

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

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 353 OF 2018**

*(Originating from Criminal Case No. 165 of 2018 in the District Court of  
Kilosa at Kilosa)*

**SALEHE S/O OMARY @ GAMBAKO..... APPELLANT**

**VERSUS**

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

*Date of last Order: 30/09/2019*

*Date of Judgment: 07/10/2019*

**J U D G M E N T**

**MGONYA, J.**

Aggrieved by the decision of **Kilosa District Court in Criminal Case No. 165/2018** 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 he plead not guilt for the offence;***

- 2. That the trial court erred in law and fact considering the charge with no exactly time the offence was committed;***
- 3. That the trial court erred in law and fact by convicting the Appellant while during interrogation the second accused confess to steal the said the said properties with first and third but the court does not considering the evidence produced by PW1 interrogator of the case;***
- 4. That the trial erred in law and fact by convicting the Appellant in contradictory evidence which is correct they sold generator at price because PW1 interrogate and found that they sold 100,000/= while PW4 who said they sold 200,000/= Tshs;***
- 5. That the trial court erred in law and fact by not considering the evidence of the Appellant who said that the Police Officers beating him demanding him to say truth and at the end of the case the Appellant was convicted this shows that there was connection to deal with Appellant rather than others; and***
- 6. That the trial court erred in law and fact during the hearing of the case DW3 was not found he ran away***

***but the court does not deal with that issue while the action of ran away show that DW3 was the one who committed the said offence.***

During the Appeal the Appellant prayed his grounds of Appeal be adopted as they appear in the Petition of Appeal for consideration.

Ms. George learned State Attorney submitted that having gone through the entire record of this Appeal, and the trial Court Judgment, it is from the outset that the prosecution supports this Appeal. In accordance to the grounds brought before this Honorable Court all are based to the fact that, the trial Magistrate conviction and sentence are based on the evidence which was not proved beyond doubt by the Republic. From the same, Ms. George said it is clearly agreed that the Republic failed to prove the offence against the Appellant for the following reason:

The learned State Attorney States that, in principle the Appellant was accused for breaking and stealing one generator in a church. However, the evidence that was used to convict the Appellant was the cautioned statement by other accused persons who mentioned the Appellant to have committed the offence. This information was given by **PW1** constable Abdul. Further, it is from **PW6**, Constable Robert who also averred that it was the

Appellant that committed the crime while the last witness was Constable Jafferi who wrote the cautioned statement of the 3<sup>rd</sup> Accused who is said to have mentioned the Appellant in this appeal.

It is proclaimed by the learned State Attorney that, all the cautioned statements that is to say **Exhibit 1 to 3** was admitted before the court un procedurally, since the accused denied that those statements were taken from them unwillingly. However, the Court admitted the same without conducting inquiry and the same were admitted as **exhibit P1, P2 and P3** on prosecution case.

The learned State Attorney further submits that, it is from the above anomaly, those cautioned statements were not supposed to be taken for evidence since there was no any inquiry that was conducted. In the event therefore, she prayed the instant exhibits i.e. **Exhibit P1, P2 and P3** be expunged accordingly from record.

Further the learned State Attorney states that, even if the court could have preferred that evidence for conviction and sentence, the same was not to be used as said evidence was to be corroborated with other evidences. Unfortunately, in the entire case there is no any other evidence collaborating the Appellant's

offence and whatever that had happened. It is from the record that, even the generator and other people who were involved, was released accordingly.

It was Ms. George's assertion that, corroboration of evidence is a legal requirement under **section 33 (2) of the Evidence Act, [Cap. 6 R.E. 2002]** which states that, a conviction of the accused person cannot be based on confession of the co-accused, but the same has to be corroborated with evidence.

It is from the above stated reason the learned Sate Attorney is of the view that, the offence before the court in respect of the Appellant before the court was not corroborated. In the event therefore, Republic is supporting the Appeal for the above stated reason.

The Appellant in his rejoinder was in support of the Ms. Georges' submission.

Having gone through the grounds of appeal and the records of the Court and the submission of the learned State Attorney; I will not be detained by the Appellants ground of appeal but rather the submission of the learned State Attorney.

It is upon the submission by the learned State Attorney that after reading the grounds of appeal of the Appellant the

Respondent's do support the appeal at hand. It was the assertion of Ms. George learned State Attorney to support the appeal upon legal bases.

Firstly, the learned State Attorney supports the appeal on the aspect of evidence that was before the trial Court and proclaims that the same was not proved beyond reasonable doubt. It is the requirement of law that in all criminal cases the standard of proof is to be "**beyond reasonable doubt**". It is the provisions of **section 110 (1) and (2) of the of Evidence Act [Cap. 6 R.E. 2002]** that establishes the requirement that facts alleged by a party must then be proved beyond reasonable doubt. To support that position of the law the bench further ruled the same in the case of ***JONAS NKIZE VS REPUBLIC 1992 TZHC 22;(19 August 1992 TLR 213.***

It is from the reasons and requirement of the law above that I find the appeal before the Honorable Court **merituous**.

However from the records before me it has come to my knowledge that the trial Court had over looked upon the proper procedure in the admission of exhibit and admission of an objected caution statement. The position as settled by a number of cases is for a court to conduct an inquiry when a caution statement has been objected so as to determine the way it was

obtained whether the process had complied with the requirements of law. The same was observed in the case of ***TWAHA S/O ALI AND OTHERS VS REPUBLIC Criminal Appeal No. 78 of 2004 CAT (Unreported)*** the Court observed inter alia:

***"If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."***

Ms. Faraja George noted the omission and I join hands with her submission to such irregularity and *therefore expunge the caution statements* and the exhibits from the record as prayed by the Respondent.

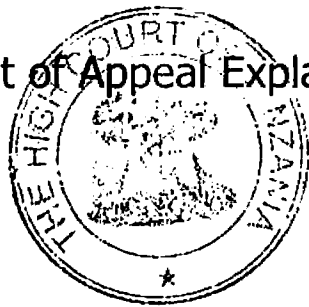
It is my firm view that the Appellant from this juncture stands to have been charged of an offence that had no exhibits neither a caution statement. It is the same caution statement that the Court relied upon to have warranted the Appellants conviction. It is therefore that there was a case before the trial

Court that appears to have had insufficient evidence to have proved the guilt of the Appellant in this instant appeal.

In the final analysis therefore, **I allow the appeal, quash the conviction and set aside the sentence** imposed to the Appellant. **I order that he be released from prison forthwith unless he is being held on other lawful cause.**

Order accordingly.


Right of Appeal Explained.



  
**L. E. MGONYA**  
**JUDGE**  
**28/09/2019**

**Court:** Judgment delivered in chamber in the presence of Ms. Faraja George, State Attorney for the Respondent, the Appellants and Ms. Veronica RMA this 28<sup>th</sup> day of September, 2019.



  
**L. E. MGONYA**  
**JUDGE**  
**28/09/2019**