Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO.9 OF 2007 – COURT OF APPEAL OF TANZANIA AT ARUSHA. Coram: KAJI, J.A, KILEO, J.A AND KIMARO, J.A	**MICHAEL MATHIAS VS THE REPUBLIC-** Appeal from the judgment of the High Court of Tanzania at Arusha – **HC Criminal Appeal No.89 of 2003**. (Mussa. J)	Cautioned statement must be recorded within the prescribed period as per section 50 of the Criminal procedure Act. Also in Janta Joseph Komba and 3 others Vs Republic. Criminal Appeal No.95 of 2005; and Tumaini Moleli@John walker and Others V R, Criminal Appeal No.40 of 1999 (both unreported)

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KAJI, J.A., KILEO, J.A. And KIMARO, J.A.)

CRIMINAL APPEAL NO. 9 OF 2007

MICHAEL MATHIAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Mussa, J)

dated the 26th day of July, 2006
in
HC Criminal Appeal No. 89 of 2003

JUDGMENT OF THE COURT

29 April & 2 May, 2008

KAJI, J.A.:

In the District Court of Arusha in Criminal Case No. 242 of 2001, Michael Mathias, the appellant, together with five others, were jointly arraigned for the offence of armed robbery, contrary to sections 285 and 286 of the Penal Code Cap 16. In the second count, another person, namely Thomas Francis (7th accused) was

arraigned alone for the offence of receiving stolen property contrary to section 311 (1) of the Penal Code, Cap 16.

The appellant was convicted as charged and was sentenced to 30 years imprisonment and 12 strokes of the cane. His co-accused were acquitted for want of sufficient evidence. The appellant was aggrieved. His appeal to the High Court was dismissed for want of merit. Still daunted he preferred this appeal in the Court.

At the trial the prosecution had adduced evidence to the effect that, on 19th February, 2001, at about 8.00 pm, Abdallah Musa (PW2), a Tanzanite gemstones dealer, was on his way from Mererani Tanzanite Gemstones Mines to Arusha riding a motorcycle Registration No. TZN 8750 with one Oscar Mollel as his passenger. When he approached a bridge at Miembeni area, a torch light was flashed towards his face. He could not see well his way. He slowed down.

Suddenly he was struck on the head with a blunt weapon. He fell down. All of a sudden a group of about eight (8) bandits surrounded him. One of them pointed a gun at him ordering him to give them

everything he had. They took away his Shs. 700,000/=, a golden chain, a silver chain, a mobile phone and a trousers belt. Then two of them took his motorcycle and rode off together with the other articles including the money. PW1 could not identify any of them. Through investigation, on 3.3.2001 the appellant was arrested. Through interrogation by way of a cautioned statement Exhibit B he admitted to have participated in the robbery and took PW2 and No. E.2740 DC Pastory (PW1) to the 7th accused to whom he alleged to have sold the motorcycle. Indeed they found it in the hands of the 7th accused who surrendered it and alleged to have purchased it from the appellant on 24th February, 2001. In the caution statement the appellant also mentioned his co-accused to have jointly committed the offence charged.

In his defence the appellant denied to have participated in the commission of the offence charged. He denied even to have sold the motorcycle to the 7th accused. His co-accused also denied the offence charged. The 7th accused insisted that it was the appellant who sold it to him on 24.2.2001. The learned trial magistrate found

the appellant guilty as charged and convicted him accordingly and acquitted his co-accused

Aggrieved by the decision he unsuccessfully appealed to the High Court. In dismissing the appeal the High Court (Mussa, J) held the view that, there was ample evidence through the cautioned statement Exhibit B that the appellant committed the offence charged, and that the cautioned statement was voluntarily made and was nothing but all truth. Still dissatisfied the appellant has protested his innocence in the Court and preferred three (3) grounds of appeal which may conveniently be paraphrased as follows:-

1. The learned trial magistrate and the learned judge on first appeal erred in law and fact on relying on the cautioned statement which was recorded outside the period prescribed by section 50 of the Criminal Procedure Act [Cap. 20 R.E. 2002].

2. The learned trial magistrate and the learned judge on first appeal erred in law and fact in believing the defence evidence of DW5 which was not trustworthy.

3. The learned trial magistrate and the learned judge on first appeal erred in law and fact in failing to assess the credibility of the prosecution witnesses.

At the hearing of the appeal the appellant appeared in person and presented three additional grounds which are more or less the same as the above grounds except ground No. 3 in which he complains of non-identification. In that ground the appellant's complaint is that, he was wrongly convicted because there was no evidence that he was identified at the scene of crime.

Mr. Henry Kitambwa, learned State Attorney, represented the respondent Republic.

The appellant suggested that the learned State Attorney should reply to his grounds of appeal first and thereafter he would decide whether to respond to the learned State Attorney's reply.

The learned State Attorney did not support the conviction mainly on two grounds.

One, that the conviction was based on the appellant's cautioned statement Exhibit B which was illegally recorded. The learned State Attorney contended that, the appellant was arrested on 3.3.2001 but his confessional statement was recorded on 8.3.2001 which was 5 days after his arrest. It was the learned State Attorney's submission that this contravened the provisions of section 50 of the Criminal Procedure Act [Cap 20 R.E. 2002] and should not have been considered/acted upon.

Two, the appellant was not found in possession of the motorcycle in issue (Exhibit A) but DW5. The learned State Attorney pointed out that, although DW5 alleged to have been sold the same by the appellant, yet there was no sale agreement to support the allegation. It was the learned State Attorney's view that, DW5 was probably the one who had stolen it but fabricated the case against the appellant to free himself. The learned State Attorney did not elaborate why DW5 should have fabricated the appellant and not somebody else.

We have carefully considered the appellant's grounds of appeal and the learned State Attorney's reply thereat. Indeed the record

shows that the appellant's cautioned statement was one of the grounds upon which the conviction was based. There is no dispute that it was recorded outside the period prescribed by section 50 of the Criminal Procedure Act. That being the position it should not have been considered against the appellant as was held by the Court in the cases of **Janta Joseph Komba & 3 Others** v **R,** Criminal Appeal No. 95 of 2005; and **Tumaini Moleli @ John Walker & Others** v **R,** Criminal Appeal No. 40 of 1999 (both unreported). But as indicated above, this was only one of the grounds upon which the conviction was based. There was also another ground. It was the evidence of PW1 and PW2. According to the evidence of these witnesses, the appellant admitted to have participated in the armed robbery and told them he had sold the motorcycle to DW5. He took them to DW5. When they arrived they asked DW5 to show the motorcycle which the appellant had sold to him. DW5 obliged and showed them Exhibit A. PW2 identified it to be his, the very one he was robbed at gun point on 19.2.2001. In his defence the appellant denied to have admitted or taken them to DW5. However he did not tell either the trial court or the court on first appeal or this Court why

PW1 and PW2 would have told lies against him. Even the evidence of DW5 on this is not insignificant. He told the trial court as to how the appellant sold the motorcycle Exhibit A to him. The trial court believed him and held him to be an innocent receiver and acquitted him. We are quite alive to the fact that, as a suspected receiver, he was an accomplice. But in appropriate cases, a conviction can be founded on uncorroborated evidence of an accomplice where the court finds it to be true and warns itself of the danger of convicting on uncorroborated evidence of an accomplice, as was held by the Court in the cases of **Fanuel Joseph Mbendule** v **R** (1989) TLR 221; and **Pascal Kitigwa** v **R** (1994) TLR 65.

In the instant case, in view of the evidence of PW1 and PW2, the evidence of DW5 cannot be said to be anything but the whole truth.

The appellant complained why the sale agreement was not tendered in evidence. We agree, had the said sale agreement been tendered in evidence it would have made the prosecution case which was already strong, even stronger. However its non-production did

not vitiate the merit of the prosecution case in view of what PW1 and PW2 had testified.

The appellant also complained that he was wrongly convicted as there was no evidence that he was identified at the scene of crime. This complaint is baseless. The conviction was not based on identification at the scene of crime. PW2 had testified clearly that after being blinded by the torch light, and having been struck on the head, could not identify the culprits. The appellant's conviction, (after expunging the evidence pertaining to the cautioned statement), was founded on the evidence of PW1 and PW2, and to a limited extent as stated above, DW5.

Since there was ample evidence by PW1 and PW2 to support the prosecution case as stated above, we disagree with the learned State Attorney and the appellant that the prosecution failed to prove the guilt of the appellant beyond all reasonable doubt.

The sentence imposed is the minimum.

With the exception of the cautioned statement which we have found to be illegally recorded, we have found nothing else to fault the concurrent findings of fact by the two courts below.

In the event, and for the reasons stated above, we dismiss the appeal in its entirety.

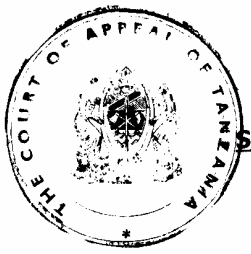
DATED at ARUSHA this 2nd day of May, 2008.

S. N. KAJI
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR