IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

(HC) CRIMINAL APPEAL No. 162 OF 2021

(Originating from Criminal Case No.67 of 2020 in the District Court of Misungwi)

JOHN ELIAS .... APPELLANT

VS

REPUBLIC .... RESPONDENT

JUDGMENT

3/3/2022 & 22/4/2022

ROBERT, J:-

The appellant, John Elias, was arraigned before the District Court of Misungwi on a charge of armed robbery contrary to section 287A and 287C of the Penal Code, Cap. 16 (R.E 2019). He was convicted and sentenced to thirty (30) years imprisonment. Aggrieved, he preferred this appeal against the conviction and sentence of the trial Court.

The factual setting behind this appeal reveals that, on 14/05/2020 about 20:00 hours one Phares Ezekiel (the victim), a resident of Misungwi township and an operator of a commercial motorcycle (popularly known

as bodaboda) was hired by the Appellant herein to take him from a place known as Ndinga bar to the village of Nyahiti. In the course of the journey to Nyahiti village, the Appellant asked the victim to stop the motorcycle so that he could attend to the call of nature. Having stopped, the Appellant pulled a knife and stabbed the victim then left with the victim's motorcycle.

The victim was found by the roadside wounded and taken to hospital by another motorcyclist. Later, while the victim was still in hospital, the Appellant was allegedly found in possession of the victim's motorcycle and taken to police station. Thereafter, he was arraigned for charges of armed robbery. The trial Court convicted him as charged and sentenced him to thirty years imprisonment. Aggrieved, the Appellant is now challenging the decision of the trial Court on the following grounds:

1. *That, the trial magistrate erred in law and in fact to admission the exh. P.01 in evidence whilst was not read out in court.*
2. *That the residing magistrate erred both in law and in facts as receiving the exh. P.01 which contravened the provision of sec. 50(1) of the CPA*
3. *That the prosecution side failed to tender the search warrant and certificate of seizure proving the relied fact that the search conducted complied to the statutory requirements of the law and to prove that it was made in the appellant premises.*

4. *That, the trial magistrate relied on dock identification on which is bad in law*
5. *That the said virtual identification by PW2 Robert s/o Amos to appellant was not disclosing the distance between assailant and him under observation*
6. *That the prosecution offered no explanation as to why uncle & 2 fellows and accused relatives or parents (who said that, were the ones who submitted the appellant to police post)*
7. *That the prosecution witness failed to prove the ownership of the alleged stolen properties by tendering confirmatory receipts or registration card as to prove true legal ownership of the said one motorcycle with registration number MC 203 BKU San LG*
8. *That, the recent possession of the stolen property was not proved as the law requirements*
9. *That, the presiding magistrate erred in law and in facts on failure to specify the offence of which and section of the penal code or other law under which the appellant was convicted and punished contrary to the law provision of Section 312(2) of the Criminal Procedure Act (CPA)*

When this matter came up for appeal, the Appellant appeared in person without representation whereas the Respondent enjoyed the legal services of Ms. Gisella Alex, Senior State Attorney.

When the Appellant was asked to address the Court by amplifying on his grounds of appeal, he simply adopted his grounds of appeal and asked the Court to allow the appeal based on the said grounds.

In response, Ms. Alex opted to support the appeal. Submitting on the first ground, she argued that when the cautioned statement was being tendered the Appellant objected to the tendering by stating that "I do not know them" but the trial Court proceeded to admit the cautioned statement as exhibit P1 without conducting an inquiry. She submitted that since the document was not admitted properly in evidence it should be expunged from the records of the case.

As for the second ground, the learned counsel was in agreement with the Appellant that the cautioned statement (exhibit P1) was recorded in violation of section 50(1) of the Criminal Procedure Act. The Officer who recorded the statement did not indicate when the cautioned statement was recorded which means there is no indication that the cited provision was complied with.

Coming to the 3rd ground, the learned counsel agreed with the Appellant that, the proceedings did not indicate if certificate of seizure and search warrant were tendered as exhibit in court. The evidence of PW1 and PW2 indicates that the appellant robbed a motorcycle from PW1 and took a jacket & a bag but the said items were not tendered as exhibit. She cited the case of **James Kisabo Mirango & Another Vs R**, Cr. App No. 216/2006 CAT Mwanza (unreported) to support her argument that

without a search order or certificate of seizure it cannot be said that there is evidence that the properties were found in Appellant's possession.

On the 4th and 5th grounds, the Appellant faulted the trial Court for relying on dock identification and visual identification by PW2 Robert Amos who failed to disclose important details to support the alleged identification. In response, the learned state attorney agreed with him. She argued that, PW1's evidence shows that it was the first time for the victim to carry the Appellant on his motorcycle which means he was not well known to him. Further to that, the testimony of PW2 who arrested the Appellant shows that, he saw a man riding a motorcycle without headlights at the village of Nyashishi and when he went home he heard the news about the stolen motorcycle which he related to the man he saw earlier hence he went back and arrested the Appellant who was in possession of a motorcycle, a bag and a phone. The witness did not state how he identified the Appellant and the source of light was not mentioned. Although PW2 said the headlights of his motorcycle were on, the intensity of the light and distance to the said person was not clear. She argued that, it was unsafe to rely on dock identification while the Appellant was not identified properly at the scene of crime.

Coming to the 6th ground, the learned state attorney submitted that there is substance in this ground because the appellant was found at Geita allegedly after being traced through his phone number. However, the person alleged to have traced the appellant through his phone number and the person found in possession of the mobile phone alleged to belong to the appellant did not testify in court. Further to that, the alleged mobile phone was not tendered as exhibit.

Coming to the 7th & 8th grounds, the learned state attorney agreed with the appellant that the doctrine of recent possession was not well applied in this case. She maintained that proof of ownership of the motorcycle alleged to have been stolen was not established and the said motorcycle was not described in the proceedings (eg. Registration number and make of the motorcycle were not disclosed).

The last ground of appeal faulted the trial Magistrate for failure to specify the offence and section of law under which the appellant was convicted and sentenced. The learned state attorney did not support this ground of appeal, she maintained that the trial magistrate stated that the accused (appellant herein) was convicted as charged which means he was convicted as charged in the charge sheet and the said charge sheet indicated the provisions of law under which the appellant was charged.

On the basis of her submissions, she prayed for the appeal to be allowed, conviction and sentence set aside and the Appellant to be discharged.

The appellant had no rejoinder submissions but prayed to be discharged.

From the grounds mounted in support of this appeal and the submissions made by the learned counsel for the Respondent, it is clear that both parties in this appeal do not support the conviction and sentence passed by the trial Court. I will now determine the merit of this appeal by examining the grounds of appeal in a regular order.

Starting with the first and second grounds, having looked at the records of this matter, this Court is in agreement with the parties that the Appellant's cautioned statement (exhibit P01) was not only recorded in contravention of section 50(1) of the Criminal Procedure Act, records indicate that, it was also admitted in evidence without an inquiry being conducted or being read out after admission.

According to the cautioned statement (exhibit P01), the Appellant's interview took place on 25th May, 2020 from 09:00 in the morning but it doesn't indicate when the interview ended. It is therefore not possible to determine if the Appellant's interview complied with the basic period

available for interviewing a person who is in restraint in respect of an offence under section 50(1) of the Criminal Procedure Act. It is significantly important for the person conducting the interview of a person who is in restraint in respect of an offence to indicate both the time when the interview starts as well as the time when it ends in order to avoid any frivolous or vexatious extension of the basic period available for interviewing a person under restraint.

I have also observed, as submitted by the learned state attorney, that at the time of tendering the Appellant's cautioned statement, the Appellant (accused then) was asked if he had objection to the said statement being tendered and he replied that, "I do not know them". This implies that the Appellant either refused to accept the statement or denied the truth or validity of it. In the circumstances, the trial Court was required to conduct an inquiry to determine if the Appellant's confession in that statement was voluntary. Unfortunately, that was not done.

In the case of **Twaha Ali and 5 others v. The Republic**, Criminal Appeal No. 78 of 2004 (unreported), the Court emphasized on the requirement to conduct an inquiry or trial within a trial to satisfy itself on the voluntariness of the cautioned statement after the accused person had repudiated or retracted it. It said: -

"If that objection is made: after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry or a trial within a trial into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."

In another the case of **Stephen s/o Jonas & Another Vs R.** CRIMINAL APPEAL NO. 337 OF 2018 CAT at Mbeya Unreported Sehel, J.A. said

" The trial court ought to have stopped everything and conducted an inquiry to determine the voluntariness of the cautioned statements."

Further to that, it is not disputed that exhibit P01 was admitted and used in the impugned judgment of the trial Court without being read out in court. It is now a settled law that whenever a document is intended to be introduced in evidence, it should first be cleared for admission, and be actually admitted in evidence, before it can be read out in court. (See the case of **Aniseth Ibrahim Vs R. Criminal Appeal No. 227 of 2018** CAT unreported.)

Considering that the Appellant's cautioned statement (exhibit P01) was recorded in violation of section 50(1) of the Criminal Procedure Act, admitted in evidence without conducting an inquiry despite the Appellant's objection and was not read out in Court after being admitted, this Court finds that exhibit P01 cannot be spared with all these violations. I therefore expunge exhibit P01 from the records of this case.

Coming to the third ground, the appellant alleged in his this ground that the prosecution side failed to tender the search warrant and certificate of seizure as proof of the fact that search was conducted in appellant's premises and in compliance with the requirements of the law.

For the doctrine of recent possession to have been successfully invoked, the prosecution ought to have established several elements which were succinctly enumerated in the case of **Joseph Mkumbwa and Samson Mwakagenda v. R,** Criminal Appeal No. 94 of 2007 (unreported) where the Court observed that:

> *"Where a person is found in possession o f a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For a doctrine to apply as a basis for conviction, it must be proved first, that the*

property was found with the suspect; second, that the property is positively proved to be the property of the complainant; third, that the property was recently stolen from the complainant; lastly, that the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above...."

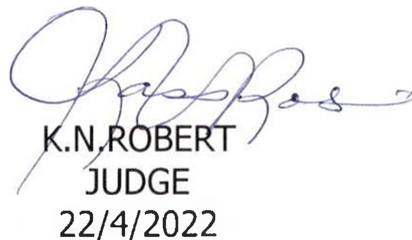
In the present case, while the testimony of PW1 and PW2 indicates that the appellant robbed a motorcycle and took a jacket & a bag, the said items were not tendered as exhibit in Court. Further to that, the proceedings did not indicate if the certificate of seizure and search warrant were tendered as exhibit in court to establish that the alleged search and seizure was conducted against the appellant. In the circumstances, I am in agreement with the parties in this case that, there is evidence that the properties alleged to have been stolen were found in the Appellant's possession. Hence, the doctrine of recent possession was wrongly applied against the appellant.

On the 4th and 5th grounds, once again I am in agreement with the parties that it was unsafe to rely on dock identification in the absence of

any prior identification or description either at the scene of crime or police station.

On the basis of the reasons stated above, it is evident that the trial Court failed to scrutinize the body of evidence adduced by prosecution to prove the alleged offence against appellant. In the circumstances, I agree with both parties that the appellant's conviction was based on insufficient evidence. Consequently, I allow this appeal, set aside the conviction and sentence imposed by the trial Court. Appellant to be released with immediate effect unless he is lawfully held in connection to other causes.

It is so ordered.



K.N.ROBERT
JUDGE
22/4/2022