IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 12 OF 2022

(From the decision of the Resident Magistrates' Court of Mbeya at Mbeya (Hon. Z. D. Laizer, SRM) in Criminal Case No. 322 of 2019)

JOSHUA MILITARY.....1ST APPELLANT

FRANCIS PETER.....2ND APPELANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 25/04/2022
Date of Judgement: 24/05/2022

MONGELLA, J.

The appellants were arraigned in the Resident Magistrates' Court for Mbeya for the offence of stealing contrary to **sections 258 (1) and 265 of the Penal Code, Cap 16 R.E. 2002**. In the charge they were alleged to have jointly committed the offence on 24th August 2019 at Inyala area within the City and region of Mbeya. The offence involved a motorcycle with registration number MC 505 MBT make Kinglion worth T.shs. 2,000,000/-, property of Joseph Mwakayula. They pleaded not guilty to the offence necessitating the prosecution to parade evidence to prove the offence.

Through its witnesses, the prosecution tendered evidence showing how the appellants were involved in the offence, arrested and charged in court. The evidence shows that it was through the 2nd appellant, the 1st appellant got arrested as well. The complainant (PW1) explained that on 24th August 2019 at around 20hours, after returning from work, he parked his motorcycle with number MC 505 BNT at the compound of his house and went inside his house. The house was fenced and the motorcycle was parked inside the fenced area. After sometime he went outside to take the motorcycle and found it missing. He woke up his neighbours who searched for the motorcycle in vain. The incident was reported at Iyunga police post.

He explained further that sometime in September 2019 he was phoned by a police officer named Rama and told to go to the police post. At the police post he was shown the appellants, but did not know them. The 1st appellant however, said that he knew the complainant. The appellants found themselves in the hands of the police after PW2 reported a fishy business deal initiated by the 2nd appellant. He told the trial court that on 30th October 2019 he was phoned by a motorcycle owner telling him that there was a motorcycle on sale at one Million Tanzanian shillings, but had no blue card. The caller told him that the motorcycle was used but looked new.

PW2 suspected the deal and decided to report to the police. A trap was therefore set leading to the arrest of the 2nd accused person at the place where the deal was to be concluded. Upon being arrested the 2nd appellant told the police officer (PW4) and PW2 that he and the 1st

appellant had previously stolen a motorcycle at Iyunga-Inyala area and sold it at Kyela. This information led to the arrest of the 1st appellant. Investigation revealed that the motorcycle referred to by the 2nd appellant was that of the claimant (PW1). On 04th November 2019 the suspects were taken to the complainant's house whereby they explained how they entered the compound and drove away with the motorcycle.

The trial court was satisfied that the prosecution evidence proved the offence against the appellants beyond reasonable doubt. It therefore convicted them for the offence charged and sentenced them to serve four (4) years imprisonment. Aggrieved by the decision, they lodged the appeal at hand on ten grounds as follows:

1. *That the trial court erred in convicting the appellants relying on the caution statement of both appellants which were admitted wrongly.*

2. *That the trial Magistrate erred in convicting and sentencing the appellants basing on hearsay evidence.*

3. *That the trial Magistrate erred in convicting the appellants regarding that PW4 was incompetence (sic).*

4. *That the trial Magistrate erred in law and fact in convicting the appellants basing on the evidence of PW2 which was doubtful to warrant conviction.*

5. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellants while she failed to analyse the entire prosecution evidence.*

6. *That the trial court faulted in entering conviction and sentencing the appellants basing on contradictory evidence.*

7. *That the trial court erred in convicting the appellants relying on uncorroborated evidence of witnesses as far as the appellants were not caught in commission of the crime.*

8. *That the trial court erred in convicting the appellants on circumstantial evidence which was not established.*

9. *That the trial court erred in convicting the appellants basing on confession statement of a co-accused (the 1st appellant).*

10. *That the prosecution side failed to prove the case beyond reasonable doubt.*

The appeal was argued orally. While the appellants fended for themselves, the respondent was represented by Mr. Davis Msanga, learned state attorney.

The 1st appellant argued on the 1st, 2nd, 5th, 6th and 7th grounds and the 2nd appellant argued on the 1st, 4th, 8th, and 9th grounds. The 3rd and 10th grounds were abandoned.

Addressing the 1st ground, the 1st appellant said that he denied to have issued the statement as he was beaten when interrogated. He complained that the trial court was unjust on his part as it disregarded his complaints and said that the caution statement was admitted with no objection. He faulted the trial court for admitting the caution statement without satisfying itself if the same was obtained in accordance with the law. He urged the Court to consider the principle settled in the case of ***Musa Mustafa Kusa & Beatus Shirima Mangi vs. Republic***, Criminal Appeal No. 51 of 2010 (CAT, unreported) in which it was held that the trial court should not admit a caution statement without satisfying itself that the law was adhered to in obtaining the statement.

Challenging the admission of the caution statement further, he alleged that the same was obtained outside the prescribed period. He said that PW5 never stated the time he was arrested. He said he was arrested on 26th October 2019 at around 14hours at Uyole area and taken to the police station at a time he does not remember. However, he said, given the time it is open that the statement was recorded outside the prescribed time and the trial court failed to consider that. To support his point he referred the case of ***Richard Lubilo & Mohamed Selemani vs. Republic*** [2003] TLR 149.

On the 2nd ground, he challenged the prosecution evidence for being hearsay and the trial court for relying on such evidence. Referring to the complainant's testimony he said that the said witness told the court that he never saw the person who stole the motorcycle from him and never suspected anyone. That, the said witness said that he was told by the

police that the appellants were the culprits. On those bases he was of the stance that the evidence adduced was hearsay. He referred the Court to the testimony of the complainant, PW1, at page 13 of the trial court typed proceedings.

Arguing on the 5th ground, the 1st appellant faulted the trial court for failure to analyse and consider the prosecution case. He contended that the prosecution case shows that the arrest of the 2nd appellant led to the arrest of the 1st appellant. However, he said, if the trial court had been keen, it would have noted that the evidence was fabricated. He argued so saying that the statement of the 2nd appellant was recorded on 30th October 2019 while that of the 1st appellant was recorded on 29th October 2019. In the premises, he wondered how the statement of the 2nd appellant, which led to the arrest of the 1st appellant, could be recorded after the 1st appellant had already been arrested.

In addition, he faulted the findings of the trial Magistrate at page 6 of her judgement whereby she stated that PW2 was phoned by the 2nd appellant. On this, he contended that the said finding is not reflected anywhere in the proceedings. He further argued that during cross examination, PW2 denied to have been called by the 2nd appellant, showing that PW2 was never called. He challenged the prosecution evidence saying that there was no printout presented in court from the telecommunication company to prove that the phone call was indeed made.

He as well challenged the testimony of PW1 who said that he reported the theft to the police and was given the RB. He said that the said RB was never presented in court as evidence. He also challenged the testimony of PW3 who said that the appellants showed the houses of one Joseph Mwakijola, Emma Sikwenge and Laurence Mwaiselo as the houses they committed theft. He challenged the said testimony on the ground that it was not connected to the case as the complainant in the case was never mentioned and PW3 never stated if the appellants showed the house of the complainant. He said that the appellants never took anyone anywhere as they never committed any theft.

He further challenged the testimony of PW1 for being contradictory. Explaining the contradictions, he said that at first PW1 stated that he bordered a motorcycle to his home and found the police and the appellants heading to his home then during cross examination, he changed and said that the police officers found him at his home. Considering the pointed contradiction, he concluded that PW1's evidence was fabricated and the trial court failed to note the contradictions and arrived at a wrong decision.

With regard to the 6th ground, the 1st appellant addressed further the contradictions in the prosecution witnesses thereby faulting the trial court for relying on such evidence. Starting with PW1's testimony, he said that PW1 stated that he was phoned by a police officer named Rama in the month of September and told to go to the police station to see his thieves. When he arrived he saw his two thieves. The 1st appellant found the

testimony not credible on the ground that the prosecution evidence shows that the appellants were arrested in October.

The other contradiction he addressed regards the testimony of PW2 and PW4. He contended that while PW2 stated that the 2nd appellant was arrested at Ghana Street, PW4 stated that the 2nd appellant was arrested at Majengo Street. Addressing more contradiction between these witnesses, he added that while PW2 stated that the motorcycle was sold at Ipinda-Kyela, PW4 stated that the motorcycle was sold at Kasumulu-Kyela. Referring to the trial court judgment, he argued further that it appears that there were two different motorcycles being referred to, which were one with reg. no. MC 505 MBT and the other with reg. no. MC 505 BMT. He further challenged the testimony of PW2 on the ground that he failed to identify the accused he claimed to have arrested on the date of the incident and in his testimony he mentioned both accused persons as "France." He added that during cross examination, PW4 told the trial court that he arrested the 2nd appellant, but later denied to have arrested the 2nd appellant whereby he said that he found him at the lockup room.

Arguing on the 7th ground, he briefly submitted that the evidence of prosecution witnesses was not corroborated.

When his turn to address the Court arrived, the 2nd appellant also addressed the 1st ground of appeal whereby he basically challenged the admission and consideration of the caution statement by the trial court. He contended that he specifically objected the admission of the statement but the trial court never considered his objection. He further

faulted the trial court for considering the statement of the 1st appellant to convict him. He invited the Court to consider the principle settled in the case of ***Saidi Bakari vs. Republic***, Criminal Appeal No. 422 of 2013 (CAT at Tanga, unreported); and that of ***Emmanuel Mahaya vs. Republic***, Criminal Appeal No. 212 of 2014 (CAT, unreported) in which it was ruled that the provisions of section 50 and 51 of the Criminal Procedure Act were meant to safeguard the rights of the suspect and therefore should not be taken lightly.

He argued further that the law is settled to the effect that non-compliance with the provisions of section 50 and 51 of the Criminal Procedure Act is a fundamental irregularity that goes to the root of the matter. He was of the view that the trial court had to satisfy itself as to whether the statement was recorded legally and within time. He argued that there was no evidence as to when the accused was arrested and interrogated. In the circumstances, he prayed for the caution statement to be expunged from the record.

Addressing the 4th ground, he challenged the evidence of PW2 as well. He contended that the testimony of PW2 was full of doubts to warrant conviction and the trial court ought to have considered that. He further challenged the prosecution for failure to present some key witnesses being, the OCD, OCCID, and the motorcycle driver who was alleged to have called PW2 for a motorcycle deal. In support of his arguments, he referred the case of ***Alhaj Ayubu Msumari & 2 Others vs. Republic***, Criminal Appeal No. 136 of 2009 (CAT at Tanga, unreported) which insisted on presentation of key witnesses to the case.

Arguing on the 8th ground, he faulted the trial court for relying on circumstantial evidence which was not fully established. He prayed for the Court to consider the principle settled in the case of ***Godlisen Daudi Mweta & Solomon Joel Soloho vs. Republic***, Criminal Appeal No. 259 of 2014 (CAT at Arusha, unreported) in which while quoting an Indian decision in the case of ***Inspector of Police – Tabir Nadhu vs. John David***, 2011 NSC 418, held that "*each and every incriminating circumstance must be clearly established by reliable witnesses and circumstances must form a chain of events, from which the only irresistible conclusion will withdraw the guilty of the accused, and no other hypothesis against the guilty is possible ...*" Considering this authority he concluded that the chain of events were unconnected to establish their connection to the offence charged and the trial court failed to take that into consideration in its decision.

With regard to the 9th ground, he faulted the trial court for relying on the confession statement of a co-accused, the 1st appellant. Referring to the case of ***Simon vs. Republic*** [1971] E.A. 74 he contended that the law prohibits taking into consideration against an accused person a confession made by a co-accused. He said that the confession statement is only to be considered against the maker. On those bases he concluded that the trial court contravened the provisions of **section 33 (2) of the Evidence Act** by considering the statement of the 1st accused person who was the only person who mentioned the 2nd appellant.

On the other hand, the respondent opposed some of the grounds of appeal and conceded on some. With regard to the 1st ground

concerning the caution statement of the 1st accused, he conceded that the same was taken out of time and prayed for the Court to expunge it from the record.

Replying to the 2nd ground, he disputed the claim that the prosecution evidence was hearsay saying that what was testified came from the appellants themselves. Referring to the testimony of PW1, he said that PW1 said that "*Joshua said he knows him as he stole his motorcycle.*" Mr. Msanga considered the contradictions pointed regarding PW1 being minor and not going to the root of the case. He said that what is important is the fact that PW1 identified the appellants by face and not by names. Commenting on the discrepancy on the registration number of the motorcycle he said that in the proceedings the number reads MC 505 BMT and the discrepancy is in the judgment. Though agreeing that there was no eye witness, he said that the offence was investigated and the police knew it was the appellants who were involved as they confessed before the police after being arrested on other theft offences.

On the 4th ground, Mr. Msanga referred to section 127 (1) of the Evidence Act arguing that under this section every witness is credible unless where there reasons not to believe the witness. He said that the 2nd appellant was arrested as he wanted to sell a "*Bhajaji*" with no blue card. He said that PW2, one Festo Andimili Kasinde, who is the leader of "*Bodaboda*" drivers testified that the 2nd appellant introduced himself as "Francis" when they talked over the phone. That, the 2nd appellant was arrested ready handed by PW2 with a "*Bhajaji*" with no blue card. That, PW2 testified that the 2nd appellant explained that he was so much involved in

stealing of motorcycles and selling them in Kyela and mentioned the 1st appellant as his counterpart. He was of the view that the 2nd appellant confessed orally while a free agent, making his confession valid. He referred the Court to the case of ***Posolo Wilson Mwalyego vs. The Republic***, Criminal Appeal No. 613 of 2015 (CAT at Mbeya, unreported).

Addressing the argument that there was contradiction as to the place where the motorcycle was sold, he said that both places, that is, Ipinda and Kasumulu are within Kyela and are nearby places. In the same vein he said that Majengo and Ghana are also within the same place within Mbeya city.

Replying to the 5th ground, he disputed that the evidence was fabricated in consideration of the environment in which the appellants were arrested. He said that PW1 did not know the thieves and never mentioned anyone so he had no reason to fabricate the case against the appellants. He countered the argument that no phone printout was presented in court saying that the printout would not have served any purpose as the culprits and witnesses were present. He added that the non-tendering of the printout did not prejudice anything.

Mr. Msanga further disputed the appellants' assertion that they never showed anyone anything. Referring to the testimony of PW1, PW2, and PW3, who is the chairman of Inyala Street, he said that PW3 testified that the appellants were brought to his office. That, PW3 testified that he knew Joshua as he is the son of his neighbour named Military, and that he did not know Francis. That, PW3 testified further that the 1st appellant took

them to several places where he had stolen motorcycles and tricycles. That PW3 also mentioned one name being Joseph who he believed was the claimant.

With regard to the 6th ground, Mr. Msanga conceded that the appellants were not identified by PW1 at the scene, but he said that Francis was identified by PW2 in court.

Addressing the issue of circumstantial evidence raised on the 8th ground, he contended that the prosecution evidence was supported by PW1, PW2, PW3, and PW5 who were taken by the appellant to the places they committed the offence.

On the 9th ground regarding evidence of co-accused, he briefly replied that the 1st appellant was arrested after the 2nd appellant was arrested and that both appellants mentioned each other. He prayed for the appeal to be dismissed as the appellants are habitual offenders.

The appellants rejoined to the learned state attorney's submission. The 1st appellant addressed the contradictions as not being typing errors as contended by Mr. Msanga. He said that the month of September appears on the proceedings and judgment thus not a typing error. He as well challenged Mr. Msanga's contention that the appellants mentioned each other. He said that the learned state attorney misconceived the issue in dispute. Explaining, he said that the issue is that the 2nd appellant led to the arrest of the 1st appellant, which means that the 1st appellant was not in custody. In the premises he said that if the 2nd appellant was arrested

first, then the 2nd appellant ought to have made his statement first, however his statement was recorded on 30th while that of the 1st appellant was recorded on 29th which is contradictory.

He further denied the contention that PW2 was called by an unknown person and upon setting a trap Francis got arrested. He denied to have been arrested at the scene but at night at RETCO area.

In his rejoinder, the 2nd appellant maintained his contention that PW2 failed to identify the person he arrested as he identified both accused persons as Francis. He added that PW3 never mentioned the complainant as one of the persons whom the appellants took the witnesses to. He said that he only mentioned Joseph and not Joseph Mwakayula. He claimed that the one mentioned is not the claimant.

With regard to the place where the stolen motorcycle was sold, he contended that Ipinda-Kyela and Kasumulu-Kyela are two different places. He argued that if the motorcycle was sold at the same place it surprises that the witnesses contradicted. He said that the same applied to Majengo and Ghana areas.

Addressing the contention that the appellants had stolen "*Bhajaji*" he contended that the matter at hand does not involve "*Bhajaji*" as the stolen property. He concluded by reiterating the contradiction on PW4's testimony whereby he argued that PW4 first stated that he arrested Francis, but on cross examination he changed and denied to have arrested him. He prayed for the appeal to be allowed.

I have objectively considered the arguments by both parties and thoroughly gone through the trial court record. After careful consideration I am of the view that this appeal can only be disposed under one ground, which is the 10th ground as to whether the offence the appellants were charged with was proved beyond reasonable doubt.

It is clear from the particulars of the charge that the appellants were charged for the offence of theft of a motorcycle make King Lion with registration number MC 505 BMT worth T.shs. 2,000,000/-, property of one Joseph Mwakayula. It is alleged to have occurred on 24th August 2019.

The law requires the contents of the charge to be proved beyond reasonable doubt by the prosecution. The appellants argued that the prosecution evidence was full of contradiction, particularly as to the registration number of the motorcycle alleged to have been stolen and the cause that led to their arrest. While conceding to the contradictions pointed by the appellants, Mr. Msanga argued that the same were minor contradictions not going to the root of the matter. I however do not subscribe to Mr. Msanga's contention as I also find the prosecution evidence contradictory, inconsistent and implausible. The contradictions go to the root of the matter. I hold so on the following grounds:

Starting with the issue of registration of the motorcycle alleged to have been stolen, Ms. Msanga contended that the discrepancy is between the proceedings and the judgment which is typing error. His contention is however not supported by the record, which shows that the discrepancy is between the charge and the witnesses' testimonies. While the charge

refers to "MC 505 BMT" all the prosecution witnesses throughout their testimonies referred to "MC 505 BNT." Considering that the number was maintained throughout their testimonies by all the prosecution witnesses, I do not find it a typing error or minor mistake. The charge was not proved as the witnesses referred to a different motorcycle. The prosecution has a duty of framing clearly the charge and to lead evidence proving the charge. See: ***Director of Public Prosecutions vs. Yussuf Mohamed Yussuf***, Criminal Appeal No. 331 of 2014.

The proceedings show that the 1st appellant was arrested following being mentioned by the 2nd appellant. This is in accordance with the testimony of PW2 and PW4. However, PW5 stated that the 1st appellant was already in custody whereby he was arrested for another offence regarding theft of a tricycle "Bajaji." PW5 who administered the caution statement of the 1st appellant stated that he recorded the statement on 29th October 2019 whereby he admitted stealing the motorcycle of the claimant, PW1.

The record as well shows that the 2nd appellant was arrested on 30th October 2019 and his statement recorded on the same day by PW4. In the premises, I agree with the appellants that the evidence presented by the prosecution was inconsistent and implausible. This is because it is not possible that the 1st appellant confessed through a caution statement recorded on 29th October 2019 to have committed the offence charged, while the police officers connected him to the charges following being mentioned by the 2nd appellant whose statement was recorded on 30th October 2019.

PW2 and PW4 contradicted as to what led the 2nd appellant being arrested. While PW2 testified that someone called him on a tricycle deal whereby after learning that the seller had no blue card set a trap with the police officers including PW4; PW4 stated that he was given information from key informers that the 2nd appellant was involved in the theft of PW1's motorcycle. The fact that he used PW2 in setting the trap shows that what was actually involved in the trap was the tricycle and not the motorcycle, which is the subject of the case at hand.

PW1, PW3, PW4, and PW5 testified that the appellants led them to PW1's house and showed them how they stole the motorcycle. I find the testimony doubtful on two reasons. First, PW1 contradicted himself in identifying the appellants, when testifying in chief he said that he was called sometime in September at the police station by officer Rama whereby he found the appellant. Then he said the police called him and told him that they were going with the appellants to his home whereby he met them and the appellants demonstrated how they stole the motorcycle. However, when asked as to how many times he met the appellants, he said two times whereby the date he testified in court was the second time. If indeed he met the appellants in September at the police station, then at his home, meeting them in court on the day of hearing would be the third time.

Second, there is a discrepancy as to the time the appellants were apprehended for the charged offence and the time the victim was called at the police to identify his culprits. While PW1 said that he was called at the police sometime in September and met both appellants

there and asked them questions, it is on record that the 1st appellant was arrested on 26th October 2019 and recorded his statement on 29th October 2019 and the 2nd appellant was arrested on 30th October 2019.

Lastly, the as complained by the appellants, the trial court considered the appellants' cautioned statements among other evidence. I have gone through the prosecution evidence and found the cautioned statements being irregularly admitted and considered. Starting with the caution statement of the 2nd appellant, it is on record that the same was objected on ground of voluntariness and an inquiry conducted. However, there is nowhere on record showing that the cautioned statement was tendered and admitted in evidence by the prosecution after the ruling of the inquiry. The record shows PW4 suddenly reading the contents of the cautioned statement termed "Exhibit P2" while it was never tendered and admitted. It is trite law that a document must be cleared and subsequently admitted in evidence before being read out. Failure to do so is a fatal irregularity with an effect of rendering the document expunged from record. See: ***Jumanne Mohamed & 2 Others vs. The Republic***, Criminal Appeal No. 534 of 2015 (CAT, unreported); and ***Robinson Mwanjisi & 3 Others vs. Republic*** [2003] TLR 218.

With regard to the cautioned statement of the 1st appellant, "Exhibit P3," it is on record that the 1st appellant was arrested on 26th October 2019, but interrogated on 29th October 2019. This is contrary to the requirement under the law that a cautioned statement must be recorded within four hours from the time the suspect is arrested unless where there are cogent reasons explained to the court and recorded. No reasons were furnished

for recording the statement after four days. Under the law, a cautioned statement recorded in infringement of section 48 to 51 of the Criminal Procedure Act, Cap 20 R.E. 2019 is bound to be expunged. See: ***Shabani s/o Hamisi vs. The Republic***, Criminal Appeal No. 146 "A" of 2017 (CAT at Tabora, published at Tanzlii); ***Director of Public Prosecutions vs. Festo Emmanuel Msongaleli & Another***, Criminal Appeal No. 62 of 2017; and ***Sia Mgusi @ Wambura & 2 Others vs. The Republic***, Criminal Appeal No. 125 of 2015 (CAT, unreported). In addition, considering the testimony of PW4, I also find that the statement was recorded in connection to another offence from the one charged in the case at hand.

Considering the anomalies in recording and admission of both statements, which was also conceded by Mr. Msanga, I find the cautioned statements irregularly admitted and considered and therefore expunge them accordingly from the record.

Having observed as above, I find the appeal succeeding. The charged offence was not proved beyond reasonable doubt by the prosecution. In the premises, the trial court's conviction and sentence are quashed. The appellants should be released from prison custody forthwith unless held for some other lawful cause.

Dated at Mbeya on this 24th day of May 2022.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 24th day of May 2022 in the presence of the appellants appearing in person and Mr. Lordgurd Eliamani, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE