THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

CRIMINAL APPEAL NO. 72 OF 2022

(Arising from Criminal Case no. 86 of 2021, Morogoro District Court at Morogoro)

MUSSA MGEMBE@ISSAH ..... APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order12/12/2022

Date of Judgement 16/02/2023

MALATA, J

The appellant Mussa Mgembe @ Issah is challenging the conviction and sentence of thirty years imposed to him by District Court of Morogoro. In the trial the accused was charged with two counts Armed, Robbery Contrary to Section 287 A of the Penal Code and Rape contrary to section 130 (1)(2)(b) and section 131 of the Penal Code Cap 16.

It was alleged by prosecution that on 13th day of September 2020, during 1.20 hours the victim one Tatu Selemani was at Msamvu B area within

Morogoro Region, on that fateful date the victim was with Godfrey Ishengoma escorting her from Msamvu B to Mazimbu B area.

After reaching Msamvu B Geofrey Ishengoma went back to his house leaving the victim alone going to her home. While the victim was alone suddenly Mussa Mgembe appeared from the back and told the victim to give him the phone, she gave him the phones and money.

Upon investigation, the accused was arrested and arraigned before the District Court of Morogoro for the offence of Armed robbery and rape. Upon full trial the accused was acquitted for one count of Rape, convicted and sentenced to serve a term of thirty years for the offence of armed robbery.

Being aggrieved by both conviction and sentence the appellant appealed to this court armed with nine grounds of appeal that,

First, the trial magistrate erred in law and fact to convict and sentence the appellant when there was variance between charge sheet and evidence. **Second**, the trial magistrate erred in law and fact to convict and sentence the appellant based on poor visual identification, **third**, the trial magistrate erred in law and fact to convict and sentence the appellant based on objected cautioned statement, **fourth**, the trial magistrate erred in law and fact to convict and sentence the appellant based on contradictory evidences, **fifth**, the trial magistrate erred in law and fact to convict and sentence the appellant without following the procedure of the law laid down by section 312(2) of the criminal Procedure Code, **sixth** the trial magistrate erred in law and fact to convict and sentence the appellant based on exhibit PE1 which was seizure note tendered by state

attorney instead of the witness, **seventh**, the trial magistrate erred in law and fact in convicting and sentencing the appellant based on exhibit PE3 which was admitted unprocedural, **eighth**, that the trial magistrate erred in law and fact when there was no chain of custody exhibit PE2, **ninth** the trial magistrate erred in law and in fact to convict and sentence the appellant when the prosecution case was not proved beyond reasonable doubt.

Basing on the grounds of appeal, the appellant prayed the appeal to be allowed by quashing the conviction and set aside the sentence.

At the hearing of this appeal the appellant appeared in person unrepresented while the respondent/ The Republic was represented by Mr. Emmanuel Kahigi, State Attorney.

In the cause of submitting his appeal, the appellant did not labour on submitting on his grounds of appeal but pleased the court to adopt the same for determination as they believe to have merits. Further to consider his appeal by allowing it and set him free.

The learned state attorney, Mr. Emmanuel Kahigi submitted on the grounds of appeal as follows;

On the first ground of appeal as submitted by the Appellant that there was a variance between the charge and evidence, the learned counsel submitted that, PW1 testified that his properties to wit mobile phone make techno C9, Tecno T.410 and TZS 50,000 is reflected in the charge sheet before the court, however in the charge sheet there are no specific features of the techno C9 differentiating PW1 phone from other mobile phones of the same kind.

The stolen techno C9 was tendered in court as exhibit P2 at page 15, however there is no specific feature of the techno C9 of the victim. Further the victim did not state any feature of the phone alleged to have been stolen, but during testimony she mentioned IMEI number of which she did not mention before, the learned counsel submitted that there was variance however in the charge sheet there is no IMEI number and record is silent as to when and where PW1 got the IMEI number. There is no IMEI number mentioned by PW4 who tendered Tecno C9, and the records are silent on the IMEI number of exhibits PE2. The learned counsel further stated that the evidence is suffice to connect that it is the same phone tecno C9 stolen from PW1, the connection is that exhibit PE2 was recovered and PW1 is the owner and PW4 brought it and that connection suffice to corroborate the evidence and establish that it is the same phone.

On ground number two the learned counsel conceded that the evidence of visual identification cannot be relied to support conviction due to the following reason that the intensity of light was mentioned, duration of time from which the accused was able to identify the accused, distance from where the victim was when identifying the accused, favourability of conditions for identification and description of the appellant PW1 testified that she identified the accused by the aid of the moonlight and electricity light however being the first time PW1 to see the accused it was important to conduct identification parade which wasn't conducted therefore it is unsafe to rely on such visual identification.

Submitting on the third ground, exhibit PE4 (cautioned statement) and PE5 (extra judicial statement) were tendered in court without any objection from the appellant, in the said exhibits the appellant admitted

to have robbed and stolen tecno C9 and sold to one Richard Mkanza, the appellant did not question the witnesses on the validity and contents of the said exhibits as such this is a mere after thought by the appellant. It was the learned counsel submission that this is the evidence linking the appellant with the offence is the recovered cellular phone, the confession statement of the appellant in exhibit PE4 and PE5, the cellular phone which was recovered from one Richard who, was however not called to testify before the court.

Submitting on the ground number four the learned counsel submitted that the evidence by PW1, PW3 and PW4 are not contradictory in any manner, PW1 testified how she was robbed and PW3 testimony corroborated the evidence by PW4. The evidence provides the series of events thus there was no contradiction at all.

Grounds number five, six and seven were argued together by the Learned Counsel, these grounds attacks the tendering and admission of exhibits before the court, and the learned counsel conceded that it is true that the certificate of seizure was admitted as exhibit PE1 but was not read before the court,PE3, the statement of one Richard Mkanza which was tendered by PW5 was not in compliance with Section 34B(2) and (d) of the Evidence Act, as the copy of the said statement wasn't served to the appellant before being used in court. Therefore, the remedy as far as exbibits PE1 and PE3 is to expunge the same from court records and thus the remaining evidence to convict the appellant is PE5 and PE4.

Submitting on ground number nine, the learned counsel stated that the prosecution proved the case beyond reasonable doubt through exhibit PE4 an PE5 where the appellant admitted to have robbed and stole PW1

properties, the appellant did not object the same when tendered, and asked no question as to the validity and contents of those evidence. The evidence in PE4 and PE5 is the best evidence since the appellant confessed and by so doing, he knows the implication. The learned counsel cited the case of **Frank Kinambo vs. DPP, Criminal Appeal number 47/2019 CAT, Mbeya,** unreported at page 17.

Concluding his submission, the learned counsel stated that, they contest the appeal and the conviction and sentence was properly arrived he prayed the trial court's decision to be upheld.

In his brief rejoinder the appellant did not have much to say, he prayed for this appeal to be allowed.

I have anxiously considered the submission of the learned State Attorney in line with the grounds of appeal as well as the written statement of arguments in support of the appeal which were lodged by the appellant and adopted by this Court. The issue for determination is whether this appeal is meritorious, based on the cardinal principle in criminal cases that the proof must be beyond reasonable doubt.

Before doing so, I wish to restate the principles of law that a first appeal is in the form of a re-hearing and as such, this being the first appellate court, it is duty bound to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact (see **D.R. Pandya v. Republic (1957) EA 336** and **Iddi Shaban @ Amasi v. Republic, Criminal Appeal No. 2006** (unreported)

Beginning with the first ground on Variance between charge sheet and evidence. On the first count, the appellant was charged of armed robbery and in the course stole mobile phone make Tecno C9, Tecno T410 and cash money TZS 50,000. However, in the evidence by PW1 she did not mention specific features that differentiate Tecno C9 which was stolen with other cellular phones of the same kind, the victim further identified the phone stolen that Tecno C9 by using IMEI number which was not mentioned in the charge sheet nor was it mentioned by PW4 who tendered the phone as evidence. The stolen techno C9 was tendered in court as exhibit PE2, the issue for determination on this aspect is whether Tecno c9 which is stated in the charge sheet is the same Tecno c9 which PW1 described by using IMEI number, and is it the same mobile phone tendered in this court as exhibit PE2.

The record is silent as to when and where PW1 got the IMEI number, and the records, especially the charge sheet are silent as to the IMEI number of exhibits PE2. The charge sheet is the foundation of any trial, what is stated in the charge sheet should tally with the evidence brought before the court, if there is any variance between the charge and evidence the only remedy when this situation arise is for the prosecution to pray to amend the charge sheet as per section 234(1), of the Criminal Procedure Act Cap. 20 R.E. 2019 which the prosecution failed to abide with. It was necessary to amend the charge because the evidence did not support the charge as regard to the specification of mobile phone Tecno C9 (exhibit PE2). That omission water down the prosecution case, hence the offence remains unproved.

We are fortified in this stance with the case of **Masota Jumanne v. Republic, Criminal Appeal No. 137 of 2016 (unreported)** wherein the Court when faced with akin situation stated as follows: -

> *"In a nutshell the prosecution evidence was riddled with contradictions on what actually was stolen from PW1. Such circumstances do not only imply that there was a variance as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge".*

As similar stance was also taken in the case of **Stany Loidi v. D.P.P., Criminal Appeal No. 466 of 2017 (unreported)**. The existence of the variance in the identification of the mobile phone stolen, in the charge sheet and the evidence adduced, creates doubts in the appellant's conviction rendering the entire case not to be proved to the required standard. On that account, I find that the trial courts misapprehended the nature and quality of the evidence, as a result occasioned injustice to the appellant.

On that account this court being the first appellate court entitled to interfere with the concurrent findings of the lower courts so as to correct the occasioned injustice in favour of the appellant. This ground of appeal is with merit and is hereby allowed.

On the fourth ground, that is contradiction between evidence of PW1, PW3 and PW4. It has been held in a number of Court of Appeal decisions that due to frailty of human memory, discrepancies which are on details are excusable - see**: John Gilikola v. Republic, Criminal Appeal No. 31 of 1991, Issa Hassan Uki v. Republic, Criminal Appeal No. 129**

of 2017, Deus Josias Kilala @ Deo v. Republic, Criminal Appeal No. 191 of 2018 and Marceline Koivogui v. Republic, Criminal Appeal No. 469 of 2017 (all unreported). In Issa Hassan Uki (supra) the Court of Appeal subscribed to the statement of the law by the High Court of Tanzania in **Evarist Kachembeho & Others v. Republic 1978 LRT No. 70** as depicting the correct statement of the law in our jurisdiction. In **Evarist Kachembeho** the High Court (Mnzavas, J. - as he then was) observed:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story".*

However, the court has the duty to look at the evidence said to be contradictory to satisfy itself if that contradiction goes to the root of the matter. By looking at the court records Pw1 in her evidence stated that;

> *PW1 - The police trucked my phones and manage to know the persons who were using my phones using IMEI number.*

pw3 stated that

> *then I saw two persons came to the police station one of that person introduced himself in the name of Richard, he said that he bought a phone make Tecno T.410 from the person known as Mussa.*

Pw3 went on to state that;

> *PW3 - The said Mussa was at a bus stand to the 'banda' eating food. The Ocs assigned me to go to arrest the said person.....*

The person Richard showed me to the accused person. I managed to arrest him.

PW4 stated that;

PW4 - I was followed by D/CPL Mwajabu who was the investigation of the case, she told me that she got information from his informed that there was the person using Tecno C9 which was robbed at Msamvu B area.

After that information I went to Msamvu B, to the bar known as BM Pub. When reached there we manage to arrest the person known Richard Mkanza. When we search him, we found him with the phone Tecno C9.

First, the charge sheet clearly states that two phones were stolen, that is tecno T.410 and C9, PW1's evidence did not disclose the phone which was apprehended by the police, she just mention the IMEI numbers and the colour without saying whether it was Tecno T.410 or Tecno C9, ***Second*** ,the witness PW3 stated that Richard Mkanza voluntarily reported to the police that he bought the phone Tecno T.410 which was stolen and he went to arrest the alleged thief (the appellant), ***Third*** ,PW4 give different version of what transpired he explained that he arrest Richard with the phone tecno C9.

The two phones stolen make the basis of this case, the contradiction of evidence among witnesses raises reasonable doubt as to which phone was apprehended by the police, whether is Tecno T. 410 or Tecno C9, was Richard Mkanza arrested or he voluntarily report to the police, who arrested Richard Mkanza, all these questions when answered in line with

the proceedings of this court raise inconsistencies which creates doubts on the prosecution evidence. The question is what happens if there are inconsistencies and contradiction in the evidence?

In the case of **Mohamedi Saidi Mataula vs. Republic [1995] TLR 3,**

> *"Where the testimonies by witnesses contains inconsistencies and contradiction, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

It is trite law that where there is material contradictions the appellant has to benefit out of that. That was the position in the case of Leonard **Zedekia Maratu Vs. Republic,** Criminal Appeal No, 86 of 2005 (CAT-unreported). The contradictions of the above referred witnesses all resolved in the appellant's favour, I would hold that prosecution case was not proved beyond reasonable doubt. Thus, this ground of appeal has merit too.

On the eighth ground of appeal, regarding the chain of custody. It is an established principle that when an item relating to the crime is to be exhibited in court, its chain of custody must be properly established, the rationale behind is to establish that the alleged evidence is in fact related to the alleged crime, that is the position in the case of **Paulo Maduka and 4 Others v. Republic,** Criminal Appeal No. 100 of 2007 (unreported). Chain of custody can be proved either by documentary or

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oral evidence. the chain of custody was not established, first it was not clear as to whom apprehended the phone, where it was kept until it became to the hands of PW4 who tendered it in court as evidence.

As to the 3rd and 9th ground of appeal, as to whether the prosecution side prove their case beyond reasonable doubt. The two grounds are determined jointly since the learned advocate for the respondent was of the opinion that the Republic proved the case beyond reasonable doubt through exhibits PE4 which is the cautious statement and PE5 which is the extra judicial statement of the accused.

It is trite law therefore that, in criminal cases the burden of proof always lies on the prosecution throughout, to establish and prove the case against the accused.

In Woodmington v. DPP (1935) AC 462, it was held that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused.

The term beyond reasonable doubt is not statutorily defined but the case laws have defined it. In the case of **Magendo Paul & Another v. Republic (1993) TLR 219** the Court held that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

During trial is indicated on the record that the appellant when exhibit PE4 and PE5 were tendered before the court he raised no objection moreover in his respective defence during trial the appellant did not object the content or validity of those exhibits.

Now, the appellant is seeking to challenge those exhibits based on the fact, that they were admitted unprocedural as the magistrate had the duty warn him of the danger of the exhibit intended to be tendered and ask for his comment before admitting the same in evidence,

The duty of the trial magistrate Court is to ensure that the procedures laid during hearing are followed and the parties are not prejudiced. The reason raised by the appellant that the magistrate ought to have warned himself the danger of those exhibit being admitted, is not mandatory requirement when admitting evidence.

Regarding exhibits PE4 and PE5, the appellant made confession statement on two different occasions, ***first,*** was before the police officer and ***second*** occasion the appellant made confession before justice of peace. The contents and validity of the exhibits were not objected by the appellant, which means the appellant agreed to what was stated in those exhibits to be true statement he made before the police and before the justice of peace. The most crucial question is whether or not the appellant made the statements voluntarily and whether the said statement could support conviction.

In the statements the appellant admitted to have robbed PW1 by using panga which he used to threaten her. This is the position of the learned

state attorney that based on those statements the offence of Armed Robbery has been proved beyond reasonable doubt.

Having gone through the evidence there is no doubt that in the extra judicial statement and cautioned statement the appellant confessed to commit the offence. When the evidence was tendered before the trial court the appellant did not object to its admission and the court went on to admit the exhibits to form part of evidence. The relevant extract of the proceedings is hereby reproduced;

***State attorney**: I pray to show my witness the cautioned statement of accused for identification.*

***Witness**: this is my handwriting and this is my signature.*

***Court:** the witness identified the exhibit*

***Witness**: I pray to produce in court as exhibit.*

***Accused**: no objection.*

***Court**: admit caution statement as exhibit PE4.*

***State attorney**: I pray witness to read the statement*

***Court**: the statement read in court.*

***State attorney**: I pray to show my witness the extra judicial statement of Mussa Mgembe for identification.*

***Court**: witness identified extra judicial statement of accused person Mussa Mgembe.*

***Witness**: I pray the court to receive the Extra Judicial statement as exhibit.*

***Accused**: no objection*

Court: *admit the extra judicial statement of accused person as exhibit PE5 and read over in court.*

On the part of extra judicial statement, the appellant narrated how they robbed PW1 on that particular day, the items they robbed from PW1 and where the incidence took place.

> *Tulimuibia simu ndogo na simu kubwa aina ya Tecno, muda wa tukio ni saa nane usiku, sehemu ya tukio la unyang'anyi ni njiani kunakaribia na boma.*

In the cautioned statement the appellant stated

> ***Jibu:*** *ndiyo ninafahamu kukamatwa kwangu ni kwa sababu nilimnyang'anya dada ambaye simfahamu kwa kutumia panga kwa kumtishia na panga na kuchukua mali zake ambazo ni simu mbili, moja smart phone aina ya TECNO C9 na simu ndogo ya batani rangi nyeusi nayo ni TECNO Pamoja na kiasi cha pesa Tsh 50,000/= alizokuwa ameweka nyuma ya cover la lile simu.*

The next question for consideration is whether or not the appellant's extra judicial statement and cautioned statement can form basis of the conviction. It is the common understanding that even if confession was not objected by the defence, the court is still bound to be cautious in admitting such statement, and ought to have looked for corroboration and could only convict if it is satisfied that the confession contained nothing but the truth.

As can be gleaned from the above reproduced extract of the appellant's extra judicial statement and cautious statement, the items alleged to

have been stolen are the same the appellant confessed to have robbed from PW1, and the same were detailed in the Charge sheet.

This is sufficient evidence to corroborate the extra judicial statement, cautioned statement and connect the appellant with the robbery.

These statements have one common feature, all of them describe the circumstances and the manner in which PW1 was robbed. They are so thorough that the events described therein could have only given by the person who had the knowledge of how the incident happened.

However, in his defence the appellant stated that the cautioned statement was taken out of the prescribed time, that is, after three days from the day he was arrested, the appellant was however supposed to raise this objection before the cautioned statement is tendered and admitted as evidence. Nevertheless, upon my perusal of the court file specifically exhibit PE4 the cautious statement was taken the same day he was arrested, that is on 14/11/2020 from 12.00 to 14.15.

The court have considered the detailed contents of the accused person's cautioned statement as well as taking into account that the accused person's extra-judicial statement was made before a free and independent officer. Furthermore, the accused did not object the content of the documents, it follows therefore that the prosecution evidence is sufficiently credible against the accused and has proved the case beyond reasonable doubt.

Based on the above evaluation of evidence, this court is satisfied that evidence PE4 and PE5, that is Cautioned Statement and Extra Judicial

Statement of the accused suffice to enter conviction against the accused. The appeal is therefore without merit and it is accordingly dismissed.

It is so ordered.

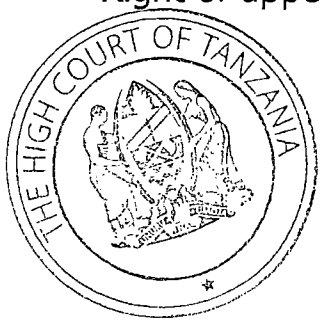
DATED at **MOROGORO** this 16th day February, 2023

G. P. MALATA

JUDGE

16/02/2023

Right of appeal explained to the parties.



G. P. MALATA

JUDGE

16/02/2023