IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 51 OF 2021

(Arising from Criminal Case No.176 of 2019 in the Court of the Resident Magistrate of Mbeya at Mbeya)

Between

NASSIB JUMA MZUMBWE @ BITO..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

A.A. MBAGWA J.

The appellant herein was arraigned before the Court of the Resident Magistrate of Mbeya at Mbeya on an indictment of two counts namely, burglary contrary to section 294(1) and (2) of the Penal Code and stealing contrary to sections 258(1) and 265 of the Penal Code.

Upon a full trial, the trial court acquitted the appellant with the first count of burglary on the ground that the charge did not specify the time at which the offence was committed. However, the trial court found the appellant guilty and convicted him of stealing. In consequence, the appellant was sentence

to serve a jail term of five (5) years and subsequently pay the stolen properties.

The appellant was not amused by the findings, sentence and orders made by the trial court hence he has come to the High Court to assail them.

In the trial court, it was alleged by the prosecution that on 29th day of November, 2018 at Iwambi within the city and region of Mbeya the appellant in the company of others broke the house of one Dr. Nyanda Ntinginya and therein stole various properties to wit, television make LG, music speakers and two tablets. The appellant denied the allegations and for that reason the prosecutions brought five (5) witnesses along with three exhibits whilst the appellant stood alone to defend himself.

It was the prosecution evidence that on the fateful day PW1 Mwise Jackson woke up at night for short call only to find the main house's door open. On coming close, he noticed that one of the windows was broken. Thus, he awakened PW5 Dr. Nyanda Elias Ntunguja who was sleeping in the main house. They then noticed that television make LG, music speakers and two tablets were missing. Thereafter, the matter was reported to Mbeya Central Police Station and to the neighbours.

According to PW3 D/CPL Ramadhan, the investigation commenced immediately and on 14th day of May, 2019 was informed that one of the culprits (appellant) was arrested. PW3 therefore went to interview the appellant who confessed to have committed the offence. PW3 recorded the caution statement which was tendered without objection and admitted as exhibit P2. Further, on 19th day of May, 2019, the appellant led the police to scene of crime. According to PW1, PW2, a ten-cell leader of the area and

PW3, the appellant demonstrated them how they broke and entered the house. Though the broken window had been repaired, the appellant was able to point it.

After visiting the scene of crime, the appellant was taken before justice of peace. PW4 Isaya Mtunguja told the court that the appellant was brought to him on 20th day of May, 2019. He inspected the appellant and found him in good health condition. Further, the appellant assured him that he voluntarily chose to confess. PW4 recorded extra-judicial statement of the appellant in which the appellant confessed and the same was tendered without objection and admitted as exhibit P3.

During defence, the appellant stood the only witness. Basically, his defence centred on the allegations of torture in both caution statement and extra-judicial statement. He claimed that he was harshly beaten by PW3 in order to make caution statement. The appellant further testified that he was threatened by PW3 before he was taken to justice of peace PW4 as such, the extra-judicial statement was a result of threats from PW3.

Based on the evidence adduced, the trial magistrate was satisfied that the second count of stealing was proved beyond reasonable doubt. He thus, convicted and sentenced the appellant as hinted above.

As indicated above, the appellant was not satisfied with the decision of the trial court hence he filed to this Court a petition of appeal containing the grounds which can be rephrased as follows;

1. That the learned trial magistrate erred in law and fact to convict the appellant with the offence of stealing whereas he was not arrested

with the stolen properties nor were the stolen items produced in evidence.

2. That the trial magistrate erred in law and fact when he denied the appellant the opportunity to object the tendering of caution statement (P2) and extra-judicial statement (P3).
3. That the trial magistrate erred in law and fact when he relied on the caution statement and extra-judicial statement to convict the appellant whereas the same were involuntary.
4. That the trial magistrate erred in law and fact to believe the testimonies of PW2 and PW3 that the appellant confessed before them.
5. That the trial magistrate erred in law and fact to base his conviction on uncorroborated evidence of the caution statement (P2) and extra-judicial statement(P3).
6. That the trial magistrate erred in law and fact to rely on the contradictory evidence of PW1 and PW2 on the number of the culprits who went with PW3 at the scene of crime.
7. That the trial magistrate erred in law and fact for not reading to the appellant the memorandum of undisputed facts.

When the matter was called on for hearing, the appellant appeared and prosecuted the appeal in person whilst the respondent/Republic had the representation of Hannarose Kasambala, learned State Attorney.

As usual, the appellant, being unrepresented, did not have much to expound on the grounds of appeal. He thus, prayed the State Attorney to submit first.

Ms Kasambala was in total opposition of appeal. She submitted that it is true that the appellant was not found with the stolen properties nor was he seen at the scene of crime but he was implicated by his caution statement (P2) and extra-judicial statement (P3). She further submitted that in addition to the confession, appellant took the police to the scene of crime and explained how he committed the offence in front of PW1, PW2 and PW3. The learned State Attorney concluded that the complaints had no merits.

Regarding the grievance that the appellant was not given opportunity to object the caution statement and extra judicial statement. The respondent's counsel strongly countered the complaint. She referred the Court to page 25 and 30 of the trial court proceedings and submitted that it is clear that the appellant was given the opportunity and the appellant informed the trial court that he had objection. She continued argue that even during preliminary hearing the appellant admitted at page 8 that he confessed before justice of peace. The State Attorney therefore pray the court to dismiss this ground as well.

Coming to the complaints that he did not give the confession statements voluntarily and that the statements were not read out after their admission, Ms Kasambala submitted that the appellant did not object the admission of the statements hence there was no other thing the court could do. She cited the case of **Nyerere Nyague vs the Republic,** Criminal Appeal No. 67 of 2010, CAT at Arusha and submitted that the Court, at page 7, held that a confession or statement is presumed to have been made voluntarily until objection to it is made by the defence on the ground , either that it was not voluntarily made or not made at all. The State Attorney said that since

the appellant did not object their admission, this Court should believe that he made them voluntarily. Further, Ms Kasambala said that, as per the proceedings, it is clear that the statements (exhibits P2 and P3) were read out after their admission and the appellant was given opportunity to cross examine but he did not examine PW3 and PW4 on the aspect of voluntariness of the statements. As such, it was an afterthought for the appellant to raise it during his defence, the State Attorney submitted.

Ms Kasambala told the Court that the law is very clear that non cross examination on important issue is tantamount to admission of the fact. She sought support of her argument from the decision of the Court of Appeal in the case of **Martin Misara vs the Republic, Criminal Appeal No. 428 of 2016, CAT at Mbeya** where it was held that as matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said.

Furthermore, the State Attorney submitted that the trial court considered his defence and remarked that the appellant ought to raise his objection during admission. This is found at page 9 of the trial court judgment. As such she said that this ground has no merits as well.

With regard to the ground that the court convicted him basing on uncorroborated caution statement and extra judicial statement, the State Attorney conceded that the caution statement and extra judicial statement cannot corroborate each other as was held in the case of **Mashimba Dotto Lukubanija vs the Republic, Criminal Appeal No. 317 of 2013, CAT at Mwanza**, in particular at page 7. She, however, submitted that there was corroboration from the testimony of PW1, PW2 and PW3 in that they

testified that the appellant admitted before them that he broke the house and stole the properties.

On the issue of contradictions in the testimonies of PW1, PW2 and PW3 in respect of the number of suspects who went to show the police the scene of crime, the State Attorney was opined that the contradiction was minor as it did not go to the root of the offence. She said that it remains a fact that the appellant stole the properties and PW1 and PW2 identified him in court that he is the one who took the police to the scene of crime.

With respect to the memorandum of agreed facts, the State Attorney said that at page 8 of the proceedings it is evident that the appellant indicated the facts which he did not dispute and thereafter he appended his signature to signify that he was read and understood what he admitted.

More so, the State Attorney, expounded that all the prosecutions witnesses testified that the stolen properties were not recovered thus, it was irrational to demand their production in evidence.

Finally, Ms Kasambala pray the Court to dismiss the appeal and uphold the conviction and sentence meted out by the trial court.

In a brief rejoinder the appellant reiterated that he was not read the memorandum of agreed facts. However, on being shown the original court record, he conceded that on 10/12/2019 that the appellant signed memorandum of agreed facts. Also, the appellant added PW5 failed to produce the receipt s of the allegedly stolen properties.

Finally, the appellant submitted that the prosecution did not prove the case beyond reason doubt hence he prayed the court the quash conviction and set aside the sentence.

Ahmada.

I have thoroughly gone through the record of appeal and had an opportunity to scrutinize the evidence and submissions made by the parties. It is common cause that this case wholly rests on circumstantial evidence as the appellant was not seen committing the offence. The pivotal issue therefore for determination is whether the circumstantial evidence is cogent enough to ground the conviction.

In have decided to analyse and evaluate the evidence afresh and found that the only implicating evidence in this case is the appellant's confessions both written and oral. Whereas I agree that evidence which needs corroboration may not be used to corroborated another evidence in order to ground conviction, it is a settled law that a retracted confession is sufficient and alone can ground conviction if the court is satisfied that the confession was nothing but true. See the case of **Dickson Elia Nsamba Shapwata & Another vs the Republic**, Criminal Appeal No. 92 of 2007, CAT at Mbeya.

In this case, the appellant confessed before PW3 through the caution statement (exhibit P2). Further, he was taken before justice of peace (PW4) where he also confessed via (exhibit P3). PW4 clearly testified that he asked the appellant whether he voluntary to give the statement and the appellant confirmed. In addition, PW4 said that he inspected the appellant and found him in good condition as he had no signs of beatings. To crown it all, when the appellant was given opportunity to comments on the statements, he told the court that he had objection. This is clearly reflected at page 24 and 31 of the typed proceedings. More so, they two statements were read loudly in court but the appellant did not ask PW3 and PW4 any question regarding voluntariness of the statements.

I took trouble to read the impugned statements namely, P2 and P3. In my considered findings, they are true confessions in that the appellant explained very well how he committed the offence. The appellant went further to tell that he and his associates Bright, Mwaimu and Bosco after stealing the said properties, they sold them to one Adam. Indeed, the confessions leave no doubt in my mind that the appellant was responsible for the offence he was convicted of.

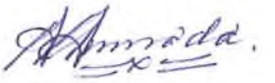
There is also oral confession from PW1 Mwise Jackson and PW2 Amoni Njile. These two witnesses testified that the appellant confessed before them and demonstrate while at the scene of crime how he broke and entered the house. It is also the law that oral confession is admissible. See the case of **Patrick Sanga vs the Republic**, Criminal Appeal No. 213 of 2008, CAT at Iringa.

Therefore, like the trial magistrate, I am satisfied that the confessions in this case were sufficient to ground conviction. It is thus my considered views that the case against the appellant was proved beyond reasonable doubt.

In the event, I find this appeal meritless, the consequence of which I dismiss it. The conviction entered and sentence meted by the trial court are upheld.

It is so ordered

The right of appeal is explained.



A.A. Mbagwa
Judge
27/12/2021

This judgment has been delivered in the presence of the appellant and ....

For the Republic this 27th day of December, 2021

A.A. Mbagwa
Judge
27/12/2021