IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 109 OF 2021

(Originating from the Court of Resident Magistrate of Mbeya, at Mbeya, in Criminal Case No. 204 of 2018)

EMMANUEL NGOSHA @ SHETA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 25.03.2022

Date of Judgment: 13.05.2022

Ebrahim, J.

In the Court of Resident Magistrate of Mbeya, at Mbeya the appellant EMMANUEL NGOSHA @ SHETA and other two person (not subject of this appeal) were charged with three counts. The appellant and another who was a 2nd accused were faced with two counts of burglary contrary to **section 294 (1) (a) and (2); and stealing contrary to sections and 258 (1) and 265 of the Penal Code, Cap. 16 R.E. 2002 (Now R.E. 2019).** Whereas the 3rd accused was faced with one count of receiving a stolen property contrary to **section 311** of the same law. The appellant and his co-accused

were found guilty on the two counts as they were charged. The 2nd accused was convicted in absentia since he went at large. Consequently, the appellant was sentenced to serve four (4) years in prison for the 1st count and three (3) years for the 2nd count. The sentences were to run concurrently.

It was alleged by prosecution that the Appellant and the another person on the 4th day of August 2018 at New Forest within the City and Region of Mbeya did break and enter the house of one Anna d/o Mwashusa with intent to steal. That they did steal one Television (TV) make Samsung valued at Tshs. 1,100,000/=, and a thermos flask valued at Tshs. 25,000/= the properties of the said Anna d/o Mwashusa. They pleaded not guilty to the charge, hence a full trial.

In essence the evidence which led to the conviction of the appellant was the cautioned statements which the appellant and the 2nd accused recorded to the police station. The cautioned statements were to the effect that the two, on the material date went to the house resided by PW4, jumped into the fence, break the door of the house and store PW4 properties including one TV. The TV was sold to one Alex John Swila (DW3). The appellant and

his co-accused directed the police to the house where they did the act. The said Alex John Swila who testified as DW3 also admitted to had purchased the said TV from the appellant. However, he said that he sold the same TV another person whom he did know his whereabouts.

In his defence the appellant denied to have been involved in the incident. He told the trial court that the cautioned statement was recorded following the torture he faced at the police station. At the end result the trial court found that the prosecution proved the case to the hilt, thus convicted and sentenced the appellant.

Dissatisfied by the conviction and sentence, the appellant lodged the instant appeal raising seven (7) grounds of appeal. The grounds can be smoothly re-framed as follows:

1. That the trial Court erred in law and fact when it convicted and sentenced the appellant while the prosecution did not prove the charge beyond reasonable doubt.
2. That the trial Court erred in law and fact when it convicted the appellant relying on the cautioned

statement of DW3 without any proof that the appellant sold the television to him.

3. That the trial Court erred in law and fact in convicting the appellant of the offences charged while he was not found in possession of the said stolen properties.
4. That the trial Court erred in law and fact in convicting and sentencing the appellant for the charged offences basing on evidence of PW1 and PW3 which was not intact.
5. That trial Court erred in law and fact when it convicted and sentenced the appellant relying on the evidence of PW3 that the appellant directed the police to the place (the house) where the act took place.
6. That the trial court erred in law and fact when it convicted the appellant basing on his cautioned statement which was recorded in contravention with the law and it was not read out after being admitted.
7. That the trial Court erred in law and fact in rejecting the uncontradicted defence of the appellant.

During the hearing of the appeal, the appellant appeared in person without legal representation. On the other side Ms. Sarah

Anesius, learned State Attorney represented the respondent/Republic. The appellant prayed for the learned State Attorney to begin while reserving his right to re-join.

Ms. Anesius for the respondent, objected the appeal. She supported the conviction and sentence. However, she conceded to ground 6 of the appeal which is the complaint by the appellant that exhibit P3 (cautioned statement of the appellant) was not read in court. Ms. Anesius prayed for the same to be expunged from the record since it violated the law.

Indeed, the law is certain that cautioned statement like any other documentary evidence whenever is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out. See **Anosisye Tubuke Mwamkinga vs. R.** Criminal Appeal No. 331 of 2016 CAT at Mbeya (unreported). So non-reading the content of the document after being admitted as an exhibit is an irrugularity.

However, I am alive to the position that whether the irregularity is fatal or not depends on the circumstance of each case. This is because, when the document is tendered by a witness whose testimony was in regard to the content of the very

document; non-reading is not fatal since the appellant was not prejudiced as he was able to grasp the content of the document. The same was observed in the case of **Chrisant John V. Republic,** Criminal Appeal No. 313 of 2015 CAT at Bukoba (unreported).

In the case under consideration, though the learned State Attorney prayed for the cautioned statement regarding the appellant be expunged from the record, I am of the different view that the non-reading of the same did not prejudice the appellant since a witness (PW2) who tendered the document is the one who testified regarding the content of the document. Page 19 of the typed proceedings clearly shows that PW2 testimony dwelt on what he recorded in the cautioned statement of the appellant. He then tendered the very cautioned statement which the appellant neither raised an objection nor cross-examined the witness. It is a settled law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. See the holding in the case of **Damiani Ruhele v. Republic, Criminal Appeal No. 501 of 2007 CAT** (unreported). In the instant case therefore, failure by the appellant to cross-examine PW2 admitted that he voluntarily recorded the

cautioned statement in which he admitted to be involve in the offence of burglary and stealing.

Now, the other grounds of appeal i.e ground 1, 2, 3, 4,5 and 7 can be concisely and smoothly dealt with in a single issue of whether the prosecution proved the case against the appellant beyond reasonable doubt. Ms. Anesius argued that the prosecution proved the charges to the required standard. She protested the grounds of appeal on an account that the trial Court depended solely on the statement of the appellant's co-accused.

According to Ms. Anesius the trial Court convicted the appellant basing on other evidence such as the fact that the appellant directed the police where the items were stolen. She also contended that PW1 and PW3 gave evidence especially that the appellant and his co-accused admitted in their cautioned statement that they broke and stole the items mentioned in the charge and that they sold the stolen TV to DW3. DW3 also admitted to purchase the TV from the appellant.

Ms. Anesius further argued that the appellant did not cross-examine PW3 on his testimony that the appellant and his co-

accused directed the police and him (PW3) where they stole the item. She cited the case of **George Maili Kemboje vs Republic**, Criminal Appeal No. 327 of 2013 CAT on the effect of failure to cross-examine a witness.

As to ground 7 of the appeal, Ms. Anesius submitted that the trial Court evaluate the defence evidence, but it rejected the same since it did not cast any doubt on the evidence adduced by the prosecution. She however, prayed for the Court to re-evaluate the evidence. In her conclusion, she urged this court to dismiss the appeal.

In his rejoinder submissions, the appellant just reiterated his complaint that DW3 who alleged to have purchased the TV from him did not prove by writing. The appellant thus prayed for this court to consider his grounds of appeal and the same be allowed.

I have considered the grounds of appeal by the appellant and the submissions by the learned State Attorney. I have also gone through the proceedings of the trial Court. I hastily resolve that the prosecution proved the case against the appellant beyond reasonable doubt. This is because, the evidence adduced by PW1, PW2 and PW3 were direct. For example, PW1

gave evidence on how he interrogated one SAID (the appellant's co-accused). SAID mentioned the appellant, he also admitted that the two committed the offence and one of the stolen properties (TV) was sold to one Alex John at Mafiati. The appellant and his co-accused directed the police including (PW1 and PW3) to New Forest area where they showed the house and the exact room where they broke and stole. DW3 also testified in court against the appellant that he was the one who sold the TV to him. DW3 described the TV as it was described by PW4 and in the charge sheet.

On the part of PW2, he gave evidence regarding the admission of the appellant and tendered the cautioned statement. As I have already observed above that, the appellant neither objected nor cross-examined PW2.

The appellant's defence was that he was arrested at Mbalizi, taken to central police station, then he was taken to New Forest where the theft was committed. That he was tortured and forced to admit some facts and later he was charged in the trial Court.

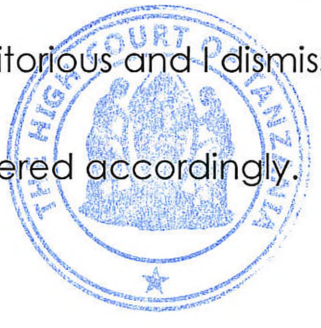
Considering the available evidence as summarized above. I find no doubt which was left by the prosecution witnesses. I also

find no shadow of doubt raised by the appellant to damage the prosecution evidence. The account by the appellant that he was tortured and forced to admit some facts was an afterthought. The complaint of torture or the allegations of being forced to admit facts would have been raised as an objection when PW2 was testifying against the appellant.

In this appeal the appellant further complained that there was no documentary evidence to prove that he sold the TV to DW3. Nonetheless, DW3's testimony was to the effect that he knew the appellant and his co-accused before and they made him believe that the TV was theirs. Thus, they sold it without any receipt nor record the transaction in writing. The appellant did not cross-examine him on that account. Raising that complaint in this appeal, it is again an afterthought.

Having found as above, I find the entire appeal non-meritorious and I dismiss it in its entirety.

Ordered accordingly.



R.A. Ebrahim
Judge

Mbeya
13.05.2022

Date: 13.05.2022.

Coram: Hon. P.A. Scout, Ag -DR.

Appellant: Present.

For the Republic: Ms. Hanarose – State Attorney.

B/C: Gaudensia.

Ms. Hanarose – State Attorney:

Your honour, the case is coming on for judgment. We are ready to proceed.

Appellant: I am ready too.

Court: Judgement is delivered in the presence of Ms. Hanarose State Attorney, Appellant and C/C in chamber court on 13/05/2022.

A.P. Scout

Ag-Deputy Registrar

13/05/2022

Court: Right of appeal explained.

A.P. Scout

Ag-Deputy Registrar

13/05/2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA