

TANZANIA / JUDGMENT

david muhando another vs republic

2017 tzhc 2099 23 june 2017

COURT
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23 June 2017

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IN THE HIGH COURT OF TANZANIA AT DODOMA (APPELLATE JURISDICTION) DC. CRIMINAL APPEAL CASE NO 104 OF 2016 (Original Criminal Case No. 09 of 2016 of the District Court of Mpwapwa at Mpwapwa)

1. DAVID M UH A N D O 1st APPELLANT
2. AMIRI MUSA.....2N° APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

2 Z/06/20M & 23/06/2017 A. MOHAMED, J: The two appellants and a third (who was the 1st accused in the District Court of Mpwapwa) ("the trial court") were charged and convicted of two offences to wit burglary c/s 294 and stealing c/s 265 both under the Criminal Code [Cap 16 RE 2002] and sentenced to 3 years imprisonment. The first accused was tried in absentia. According to the prosecution, the 1st accused informed the police that he and the appellant broke into the house of a person and stole a motorcycle. While in police custody, he was told to call i the appellants and assisted in their being apprehended. However the stolen motorcycle was not found. The basis of the conviction was the information from the 1st accused person. It was in evidence the two appellants had been working as masons at the house where the motorcycle was stole. Their grounds of appeal are as follow:

1. That the trial court erred in admitting as exhibits the appellants" cautioned statements that violated section 50 (1) (a) and (b) and 51 (1) (a) and (b) of the Criminal Procedure Act.
2. That the trial court erred in failing to convict the appellants.
3. That the trial court did not consider their term in remand before sentencing them.
4. That the trial court did not consider their defence. When the appeal was called on for hearing, the appellants said Hon they would rely on their grounds of appeal as set out in their petition of appeal in support of the appeal. Ms. Magesa, learned state Attorney who appeared for the respondent supported the appeal on a number of grounds. 2 On the 1st ground, she was of the view the police did comply with section 50 (1) (a) and 51 1 (a) and (b)

of the CPA. She said the police were unable to recover the stolen motorcycle as the suspect made away with it. However, after the appellant's arrest, the police were busy trying to pursue the suspect in possession of the motorcycle and they later recorded the appellants' statements. She is therefore satisfied the delay in taking the suspects' statements was justified. She was in agreement with the appellants' 2nd ground of appeal since the trial magistrate failed to convict the appellants. However she assailed the 3rd ground is being baseless. She said the trial court did consider the period the appellants were in remand when it sentenced them. As to the 4th ground, she was in agreement with the appellants that the trial magistrate failed to consider the defence case to wit they were masons building the house where the motorcycle was stolen. The owner was not called as a witness. Ms. Magesa said this failure to consider the appellants' defence at the trial has created a doubt which has to be in favour of the appellants. Furthermore, she also noted the 1st appellant objected to the admission of his cautioned statement (then 2nd accused) by stating the signature on the statement was not his. Ms. Magesa said the trial court erred by failing to refer the question to a handwriting experts to establish whether it was really the appellant's. Ms. Magesa submitted that also that the trial magistrate failed to caution herself on the treatment of evidence of an accomplice as it ought to have been corroborated. The accomplice who was the 1st accused was tried in absentia. She said the buyer of the stolen motorcycle was not called to testify in court to corroborate the prosecution's witnesses. For these above reasons, she prayed the appellants be freed. After hearing the parties' submissions and having reviewed the record, I state from the outset that there was a gross miscarriage of justice in this case. There was very scanty, if any, evidence to ground a conviction. I will begin with the question of accomplice evidence. Section 33 of the Tanzania Evidence Act Cap 6 RE 2002 provides that:

- (1) when two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of these persons is proved, the court may take that confession into consideration against that other person.
- (2) Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused. Gleaning from the record, the only evidence that the learned trial magistrate relied on basing the conviction was the testimony of PW1, the police officer who narrated how the investigation was conducted with the assistance of the 1st accused person who named the appellants in this case. He was instructed by the police to call the appellants (then suspects) by their mobile phones on the theft of the motorcycle and proceeded to apprehend and charge them. The rest of the witnesses gave testimonies that were mere hearsay. I am in agreement with the learned State Attorney's argument that there was no corroboration at all of the 1st accused person's information given to the police implicating the appellants in the offences they were charged of. After the foregoing, I find merit in the appeal and I allow it. I consequently set aside the proceedings and judgment of the trial court. The appellants are to be freed forthwith unless held for another lawful cause. It is so ordered. 5 A. MOHAMED JUDGE 23/06/2017 The right of appeal explained. A.

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