IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC. CRIMINAL APPEAL NO. 44 OF 2021

(Originating from the District Court of Iringa at Iringa in Criminal Case No. 110 of 2019)

MASOUD BAHATI MLIUKA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Date of Last Order: *09/03/2022*
Date of Judgement: *15/06/2022*

MLYAMBINA, J.

This appeal stems from the decision of the District Court of Iringa at Iringa, where the Appellant herein one Masoud Bahati Mliuka and Three Others were jointly charged with a total of six counts. Three of the offences relates to armed robbery which is contrary to *sections 287A and 258 (1) Penal Code [Cap16 R. E. 2019].* The other three counts concerned with causing grievance harm contrary to *section 225 of the Penal Code (supra).* The allegations of each particular offence implicating the Accused Persons is shown through the charge sheet found in the trial Court's proceedings.

The trial Court's record reveals that the prosecution brought twelve witnesses and tendered several exhibits while the Appellant together with his fellow Accused Persons relied on their sole own evidence.

After a full trial, the second, third and fourth Accused Persons were acquitted. The Appellant who was the First Accused was nevertheless found guilty on all six counts, thus convicted and sentenced to thirty years imprisonment. Being aggrieved and in an attempt to dig into his innocence, he has now approached this Court by way of a Petition comprised of seven (7) grounds of appeal. The for sake of avoidance of repetition, the same will be slightly referred to along the arguments of this Court.

At the hearing of this appeal, the Appellant was represented by Mr. Jally Mongo, Learned Advocate whereas the Respondent/Republic was represented by Ms. Magreth Mahundi, learned State Attorney.

Upon taking the floor, Ms. Magreth Mahundi, primarily informed the Court that she does not object the appeal. According to Ms. Magreth, some there are procedural irregularities which creates doubts on whether the prosecution side proved their case at the required standard. The

learned Counsel submitted that, at the trial Court, the Republic claimed that the Appellant and 3 Others on 22nd February, 2018 at Mkwawa University College of Education (MUCE) area in Iringa Municipality did stole one (1) Laptop THINK PAD Model T450 valued at TZs 1,500,000/= Mobile Phone HUAWEI Honor Make worth TZs 1,500,000 and Monies to the tune of TZs 7,700,000/= and Chinese Yuen equivalent to TZs 161,479.84 all valued at TZs 10,861,476.84/=, 3,781,264.49/=, 4,474,000/=. That, while stealing they had machete, iron bar and scissor. The Accused Persons did also cause grievous harm to Bian S/O XU, Liming S/O Pang and Yun Yong S/O Zong.

She narrated that, the incident happened in the night. There was no eye witness. The victims did not adduce evidence. Their statements were admitted in Court under *Section 34B of the Law of Evidence Act, Cap 6 [R.E. 2019].* She submitted further that the police officers released Other Persons who were arrested with the Appellant. The acquitted persons admitted during their caution statement. Also, the Appellant admitted in his confession statement. Both the cautioned statement and the confession statement of the Appellant was admitted but not read as it can be seen at page 19 and 12-13 of the typed trial Court proceedings

contrary to the requirement of the law. She invited this Court to go through the case of **Wilson Musa @ Jumane v. The Republic,** Criminal Appeal No. 109 of 2018 Court of Appeal of Tanzania at Arusha (unreported) at page 11. The irregularities are fatal. The remedy is to expunge them.

Eventually, she submitted that, if the confession and caution statements are expunged, there is no other evidence which connects the Appellant with the offence. This is due to the fact that the victims in their statements did not recognize any of the Accused Persons. Thus, she prayed for this appeal to be sustained.

In response, Mr. Jally Mongo for the Appellant submitted that exhibit P1 which form the base for the Appellant 's conviction was admitted without conducting an inquiry as per page 16 of the Judgement. He referred the Court to the case of **Yohana Kulwa @ Mwigulu and 3 Other v. The Republic**, Consolidated Criminal Appeals No. 192 of 2015 and 397 of 2016, Court of Appeal of Tanzania at Tabora (unreported) at page 8-10.

Further, Mr. Jally argued that the certificate of seizure (exhibit P2) and the charge sheet are not in tandem. In the charge sheet, one of the

stolen properties was Laptop Think Pad Model T450 (1st and 2nd Count) but in the certificate of seizure mentions Laptop Lenovo Think Pad T440. Another property was a phone model Honor, Gold ID-LTE-BLN -AL40. It is exhibit P2. In the charge sheet: First count; Mobile Phone Huawei Honor. Second count; Mobile Phone Huawei P9. Third count: Mobile Phone Huawei P9.

That there is a variance between the particulars of the charge and the evidence specifically exhibit P2. He invited this Court to make reference to the case of **Mosota Jumanne v. The Republic**, Criminal Appeal No. 137 of 2016 Court of Appeal of Tanzania at Tabora (unreported), at page 11. Therefore, the stolen properties were not proved.

Moreover, he submitted that the Appellant was convicted based on exhibit P16. Such statement lacks weight too because there is no description of the stolen goods to see if they are the same with those in the charge sheet. *Section 34B (2) (c) of the Evidence Act* requires certification of the one who gives statement. In this case, Salma Mussa did not give certificate. Instead, the certificate was given by the Police Officer who was a mere recorder. To back up his submission, he referred

the case of **David Livingstone and 8 Others v. The Republic**, Criminal Appeal No. 146 of 2015 Court of Appeal of Tanzania at Mbeya (unreported) at page 15.

Finally, he prayed the appeal be sustained as there is no any evidence which implicates the Appellant. He therefore prayed that the conviction and sentence be quashed, nullified and set aside and the Appellant be set free.

From my optimum study of the records of the trial Court in combination to the grounds of appeal as argued by both sides, I am satisfied that learned trial Magistrate arrived at a wrong conclusion since he/she failed to evaluate the evidence and attend some material irregularities.

Firstly, as rightly pointed by the Respondent, both the cautioned and confession statements were not read after being cleared for admission. It is trite law that the documentary evidence must be initially read for admission and then actually be admitted before it can be read out. Reference can be made to the case of **Robinson Mwanjisi & 3 Others v. Republic** (2003) TLR 218 and **Walii Abdullah Kibutwa & 2others v. Republic**, Criminal Appeal No. 181 of 2006 (unreported).

In the case at hand, there is no place in the typed proceedings which shows that the cautioned statement and confession statement of the Appellant was admitted and then read over before the Appellant. This being the obvious, I concur with Ms. Magreth Mahundi, that the cautioned statement ought to have been expunged. Since the trial Magistrate failed to do so, I hereby expunge both the cautioned and confession statement from the trial Court records. Such act is *in tandem* with the decision in the case of **Wilson Musa** *(supra).*

Secondly, I have discovered that there is no any other evidence which implicates the Appellant with the offences which he was charged and convicted for. It can be seen from the typed proceedings of the trial Court, the victims testified that they did not reorganize the culprits and the evidence to support their case. The evidence given by Mis Salma Mussa fall short of the requirement of the law. Thus, there was no enough evidence to prove the offences against the Appellant and so the conviction.

In criminal law, the burden of proving a criminal charge is on the prosecution. It is well established that the standard of proof in criminal cases is proof beyond reasonable doubt. *(See section 110 of the Evidence*

Act (supra)) and that, in any case where there is reasonable doubt such doubt must be resolved in favor of the accused. For that matter the accused is not required to prove his innocence.

In this particular case, there was no evidence proving beyond reasonable doubt that the Appellant committed the offence charged. He was therefore wrongly convicted by the trial Court.

All considered, I am satisfied that this appeal is meritorious. Hence, I hereby reverse the decision of the trial Court, quash the Appellant conviction on all counts, set aside the sentence which was imposed on him by the District Court of Iringa. I further order that he should immediately be released from prison unless otherwise he is lawfully held on any other charge.

It is so ordered.

Y. J. MLYAMBINA

JUDGE

15/06/2022

Judgement pronounced through virtual Court and dated this 15th day of June 2022 at 09: 55 am in the presence of the Appellant and Senior Learned State Attorney Ms. Blandina Manyanda for the Respondent. Both parties were stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal explained.

Y. J. MLYAMBINA

JUDGE

15/06/2022