THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 72 OF 2022

HAMIS IBRAHIM PUA UPETE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the District Court of Iringa at Iringa)

(Hon. R. Mayagilo - RM)

dated the 20th day of July, 2022

in

Criminal Case No. 53 of 2021

JUDGMENT

Date of Last Order: 26/01/2024 &
Date of Judgment: 02/02/2024

S. M. Kalunde, J.:

The appellant, **HAMIS IBRAHIM PUA UPETE**, was arraigned and tried before the District Court of Iringa sitting at Iringa (henceforth "the trial court") for armed robbery contrary to sections 287A of **the Penal Code [Cap. 16 R.E. 2019]**. The specifics of the offence were that on the 03rd day of March, 2021, at Munio Petrol Station, Kitanzini Area, within the District and Region of Iringa, the appellant stole one pulse, one National Identification Card, one NSSF Member card, one

voters' Identification Card, one silver necklace, one driving licence, Two NHIF Identification Cards, Four Passport size pictures, Tshs. 1,525,000.00, and one mobile phone make ITEL all being the properties of Glory Msyane. It was alleged further that, at the time of stealing the appellant used a knife to threaten the said Glory Msyane for the purposes of obtaining and retaining the said items.

The appellant rebuffed the charges and the matter proceeded to full trial. At the trial the prosecution questioned three witnesses. That is: Glory Atupele Msyane (**Pw1**), Evance Edson Kiula (**Pw2**) and H.1593 D/CPL David (**Dw3**). Together with witness testimonies, the prosecution tendered in evidence one documentary exhibit, that is the caution statement of the appellant (**Exhibit PE1**). Unrepresented, the appellant defended himself on oath as Dw1 and did not tender any documentary or physical exhibit.

Having heard the parties, the learned trial magistrate was satisfied that the prosecution successfully established the charges against the appellant. The trial court concluded that the appellant was guilty as charged and convicted him accordingly. Subsequently, he was sentenced to thirty (30) years imprisonment.

Unhappy with the decision of the trial court, the appellant has preferred the present appeal. His appeal to this court is predicated on the following grounds of appeal as quoted from his petition:

> *"1. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant relying on prosecution evidence while the prosecution failed to bring an important witness (boda-boda driver);*
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> *2. That, the learned trail Magistrate erred in law and fact by relying on PW1 evidence that she was threatened by a knife which ignored the fact that there was no dangerous weapon tendered in court;*
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> *3. That, the learned trial Magistrate erred in law and fact in relying on PW1's evidence who failed to properly identify or describe how she identified the two mobile phones which were allegedly stolen;*
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> *4. That, the learned trial Magistrate erred in law and fact to rely on the caution statement of the accused person which was improperly admitted in evidence; and*
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> *5. That, the prosecution side failed totally to prove this case against the appellant beyond reasonable doubt."*

Believing that the above grounds were acceptable and correct, the appellant prayed that; one, the appeal be allowed, thereby setting aside and quashing the conviction and sentence; and two, an order for his immediate release be issued.

At the hearing of the appeal, the appellant was unrepresented. Being a lay person, the appellant had nothing of value to add to his grounds of appeal. He urged the court to adopt and consider his grounds of appeal.

The respondent, Republic was represented by Mr. Simon Masinga, learned State Attorney. When he took to the floor Mr. Masinga was quick to inform the court that the Republic was supporting the appeal on the strength of the first, third and fourth grounds of appeal. In support of the first ground of appeal Mr. Masinga submitted that, the records were clear that the victim, Pw1, stated that the mobile phone allegedly stolen during the incident were given to a boda-boda driver by the appellant so that he can present them to the police station. However, the said boda-boda driver was not paraded before the court to verify the prosecution story. The learned state attorney argued that, failure to call an important witness dented the prosecution case and entitled the court to draw a negative inference. For this, the learned state attorney cited the case of **Omary Hussein @ludanga & Another vs Republic** [2021] TZCA 543 (30 September 2021 TANZLII).

Regarding the mobile phone, which was tendered in evidence for identification, Mr. Masinga submitted that it was wrong for the court to place reliance on the said exhibit for several reasons. **Firstly**, the victim, Pw1, failed to make a positive identification of the said exhibit by providing a clear description of unique features that would distinguish the phone from other mobile phones. For this he cited the case of **Samson Samwel vs Republic** [2021] TZCA 422 (27 August 2021 TANZLII). **Secondly**, Mr. Masinga submitted that, it was wrong for the trial court to have the mobile phone admitted for purposes of identification. The learned counsel argued that any exhibit admitted for ID purposes is not part of records and the court ought to have the same expunged and not relied upon. In bolstering his argument, the learned counsel cited the case of **Alex Mwalupulage @ Mamba vs Republic** [2022] TZCA 146 (25 March 2022 TANZLII).

Turning to the fourth ground of appeal, Mr. Masinga argued that there were inconsistencies and contradictions between key prosecution witnesses regarding the date of arrest of the appellant. Elaborating his point, Mr. Masinga argued that Pw1, the victim, and Pw3, the police officer who recorded the confession statement of the appellant gave conflicting account of the date the appellant was arrested. Mr. Masinga

submitted that, while Pw1 narrated that the appellant was arrested on the 04th day of April, 2021. The police officer who recorded the confession statement narrated that the appellant was arrested on the 06th day of April, 2021. The learned counsel submitted that the contradiction between Pw1 and Pw3 as to the arrest of the appellant raised doubts on whether the confession statement of the appellant was recorded within the prescribed time limit provided by law. In view of the contradictions, Mr. Masinga advised that the caution statement of the appellant be expunged from the records.

I have carefully examined and considered the records and submissions made by the parties. Having done so, I gather that the issue for my determination is whether the appeal is meritorious.

In the first ground of appeal the complaint is that the prosecution failed to call an important witness during trial. It is common knowledge that in terms of section 143 of **the Evidence Act [R.E. 2022]**, there is no specific number of witnesses required for a proof of any fact. According to that section, the prosecution is at liberty to select and parade any number of witnesses they deem fit to prove their case. However, the law is very clear that where a crucial witness who is within reach is not called to testify in court, without sufficient reason

being shown by the prosecution, the court is entitled to draw an adverse inference. See **Geita Gold Mining Limited vs Jumanne Mtafuni** [2022] TZCA 272 (12 May 2022 TANZLII); **Daudi Anthony Mzuka vs Republic** [2023] TZCA 165 (30 March 2023 TANZLII) and **Omary Hussein @ludanga & Another vs Republic** (supra).

For example, in the case of **Geita Gold Mining Limited vs Jumanne Mtafuni** (supra) the Court held that;

> *"The latter's unexplained failure to bring in court any such key witnesses entitles us to draw adverse inference, as we hereby do. We held so in the cases of **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 351 of 2008, **Raphael Mhando v. Republic**, Criminal Appeal No. 54 of 2017, **Allan Duller v. Republic**, Criminal Appeal No. 367 of 2019 (all unreported) and **Aziz Abdallah v. Republic** (1991) T.L.R 71. For instance, in **Aziz Abdallah** (supra) we stated as under:*
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> > *" ...the general and well known rule Is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

Guided by the above authority I wish to consider the circumstances in the instant case. There is no dispute that during her

testimony Pw1 testified that, on the 02nd day of March, 2021, the accused person sent a motorcycle driver (boda-boda driver) to return her two mobile phones at the police station. At that time the victim, Pw1, was also at the police station. Upon receipt of the phones, she inspected and recognized the phones. During her further inspection she noted that the mobile operator lines had been removed. Thereafter, she took her mobile phones and went away. It is glaring that the said boda-boda driver was not called to testify in court and confirm the prosecution story that the appellant gave the said boda-boda the two phones ;and that the said boda-boda gave the phones to the victim in front of the police officers on the 02nd day of March, 2021. In absence of the testimony from the said boda-boda driver it cannot be vouched with certainty that the said phones were actually recovered from the appellant.

It is also evident that the said mobile phones were not tendered in evidence. Instead, the learned trial magistrate opted to have them admitted for identification purposes. However, given that the said mobile phones were not earlier tendered in evidence, I do not see how and why they were tendered in evidence for identification. As I understand, the position of the law on tendering and admission of

exhibits into evidence is that an exhibit or evidence admitted for identification purpose is not part of the records and has no evidential value. For that reason, the mobile phones allegedly stolen and tendered for ID purposes is not part of the court records and the trial court ought to have not relied on the same.

The other missing link in the prosecution case is found in the manner in which Pw1 identified the two mobile phones the subject of the crime. This issue is a subject of the appellants complaint in the third ground of appeal. It is evident from the records that during trial Pw1 identified the stolen mobile phones in the following terms:

> *"The 1st mobile phone make Kitochi black in colour and another is tigo smart kitochi black in colour."*

The next question is whether this identification procedure adopted by the trial court was appropriate. The answer to that is definitely in the negative. I say so because as evidenced above, the mobile phones are items of common use in the public. As such, a witness identifying such items must make a detailed identification or mention of specific and unique features of the said phone that are distinct from other mobile phones. In the case of **Samson Samwel vs**

Republic (supra), the Court of Appeal (Mashaka, J.A) outlined the manner in which a mobile phone can be uniquely identified when it stated:

> *"Pertaining to the variance between the charge and the evidence it is not in dispute that the appellant was charged with armed robbery whereby the appellant was alleged to have stolen a NOKIA mobile phone which belonged to the victim. However, PW1 in his testimony fell short of proving he owned the said phone as he failed to state the description, make or peculiar marks of the phone and the IMEI number which is unique to every mobile phone."*

In light of the above authority, it is clear that the identification of the stolen item by Pw1 is doubtful as she did not state any unique or peculiar features of the said phones that would distinguish the said phones with other mobile phones available in the general public. It is also clear that the only physical evidence available and linking the appellant to the crime were the said mobile phones. Given that the said phones were not clearly identified it cannot be said that they were the ones stollen by the appellant from the victim. For that matter the testimony of Pw1 clearly does not support the charge.

It is trite that where there is variation between the charge sheet and evidence the appropriate course of action is to amend the charge as allowed under section 234 of **the Criminal Procedure Act [Cap.**

20. R.E. 2022]. Failure of that, the charge remains unproved. See **Abel Masikiti vs Republic** [2015] TZCA 219 (TANZLII) and **Credo Siwale vs Republic** ([2014] TZCA 184 (22 October 2014); [2014] T.L.R. 144 [CA].

In the case under scrutiny, Pw1 came up with her own version of story contrary to what was stated in the charge sheet. It is worth noting that, the charge sheet alleges that one mobile phone make ITEL was stolen from Pw1. However, in her testimony, Pw1 stated that the mobile phone stolen were two, one "***mobile phone make Kitochi black in colour and another is tigo smart kitochi black in colour***". It is clear that the two mobile phones purportedly tendered in court and allegedly identified by the victim in her testimony were all different from the one mentioned in the charge sheet. To make matters worse, Pw1 gave a different account of what was stolen from her. In her testimony the victim stated that her business licence and Tax Payers Identification Number were also stolen. These items were not included in the charge sheet. From these set of facts, it is clear that there was variance between the charge and evidence presented in court. The correct procedure is that, once there is variance between witness testimonies and the charge, the prosecution should proceed to

amend the charge. Failure to do so leads to a conclusion that the charge against the appellant was not proved beyond reasonable doubt.

Having considered the totality of circumstances in this case I am satisfied that had the learned trial magistrate considered these patent variation between the items allegedly stolen as mentioned in the charge sheet and as testified by Pw1 she would have come to a conclusion that the charge against the appellant was not brought home.

That takes me to the fourth ground of appeal in which the appellant alleges that the caution statement was improperly admitted in evidence. It is on record that when Pw3 sought to tender the said statement in court the appellant objected to its admission on the ground that he was tortured and made to sign the document that he did not know its contents. After an enquiry, the statement was admitted as **exhibit PE1**. Presently, the appellant alleges that if the trial court had considered the material variation between Pw1 and Pw3 as to the date of his arrest he would not have admitted the said statement. The appellant alleges that whilst Pw1 stated that he was arrested on the 04th day of April, 2021, Pw3, a police officer who recorded his statement gave a different version that he was arrested on the 06th day

of April, 2021. The appellant implies that the credibility of these two key witnesses and the prosecution case is doubtful.

It is trite that where there exists contradictions and inconsistencies between witness testimonies it is the duty of the court to try to resolve such inconsistencies and resolve whether they are minor or serious touching the core of the case. Where the court resolves that the contradictions and inconsistencies are serious and go to the root of the matter, such contradictions and inconsistencies must be resolved in favour of an accused person. Commenting on this, the Court of Appeal (Lila, J.A) in the case of **Sylivester Stephano vs Republic** [2018] TZCA 306 (03 December 2018 TANZLII); Lila, J.A:

> *"Where there are inconsistences, the Court's duty is to consider them and determine whether they are minor not affecting the prosecution case or they go to the root of the matter. That was said by the Court in the case of* ***Mohamed Said Matula vs. R*** *[1995] TLR. 3 in the following words:*
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> > *"where the testimony by witnesses contain inconsistencies and contradictions, 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"*

Going by the records, it is not disputed that in her testimony, Pw1 narrated that the appellant was arrested on the 04th day of April, 2021. In her testimony at page 10 of typed proceedings Pw1 stated:

> *"The accused was arrested on 04/04/2021. I went with my people at the place where the accused was and we managed to arrest him."*

However, in his testimony Pw3 gave a different account of the circumstances of the appellants' arrest. In his testimony, the witness is recorded to have stated that the appellant was arrested on the 06th day of April, 2021 and brought to the police station by civilians and the victim, Pw1. His testimony, at page 23 of typed proceedings read:

> *"On 06/04/2021 accused person was arrested by civilians together with a complaint and brought before the police station I received a call and was informed that accused has been arrested."*

From the above excerpts it is clear that there is inconsistency between Pw1 and Pw3 regarding the timeline of the appellant's arrest. The next question is whether such contradictions and inconsistencies are minor or serious.

I have carefully considered the facts and circumstances in the present case, having done so I am satisfied that the contradictions and

inconsistencies are serious and goes to the root touching the subject matter. In the instant case, the contradictions and inconsistencies as to the time and date of arrest of the appellant are so important because in terms of section 50(1)(a) of the CPA the basic period police have to interview a person is four hours commencing when the police take him under restraint. This view has been stressed by the Court of Appeal in several of its decisions including the case of **Mashaka Pastory Paulo Mahengi @ Uhuru & Others vs Republic** [2015] TZCA 52 (TANZLII) where the Court (Juma, CJ), at page 15 and 16, stated:

> *"Under section 50(1)(a), the basic period available to the police for interviewing a person under restraint in respect of an offence is the period of four hours commencing at the time he was taken under restraint in respect of that offence, unless that period is either extended under section 51 or in calculating the period available there is a period of time therein which is not to be reckoned as part of that period during the acts or omissions and for the purposes spelt out in section 50(2)(a) to (d). The bitter contest between the parties is over section 50(2)(a), which the High Court relied upon to enter the conviction."*

Relying on the above guidance, I am satisfied that if the learned trial magistrate had considered these factual circumstances carefully, she could not have admitted the confessional statement of the appellant which was recorded in contravention of section 50(1)(a) of

the CPA. The statement ought to have been expunged from the records as I hereby do expunge the same.

From the forgoing discussion, it is clear that the prosecution case was marred with serious irregularities. My re-evaluation of the available evidence leads me to a conclusion that there was a misapprehension of the substance, nature and quality of evidence, and misdirection on the evidence by the trial court that occasioned a miscarriage of justice. It is therefore the duty of this court to intervene so as to ensure justice is seen to be done. Thus, having deliberated on, and re-evaluated the evidence on record, I find that the present appeal is merited. The same is accordingly allowed.

That said, I nullify the proceedings of the trial court, quash the conviction and set aside the sentence meted out against the appellant. In the circumstances, I order that the appellant be immediately released from prison unless held therein for other lawful cause.

It is ordered accordingly.

DATED at **IRINGA** this **02ND** day of **FEBRUARY, 2024.**

S.M. KALUNDE

JUDGE