IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL No. 130 OF 2023

(Originating from the Decision of the Resident Magistrate's Court of Mbeya in Criminal Case No. 8 of 2021 before Hon. Z.D. LAIZER- PRM dated 31.10.2022)

AUGUSTINO GODFREY..... 1st APPELLANT

EMMANUEL KENEDY..... 2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

11th December, 2023 & 19Th February, 2024

POMO, J.

In the Resident Magistrate's Court of Mbeya at Mbeya, in Criminal Case No. 8 of 2021, the appellants, AUGUSTINO GODFREY and EMMANUEL KENEDY, were charged with the offence of theft, as per section 258(1) and 265 of the Penal Code, Cap 16 Revised Edition 2022 (the Act). Additionally, YUSUPH SICHEMBE, the third accused (not part to this appeal), was arraigned with them and charged with the offence of being found in possession of properties suspected of being stolen contrary to section 321 (1) (b), of the Act. Following the trial, the two were found guilty, convicted, and sentenced to serve four years imprisonment

whereas the 3rd accused was sentenced to pay fine of Tshs. 1,000,000/=. Dissatisfied with the conviction and sentence, they now appeal against the entire decision on the following grounds:

1. *That the trial court erred in law when convicted and sentenced the appellants without regarding that the prosecution failed to proof the charges as per the law since none of the appellants was found while stealing such items.*
2. *That the trial court erred in law when it convicted and sentenced the appellants without regarding that none of the leaders of where the said stolen properties who were called to prove if the first and second appellants led the police to the domicile of the 3rd accused to show the said PW1's properties claimed to be stolen.*
3. *That the trial court erred in law when convicted and sentenced the appellants without taking into account that the said exhibits PE1, PE2, PE3, PE4 and PE5 were illegally admitted as per the objections raised by the appellants the same contravened the law.*
4. *That the trial court erred in law when convicted and sentenced the appellants without taking into account the doctrine of recent possession of the stolen properties since the offence of stealing was not proved as per law.*
5. *That the defence of the appellants were not considered deeply by the trial court.*

Briefly; on 22.7. 2020, at Iyunga area in Mbeya District, Mbeya region, the two appellants were accused of stealing a generator valued at Tshs. 800,000, a water pump make boss worth Tshs. 350,000, and a ladder valued at Tshs. 100,000 the properties of Landbless Inn Lodge. Subsequently, they sold the generator to Yusuph Sichembe (the 3rd accused) for Tshs. 150,000. The appellants were apprehended between 19.8.2020 and 22.8.2020, while the 3rd accused was arrested on 25.8.2020. The generator was allegedly traced by the in-law of the 3rd accused to the police station. It was found there after being dropped by an unidentified motorist who then left. All the three accused were brought before the court to face charges related to the aforementioned theft.

This appeal was disposed of through written submissions. Both sides filed their respective submissions

Arguing the grounds of appeal, the appellants, being lay persons, submitted a concise summary with numbered points, each containing sentences not exceeding six lines. Despite the brevity, I will endeavor to summarize their written submission.

The appellants argued that none out of the prosecution witnesses gave evidence to establish their presence or arrest at the crime scene. They highlighted that the testimony of Daniel Gidion Mbena (PW1), lacks credibility as he was not present at the crime scene, rendering his

evidence hearsay. They further contested the testimonies of G.9929 Johnson (PW2), and SP Boniface Luambano (PW3), asserting that their claims that the appellants led them to where they sold the generator to the 3rd accused lack credibility. The appellants emphasized that no local leaders from the area of the 3rd accused's residence were called to corroborate this assertion.

The appellants contended that the certificate of seizure violated section 38 (1)(2) and (3) of the Criminal Procedure Act [Cap 20 R.E. 2022] (the CPA). They questioned why, if at all PW2 and PW3 conducted the search, failed to produce a search warrant as required by law. Additionally, they raised concerns about the certificate of seizure lacking the signature of the 3rd accused. Regarding the cautioned statements, exhibits PE1, PE2, and PE3, they argued that these were unlawfully obtained. Referring to page 1 of the proceedings, they highlighted discrepancies in the arrest dates, claiming they were arrested on different dates in August 2020 but were all arraigned before the court on January 19, 2021.

The appellants continued to argue that the statement of Abinala tendered by PW4 was unlawfully admitted, citing section 34 B (2) (c) and (f) of the Tanzania Evidence Act, which explicitly delineate the conditions for admitting statements as evidence. They informed the court that the

said statement was tendered without granting them the right to review it within the specified ten-day period or allowing them the opportunity to object to thier admission.

Furthermore, the appellants submitted that the trial court failed to comply with section 214 of the CPA. They contended that they were not afforded the right to recall witnesses or to continue with the case.

Lastly, they argued that the trial court did not adhere to the doctrine of recent possession in deciding their case. Additionally, they asserted that the trial court failed to properly evaluate the evidence before it.

In response to the appellants' written submission, the Republic promptly informed the court that they have thoroughly reviewed the appellants' submissions and strongly oppose the appeal.

Addressing the first ground of appeal, the respondent Republic argued that the ground lacks merit since the prosecution presented material witnesses capable of establishing the offence for which the appellants were convicted, namely PW1 and PW2. They urged the court to refer to page 83 of the trial court proceedings, where PW3 testified that he received stolen items from the appellants. The respondent Republic asserted that upon reviewing the trial proceedings and judgment, it is evident that the prosecution successfully proved the case beyond reasonable doubt, as all elements of the offence were adequately

established. To support this submission, they referred this court to the case of **Mosi s/o Chacha @ Iranga & Another Vs. Republic**, Criminal Appeal No. 508 of 2019 CAT (Unreported).

Regarding the second ground of appeal, the Respondent contended that there is no legal requirement for a street leader to witness such proceedings. They further argued that when the property was seized, a receipt was issued by the seizing officer, which was signed by the accused person and their relative. To bolster their argument, they directed the court to examine section 38(3) of the CPA, which does not mandate leaders to witness such actions as asserted by the appellants. Therefore, they prayed for this ground to be dismissed.

Responding the third ground of appeal concerning the cautioned statement, the certificate of seizure, and the statement of Abinala, the respondent Republic contended that the appellants' claim that the cautioned statement was recorded outside the prescribed time is misconceived. They argued that this assertion by the appellant is merely an afterthought, as the objections raised by the appellants during the trial court proceedings focused on the voluntariness of the statement, not the time of recording. Citing the case of Said **Mohamed Said vs. Muhusin Amiri & Another**, Civil Appeal No. 110 of 2020 CAT (unreported), they

emphasized that judges are obligated to decide a case based on the issues on record. Additionally, they referenced the case of **George Senga Musa Vs. Republic,** Criminal Appeal No.108 of 2018 CAT (Unreported), where the court affirmed this principle.

> *" The court has no jurisdiction to deal with the issue raised for the first time that was not raised nor decided by the lower courts...the jurisdiction of the court is confined to the matters which come up in the lower court and were decided"*

He argued that the appellants introduced a new fact that was not raised as an issue in the trial court. Therefore, he asserted that this ground is baseless.

Regarding the contention that the certificate of seizure was flawed due to the absence of witnesses, he reiterated that this argument has already been addressed.

As to the contention that exhibit PE5 contravened section 38 B (2) (a) (b) (c) and (d) of the Tanzania Evidence Act, Cap 6 Revised Edition 2022, as the appellants were not given ten days to review it or make an objection, the Republic submitted that this ground lacks merit and is unsubstantiated. They argued that this issue was not raised by the appellants in the trial court, making it an afterthought. Since there were no objections to its admission at that time, they asserted that this claim

holds no weight. To support their argument, they cited the case of **Makubi Dogani Vs. Ngodongo Maganga**, Civil Appeal No. 78 of 2019 CAT at Shinyanga (unreported).

On the fourth ground of appeal, the respondent Republic argued that the appellants were convicted of the offence of stealing, not simply because of being found with stolen properties. Therefore, they contended that the doctrine of recent possession is not applicable to the appellants in this case.

On the last ground of appeal, the Republic argued that it is baseless, as page 6 of the typed judgment of the trial court clearly shows that the court did consider the evidence presented by both sides in reaching its decision. Finally, they prayed for the appeal to be dismissed.

In a brief rejoinder, the appellants argued that the respondent's reply written submissions failed to consider the entire proceedings and the copy of the judgment. They emphasized that a person who was arrested with the complainants' properties was the 3rd accused, who also signed the certificate of seizure. Furthermore, they asserted that the respondent demonstrated a lack of understanding of the doctrine of recent possession of stolen properties. They referenced the case of **Joseph Mkumbwa and Another Vs. Republic**, Criminal Appeal No 94

of 2007 CAT at Mbeya (unreported), where the court explained that for the doctrine to apply as a basis of conviction, it must be proven that: one, the property was found with the suspect; two, the property is positively identified as belonging to the complainant; three, the property was recently stolen from the complainant; and four, the stolen items in possession of the accused constitute the subject of the charge against them and they must be the one who stole the property. This marked the end of submissions

I have dispassionately gone through the submissions made by both parties, and thoroughly reviewed the entire trial court record.

It is pertinent at this stage to state first the law regarding the standard of proof in criminal cases. It is trite law that in criminal cases the duty to prove the case lies on the shoulders of the prosecution, the standard of which being proof beyond reasonable doubt. See, among others, the case of **Wilfred Praygod @ Msangi v. Republic**, Criminal Appeal No. 285 of 2010 CAT (unreported) where it had this to state: -

> *"In a criminal case, the burden of proof lies on the prosecution to prove the case beyond reasonable doubt. The burden never shifts (Section 3(2)(a) of the Evidence Act, Cap 6, R.E. 2002). See* ***Woolmington V Director of Public Prosecutions***

1935 AC 462 and ***Boniface Siwinga V Republic****, Criminal Appeal No. 421 of 2007 CAT (unreported)."*

The trial court proceedings reveals that the prosecution's evidence relied so much on the cautioned statements tendered as exhibits PE1, PE2 and PE3, the statement of Binala Blackson, whom according to the prosecution could not be traced and the certificate of seizure exhibit, P4. This also forms ground 3 of the appellant's appeal.

To address the issue, it is essential to examine the cautioned statements in question, Exhibit PE1 and PE2. As per the 1st appellant's account, he was apprehended on 19.8.2020, whereas the 2nd appellant was on 22.8.2020. However, both of their caution statements were recorded on 26.8.2020. Such recoding of the cautioned statement done on 26/08/2020 contravened section 50(1)(a) of the CPA, which mandates the same to be done within four (4) hours from the moment the accused person is arrested, unless an extension of time is requested and granted in accordance with section 51 of the CPA. In the case of **Petro Teophan v. The Republic**, Criminal Appeal No. 58 of 2012 CAT at Dodoma (Unreported) the court of appeal, at page 9, articulated thus:

"Further, the prosecution did not explain as to why the cautioned statement of the appellant was taken on 12/5/2008 six days from 6/5/2008 when he was at Kwamtoro Police

*Station which is beyond the time limit of **four hours** as per section 50(1) (a) of the Criminal Procedure Act, Cap. 20 of taking such statement."*

And in **Juma Nyamakinana & Another V. Republic,** Criminal Appeal No. 133 of 2011 CAT at Mwanza (unreported) where at page 13, 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."

Considering the aforementioned precedents, it is evident that the trial court erred in convicting the appellants by relying on the cautioned statements. Given that these statements, exhibits PE1, PE2 and PE3, were obtained in violation of legal provisions, they are deemed inadmissible and therefore are hereby expunged from the record.

The trial court conviction relied heavily on the cautioned statements of the appellants, of which the learned trial magistrate believed led to the discovery of the generator. However, it is notably that no suspect was found in possession of the generator. Now, following the expungement of these two cautioned statements, the question arises: are there any remaining pieces of evidence that can establish a link between the appellants and the theft?

The 3rd accused's cautioned statement implicates the appellants, but its admissibility hinges on Section 33(1) of the Tanzania Evidence Act, Cap 6 Revised Edition 2029. However, it's important to note that corroboration

is mandated by subsection 2 of the same Act. In **Flano Alphonce Masalu @Singu Vs. Republic**, Criminal Appeal No.366 of 2018 CAT at Dar es Salaam (Unreported), the court of appeal underscored, at page 33, thus: -

> *"In terms of section 33(1) of the Evidence Act, the first* ***appellant's confession implicating his two co-appellants*** *could be acted upon against them. But we agree with Mr. Katunga that* ***the law requires corroboration of such confession****".*

Now, replying to the first ground of the appeal, the prosecution contends that, per page 83 of the trial court proceedings, PW3 testified to the effect that the 3rd accused received stolen items from the appellants. However, upon scrutiny and referencing page 83 as directed by the prosecution, it becomes apparent that PW3's testimony is based solely on hearsay—what he claims to have been told by the appellants themselves.

Regarding the second ground of appeal, it's evident that the alleged generator was seized at the police station, as previously stated. Given that no suspect was found in possession of the generator, coupled with the absence of local leaders not called to testify, it becomes clear that there is no link connecting the appellant to the offence.

In light of the above, in my view, the three grounds of appeal are merited and suffices to resolve the appeal. Further discussion on the rest of the grounds is uncalled for.

In the upshot, I allow the Appellants' appeal and consequently set aside the trial court judgment and sentence.

Further, I order the Appellants be release from custody forthwith 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 Appellants and Ms. Annastazia Sayi Elias, learned State Attorney for the respondent republic.

MUSA K. POMO

JUDGE

19/02/2024