone through the submission of the Appellant and the Respondent on the grounds of Appeal filed by the Appellant in this Court, I take from this juncture to determine the Appeal.

Firstly, on the **1st ground** in determining that the Magistrate failed to realize the Contradiction of **PW1** and **PW2** on actual date of the offence where PW1 states the offence to have taken place on the 30/05/2017 while PW2 states it to be **31/05/2017**,

while in the original records the offence is stated to have occurred on 31/05/2017, I have the following:

Visiting the original proceeding it appears the dates truly contradict. PW 1 and PW2 each stated a different date but same month and year. I am of the firm view that the inconsistency in these dates weakened the prosecution case, though not fatal. On this I hereby refer the decision of ***SHIHOBE SENI AND ANOTHER VS REPUBLIC 1992, TZ Court of Appeal TLR 330***. Where it was held that:

"...for an illiterate person discrepancies as to dates relied upon are apparent rather than real".

Therefore, from the above contradiction of dates where one states the offence to have been committed on the **30/05/2017** and the other **31/05/2017** is **not fatal** for the length between the two dates is not prolonged to the extent of bringing confusion and does not go to root of the matter. It is from the reasons above **I find the ground lacking merits.**

On the **2nd ground** of appeal, on identifying the exhibits being exhibit P1 to P6 not being identified by witnesses was a necessary factor, for it is before PW1 that the Appellant was searched before in their presence as stated by PW 3. The witness having seen the exhibits on the day the Appellant being arrested

would have not changed the fact the same were found in his possession. Therefore, the appellant claim on this ground of appeal is **meritless**.

In view of the **3rd ground** of Appeal the Appellant complains on the caution statement. It is according to law that a fact not disputed is admitted. The same as reiterated by the Respondent I have noted that the Appellant at the trial did not object to the Caution statement. And hence forth its admission was properly handled. It is from here, **I find this ground of appeal lacks merit.**

On the **4th ground** of appeal, on the issue of chain of custody, I fully subscribe the views expressed by both the Appellant and the Respondent in establishing a chain of custody of the exhibits in record it was necessary to afford reasonable assurance of the exhibits seized and those tendered in court.

In the records before me, I have seen the testimony of **PW 3** who testified to have arrested the Appellant and is the one that found the exhibit P 1-6 seized them and is the one that tendered them before the Court. However, the witness did not testify as to how the exhibits were transferred to where they were stored until the date the same were tendered before this Court. The

prosecution lacked proper trail on the exhibits purported to have been seized.

It is the position in decided cases that the trial Court has to know in whose custody those exhibits were kept. This was emphasis provided in the case of ***ILUMINATUS MKOKA VS REPUBLIC 2003 TLR 245***; and in the case of ***PAULO MADUKA VS REPUBLIC, CRIMINAL Appeal No. 110 of 2007 (Unreported)***, where the court underscored the importance of proper chain of Custody of exhibits where there should be:

"... Chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime..."

In the case at hand there is no explanation from the prosecution witness how on the exhibits were taken care of, from when they were found at the Appellant's possession right up to the point when they were tendered in Court as exhibits. The essence of paper trail to the exhibits intends to maintain that the exhibits seized are the exact ones that are tendered before the

court and have not in any way been tampered with. The Case of ***ONESMO s/o MLWILO vs. REPUBLIC, Criminal Appeal No. 213 of 2010, MUSSA HASSAN BARIE AND ALBERT @JOHN vs. REPUBLIC, Criminal Case No. 292 of 2011 (Unreported)*** and ***DAVID ATHANAS @ MAKASI & ANOTHER VS REPUBLIC, Criminal Appeal No. 168 Of 2017 TZCA 65*** all these cases emphasized on the importance of chain of Custody. In the circumstances therefore, **I find the ground of appeal meritious.**

I now move to the two last grounds, the Appellants complaint is on the evidence of the prosecution that it was unjustifiably corroborated and error that the case was not proved beyond reasonable doubt. The Appellant however did not state on what exactly is the bases of his ground. I took chance to visit the trial records and found that the prosecution case proved its case beyond reasonable doubt for the offence the accused was charged with serve for the issue of chain of custody as seed above. From that shortfall, It is from this point of view ***I find this ground with merits.***

In the event and for the reasons stated in the **4th ground** of appeal, **I allow the appeal, quash the conviction and set aside the sentence. I proceed to order that the Appellant**

be released from prison forthwith unless otherwise lawfully detained.

It is so ordered.

Right of Appeal Explained.




L. E. MGONYA
JUDGE
04/11/2019

Court: Judgment delivered in chambers in the presence of Ms. Debora Mcharo, State Attorney for the Respondent, the Appellant and Ms. Veronica RMA, this 04th day of November, 2019.




L. E. MGONYA
JUDGE
28/10/2019