THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
DC. CRIMINAL APPEAL NO. 28 OF 2021
(Arising from the Resident Magistrate Court of Mbeya at Mbeya in Criminal Case No. 12 of 2019)

RICHARD JACKSON.....1ST APPELLANT
DAVID RABI @ MWASHINANI.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 05th October & 08th November, 2021

KARAYEMAHA, J

This is an appeal against conviction and sentence imposed on the appellants by the Resident Magistrate Court of Mbeya at Mbeya in Criminal Case No. 12 of 2019 on armed robbery offence allegedly committed by the appellants. By a charge sheet lodged in the trial court on 17/1/2019, the appellants faced one count of Armed Robbery contrary to ***section 287A*** of the Penal Code, Cap. 16 (R.E. 2002) [now R.E 2019]. The allegation is that on 28/11/2018 at Iwambi area within the City and Region of Mbeya, the appellants did steal one television make Samsung 42 inches, one mobile phone make Tecno, one wrist watch, three bags and clothes the properties of one Habib Morris and

immediately before or after stealing did use an iron pipe against the said Habib Morris to obtain such properties.

The appellants were charged in the same charge sheet along with Zuberi s/o Mboma @Mchungaji. The latter was charged with the offence of receiving stolen properties. However, after a full trial the trial Court acquitted him on reason that the charge against him was not proved to the hilt.

On the same transaction, the trial court was convinced that the appellants were properly and dully linked with the commission of the offence of armed robbery. They were consequently convicted and sentenced, to a term of 30 years imprisonment each. Aggrieved, the appellants preferred the present appeal which has raised ten (10) grounds of appeal as follows:

1. *That the trial court Magistrate erred of law and fact by convicting the appellant basing on the cautioned statement that the admitted (sic) to commit the offence without taking into consideration that any confession must have repeated (sic).*

2. *That the lower court magistrate erred in both points of law and fact when he convicted the appellant basing on an interested witness of police officer PW5,PW9,PW10,PW11 and PW12.*

3. *The trial court magistrate misdirected himself when he convicted the appellant relying on the prosecution case only ignoring the defense case.*

4. *That the trial magistrate misdirected himself when he convicted the appellant while the prosecution side failed to prove the case reasonable doubt (sic). please Hon. Judge see as ruled in the case of* ***MAZIKU SHIJA @ KIMUMU V. R.CR.APP No 382 of 2015 CAT BUKOBA*** *the court held this so say "in such circumstance we think that the appellant complaint raise some doubt as to the geniuses of the case for the like this one where there is doubt such is no resolve of the accused."*

5. *That the lower court magistrate erred in points of law and fact when he convicted the appellant on believing (sic) that properties stolen were belongs (sic) to PW1 while no any receipts submitted at court (sic) to justify the same allegation except the seizure certificate and the properties only.*

6. *That the lower court magistrate erred in points of law and fact by convicting the appellant relying on evidence of PW12 (exhibit P8) phone that was a property of the victim while no any supporting document of the said item that belong (sic) to him (PW1).*

7. *That the trial court magistrate grossly erred in point of law and fact by convicting the appellant while the law governed*

by section 235 and 312 of the CPA was not established (sic) please Hon. Judge refer to the case of ***KELVIN MYOVELA V.R.CR.APP.NO 603 OF 2015 CAT MBEYA [UNREPORTED] PAGE 4.5 AND 6.***

8. *That the court erred in law and fact when convicted the appellant on contradictory evidence of the prosecution side.*

9. *That my lord the trial court magistrate court erred both in points of law and fact by convicting the appellant 1st by considering they admitted to commit the offence without taking not that any confession must have repeated (sic) refers as ruled in the case of* ***BUSHIR MASHAKA AND 3 OTHERS V.R.CAT DAR*** *main registry in CR.APP. No 45/1991 [UNREPORTED] the court held that " If the accused person confessed while at police station the safest way to was to let him repeat his of* ***R.V HASSAN JUMANNE (1983) TLR 432****. It was held that "a confession made involuntary to a police cannot be the basis of conviction".*

10. *That the magistrate of lower court faulted (sic) by convicting appellant basing on exhibit P5 certificate of seizure without taking in to account that is in contravention with section 38(3) of the CPA please Hon. Judge refer as ruled in the case of* ***CHRISTOPHER CHACHA @ MSAMBI AND TWO OTHERES V.R.APP NO. 235 2009 CAT DSM [UNREPORTED] AT PAGE 13.*** *it was held "worst of all no receipt was issued at all in terms of section 38 (3) of the CPA in the absence of such a receipt signed by the 3rd appellants*

wife the house lady and or the 1st appellant it will be highly preposterous to imagine, leave a lone holing that there was such a search".

Hearing of the appeal pitted the appellants who fended for themselves against Ms. Zena James learned State Attorney who advocated for none other than her usual client, the respondent.

In order to have a clear picture of the ordeal from which the present appeal emanated, I find it apposite that I give, albeit in brief, the background of the case.

On the night of 27th December, 2018 around 2:00 a.m., Habibu Juma Morris (PW1) woke up and went to the wash room. While resuming to his bedroom, a person he identified the raster man due to his hair style, touched him and at the same time hit him with something on his head. He identified that person in court as the 1st appellant. According to him after being hit he run unconscious. It was the prosecution case on that the same date PW2 Stella Morris, his mother, tried to call PW1 to have lunch together but PW1 was not picking the phone. Following that event, she went to check on him only to find the door open but no response on calling. When she peeped through the window she saw him lying in the living room covered with a bed sheet. On entering in the house she found blood scattered in the room and

PW1 unconscious. The matter was reported to police. The victim was given a PF3 (Exhibit P3) that enabled him to undergo medical examination before Dr. Lazaro Mboma (PW8) which revealed that PW1 had sustained injuries on his head with multiple cut wounds caused by a blunt weapon. According to PW5 (E.6796 D/CPL Vincent) and PW8, PW1 was in a critical condition and could not talk.

On 28/12/2018, PW5 and PW9 (ASP Lwambano) in a company of PW2 went to PW1's house and confirmed that the door's lock was damaged and saw blood in the living room.

It was the prosecution case that on request, PW2 gave PW8 and PW9 PW1's mobile phone numbers. The said numbers which are not mentioned were sent to Dar es Salaam for investigation. The investigation results revealed that, PW1's mobile phone was being used by PW3 (Nuru John Mwamlinga). Following that information PW3 was arrested by police officers. In defence PW3 told the police officers that he bought it at a price of Tshs. 15,000/= from Ras. When Ras was arrested, he told the police that he got it from Richard Jackson (1st appellant). Both appellants were interrogated on 11/12/2018 and admitted to commit the offence. They later took the police to the 3rd accused who in turn took them to PW6 (John Romanus Nyasi) where the TV 42" was taken for repair. The 3rd accused mentioned the 1st

appellant being the one who took the TV to him hawking it. Moreover, when the 1st appellant's room was searched by PW 12 (Insp. Alifa William Ngonyani), three bags, wrist watch, phone chargers, phone lines and modem were retrieved and seized. Later bags were found containing PW1's clothes one of which was a T-shirt weaved NMB words.

The appellants constantly denied committing the offence. The 1st appellant's defence was that he was arrested on 09/12/2018 but was not told the wrong he committed. At police station he was tortured and later was forced to sign on documents after being told that he was to be taken to court. The second appellant also distanced himself from the incident contending that on 09/12/2018 was arrested by civilians on allegations that he stole the mobile phone. He was later beaten severely by police officers forcing him to mention the 1st appellant as the one who sold the mobile phone to someone.

Having heard both sides, the trial Magistrate was convinced that the prosecution proved its case beyond reasonable doubt against the 1st and 2nd appellants. In the event, he convicted and ultimately sentenced them to serve 30 years imprisonment each.

When parties were invited for the hearing, it was the 1st appellant who got us under way. He submitted in support of the 1st ground that

the trial court didn't consider the defence evidence but relied on the prosecution case.

Submitting on the 2nd ground, the 1st appellant complained that the trial court based its conviction on the seizure certificate which was neither supported by the chairman nor independent witness from the place where the search was conducted.

The appellant's further onslaught aimed at the 3rd ground faulting the trial court's stance of failing to conduct an inquiry when the cautioned statements were objected by him.

The 2nd appellant had nothing to offer. He simply subscribed to the 1st appellant's submission.

Ms. James commenced her submission by intimating her support, albeit partly, of grounds 1, 4 and 9 which she argued jointly. She supported in full grounds 5 and 6. She also indicated that she was opposing grounds 2, 3, 4, 7, 8 and 10.

With respect of grounds 1, 4 and 9 in a combined fashion, Ms. James contended that the trial Court was wrong to admit the repudiated 1st appellant's cautioned statement. She argued that whenever the cautioned statement is repudiated, the trial Court must stay the proceedings and conduct an inquiry to ascertain the voluntariness of the statement. She aided her position with the case of

Twaha Ally and 5 others v the Republic, Criminal Appeal No. 78 of 2004 CAT- DSM (unreported) at page 8. The consequence of this anomaly is to have the cautioned statement expunged from the record, she remarked.

Nevertheless, she was quick to submit that apart from expunging the 1st appellant's cautioned statement there was evidence of PW1 which proved the incident of armed robbery to have occurred. She stated further that PW1's was corroborated by the testimonies of PW5, PW9, PW10 and PW12 who all informed the trial court that the piece of iron was used in the ordeal.

Ms. James submitted in respect of the 2nd appellant's cautioned statement that it was admitted in evidence in compliance with the law. She stated that when PW11 prayed to tender it the 2nd appellant accorded a chance to object or not. According to her, he simply stated that his statement was recorded as reflected at page 43 of the proceedings. She submitted further that the issue of non compliance with the law was not raised during the trial as was required by law. She reinforced her position with the case of ***George Maili v R,*** Criminal Appeal No. 327 of 2013 CAT - Mwanza (unreported) at page 6.

Having this fact in mind, Ms. James submitted adding that confession by the accused is the evidence which can be admitted as the

best evidence because it is the only evidence which can enable conviction where it is found to be free and voluntary. She supported this position by citing the case of ***Seleman Hassani v. Republic,*** Criminal Appeal No. 364 of 2008 CAT- Dodoma (unreported) at page 4.

As regards ground two, the learned State Attorney admitted that PW5, PW9, PW10, PW11 and PW12 were police officers but submitted that they had no common intention because they testified on what they did. She termed the complaint as utterly baseless because the trial Magistrate did not base conviction on it alone.

Tackling ground three of the appeal in which the appellants decried what they contend to be failure by the trial court to consider their defence evidence and bank reliance in the prosecution case, Ms. James contended that the defence evidence was accordingly considered and evaluated as it is reflected at page 16 of the trial court's judgment.

Addressing the Court on grounds 5 and 6 in a combined fashion, Ms. James expressed an unequivocally support of the same and stated that the mobile phone (exhibit 8) was not properly admitted because PW1 failed to identify it even if it was found in possession of the appellants.

Submitting on ground 7, the respondent's counsel contended that the trial Magistrate complied with sections 235 and 312 of the Criminal

Procedure Act (Cap. 20 RE 2019) because the trial Magistrate specified the offence and section against which the appellants were convicted. She said adding that after convicting them, the trial Magistrate sentenced them as can be clearly seen at page 16 of the judgment. She held the view that this ground is devoid of any merits.

Coming to ground eight, Ms. James held the view that apart from the appellant complaining that the prosecution case was clothed with contradictions, they failed to point them out. She added, however, that even if contradictions existed did not disturb the central story that PW1 was invaded, harmed and his properties stolen.

Finally on ground ten, Ms. James drew my attention to the fact that exhibit P5 was not objected during the trial. She therefore moved me to consider this ground an afterthought.

On the whole, Ms. James held the view that the appeal is not meritorious. She reiterated her plea that the same be dismissed in its entirety.

The appellants were expectedly terse in their rejoinder. Punching holes in the prosecution case they submitted that PW1 failed to prove that his properties were stolen and the invasion incident. Furthermore, they asked this court to adopt their grounds of appeal and allow their appeal.

Having heard parties' rival submissions, my task now is to consider the merits or otherwise of the appeal, and the grand question is whether the appeal presents any credible and compelling case for departing from the view taken by the trial Court.

I embark on the disposal journey by taking on board matters considered by Ms. James on grounds 1, 4 and 9, and 5 and 6 to be useful as aspects that dispose of this appeal. Let me first address ground one, four and nine of the appeal in which the appellants fault the trial court on procedural irregularity in admitting exhibit P2 collectively. Led by the trial court's record, it is apparent that the 1st appellant's cautioned statement was tendered by PW5. From the trial court's record, it is clear that when PW5 prayed to tender it, the 1st appellant informed the trial court at page 24 of the proceedings as follows:

***1st accused**: I do not know about it.*

The trial Magistrate proceeded to admit it and the so called extrajudicial statement. Although he marked it exhibit P1, but in sequence it is exhibit P2.

The trial Magistrate proceeded to record the evidence. As correctly submitted by Ms. James, the trial Magistrate disregarded the 1st appellant's repudiation statement of exhibit P2. This was wrong both in law and practice. The constant practice which, in my considered opinion,

has crystallized itself into law is that when the accused repudiates the cautioned statement, the main case is to be stopped and conduct an inquiry with an intention to establish the voluntariness or otherwise of the statement through evidence. This position was emphasized by the Court of Appeal of Tanzania in ***Twaha Ally and Others*** (supra) that:

> *"If the objection is made after the 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 trial within trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

This trite position has endured for long and no magic can reverse it. In this case no inquiry was conducted. In my considered opinion the trial Magistrate was not better positioned to appreciate all the circumstances in which the confession was retrieved from the accused person hence a gross shortcoming. In whole, the effect of non compliance with the legal procedure ends in expunging the statement. In the event, exhibit P2 collectively is hereby expunged from the record.

Regarding the 2nd appellant's cautioned statement (exhibit P6) which in sequence it is exhibit P7, Ms. James submitted that the same was admitted in evidence in compliance with the law. She stated that when PW11 prayed to tender and the 2nd appellant accorded a chance

to object or not he simply stated that his statement was recorded as reflected at page 43 of the proceedings. I have closely looked at the trial court's proceedings. It is vivid as Ms. James has submitted that the 2nd appellant, when was invited to comment on the admissibility or not of his cautioned statement, simply stated as follows:

***2nd accused**: My statement was written/recorded down.*

The question that arises is whether by that statement, the 2nd appellant objected or not. The learned trial Magistrate did not evaluate the probity of the cautioned statement. He solely relied on the testimony of PW11 (D/SGT Allas) who had recorded that statement of the 2nd appellant and all his rights were duly explained. The learned trial Magistrate, without so much as conducting an inquiry to determine its voluntariness, concluded that the cautioned statement had credence to establish the offence leveled against the appellant even where the 2nd appellant had simply stated that his statement was recorded. I think the trial Magistrate had not to take this statement rightly. He was to solicit more from the 2nd appellant to get an unequivocal statement which in my view would amount to *"I object"* or *"I do not object"* whatever words that would amount to those. In my considered opinion, I differ with Ms. James' contention that by stating *"my statement was written/recorded"* meant *"no objection"*. If the 2nd appellant stood on his ground and the

learned trial Magistrate could not scan a proper meaning, I think he hand to conduct an inquiry. The inquiry would give him a broad understanding of what the 2nd appellant meant and whether or not it was voluntarily made. And that would mean a fair trial. Since under these circumstances an inquiry was very crucial but was not done, and the court admitted it evidence, the statement was improperly received; and the Court ought not to act on such evidence.

From the foregoing, I find that the cautioned statement was improperly admitted as exhibit P6 and I hereby expunge it from the records of the trial court.

This brings me to the evidence of the doctrine of recent possession under grounds 5 and 6. The doctrine in this case is grounded on the evidence that the mobile phone make Tecno found in possession of PW3 (Nuru John Mwamlinga) was PW1's property. PW1's was unable to identify it. That event forced Ms. James to an unequivocally support of the same and stated that the mobile phone (exhibit 8) was improperly admitted.

That being the situation, and bearing in mind that it was exhibit P8 which linked the investigators and PW3, its elimination from the evidence harms the prosecution case grievously. I am of that position because if it was not exhibit P8, PW3 could not be arrested. The

arresting of PW3 facilitate the arresting of the 1st and 2nd appellants and finally to the recovery of stolen properties. In the clear evidence linking the arresting of the 1st and 2nd appellant, it was possible that it was not the appellants who committed the offence.

In my considered opinion, this case depended solely on exhibits P6 and P8. Although there is tangible and strong evidence proving that the offence of armed robbery was committed, the appellants' complaints have punched holes in the prosecution case that it was not them who committed the charged offence.

A scrupulous review of the evidence reveals that PW1 did not identify the assailants. The remaining witnesses also did not know who invaded PW1. They were connected to them with exhibit 8. After being enabled by that exhibit, the prosecution case is that they arrested PW3 who mentioned the 1st appellant who again mentioned the 2nd appellant.

Another piece of evidence which links the appellants with the commission of the offence was the recovery 3 bags which contained PW1 clothes, a wrist watch, NMB T-shirt, trousers. However, in evaluating the evidence I do not see the linkage between the evidence of PW1 and the seized exhibit properties (exhibit P1 Collectively). I say so because the evidence on record does not disclose that PW1 looked at

the TV in court in the presence of everybody and then matched the serial numbers or shown the distinguishing peculiar features with either receipt or anything authentic. He just said he recalled its brand. Regarding clothes, PW1 simply said:

> *"Clothes are here. One of them is stitched with NBM words. The rest are my clothes which I am familiar with. Also the wrists watch (viling type)."*

This evidence has its shortcomings. Admittedly, T-shirts weaved with NMB words are many and common. They are not only owned by NMB workers but also customers and other people. Other clothes, PW1 did not clarify, and wrist watch, are also common items available for purchase in open market. PW1 was duty bound to identify them by special marks. I think that is why PW1 did not tender exhibit P1 in court. Of course there are no hard and fast rules as to who should produce an exhibit. However, in a fair determination of this case I think that prudence demanded that exhibit P1 be produced by PW1 whose evidence is that those were his properties. In my settled opinion, therefore, to prove ownership one must reveal special marks peculiar and different from others. In case no such special marks, receipts will serve the purpose. This has been a position long ago. It was stated in the case of ***Machia Mashenene and Another v Republic***, DC Criminal Appeal No. 13 of 2006 (HC) Dodoma unreported that:

"When a person reports a theft to the police, he should be called upon to describe the same fully. The description should include make of good, manufacturers, numbers, quantity and any distinguishing features such as size, colour, defects, reparation, etc. that a person identifying goods in court as being his should always be asked how he can distinguish them."

Deducing from the record of the trial proceedings, it is quite clear that the evidence which constituted the conviction of the appellant was, by and large that of stealing PW1's properties. This was the evidence by all prosecution witnesses.

Another crucial point to be noted is the seizing of the properties. The TV and other properties were seized on 11/12/2018 as per exhibit P4 and P5. It must be recalled that when PW5 and PW8 went to see PW1 in the hospital, the latter was in bad condition and could not talk. The question that comes to the fore at this juncture is who described those properties to enable them to distinguish them from the appellants' prosperities. PW11's evidence is clear that when the 1st appellant was interrogated he confessed and on searching his room they retrieved exhibit P1. However, there is no proof of this confession/admission. As already observed, PW1 failed to produce exhibit P1 in court intimating his disconnection with it coupled with the failure to dully identify it.

It follows that in view of the above shortcomings in the evidence, it cannot be safely said and concluded that exhibit P1 belonged to PW1 and invoke the doctrine of recent possession in the justice of this case. For this reason, the appellants ought to have been given the benefit of doubt and thereby earn acquittal.

This destines me to the conclusion that the prosecution evidence was weak and the charge against the appellants was not proved beyond reasonable doubt.

As the discussion above suffices to dispose of this appeal as it has, there is no need for this court to engage itself on the other grounds (2, 3, 7, 8 and 10) of the petition of appeal. In the fine, this court finds merit in this appeal. Consequently, convictions against the appellants are quashed. Sentences are set aside. If the appellants are not lawfully held, they are all declared free. They must be released forthwith.

Appeal allowed.

DATED at **MBEYA** this **8th** day of **November, 2021**

J. M. KARAYEMAHA
JUDGE