IN THE HIGH COURT OF TANZANIA

DODOMA SUB – REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 8663 OF 2024

(Arising from Criminal Case No 11 of 2023 in the District Court of Kondoa at Kondoa)

SOFIA ISSA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29th May & 28th June, 2024

MUSOKWA, J.

The appellant herein was arraigned before the District Court of Kondoa (trial court) charged for the offence of malicious damage to property contrary to section 326(1) of the Penal Code, Cap. 16 R.E. 2022 (Penal Code). The prosecution alleged that on 22nd September, 2022 at Mungolo Village within Kondoa District in Dodoma Region, the appellant wilfully and unlawfully grazed her animals, one cattle and one donkey, into the farm of Issa Ibrahimu @ Chira. The said act caused the destruction of peas in the farm of the complainant, valued at TZS 2,800,000/-.

In the trial court, the appellant was convicted for the offence charged and was sentenced to serve three (3) years of community service. In

addition, the appellant was ordered to pay compensation to the complainant totalling TZS 1,500,000/=. Dissatisfied with the decision, the appellant lodged the present appeal. The grounds of the appeal will not be reproduced as the appeal was disposed on different grounds from those contained in the petition of appeal.

This appeal was scheduled for hearing on 29th May, 2024 whereby the appellant appeared in person, unrepresented; and Ms. Patricia Mkina, learned state attorney represented the respondent.

Before the hearing of the appeal, Ms. Mkina stated that while perusing the proceedings of the trial court and the judgment thereto, she observed an apparent error on the face of the trial court records. The said error was the omission of the judgment to include the sentence that had been issued against the appellant. Ms. Mkina referred to page 9 of the trial court's judgment. The learned counsel for the respondent submitted that the sentence merely appears at page 30 of the typed trial proceedings.

According to Ms. Mkina, the omission to indicate the sentence in the judgment is contrary to the prescribed format of judgment writing as provided for under section 312 (2) of the Criminal Procedure Act, Cap. 20, R.E. 2022, (CPA). The section aforementioned requires the sentence to form part of the judgment. In this regard, the counsel for the respondent

prayed that the case file should be remitted to the trial magistrate for the composition of a proper judgment in accordance with the law.

Apart from the apparent error on the face of the records, Ms. Mkina submitted on the weaknesses of the evidence adduced by the prosecution during the trial. In explaining this ground further, Ms. Mkina asserted that some key witnesses did not enter appearance before the trial court to testify thereof. Among these witnesses, included the father of the complainant who was a material witness in this case.

In addition, the learned counsel submitted on procedural anomalies in recording the testimony of PW4, an agronomist. In the course of giving his testimony, the said witness tendered a valuation report, which upon its admission, was not read out. Mkina submitted that the law requires that a documentary exhibit that is tendered in court, upon its admission, must be read out, in order to provide an opportunity for the accused person to pose questions, if any, with regard to the said exhibit. Ms. Mkina averred that failure to read out the said exhibit was contrary to the law and that, it prejudiced the right of the accused person. The learned state attorney referred to page 15 of the typed trial court proceedings. Ms. Mkina cited the case of **Lucas Nyirenda Karikeni vs Republic,** Cr. Appeal No. 81 of 2021 in support of her position. Based on the case of

Lucas Nyirenda (supra) Ms. Mkina submitted that an exhibit that is admitted without following the proper procedure, should be expunged from the records.

Moreover, Ms. Mkina referred to the cautioned statement which was tendered before the trial court by PW6. The counsel for the respondent stated that when the cautioned statement was tendered, the accused raised an objection on the grounds that the same was not given voluntarily. In the circumstances, where an objection is raised regarding involuntariness of the accused person at the time of recording the cautioned statement, an inquiry must be conducted. Ms. Mkina referred to page 21 of the typed trial proceedings noting that an inquiry was not conducted. Instead, the trial magistrate merely analyzed the submissions of the advocate for the accused, and the submissions by the prosecution, followed by a ruling thereof.

In this regard, Ms. Mkina contended that, the cautioned statement was admitted contrary to section 29 of the Evidence Act, Cap. 6 R.E 2022 (Evidence Act) which requires the court to conduct an inquiry. In view of the aforementioned anomalies, the learned counsel for the respondent argued that, the only remaining evidence before the trial court was the testimony of PW1 and the testimonies of the village leaders. According to

Ms. Mkina, the mere testimonies of the aforementioned witnesses rendered the prosecution case wanting. In conclusion, the state attorney averred that the prosecution case was not proven in accordance with the required legal standards in criminal matters as per section 3(2) (a) of the Evidence Act. As a result of the identified weaknesses in the matter before this court, Ms. Mkina supported the appeal. On the other hand, the appellant, being a lay man and not conversant with legal issues, had nothing to submit.

To begin with, this court will address the validity or otherwise of the judgment that was delivered by the trial court. The law, under section 312 (2) of CPA, provides guidance on the proper composition of a judgment. The section reads as follows:-

> *"**312** (2) In the case of conviction, **the judgment shall specify** the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the **punishment to which he is sentenced**." [emphasis added]*

According to above provision, the judgment apart from the conviction, must further contain the punishment to which the accused is sentenced. Failure to pronounce the sentence in the judgment, is a fatal and incurable irregularity in the eyes of the law. For the purpose of transparency, the trial court's judgment at pages 8 and 9 is recorded as follows: -

"...from the evidence and the law above, I am of the considered views that the first ingredient which constitutes the offence that the accused stands charged was proved beyond reasonable doubt. I therefore find the accused person guilty and deserves to be convicted as I here do under section 326(1) of the Penal Code Cap.16 R.E 2022. It is so ordered.

Dated at Kondoa this 6th day of February, 2024.

Sign:
F.A Kahamba, SRM
06.02.2024"

In view of the above, it is evident that the judgment is incomplete as it lacks the corresponding sentence. Notably, the indication of the sentence in the typed proceedings is not sufficient for the purpose of Section 312(2) of the CPA which is coached in mandatory terms. As correctly intimated by Ms. Mkina, the consequential order is to remit the case file to the trial Magistrate or his successor in office to compose proper judgement in compliance with section 312(2) of the CPA.

However, I will proceed to address the issue raised by the learned state attorney with regard to insufficiency of the prosecution evidence before the trial court. Ms. Mkina pointed out the failure by the prosecution to procure the testimony of some material witnesses including the testimony of the father of the complainant. On page 6 of the typed trial court proceedings, PW1 Issa Ibrahim Chila, gave his testimony and it is recorded as follows: -

"On 22/09/2022 ***I received a phone call*** *from father Ibrahim Ramadhani* ***and informed me*** *that the cattle had destroyed my peas farm." [emphasis added]*

From the above testimony, it is evident that the father of the complainant had direct information as to what had transpired in the farm of the complainant. Thus, the father of the complainant was a material witness to the matter before the trial court as submitted by Ms. Mkina. In the case of **Wambura Marwa Wambura vs Republic,** Criminal Appeal No. 135 of 2019 the Court of Appeal of Tanzania (CAT), referring to the case of **Baya Lusana vs Republic,** Criminal Appeal No. 593 of 2017 (unreported) at page 13, stated that: -

> *"Being guided by the position above and as we have already stated that* ***the investigator was a material witness in the present case****, with respect, we are unable to agree with Ms. Fyeregete and the first appellate court that section 143 of the Evidence Act will rescue the situation at hand. We are inclined to find that* ***failure to call the investigator as a witness leaves us with no option but to draw an inference adverse to the prosecution*** *as we accordingly do." [emphasis added]*

Thus, I am of the settled view that, failure to call the material witness leaves this court with little option than to draw an inference adverse to the prosecution.

On the issue of procedural anomalies in recording the testimony of PW4, the agronomist, Ms. Mkina argued that in the course of giving his testimony, PW4 tendered a valuation report (exhibit P1) which, upon its admission was not read out contrary to the law.

I have carefully examined the proceedings of the trial court. For clarity, the testimony of PW4, one Safari Gaitan Penda Roho is recorded at pages 14 and 15 of the typed proceedings as herein below:-

> *"I prepared my valuation report which was tabled to VEO.*
>
> *If I happen to see that valuation report, I can identify it by my hand writing.*
>
> *Court: PW4 was shown the valuation report and managed to identify the same basing on the above criteria.*
>
> *XD: I pray to tender valuation report as exhibit.*
>
> ***Mr. Nkusa Adv.***
>
> *We objected because the said report did not involve the accused person.*
>
> *Secondly the valuation report was supposed to be done by agricultural officer.*
>
> ***PP:***
>
> *The first ground by defence counsel that the accused was not involved. This is not a legal requirement.*

Secondly the witness was trained on both as a livestock officer and agricultural officer...

Court:

The defense counsel objection on the issue that the accused was not involved at the time PW4 was conducting valuation, I join hands with the prosecution submission that the defense counsel did not support his argument with any authority therefore his first ground is want of merit.

Again, the fact that the valuation report has to be conducted by agricultural PW4 officer has no limb, as he did not bring any supporting document to disqualify the witness. In that respect therefore evaluation report is admitted and the objections dismissed for want of merit.

Court:

Valuation report of the victim's farm dated on 7/10/2022 admitted as exhibit P1.

According to the trial court proceedings above, the exhibit P1 which is a valuation report was not read out upon being admitted by the trial court. This is fatal and cannot be cured under section 388 of the CPA. I therefore expunge the valuation report (exhibit P1) from the trial court records. For the purpose of emphasis, the CAT case of **Ngesela Keya Ismail Joseph and two Others vs. Republic,** Criminal, Appeal No. 603 of 2020 (unreported) held at page 17 to 18 as follows: -

> *"It is a well-established principle that an* ***exhibit admitted in evidence must be read out in court to the appellants****... the omission to read out or* ***failure to read the contents of the exhibit after it is admitted in evidence is a fatal irregularity which is prejudicial to the appellants****...in this regard,* ***Exh- P4 would be liable to be expunged from the records as we hereby do****". [emphasis added]*

Going further, I will proceed to address the propriety or otherwise of the cautioned statement which was tendered as exhibit P2 before the trial court by PW6. Ms. Mkina submitted that when the cautioned statement was tendered, the accused person raised an objection on the grounds that the same was not given voluntarily. The counsel for the respondent added that, it is the position of the law that when a cautioned statement is being tendered in court; and where the accused objects on the ground of involuntariness, then an inquiry must be conducted.

According to Ms. Mkina, and referring to page 21 of the typed trial proceedings, an inquiry was not conducted and the cautioned statement was admitted contrary to section 29 of the Evidence Act. Having perused the trial court records, it is evident that the trial court failed to conduct an inquiry as required by the law. Section 29 of the Evidence Act, reads as follows: -

"No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing ***unless the court is of the opinion*** *that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made." [emphasis added]*

Further, in the case of **Nyerere Nyegue vs Republic,** Criminal Appeal No. 67 of 2010 (unreported), at pages 7 to 8 it was stated that: -

"As we understand it, the law regarding admission of accused's confession under this head is this:

First, *a confession or statement will be presumed been voluntarily made until objection to it is made by the defense on the ground, either that it was not voluntarily made or not made at all (see also Selemani Hasani R., Criminal Appeal No. 364 of 2008 (unreported).*

Secondly*, if an accused intends to object to the admissibility of a statement or confession, he must do so before it is admitted, and not during cross examination or during defense, see Shihoze Seni v. R, (1992) TLR 330); Juma Kaulule v. R, Criminal Appeal No. 281/2006(unreported).*

Thirdly, *in the absence of any objection into the admission of the statement when the prosecution sought it to have admitted, the trial court cannot hold a trial within a trial or inquiry suo motu to test its voluntariness. (see also Stephen Jason and Another v. R, Criminal Appeal No. 79 /1999(unreported).*

Fourthly, *if objection is made at a right time,* ***the trial court must stop everything and proceed to conduct a trial within a trial (in a trial with***

> ***assessors) or inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted in evidence****. See also Twaha Ally and 5 Others v. Criminal Appeal No. 78/2004(unreported).* ***Fifthly,*** *even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case (See TUWAMOI v UGANDA (1967) E.A 91 STEPHEN JASON & OTHERS v R (supra).* ***And lastly, everything being equal the best evidence in a criminal trial is a voluntary confession from the accused himself.*** *[emphasis added]*

In the case at hand, the appellant objected on the admissibility of the cautioned statement, due to existence of undue influence. In that regard, the prosecution ought to prove before the trial court that the appellant made his confession voluntarily in terms of section 27(2) of Evidence Act, which states that: -

> *"**The onus of proving** that any confession made by an accused person was voluntarily made by him **shall lie on the prosecution.**" [emphasis added]*

However, the trial court did not at all exercise its judicial discretion, before admitting it. The CAT case of **Nyerere Nyegue** (supra) at page 12, went further and stated that:

> *It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question.* ***The***

decision of the trial court on such matters can only be faulted if it can be shown, that the admission or rejection of such evidence was objected to and that it did not properly exercise its judicial discretion, or at all, in rejecting or admitting it*. [emphasis added]*

Being guided by the above decisions, I am of the settled view that under the circumstances, the trial court ought to have conducted an inquiry and the burden to prove that the confession was made voluntarily should have been borne by the prosecution. Thus, failure to conduct the inquiry was a grave irregularity and exhibit P2 was admitted inappropriately. The same is expunged too. In totality, I find that the prosecution failed to prove its case against the appellant beyond reasonable doubt. Accordingly, all evidential gaps identified are resolved in favour of the appellant, as correctly submitted by the learned state attorney.

In the premises, the proposed order to remit the case file to the trial Magistrate or his successor in office to compose a proper judgement in compliance with section 312(2) of the CPA is, in the circumstances of this matter, superfluous. Thus, I allow the appeal, quash the conviction and set aside the sentence of three (3) years in community service and the compensation of TZS 1,500,000/=.

It is so ordered.

Right of appeal explained.

DATED at **DODOMA** this 28th day of June, 2024.

I.D. MUSOKWA

JUDGE

Judgment delivered in the presence of the appellant and in the presence of Mr. Anyimike Mwamsiku, learned state attorney.

I.D. MUSOKWA

JUDGE