

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MANYARA  
AT BABATI**

**CRIMINAL APPEAL NO. 61 OF 2023**

*(Originating from Criminal Case No. 62 of 2022 of Mbulu District Court at Mbulu)*

**PASKALI AKONAAY.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

*22<sup>nd</sup> November 2023 & 22<sup>nd</sup> February, 2024.*

***Kahyoza, J.***

**Paskali Akonaay, Martine Emmanuel** and **Emmanuel Zakaria** were charged with two counts; **one**, burglary; and **two**, stealing. They pleaded not guilty. After full trial, the court acquitted Martine Emmanuel, and Emmanuel Zakaria and convicted Paskali Akonaay with the offence of stealing. Paskali Akonaay has appeared to this Court contending that the trial court erred to rely on the uncorroborated cautioned statement, contradictory and inconsistent prosecution's evidence, to convict him, and that the court did not consider his defence.

The respondent's state attorney supported the appellant's conviction and sentence. He was of the view that the prosecution's evidence proved the appellant guilty beyond reasonable doubt.

A brief background is that Paskali Akonaay, Martine Emmanuel and Emmanuel Zakaria (co-accused persons) were charged with offence of burglary contrary to section 294 (1) (a) (b), in the first count, and stealing contrary to section 258 (1) and 265 all of the **Penal Code**, [Cap. 16 R.E. 2022]. It was alleged that Paskali Akonaay and his co-accused persons did on 11<sup>th</sup> January, 2021 at night hours break into the dwelling house of Jackson Ninga and steal one motor cycle valued at Tzs. 1,800,000/= the property of Paschal John.

The facts as gathered from the prosecution's case are that on 11.01.2021 at about 23:30hrs, Jackson Ninga (**Pw1**) found his motorcycle Lifan make, black in colour with registration number MC822 ARP stolen.

He made a report to Mbulu police station. On the following morning Hassan Musa (**Pw2**) informed him that he met Paskali Akonaay (**Paskali**), Emmanuel Zakaria and Martine Emmanuel with his motorcycle. He searched and arrested Paskali Akonaay who mentioned other suspects. Paskali asked

Jackson Ninga (**Pw1**) to settle the matter out of court. Paskali and Martine Emmanuel took that opportunity to disappear until February when they were re-arrested.

Hassan Musa (**Pw2**) testified that he met Paskali and his co-accused persons with motorcycle with registration No. MC. 822 ARP make Lifan, black in colour the property of Jackosn Ninga. He inquired from them why they were in possession of Jackosn Ninga's motorcycle. Emmanuel answered that they had borrowed it. He said that he stood three metres away and spent same five minutes talking to the accused persons and he identified them due to electricity lights. The next morning, he met Jackosn Ninga (**Pw1**) who told him that his motorcycle was stolen, he notified him that he met the accused persons with his motorcycle.

F. 1683 Sgt. Walii (**Pw3**) deposed that he arrested and interrogated Paskali who voluntarily admitted to have committed the offence. Paskali objected his cautioned to be tendered as exhibit. The court conducted an inquiry and found that Paskali had voluntary made the statement and admitted the cautioned statement as Exh. P.E.1.

F. 1683 Sgt. Walii (**Pw3**) stated that after recording Paskali's statement the accused persons prayed to settle the matter out of court. The police released them on bail. The third accused person refused to pay his part. They were given time to report to police while on bail before they settled. They reported two times, stopped, and disappeared. They were re-arrested and charged.

The accused persons denied to commit the offence but Martin Emmanuel (1<sup>st</sup> accused) admitted during cross-examination that he met Hassan Musa (**Pw2**) on the material date at the government office and that he had no torch but that there was electricity light. He deposed that they closely knew each other and it was Hassan Musa (**Pw2**) who signed a bail bond for him at the police station.

Paskali deposed that he was not at the scene of the crime and that he travelled on 30.04.2021. He was arrested on 27.02.2022. Paskali deposed that Hassan Musa (**Pw2**) did not identify him or explain the type of the torch he used to identify them. Emmanuel Zacharia denied the offence.

As pointed out the trial court convicted only Paskali and sentenced him to serve five (5) years' imprisonment for stealing. Paskali filed a petition of appeal with five grounds of complaint, which raised several issues as follows;

- (a) Was the court justified to rely on the cautioned statement?
- (b) Was the prosecution's evidence contradictory and inconsistent?
- (c) Did the court fail to consider the defence?
- (d) Was the court justified to convict the appellant in the absence of the exhibit?

Paskali, the appellant who appeared in person had nothing to add to his ground of appeal. Whereas, Mr. Rwezaula State Attorney, appeared for the respondent vehemently opposed the appeal. I will refer to his submissions why answering the issues, the appellant raised vide his grounds of appeal.

### **Was the court justified to rely on the cautioned statement?**

The appellant's complaint was that the court erred to rely on the uncorroborated cautioned statement to convict him.

Mr. Rwezaula contended that the cautioned statement was admitted after the trial court conducted an inquiry. He added that any cautioned statement may be relied upon if the court formed an opinion that was true.



He cited the case of **Alex Nyenda V. R**, Criminal Appeal No. 207 of 2018 and **Muhangwa, Simon V. R**, Criminal Appeal No. 480 of 2019 to support his position.

It is true that the appellant repudiated his confession, that he rejected to have voluntarily signed the cautioned statement. He contended that he was forced to make a statement. The State Attorney cited to this court the case of **Muhangera Simon**, (supra) where the Court of Appeal held that *"the court may rely on the repudiated confession to convict if the court is satisfied that the confession was true."* The trial court was satisfied that the confession was true and convicted the appellant. In the present case, even if the court would not have been satisfied that the caution statement was true, there was evidence to corroborate the confession. Jackson Ninga (**Pw1**) deposed that Paskali admitted orally to have committed the offence. Oral confession is strong evidence and the court may rely on the oral evidence to convict.

To prove that Paskali admitted to have committed the offence, the police gave him a chance to settle. He disappeared after reporting to police twice. Jackson Ninga (**Pw1**)'s evidence that Paskali admitted to commit the offence and prayed for time to settle was supported by D/Sgt. Walii (**Pw3**)'s

evidence. It is settled that oral confession is sufficient to mount a conviction to against the maker. See the cases of **Posolo Wilson @ Malyengo V. R**, Criminal Appeal No. 613 of 2015 (CAT – Unreported), **DPP V. Nuru Mohamed Gulamrasul** [1989] TLR 82 and **Mohamed Manguku V. R**, Criminal Appeal No. 194 of 2004, a few to mention. In **Posolo Wilson**, the Court of Appeal observed that-

*"It is settled that on oral confession made by a suspect, before or in the presence of reliable witness, be the civilians or not, may be sufficient by itself to find conviction against the suspect."*

I find it proved that Paskali confessed orally to commit the offence and asked for time to compensate Jackson Ninga(**Pw1**) and took that advantage to escape. Thus, the repudiated confession was corroborated by oral evidence. Thence, the trial court was right to ground conviction on the repudiated confession because it believed the same to be true and there was evidence to corroborate it.

**Was the prosecution's evidence inconsistent and contradictory?**

The appellant complained, without pointing out the contradictions and the inconsistencies, that the trial court erred to rely on contradictory and inconsistent and yet weak prosecution's evidence to convict him.

The State Attorney replied to the appellant's complaint that there were no contradictions in the prosecution evidence. He deposed that Jackson Ninga(**Pw1**) explained how he found his motorcycle stolen. Hassan Musa (**Pw2**) explained how he saw and identified Paskali and his co-accused persons in possession of Jackson Ninga (**Pw1**)'s motorcycle. Whereas D/Sgt. Walii (**Pw3**) tendered a caution statement.

I examined the evidence on record. To say the least, there was no contradictions. Looking at the evidence prosecution witness, supported each other. Jackson Ninga(**Pw1**) deposed how he realized that his motorcycle was stolen. He made a report to police. The following morning, he got information from Hassan Musa (**Pw2**) that he met Paskali and his co-accused persons with his motorcycle. Hassan Musa (**Pw2**) described Jackson Ninga(**Pw1**)'s motorcycle and that he found Paskali and his co-accused persons in possession of the motorcycle. Hassan Musa (**Pw2**) deposed that he identified them and he even talked with them. D/Sgt. Walii (**Pw3**) deposed how he arrested Paskali and his co-accused persons. He testified how Paskali



admitted to commit the offence and asked to settle the matter out of court. Paskali after he got time to settle out of court, he disappeared and stopped to report to police.

D/Sgt Walii (**Pw3**) supported the evidence of Jackson Ninga(**Pw1**) that Paskali admitted to commit the offence and requested to settle the matter out of court.

Given the evidence on record the appellant's complainant that the prosecution's evidence was contradictory and inconsistent is baseless. I would say even if there such inconsistency or contradictions, they are minor. They did not go to the root of the matter. Such contradictions and inconsistencies are trivial they can be ignored. See **Chrisant John V. R** Cr. Appeal No. 313/2015 where the Court of Appeal held that "contradictions cannot be avoided in any case and **Evarist & others V. R** [1978] LRT 70 (HC) where this Court held that human recollection is not infallible. A witness is not expected to be right in minute details when telling his story.

### **Did the trial court fail to consider the defence?**

The appellant's complaint was that, his defence was not considered, the respondent opposed this ground of appeal. The State Attorney argued

that the trial considered the appellant's defence of *alibi* but did not give it weight. He argued that the trial court was justified to give no weight to the defence of *alibi*. He submitted that the appellant did not follow the procedure of giving such a defence. He argued that the appellant did not give a notice to raise the defence of *alibi*. He simply stated in his defence that he was not at the scene of the crime.

It is true that a defence of *alibi* can be raised after giving a notice to the prosecution before it's closing its case that the accused person intends to raise the defence of *alibi*. The law on this subject is well settled. First, the law requires a person who intends to rely on the defence of *alibi* to give notice of that intention before the hearing of the case. See section 194(4) of the CPA. If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the *alibi* at any time before the prosecution closes its case s. 194(5) of CPA. Should the accused person raise the defence of *alibi* much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence (s.194 (6)).

If a defence of *alibi* is raised after the prosecution had closed its case and without following the procedure, that defence is an afterthought. The trial court may consider that defence and afford it no weight. I examined the trial court record and found that it did not say a word on the appellant's defence of *alibi*. However, failure to consider the defence does not render the conviction a nullity as the first appellate court has a duty to step into the shoes of the trial court and consider the defence.

I considered the appellant's defence of *alibi*, and the evidence on record. I cannot escape the conclusion that the defence of *alibi* was an afterthought. The appellant did not follow the laid down procedure to raise the defence of *alibi* and he raised it during his defence. To add salt to an injury, the appellant admitted orally to Jackson Ninga(**Pw1**) and also confessed to D/Sgt. Walii (**Pw3**) to have committed the offence. A person who confess to have committed the offence is the best witness to the offence in issue. Thus, his defence of *alibi* could not pinch holes in the prosecution's evidence. Not only that but also, Hassan Musa (**Pw2**) deposed that he saw him in possession of the stolen motorcycle, identified him and reported to Jackson Ninga(**Pw1**) that the appellant was among persons who stole his motorcycle.

Hassan Musa (**Pw2**) promptly reported to D/Sgt. Walii (**Pw3**) that Paskali, the appellant, was among the thieves, was an assurance of his reliability. See **Marwa Wangiri Mwita & another V. R**, Criminal Appeal No. 6 of 1995, whom the Court of Appeal stated that-

*"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as an unexplained delay of complete failure to do so should put a prudent court to inquiry"*

I am of the view that the appellant's defence of *alibi* was an afterthought.

**Was the trial court justified to convict the appellant in the absence of the exhibit?**

The appellant complained that, the trial court convicted him without considering the differences between proceedings and the judgment and in the absence of exhibit.

The State Attorney contended that the complainants are baseless.

I had time to review the proceedings and the judgment I was unable to find the differences complained about. The judgment was based on the evidence available and the law. As to the complain that the trial court had

no exhibit to mount conviction, this complaint is baseless. A case may be proved by oral testimony with or without document and exhibit. The appellant complaint that there was no exhibit, he may have been referring to the stolen motorcycle. The fact that the motor vehicle was not tendered as evidence does not mean that it was not stolen. One of the elements of offence of stealing is an intention to deprive the special or general owner use of the thing permanently. The fact that the motorcycle was not recovered, does not only prove the intention to deprive the owner permanently but also, it exhibits the intention to deprive the owner permanently.

In the end, I find no merit in all grounds of appeal and dismiss them.

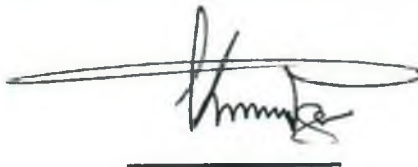
Before concluding the judgment, I had an opportunity to review the sentence. As per the record, the appellant had no record of previous conviction. He was the first offender. I find a sentence of five years imprisonment with the order to compensate the appellant, on the high side. Using my revision powers, I set it aside and impose a sentence of three 2 years and six months instead. I uphold the order for compensation.



In the end, save for the order reducing the sentence from 5 years to 2 years and six months imprisonment, I find the appeal meritless, uphold conviction and the compensation order.

I order accordingly.

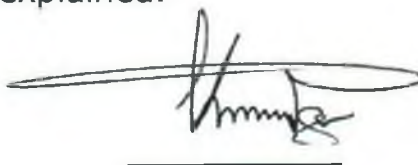
Dated at **Babati** this **22<sup>nd</sup>** day of **February**, 2024.



**J. R. Kahyoza**

**Judge**

**Court:** Judgment delivered in the presence of the appellant, and Mr. Rwezaula, State Attorney for the respondent. B/C Fatina (RMA) present. Right of further appeal explained.



**J. R. Kahyoza**

**Judge**

**22/02/2024**