

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SONGEA SUB - REGISTRY**

**AT SONGEA**

**CRIMINAL APPEAL NO. 5243 OF 2024**

**REFERENCE NO. 202402282000005243**

*(Originating from Tunduru District Court in Criminal Case No. 39 of  
2023)*

**HUSSEIN JAMAL MATUNGUNYA ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

Date of last Order: 27/03/2024

Date of Judgment: 22/04/2024

**U. E. Madeha, J.**

To begin with, at Tunduru District Court in Ruvuma Region, the Appellant; Hussein Jamal Matungunya together with three others, who are not parties in this appeal, were jointly charged with three offences. On the first count, they were charged with the offence of conspiracy to commit an offence contrary to section 384 of *Penal Code* (Cap. 16, R. E 2022). On the second count, they were charged with the offence of burglary contrary to section 294 (1)(a) & 2 of the *Penal Code* (supra).

The third count was for the offence of stealing contrary to section 265 *Penal Code* (supra). All these offences were alleged to be committed On 4<sup>th</sup> day of January, 2023, at Tuleane Village in Tunduru District.

Also, there was the fourth count in which the Appellant was not charged with. It involved the other accused persons and they were charged with the offence of receiving unlawful obtained property contrary to section 311 of the *Penal Code* (supra), the offence which was alleged to be committed on 1<sup>st</sup> day of February, 2023 at Machinjioni area in Masasi District.

The Appellant who was the third accused person together with his co-accused who was the first accused person were convicted for the first, second and third counts and sentenced to serve five years imprisonment for each count. The sentences were ordered to run concurrently. The convictions and sentences did not amuse the Appellant and he lodged this appeal on three (03) grounds of complaints, which are paraphrased as follows:

- i. *That, the trial Magistrate erred in law and fact to convict the Appellant without considering that the prosecution side failed to prove the offences against him since there were a lot of doubts on the prosecution evidence.*

- ii. That, the trial Court erred in law and in fact by convicting the Appellant basing solely on the cautioned and extra judicial statements of the Appellant recorded before PW2 & PW4.*
- iii. That, the trial Court erred in law and in fact by convict the Appellant based on circumstantial evidence which are full of doubts.*

Before I proceed with this appeal, I find it is important to provide an albeit brief of the evidence given before the trial Court. To prove the aforementioned offences, the prosecution side paraded a total of five witnesses. PW1 who is a peasant and a boda-boda driver, alleged to be the owner of a motorcycle with registration No. MC 525 DEV made Houjue which he used for business purposes. On 4<sup>th</sup> January, 2023 at around 05:00 hours, when he woke up, he discovered that the door of his house was broken and his motorcycle was missing. He reported the incident at the Police Station and investigation was conducted. It was after three days of his investigation, PW1 suspected the first accused person to be the one who was involved in stealing the motorcycle. He reported at the Police Station and after the arrest, the first accused person confessed to have committed the offence and he mentioned his fellows with whom they jointly involved in the incident. This enabled the arrest of the Appellant and other two accused person. The Appellant

was arrested at Machinjioni Street in Masasi District when he was trying to sell the stolen motorcycle to the fourth accused person.

It is important to note that, at the time when the motorcycle was seized and its plate number was changed and the motorcycle was identified by its colour, engine and chassis numbers which resembled with those found in the motorcycle registration card which was admitted as exhibit before the trial Court together with the motorcycle as exhibits "P1" and "P2" consecutively.

The testimony given by PW1 was corroborated by that given by PW2, the investigator and a Police Officer and stated that, he received an information from PW1 that there was a theft incident and he went at the scene of crime and found the door of PW1's house was broken. After investigation they suspected the first accused person to be the one who was involved in the incident and they arrested him. After his arrest, the first accused person was interrogated and he admitted to having committed the alleged offence of breaking the house and stealing the motorcycle. They also arrested two other suspects who were the second, third and fourth accused persons.

While at the Police Station, all the accused persons were interrogated and the second and fourth accused persons denied to have

committed the offences but the Appellant who was the third accused and the first accused admitted to have committed the offences and their cautioned statements were tendered and admitted as exhibits "P3" collectively. The cautioned statements (exhibits P3 collectively) were admitted without any objection from the Appellant. Also, the seizure certificate was admitted as exhibit "P4".

Another piece of evidence was from PW4, a resident magistrate and a justice of peace, who recorded the extra-judicial statement of the third (Appellant) and the first accused persons who confessed to have broken the door of PW1 house by using an iron-bar and stolen the motorcycle. The extra judicial statement of the Appellant was admitted as exhibits "P5" and there was no any objection from the Appellant.

PW5, one G. 5164 Corporal Said of Tunduru Police Station who is the exhibits keeper admitted to have received the motorcycle and kept it at the Police Station and he tendered the chain of custody which was received and formed part of the prosecution evidence. This marked the end of the prosecution evidence.

At the closure of the prosecution case, the trial Court found the fourth accused person had no case to answer and ordered the Appellant and other two accused persons to give their defence. The Appellant and

his co-accused persons denied to have committed the offences charged with and alleged that the evidences given by the prosecution witnesses were fabricated to incriminate them. The Appellant told the trial Court further that, he was mentioned by the first accused person since he was not in good terms with whom as he has a case against him.

At the hearing of this appeal, the Appellant appeared in person as he was unrepresented whereas the Respondent was represented by Mr. Frank Sarwart, the learned State Attorney.

Submitting in support of his appeal, the Appellant started by challenging the testimonies which were given by the prosecution witnesses. He argued that the evidence given by PW1 who was the victim in this case was to the effect that, the Appellant was arrested on 1<sup>st</sup> February, 2023, at around 09:00 hours when he was at Machinjoni area in Masasi District while trying to sell the stolen motorcycle. But the testimony given by PW3, who is a Police Officer told the trial Court that the Appellant was arrested on 1<sup>st</sup> February, 2023. He added that there was no any document which was tendered during trial to prove that he was arrested on that date. The Appellant argued further that the trial Court erred in law by acquitting the fourth accused person who was found with the stolen motorcycle.

The Appellant went on submitting that the trial Court erred in law when it believed that the Appellant in his cautioned statement confessed to have committed the offences he was convicted and sentenced with. He argued that, he was neither recorded his cautioned statement nor sent before the Justice of Peace to be recorded his extra judicial statement and what were recorded and tendered in Court were not correct.

Resisting the appeal, Mr. Frank Sarwart submitted that; on the first ground of appeal the Appellant's complaint is on why the prosecution failed to have an independent witness to support the testimony given by PW1 and PW3. He contended that in criminal cases, the prosecution is duty bound to proving the guiltiness of the accused person and the accused may be convicted basing on the weight of the prosecution evidence only and not otherwise.

Mr. Sarwart went on arguing that, the offence of conspiracy to commit an offence to be proved, the prosecution was required to prove that there was an agreement between two people to commit an offence and the prosecution side proved this offence through PW2 who was the investigator, who told the trial Court that the Appellant and the first accused person who is not a party in this appeal confessed to have

conspired to commit the offences. The cautioned statements were tendered and admitted to form part of the prosecution evidence. He also submitted that, this piece of evidence was corroborated by PW4 who is a justice of peace, that the Appellant and his co-accused person confessed to have committed the offence. He contended that the prosecution proved the first count beyond reasonable doubt. He emphasized that, the other two counts of burglary and stealing were also proved by the prosecution side. He went on arguing that the offence of stealing was proved since the claimant (PW1) proved to be the rightful owner of motorcycle with Registration Number MC 525 DEV which was stolen and identified by comparing the engine and chassis numbers with those in the Motorcycle Registration Card which was tendered during trial. He emphasized that, PW1 also tendered the receipt to prove that he was the owner of the motorcycle. He added that the Appellant was the one who was found to be with the stolen motorcycle.

On the offence of burglary, he argued that the offence was properly proved since the elements of the offence were clearly proved by PW1 who told the trial Court that he discovered his motorcycle was missing at 5:00 hours and he parked it during night hours which means



the house was broken at night time. He added that, PW1 testimony was corroborated by PW2 and PW4 to whom the Appellant confessed to have committed the offences they were charged with.

On the submission made by the Appellant that there was no independent witness, Mr. Frank Sarwart submitted that according to section 16 (2) of the *Criminal Procedure Act* (Cap. 20, R. E 2022), in arresting a person found committing an offence, especially on offences involving property there is no need to have either the arrest warrant or an independent witness. He added further that, PW1's evidence was corroborated with the evidence given by PW2 and PW4.

On the issue of the Appellant contention that he objected the admission of the cautioned and the extra judicial statements was not party of the Appellant's grounds of appeal and this Court lacks jurisdiction to deal with it. To buttress his contention, he cited the case of **Yusufu Masari & Three Others vs. Republic**, Criminal Appeal No. 2017, in which the Court of Appeal of Tanzania insisted that, Court has no jurisdiction to adjudicate matters not raised as grounds of appeal. Lastly, he prayed for this appeal to be dismissed.

In his short rejoinder submission, the Appellant prayed for this Court to consider his appeal and set him free from prison.

In this appeal, the Appellant and one other accused who has not preferred an appeal, were convicted for three counts of conspiracy, burglary and stealing and they were sentenced to serve five years imprisonment for each count. The sentences were ordered to run concurrently.

In determining the merit or otherwise of this appeal, I will be guided with the grounds of appeal. On the first ground of appeal that the prosecution failed to prove its case, the issues is whether the offences with which the Appellant was convicted with and sentenced were proved to the required standard. Stating with the first count of conspiracy contrary to section 384 of the *Penal Code* (supra), which reads as follows:-

*"384. Any person who conspires with another to commit any offence, punishable with imprisonment for a term of three years or more, or to do any act in any part of world which if done in Tanzania would be an offence so punishable, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of an offence, and is liable if no other punishment is provided, to imprisonment for seven years or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for seven years, then to such lesser punishment."*

The second count was for the offence of burglary contrary to section 294 (1)(a) & (2) of the *Penal Code* (supra) and it provides that:-

*"Any person who- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein; or (b) having entered any building, tent or vessel used as a human dwelling with intent to commit an offence therein or having committed an offence in the building, tent or vessel, breaks out of it, is guilty of housebreaking and is liable to imprisonment for fourteen years. (2) Where an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years".*

On the third and last count, the Appellant was charged and convicted with the offence of stealing contrary to section 265 of the *Penal Code* (supra), which reads as follows:

*"265 Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years."*

From the trial Court's records, the testimonies given by the prosecution witnesses, cautioned and extra judicial statements which

were tendered and admitted in Court during trial, shows clearly that the Appellant confessed to have broken and entered into the house of PW1 and steal a motorcycle which he was arrested with it. It was the cautioned and the extra judicial statements (exhibits "P3" collectively), the motorcycle and the motorcycle card (exhibit "P1" & "P2" consecutively) which were tendered and admitted during trial without any objection from the Appellant and the first accused person which formed the base of their convictions.

Also, the prosecution evidence shows that the Appellant was caught with the motorcycle which its plate numbers were changed from the original numbers of MC 525 DEV to MC 858 DEJ but the complainant (PW1) managed to identified his motorcycle which was stolen since its chassis and engine numbers resembled with those found in the stolen motorcycle's registration card. PW1's evidence was corroborated by the Appellant's cautioned and extra judicial statements given before PW2 & PW4, which he never objected during trial. The Appellant's act of changing the plate numbers of the stolen motorcycle aimed to conceal its identity and ownership, which shows that they did steal the it.

There is another piece of evidence from the prosecution side that the Appellant attempted to flee when he was arrested, this is also

implying that the Appellant has a consciousness of guilt or an awareness of wrongdoing. It is my view that, all those pieces of evidence when considered together they strongly suggest that the Appellant committed the offences he was convicted with. Therefore, I agree with the Respondent's learned State Attorney that the evidence given by the prosecution proved the three counts to the required standard of proving the case beyond reasonable doubt and the Appellant was properly convicted.

The second ground of appeal as it can be construed from the petition of appeal, the Appellant complaint is to the effect that the trial Court erred in law and in fact by convicting the Appellant basing solely on the cautioned and extra judicial statements of the Appellant recorded before PW2 & PW4. Section 27 (1), (2) and (3) of the *Evidence Act* (Cap. 6, R. E. 2022), a confession voluntarily made to a Police Officer by a person accused of an offence may be proved as against that person. The onus of proving that the confession was voluntarily made by the accused person is on the prosecution. Generally, confessions are said to be voluntary made unless the accused person alleges that it was induced by any threat, promise, torture or other prejudices and the Court believe that it was involuntarily made.

Where confession is said to be involuntarily made, the court may admit the it but it may be acted upon if there is a competent corroboration. See the decision in the case of **Mkubwa Said Omar vs. SMZ** [1992] TLR 365 and **Mbushuu @ Dominic Mnyaroje & Another vs. Republic** [1995] TLR 97.

But for a confession which is voluntarily made, Courts may convict the accused person basing on it without any corroboration. It is a trite law that, the best evidence in any criminal trial is that of the accused person who freely confesses his/her guilty. This was the position of the Court of Appeal of Tanzania made in the case of **Mohamed Haruna & Another vs. Republic**, Criminal Appeal No. 259/2007 and **Jacob Asengelile vs. DPP**, Criminal Appeal No. 178 of 2017 (both unreported).

In this appeal, on perusal of the trial court's records, I find in convicting the Appellant, the trial Court partly relied on the cautioned and extra judicial statements which were tendered and admitted in Court as exhibits P3 collectively. These exhibits were admitted during trial and there was no any objection from the Appellant. Since the Appellant failed to object them during trial, the trial Court believed that it was voluntarily made and it used in its decision. In my view, I find the

trial Court was correct in using the Appellant's cautioned and extra judicial statements as evidence as provided under section 27 (1), (2) and (3) of the *Evidence Act* (supra), that a confession which is voluntarily made by the accused person may be used against that person. Corroboration is only needed where confession was declared to be involuntarily made. See the decision in **Mkubwa Said Omar vs. SMZ (supra)**.

The Appellant's complaint is that, the trial Court erred in law by convicting him basing solely on the cautioned and extra judicial statements, but having gone through the judgment of the trial Court, I find his convictions were not based only on the cautioned and extra judicial statements. There were other pieces of evidence such as the prosecution witnesses' testimonies and exhibits which were tendered and admitted during trial including the motorcycle which was stolen and found to be in possession of the Appellant. Thus, the second ground of appeal lacks merits and it is dismissed.

On the third ground of appeal, the Appellant criticises the trial Court that it convicted him basing on circumstantial evidences which are full of doubt. Having decided the above two grounds of appeal, I am not going to take much time and efforts discussing on this ground of appeal.

In fact, as discussed above, the evidence which led to the convictions of the Appellant were the confessions made by him which in the view of this Court and the trial Court was voluntarily made, the tendered exhibits including the motorcycle which was stolen and found to be in the hands of the Appellant and the testimonies given by witnesses from the prosecution side which the trial Court found to be credible and reliable of which I also find to be so. Those piece evidences in my view, they point irresistibly that the Appellant together with his co-accused who has never preferred an appeal be committed the offences they were charged and convicted with. I also find all those pieces of evidence to have proved those offences beyond reasonable doubts. Therefore, this ground of appeal also fails.

In the final event, this appeal is barren of merit and I hereby dismissed it. I uphold the convictions and sentences meted by the trial Court. Order accordingly.

**DATED** and DELIVERED at **SONGEA** this 22<sup>nd</sup> day of April, 2024.



A blue ink signature, appearing to read "U. E. MADEHA", is written over a horizontal line.

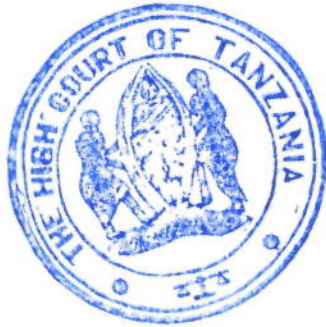
**U. E. MADEHA**

**JUDGE**

**22/04/2024**



**COURT:** This judgment is delivered in the presence of the Appellant and Mr. Gaston Mapunda, the learned State Attorney for the Respondent. Right of appeal is explained.



A handwritten signature in blue ink, appearing to read "U. E. Madeha", is written over a horizontal line.

**U. E. MADEHA**

**JUDGE**

**22/04/2024**