

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 90 OF 2023

(Originating from Criminal Case No. 77 of 2022 Mbeya District Court)

BRYSON S/O KABUNGO DAYSOAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

11/12/2023 & 19/02/2024

POMO, J

Against the conviction and sentence, the Appellant BRYSON KABUNGA DAYSO, is aggrieved with the decision of Mbeya District Court in Criminal Case No. 77 of 2022 imprisoning him to serve jail sentence of ten years. It is the decision which was delivered by the trial court on 10th May, 2023 Hon. A.P. Scout, SRM. The trial court found him guilty of two counts of the offence charged, to wit, **House Breaking** contrary to section 294(1) of the Penal Code, [Cap. 16 R.E.2019] and **Stealing** contrary to section 358(1) and 265

of the Penal Code, [Cap. 16 R.E. 2019]. He thus filed seven (7) grounds of appeal. I reproduce them verbatim: -

1. *That, the trial court erred in law when it convicted and sentenced the appellant without taking into account that the prosecution failed to prove the case in both two counts per the law*
2. *That, the trial court erred in law when it convicted and sentenced the appellant without taking into account that the appellant was not arrested in the area of incident breaking the said house and stealing PW1 properties*
3. *That, the trial court erred in law when it convicted and sentenced the appellant without taking into account that the recent possession of stolen properties of PW1 was not found with the appellant*
4. *That, the trial court erred in law when it convicted and sentenced the appellant without taking into account that the evidence of PW1, PW2 and PW3 failed to link the Appellant with the allegation*
5. *That, the trial court erred in law when it convicted and sentenced the appellant relying on exhibit PE1 Cautioned Statement which was objected to by the Appellant but the trial court rejected to conduct inquiry to prove its correctness*
6. *That, the trial court erred in law when it convicted and sentenced the appellant relying on the evidence of PW1, PW2 and PW3 that the appellant led them to the scene of crime the evidence which was not corroborated by civilian and street chairperson or neighbour to prove the same*

7. That, the appellant's defence was not considered

In essence, these grounds, boil into two basic grounds. **Firstly**, that the respondent republic didn't prove the offence against the Appellant and **secondly**, the defence evidence was not considered.

Briefly, the facts of the case are as follows. On 1st April, 2022 at 09:30AM, PF 21250 Assistant Inspector Chato (PW2) while on police patrol duties arrested the Appellant at SIDO area within the District of Mbeya in Mbeya region and took him to Mwanjelwa Police Station. He arrested him after being notified by a secret informer on his presence at that area. It appears the appellant was being hunted. According to PW2, on the same day at night time hours the appellant was interrogated and admitted to have committed several theft offences including that of house breaking and stealing Mr. Gilbert Benjamin Mwambapa (PW1)'s TV make Sony sized 32 inches worth TZS 1,500,000/- at Isanga Area within Mbeya City.

Following such admission, on 2/04/2022 the police required the Appellant to take them to the scene of crime, which is the PW1's premises. He did so. According to PW1, they arrived at his place which is Isanga area near Ijumaa Mosque at 21:00 hours. The police asked him if his TV was ever stolen through house breaking, PW1 admitted to be a victim of such incident.

E.6796 D/SGT Vicent (PW2) is the police who recorded the cautioned statement of the accused. He testified in court that he did so on 2nd April, 2022 and tendered the said cautioned statement which was admitted by the court as Exhibit PE.1. This was after overruling the Appellant's objection raised against it in that it was taken without being given his right of calling an advocate or relative to be present at the time of recording his statement

On the other hand, the victim (PW1)'s evidence is that the house breaking and stealing of his TV occurred in august, 2021 on the date he doesn't remember. Following the incident, he reported the matter to the ten-cell leader. October, 2021 at 21:00 hours evening time the police accompanied with the appellant while handcuffed went to his home and was asked if he had ever been a victim of stealing of a TV and admitted.

In his defence, the Appellant denied to have committed the offence and stated he was remanded in police custody for a month before being taken to court.

In the end, the trial court was satisfied by the prosecution evidence that the offence was proved beyond doubt and therefore convicted the Appellant and sentenced him in the manner above sated

This appeal was heard by way of written submission. The Appellant defended himself unrepresented while the respondent republic enjoyed legal service of Ms. Julieth Katararo, learned State Attorney.

The Appellant argued generally in support of the Appeal. That, no documents proving ownership of the allegedly stolen TV were tendered. Local leaders or neighbours of the victim didn't come to testify in court on the allegations that he took the police to the victim (PW1). And that, the cautioned statement was illegally admitted as it was taken out of time. Therefore, prayed his appeal be allowed and be let free

In reply, outrightly the respondent republic argued that they don't support the conviction and sentence, instead supports the appeal.

Submitting, the respondent republic argued that evidence adduced by the prosecution witnesses are in huge contradictions. That, PW1 testified that the incident occurred in August, 2021 and police went with the accused to his premise on October, 2021 the evidence which contradicts with those of PW2 and PW3 who testified that on 2nd April, 2022 is when the Appellant took them to PW1 making a difference of six months. To bolster the argument, this court is referred to page 10 and page 27 – 28 respectively of

the trial court proceedings. A difference of six months creates doubt as to when the incident occurred.

Arguing further, the respondent republic submitted that exhibit PE1 the cautioned statement was admitted by the trial court without conducting inquiry despites being objected by the Appellant hence violation of section 53 of the Criminal Procedure Act, [Cap. 20 R.E. 2022]. That, the trial court overruled the objection without conducting inquiry as required by the law. This court is asked to look page 33 of the trial court proceedings showing that inquiry was not done. In the end conceded to the appeal

I have given due consideration the grounds of appeal, both sides submissions and the trial court record. The issue for determination is whether the appeal is merited.

Both parties support the appeal the ground of which being existence huge contradictory evidence by the prosecution evidence as to when the Appellant took the police to the PW1 who is the victim of house breaking and stealing. As correctly observed by the respondent republic that while PW1 testified that the incident took place in August, 2021 and that the Appellant led the police to the scene in October, 2021 the very police came with a different version of evidence that it was on 2nd April, 2022 when the Appellant

lead them there. This is evident at page 27 – 28 of the trial court proceedings as well page 10. What PW1 testified meant that the Appellant who was arrested on 1st April, 2022 took the police to the PW1's residence (the scene of crime) even before his arrest.

In **Deus Joasis Kilala versus Republic**, Criminal Appeal No. 191 of 2018 referred at page 34 in **Alexandris Athanansiaos versus Republic**, Criminal Appeal No. 362 of 2019 Cat at Dar es Salaam (unreported) the Court of Appeal had this to state: -

"...material contradiction or discrepancy is that which is not normal and not expected of a normal person, and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterized".

Also, in **Moshi Hamisi Kapwacha versus Republic**, Criminal Appeal No. 143 of 2015 (unreported) cited at page 15 in **Emmanuel Kabelele versus Republic**, Criminal Appeal No. 536 of 2017 CAT at Shinyanga (unreported) the court stated thus: -

"Another observation worth making here is that while normal discrepancies do not corrode the credibility of the witness, the material discrepancies do. Normal discrepancies are those which are due to normal errors of observations, memory errors due to

*lapse of time, or due to mental disposition such as shock and horror at the time of occurrence of the event. **Material ones are those going to the root of the matter or not expected of a normal person***".

Following the evident facts above, in my considered view, correctly so as suggested by the respondent republic, the contradiction goes to the root of the case as the act of letting the appellant take the police to the scene of crime aimed at connecting the Appellant and the allegedly housing breaking and theft of PW1's TV.

Another pertinent issue is that the Appellant's cautioned statement was recorded on 2nd April, 2022 his arrest being on 1st April, 2022 therefore beyond four hours prescribed by section 50(1) of the Criminal Procedure Act, [Cap. 20 R.E. 2022]. Faced with akin situation, the Court of Appeal in **Juma Nyamakinana & Another V. Republic**, Criminal Appeal No. 133 of 2011, held as follows: -

"According to the record, the appellants were arrested on 10/10/2008 in the morning hours and their respective cautioned statements (Exhibits "P4" and "P.5" respectively) were recorded contrary to the mandatory provisions of sections 50 and 51 of the Act on 11/10/2008 for the 2nd appellant and 12/10/2008 for

*the 1st appellant. **Section 50 of the Act provides for a basic period of four (4) hours from the time of arrest to the time for interviewing a person in restraint in respect of an offence.** Such basic period may be extended under section 51 of the Act by the officer in charge of investigating the offence for a further period **not exceeding eight hours** or on application to a magistrate for a further extension of that period as deemed reasonable in the circumstances. There is no such evidence on record that there were such extensions granted before PW4 and PW6 recorded the cautioned statements of the appellants on 11/10/2008 at 11 a.m., which was a period of over 24 hours after 2nd appellants arrest on 10/10/2008 in the morning hours; and on 12/10/2008 at 15hours which was over 50 hours after arrest of the 1st appellant....Section 57 (1) of the Act protects the rights of the common man, the illiterates, etc."*

That being the case therefore, accordingly, exhibit PE1 the cautioned statement of the appellant, in my view, was inadmissible in evidence it being obtained in violation of the law. Thus, I hereby expunge it from the record.

In totality, there is no any other piece of evidence in the trial court record which links the Appellant and the offence charged

That said, I hold that the appellant's appeal is merited and hereby allow it. The conviction entered by the trial court as well the sentence both are hereby set aside. I order for immediate release of the Appellant from custody unless held therein for other lawful cause

It is so ordered

Right of Appeal explained to an aggrieved party




MUSA K. POMO

JUDGE

19/02/2024

Judgment delivered in chamber in presence of the Appellant and Ms. Annastazia Sayi Elias, learned State Attorney for the respondent republic.


MUSA K. POMO

JUDGE

19/02/2024