THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 118 OF 2022

(Originating from the Court of Resident Magistrate of Mbeya at Mbeya Criminal Case No. 325 of 2019)

KULWA MARTIN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 06/09/2022
Date of judgment: 30/09/2022

NGUNYALE, J.

The appellant Kulwa Martine @ Mwasakyene with other two persons who are not subject to this appeal were arraigned before the Resident Magistrate Court of Mbeya at Mbeya with the offence of Stealing contrary to section 258 (1) and 265 of the Penal Code Cap 16 R. E 2002 now 2022. It was alleged that on 14th day of June, 2019 at Nzovwe area within the City and Region of Mbeya fraudulently and without claim of right did steal tricycle with registration No. MC 896 CBL make TVS KING the property of Belian s/o LEMA. Upon a full trial, the appellant was

convicted and subsequently sentenced to serve five years imprisonment while his two fellows were acquitted.

During trial the prosecution paraded eight (8) prosecution witnesses and tendered about seven documentary exhibits, in defence the appellant defended by himself. The prosecution witnesses testified that the appellant was interrogated and admitted to have committed the offence of stealing a tricycle No. MC730 BZN. He led the police officers including PW1 D8837 Detective Sgt Leonard to recover the stolen tricycle at Mbarali District. PW1 tendered certificate of seizure Exhibit P1 and the said tricycle Exhibit P2. PW2 Bahati Joel Way a cyclist came to know that the said tricycle was missing likewise PW3 the owner of the same. PW3 Bakari Lema (58) the owner of the disputed tricycle on 4th day of November 2019 witnessed the appellant narrating how he participated to steal the motorcycle. PW4 Asha Israel also witnessed the appellant explaining how they stole the said tricycle on 14th June 2019 with his fellows. PW6 recorded the caution statement of the appellant on the date of his arrest. The said caution statement was tendered as Exhibit No. P7. In the caution statement the appellant confessed to have committed the offence of stealing and narrated how they exchanged the

same and the way it was recovered and how he assisted the police to recover the same.

The appellant defence was to the effect that he was not present when the offence occurred. He was in Dar es Salaam. In short, he distanced himself from commission of the offence charged by saying that he knew nothing about stealing of the tricycle and he denied to have led the police towards recovery of the said tricycle. He prayed the trial court to acquit him.

The trial Magistrate believed the prosecution evidence as formed by those who he identified as credible witnesses. According to him, the defence case could not tilt the prosecution case which remained intact. The appellant was convicted as charged and sentenced accordingly as it has been stated herein. He was aggrieved with the verdict as pronounced on 7th December 2021; he preferred the present appeal premised in seven grounds of appeal per petition of appeal dated 26th July 2022. The grounds of appeal are paraphrased as follows in order to make sense; -

One, the trial court erred in law and fact by convicting the appellant while he was not found with the stolen items of the victim**, two**, the trial court erred in law and fact to consider that the appellant made an oral

confession before PW1, PW3, PW5 without warning itself that the police used force to induce the appellant to narrate what transpired during theft without recording the alleged confession before the justice of peace. **Three**, that the trial court erred in law and fact to rely on the testimony of PW4 that the appellant confessed in her presence with other people. **Four**, the trial court erred in law and fact by not complying with section 214 of CPA in exchange of Magistrates as the predecessor had recorded evidence of PW1, PW2, PW3 and PW4 and the successor Magistrate continued without giving chance the appellant to consent to continue from where the predecessor ended.

Five, the trial court erred in law and fact when it convicted and sentenced the appellant without taking into regard that he was not arrested with the motorcycle and the recent possession do not bind the appellant who never signed even the certificate of seizure. **Six**, the sentence of five years imposed by the trial court was excessive and **lastly** the appellants defence was not considered and the caution statement was admitted against the law section 50, 51 and 57 of the Criminal Procedure Act Cap 20 R. E 2019.

The appeal was called for hearing on the 6th day of September 2022 whereas the appellant appeared in person and the respondent was

represented by Zena James learned State Attorney. The appellant as a layman had nothing to say he asked the respondent to start arguing the appeal while reserving a right to rejoin if a need will arise.

Ms. Zena James for the respondent resisted the appeal stating that all the grounds of appeal have no merit believing that the appellant was properly convicted and sentenced.

On the first ground of appeal, she submitted that it is true that the appellant was arrested with nothing but there was evidence from PW1 that the appellant was arrested and directed where he had sold the Bajaj. The court relied on the oral confession before PW4, PW3 and PW3 and the caution statement that the prosecution proved that the tricycle was stolen by the appellant.

On the second ground of appeal the appellant confession enabled recovery of the stolen tricycle and identified by the owner PW3. She referred the Court to the case of **Godfrey Sichizya vs DPP**, Court of Appeal of Tanzania Criminal Appeal No. 176 of 2017 at Mbeya (unreported) where the court relied to the oral confession of the accused and believed it because it was witnessed by other witnesses. Such evidence is sufficient to ground conviction. She insisted that they

have no doubt with the testimony of PW1, PW2, PW4 and PW5 which forms the oral confession of the appellant.

The statement of Justice of Peace was not tendered in evidence but she stated that on looking on the case of **Ally Mohamed Mwaya v. R**, Criminal Appeal No. 214 of 2011 Court of Appeal at Dar es Salaam oral evidence is said to be relevant when exhibit is expunged. In this case oral evidence that the appellant confessed was recorded by the court therefore during proceedings Extra Judicial Statement is irrelevant. His third ground of appeal is also irrelevant because he confessed to have stolen the Bajaj and he assisted by showing where it was.

The complaint in the fourth ground of appeal that the Magistrates exchange the case without proper procedures the State Attorney submitted that the lamentation has no merit because the successor Magistrate explained why he succeeded to the case and he was satisfied that he was legible to proceed with the matter. It was the view of the respondents' that the ground had no merit.

On the fifth ground of appeal the State Attorney submitted that there is no doubt that the appellant had stolen the tricycle therefore not signing the seizure note has no weight.

The sixth ground of appeal about sentence the State Attorney submitted that the sentence imposed of five years was justifiable because per section 265 he would have been punished to a maximum of seven years imprisonment.

The complaints on the seventh ground of appeal were that the charge was not proved beyond all reasonable doubt and his defence was not considered. The State Attorney submitted that the offence was proved beyond all reasonable doubt, the testimony of PW1 was to the effect that the appellant after being arrested admitted to have committed the offence and he told the police that the stolen tricycle he sold to another person who was later found with it. It was identified by the owner. The trial Court correctly ruled in favour of the respondent. His defence case was considered and found to be not worth of disturbing the prosecution case which was strong. The caution statement was recorded according to law, when it was tendered, the appellant objected it, the objection attracted inquiry. During inquiry the court found that the statement was obtained voluntarily.

The learned State Attorney referred the Court to the case of **Seleman Hassan vs Republic,** Criminal Appeal No. 364 of 2008 Court of Appeal at Dodoma where the Court directed that objections to statement

attracts inquiry which was done. The objections in respect of section 50 and 51 of CPA were not the objections of the appellant. In the case of **George Maile Kemboge vs R**, Criminal Appeal NO. 327 of 2013 it was observed that something not raised during trial cannot be raised on appeal so the complaint about those provisions of the law is an afterthought, the appeal is worth of being dismissed. She prayed the Court to dismiss all the grounds of appeal and upheld conviction and sentence imposed.

In rejoinder the appellant stated that he was arrested with nothing, the second accused in the one who was arrested with the stolen property which he said that he bought from Yusuph Omari. The person who was found with the said tricycle said that he does not know the appellant. He insisted that he never confessed instead he was forced to confess. He was not arrested at the scene of crime and the court erred to impose sentence of five years. He prayed the Court to accept his grounds of appeal and rule that he was illegally convicted and set him free.

After having taken keen consideration to read the records of the appeal and the rival submission I am satisfied that the appellant was convicted based on the confession recorded by PW6 and oral confession which is alleged to have been witnessed by other witnesses, therefore the only

issue to be answered is whether the confessions proved the offence charged beyond all reasonable doubt the acceptable standard in criminal justice. The alleged confession is formed by oral evidence and caution statement of the appellant, the Court will direct its mind to determine whether the two pieces of evidence met the legal standard governing court practice and procedure in criminal justice.

As already noted in criminal cases, it is a cardinal principle of law that the prosecution side must prove their case beyond reasonable doubt as per section 3 (2) of the Evidence Act Cap 6 R. E 2022. The burden of proof can never shift to the accused person. This was clearly set in several cases including the case of **Samson Matiga vs. Republic**, Criminal Appeal No. 205 of 2007, Court of Appeal of Tanzania at Mtwara (unreported) where the Court elaborated the principle as follows:

> *"What this means, to put it simply, is that the prosecution evidence must be strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence."*

After considering the records before the trial Court guided by the grounds of appeal and the rival submission of the parties the main issue is whether the caution statement exhibit P7 as tendered by PW6 and the

oral confession were sound to ground conviction against the appellant without a set of doubt.

The Caution Statement tendered by PW6 was admitted by the Court as exhibit No. P7 during trial. The appellant objected to its admission on the ground that it was not obtained voluntarily, he was tortured by PW6 at the time of recording the same. The objection attracted inquiry to be conducted to ascertain as to whether the same was voluntarily made or not. In the grounds of appeal, the appellant is faulting the caution statemen arguing that it was not obtained according to law. The learned State Attorney was of the firm view that the objection about the caution statement is an afterthought because it was not raised during trial by any means including by way of cross examination.

In my view I think the issue of voluntariness in obtaining the caution statement is a point of law which can be scrutinized at any stage, after all the learned State Attorney has misdirected herself because the caution statement was subjected to objection by the appellant. The objection attracted inquiry trial. With due respect to the learned State Attorney submission, I am not convinced with his position that the same is an afterthought. The trial Magistrate conducted inquiry to determine the voluntariness of the appellant at the time of obtaining the said

caution statement. He ended with a finding that the appellant was a free agent at the time of recording his caution statement, therefore the statement was sound and good evidence against the appellant.

In order to end up with a proper decision about the caution statement I wish to exercise the power of re-evaluation of evidence to rule as to whether the ruling of the trial Magistrate was correct or not about the caution statement. The case of **Princes Charles Junior vs. The Republic,** Criminal Appeal No. 250 of 2014 Court of Appeal of Tanzania at Mbeya (unreported) is a good guidance on the authority of the first appellate Court to re-evaluate evidence. After a thorough perusal of the records about inquiry trial I noted that the appellant besides being arrested on 29th October 2019 he was send to court first time for plea taking on 23rd December 2019. Therefore, the arguments of the appellant that he stayed for so long in police lock up where it is alleged that he was tortures and beaten in order to confess raises suspicious. The circumstances raised a number of issues to be desired because delay to be send to court is inconsistency with rule of law especially section 32 (1) of the Criminal Procedure Act Cap 20 R. E 2022. The very provision governs detention of arrested persons. It requires an arrested person to be arraigned before a court of competent jurisdiction within

twenty-four hours from the time of arrest. This was not done in the present case. The appellant complained that such delay was due to his sufferings after the alleged torture.

The testimony DW2 Evance Juma Mwasakyene (32) during inquiry was to the effect that on 2nd November 2019 he went to central police station to see his relative (the appellant) who was in police custody. At police they told him that his relative was not there, he was attending treatment at Field Force Unit Dispensary. He went there and found his relative with severe injuries on his head and marks of hand cuff around his hands. I keenly considered the complaints by the appellant in regard to the testimony of DW2 and DW3 during inquiry. The Court is convinced that the circumstance prevailed suggests that there was torture at the time of obtaining the caution statement and there is no clear answer as to why the appellant remained in police custody for such long time. Such long stay at police attracts several assumptions against the state of the appellant but the court cannot rely to the assumptions. In such a circumstance the Court has warned itself on the possible dangers of relying to such caution statement without corroboration of other independent piece of evidence. The case **of Sospeter Nyanza vs Michael Joseph** Criminal Appeal No. 289 of 2018 Court of Appeal of

Tanzania at Mwanza (unreported) the Court of Appeal referred to the case of **Tuamoi vs Uganda** (1967) E. A 91; **Bombo Tomola v. Republic** [1980] TLR 254 and **Hemed Abdallah v. Republic** [1995] TLR 172 to insist that it is unsafe to act on retracted or repudiated confession without corroboration unless before grounding conviction basing on such confession the court is satisfied that in all the circumstances the confession was true.

Because the voluntariness of the Caution Statement Exhibit P7 recorded on 29/10/2019 is doubtful, by any mean the alleged oral confession which was witness by PW4 and others on 04/11/2019 cannot be held to be safe. In the case of **Yusuph s/o Sylvester v. R,** Criminal Appeal No. 115 of 2021 Court of Appeal at Bukoba it was observed that when confession is obtained through torture any further confession cannot be voluntary. The appellants confession as recorded by PW6 has been ruled to be obtained out of free will, therefore the alleged oral confession before PW4 and other witnesses cannot be said to be voluntary.

The case of **Samson Matiga** (supra) quoted above gave a clear guidance which is the obvious law in criminal justice that the prosecution evidence must be strong as to leave no doubt to the criminality of the accused person. In the present case Caution Statement

leaves a lot of doubts with a lot to be desired. The doubts end with a benefit of doubt to the appellant the then accused person.

The appellant raised a complaint that successor Magistrate continued without giving chance the appellant to consent to continue from where the predecessor ended. The appellant had nothing to submit in support of this ground of appeal. The respondent's attorney submitted that the successor Magistrate gave reasons as to why he succeeded the case, the complaint of the appellant has no merit because the appellant could not establish how the anomaly prejudiced him. I think this is not the matter to take much time of the Court. The appellant ought to lay foundation how he was prejudiced by the act otherwise justice was fairly done to both sides.

On the complaint that the appellant's defence was not considered, again this is not the matter to detain long because re-evaluation of the evidence came out with different independent decision. The very decision is fair and balance against both parties. I find no reason to respondent on the complaint about the punishment because will not serve any purpose as will be apparent shortly.

Be it as it may the court is of the settled mind that conviction by the trial court was not safe in view of the standard of proof in criminal cases.

Conviction is hereby quashed and sentence set aside, I order immediate release of the appellant from custody unless lawful held with good cause. Order accordingly.

Dated at Mbeya this 30th day of September 2022.

D. P. Ngunyale
Judge