THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO 20 OF 2020

(Arising from Criminal Case No. 39 of 2019 of Mtwara District Court)

SELEMAN KHALFAN CHIPIHA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Hearing date on: 03/6/2020

Judgement date on: 26/6/2020

NGWEMBE, J:

This appeal has been preferred by Seleman Khalfan Chipiha (the appellant). He is contesting the conviction and sentence arrived by the trial court, in Criminal Case No 39 of 2019, which ended up by sentencing him to pay fine of TZS 500,000/= or serve custodial sentence of two (2) years imprisonment. Being aggrieved with both conviction and sentence, within two days from the date of judgement, that is, on 18th December, 2019, commenced his journey to this court by issuing notice of intention to

appeal, and finally on 24th February, 2020 came up with four (4) grounds of appeal namely:-

1. The trial court erred in law by failing to comply with provisions of section 192 (1) (2) & (4) of CPA which led to unfair trial on the appellant;

2. That the alleged search was done in contravention of section 38 (1 (2) of CPA;

3. That the exhibit P1 and P3 were un procedurally admitted as evidences. Exhibit P1 was not read in court;

4. That the trial court erred in law and in fact in convicting the appellant using uncorroborated evidences of identification of the exhibit P2. The evidences of PW1 and PW3 had contradictory evidences on identification of the alleged Motorcycle.

Briefly, the road to jail started on 25th June, 2019 at Maheha village within Tandahimba District in Mtwara region, when the appellant was found in possession of a motorcycle bearing registration No. MC 898 BMV make Sanlg, having a chassis No. LBRSPB 55G9052941 with engine No. 1607211. The said Motorcycle was suspected to be stolen or unlawfully acquired contrary to section 312 (1) (b) of the Penal Code.

On the hearing of this appeal, the appellant advocated himself, while the Republic was represented by Mr. Paul Kimweri, learned senior State Attorney. When the appellant was given the first right to argue his appeal, he opted that right to be granted to the learned senior State Attorney, but reserved the right to reply thereafter. The learned senior State Attorney supported the conviction and sentence meted by the trial court. He argued that on the first ground related to application of section 192 (1) (2) (4) of the CPA is irrelevant for same does not nullify the proceedings, rather its purpose is to expedite the process of trial.

In respect to exhibit P1, the learned State Attorney was frank, that it was not read in court, thus fatal and same be expunged. However, the oral evidence adduced in court was enough to sustain conviction.

On the third ground, he argued that, the caution statement was properly admitted in court and read according to the dictates of law. PW3 was an independent witness during search in the appellant's house. In conclusion, the State Attorney argued that, the offence charged against the appellant was of a nature of strict liability, that compelled the appellant to provide sufficient explanation on how he came across the said property. In turn the appellant failed to give any explanation on how the said motorcycle came to his possession. Thus, rightly, the trial court convicted and sentenced him according to law.

In response, the appellant being unrepresented, had limited explanation. He briefly argued that, the said motorcycle did not belong to him and was

found in a sitting room where they were four (4) tenants. Thus, he neither owned it nor had knowledge on who was the owner. Therefore, he was wrongly convicted and sentenced. Since he was dissatisfied with such punishment, he is in this court seeking justice for his is innocent.

Having briefly summarized the arguments of both parties, I think it is important to consider this appeal by commencing with third ground, which is related to the alleged failure to read exhibits P1 and P3 soon after being admitted in court.

I think it is a settled principle of law that, once a document is intended to be relied upon by either party in court, such document should be tendered by a witness who is a maker and is capable to testify on the contents of that document. But if the maker cannot be found, such document may be tendered by a witness who is conversant with the contents of the said document. This is in accordance to section 34 (b) of the Evidence Act. Moreover, soon after that document is admitted in court, the contents of the document must be read over to the accused and the contents of the document must be clearly explained to the best understanding of the accused. The rationale is to afford an accused person an opportunity to know the contents of such document, so that, he can understand the nature of his case and prepare a meaningful defence. Failure to read the contents of the admitted document is fatal, consequently the document should be expunged from the court record.

There are several precedents on similar position, including in the case of **Gode Cleophace Vs. R, Criminal Appeal No. 41 of 2019** (unreported), the Court held:-

> *"Apart from the prosecution witnesses who testified in court, there were three exhibit which when tendered before trial court and admitted namely, the certificate of seizure, valuation form and inventory form. However, all these documents were tendered but not read in court to allow the appellant to know the contents and challenge them. This procedural error is contrary to the agreed principles of Laws which have been stated by the higher court."*

In another similar case of **Mathias Dosela @ Adriano Kasanga Vs. R, Criminal Appeal No. 212 of 2019** (unreported) at Mwanza, the Court held:-

> *"With respect to Miss. Lazaro, as correctly submitted by Mr. Mutalemwa, the stand of the law as elaborated in the two cases authorities cited by Mr. Mutalemwa makes it a necessity for the document admitted in evidence to be read in court……".*

The remedy of failure to read the contents of the document (s) admitted in court is to expunge the said document from the court records. This position was again pronounced in the case of **Mbaga Julius VC. R, Criminal Appeal No. 131 of 2015** (unreported) at Bukoba, the court held:-

"Failure to read out documentary exhibits after their admission renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record"

In this appeal, the prosecution tendered three exhibits, P1 which was a certificate of seizure; exhibit P2 a motorcycle; and P3 a caution statement. The appellant complained that, although the two exhibits (P1 and P3) were admitted in court, but same were not read over to the accused to make him understand the nature of the contents in order to let him prepare for appropriate defence. The learned State Attorney conceded that exhibit P1 was admitted in court, but was not read over to the accused person. Therefore, he agreed same be expunged from the record. But he was of the view that, even if exhibit P1 is expunged, yet the available oral evidences were sufficient to sustain conviction entered by the trial court.

In respect to exhibit P3, the State Attorney argued that it was properly admitted and was read over in court. Exhibit P3 is a caution statement, which at page 17 of the proceedings of trial court is recorded that, "*having read the caution statement I have nothing more to say*" meaning the exhibit was read over to the accused and he was satisfied, and had nothing to say. This position was likewise considered by the Court of Appeal in the case of **Mbaga Julius Vs. R, Criminal Appeal No. 131 of 2015** (supra) where the Court of Appeal sitting at Mwanza, had this to say:-

"The procedure for admission of a confession is regulated by the evidence Act and case Law. Therefore, like any other documentary evidence whenever it is intended to be introduced

in evidence, it must be initially cleared for admission and the actually admitted before it can be read out..... Failure to read the contents of the caution statement after it is admitted in the evidence is a fatal irregularity".

In totality, exhibit P1 falted legal procedures, hence expunged, but the trial court properly admitted exhibits P2 (motorcycle) and exhibit P3 (caution statement).

The fourth ground of appeal is related to the alleged contradictory evidences of PW1 and PW3 in relation to identification of exhibit P2. It is a cardinal principle of criminal justice that the burden of proof is put under the shoulders of the prosecution, which proof should be beyond reasonable doubt. This legal requirement is codified under sections 3 (2) (a) and 110 of the Evidence Act. The two sections in essence meant the accused will only be convicted when all ingredients of the offence in the charge sheet is proved beyond reasonable doubt. This position was also repeated in the case of **Hassani Rashid Gomela Vs. R, Criminal Appeal No.27 of 2018** (unreported) where the court held:-

"In criminal cases the burden of proof lies squarely on prosecution side and is required to prove the case against the accused beyond reasonable doubt".

In this appeal the evidence testified by PW1 clearly stated that, following the information received, that the appellant is involved in unlawful business of stealing Motorcycles, they conducted search in the appellant's house.

That they followed all the laid down procedural requirements for conducting search, they inquired from the appellant, if had anything stolen including Motorcycles in his house. The appellant denied to have involved in stealing and does not possess any motorcycle. During search in the appellant's house, they found a Motorcycle make Sanlg, red in colour, with registration No.MC 898 BNV whose rings were blue in colour. Thereafter, certificate of seizure was prepared which recorded all the details of the said Motorcycle.

Further, they collected the said Motorcycle and arrested the appellant to Mtwara central police station. PW2 testified that, he interrogated the appellant and recorded his caution statement (exhibit P3). During interrogation the appellant admitted to have been found in possession of a Motorcycle, make Sanlg, red in colour, but he forgot its Registration number. The last witness to testify was PW3 who testified that, he was asked by police to witness a search in the house of his neighbor, (appellant). So, in the course of search, they found a Motorcycle at Selemani's (appellant) sitting room.

The immediate question is whether the evidences of PW1, PW2 and PW3 proved the alleged offence against the appellant beyond reasonable doubt? The testimonies of PW1 left no doubt that, in the course of search at the sitting room of the appellant, they found a Motorcycle, make Sanlg, red in colour, with registration No. MC 898 BNV whose rings were blue in colour. Such evidence was corroborated by PW2 who recorded the caution

statement of the appellant and supported by PW3. The caution statement indicates that, the appellant admitted to have found with possession of that Motorcycle. The caution statement was tendered and admitted in court as exhibit P3. More so, the record speaks lauder that the admission of exhibit P3 was neither objected by the appellant nor did he ask any question in relation to that statement. Therefore the appellant was stopped to deny his statement at this stage of appeal.

This position was likewise considered by the Court of Appeal in the case of **Hawadi Msilwa Vs. R, Criminal Appeal No. 59 of 2019** (unreported) at page 5 held:-

> *"Failure to object to the admissibility of the caution statement, the appellant is now stopped from denying his statement at this stage".*

Similarly, in this appeal the appellant did not object the admissibility of exhibit P3, and he was not even dared to cross – examined the witness (PW2) who tendered the exhibit P3. Therefore, the appellant is stopped to question its contents at this state of appeal. Thus, concluding the third ground as lacking merits and an afterthought.

The last grounds to be considered jointly are grounds one and two, both related to failure of the trial court to comply with section 192 (1) (2) (4) and section 38 (1) (2) of Criminal Procedure Act. In disposing these grounds, I find that the main issue for consideration is whether the Preliminary Hearing of this case as appears in pages 7, 8 and 10 of the

was properly conducted within the context of law and if not what are the consequences.

According to the proceedings, the preliminary hearing was conducted on 18th September, 2019. That proceedings are quoted hereunder for better understanding.

> **Pros**: Accused has appeared, this case is due for preliminary hearing and we are ready for phg.
>
> **Accused**: I am also ready for phg.
>
> **Court**: Let accused be reminded his charge.
>
> **Accused**: I still deny to have been found in possession of property suspected to have been stolen.
>
> Signed
>
> **Court**: EPNG
>
> **Sgd**. M. F. Esanju-RM
>
> 18/09/2019.
>
> **Pros**: We now pray to ready our facts after accused has further denied his charge.
>
> **Court**: prayer granted.
>
> **Sgd:** M. F. Esanju-RM
>
> 18/09/2019.

DISPUTING AND UNDISPUTING FACTS

Accused: signed

S/A: signed

The above quotation is the trial court's proceedings recorded during preliminary hearing. Section 192 of the CPA as amended by Act No. 3 of 2011 and also the Rules in Government Notice (GN) No. 192 of 1988 are relevant to be considered in this ground. For better understanding section 192 (1) (2) and (4) is quoted hereunder:-

> **Section 192 (1)** *"Notwithstanding the provisions of section 229 and 283, if an accused pleads not guilty the court shall as soon as convenient, hold a preliminary hearing in open court in the presence of the accused and his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial"*
>
> **(2)** *"In ascertaining such matters that are not in dispute the court shall explain to the accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation.*
>
> **(4)** *"any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved; save that if, during the course of the trial, the court is of the opinion that the interests of justice so*

demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved"

Having read both the typed and hand written proceedings of the trial court, the appellant and the respondent signed. Obvious the appellant could not have signed therein without understanding its contents. Above all, usually proceedings in court are conducted in Kiswahili language, but recorded in English Language. Even the written facts from the Prosecution side are written in English Language, but read in Kiswahili to ensure that the accused understands its contents. If the accused does not understand Kiswahili Language, always the court has a duty to look for an interpreter from the language the accused understands to Kiswahili Language. As such I am satisfied that the proceedings during preliminary hearing was properly conducted.

Even by assumption that such proceedings were not conducted as per statutory requirements, yet the effect of it is to order retrial. Since the contents of typed and handwritten proceedings do not indicate any procedural irregularity then there is no need to decide otherwise.

Practically, the trial court cannot record everything happening in court, so long the most wanted proceedings were recorded the appellate court should accept them. If the appellate court become obsessed with procedural irregularities even on minor issues, which do not affect the root of just, the law may fail to protect innocent citizens.

In respect to this appeal, the appellant recorded in his caution statement to have been found with motorcycle in his house. Therefore, he knew how that motorcycle came to his house. The prosecution evidences especially PW1 and PW3 testified quite frankly that when they went to the appellant's house for search, they found a motorcycle in the appellant's sitting room in his presence. Such strong evidence required clear explanation as to how such motorcycle came to his sitting room? Failure of which, the accusations must be considered in affirmative against the appellant.

In totality and for the reasons so stated, this appeal lacks merits same is dismissed. Consequently, I proceed to uphold the conviction and sentence meted by the trial court.

I according Order.

Dated at Mtwara in Chambers on this 26th day of June, 2020

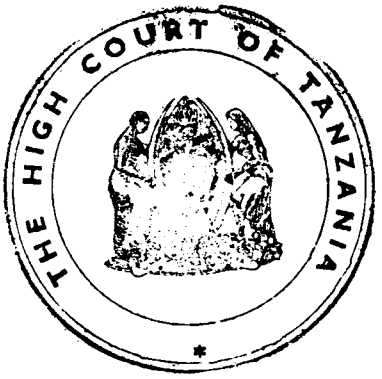
P.J. NGWEMBE

JUDGE

26/6/2020

Court: Delivered at Mtwara in Chambers on this 26th day of June, 2020 in the presence of the Appellant and Mr. Wilbroad Ndunguru, Senior State Attorney for the Respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

26/6/2020