IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA
HC: CRIMINAL APPEAL No. 62 OF 2019

(Original Criminal case No. 176 of 2016 of the District Court of Nyamagana at Mwanza)

JUMA S/O MALEKELA @ AMOS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 08/05/2020

Judgment: 15/05/2020

A.Z. MGEYEKWA, J

In the District Court of Nyamagana at Mwanza, the appellant was arraigned and convicted of stealing contrary to section 258 (1) and 265 of the Penal Code Cap.16 [RE. 2019]. Upon conviction, he was sentenced to serve thirty years imprisonment.

The accused one JUMA S/O MALEKELE @ AMOSI was charged that on the 21st day of July 2016 at the Igomba area within Nyamagana District in Mwanza Region did steal a motor vehicle with Reg. No. T560 DBU of Shadrack S/O SWAIBU MVUNYE. Aggrieved, the appellant appealed to this court for both the conviction and sentence. Upon arraignment, before the trial court, the accused entered the plea of not guilty.

From the testimony of seven prosecution witnesses, the accused was also afforded his defense before the trial court. The appellant rebutted the prosecution accusations and protested his innocence.

Aggrieved by the decision of the District Court of Sengerema, the appellants have preferred the present appeal seeking to impugn the District Court decision on a memorandum of appeal constituting six grounds as follows:-

1. *That, the presiding Court wrongly disregarded mutatis mutandis principle to the appellants whose crux of their apprehension and implication to the crime/charge was affected followed by flouted confession by their co-accused, however, discharged.*

2. *That, by failure to set the riddle on possibility and probability of the appellants to be arraigned on 19th August 2016 i.e three months before being arrested on 03rd November 2016 proves the presiding Court failed to*

detect the elements of fabricated evidence/case thus favor underserved part.

3. *That, the purported confession by the appellants plus that of their co-accused was made out of the terms specified under Criminal Prosecute Act regarding its voluntariness and time limitations, thus unsafe to be relied on.*

4. *That, the appellants were not described as real suspects by the victim (PW2) to/before any receipts during his first information report thus cast doubt to whether his identification evidence supported by PW3 was a dock and an afterthought type.*

5. *That, the presiding Court erred to rely on the dock identification evidence and that of unfair and improper identification parade which was not supported by appellants' prior descriptions.*

6. *That, the appellants' conviction was wrongly based on a constructive doctrine of recent possession of a stolen motor vehicle Registration No. T. 560 DBU which was predicted on contrived and/or artificial evidence.*

The hearing was conducted via audio teleconference, and the appellant and Ms. Fyeregete Senior State Attorney for the Republic were remotely present.

The appellant had not much to say, rather he urged this court to adopt his grounds of appeal and argued that he did not commit the offense thus he prays this court to set him free.

On the part of the learned Senior State Attorney, she supported the conviction and sentence and opted to combine the 1st and 3rd grounds of appeal which relates to the cautioned statement and argue them together. She submitted that the appellant cautioned statement was recorded and the appellant admitted to having committed the offense. She went on to submit that PW1 and PW4 corroborated the evidence of the cautioned statement.

The learned Senior State Attorney went on to submit that PW1 testified in court and tendered an exhibit to prove the case. She added that PW2, a driver was entrusted by PW4, and PW3 also narrated how the appellant hired him to navigate him to a bar and they started to drink then the appellant and his fellow took the car and drove it to Mbeya. Ms. Fyeregete went on saying that PW3 was able to identify the appellant and his fellow and confirmed that they stole the car. She ended by stating that

the trial court based its decision on the cautioned statement and prosecution witnesses.

On the second ground of appeal, Ms. Fyeregete submitted that the appellant was arrested on 3rd November 2016 in Mbeya and his statement was recorded on 10th November 2016 a delay of 7 days but PW5 gave a reasonable explanation as to why they delayed recording the appellant statement since he was arrest in Mbeya and Police Officer were investigating the case as per section 50 (2) of the Criminal Procedure Code Cap.20 [R.E 2019]. She went on stating that in calculating the days in recording the statement the days of investigation are excluded. To support his submission she cited the case of **Jusuf Masalu Kiduri Elianaza v Republic** Criminal Appeal No. 113 of 2017 Court of Appeal Dodoma (unreported).

It was Ms. Fyeregete further submitted that the issue of voluntariness was decided by the trial court after conducting the trial within trial and the trial court found that the appellant made his statement voluntarily. She urged this court to disregard these grounds of appeal.

Ms. Fyeregete continued to submit that the appellant was arrested in Mbeya and the incident occurred in Mwanza that is why it took some days to arrest the appellant and the prosecution proved that he has committed the said crime.

In respect to the 4th ground of the appeal which relates to identification, she stated that PW2 testified and tendered his driving license in court and it was revealed that the alleged stolen car was existing since the prosecution witnesses tendered a sale agreement of the car to prove the existence of the stolen car.

Concerning the 5th and 7th grounds of appeal, she stated that the identification parade was not conducted and no witness testified that Identification Parade was conducted. But PW3 managed to identify the appellant and his fellow and was able to identify the appellant. Ms. Fyeregete further stated that even if the identification was weak the remaining evidence on record is heavy to ground conviction.

As to the 6th ground of the appeal, the trial Magistrate relied on cautioned statement and PW1 to PW4 evidence that the car was not found but the appellant sold spare parts and the appellant confirmed that they

sold the car to someone else thus the car was destructed and they sold spare parts. She urged this court to disregard this ground of appeal.

In conclusion, Ms. Fyeregete submitted that the trial court was right to convict and sentence the appellant.

In his brief rejoinder, the appellant argued that he was arrested on 3rd November 2016 but the cautioned statement was recorded on 10th November 2016 approximately 10 days after his arrest. The appellant bitterly argued that the prosecution did not apply for an extension of time and he was not brought before the Justice of Peace. He went on lamenting that PW3 testified that he locked the car door and was in possession of the car key but later he found that the car was stolen while he was in possession of the key. Thus, PW3 was guessing that the appellant and his fellow stole the car. He further lamented that none of the people who seated at the said bar were called to testify and he further lamented that the alleged stolen car was nowhere to be found and it was not tendered in court. He prays this court to allow the appeal and set him free.

I have given due consideration to the argument of both sides. Now I proceed to determine the appeal. I should state at the outset that in the course of determining this case, I will be guided by the canon of the criminal cases, which places the burden of proof on the shoulders of the prosecution at the standard of beyond all reasonable doubt. The issue for determination, in this case, will be *"Whether the evidence adduced by the prosecution was strong enough to ground a conviction for the offense charged".*

I have opted to start with the 6th ground of appeal, the appellant is claiming that he was wrongly convicted based on the doctrine of recent possession of a stolen motor vehicle with registration No. T 560 DBU. The issue of recent possession does not need to take much of our time. The prerequisites for applying the doctrine of recent possession are well enumerated. They evolve around proof that an accused person was found in possession of property that had been stolen recently. For the doctrine of recent possession to apply, there should, therefore, exist a nexus between the property stolen and the person found in possession of the said property. As it was observed in the case of **Patrick Jeremiah v Republic**, Criminal Appeal 34 of 2006 (unreported), **Iddi Muhidin @**

Kitamo v Republic, Criminal Appeal No. 101 of 2008 and in the case of **Godfrey Lucas v R** Criminal Appeal No.23 of 2013 (unreported), the Court of Appeal of Tanzania underscored the need to prove that stole property found in possession of the suspect must be positively identified to belong to the complainant.

In the instant case, the alleged property was said to be a motor vehicle and the said motor vehicle was not found neither identified by PW1, the owner; PW1 tendered a copy of the vehicle registration card and a contract of sale. In the instant case, the alleged property was said to be a motor vehicle and the said motor vehicle was not found neither identified by PW1, the owner; PW1 tendered a copy of the vehicle registration card and a contract of sale. The prosecution alleged that the car was disassembled thus they managed to collect some spare parts out of it. In my view, PW1 tried to prove ownership over the stolen motor vehicle but he could not establish that the appellant was caught in possession of the stolen motor vehicle with Reg. No. T560 DBU makes Toyota Carina.

Moreover, PW6 testified that they were looking for a stolen motor vehicle with Reg. No. T 876 DDP make Carina II and when interviewing the

appellant and his fellows they admitted to have stolen both motor vehicles with Reg. No. T876 DPP make Carina II and T 560 DBU make Carina. PW6 went on testifying that the appellants admitted to have sold the car to one Sudi Hububa. Hububa admitted to have bought the vehicle which was already disassembled and he sold the spare parts. Therefore, there was no any proof that the appellant was in possession of the alleged stolen Motor vehicle. Nonetheless, even the said spare parts were not found and related to the alleged stolen motor vehicle. Thus, the appellant was not found in possession of the alleged stolen spare parts. In summary, there was no nexus between the appellant and the property stolen. He could not, therefore, be convicted of the offense basing on the doctrine of recent possession. Therefore this ground of appeal is answered in affirmative.

Next in my consideration is the third ground of appeal, the grievance about the purported confession of the appellant that it was made out of time and involuntarily. It is not in dispute that the appellant's cautioned statement was recorded seven days after his arrest. This was in the clear conflagration of the law. The provisions of sections 50(1) and 51(1) of the Criminal Procedure Act, are explicitly applicable. Section 50 (1) provides:-

" 50 (1) .....the period available for interviewing the person, who is in restraint in respect of an offense is

a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offense;

b) ***if the basic period available for interviewing the person is extended under section 51****, the basic period as so extended". [Emphasis is added].*

It is my considered opinion that the description of "period available for interviewing" as used in section 50 (1) includes and covers a period for recording a cautioned statement as provided for under section 57 of the Criminal Procedure Act, Cap. 20 [R.E 2019].

The record reveals that the appellant was arrested on 3rd November 2016 and was interviewed on 10th November 2016. When testifying PW5 did not state the reason for the delay to record the cautioned statement, until when the appellant raised an objection. The trial court conducted trial within trial and PW5 had an opportunity to state reasons for delaying

recording the appellant's cautioned statement that they were investigating the matter. Therefore, I consider the reasons for the delay given by the Police Officer. However, it is settled law section 51 of the Criminal Procedure Act, Cap. 20 [2019] elaborates that the period for interviewing the appellant was ought to extend. PW5 was required to apply for an extension of time but that was not the case thus the same was non-compliance with section 51 of the Criminal Procedure Act, Cap. 20 [2019] which state as follows:-

> *"51. When a person is in lawful custody in respect of an offense during the basic period available for interviewing a person but has not been charged with the offense, and it appears to the police officer in charge of investigating the offense, for reasonable cause, that is necessary that the person be further interviewed, he may extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or*
>
> *b)* ***either before the expiration of the original period*** *or that of the extended period, make an application to a magistrate for a further extension of the period". [Emphasis is added].*

Similar, the Court of Appeal of Tanzania in the case of **Joseph Mkumbwa and Another v R** Criminal Appeal No. 9 of 2007 held that:-

> " ... ***it is now settled law that statements taken without adhering to the procedure laid down in section 48 to 51 of the CPA are inadmissible*** *(see Janta Joseph Komba and 3 others v R Criminal Appeal No.95 of 2006 (unreported). It follows, therefore, that Exh.P27 was not properly admitted. It should, therefore, be expunged from the records." [Emphasis is mine].*

In the instant case under scrutiny, there is no dispute that the recording of appellant's cautioned statement was beyond the basic period of four hours reasons was the delay was given by PW5 but there was no extension sought and obtained in terms of section 51 (1) (b) of the Criminal Procedure Act Cap.20 [R.E 2019]. It follows, therefore, that the appellant's cautioned statement was illegally obtained and was accordingly improperly admitted in evidence. Thus, I proceed to expunge Exh. P9 from the court record.

Having expunged Exh. P9 from the court record, I am left with no cogent evidence which is going to implicate the appellant with the offense charged.

With the foregoing observation and the findings which I have made suffices to hold that the trial court's conviction against the appellant was not proved beyond reasonable doubt and occasioned to failure of justice on the part of the appellant.

In the result and for the foregoing reasons, I allow the appeal and proceed to quash the appellant's conviction, set aside the sentence imposed, and order his immediate release from the custody, unless otherwise lawfully held.

Order accordingly.

DATED at Mwanza this 15th May 2020.

A.Z.MGEYEKWA

JUDGE

15.05.2020

Judgment delivered on this 15th May 2020 in the presence of Ms. Fyeregete State Attorney and the appellant.

A.Z.MGEYEKWA

JUDGE

15.05.2020