IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

(DC) CRIMINAL APPEAL NO. 22 OF 2020

(Originating from Mbinga District Court in Traffic Case No. 34 of 2019)

ANDREW ANDREW NCHIMBI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 18/11/2020

Date of Judgment: 25/11/2020

BEFORE: S.C. MOSHI, J.:

The appellant was arraigned before the District court of Mbinga for two counts, the first one being Riding a motor cycle on the public road without valid driving license contrary to section 19 (1) and 113 (1) of the Road Traffic Act Cap. 168 R.E 2002. The second count is causing death through careless riding of a motor cycle on the public road contrary to section 41 and 63 (2) (b) of the road Traffic Act Cap. 168 R.E 2002. He was convicted of both counts, consequently he was sentenced to serve six months imprisonment for the first count and two months imprisonment for

the second count. The sentences were ordered to run concurrently. He was aggrieved by the conviction and sentences hence this appeal. The appeal contains 6 grounds to wit:

1. *That, the trial court erred in law and fact to convict and sentence the appellant without the prosecution to prove the case to the standard required by the law.*
2. *That, the trial court erred in law and fact to convict and sentence the appellant without taking into consideration my defense that I was involved in the accident as passenger and not a driver of the motorcycle and no any credible evidence was adduced by the prosecution to prove that I was riding the motorcycle.*
3. *That, the trial court erred in law and fact to convict the appellant basing conviction on admission made before police officers which was involuntary made contrary to the law governing admission.*
4. *That, the trial court erred in law and in fact to convict the appellant while the evidence adduced by PW2 one CPL Ramadhan who is the police officer shows that two motorcycle were involved in the accident resulting to death of Syverious Alexander Lupogo but the prosecution*

failed to make clear or disclose before the court among the two motorcycles which one actually caused the accident resulting to death of one person.

5. *That, the trial court erred in law and in fact to convict and sentence the appellant while the prosecution did not bring the owner of the motorcycle with Reg. No. MC 495 BAQ who could help the court to know the one who was riding his motorcycle to that effect, the court could be able to identify easily who was involved in the accident.*
6. *That, the trial court erred in law and fact to convict me in the procedurally incorrect and incurable finding for pronouncing two different sentences for the same offence that is, the sentence which his provided in the copy of the judgment is different with the sentence in the commitment warrant.*

The appeal was dully heard whereby the appellant appeared in person and the respondent was represented by Ms. Tulibako Juntwa, State Attorney who supported the appeal. The appellant prayed the court to adopt the grounds of appeal as he had nothing to add.

Ms. Juntwa supported the appeal by submitting that, the offences were not proved beyond reasonable doubt. The charge sheet shows that the appellant was negligently riding a motorcycle without having a driving license. However, there is no evidence showing that the appellant was riding a motor cycle without having a driving license and negligently. PW2 stated that the appellant was riding a motor cycle but he did not see him, his evidence was hearsay. PW2 said that on 23-11-2019 upon receiving information that there was an accident, he went to the crime scene, when he went there, he did not see the motor cycle which was involved in an accident nor the injured persons (victim). The people who were at the scene told him that the victims were already taken to Mbinga District Hospital for medical treatment. He went to the hospital where he saw the appellant who was in bad condition being attended. He also saw one of those involved in accident already dead. He met appellant's relative who told him that the appellant was riding one of the motor cycles which were involved in the accident. There was no evidence of a person who saw the accident happening, so they could tell whether it was the appellant who was riding the motor cycle. Even the said appellant's relative who said that

the appellant was riding a motor cycle which was involved in the accident was not called to testify.

Ms. Juntwa submitted further that, Pw2 believed that the appellant committed the offence basing on the caution statement, exhibit P1. However, looking at page 12 of the proceeding, PW2 said that, he recorded the statement three days after the appellant was discharged from hospital.

Pw2's evidence shows that he went to hospital on 23/11/2019 where he saw the appellant and he released the appellant on bail. Therefore, it means that the appellant was already arrested. His testimony indicates that the cautioned statement was recorded on 5-12-2019, almost 13 days had passed since the detention of the appellant. Therefore, it was recorded out of time that is after four hours of his arrest. Section 50 and 51 (a) (b) provides that leave of the court must be sought for it to be taken out of time. Page 4 of the trial court judgment shows that the Trial Magistrate based the conviction on a caution statement, however as indicated the same was illegally taken.

She argued that investigation was not properly conducted, the motor cycle was not brought to court and it is even not revealed who is the owner of the motorcycle in question. She concluded by saying that the case was not proved on the required standard; hence the accused was wrongly convicted.

The issue to be determined is whether this appeal has merits. The points revolve around analysis of evidence, a cautioned statement evidence and variance of sentences in the copy of judgement and the warrant of commitment. I have decided to determine the point relating to analysis of evidence and whether the caution statement was properly admitted as the two points suffice to dispose off the appeal.

In criminal cases it is prosecution's duty to prove that the offence was committed and that it is the accused person who committed the same, the standard of proof is beyond any reasonable doubt. See the case of **Maliki George Ndendakuma Vs Republic,** Criminal Appeal No. 353 of 2014 Court of Appeal sitting at Bukoba, where it was held thus: -

"it is the principle of law that in criminal case, the duty of the prosecution is two folds, one to prove the offence was committed, and two, that it is the accused person who committed it".

I agree with the parties' submissions that in the case at hand the prosecution didn't discharge its onus of proof for reasons which I will show herein. First, no witness saw the accused committing the offence. In his testimony PW2, said that he was told by the people who were found at the scene of crime that the people who were injured were sent to hospital. The people who witnessed the accident were not called to give testimony of what transpired on that day, and no reasons were given for not testifying. These were important witnesses who could have helped the court in reaching to a just decision as they could have testified on the manner which the motorcycle was being driven and could have issued other useful information. Failure to call these witnesses affects the prosecution's case negatively. In the case of **Aziz Abdallah vs R**, (1991) TLR 71, where the court of Appeal held that: -

"The general and well-known rule is that the prosecutor is under a primafacie duty to call those witnesses who, from their connection with

transactional question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

Again, all what was said by the people who witnessed the incident and PW2's relative remains hearsay evidence which is not admissible under section 62 of **The Evidence Act**, Cap. 6 R.E 2019.

Also, the cautioned statement which was relied upon by the prosecution in proving their case, which the trial Magistrate also relied on it, was not obtained in accordance with procedures laid down by the law. The procedure for recording a cautioned statement of the accused person is provided for under the **Criminal Procedure Act,** Cap. 20 R.E 2019, the law requires among other things that, a statement of the accused person who is under restraint be taken within four hours. The relevant provision, *section 50 (1) of the CPA, provides that:-*

"For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-

(a) Subject to paragraph (b) the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence

(b) If the basic period available for interviewing the person is extended under section 51, the basic period as so extended".

Again, under section 50(2) of the CPA, the period within which the police officer investigating the offence refrains from interviewing the person or causing the person to do any act connected with the investigation of the offence is excluded in calculating the specified period. Furthermore section 48 of CPA provides for exclusion of certain periods in calculating the basic period. In order to ensure compliance with these provisions, where the statement is recorded out of time prescribed by the law, the prosecution is duty bound to explain and advance the reasons for failure or delay to record the statement. If the explanation is missing, the statement is regarded to have been taken contrary to section 48 and 51 of the Criminal Procedure Act and cannot be admitted in evidence. This position was stated in the case of **Joseph Mkubwa and Another Vs**

Republic, Criminal Appeal No. 94 of 2007, Court of Appeal sitting at Mbeya (Unreported), where the court held thus: -

"As the CPA is the statute that governed when the appellant was arrested, prosecution had to explain the delays in terms of section 48 (2) or 50 (2) that explanation is lacking. It leads to the conclusion that the statement (Exh.p27) was taken two weeks after the appellant was arrested and put in restrain .....it is now settled that statements taken without adhering to the procedure laid down in section 48 to 51 of the CPA are in admissible".

In the case at hand, the cautioned statement was recorded on 05-12-2019 while the offence was committed on 23-11-2019 and the appellant was arrested on the same date, i.e 23-11-2019. Therefore, the cautioned statement was recorded after 13 days, hence beyond the period of four hours. The prosecution did not give explanation for delay; therefore, it was not suppossed to be admitted in evidence as it was taken contrary to the law. Thus, I expunge the cautioned statement from the records.

Having expunged the caution statement, there is no other tangible evidence which establishes that the appellant did commit the offences as charged.

All in all, I find that the case was not proved on the required standard. That said I quash the conviction and set aside the sentence.

Consequently, the appellant should be released from custody forthwith unless otherwise lawfully held.

Right of Appeal explained.

S.C. MOSHI

JUDGE

25/11/2020