THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
DC. CRIMINAL APPEAL NO. 95 OF 2020
(Arising from the Court of Resident Magistrate of Mbeya at Mbeya in Criminal Case No. 19 of 2019)

RICHARD JACKSON @KASUMBI.....1ST APPELLANT
DAVID RABI @ MWASHINANI.....2ND APPELLANT
ZUBERI MBOMA.....3RDAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 11th & 16thNovember, 2021

KARAYEMAHA, J

On 22nd January, 2019 the appellants, namely, Richard Jackson @ Kasumbi, David Rabi @ Mwashinani, and Zuberi Mboma @ Mchungaji (herein the 1st, 2nd and 3rd appellants) were initially arraigned before the Court of Resident Magistrate of Mbeya at Mbeya along with Furaha Mbalwa where they were charged with three counts. The first count for the 1st and 2nd appellants was in respect of burglary contrary to section 294 (1) (a) and (2) of the Penal Code (Cap. 16 R.E. 2002) (herein the PC) [currently R.E. 2019]. It was alleged in respect of this count that on 6th December, 2018 at Iwambi area within the City and Region of

Mbeya, the 1st and 2ndappellants did break and enter in the house of Miriam Mtaita with intent to commit offence therein, to wit, stealing.

The second count for the 1st and 2nd appellants concerned stealing contrary to section 258 (1) and 265 of the PC. It was plainly laid in the particulars of the offence that on the 7th December, 2018 at Iwambi area within the City and Region of Mbeya, the 1st and 2nd appellants did steal one television make Samsung worth Tshs. 2,950,000/=, one phone make Tecno worth Tshs. 45,000/=, flash GB 32 worth Tshs. 36,000/=, remote control and a charger worth Tshs. 15,000/= all properties valued at Tshs. 3,046,000/= the properties of Miriam Mtaita.

The third count for the 3rd appellant involved receiving a stolen property contrary to section 311 of the PC. The particulars of the offence were to the effect that on the 7th December, 2018 at Kabale area within the City and Region of Mbeya, the 3rd appellant received stolen properties from Richard Jackson @ Kasumbi and David Rabi @ Mwashinani to wit; one Television make Samsung worth Tshs. 2,950,000/= the property of Miriam Mtaita.

Lastly, the fourth count for the 4th accused was in respect of found in possession of stolen properties contrary to section 32 (1) (b) of the PC. It was alleged that on 7th December, 2018 at Mbalizi area within the City and Region of Mbeya, the 3rd appellant did receive and possess

stolen property from Zuberi Mboma @ Mchungaji, to wit, one Television make Samsung worth Tshs. 2,950,000/= the property of Miriam Mtaita.

As it were, the trial of the appellants and the 4th accused person proceeded after they had pleaded not guilty to all counts. To support the case, the prosecution summoned six (6) witnesses, namely, Miriam Mtaita (PW1), Daudi Dulle (PW2), E6796 D/CPL Vicent (PW3), E8243 D/CPL Osward (PW4), F4948 D/CPL Msamaha (PW5) and ASP Boniface Luambano (PW6). In addition six (6) exhibits, namely, a receipt, seizure certificate, cautioned statements, and a TV 55 inches were tendered and admitted as exhibits PE1, PE2, PE3, PE4, PE5 and PE6 respectively.

Briefly, the substance of the prosecution evidence was that on 7th December, 2018 at 8:00hours PW1 was informed by Suzana, her neighbour that her house's door leading inside the sitting room was open. When she entered inside, she learnt that a Television make Samsung 55 inches black in colour valued at Tshs. 2,950,00/=, a flash 16 GB worth Tshs. 36,000/=, a small Tecno phone worth Tshs. 45,000/= and Azam TV remote control worth 15,000/= were missing. The matter was instantly reported to the ten-cell leader and street chairman, and later to Iyunga Police Station.

Investigation was mounted on. Since a mobile phone was stolen, in view of PW6 they found it with someone. That someone told the

Police Officers that he got it from the 2nd appellant who also told them that he got it from the 1st appellant. According to PW6 the 1st and 2nd appellants confessed to steal TVs and took them to the 3rd accused to conduct a search. The 3rd accused told them that he took them to the 4th accused repair. When they went to the 4th accused, they got several TVs including a TV 55 inches. In the end the 1st, 2nd, 3rd, appellants were arrested along with the 3rd accused.

In their respective defences, the appellants and the 4th accused distanced themselves from the incident. The 1st appellant contended that he was arrested on 09/12/2018 at his work place and taken to police station without being told the reason. He was tortured thereat and forced to give his statement. Later he was made to sign on papers without reading them.

The 2nd appellant told the trial court that he was arrested by civilians on 09/12/2018 at Shigamba – Mbalizi and taken to Police. It was his defence that he was beaten and forced to mention names of those he committed the offence with. After a month he was given papers to sign before he was arraigned to court. He, however, admitted that the 3rd appellant was interrogated and said that the TV was at the 4th accused but not that he received it from them.

The 3rd appellant testified that he received the TV form the 1st appellant on 06/12/2018 who was looking for a customer. The 4th accused wanted to buy it but demanded a receipt. On 07/12/2018 the 1st appellant took the TV 55 inches to the 4th accused but he could not buy it so it was kept at the shop. On 11/12/2018 around 00:00hours Police went to his house and managed to get TVs one of the being 42 inches. He defended himself that he was not buying TVs but connecting the 1st appellant with buyers.

Having heard both sides, the trial Magistrate concluded that charges against the 1st, 2nd and 3rd appellants were proved beyond reasonable doubt. He therefore, convicted them and finally sentenced the 1st and 2nd appellants to serve 7 years imprisonment in respect of the 1st count and 5years imprisonment for the 2nd count. Terms of imprisonment were ordered to run consecutively. The 3rd appellant was sentenced to serve 4 years imprisonment in respect of the 3rd count. The 4th accused person was acquitted on the reason that evidence against him was insufficient.

To express their disagreement with the decision of the trial Court, appellants lodged a joint petition of appeal containing ten grounds of appeal. Nonetheless, having scanned through them, they can be conveniently joined to 7 grounds and paraphrased as follows:

1. That, appellants after making their statements at police were not taken to the justice of the peace to repeat their confessions to confirm their voluntariness.
2. That, the trial Court erred in law and fact by relying on PW1's evidence which was contradicting.
3. That the trial Court failed to consider the defence evidence.
4. That the trial court erred in law and fact by failing to comply with section 235 (1) of the Criminal Procedure Code (Cap. 20 R.E. 2019).
5. That the trial Court erred in law and fact by relying on the evidence of PW3, PW4, PW5 and PW6 who were police officers and same interest.
6. That the 1st and 2nd appellants were not arrested at the scene of the crime breaking and stealing and were not found with any stolen properties.
7. That the prosecution case was not proved beyond reasonable doubt.

Hearing of the appeal pitted the appellants who fended for themselves against Ms. Sarah Anesius who represented the respondent. The respondent republic supported the conviction and sentence imposed on appellants.

Having closely examined the evidence before the trial court, the submission by parties and the law, I am of the firm view that this appeal may be determined by considering the following matters:

1. The cautioned statements.
2. Whether the prosecution case was proved beyond reasonable doubt.

On the first ground the 1st appellant stated briefly that he objected to the admission of his cautioned statement but the trial court overruled his objection and received it.

In her reply, Ms. Sarah submitted that when the cautioned statements were tendered by PW3 and PW5, the first appellant did not object so it was admitted without any ado. However, when the 2nd appellant objected admissibility of his cautioned statement, the court conducted an inquiry and finally admitted it. The 3rd appellant also didn't object admissibility of his cautioned statement and it was ultimately admitted. Therefore, the requirements of the law were complied with.

Having dutifully examined the record, this court is satisfied that there are vivid irregularities that the trial Magistrate should have addressed his mind to and come up with clear findings in so far as the law governing the recording, tendering and admitting in evidence of cautioned statement is concerned.

One such clear irregularity is that according to the record, is that appellants' cautioned statements were admitted after being cleared and legally admitted. However, they were not read over to the appellants. This was a serious irregularity. The general rule is that after admitting documentary evidence, the trial Magistrate must cause the statements read over to the accused persons. This principle has been restated on innumerable times. In ***Robert P. Mayunga and Another v The Republic***, Criminal Appeal No. 514 of 2016 CAT-Tabora dated 5th December, 2019 it was held:

> *"It is settled law in our jurisprudence which is not disputed by the Learned Senior State Attorney that documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequence of being expunged from the record of proceedings."*

See also the case of ***Robinson Mwanjisi v. R*** [2003] TLR 218.

I take inspiration from the foregoing decision to underscore my view that the trial was marred by irregularity with respect to admitted cautioned statements.

The other clear irregularity is that according to the record, the third appellant's cautioned statement (exhibit PE4) was recorded on 11/12/2018 starting at 8:00hours, the 1st and 2nd appellants' cautioned statements (exhibit PE5 collectively) were recorded on 13/12/2018

starting at 14:00hours. The appellants, again going by the evidence on record, were arested by the Police on 09/12/2018. There is no evidence suggesting that they were released in between the said arrest and recording of the cautioned statement. This, in my view, contravened the provisions of sections 50 and 51 of the Criminal Procedure Act which in essence provide a time framework of when and how such a document should be recorded. Initially, the recording must take place within four hours from the time of arrest (section 50 (1) (a)) or extended to a period not exceeding 8 hours (section 51 (1) (a)). Further than that, the period has to be extended by magistrate (section 51 (2). The cautioned statements herein recorded some days (3 exhibits PE4 and 4 PE5 respectively) after their arrest. There is no proof that the provisions of sections 50 and 51 of the CPA were complied with by seeking and obtaining such extension of time from a Magistrate. This irregularity in itself makes the said statement inadmissible.

The two irregularities, together with others that I have noticed in this respect, cannot be allowed to stand. The said statements, therefore, suffer a natural consequence of being expunged from the record.

After expunging the cautioned statements, the vexing issue is whether charges laid by the prosecution were proved beyond doubt. Having critically examined the evidence on record, it is abundantly clear

that it was not. PW1 did not see thieves who broke into her house and stole her properties. A close examination of PW6's clearly demonstrates that it is disjointed. It does not give a neat flow. He testified that after getting information that there were robbery and theft incidents, he was informed by the informer on TV, phone and other stolen properties. On making follow up, they found one phone the property of one complainant. PW6 did not give more details with whom the phone was found with. What type of the phone was found? Whose complainant that phone was? The said phone was not tendered in court as an exhibit. Seemingly, what linked the police investigators with the 1st and 2nd appellants and finally the 3rd appellant was the mobile phone which PW6 said it was found with some one he failed to mention. In my considered view, since the phone which enabled PW6 and other police officers to arrest the appellants was not part of the evidence, it is difficulty to trust him on how they laid hands on the appellants. It is also doubtful if the appellants were the ones found in possession of the TV 55 inches.

To hummer home my thinking, I agree with the prosecution that PW1's house was broken in and some properties including a TV 55 inches were stolen. However, the appellants' complaints in the instant appeal punches holes in the prosecution case that they were arrested for other reasons than this and then found themselves in court facing

these charges. I could have believed that the 3rd appellant had some evidence connecting the 1st and 2nd appellant. Unfortunately, his defence is to the effect that the 1st appellant took him a TV of 55 inches on 06/12/2018. This means it was taken to him before it was stolen on 07/12/2018. It was the same TV which was found with the 4th accused. If logic has to prevail, the seized TV was not the one stolen from PW1

My unfleeting review of the evidence reveals that PW1 did not know who stole his property as hinted earlier on. The remaining witnesses also did not know the thieves. Appellants and police investigators were connected by help of a phone. Nonetheless, the said phone was not tendered in court and the one found with it was not produced in court to testify. Again the owner of that phone was not known. The failure to produce him/her invites this court to draw an inference that he/she had evidence contrary to what the prosecution prepared. To explain this in a clear language, I wish to borrow words of wisdom from Sisya, J stated in the case ***Hemed Said v Mohamed Mbilu***, [1984] TLR 113 thus:

> *"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the party's interest."*

In my view, the person found with phone by Police Investigators including PW6, was a very important witness. Through him we could first get the phone and secondly, get his story on where he got the said phone and who either gave it or sold it to him.

In the foregoing, I am of the firm view that it was not the appellants who committed the alleged offences. This then, destines me to the conclusion that the prosecution's evidence is weak and the charges against the appellants were not proved beyond reasonable doubt. As grounds one and seven grounds suffice to dispose of this appeal, as they have, there is no need to labour into other grounds as that exercise will not be useful. In the fine, this court finds merits in this appeal and it is hereby allowed. Conviction is quashed and sentences meted against the appellants are set aside. I order their immediate release from prison unless their continued incarceration is related to other lawful cause.

It is so ordered.

DATED at **MBEYA** this **16th day ofNovember, 2021**

THE HIGH COURT OF TANZANIA

Karayemaha
JUDGE