THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 66 OF 2023

(Originating from the Court of Resident Magistrate of Mbeya at Mbeya, in Criminal Case No. 247 of 2020)

1. OSCAR AFWILILE.....1ST APPELLANT

2. GEOFREY BONIPHASCE MWAKAKIMA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 31/08/2023
Date of Judgement: 08/12/2023

NDUNGURU, J.

The appellants, OSCA AFWILILE and GEOFREY BONIPHACE MWAKAKIMA (first and second appellant respectively) together with another person who is not a subject of this appeal were charged in the Court of Resident Magistrate of Mbeya (the trial court) for two counts namely Breaking into Building and Committing an Offence contrary to section 296 (1) (a) and Stealing contrary to section 258 (1) and 265 of the Penal Code, Cap. 16 R.E 2019.

It was alleged in the particulars of the offence that on 2nd day of April, 2020 at New Forest area within the District and Region of Mbeya the appellants together and jointly did break and enter into Manyanya Hotel and commit an offence therein to wit, stealing. And in the second count was alleged that on the same date, time and place the appellants did steal five televisions make MR. UK valued at Tshs 1,400,000/= seven blankets valued at Tshs 910,000/= and two bedsheets valued at Tshs 60,000/= all being the properties of Manyanya Hotel. The appellants denied the charge. After a full trial, the trial Court was satisfied by the prosecution evidence it thus convicted the 1st and 2nd appellants for both counts and they were sentenced to serve seven years imprisonment for the 1st count and 10 years imprisonment for the 2nd count the terms were ordered to run concurrently.

Dissatisfied with both the conviction and sentence, they instituted the present appeal raising seven grounds of appeal. The same are reproduced hereunder together with all their grammatical and semantical challenges as follows:

1. *THAT- the trial court erred in law when convicted and sentenced the appellants without regarding that the prosecution failed to proof its charges as per law.*

2. *THAT- the trial court erred in law when convicted and sentenced the appellants without taking into account that none of the appellants found while breaking the said building and stealing such items.*
3. *THAT- the trial court erred in law when convicted and sentenced the appellants without regarding that as per evidence of Pw3 the said inducement confession is not acceptable before the law of justice.*
4. *THAT- the trial court erred in law when convicted and sentenced the appellants without regarding the cautioned statements exhibits PE1 and PE2 recorded by Pw6 was not complied by the law as he failed totally to proof its correctness as per law.*
5. *THAT- the trial court erred in law when convicted and sentenced the appellants without regarding that Pw1 was identified only one blanket without provement this means that other items was not belong to him.*
6. *THAT- the trail court erred in law when convicted and sentenced the appellants without taking into account that as none of the first count and second count established the said case the sentences is very excessive as per MSA Cap 90 RE 2022.*
7. *THAT- the defence of the appellants was ignored by the trial court.*

Owing to those grounds of appeal, the appellants prayed for their appeal to allowed, the conviction be quashed, the sentence be set aside and they be released from prison custody.

When the appeal was called for hearing the appellants appeared unrepresented whereas the respondent/Republic was represented by Mr. Bashome assisted by Ms. Lilian Chagula both learned State Attorneys.

When the court invited the appellants to expound their grounds of appeal, they only prayed for their grounds to be adopted and considered and the appeal to be allowed.

On the respondent's part, Mr. Bashome resisted the appeal. Submitting in opposition, he combined ground 1,2,3,4 and 5 that they all relate to the complain that the case was not proved to the required standard. It was Mr. Bashome's contention that the charge against the appellants was proved beyond reasonable doubt. That the prosecution's witnesses PW1 and PW3 explained how the appellants confessed to have break the window entered into rooms and stole televisions, blanket and bedsheets. According to Mr. Bashome confession of the appellants alone warranted conviction as they made it freely. To reinforce his argument, he cited the case of **Joseph Thobias & Others vs. R.** Criminal appeal No. 296 of 2019 Court of Appeal of Tanzania (unreported).

Mr. Bashome went on that the confession made by the appellants was corroborated by PW6 and PW7. He held the view that since cautioned statements were recorded in conformity of law the trail court was proper to convict the appellants basing on them.

Mr. Bashome submitted further that, the 2nd appellant was found in possession of the stolen property, i.e a blanket and the 2nd appellant signed certificate of seizure on that regard. Thus, that by the principle of recent possession the 2nd appellant involved in stealing which means that the prosecution proved the case beyond reasonable doubt.

As to the 6th ground of appeal that the sentence meted to the appellants was excessive Mr. Bashome argued that the same was according to the law. And the trial Court considered both aggravating and mitigation factors.

As to the complaint under the 7th ground of appeal that the defence evidence was not considered, Mr. Bashome submitted that in the judgment the trial Court considered it but was found not shaking the prosecution's evidence. He thus, prayed the entire appeal to be dismissed for being devoid of merits.

In rejoinder, the 1st appellant insisted that this Court should consider that he was neither arrested at the scene nor seen by anybody nor found

in possession of the stolen property thus, that the appeal be allowed. On his side, the 2nd appellant reiterated that the grounds of appeal be considered.

Having considered the grounds of appeal, the submissions by the learned State Attorney and the record. The major issue for determination is whether the appeal at hand has merits. In resolving the grounds of appeal, I will scrutinize the evidence as adduced by the parties before the trial Court.

The appellant's complaints in the 1st 2nd 3rd 4th and 5th ground of appeal are that; the charge was not proved to the required standard for there was no witness who saw them while breaking and stealing, that the confession was induced which is against the law, that the caution statements were recorded in contradiction of law and that only one blanket was identified to be a stolen property.

Reading the impugned judgment, trial Court's conviction of the appellants based on the confession and cautioned statements of the appellants. On that basis, before deciding whether the prosecution proved the case at the required standard, I will firstly determine whether confession by the appellants was made under inducement and whether the cautioned statements were recorded in contradiction of law.

Starting with whether confession by the appellants was made under inducement. As a general rule, for a confession to be admissible the same should be voluntarily made. This means that it should not be given under coercion, inducement of threat or promise this per section 27 of the Evidence Act, Cap. 6 R.E 2022. Also see the case the case of **Posolo Wilson Mwalyego vs Republic,** Criminal Appeal No. 613 of 2015 Court of Appeal of Tanzania at Mbeya (unreported).

In this appeal the appellant did not tell this court how their confession was made out of inducement. I have gone through the proceedings of the trial Court. The alleged confession was testified by PW1 who said that on 23/08/2020 the appellants arrived together with police they showed where the Hotel is and demonstrated how they jumped behind the fence, climbing through the generator roof till the first floor then how they broke the window and knew electric fence was not functioning and how they unlocked the TV from the walls. Also that, they said they stole blankets and bedsheets. According to PW1 the appellants said and demonstrated all those when they were very ok, that they were not chained and the police were in civilian dresses.

Another witness was PW4 who said that, he was called to witness the search in the 2nd appellant's house. That he saw a blanket which the

2nd appellant told the police that him together with one Oscar (the 1st appellant) stole.

On his side PW5 testified that, she was called to identify their properties at Central Police, that she identified a blanket and one Oscar (i.e the 1st appellant) was there and when he was asked if they were the one stole at Manyanya Hotel, he admitted.

In their defence evidence, the 1st appellant told the trial Court that he was arrested having found with a so called *"kete"* of bhang on 20/8/2020 and that on 21/8/2020 he was taken to Manyanya Hotel by the police holding guns. That, there (i.e at Manyanya Hotel) the police and the workers of Manyaynya went far from where they were and thereafter, they were returned to police station. The 1st appellant however, did not say if they confessed under inducement and what type of the inducement.

On his side, the 2nd appellant told the trial court that when they were taken at Manyanya hotel they were beaten, forced to talk. Nonetheless, he did not say if they said anything as the result of being beaten and forced to talk.

Going through the evidence of both sides, that is the prosecution evidence and that of defence. I have noted that the account by the 1st appellant (DW1) that the police and the workers of Manyanya Hotel talked

something while they were away from where him and the 2nd appellant were was not reflected in the testimony of the 2nd appellant (DW2). Also, the account by 2nd appellant that they were beaten and forced to talk was not given by the 1st appellant. Now, I find hard to believe their defence since their accounts materially differ though they were together at Manyanya Hotel.

I also disbelieve their testimonies on what happened at Manyanya Hotel for reason that the testimonies by PW4 and PW5 were never challenged neither at the trial Court nor in this appeal. Again, the appellants did not tell the trial Court nor this Court what type of inducement the police offered than the account of the 2nd appellant that they were beaten which the same I have already found incredible. In the premises I find the confession offered by the appellants was voluntary made.

The next sub-issue is whether cautioned statements by the appellants were recorded in contradiction of the law. Mr. Bashome submitted that cautioned statements by the appellants were admitted according to the law and they were admitted after holding an inquiry.

After carefully scanned the record, I will start looking on the time frame in which the cautioned statements were recorded.

The statutory periods available for the police to interview persons suspected to have committed offences are closely regulated by the law under sections 50(1) and 51(1) of the Criminal Procedure Act, Cap 20 R.E 2022. Section 50 (1) (a) of the CPA has prescribed the initial period of four hours for police interview, counted from the time when the accused person is placed under restraint in respect of the offence. In case an extension of the time interview is desirable, conditions for extension are prescribed under Section 51 of the CPA.

In the appeal at hand, the cautioned statement of the 1st appellant was tendered the PW6 and was admitted as exhibit P1. Throughout the record, there is no evidence from the prosecution side about when the 1st appellant was arrested. But the 1st appellant himself told the trial Court that he was arrested on 20/08/2020 and his statement was recorded on 22/08/2020. Nevertheless, exhibit P1 indicates that it was recorded on 23/08/2020. Moreso in the same exhibit there is a statement by the 1st appellant that he was arrested by police on 20/08/2020 this again supports his testimony that he was arrested on that date.

That being the case, I find exhibit P1 to be recorded in flaw of the law. In the circumstances, I hereby expunge exhibit P1 from the record.

1st appellant being hel 1st appellant objected that he never given statement than being asked his name and being beaten forced to sign. However in conducting inquiry gave another version of statement that he was called asked his names and other particulars while PW6 (PW1 in the inquiry was recording on a pirce of paper then he disappeared that he knew nothing more about the cautioned statement. So what he disputes is not clear whether he did not sign at all or he signed as the result of beaten.

As regards to the cautioned statement of the 2nd appellant i.e exhibit P2 the available evidence from PW4 and DW2 (i.e the 2nd appellant himself) is that he was arrested on 22/08/2020 around 0500 hrs. And the exhibit indicates that recording the statement started at 0605 hrs and ended at 0730 hrs. That being the case exhibit P2 was recorded in the prescribed time.

Notwithstanding the fact that exhibit P2 was recorded in the prescribed time, when the same was tendered by PW7 the 2nd appellant objected its admission on the reason that he did not record it. During inquiry proceedings the 2nd appellant gave a defence that when he was taken in the room he found three police officers who asked him about the offence of stealing at Manyanya Hotel. That he denied the offence they

started beating him then called the 1st appellant who said that they were together and that he then pressed a thumb and wrote his name but he did not offer any statement. I find this evidence by the 2nd appellant not introducing anything worthy for rejecting exhibit P2. Hence, I find no fault for the trial Court to admit it.

Having found as above said, it now follows the issue whether the prosecution proved the case beyond reasonable doubt. As I have hinted earlier, the appellants were complaining that there was no witness who saw them breaking nor stealing. Also that only one blanket was identified and no other items were found in their possession. I agree with the appellant that no evidence about being seen breaking nor stealing. However, I have already found that the appellants made voluntary confession before PW1, PW2, PW4 and PW5 that they were the one whole broke and stole at Manyanya Hotel.

What the appellants made to these witnesses is what we call oral confession. The law is trite that oral confession made by a suspect before or in the presence of a reliable witnesses, be they civilian or not, may be

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that oral confession made by the suspect in front of the gathering to be valid to ground conviction.

In the totality of the prosecution evidence, i.e the evidence on confession of the appellants. The 2nd appellant's cautioned statement which shows how him and the 1st appellant planned and committed the offences. In addition, since no complaint that the blanket which was found in the possession of the 2nd appellant was not one of the stolen properties all these are proof of the charged offences. Therefore, it is my findings that the prosecution proved the case to the hilt. The findings also cutters for the 7th ground of appeal which said that the appellants defence was not considered.

The last ground for determination is the 6th ground inwhich the appellants complained the sentence meted to them. According to Mr. Bashome, the sentence was legal in accordance to the charged offence. It is principle of the law that the appellate court does not have a free reign to alter or vary a sentence imposed by the trial Court. See the case of **Rajab Dausi v. Republic**, Criminal Appeal No. 106 of 2012, CAT at Mtwara (unreported).

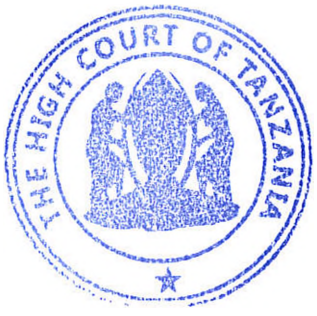
Moreover, in the case of **Silvanus Leonard Nguruwe v. Republic (1981) TLR 66** there are circumstances in which the Court can interfere

with the sentence imposed by the trial court. They include: a) where the sentence manifestly excessive, or b) where it based upon a wrong principle, or c) manifestly inadequate, or d) where it is plainly illegal, or e) where the trial Court failed or overlooked a material consideration or f) where it allowed an irrelevant or extraneous matter to affect the sentencing decision. See also **Swalehe Ndungajilungu v. Republic,** [2005] TLR 97.

In the matter at hand, it is right as argued by Mr. Bashome that the offences the appellants were charged with give the maximum sentence of 10 years and seven years respectively. It was said that the 2nd appellant is the habitual offender. I find nothing to fault the decision of the trial Court.

In the end I dismiss the appeal for lack of merit.

It is so ordered.



D.B. NDUNGURU,

JUDGE

08/12/2023