

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 36 OF 2021

(Arising from the Resident Magistrates' Court of Mwanza, in Criminal Case No. 151 of 2019)

ELVIS S/O BARAKA @ KIPONDA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

4/8/2022 & 2/9/2022

ROBERT, J:-

It was on the 29th day of June 2019 at around 20:00hrs, PW1 together with the victim one SAID S/O MIRAJI were sitting at the victim's chips kiosk chitchatting when all of a sudden, a person appeared holding a tin and poured on the victim's face some liquid like substance and then ran away. PW1 chased him in vain. The victim suffered severe injuries on the face and lost his sight. It was later discovered that the substance was Nitric Acid. Four days later, the accused was arrested following an SMS that he allegedly sent to the victim's brother, threatening him that the attack will continue until when the victim returns the money advanced to him by a woman.

He was arraigned before the RMs Court together with the second accused, who is not part of this appeal as she was acquitted of the charge.

They pleaded not guilty. A full trial was conducted after which the 1st accused, now the appellant, was found guilty, convicted and sentenced to 5 years in prison and to pay compensation of TZS 60,000,000/=. Aggrieved by the judgment of the RMs Court, the appellant appeals to this court armed with a total of eleven grounds of appeal three of which were added later as follows;

- 1. That, the trial court erred in law and fact by basing conviction on a case which was not proved beyond reasonable doubt.*
- 2. That, the prosecution evidence was tainted with contradictions so unsafe to be relied to convict me.*
- 3. That, the prosecution side did not prove it to the court if we had a quarrel with the victim which led me pouring acid on him.*
- 4. That, the prosecution did not prove it I actually sent the message to PW1 and the one I sent the message was really owned by my wife.*
- 5. That, if I sent a message using another line (sim) neither me nor my wife, how could the receiver know that I was the one who sent it?*
- 6. That, PW1 she gave me her line (sim) and she says I have a wife and my wife has a phone call. Why wouldn't she say I should use my wife phone.*
- 7. That, the learned trial Magistrate failed to justify if the 2nd accused and I were husband and wife (requiring a local leader or marriage certificate prove that the 2nd accused and I were husband and wife).*
- 8. That the owner of the line (SIM) that sent the message was not connected to the case instead it was connected to the phone owner (handset) only.*
- 9. The cautioned statement wherein the appellant is alleged to have confessed committing the offence (pg 6 of the judgment) was illegal for contravening the Justices of Peace Regulations, since the appellant was*

never taken to any Justice of peace after allegedly confessing to PW8, the police officer who interrogated him and recorded the said statement.

10. *That the trial court never took trouble to ascertain whether or not the alleged wife of the appellant (DW2) ever transacted any loan to PW4 to verify authenticity of the SMS claimed to be sent to PW4's brother by the appellant.*

11. *That, the prosecution (respondent) never brought to court and message printout alleged to have been sent by the appellant to PW2, despite the said printout being listed as an exhibit during the PH.*

On the day this appeal was set for hearing, the appellant appeared in person without representation whereas the respondent was represented by Ms. Fyeregete, learned State Attorney.

When called upon to argue his appeal, the appellant simply prayed that his grounds of appeal be adopted by the court and determination be made thereon. He had no other additional explanation. The learned State Attorney for the respondent on the other side told this court that she supports both conviction and sentence awarded by the trial court. She opted to argue the first ground of appeal separately and argue the remaining grounds together.

On the first ground, she submitted that the prosecution's case was proved beyond reasonable doubt and the appellant was convicted on the basis of circumstantial evidence and his own confession in his cautioned statement. She submitted further that according to the evidence, PW1

stated that as he was standing with the victim a man came and poured liquid on the victim's face and ran away. The victim was rushed to a police station and was given PF3. He was taken to Sekou Toure Hospital then referred to Bugando Medical Centre where he was attended to as testified by PW11, a Medical Doctor who treated the victim and proved to the trial court that his cornea had been badly injured impairing his vision. He tendered PF3 which was admitted without objection as P6.

It was further evidenced by PW2 that on the following day after the attack on the victim, he received a message on his phone from number 0745 255 622 threatening him that he will also be attacked if the victim will not repay the money given to him by a woman. He reported the matter to the police who traced the number and found out that it was sent from a handset with IMEI Nos. 359349019563778 and 359349091563783. According to the evidence by PW10, the phone was traced and was found with the second accused who admitted that her husband has used her phone but the sim card belonged to PW3. Both the handset and seizure certificate were admitted as exhibits P5 and P4 respectively.

PW3's testimony was to the effect that on 30th June, 2019 the appellant requested a sim card from her and after using it the appellant

told her to never use that sim card again and if she needed another one, he would provide her (see page 13 of proceedings).

She was of the opinion that based on circumstantial evidence above, there was enough evidence to connect the appellant with the alleged crime. To support her point, she cited the case of **Nathaniel Alphonse Mapunda & Benjamin Alphonse Mapunda vs R** (2006) TLR 402, in which the Court of Appeal stated that facts from which an inference of guilt is drawn must be proved beyond reasonable doubt. She then concluded her submissions with regard to the first ground of appeal that the evidence adduced points to the accused/ appellant person as the one who committed the offence. Also his cautioned statement which was admitted as exhibit P3 confirms so.

On the second ground of appeal, she submitted that there is no any contradiction in the evidence of the prosecution. That the appellant has failed to point to such contradictions either.

She argued grounds 3, 4, 5, 6, 7 and 8 together that there was enough evidence regarding the fact that the appellant and the second accused person DW2 were living together as husband and wife. The said fact as reflected on page 58 and 59 of the proceedings, was proved by DW2 herself and PW3, the daughter of the accused persons' landlord that

the two accused persons were living together as husband and wife. Also the appellant's cautioned statement indicated that he was living with DW2 as husband and wife and did not controvert DW2's evidence when she testified that she was his wife.

On the contention that he was not the one who sent the message to PW2, it the learned State Attorney's submission that the evidence of PW3, who testified to have given the appellant the sim card that was used to send the message, and that of DW2 who testified that she gave her handset to the appellant on 30th June, 2019, both prove that he was the one who sent the message thus the one who committed the offence.

With regard to the first additional ground, she submitted that there is no law that compels police officer to take a suspect who is willing to confess to a Justice of Peace. The appellant could only be taken to the Justice of Peace if he wanted to otherwise his cautioned statement will stand as his confession.

On the second additional ground, counsel submitted that PW4, a police officer together with others was able to trace the phone number which was used to send the message. She prayed that the ground be dismissed as it has no merit.

Regarding the third additional ground, she admitted that a printout was not tendered in evidence however the testimony of PW4 showed how the informer assisted them to get information which helped them to get access to the phone number, handset and sim card that sent the alleged text. She concluded her submission by praying that this appeal be dismissed for lack of merit.

The appellant on the other side prayed to be set free.

Having heard submissions from both parties and examined the record of this matter, I will now pose here and make a determination on the merit of this appeal by considering the grounds of appeal in the sequence preferred by the by the learned State Attorney for the respondent.

Starting with the first ground of appeal in which the appellant contends that the case was not proved beyond reasonable doubt, the respondent held a strong view that the case was proved beyond reasonable doubt although the appellant's conviction was based on circumstantial evidence and his cautioned statement.

Apart from the appellant's own cautioned statement which was admitted as exhibit P3, in which the appellant admitted that he was the one responsible for what happened to the victim, there was also other

evidence connecting the appellant to the crime he was charged with. The testimony of PW2 who testified to have received a message from an unknown number, threatening that the attack will continue until when the victim returns the money advanced to him by a woman. He further testified that he reported that incident to the police who then, as evidenced by PW5 and PW10, tracked the said number and it was revealed that the number belonged to PW3 and was used in a handset which was later discovered to belong to DW2.

Further to that, PW3 testified that the appellant requested her to give him a sim card on 30/06/2019 and later told her not to use it ever again. Also, DW2 in her defence told the court that the appellant took her phone, inserted a sim card then went at the back of the house and moments later returned the phone back to her. DW2 further testified that on the date the offence was allegedly committed, the appellant returned home with an injury under his eye and when she asked him, he replied that he fell down and got injured.

The above testimony corroborates what was stated in the cautioned statement as to what really transpired from the day the crime was committed to the time the appellant was arrested in connection to the said crime and when combined, the oral testimony of the witnesses and

the accused's cautioned statement, it is without a doubt that it was no one else but the accused person who committed the heinous crime.

Coming to the second ground of appeal in which the appellant faults the trial Court for relying on the prosecution's evidence while the same was full of contradictions, this Court finds the claim by the appellant to have no base as the alleged contradictions have not been pointed out anywhere or made apparent before this court. For contradictions to be fatal there must be proof that they touch the root of the matter. No such proof has been shown by the appellant. This court cannot be moved by mere allegations which lack proof. Thus, the Court is in agreement with the argument by the learned State Attorney for the respondent that the ground lacks merit.

As for the 3rd to 8th grounds of appeal, I think the answer to them is found in the records. On the contention that no evidence was brought to prove that DW2 is the appellant's wife, the records speak loudly that according to the evidence by PW3, the appellant and DW2 were living together. Likewise, the testimony of DW2 indicates that she was living with the appellant as husband and wife. All these testimonies were not challenged by the appellant who in his cautioned statement also admitted that he and DW2 were living together.

Also, the records reveal that it was actually the appellant himself who requested from PW3 a sim card and used it on the DW2's handset to send a threat message to PW2. This also was reflected in the cautioned statement made by the appellant in which he admitted using PW3's sim card to send a message to PW2 through DW2's handset.

In the 9th ground of appeal, the appellant complains that the cautioned statement was illegal for contravening the Justices of Peace Regulations since he was not taken to the Justice of Peace after he had admitted before a police officer. In reply to this, it was the learned State Attorney's argument, to which I fully subscribe, that there is no law compelling an accused who has confessed before a police officer to be taken to a Justice of Peace to repeat the said confession. Although it is a good practice as it corroborates the confession before a police officer and most of the time ensures that the maker of such a confession is a free agent, a confession before a police officer cannot be rendered illegal simply because there is no extra judicial statement. That ground also lacks merit.

Regarding the 10th ground of appeal, at the outset, this Court finds that the accused person in his cautioned statement admitted that his former wife told him that she gave money to the victim, who was her

lover, and that it was because of that love affair that their marriage (appellant and former wife) ended. As already stated herein above, that cautioned statement was tendered and admitted in evidence as exhibit P3 thus it was not necessary to inquire into whether DW2 ever transacted any loan to the victim as there was evidence to that effect. This ground too lacks merit.


On the last ground of appeal, the appellant claims that the prosecution never brought any message printout although the same was listed as an exhibit. The learned State Attorney admitted that the said printout was not tendered as a exhibit however, there was enough evidence that the appellant sent the said message to PW2. I agree with the appellant that among the items listed as exhibits to be tendered was the printout but records show that it was not tendered during the hearing of the case.

However, this Court is of the settled view that absence of the said printout did not affect the prosecution's evidence against the accused/appellant because apart from the said printout, there were testimonies from independent witnesses which corroborated the cautioned statement in which the accused/appellant admitted sending the alleged text to the victims' brother, PW2. This ground also lacks merit.

From the foregoing, all the grounds of appeal filed by the appellant are of no merit and are hereby dismissed. This appeal fails in its entirety as this court affirms the conviction and sentence.

It is so ordered.




K.N. ROBERT
JUDGE
2/9/2022