IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL CASE NO. 74 OF 2022

(Originating from the Court of Resident Magistrates of Mbeya, at Mbeya, in Criminal Case No. 172 of 2020)

ISSA MASSOUD YASSIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 22.08.2022

Date of Judgment: 23.09.2022

Ebrahim, J.

This is the first appeal. The appellant, ISSA MASSOUD YASSIN is challenging the conviction and sentence by the Court of Resident Magistrate of Mbeya at Mbeya (the trial court) in criminal case No. 172 of 2020. At the trial court, the appellant was charged with two counts namely burglary contrary to **section 294 (1) (a) and (2) of the Penal Code, Cap. 16 R.E 2019** (Now 2022) and stealing contrary to **sections 258(1) and 265** of the same law.

It was alleged in the charge sheet that on the 27th day of May, 2020 at old airport area within the City and Region of Mbeya, the appellant did break and enter into the shop of one Ayoub s/o Gaitan

with intent to commit an offence therein, to wit stealing. Regarding the 2nd count, it was alleged that on the same date and area the appellant stole sim recharging vouchers of different networks like Tigo, Vodacom, Hallotel, TTCL and Airtel all valued at Tshs. 6,700,000. It was also alleged that he cigarettes namely Embassy, Sport SM Master, Winston, Nyota and Club all valued at Tshs. 1,800,000; 4 cartons of Konyagi valued at Tshs. 258,000/= and 3 cartons of Valuer valued at Tshs. 192,000/=. The Appellant was alleged to have stolen 3 cartons of Mini K-Vant valued at 210,000/= and cash Tsh. 1,840,000/=. The total value of all stolen items was Tshs. 11,000,000/-, the properties of one Ayoub Gaitan.

The appellant pleaded not guilty to both counts hence a full trial. The prosecution paraded four witnesses and two exhibits i.e. sketch map (exhibit P1) and cautioned statement of the appellant (exhibit P2). On the other hand, the appellant gave a sworn defense evidence and did not call any witness. At the end, the trial court found the appellant guilt on the second count and thus convicted and sentenced him to serve a term of five years imprisonment. Discontented with both conviction and sentence, the appellant filed the instant appeal preferring

a total of seven (7) grounds of appeal which can be conveniently reconstructed as follows:

1. That the trial magistrate grossly erred in law and fact when convicted and sentenced the appellant without taking into consideration that the prosecution failed completely to prove the charge against the appellant beyond reasonable doubt as per the requirement of the law.
2. That the trial magistrate erred in law and fact in convicting the appellant of burglary and stealing basing on the evidence of PW1, PW2, PW3 and PW4 which was not water tight.
3. That the trial magistrate erred in law and fact when it convicted the appellant on a mere belief that the appellant confessed at police station while the cautioned statement was recorded involuntary and not repeated to the justice of peace as per the case of **Bishiri Mashaka & 3 others v. Republic,** Criminal Appeal No. 45 of 1991 Court of Appeal of Tanzania at Dar es Salaam (unreported).
4. That the trial magistrate erred in law and fact in admission of the hearsay evidence regarding that there was no exhibit tendered

before the court in correspondence with the allegation of the properties alleged to be in the shop.

5. That the trial magistrate erred in law and fact by admitting the caution statement as exhibit P2 while the appellant was denied the right to be heard during the inquiry.
6. That the trial court erred in law and fact by relying on cautioned statement of the appellant while it was recorded contrary to the requirement of the law.
7. That the trial magistrate grossly erred in law and fact when he convicted the appellant by believing the evidence of PW2, PW3 and PW4 which was hearsay as they testified to have been told by PW1.

At the hearing, the appellant appeared in person unrepresented, whereas the respondent was represented by Mr. Rwegira, learned Senior State Attorney. The appeal was argued orally.

When the appellant was invited to elaborate his grounds of appeal, he prayed to adopt his grounds of appeal and the court to consider them at the same time he prayed to reserve his right to re-join.

On his part, Mr. Rwegira objected the appeal on a general account that the prosecution proved its case beyond reasonable doubt. He also

submitted that the appellant was convicted on his own admission. He further argued that the appellant after being arrested confessed to commit the offence of stealing and his cautioned statement was admitted as exhibit P2 after the appellant abandoned the objection he raised regarding the admission of the said exhibit. Mr. Rwegira was of the view that the complaint about the illegality of the exhibit is irrelevant.

In addition, Mr. Rwegira submitted that the admission by the appellant was collaborated by PW 1, PW2 and PW3 who were independent civilians. That the appellant was the one who showed the police how he and his accomplice dug the hole at the store and stole. According to Mr. Rwegira, showing the area (i.e., crime scene) by the appellant is an oral confession which is admissible as per the case of **Rashid Roman Nyerere vs Republic,** Criminal Appeal No. 105 of 2014. It was his further argument that oral confession by the appellant collaborated his cautioned statement.

Moreover, Mr. Rwegira contended that all prosecution witnesses were credible and truthful. He gave an example of PW1 that he was a victim but did not testify that he identified the appellant instead he testified about the appellant's confession by showing the crime scene.

Mr. Rwegira also contended that the appellant's confession was freely given as he did not adduce evidence if had bad blood with any of the witnesses. He thus prayed for this court to dismiss the appeal for want of merits.

In his rejoinder the appellant reiterated what he said earlier on.

I have considered the grounds of appeal, the submissions by the learned State Attorney, the records and the law. Verily, the appellant's complaints are mostly based on the account that the prosecution did not prove its case beyond reasonable doubt. It should be noted however that the appellant's conviction was predicated upon his admission in the cautioned statement and the confession he made at the crime scene.

Nonetheless, for this court to decide whether or not the prosecution proved its case at the required standard, it should be firstly determined if the cautioned statement was legally recorded and admitted as evidence. This is due to the complaints raised by the appellant under the 5th and 6th ground of appeal.

Cautioned statement is legal if it is recorded within the time prescribed by the law i.e., four hours after the accused has been taken under restraint as per **section 50 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E 2022;** and if it is voluntarily procured.

In the case at hand, the proceedings on the record indicates that, before the trial court the appellant objected the admission of the cautioned statement on two grounds that the same was involuntarily recorded and it was out of prescribed time. However, the trial court resolved that the same was recorded within time limit. The appellant was arrested on 6/6/2020 for the offence of murder and the cautioned statement was recorded on the very date from 4:00 PM to 4:48 PM as shown 22 of the proceedings after discovering that he is also involved in the offence of stealing. I am of the same findings that, indeed, the cautioned statement was recorded within time limit.

Notwithstanding the findings above, the complaint that it was involuntary, in my view, would have been resolved by the trial court if the inquiry was conducted but, the proceedings are clear that inquiry was not conducted as the appellant withdrew the objection raised against the cautioned statement; see page 25 of the typed proceedings. In that regard, the complaint at this appellate stage by the appellant is an afterthought since there is no evidence about the claimed involuntariness that can be re-assessed by this court. Thus, the 5th and 6th grounds of appeal lack merits, therefore are dismissed.

Now, the remaining grounds of appeal can be resolved under a single issue of whether or not the prosecution proved the case beyond reasonable doubt. As I have intimated earlier, the appellant's conviction was predicated upon his admission in the cautioned statement and the confession he made at the crime scene. I will thus confine my analysis on the confession evidence which formed the basis of the trial court's decision.

According to the record, the appellant made his admission at two levels: (a) admission at the police station before PW4 who recorded his caution statement which was subsequently admitted as exhibit P2. (b) Oral admission before PW1, PW2, PW3 and PW4 when the appellant went to show where he committed the offence i.e the shop of one Ayoub Gaitan.

It is a settled cardinal principle of the law that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be the civilian or not, maybe sufficient by itself to ground conviction against the suspect. See; **Rashid Roman Nyerere vs R.** (supra). **The Director of Public Prosecutions vs Nuru Mohamed Gulamrasul,** [1988] T.L.R. 82. Also, **Mohamed Manguku vs Republic**, Criminal Appeal No. 194 of 2004, (unreported) quoted in

Chamuriho Kirenge @ Chamuriho Julias vs Republic, Criminal Appeal No. 597 of 2017 CAT at Mwanza (unreported). The Court of Appeal insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed on him. It means therefore that for an oral confession to base a conviction, the same should be made voluntary. What amounts to an involuntary confession is provided for under subsection (3) of section 27 of the Evidence Act, Cap 6 R.E 2022 which states:

> *"(3) A confession shall be held to be involuntary if the court believes that it was induced by any threat; promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority."*

The question at this juncture therefore is whether the appellant was a free agent when giving his statement before PW4 and later in the presence of PW1, PW2 and PW3. There is no evidence whatsoever and the appellant is not saying in this appeal that when he went to show the crime scene on how they committed the offence he was under any threat or coercion or inducement.

As to the credibility of the witnesses, I wish to state that I agree with the findings of the trial court and the contention by Mr. Rwegira that the prosecution witnesses were credible and truthful. This is

because, their testimonies were coherent and cogent, thus reliable. See: **Athumani Hassani vs Republic,** Criminal Appeal No. 292 of 2017 (unreported). For example, PW3 local government leader (street Chairman) testified to have seen the appellant on 18/6/2022 showing the police how he and co-bandits drilled the hole to the victim's shop/store and stole the money Tshs. 1,300,000/= in the counter. The appellant further narrated in front of PW1, PW2 and PW3 that he himself did not stole the voucher and cigarettes but his co-bandits did.

Like in the **Rashid Roman Nyerere case** (supra) in this case the appellant did not admit the commission of the offence in the cautioned statement only but confessed in front of PW1, PW2 and PW3 and showed how they drilled the hole to reach at the shop. The fact raised in this appeal that the stolen properties were not found in his possession or the victim did not prove the presence of the said properties, in my view, does not omit the fact that the appellant confessed to have stolen some money from the victim's shop. It is thus my considered opinion that the prosecution was not duty bound to prove that all of the alleged stolen properties were stolen by the appellant.

Owing to the above findings, I hereby dismiss the entire appeal for lack of merits.

Ordered accordingly.

R.A. Ebrahim

Judge

Mbeya

23.09.2022