

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

CRIMINAL APPEAL NO. 24 OF 2020

*(Originating from Criminal Case No. 287 of 2018 in the District Court of Mkuranga at
Mkuranga (Barnabas, RM)*

MSOLE KATAMBO@ MWINYICHANDE.....1st APPELLANT
SAID KASSIM KATEMBO.....2ND APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

JUDGMENT

MASABO, J.:-

The appellants were on 12th September 2019 convicted of the offence of criminal trespass, theft and possession of stolen properties contrary to section 299 (a), 258(1), 265 and 31 of the Penal Code [Cap 16 RE 2019]. Each was subsequently sentenced to (3) months, 5 years, and 5 years, retrospectively. Aggrieved, they lodged this appeal armed with 10 grounds of appeal. In summary, the grounds were as follows: **First**, the court erred in law by convicting them in absence of a seizure certificate signed by both parties; **Second**, the trial court erroneously relied upon a repudiated caution statement without conducting an inquiry; **Third**, the trial court erred in assuming the excel they were found in possession of was from a car allegedly

involved in an accident while no sketch map for the alleged accident was tendered; **Fourth**, the court erred in holding that the car allegedly involved in the said accident was the property of PW2 (Samson Wilson Ngowi) as no evidence as to ownership was rendered; **Fifth**, the court erroneously ignored their defence without assigning any reason; **Sixth**, the court erroneously convicted them based on uncorroborated prosecution evidence; **Seventh**, the chain of custody in respect of Exhibit P2 was broken; and **Eighth** the prosecution did not prove their case beyond reasonable doubt.

At the hearing which proceeded via the judiciary's virtual court, the appellants appeared in person, unrepresented. Ms. Christine Joas, learned State Attorney represented the respondent Republic. Being lay and unrepresented the appellant did not have much to submit. They adopted their grounds of appeal and produced a judgment of the Court of Appeal in **Kaenge Christopher v The Republic**, Criminal appeal No. 187 of 2016 in support of their appeal.

In reply to the appellant's grounds of appeal, the learned State Attorney supported the appeal. Placing reliance on the 1st, 2nd and 5th ground of

appeal, she submitted that the appeal cannot be sustained because, while PW2 testified that he found the appellants in possession of Exhibit P2, he rendered no certificate of seizure to substantiate his averments and this casts doubt as to the credibility of the averment. She argued further that the caution statement was objected but no inquiry was made hence, it was irregularly admitted. It was further submitted that, contrary to the requirement of section 312 of the Criminal Procedure Act [Cap 20 RE 2019], the appellants defence was not considered.

I have carefully considered the ground of appeal and the submission from the learned State Attorney who has conceded to the three grounds of appeal. Starting with the first point of learned state Attorney's concession, the law on confession, is as articulately by the Court of Appeal in **Nyerere Nyague v R**, Criminal Appeal No. 67 of 2010, CAT at Arusha (unreported), that:

"....., a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground, either that it was not voluntarily made or not made at all (See **SELEMANI HASSANI v R** Criminal Appeal No. 364 of 2008 (unreported))."

"..... if objection is made at the right time, the trial court must stop everything and proceed to conduct a

trial within trial (in a trial with assessors) or an inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted in evidence (See **TWAHA ALLY AND 5 OTHERS v R** Criminal Appeal No. 78 of 2004 (unreported))

In the instant case, page 21 of the trial court proceedings demonstrates clearly that, when PW3, E 9972 D/C Trano prayed to tender the caution statement on 20th June 2019, the appellants objected. Instead of conducting an inquiry, the trial magistrate casually ruled that the objections have no basis and proceeded to admit the caution statement for the appellants as exhibits P3 and P4, respectively. This was certainly a material irregularity. Since page 5 of the judgment reveals that, these two pieces of evidence was relied upon in convicting the appellant, I subscribe to the view expressed by the learned State Attorney.

Regarding the certificate of seizure, it is mandatory requirement of law that, where an officer seizes a thing in the course of arrest /search, he/she shall issue a receipt acknowledging the seizure of that thing, signed by the owner, his and a witness. In the instant case, it was testified that the appellants were found in possession of motor vehicle spare parts namely Excel which were

admitted as Exhibit P2). But, no certificate of seizure was rendered to substantiate this averment. Therefore, as submitted by the learned State Attorney, this too was material irregularity as casts doubt on the credibility of the averment.

Since the conviction was only based on the retracted confession statement and Exhibit P2, I find merit in the learned State Attorney's submission that the conviction cannot be sustained. On these grounds, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. The appellant is to be forthwith released from custody unless otherwise lawfully held.

Dated at Dar es Salaam this 18th day of December 2020.



A handwritten signature in blue ink, consisting of a stylized, scribbled name.

J.L. MASABO

JUDGE