IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 371 OF 2019

1. JUMANNE AHMAD CHIVINJA
2. HAMIS PETER CHISEULI } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)

(Mlyambina, J.)

dated the 25th day of July, 2019
in
HC. DC CRIMINAL APPEAL NO. 374 of 2017

JUDGMENT OF THE COURT

6th July & 15th December, 2021

KITUSI, J.A.:

Jumanne Ahmad Chivinja and Hamisi Peter Chiseuli were among nine people that appeared before the District Court of Temeke in Dar es Salaam, to answer charges of conspiracy under section 384 and stealing under section 258 and 265 of the Penal Code, [Cap 16, R.E, 2002]. Only these two were convicted of theft and each sentenced to a jail term of 5 years. They unsuccessfully appealed to the High Court. Still dissatisfied, they have appealed to the Court.

However, on the date the appeal was placed before us for hearing, only Hamis Peter Chiseuli, henceforth the appellant, entered

appearance. By a letter from the Officer Incharge Ukonga Prison where the first appellant was serving his prison term, we were informed and we got satisfied that, Jumanne Ahmad Chivinja, had completed serving the sentence and had been released. Since his whereabouts were unknown, and in order not to keep the appeal pending indefinitely, we struck out the appeal in respect of the said Jumanne Ahmad Chivinja, with liberty to refile should he turn up and still wish to prosecute it. In making that order, we acted under Rule 4 (2) (a) of the Tanzania Court of Appeal Rules (the Rules). Therefore, there is only one appellant and we shall henceforth refer to him as such.

The appellant appeared in person and argued in support of the appeal, despite the fact that by that time he had also completed serving his prison term. The respondent Republic was represented by Mr. Credo Rugaju, learned Senior State Attorney, and Florida Wenceslaus, learned State Attorney.

The facts of the case relevant for the determination of this appeal, are reasonably simple, and they go thus: -

Camel Oil is a company that deals with importation and distribution of fuels in the country. It has tanks for storage of fuels by the shores of the Indian Ocean at Kurasini area in Dar es Salaam, where the appellant worked as a security guard, and one Omary Issah Ahmed

(PW3) worked as a Terminal Manager. PW3's duties included measuring levels of fuels every morning as a means of keeping track of the quantities of fuels received and distributed per day. The tank, the subject of the charges that led to this appeal, is tank No. 1.

In PW3's evidence, there was a total of 2,137,851 litres of fuel in Tank No. 1 on 6th May, 2017. According to one Salim Abeid Salim (PW2) the General Manager of Camel Oil, 7th May, 2017 was a weekend, therefore not a working day. There was no dispute that the appellant was assigned to guard Tank No. 1 on 7th May 2017, the said weekend.

On 8th May, 2012 the next a working day, when PW3 went to take measurements of the fuels, he found the seal at tank No. 1 broken and lying nearby, but it had been replaced by another seal. According to PW1 and PW3, a company known as Valis was the one responsible for the installation and maintenance of the seals. So, upon measuring the fuels in Tank No. 1, PW3 detected loss of 16,576 litres of fuels, recorded the finding in a written report (Exhibit P1) and reported the matter to PW2. Later, on that day, an expert played the CCTV footage of the relevant dates, in the presence of PW1, PW3 and other security guards. According to PW3, the footage showed one Pascal Stanslaus Kilato as the man tampering with the seal. This man was an employee of Valis,

the company that installed the seals as already alluded to, and had stood trial as fourth accused.

On being seized with the matter, PW2 conducted his own investigation and discovered that two security guards, the appellant and one Hulka Mbonde, who had been on night duty, left very early in the morning of 8th May, 2017. PW2 became suspicious of their behavior and through a phone call he instructed them to go back to the terminal. At the terminal, the appellant and two others were interrogated by Hamza John (PW4) an Ex-Police Officer who worked for Camel Oil as a security officer. In their testimonies, PW1 and PW4 said that the suspects confessed to have stolen fuels.

Not only that, after the suspects had been turned over to the police, they allegedly confessed too and proceeded to surrender money to the police officers, presumably the proceeds of the stolen fuels. The relevant part of PW4's deposition runs as follows: -

> *"The first accused admitted theft occurred and 2nd accused gave him Tsh. 3,000,000/= and 1st accused gave 3rd accursed 1,000,000/= although he was not on duty. We went to the 1st accused house and he gave us Tshs. 2,000,000/= and filled in the certificate of seizure...."*

When cross examined, PW4 said that the 4th accused was not on duty. D/CPL Peter Musiba (PW5) who was assigned to investigate the case visited the scene of crime and saw the broken seal. He arrested the security guards and interrogated them during which the appellant (1st accused) admitted to have received Tshs. 2,000,000/= from the 2nd accused. The 3rd accused admitted to have received Tshs. 1,000,000/= but he only surrendered Tshs 800,000/=. The surrendered money, a total of Tshs. 2,800,000/=, was admitted as an exhibit despite objection from the appellant that he had not surrendered any money to the police. The appellant allegedly made a confession that was recorded by Sgt. Jonas (PW6) and it was admitted as Exhibit P IV, after an inquiry.

In defence, the appellant admitted having been on night duty as a security guard from 7th May 2017 to 8th May 2017 and stated that he smoothly handed over the sentry in the morning of 8th May 2017. He denied taking part in any theft and maintained that he made a similar denial when he was interrogated by PW6. He denied surrendering any money to anyone.

The magistrate's finding of guilt against the appellant and Hamisi Peter Chiseuli was based on her conclusion that their failure to report the theft was an indication that they were the actual perpetrators, and their being found in possession of the money confirmed it. The High

Court upheld that decision, dismissing the first appeal on the ground that the appellant confessed to PW6 and was found in possession of the proceeds of the crime he had committed.

This appeal raises a total of nine grounds. The appellant adopted those grounds and moved us to allow the appeal on the basis of the complaints raised therein. Immediately Mr. Rugaju took the floor, he drew our attention to grounds 1, 5, 6 and 9 as being new grounds because they did not feature in the first appeal before the High Court. The learned Senior State Attorney submitted that with the exception of ground 1 which raises a legal complaint relating to propriety of the charge sheet, grounds 5, 6 and 9 which raise factual issues for the first time, may not be dealt with by the Court.

Our consideration of this early concern raised by the learned State Attorney begins by taking note that the law is settled that this Court will only consider matters that were raised and determined by the High Court or a Resident Magistrate with extended jurisdiction. This position is clear from our previous decisions such as **Damiano Qadwe v. Republic**, Criminal Appeal No. 317 of 2017, **Abdalah Ahamadi Likunja v. Republic**, Criminal Appeal No. 120 of 2018, **Karim Seif @ Slim v. Republic**, Criminal Appeal No. 161 of 2017 and **Pius Matei @ Kiguta v. Republic**, Criminal Appeal No. 98 of 2017 (all unreported).

We shall therefore desist from considering grounds 5, 6 and 9 because, as rightly submitted by Mr. Rugaju, they are new and do not raise points of law.

In relation to ground 1 which criticizes the High Court for sustaining the conviction without considering that the charge did not specify the type of theft that was allegedly committed, Mr. Rugaju submitted that, although the charge did not specify the type of theft as complained, the appellant understood what he was being charged with, and he prepared his defence. He submitted in conclusion, that the defect is not fatal and therefore it is curable under section 388 of the Criminal Procedure Act, [Cap 20 R.E 2002], hereafter, the CPA.

With respect, it is not easy to appreciate the complaint being raised in ground 1 and we can only suspect that the appellant had in mind of similar complaints repeatedly raised in relation to charges of sexual offences, where there are different categories. The purpose of a charge is to provide to the accused sufficient information for him to understand what are the allegations against him so as to enable him prepare an informed defence. That in our view is the essence of section 135 of the CPA. We have had occasions to address a similar complaint in quite a number of our decisions since the case of **Jamali Ally @ Salum vs. Republic**, Criminal Appeal No 52 of 2017 (unreported). In the

instant case the charge was clearly of simple theft, and the particulars of the offence were so informative as to enable the appellant know what was ahead of him and he prepared an informed defence, in our view. Our conclusion is that ground 1 is misconceived, lacks merit and we dismiss it.

Next, we shall deal with grounds 2, 3 and 4 which raise a common complaint, that the trial court and the first appellate court erred in relying on the cautioned statement (Exhibit P iv) and oral testimonies of prosecution witnesses in convicting the appellant. In relation to this complaint, we shall first interrogate the procedure that was used in admitting the cautioned statement, then later consider whether it can safely be said that the appellant confessed to the offence of stealing. It was PW6 who sought to tender the appellant's statement after which the appellant is recorded to have stated: -

> *" 1st accused*
>
> *It is true the statement is mine but I was threatened by the time I provided my statement".*

What should the trial court do in such a scenario? Case law, such as **Amiri Ramadhani vs. Republic,** Criminal Appeal No. 228 of 2005 and; **Daniel Matiku vs. Republic**, Criminal Appeal No. 450 of 2016 (both unreported), provides for the procedure to be followed by trial

courts when an objection to admission of a cautioned statement is raised, that is, a trial within a trial if it is proceedings conducted by the High Court, and an inquiry if the proceedings are before courts subordinate to it. In this case an inquiry was conducted to determine the voluntariness of that statement, at the end of which the trial court ruled out the objection and admitted it as exhibit P IV. At the first appeal, the appellant did not challenge the trial court's finding on voluntariness, but raised a complaint that in tendering that exhibit, PW6 was not under oath. The High Court referring to the record placed before it, found no merit in that complaint.

Thus, in considering grounds 2, 3 and 4 of appeal, we are satisfied that the procedure for admission of exhibit P IV was observed by the trial court by conducting an inquiry, and its finding that the statement was voluntarily made, was not challenged before the High Court. There is therefore, no basis, for making a finding other than that the statement was voluntarily made. So, what remains is for us to consider if exhibit P IV amounts to a confession. We have in mind the decision in **Diamon Malekela @ Maunganya vs. Republic**, Criminal Appeal No. 205 of 2005 where the Court reproduced the following paragraph from **Rhino Migere vs. Republic**, Criminal Appeal No 122 of 2002 (both unreported): -

"...for a statement to qualify for a confession it must contain the admission of all the ingredients of the offence charged as provided for under section 3 (c) of the Evidence Act, 1967..."

It has long been settled that a person who confesses to a crime is the best witness, a position taken by the Court in many of its decisions such as **DPP vs Nuru Gulamrasul** [1988] T.L.R 82 cited in **Diamon Malekela @ Maunganya vs. Republic** (supra). Does exhibit P IV meet the above criterion? In our view the appellant's cautioned statement contains a confession by him that, although he did not actively execute the theft, he and the actual perpetrators had a common intention, he was there watching as the others committed the offence, and he received a reward for it. We are satisfied that the factors for establishing common intention as set out under section 23 of the Penal Code, existed in this case. See also the case of **Shija Luyeko vs. Republic** [2004] T.L.R 254.

In view of our conclusion above, it is our finding that the first appellate Judge's finding that the appellant confessed to have taken part in the commission of the theft, cannot be faulted. There are also the oral testimonies of PW1, PW4 and PW6 who are witnesses to the fact that the appellant confessed and surrendered the money he had

received as his share of the proceeds. We accordingly find no merit in grounds 2, 3 and 4 of appeal and consequently, we dismiss the appeal in its entirety.

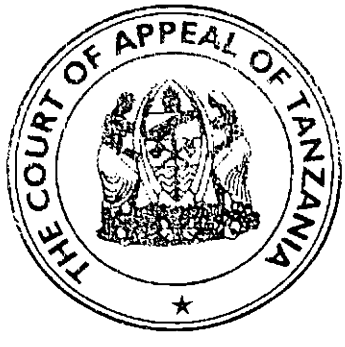
DATED at **DAR ES SALAAM** this 12th day of October, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 15th day of December, 2021 in the presence of the appellant in person and Ms. Ester Kyara, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL