

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MTWARA)**

**AT MTWARA**

**CRIMINAL APPEAL NO 93 OF 2019**

*(Arising from Criminal Case No.140 of 2019 of Kilwa District Court at Kilwa)*

**GANJA <sup>S</sup>/o MHELE NYAMA ..... APPELLANT**

**VERSUS**

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

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**JUDGMENT**

*Hearing date on: 27/3/2020*

*Judgement date on: 31/3/2020*

**NGWEMBE, J:**

The appellant Ganja Mhele Nyama, being dissatisfied with conviction and sentence meted by the trial court of Kilwa District Court, preferred this appeal armed with five (5) grounds which may be summarized for convenient purposes into two grounds namely:-

1. That the trial magistrate erred in convicting and sentencing the appellant based on the caution statement of co-accused;
2. That the trial court erred in convicting and sentencing the accused while the prosecution failed to prove the case beyond reasonable doubt.

Brief recap of the matter originated from 31<sup>st</sup> October, 2018 jointly with Nchiba s/o Mangi Kongwa and Mustafa s/o Mamsuri Lituli @ Mifani within Kilwa District in Lindi Region did conspire to commit an offence. The second count was in respect to the same accused persons that jointly and together at Chetu Village within Kilwa District in Lindi Region did steal one cattle valued TZS 600,000/- property of Falala s/o Kazamoyo Kona. The third count was in respect to receiving stolen property of one cattle property of the same owner Falala s/o Kazamoyo Kona.

Upon hearing the accusations, the appellant was found guilty on both counts, jointly with the Nchiba s/o Mangi Kongwa, while the third accused (Mustafa s/o Mamsuri Litul was acquitted to all counts. Subsequently the two were convicted and sentenced to serve five (5) years imprisonment, for the second count, while the first count, though were convicted, but there was no corresponding sentence neither in a typed judgement nor in the hand written judgement.

It is on record that when the accused were convicted, and granted time for mitigation, the appellant prayed for lenience punishment because he did not steal, while his co-accused prayed for lenient sentence because he was

the first offender. Likewise, the first accused person is the only one preferred an appeal against both conviction and sentence.

On the hearing date of this appeal, the appellant did not procure assistance from learned advocate, rather stood alone, hence did not have viable contribution to his appeal. When was invited to address the court, he just prayed the Republic to commence his submission and when need arise he would respond. The court understood that the appellant has limited ability to argue on his case like any other person, who lacks expertise and experience to appear and address the court. This is not new for their Lordships in England in the case of **Pett Vs. Greyhound Racing Association Ltd [1969] 1 B. 125** held:-

*"It is not every man who has ability to defend himself on his own... he may be tongue – tied, nervous, confused or wanting in intelligence, we see it every day. A magistrate says to a man, you may ask a question you like, whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him".*

Having that understanding, in mind this court invited the learned senior State Attorney Mr. Paul Kimweri to address the court on this appeal. He rightly pointed out that the appeal is supported by the republic, because the trial magistrate failed to analyze the evidence properly for all seven prosecution witnesses none of them testified against the appellant. The

only evidence touched the appellant was caution statement of the second accused.

Further argued that the caution statement of co-accused which implicated the appellant, but in his testimony in court such co-accused denied to know the appellant. He referred this court to the case of **Asia Iddi Vs. R, [1989] TLR 174**, where the court ruled that conviction cannot solely be based on caution statement of a co-accused. Also referred this court to the case of **Abubakari Issa @ Mnyambo Vs. R, criminal appeal No. 34 of 2010**. Therefore, in the absence of an independent witness to corroborate such evidence of co-accused, the accused cannot be convicted. He concluded that the trial court failed to apply the law and precedents of the court of record properly, hence the appeal be allowed and the conviction and sentence meted by the trial court be quashed and set aside.

In considering this appeal, it is wise to combine both grounds because they boil down into one issue, that is, whether the prosecution proved the case against the appellant beyond reasonable doubt. It is a trite law that in criminal proceedings the burden of proof lies on the prosecution as rightly provided for under section 110 of the evidence Act [CAP 6 R.E 2002] read together with section 3 (2) (a) of the Act. This position was held in the case of **Jonas Nkinze Vs Republic [1992] T.L.R 213**, held:-

*"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking"*

Undoubtedly, and as a general rule, the prosecution has a noble duty to establish a prima facie case and prove the offence against the accused beyond reasonable doubt. The same principle was repeated in the case of **Joseph John Makune Vs. R, [1986] T.L.R 44**, held:

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence".*

In this case, as rightly, argued by the senior State Attorney, the only piece of evidence which touched the appellant is the caution statement of Nchiba Mangi Kongwa. However, when was testifying in court, at pages 29 of the proceedings, he admitted that the appellant was not known to him *"Yes I said I did not know you"* Apart from that caution statement, there is no other piece of evidence which linked the appellant with that stealing of cattle owned by Falala Kazimoto Kona.

It is a legal position in our jurisdiction that, conviction cannot be based solely on a confession by a co-accused. There must be, in addition, other independent testimony to corroborate it. Also it is settled that the evidence of a person who has an interest to serve also needs corroboration as such it cannot be used to corroborate other evidence. This position was pronounced loudly in the case of **Asia Iddi (supra)**. This position is a replica of section 33 (2) of the Law of Evidence Act, Cap. 6 R.E. 2002 which states verbatim;

*"Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused"*

In the absence of corroborating evidence, the appellant cannot be convicted on the sole incriminating cautioned statement recorded by co-accused, who in this appeal, that co-accused denied to know the appellant.

Another serious shortfall in the judgement of the trial court, is that he convicted, the both accused persons in two counts, that is count one and two but failed to pass sentence in both counts. That is contrary to proper application of law and proper composition of the court judgement.

In totality, the case against the appellant was not proved, thus wrongly convicted and sentenced. Therefore, I find merit in this appeal and accordingly, allow the appeal, quash the conviction and set aside the sentence meted by the trial court against the appellant, subsequently order an immediate release from prison unless otherwise lawfully held.

**I Accordingly order.**

Dated at Mtwara this 31<sup>st</sup> day of March, 2020.



A handwritten signature in black ink, appearing to read "P.J. Ngwembe".

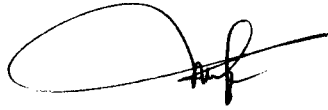
**P.J. NGWEMBE**

**JUDGE**

**31/03/2020**

**Court:** Delivered at Mtwara in Chambers on this 31<sup>st</sup> day of March, 2020  
in the presence of the Appellant and Mr. Joseph Maugo, Senior  
State Attorney for the Republic/Respondent.

**Right to appeal to the Court of Appeal explained.**



**P.J. NGWEMBE**

**JUDGE**

**31/3/2020**

