THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 24 OF 2021

(Originating from Mlele District Court in Criminal Case No. 186 of 2019)

JACOB JONAS @ MAGANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last order: *04/03/2021*
Date of Judgment: *19/05/2022*

JUDGMENT

NDUNGURU, J.

Jacob Jonas @ Maganga the appellant was Convicted and sentenced to serve ten years imprisonment by Mlele District Court. [Ngowi RM] for breaking into the building matter written to Commit an offence **c/s 296 (a) and (b) of the Pena code Cap 16 R.E 2019**, While in the 2nd Count the appellant was charged of stealing **c/s 258 (1) and 265** of the Pena code Cap 16 R.E2019, but he was acquitted in the 2nd Count.

Being dissatisfied with the decision of the trial Court, the appellant filed two grounds of Appeal to this Court.

i. *That the trial court erred in both Law and fact to convict the appellant basing on the Caution Statement which was procured Contrary to Law as the Personal recorded it was also the investigation office in this case.*

ii. *That the trial Court erred in Law and fact by Convicting the appellant basing conflicting and feeble evidence by the Prosecutions which had no value in proving case beyond Reasonable doubt as required by law. He prays for Appeal be allowed, Judgment of the trial court be set inside.*

At the hearing stage, Appellant was unrepresented while Ms. Safi Kashindi Amani (State Attorney) Represented the (Republic) Respondent.

Arguing his appeal, Appellant didn't have any clarification on the grounds of Appeal except the court to consider them.

Ms. Safi Kashindi Amani (State Attorney) for Republic submitted the appellant was Convicted and sentenced for only 1st Count of breaking into the building.

As first ground is concerned the learned SA told the court that the Caution statement of the appellant was recorded before the witness (PW4) was assigned to investigate the case, the said Caution statement was tendered in court as an exhibit and the same was admitted in court without any objection from the appellant and marked as an Exhibit PI. The caution statement of the appellant contains detailed events on how the alleged offence was committed.

The learned State Attorney further told the court that the trial court did not based on the caution statement alone but on other evidence, he pray the 1st ground be dismissed for lack of merits.

The 2nd ground, the learned state Attorney told the court that the appellant was seen entering into the building unlawfully (as per PW2) and during the interrogation he admitted the offence and he named his fellow 2nd Accused.

The appellant and his fellow accused were found in the building behind the net bags she prays the appeal be dismissed for lack of merits.

Having the consolidated the humble arguments of both the Appellant and Respondent the brief facts of the case look like this.

On 17th day of December, 2019 during the night hours at Inyonga Village Mlele District Katavi Region the appellant did break and entered into the store Owned by one Maximilian s/o Benezet @ Opita with intent to commit an offence, Appellant was actually arrested at the scene and shown where he kept the stolen properly, matter was referred to the Police station accused was brought before Mlele District Court, and at the hearing stage, five witnesses were called and five exhibits were tendered in court. These are Appellant's Caution statement (**Exhibit P1**), certificate of seizure (**Exhibit P2**), Sketch map plan of the scene (**exhibit P3**), and chain of custody (**exhibit P4**) and paddy bags (**exhibit P5**).

The appellant didn't have witness in his defense. He was found guilty of the offence in the 1st count and was acquitted in the 2nd Count. The appellant was sentence to serve 10 years imprisonment

as he was not the first offender, he was convicted and sentence in criminal case No. 73 of 2019 by Inyonga Primary Court to serve five months imprisonment. In brief this is what transpired in the record of the trial court. Dissatisfied with the decision of the trial Court, His main complaints on the two grounds of Appeal are,

(i) ***Admissibility of caution statement as it was recorded by the investigation.***

(ii) Whether the prosecution case was not proved to the required standard in criminal cases.

To start with the first ground of appeal, the appellant is complaining about the admissibility of confession he made to the police officer, the test to be applied to ascertain whether the confession is admissible was provided under the provision of **section 29 of the Evidence Act Cap 6 R E 2019** and there is unbroken chain of principles of case laws. In the case of **Masasila Mtabo v. Republic (1982) TLR no 131 HC, It** was settled that,. *where the admissibility of confession comes about, in the Magistrate's court, where a trial within atrial is not strictly applicable the Magistrate should take the matter and inquire into the circumstances leading up to the taking of the statement, much more details and ask the*

accused whether he plans to challenge the admissibility of the statement. If the accused does not challenge its admissibility, then the Magistrate determines the question of admissibility on the evidence."

Section of the evidence Act.1967 has introduced a new dimension in the admissibility of confession. That is, in addition to the test of voluntariness the test of whether or not the inducement or torture was likely to affect the truth of the confession has been introduced, so that if, despite torture or undue influence, the truth content of the confession is not affected, mere allegation of torture will not render the confession automatically inadmissible, but as the provision of s. 29 of the Evidence Act apply procedurally, admissibility of such confession, two test must be carried out. First the court must have to satisfy itself that the confession was voluntary, in which the admissibility of the same causes no problem, secondly, if there is allegation of torture, the same had to satisfy the truth of the confession was not affected.. see the case of **Mohamed Ally & Another v. Republic (1956) 29 K L R,166., R V. Igungu s/oTungu (1943) EACA no 111, Omari s/o Mussa v. Republic (1968) HCD n.99,and simon Republic (1970) H.C.D N335.**

In the present case the trial record shows that not only the caution statement of the accused was admitted without objection but also the real exhibits arrested with him were admitted without objection. It was also well by the Court of Appeal of Tanzania in the case of **Jaribu Abdallah v. Republic criminal Appeal no 220 of 1994** (unreported), It was held that, *where confession made by the accused lead to the discovery of the property suspected to have been stollen, such confession is relevant and admissible in evidence*. See the case of **selemani Rashidi & Another v. Republic (1981) TLR no.252, Gopa v, Republic (1993) 20 EACA NO 318 and Ezera v. Republic (1962) E A 309.** In the present appeal the trial court rightly admitted the caution statement of the appellant as it contains nothing but the truth about the offence committed. I have satisfied that the confession before police officer was voluntarily obtained, mere statement by the appellant at the appellate stage cannot invalidate his caution statement, It is also well settled in courts decisions that not any omission of the provision in the CPA will invalidate the evidence. The first ground of appeal has no merits the same is dismissed for lack of merit.

The second ground is ***whether the prosecution case was proved beyond reasonable doubt.*** The law in this country as far as criminal

cases is concerned is clear, that the burden to prove criminal case lies to the prosecution. In the case of **Jacob pastory & 2 others v. Republic cr. Appeal no 94 of 2014, HC Mwanza (unreported), it was held that...***like other criminal offences it is the duty of the prosecution to prove the case against the accused persons beyond reasonable doubt, the burden never shifts (S.3 (2) (a) of the Evidence act cap 6 R E 2019" In another case of* **Boniface Siwinga v. Republic Cr. Appeal no 421 of 2007 (ACT),** (unreported)., it was settled that.

> *"The accused have no duty to prove their innocence. All what the accused need to do is just to raise reasonable doubt on the prosecution case. (see the case of* ***said Hemedi v. Republic (1987) TLR no 117****)."*

Coming back to the case at hand the accused was arrested at the scene and the stolen property was identified by the owner, the principles governing the identification of stole properties was pronounced in the unbroken chain of decisions, in the case of **Mustafa Darajani v. Republic cr. Appeal no 242 of 2008, decided on march 2012 (CAT) (unreported), held,** for the doctrine of recent possession to apply it must be established that,

(a) *That, the property was found with the suspect or there should be a nexus between the property stole and the person found in possession of the property (b) That the property is positively the property of the complaint (C) the property was recently stolen from the complainant and, (d) the stolen property in possession of the accused must have a reference to the charge lid against him.* See the case of Alexander Milambo vs. Republic Criminal Appeal no 49 of 2013 HC, (unreported), **Fadhili Mohamed vs. Republic (1974) LRTno 5, Salehe mwenya & 3 others vs. Republic Criminal Appeal No 66 of 2006 (Unreported), Massor Mohamed vs. Republic (1967) H. C D No 446 and George Mlangwe vs. Republic (1989) TLR No 10**. In the final stage as far as the first ground of appeal is concerned, investigation by the police who recorded the caution statement of the appellant is not fatal irregularity as the appellant was not prejudice, the appellant was tried fairly by the trial court, the principle of fair trial was well stated by the Court of appeal of Tanzania in the case of **Mussa mwaikunda vs. Republic (2006) TLR No 379,** but nothing was contravened by the trial court, However the test to be applied if the omission done by the trial court is fatal or not, was whether the omission goes to the root of the case, In the case of **Said**

Ally Saif vs. Republic Criminal Appeal No 249 of 2008 (CAT) (Unreported), *it was settled that,...It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of evidence is contradictory that the prosecution case will be dismantled....,*

See the decision in the same aspect in the case of **Niyonzimana Augustine vs. Republic criminal appeal no 485 of 2015 (CAT) (unreported). And the case of Mohamed Salum Matumla vs. Republic (1995) T L R no 3 CAT.**

In the appeal at hand even if the caution statement is expunged from the record, still evidence is so strong against the appellant, this ground fails as it lacks merits the same is dismissed, with regard to the second ground the position was well settled in the case of **Capt Lamu & Another vs. R (CAT) mwanza criminal appeal no 145 of 1991 unreported, quoted with approval the case of Minister of pension (1947)2 All ER 372,** the court has these wards,.....*the law would fail to protect the community if it admit fanciful possibility to deflect the course of justice. If the evidence is so strong against a man so as to leave only remote possibility in his favor which can be dismissed with sentence, the case is*

proved beyond reasonable doubt...' there is no shadow of doubt that prosecution that it is the accused person who committed the offence and non else, the second ground also has no merits and it is dismissed accordingly.

All and all, appeal fails the same is dismissed for being devoid of merits. But regarding sentence, the appellant is being convicted of the 1st count was sentenced to the maximum statutory sentence of 10 years. According to the wording of section 296 such a sentence is not mandatory but discretionary. The trial court meted maximum sentence to the appellant on the reason that, he is habitual offender. But the fact that he is habitual offender was raised by the prosecution when addressed antecedent. The prosecutor told the court that the appellant as convicted and sentenced by Inyonga Primary Court in the case no 73 of 2019 to serve five months imprisonment. The prosecutor did not tell the court what offence did the appellant charged before the Primary Court. The nature of offence to my opinion is very essential for the court to consider when sentencing the appellant relying on previous Criminal.

In the premises, I find the appellant's sentence is excessive. I hereby reduce the sentence from 10 years to five years. The served period be deducted out of those five years.

It is so ordered.

D. B NDUNGURU

JUDGE

19/05/2022