

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 104 OF 2021

(From the decision of the District Court of Momba at Chapwa (Hon. D.A. Magezi, RM) in Criminal Case No. 65 of 2018)

LAZARO S/O VENANCE SINKAMBA.....1ST APPELLANT
IBRAHIM S/O ANYAWILE KIBONA.....2ND APPELLANT
AMBOKIWE S/O LUKAS KABUKA.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 01/03/2022
Date of Judgement: 08/03/2022

MONGELLA, J.

The appellants were charged on two counts being armed robbery contrary to section 287A of the Penal Code, Cap16 R.E. 2002; and malicious damage to property contrary to section 326 (1) of the Penal Code. The 2nd appellant was also charged with a third count on rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code. The offences were alleged to have occurred on 06th March 2018 at around 00hours at night at Sogea area within Momba district in Songwe region.



It was further alleged that while at that area, the appellants jointly and together broke and enter into a dwelling house of one Doris daughter of Ibrahim Chongolo and stole different kinds of clothes worth T.shs. 38,500/-, two mobile phones makes Itel worth T.shs. 60,000/-, two mobile phone chargers make phantom six plus worth T.shs. 30,000/-, one CD deck make Samsung worth T.shs. 45,000/-, and cash money to the tune of T.shs. 1,400,000/-, all belonging to Doris Ibrahim Chongolo. It was further alleged that the appellants immediately before and after stealing the items threatened with a machete, one Flora daughter of Sylvester Nyoni with intent to obtain and retain the stolen properties.

The appellants, while at the same place, on the same date and hour, maliciously damaged a motor vehicle make Spacio with Reg, No. T. 355 BME by breaking its windows and cutting off the wire system. In the course of committing the offences, the 2nd appellant did have carnal knowledge of Flora without her consent. However, the trial court found him not guilty of the offence and acquitted him on this count. With respect to the 1st and 2nd counts on armed robbery and malicious damage to property, the appellants were convicted as charged and sentenced to thirty and five years' imprisonment respectively. The sentences were to run concurrently.

Aggrieved by the decision they filed the appeal at hand on eleven grounds. I shall however deal with the 4th ground for reasons to be apparent shortly.

On this ground, the appellants, who fended for themselves and argued the appeal, faults the trial court's conviction for basing on the appellant's

cautioned and extra judicial statements which were involuntarily obtained. In their submission, they argued that when the caution and extra judicial statements were tendered they objected by all the appellants on the ground that the same were illegally obtained as they were obtained involuntarily. They contended that despite their objection, the trial Magistrate admitted and relied on them in his decision without even conducting an inquiry to ascertain the voluntariness in issuing the statements. They prayed for the Court to be guided by the decision of **Omari Idi Mbezi & 3 Others vs. Republic**, Criminal Appeal No. 227 of 2009.

The respondent was represented by Ms. Sara Anesius, learned state attorney. Ms. Anesius supported the appeal, particularly on the error committed by the trial court in handling the objected caution and extra judicial statements by the appellants. She conceded to the appellants' claim that the caution and extra judicial statements, which were tendered and admitted as exhibit P1, P2, P3, P6, P8, and P9 were objected by the appellants, but the trial court admitted them without conducting an inquiry. She submitted that the exhibits were admitted contrary to the law.

In support of her argument she cited the case of **Mawasa Jeki @ Kamanga vs. The Republic**, Criminal Appeal No. 253 of 2018 (CAT at Mbeya, unreported), in which the Court of Appeal insisted that where a caution statement and extra judicial statement is objected, the trial court has to conduct an inquiry to ascertain whether the same was issued voluntarily and legally. She added that since all the exhibits were

admitted without the procedure being followed, the same should be expunged from the record.

She was further of the view that if the exhibits are expunged, there remains no tangible evidence on record to hold the conviction against the appellants. She argued so, on the ground that the appellants were not identified at the crime scene as testified by PW10 and PW11 who were present at the crime scene. She prayed for the appeal to be allowed and for the appellants to be set free.

After considering the arguments by the parties and gone through the trial court record, I agree with them that the trial court relied on the appellants' caution and extra judicial statements in convicting the appellants for the offence of armed robbery and malicious damage to property. The record shows that when the exhibits were tendered all the appellants objected on the ground of voluntariness in obtaining the statements. It is trite law that once a confession is repudiated/retracted, particularly on ground of voluntariness, the trial court, in this case a subordinate court, is obliged to conduct an inquiry. See: **Mawasa Jeki @ Kamanga** (supra); **Nyeura Patrick v. Republic**, Criminal Appeal No. 73 of 2013 (CAT at Mwanza, unreported); and **Twaha Ally & 5 Others v. Republic**, Criminal Appeal No. 78 of 2004.

In the matter at hand no inquiry was conducted rendering the admission of the exhibits a nullity. The exhibits are therefore expunged from the record. As argued by Ms. Anesius, to which I subscribe, the appellants were not identified at the crime scene. PW10 and PW11 who were key

witnesses in the case, testified that they did not identify the appellants at the crime scene. In the circumstances, there stands no tangible evidence on record to hold the conviction against them.

In the premises, the conviction and sentence entered against the appellants is hereby quashed. The appellants should be released forthwith from prison custody unless held for some other lawful cause.

Appeal allowed.

Dated at Mbeya on this 08th day of March 2022.


L. M. MONGELLA

JUDGE

