IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 100 OF 2021

(C/O Criminal Case No. 16 of 2021 Mpanda District Court)

(Luoga, B. G., RM)

JILALA S/O MAKEJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

11 & 30/03/2022

NKWABI, J.:

After convicting the appellant, the trial court sentenced him to serve four years imprisonment for burglary and two years imprisonment for stealing. It had, however, acquitted him for being in possession of properties suspected to have been unlawfully acquired.

A brief account of the facts of the case is that the room where one Saidi Ramadhani rents was burgled in the night of 28th December, 2020. The room is situated at Kwalakwacha area within Mpanda district. A mattress make Banco was stolen from the room. That property was said to be the property of Saidi. The appellant was charged with burglary, stealing and being in

possession of properties suspected to have been unlawfully acquired. The prosecution called five witnesses and tendered several exhibits including the alleged mattress. Other properties in respect of the 3rd count were not tendered in court and the court acquitted the appellant on the 3rd count and convicted him on the 1st and 2nd counts which the trial court was satisfied that the counts were proved beyond reasonable doubt.

The appellant has come to this court challenging the conviction and sentences seeking they be reversed. He paraded three justifications of appeal which are:

1. The trial court erred at law by admitting and working upon allegedly oral confession which was not proved and its admission was contrary to the law.
2. That the trial court erred both at law and fact by admitting the caution statement which was procured in contravention of the law.
3. That the trial court erred both at law and fact by convicting the appellant on a case which was not proved beyond reasonable doubt.

The respondent was keen to battle the appeal. During the hearing, the appellant appeared in person, unrepresented while the respondent was ably

represented by Ms. Safi Kashindi, learned State Attorney. The appellant adopted his grounds of appeal as his submissions.

On her part, Ms. Kashindi argued the 1st and 2nd grounds together and maintained that the procedure of recording the caution statement was followed and its admission in evidence was flawless. On Page 31 of the proceedings the caution statement was tendered by PW5 who recorded it, it was read over in court as such it was proper to consider it in determining the case, she argued.

Challenging the 3rd ground of appeal, Ms. Kashindi pressed that the charges were proved. The victim identified the mattress. The appellant signed on the certificate of seizure. The search that was conducted during the night was witnessed by an independent witness (PW3). The appellant did not want to enter his defence hence the trial court was entitled to draw an adverse inference under section 231 (3) of the Criminal Procedure Act hence the ground of appeal is meritless, it be dismissed, she added. She urged I uphold the trial court's decision.

Lastly, the appellant made a rejoinder submission, in which he argued that it is not true that he refused to defend himself. He fell sick and when he was sent to court, he was told he had refused to enter defence. He had no reason to refuse to enter his defence, he stressed.

I have carefully deliberated this appeal. With respect, I do not accept Ms. Kashindi's contention that the procedure of recording the caution statement was followed and its admission in evidence was flawless. Ms. Kashindi was of the view that on page 31 of the proceedings the caution statement was tendered by PW5 who recorded it, it was read over in court as such it was proper to consider it in determining the case.

I am of a contrary view. With respect, the learned trial Resident Magistrate acted perfunctorily in the process of admitting it and in considering its worthiness in the determination of the case. He did not give the appellant a right to rejoin over his objection towards the admission of the caution statement thus violating the right to a hearing to the appellant. Further to that, the trial court was not told of what rights actually were given to the appellant prior to its admission. The witness merely stated he gave rights to the appellant. That is illegal. Even in the determination of the matter, the

trial magistrate did not give reasons why he was accepting the caution statement. In the circumstances, the evidence as to confession is tainted with flaws and cannot be relied upon to uphold the conviction of the appellant. My view is fortified by the holding in **Paulo Maduka & 4 others v Republic,** Criminal Appeal No. 110 of 2007, (CAT) (unreported):

> *"However, such claims of accused persons having made confessions should not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily.* ***The confession should have been free from the blemishes of compulsion, inducements, promises or even self-hallucinations."*** (Emphasis supplied)

Next, I consider Ms. Kashindi's confrontation on the 3rd ground of appeal. In my respectful view, the confrontation does not bear fruits. I recall she had argued that the charges were proved. The victim identified the mattress. The appellant signed on the certificate of seizure. The search that was conducted during the night was witnessed by an independent witness (PW3). The appellant did not want to enter his defence hence the trial court was entitled to draw an adverse inference under section 231 (3) of the Criminal Procedure

Act hence the ground of appeal is meritless it be dismissed, she added. She urged I uphold the trial court's decision. I think, what appears to have skipped Ms. Kashindi's legal eye, is failure of PW1 to describe the mattress prior to its admission. In his judgment the trial magistrate had these to say about identification of the exhibit:

> *"PW1 managed to identify the said mattress in this court. ..."*

The above does not fit to the requirement of the law as stated in the case of **Nassor Mohd v. Republic [1967] HCD 446:**

> *"The proper identification of property in court is that the complainant should describe the property before it is shown to him so that when it is eventually tendered and the description confirmed it can be clear to the court that the identification was impeccable or not."*

The seizure of the exhibit P. 1 too was not satisfactorily conducted per the requirement of the law. The seizure was done during the night. There was no permission of the court for such search, that contravenes the provisions of section 40 of the Criminal Procedure Act, Cap. 20 R.E. 2019. As the exhibit was illegally obtained, the same has to be expunged from the court record.

After the expungement of the exhibit, nothing remains in terms of evidence to sustain the conviction of the appellant.

In the circumstances, and in the event the appellant opted not to enter his defence, was there any justification to have adverse inference for such option? I am mindful that for an accused person to be called upon to enter his defence, there ought to be established by the prosecution, a prima facie case. After all I have said above, could one legally say that the prosecution, after the close of their case, had established a prima facie case against the appellant sufficiently to require him to enter his defence? With the greatest respect to the learned trial Resident Magistrate, I am doubtful. Had the trial Resident Magistrate revisited just two authorities I am going to demonstrate here below, he would have not called upon the appellant to enter his defence. One of the authorities is **Republic v Makuzi Zaid and Another [1969] HCD no 249** where Georges CJ Quoting **Bamaulal P. Bhat v. Republic** [1957] EA 332 said:

> *"The case to be prima facie case must be such that a reasonable tribunal properly directing its mind to the law and the evidence can convict if no explanation is offered by the defence."*

Also, in **Mussa Fedha v. Republic,** Criminal Appeal No. 169 of 1992 (Unreported) (CAT) (Mwanza) it was held thus:

> *"It is thus clear that when the prosecution closed their case, there was no basis on which the appellant could have been convicted. As it turned out the appellant was convicted not on the strength of the prosecution case but on what he said. What would have happened if the appellant had opted to say nothing? Appeal allowed."*

So, there was no prima facie case worth the name and therefore there was no justification for the court to have an adverse inference against the appellant when he opted not to say anything in defence.

Before I wind up, I have to note, although in the passing, the way the charge sheet was drawn is a bit troubling. The charge sheet indicates that the case was between Jilala s/o Joseph while the particulars of the offence indicate that the culprit of the offence is Jilala s/o Makeja. I am in doubt if the names refer to the same person.

Everything said and done as above, I allow the appeal, quash the convictions and set aside the sentences. I order for the appellant's immediate release from prison unless he is held therein for another lawful cause.

It is so ordered.

DATED at **SUMBAWANGA** this 30th day of March 2022.

J. F. NKWABI

JUDGE