IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DODOMA SUB REGISTRY
AT DODOMA

DC CRIMINAL APPEAL NO. 60 OF 2023
(Arising from Criminal Case No. 19/2022 before the District Court of Iramba at Kiomboi)

HILARY JOHN.....1ST APPELLANT
BONIPHACE KIDONDELA.....2ND APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 29/2/2024
Date of Judgment: 15/3/2024

MASABO, J.:-

The appellants herein were jointly charged before the District Court of Iramba at Kiomboi (the trial court) with two counts, namely breaking into a shop and theft. It was alleged that on the night of 21st February 2022 they broke into a shop of Richard Juma@ Owino and stole a sum of Tshs 2, 700,000/= property of the said Richard Juma@ Owino (PW4). After the trial, the court acquitted them of the charge of theft but convicted them of breaking into a shop and it subsequently sentenced each of them to a jail term of 10 years.

Aggrieved by the conviction and sentence they have knocked on the doors of this court with an appeal based on 14 grounds of appeal which I will conveniently summarise as follows. **One**, the evidence of visual identification

was not watertight. **Two,** there was no proof that the monies above were indeed stolen as the owner of the money did not state how he acquired it. **Three,** the case was fabricated as there was no business license to prove that the victim had a shop. **Four,** no iron sheet was brought to show that the roof of the shop was broken into and the witnesses did not demonstrate how. **Five,** the trial court wrongly relied on an oral confession which was neither corroborated nor voluntarily made as at the time of making it the first appellant was under threat. **Six,** the provision of section 210(3) was not complied with. **Seven,** the appellant's defence was not considered although it was strong and of probative value. **Eight,** the appellants were arrested with no exhibits connecting them to the crime. **Nine,** the first appellant was beaten up to compel him to confess to the offence. **Ten,** the 2nd appellant was wrongly convicted based on the confession of a co-accused which was not anyhow corroborated and **lastly,** the prosecution did not prove its case.

When the parties appeared before me for hearing, the appellants were unrepresented whereas the respondent republic enjoyed the service of Ms. Patricia Mkina, learned State Attorney.

Invited to address the court in support of their appeal, the appellants stated that they have no submission in support of their grounds of appeal and that they have total trust that this court will do justice to the appeal. On her part, Ms. Mkina sharply opposed the appeal and went on to submit that the first ground of appeal has no merit as the evidence of virtual identification was watertight. PW1 saw the 1st appellant while he was at the rooftop of the

shop. At the scene, there was an electricity light that was illuminating well and it enabled PW1 to identify the 1st appellant who is very familiar to him as they live in the same village. They are all domiciled at Ndoromoni village hence familiar to each other. PW2 corroborated this account. He told the court that he is similarly acquainted with the first appellant and he identified him when he was running past his house which has an electricity. Thus, there are no chances for mistaken identity and the complaint is misguided as the criteria set out in the case of **Waziri Aman v R** [1980] TLR 280 as regards visual identification were fully complied with.

On the second ground, it was submitted that it has no merit as the culprits were named at the earliest opportunity. PW1 was the first to spot the 1st appellant at the rooftop of the shop and when he met with PW2 he told him that he had spotted PW1 and the two of them started to chase the first appellant. And, for the 2nd appellant, he was mentioned by the first appellant immediately after the arrest of the latter. On the ground that there was no proof as to theft of the monies, it was submitted that indeed there was no sufficient proof and for that reason, the appellants were acquitted of the offence of theft. Hence, they have nothing to complain about. On the complaint that the case was fabricated, it was submitted that there was no fabrication. The case was proved to the required standards and based on such proof the appellants were convicted.

Regarding the ground that there was no explanation as to how the 1st appellant got to the roof of the shop, it was submitted that much as it true

that no explanation was rendered as to the means they used to get to the roof of the shop and the iron sheet cut by the appellant at the shop was not brought to court, the conviction was well founded as, through the testimonies PW1, PW2, PW3, PW4, PW5 and PW6, the case against the appellants was sufficiently proved.

As regards inconsistencies, it was submitted that there were no major inconsistencies. The witnesses were all consistent in their accounts. PW1 and PW2 stated that they saw the appellant and pursued him in vain. They also stated that they witnessed the 1st appellant confessing to the commission of the crime. Other witnesses also stated to have witnessed the 1st appellant confessing to the crime and mentioning the 2nd appellant as his accomplice. As regards the confession, it was submitted that the allegation that the 1st appellant was beaten is devoid of merit and an afterthought as it was not raised at the earliest opportunity. Besides, the confession was corroborated by PW1, PW2, PW3, PW4 and PW6 who all stated that the 1st appellant confessed commission of the offence. As to the complaint that the appellants' defence was ignored, it was submitted and argued that their defence was duly analysed and considered. In conclusion, it was submitted that the prosecution ably proved its case by producing sufficient evidence which was found to be credible hence the conviction. In the foregoing, it was prayed that the appeal be dismissed for want of merit.

Invited to comment on the respondent's submission, the appellants argued that the submission by the learned State Attorney was lucidly misconceived

as the 1st appellant's confession was made out of duress. He was beaten up and threatened to be burnt alive if he did not confess. Also, the case against him was fabricated by the shop owner. For the second appellant, it was submitted that he knows nothing about the incident and, hence blameless.

I have considered the submission by the parties alongside the grounds of appeal and the lower court record. The ultimate question for determination is whether the case against the appellants was proved beyond reasonable doubt. This being a first appeal, I am legally obligated to reevaluate the evidence on record and make an independent finding on whether the case was proved (see **Bonifas Fidelis @ Abel vs Republic** (Criminal Appeal 301 of 2014) [2015] TZCA 25 TanzLII).

When perusing the lower court, I observed that the evidence laid at the appellants' door constituted oral testimonies of seven (7) witnesses. PW1 Emmanuel Samwel was an eyewitness. On 21/2/2022 at midnight he saw the first appellant breaking into the shop of PW4. After noticing that he had been seen he jumped down and started to run away. PW1 recognized the 1st appellant as there was electricity and they were familiar with each other as they lived in the same village. He raised an alarm and started chasing him. PW2 William Keferson saw the 1st appellant as he was running past his house while he was being chased by PW1. He recognized both through electricity light which was illuminating his home. He joined PW1 in chasing the appellant but it was all in vain as the 1st appellant was faster than them. On the next morning, PW1 and PW2 managed to apprehend the 1st appellant

as he was about to leave the village. They took him to Ndoromoni village authorities' offices where he confessed to have cut the roof of the shop and asked to be pardoned. He also named the 2nd respondent as the mastermind of the incident. Those who heard the confession included PW3, Said Salimi who is Ndoromoni village chairman; Richard Juma, PW4 who is the shop owner, and PW6 Godson Hamis who was acting for village executive officer. Based on the first appellant's confession the 2nd appellant was apprehended by PW5, a militia, and brought to the village authorities' offices. When interrogated he denied the allegations. Both were taken to a police station. Later on, they were arraigned in court where they entered a plea of not guilty and after a full trial, they were both convicted of one count of breaking into a shop and acquitted of the offence of theft.

With this summary, I will now proceed to the grounds of appeal starting with the third ground of appeal. On this ground, the appellants have complained that they were wrongly convicted of theft as there was no proof of the stolen money. I will not be detained on this ground because as demonstrated in the summary above and as correctly submitted by the learned State Attorney none of the appellants was convicted of theft as they were both acquitted of this count. Their lamentation that they were wrongly convicted of theft is, therefore, misconceived and without merit.

The next ground, I prefer to proceed to is the seventh ground of appeal vide which the appellants have lamented that the provision of sections 210(3) of the Criminal Procedure Ac, Cap 20 RE 2022 was offended. This provision

directs what should be done by the trial magistrate after recording the testimony of the witness. It states that after recording the testimony of the witness:-

> 210(3). The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments that the witness may make concerning his evidence

The import of this provision has been extensively discussed and so is the consequences for noncompliance with it. In the case of **Flano Alphonce Masalu @ Singu vs Republic** (Criminal Appeal 366 of 2018) [2020] TZCA 197, TanzLII, the Court of Appeal stated that:

> The above provision enjoins the presiding magistrate to avail every witness an opportunity to have his evidence read over to him after it is recorded and then note down whatever comments the witness makes after his testimony is read over. As we observed in our recent decision in **The Director of Public Prosecutions v. Hans Aingaya Macha,** Criminal Appeal No. 449 of 2016 (unreported), this requirement is intended to ensure that every testimony is properly recorded and that it guarantees against distortion, perversion and suppression of evidence.

As to the consequences for noncompliance, it is now settled that save where there is a miscarriage of justice occasioned by such omission, the defect is nonfatal hence, curable under section 388 of the Criminal Procedure Act. In **Athuman Hassan v. Republic,** Criminal Appeal No. 84 of 2013

(unreported) as cited with approval in **Flano Alphonce Masalu @ Singu vs Republic** (supra), the Court of appeal held that:

> "The record of proceedings of the trial court shows that there was no compliance with section 210(3) in the process of recording the evidence of the witnesses. **However, we do not see the substance of the appellant's complaint because it was the witnesses who had the right to have the evidence read over to them and make a comment on their evidence. We do not even think that the omission occasioned a miscarriage of justice to the appellant."** [Emphasis added]

In the present case, the appellants have lamented that the trial magistrate just stated that section 210(3) was complied with but did not explain how it was complied with. In my scrutiny of the record to ascertain what transpired, I have observed that at the bottom of the record of the testimony of every witness there is a remark by the trial magistrate to the effect that, section 210(3) of the Criminal Procedure Act was complied with. Having considered the appellant's lamentations in view of this record, I have found it to be devoid of merit. In my firm view, as much as clarity and convenience are in favour of an explicit narration of how the provision above was complied with, the affixation of the remark that the said provision was complied with is in itself sufficient as all it communicates is that the record of the testimony was read over to the respective witness. It is also noticeable that, apart from lamenting about noncompliance, the appellants herein have not demonstrated if and how they were prejudiced by such noncompliance, if any. In the premises, even if I were to agree with them that indeed there

was an anomaly they would not benefit from it because, as per the authority above, the failure to demonstrate the prejudice renders the defect nonfatal and curable under section 388 of the Criminal Procedure Act. This ground of appeal, consequently, fails.

The first and second grounds of appeal to which I now turn to concern the evidence of visual identification of the first appellant. The appellants contend that he was not properly identified as the evidence to his identification was blemished and worthless. For the respondent, it has been argued that much as it is true that the incident happened at night, the evidence as to the visual identification of the first appellant was unblemished and watertight.

The law on visual identification has been extensively litigated and it is now very well settled that the courts should not ground a conviction based solely on evidence of visual identification unless it is satisfied that all possibilities of mistaken identity have been eliminated. This principle was expounded in the landmark case of **Waziri Amani v. Republic** [1980] T.L.R. 250. Restating this principle in **Riziki Ally Mfinanga @ Kicheche vs Republic** (Criminal Appeal No,315 of 2020) [2023] TZCA 17546 TanzLII, the Court of Appeal stated thus:

> The law relating to visual identification is settled in this jurisdiction. In the oft-cited **Waziri Amani v. Republic** [1980] T.L.R. 250, the Court sounded a warning that the evidence of visual identification is of the weakest kind and most unreliable and that it should not be acted upon unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.

The Court stated further that, for such evidence to be considered watertight, it must among other things explicitly demonstrate the time the witness had the accused under observation, the distance at which he observed him, the conditions in which such observation occurred, the source of light and its extent. Also see **Hamza Thabit & 6 Others v Republic** Criminal Appeal No. 142 of 2014, CAT and **Khalid Rafii Mohamed vs Republic** (Civil Appeal No. 398 of 2021) [2023] TZCA 17753 TanzLII.

From the evidence rendered in support of the prosecution's case at trial stage, it is crystal clear that the incident happened at midnight. Thus, it was incumbent for the prosecution to meet the threshold in **Waziri Amani's** case. As stated in the preceding summary, it was demonstrated in evidence that PW1 was the one who saw the first appellant while breaking into PW4's shop at its rooftop. He told the court that he recognized the first appellant through an electricity light at the shop and started to chase him. His account was further that, the appellant was familiar to him as they all lived in Ndoromoni village. His testimony as to the identity of the first appellant was corroborated by PW2 who stated that he saw the appellant who was well known to him running past his house and being chased by PW1. This witness stated that the electricity light at his house illuminated them and enabled him to identify the first appellant. After he had identified both of them, he immediately joined PW1 and together with him they chased the 1st appellant but did apprehend him as he was faster than them. Much as this piece of evidence was not strongly controverted, it fell short of the principle in **Waziri**

Amani's case. Thus, it cannot, in the absence of an independent corroboration, sustain a conviction.

The question that follows is whether there was any corroboration to this evidence. In my scrutiny of the evidence on record, I have observed that, the main evidence leading to the 1st appellant's conviction and sentence was twofold. It comprised of the evidence of visual identification on the one hand and on the other hand, the 1st appellant's confession. The later has landed me on the fifth and ninth grounds of appeal which challenge the reliability of the confession. Through these two grounds, they have complained that the 1st appellant's confession ought not to support his conviction as it was neither corroborated nor voluntarily procured.

The law in our jurisdiction recognizes and accords significant weight to the accused's confession as a valuable piece of evidence capable of mounting a conviction provided that it was made before a reliable witness and the accused was a free agent when making it (See, **Director of Public Prosecutions vs Orestus Mbawala @ Bonge** (Criminal Appeal No. 119 of 2019) [2020] TZCA 1728 (TanzLII); **Ngusa Sita Mabunda vs Republic** (Criminal Appeal No. 254 of 2017) [2021] TZCA 267(TanzLII); **Vasco Lwenje and Another vs the Director of Public Prosecution** (Criminal Appeal No. 220 of 2020 [2022] TZCA 786 (TanzLII) and **Chamuriho Kienge @Chamuriho Julias vs Republic** (Criminal Appeal No. 597 of 2017) [2022] TZCA 98 (TanzLII). In the latter case, the Court held thus;

> "It is settled that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be the civilian or

not, maybe sufficient by itself to ground conviction against the suspect. See: **The Director of Public Prosecutions vs Nuru Mohamed Gulamrasul,** [1988] T.L.R. 82. In **Mohamed Manguku vs Republic,** Criminal Appeal No. 194 of 2004, quoted in **Posoho Wilson @ Mwalyego vs Republic,** Criminal Appeal No. 613 of 2015 and **Tumaini Daudi Ikera vs Republic,** Criminal Appeal No. 158 of 2009 (all unreported). The Court insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him. It means therefore that even where the court is satisfied that an accused person made an oral confession, still the trial court should go an extra mile to determine whether the oral confession is voluntary or not." [The emphasis is added].

In the instant case, the first appellant does not repudiate his confession. He has instead retracted it arguing that it was not voluntarily procured as while making it he was not a free agent. He made it after being coerced by PW2 and PW3. Having holistically examined the evidence relating to the 1st appellant's confession, I outright reject this ground for being purely exculpatory and an afterthought. The record shows clearly that the narration by PW1, PW2, and PW3 (the village chairman) as regards the confession made before them by the first appellant was uncontroverted as the first appellant did not cross-examine them on this aspect. The law is settled that failure to cross examine a witness on a crucial fact ordinarily implies the acceptance of the truth of the witness's evidence on such fact. Cementing this position in **Gerson Geteni vs Republic** (Criminal Appeal No. 73 of 2021) [2024] TZCA 52 TanzLII, the Court of Appeal while echoing its previous decisions stated thus;

> This Court in the case of **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (unreported), relying on the case of **Cyprian A. Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 (unreported) held that;
>
> *"We are aware that there is a useful guidance in law that a person should not cross-examine if he/she*

> *cannot contradict. But it is also trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence.*

Therefore, the first appellant's failure to cross-examine these three witnesses implicitly amounts to his admission that he voluntarily confessed commission of the offence. Not only that, further revelation from the record is that, much as the first appellant while testifying as DW1 retracted his confession and alleged as he has done herein that he was beaten up and compelled to confess to the crime he contradicted his statement in cross examination. Cross examined whether he was a free agent when making his confession before the village leaders who testified as PW3 and PW6, he stated as follows:

> I was interviewed by village leaders when I was at Doromoni village. When the villagers were intending to burn me there was no village leaders. **when I was inside the village executive office there was no threat. I stated the truth to the village leaders of Doromon**. I have no conflict with the village executive officer and the chairman of Doromoni village.

Since the village leaders while testifying as PW3 and PW6 told the court that the first appellant confessed to them and asked for pardon, the first appellant's testimony that he told them nothing but the truth and that at that time he was under no threat, is a strong demonstration that his confession was voluntarily made. When this is considered alongside the first appellant's omission to cross examine, entertains no doubt that the 1st appellant was a free agent and he voluntarily made his confession.

Needless to emphasize what was stated by the Court of Appeal in **Gerson Geteni vs Republic** (supra) that;

> Section 3 (1) (a), (b) and (c) of the Evidence Act provides to the effect that oral confessions are recognized, and in reality, an accused may be convicted based solely on such evidence see, the case of **DPP v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82. On the same aspect, this Court in **Posolo Wilson Mwalyego v. R,** Criminal Appeal No. 613 of 2015 (unreported), stated that:
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> > "It is settled law that an oral confession made by a suspect before or in the presence of reliable witnesses, be the civilian or not; may be sufficient by itself to found conviction against the suspect"
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> Equally so in **Bujigwa John @ John Kijiko v. R**, Criminal Appeal No. 427 of 2018; Court held that:
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> > "As correctly found by the trial court; the prosecution witnesses who heard the appellants' oral confession were reliable and there is no reason whatsoever to doubt their credibility."
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> Similarly, the Court in the case of **Twaha Ali and Five Others v. Republic,** Criminal Appeal No. 78 of 2004 (unreported) held that:
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> > "The very best of witness is an accused who confesses his guilt provided that the confession is above and free from the remotest taint of suspicious.

In the foregoing, since this court was not told that PW1, PW2, PW3 and PW6 are untrustworthy, I have no reason whatsoever to doubt their credibility and I have for that reason, found the first appellant to be the best witness of his case. The 5th and 9th grounds of appeal are therefore found with no merit.

Based on what I have demonstrated, the argument that the first appellant's conviction was based on uncorroborated evidence of visual identification, is with no merit. Similarly unworthy is the lamentation that a business licence was not produced to show that there was a shop because, as much as this evidence was relevant, its absence did not cause the prosecution case to flop considering that there was sufficient oral evidence to the existence shop as demonstrated through the testimonies of PW1, PW2, PW3, PW4, PW5, and PW6. As stated above, it is a cardinal law that every witness is entitled to credence and his evidence must be believed unless there are reasons for doubting him (see **Goodluck Kyando vs Republic** [2006] TLR 363). For that reason and since I was presented with no materials or reasons as to why these witnesses should not be believed, I have no justification not to believe their testimony as to the existence of the shop. Similarly unworthy is the lamentation that the appellants were found without an exhibit as being found without an exhibit is not by itself an exculpatory factor, had it been one many culprits would have escaped justice.

Lastly, is the complaint that the 2nd appellant was wrongly convicted based on the confession of co-accused which was not anyhow corroborated. Indeed the only evidence implicating the 2nd appellant was the first appellant's confession which was not corroborated. It is a cardinal principle that a confession of a co-accused requires corroboration (see section 33(2) of the Evidence Act, Cap 6 RE 2022 and **Majid Hussein Mboryo & 2 Others vs Republic**, Criminal Appeal No. 141 of 2015, CAT at Dodoma (Unreported)).

In the foregoing, I find the 2nd appellant to have not been sufficiently implicated. The tenth ground of appeal is therefore meritorious and is allowed.

In the end, based on what I have demonstrated above, this appeal partially succeeds to the extent that the first appellant's case was proved as opposed to the 2nd appellant who was not sufficiently implicated. Accordingly, the first appellant's conviction and sentence are upheld whereas the 2nd appellant's conviction and sentence are quashed and set aside. Further, it is ordered that the 2nd appellant be released from custody unless he is otherwise held for a lawful cause.

DATED and **DELIVERED** at Dodoma this 15th day of March 2024.

J. L. MASABO

JUDGE

15/3/2024