IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 82 OF 2021

(Arising from District Court of Tarime in Criminal Case no 4 of 2020)

JOSEPH MWIZARUBI @ MANYEGE .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

21st September & 24th October 2022

F. H. Mahimbali, J.

The appellant was working as watchman at the home of PW1. It is alleged that on the 14th December 2019 when PW1 went for work, the appellant collected his belongings and left the guard. When PW1 had returned home at 11.30hrs, he could not see the appellant at his home. When he entered his room and opened the wardrobe, he found his money 11,000,000/= missing and his mobile phone Samsung Galaxy make, missing. He then started looking for the appellant but in vain. When he went to his guard area, he could not see any of his belonging there. He reported the incident to his colleague – PW2 who in

2. *That the trial court erred in law and fact when it ignored and failed to consider the final written submissions by the appellant as per court order without reasons which at the end prejudiced the appellant.*

3. *That the trial court erred in law and fact in admitting and considering exhibit P5 as evidence without considering that the same was in contravention of law having been taken six days from the appellant's date of arrest and without reasons for the said delay.*

4. *That the trial Magistrate grossly erred in law when she convicted the appellant relying on exhibit – P.4 which was not properly recorded and tendered in court.*

5. *That trial court erred in law in proceedings ahead to convict the appellant based on a defective charge sheet which had an effect of rendering the judgment illegal.*

6. *That in general the trial court erred in law and fact in convicting and sentencing against the appellant without the prosecution proving their case beyond reasonable doubts.*

During the hearing of the appeal, the appellant was represented by Mr. Njelwa learned advocate, whereas Mr. Frank Nchanilla learned state attorney appeared for the respondent – Republic.

In arguing the appeal, Mr. Njelwa learned advocate condensed the 1st, 4th and 6th grounds of appeal and argued them jointly. The rest i.e. 2nd, 3rd, and 5th ground of appeal, he argued them each separately.

Thirdly, he challenged the trial magistrate didn't evaluate the defense testimony as per law. At page 25-26 of the typed proceedings, the appellant's evidence is dully recorded. However, in the composition of her judgment, the trial magistrate (on page 8-10) didn't consider the defense testimony in any value as per law. As it was not considered, he submitted that the same vitiates conviction. This is as rightly referred by the trial magistrate herself (on page 7-8) of the typed judgment. On this he relied in the case of **Sadiki Kitime vs Republic,** Criminal Appeal No 483 of 2016 (at page 10), which insisted on the consideration of both the prosecution as well as the defense case before arriving at the verdict of the case. He invited this Court to be persuaded by that decision in considering this argument.

Fourthly, he challenged what is in exhibit P4 (certificate of seizure), as amongst the items seized is exhibit P3 (phone). His concern is, the said P4 exhibit was wrongly admitted. It ought not to have been admitted as it was recorded against the law. He clarified that as per section 38 (3) of CPA, dictates that after the said seizure, the seizing officer ought to have issued receipt and dully acknowledged by the person from whom it is seized. Furthermore, the chain of custody from the seizing point up to the time of tendering it in court, there ought to

illegal. Therefore, equally exhibit P4 was illegal from its inception. As it was illegally obtained, he persuaded this Court to be inspired by a similar stance once dealt by the Court of Appeal in the case of **Badiru Musa Hanosi vs Republic,** Criminal Appeal No 118 of 2020, CAT at Mtwara, page 8 – 11.

On the second ground of appeal, he faulted the trial court for failure to consider the final submissions of the case. He says, this prejudiced the appellant's case. He said so, on the pretext that as the appellant was not represented by an advocate from the beginning but only during the defense case, he was of the view that the final submissions filed would have assisted the trial magistrate in adding more lights in the case. Though it is trite law that final submission is not part of evidence but as it was ordered, he is of the view that it ought to have been dully considered. He invited this Court then to intervene and give a proper guidance.

On the 3rd ground of appeal, the grief is on the admissibility of P5 exhibit. That as per typed proceedings (PW4 – Hamisi Sambo) at pages 21-22, the recorded cautioned statement of the appellant was wrongly admitted as it was recorded beyond the statutory period of time i. e. 6 days later. As he was arrested on 23/12/2022 and recorded his

must be expunged from the record, insisted Mr. Njelwa. He insisted that if P3, P4 and P5 exhibits are expunged from record, there is no further remaining evidence holding the appellant with the charge. Thus, he prayed that this appeal be allowed. The proceedings and judgment of the trial court be quashed and set aside. The conviction and sentence meted out be set aside. In their place appellant be acquitted.

On his part Mr. Frank Nchanilla learned state attorney for the Republic resisted the appeal arguing that the appellant on the strength of evidence and law, was properly convicted and sentenced.

As far as the argument in exhibit P3 (cell phone), that its ownership was not established, he countered by saying that the said cell phone was properly identified by the owner. In identifying ownership, it is not necessary that there is a purchase receipt and how it was obtained. As per page 13 of the typed proceedings, the PW1 had been able to state special mark (window crack). Not every cell phone has a crack on its window glass. Reading the testimony of DW1, has never disputed the ownership of it to PW1. In a further scrutiny of defense case, the appellant didn't spell out the features of a P3 exhibit as his. He just testified that during search, they took his motorcycle and cell phone. The said cell phone is not described but just mentioned.

has been well captured. Mr. Frank Nchanilla argued further that the appellant's defense does not state the type of cell phone he had bought/purchased does not hold any water. In his view, the appellant's testimony is well captured and considered save that it was valueless. The trial magistrate at page 8 says: *"After the accused person had failed to identify the properties which he was found in possession with, this court hereby concludes that those are stolen properties".* Therefore, the argument that failure to consider defense evidence vitiates proceedings does not apply in the current case as submitted. Thus, the case of **Sadick Kitime** is inapplicable in the circumstances of this case.

With exhibit P4 (certificate of seizure), he argued that it should not be expunged from record. As per testimony of PW3 (at page 17 of the typed proceedings) and that of PW4 (at page 19 of the typed proceedings), their testimony is clear on that. Therefore, even if in the said search there was no receipt issued in respect of the seized items to the appellant as per section 38 (1) of the CPA, in the absence of warrant of search any police officer can still conduct search. He referred this Court to the case of **Jumanne Mpini @ Kambilombilo and another vs Republic**, Criminal appeal No 195 of 2020, CAT at Kigoma (page 12 and 13).

tempered with. As the current case involves exhibits such as Motorcycle and cell phone, the principle of **Paul Maduka** can be relaxed.

With the 2nd ground of appeal, the grief is on non-consideration of the final submissions in the judgment, he first admitted that final submissions were ordered by the trial court but not considered at all. However, he argued that final submission is not part of evidence and that there is no any law that dictates filing of final submissions. It is a mere practice. Since the position of the law (section 312 (1) of CPA) provides what is to be contained in the judgment, final submission is not one amongst them. He prayed that the said argument be disregarded as it is value less.

With the third ground of appeal, the argument that the cautioned statement (P5) be expunged as it was recorded out of time, he considered it as an astonishing ground as it was not objected during its admission in trial, (as per testimony of Pw5 at page 22 of the typed proceedings). Relying on the position of the law as stipulated in the case of **Nyerere Nyague vs Republic**, Criminal Appeal 67 of 2010, CAT at Arusha at page 12 and 13, it is trite law that since the cautioned statement was not objected during its admissibility, the appellant is now

In totality, Mr. Frank Nchanilla prayed that the appeal be dismissed. Conviction, sentence and compensation order meted out by the trial court be maintained.

In his rejoinder submission, Mr. Njelwa maintained his earlier position that it is undisputed that there is variation between the amount stolen and the charge sheet as per exhibit P5. Whereas in the charge sheet is 11,000,000/= but P5 exhibit, the appellant admits it 10,000,000/=. That this variation is minor does not make good sense. So long as the cited case is not distinguishable, the issue of minor variation had no space. As the prosecution failed to amend the charge sheet, it was prejudicial to the appellant.

With the 3rd ground of appeal that the cautioned statement recorded out of time is not fatal as it was not objected during its admission (as per Nyerere Nyague's), he submitted that since **Nyerere Nyague's case** is a 2012 case and the position in the case of **Shabani Hamisi** is a 2017 case (decided in 2019) as a matter of principle, the most recent precedent is more relevant than the former.

With the 2nd ground of appeal, he insisted that so long as there was an order for final submission and the parties made compliance to it,

phone. There back he left the PW1's family (son, wife and pw1 himself). With this, he reiterated that the appeal be allowed.

In determining this appeal, I have carefully examined the evidence in record in the light of the contending submissions and judiciously scanned the trial court's judgment (the subject of this appeal). The vital question now to ask is whether the appeal is meritorious as per submissions made. To answer this, I will direct my mind whether there is ample evidence to support the appeal.

To start with, I will examine what is contained in the said exhibit **PE5**. The appellant admits to have been employed by the PW1 on monthly payment of Tsh300,000/= from October 2017. Previously, he had worked with him on other terms as from 2013 to October 2017. With the said contract which was oral, the appellant on what transpired on the relevant date of 14th December of 2019, he stated the following:

> *"...kwamba tarehe 14/12/2019 siku ya Jumamosi, siku hiyo mimi niliamka asubuhi kama kawaida na nikafungua geti na Bosi wangu Haroun Maisa aliondoka akiwa kwenye gari yake muda huo ilikua yapata kama saa 06.30hrs hivi kwa vile tayari kulikua kumepambazuka na baada ya yeye kuondoka pale nyumbani mimi niliamua kuchukua ufunguo za kuingia chumbani kwa bosi wangu ambako mlango ulikua wazi kwa siku hiyo kwa maana haukufungwa na baada ya kuingia*

aitwaye NYANJURA W/O MIRYANGO ambako nilikaa kwa muda wa siku tatu na tarehe 17/12/2019 niliondoka kwa shangazi na kwenda kisiwa cha Ghana kwa ajili ya kufanya biashara nikiwa huko na tarehe 21/12/2019 niliamua kurudi nyumbani kwa shangazi yangu Nansimo na tarehe 23/12/2019 siku ya Jumatatu nilikamatwa na askari Polisi kutoka kituo cha polisi Nansimo aitwaye Afande Mrisho akiwa na askari wa kike aitwaye Agnes wote ni wa kutoka kituo cha polisi Nansimo ambao walikuwa na gari la kiraia wakati nakamatwa nilikutwa nikiwa na pikipiki aina ya King lion mpya nilonunua tarehe 15/12/2019 katika duka la kuuza pikipiki lililopo Bunda mjini kwa bei ya shilingi milioni mbili na laki mbili Tshs 2,200,000/= na kuwekewa plate namba iliyokuwa inasomemka ***MC 539 CJY*** *ikiwa pamoja na kadi yake ambayo haikuwa na jina langu pia nilipewa kofia ngumu yenye rangi nyeusi na nyekundu. Pia wakati nakamatwa nilikuwa na kiasi cha pesa cha shilling laki tatu Tshs 300,000/= ambazo nilikuwa nazo mfukoni. Wakati nakamatwa nilikuwa nyumbani nimelala majira ya saa tano hivi asubuhi kwa sababu siku hiyo mvua ilikuwa inanyesha na baada ya kukamatwa wale askari polisi walioandika karatasi ambayo mimi niliweka sahihi yangu na kisha walinipeleka kituo cha polisi Nansimo na katika upekuzi uliofanywa nyumbani kwangu sikukutwa na kitu kingine zaidi ya pikipiki, kofia ngumu na fedha kidogo nilizokuwa nazo, na kwamba fedha nyingine zilizo salia kiasi cha shilingi milioni saba 7,000,000/= ambapo kiasi cha shilingi milioni sita Tshs 6,000,000/= nilipata nzao ajali ya boti wakati naenda kisiwa cha Ghana baada ya boti kuzama na kusababisha fedha nilizokuwa nazo kwenye begi kupotea ziwani na kwamba nilikamatwa baada ya kupata ajali ya boti na fedha kupotea*

In law, there is no known law that where there are two conflicting legal principles of the law (precedents), the latter principle prevails. In such a situation, the subordinate court can either choose more suiting to his situation at hand or abandons both and rule what is just as per facts and evidence available. This is because, every case must be decided on its own merit for its justice.

I am in agreement with the both learned counsel on the position of the cautioned statement (Exhibit P5) that it was recorded beyond the statutory period. Whereas in the case of **Shabani Hamis vs Republic (Supra),** the Court of Appeal expunged the said evidence illegally obtained but the Court of Appeal in the former case of **Nyerere Nyague vs Republic (supra),** held that where the said cautioned statement illegally obtained was not objected its admission during trial, it can not be raised at defense stage as the appellant is precluded from disputing it at appellate level.

Since each case must be decided by its own merits, in the current matter, I am of the firm view that as the decision in the latter case of **Shabani Hamis vs Republic** (Supra), has not extinguished the principle set in the former case of **Nyerere Nyague**, but do co-exist. Depending on the nature of the case, the subordinate courts are at

search was done and dully witnessed, a mere fact that the receipt of the seized properties was not issued, the anomaly didn't vitiate the trial as per the position in the case of **Juma Mzee vs Republic** (supra).

As regards the identification of the said Samsung Galaxy phone was not descriptive by either side claiming ownership (PW1 and the appellant), the clarification obtained in exhibit PE5 supports the assertion that it was the same phone stolen from PW1 (Exhibit P3). As PW1 described it and the description fits to all fours, unless the appellant claimed it as his, there is no such dispute as argued.

All this said and done, the first limb of grounds of appeal (1st, 4th and 6th grounds) is bankrupt of any merits and the same is valueless in the circumstances of this case.

With the second ground of appeal, I admit that the trial court did not consider the final submissions as ordered. Though it was important to say a little of what was contained in the said written submissions, not saying anything was not good. However, as a matter of law there is nothing prejudicial to the appellant in the circumstances of this case.

That the charge is defective, is the contention in the 5th ground of appeal. With due respect of what has been submitted by both parties, I

Otherwise, it will just be considered as a mere divergence to escape criminal liability.

Thus, considering the whole case at large, the prosecution's case has been established beyond reasonable doubt as per law on reliance of the testimony of PW1, PW3, PW4, PW5 and exhibit P5 as reproduced above.

That said, the appeal is devoid of merits and is hereby dismissed. Conviction, sentence and compensation orders issued by the trial court are hereby maintained by this Court.

It is so ordered.

DATED at MUSOMA this 24th day of October, 2022.

F. H. Mahimbali

Judge

Court: Judgment delivered this 24th day of October, 2022 in the absence of both parties and Mr. Gidion Mugoa, RMA.

F. H. Mahimbali

Judge