IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And MUNUO, J.A.)

CRIMINAL APPEAL NO. 47 OF 2001

BETWEEN
SAMWEL MKIKA.....APPELLANT
AND
THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Tabora)

(Masanche, J.)

dated the 4th day of July, 2001
in
Criminal Appeal No. 15 of 2000

JUDGMENT OF THE COURT

LUBUVA, J.A.:

In the District Court of Tabora, the appellant together with three others who have not appealed, was charged on one count of armed robbery contrary to sections 285 and 206 of the Penal Code. In another count, he was separately charged with conversion not amounting to theft contrary to section 284 of the Penal Code. On both counts the appellant was convicted and sentenced to thirty years imprisonment on the first count and two years on the second count. The sentences were ordered to run concurrently. The

appellant was aggrieved, he unsuccessfully appealed to the High Court and has further appealed to this Court.

Briefly stated the prosecution case was as follows: The appellant was referred to at the trial as the first accused, he was a police constable based at Tabora. The second accused, Yohana s/o Shitana and the third accused, William s/o Mkumbo were also police constables at the same station. They were assigned by the Officer Commanding Station (PW4) to escort money shillings 19,732,341/= to Sikonge. The money had been drawn from the N.B.C. at Isike Branch Tabora. Initially, the appellant was listed and instructed as one of the constables for the escort but his assignment was cancelled. However, despite the cancellation, on 23.9.1998, at about 1.57 p.m. he collected from the armoury a firearm SMG Serial No. 20052911 (Exh. P.10). At about 3 p.m. the same day, the second and third accused together with Jackson Meri (PW3), Chairman of Tutuo Co-operative Society Sikonge and Mariam Simon (PW3), Secretary/Manager of Usungu Co-operative, left Tabora for Sikonge in a taxi carrying the money. On the way, the party under the police

escort was ambushed. A gun shot was heard, two armed bandits with masks covering their faces emerged, the second and third accused, the police escort, fled and in the process, the money was stolen. According to the ballistics expert, (PW12) the empty cartridges found at the scene of crime were fired from the gun (Exh.P10) which the appellant had collected from the armoury. Upon investigation by the police, the appellant was arrested and charged.

At the trial in the District Court,the appellant merely denied any involvement in the alleged crime. The trial magistrate relying on the evidence of the ballistics expert (PW12) and the appellant's cautioned statement (Exh. P6), found that the appellant was sufficiently implicated in the alleged offence. The appellant was convicted and sentenced to imprisonment. As indicated, from the conviction and sentence, the appellant has come to the Court on appeal.

In this appeal, the appellant was represented by Mr. Makowe, learned advocate, and Mr. Mlipano, learned State Attorney, appeared for the respondent Republic.

Mr. Makowe argued the following two grounds. First, that the Honourable Judge erred on a point of law to isolate and deal only with a confession that was retracted instead of evaluating and assessing the evidence in its totality. Second, that the Honourable Judge erred on a point of law to find and hold that relevance is the only criterion in determining the admissibility of statements extracted from accused.

In elaboration, Mr. Makowe strongly criticised the learned judge in relying heavily on the confession in sustaining the conviction against the appellant. He said it was erroneous on the part of the learned judge in not considering other circumstances apart from the cautioned statement Exh. P6. According to him the judge did not consider the appellant's defence of alibi. While Mr. Makowe conceded that the appellant did not give notice of the alibi in terms of the provisions of section 192 (1) and (3) of the Criminal Procedure Act 1985, (the Act) he maintained that failure to do so did not

exempt the judge from considering the alibi. Failure to consider the defence of alibi, Mr. Makowe insisted, prejudiced the appellant.

Secondly, Mr. Mokawe also complained that the learned judge on first appeal did not consider the discrepancies in the evidence of the eye witnesses and the ballistics expert (PW12). He said the evidence of PW2 and PW3 that they did not see or hear the appellant, the second and third accused, firing any gun conflicts with the evidence of Assistant Inspector of Police Msangawale (PW12), the ballistics expert that the cartridges were fired from the gun Exh. P10. Thirdly, another factor which Mr. Makowe claimed was not considered by the learned judge was the Escort Register Exh. P5. He said according to the register the appellant was one among the policemen listed for the escort duty. It was therefore nothing unusual that the appellant collected the gun from the armoury as the second and third accused did. Fourthly, that the learned judge did not consider the circumstances in which the cautioned statement Exh. P6 was made. This, we shall revert to later in this judgment when dealing with the next ground of appeal.

Responding to these submissions, Mr. Mlipano, learned State Attorney, strongly maintained that apart from the cautioned statement Exh. P6, the learned judge on first appeal took into consideration other relevant circumstances. He submitted that Mr. Makowe's complaint on this aspect is unfounded, it is not supported by the evidence on record.

We think there is merit in this submission by Mr. Mlipano. For instance, with regard to the alleged defence of alibi raised by the appellant, it appears from the record that the learned trial judge considered the alibi within the general line of defence raised by the appellant and treated it in terms of the law as provided under the Act. As Mr. Makowe correctly submitted, the fact that the defence of alibi was not raised by the appellant in terms of the provisions of section 192 (1) and (3) of the Act, did not exempt the judge from dealing with it. In this case, and as observed earlier, even though the defence of alibi was not expressly raised, nonetheless, within the appellant's defence of a general denial, the learned judge considered it and accorded no weight to it. Under the provisions of section 194

(5) and (6) of the Act, where the accused neither gives notice of his intention to rely on the defence of alibi nor furnishes the particulars of the alibi, the court may in its discretion, accord no weight of any kind to the defence, as happened in this case. In that situation, we are satisfied that Mr. Makowe's complaint that the defence of alibi was not considered is unfounded, it was considered and no weight was accorded to it in line with the law. As for the contention that the Escort Register Exh. P5 was not considered, we hardly need to labour much on it. The reason is not far to seek. The fact that the appellant was one of the police officers listed in the register for standby escort duty was not in issue both in the trial court and the first appellate High Court. The learned judge cannot therefore be criticised for failing to consider a matter which was not in issue before him.

Mr. Makowe, learned counsel, had also sought to fault the learned judge for failure to consider what he referred to as discrepancies between the evidence of the ballistics expert, Enos Msangawale (PW12) and the eye witness Jackson Meri (PW2) and

Mariam Simon (PW3) who were in the taxi together with the second and third accused. As Mlipano, learned State Attorney submitted, we are unable to find any discrepancies in the evidence of these witnesses. On the one hand, Enos Msangawale, the ballistic expert (PW12) had testified to the effect that some of the empty shells collected from the scene of crime were fired from the gun which the appellant had taken from the armoury. On the other hand the evidence of PW2 and PW3 is to the effect that they did not hear the second and third accused, the escort policemen, firing. Rather, they heard gun shots from outside the taxi. As a matter of fact the case for the prosecution was that the taxi carrying the money together with PW2, PW3 and the police escort, the second and third accused was ambushed.

In the circumstances, it is our view that the evidence as it is, reflects no discrepancy at all. The ballistics expert's evidence clearly shows the expert's opinion on the empty shells in relation to the gun that the appellant had (Exh. P10). This, hardly conflicts with the evidence of PW2 and PW3. In the event, we are satisfied that there

was no conflict or discrepancy in the evidence of these witnesses. Therefore, the learned judge cannot be criticised for failing to consider non existing discrepancies.

This now takes us to the fourth factor which learned counsel for the appellant, Mr. Makowe, also claimed was not addressed by the learned first appellate judge. We shall deal with this aspect in relation to the second ground of appeal. Mr. Makowe strongly urged that the judge was also in error in not considering the circumstances under which the cautioned statement Exh. P6 was taken. Had the learned judge duly considered the fact that the statement was taken under torture, Mr. Makowe insisted, the statement would not have been admitted as evidence upon which to sustain the conviction against the appellant. He also stated that the judge fell into error when he found and held that relevance is the only criterion in determining the admissibility of the appellant's cautioned statement, Exh. P6. Mr. Makowe further submitted that had the learned judge directed himself properly on this point, he would have found that the appellant's cautioned statement (Exh. P6) was not voluntary in terms

of the provisions of section 27 (1) of the Evidence Act, 1967. The statement not being voluntary, Mr. Makowe went on in his submission, it should not have been admitted as evidence against the appellant. In the statement, Mr. Makowe contended, the appellant stated what the police had forced him to say under torture. If the statement Exh. P6 was not admitted in evidence, Mr. Makowe stressed, there was no other evidence in support of the charge against the appellant. In support of the proposition that the cautioned statement Exh. P6 being involuntary, it was improperly admitted, the Court was referred to its decision in 1. Richard Lubilo 2. Mohamed Seleman V Republic, Criminal Appeal No. 10 of 1995, (unreported).

Mr. Mlipano was in agreement with Mr. Makowe that the learned judge erred in holding relevance as the only criterion in determining the admissibility of the statement (Exh. P6). With respect, we agree with the learned advocate and learned State Attorney that the learned judge erred in finding and holding that relevance is the only criterion in determining the admissibility of the

cautioned statement. This is evident from the judgment in which among other things, it is stated –

> One question to be asked in all these documents ... is this: The Court should ask: Is it relevant? If it is, then regardless of how it was obtained, and sometimes it is said it can be stolen, then the evidence is admissible.

Apparently, this is based on the dictum of Crompton, J. in R v Leatham (1861), 3 E & E 658, 8 Cox C.C. 498; 30 L.J. Q B. 205 which was referred to by LORD GODDARD, C.J. in KURUMA Son of Kanin V Reginam [1955] 1 All E.R. 236. At page 236 it was stated inter alia:

> The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

Relying on this passage, it seems to us that the learned first appellate judge was settled that the only criterion in the admissibility of the statement (Exh. P6) is relevance. With respect, we think the learned judge misconceived the import of the decision in Karuma. It is true as the learned judge observed that in Karuma, Lord Goddard, C.J. expressed the view that the above stated principle applies in both civil and criminal cases. However it is to be observed at once that the learned judge having stated so, for some reasons, he did not go further to consider Lord Goddard's next sentence in the judgment in which His Lordship qualifies the principle. The next sentence reads:

> No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

Further on in the judgment, it was also observed:

> It is right, however, that it should be stated that the rule with regard to the admission of

> confession, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever. The rule is that a confession can only be admitted if it is voluntary and therefore, one obtained by threats or promises held out by a person in authority is not to be admitted.

From these extracts, it is clear that the case on which the learned judge relied on does not support him in his holding that relevance is the only criterion in determining the admissibility of the confessional statement Exh. P6. Upon a proper reading of Karuma, (supra) it is loud and clear that the confession is only admissible if it is voluntary. Where the confession is obtained through torture or threats the confession is not admissible. In this light, it is our view that the learned judge erred in restricting himself to relevance as the only criterion in determining the admissibility of the confessional statement. Admittedly, in certain situations, the confession may well be relevant but even then, once it is shown that it was obtained through torture, its admission would be improper. In a number of

cases, this Court has taken this view in the course of interpreting the scope and application of sections 29, 27 and 28 of the Evidence Act, 1967. See for instance, Thadei Mlomo And Others V Republic (1995) T.L.R 186, Brasius Maona And Another V Republic, Criminal Appeal No. 215 of 1992 (unreported), Marus Kisukuli V Republic, Criminal Appeal No. 146 of 1993 (unreported). More recently, the Court reiterated the position in 1. Richard Lubilo 2. Mohamed Seleman v Republic, Criminal Appeal No. 10 of 1995 (not yet reported).

In this case, we pose to consider whether the confessional statement, Exh. P6 was properly admitted in evidence. Mr. Makowe, learned counsel for the appellant vehemently maintained that it was improperly admitted because the appellant made the statement under circumstances of torture. That the appellant while in police custody was tortured in an isolated torture room. On the other hand, Mr. Mlipano, learned State Attorney strongly urged that the cautioned statement Exh. P6 was properly admitted because it was voluntary. He said the appellant's claim of torture is a made up story which is not supported by any evidence indicating signs of torture. He further

urged that on the basis of the appellant's voluntary confession, the trial court and the first appellate High Court were justified in finding that the appellant was sufficiently linked with the robbery.

In determining whether the statement, Exh. P6 was voluntary, the central issue is whether the appellant was tortured as Mr. Makowe claimed. In resolving this issue, it is convenient to examine closely the surrounding circumstances as a whole. In the first place, it is to be observed that the appellant was a police man, he is alleging that he made the statement (Exh. P6) to Assistant Inspector of Police Colman Thobias (PW5), as a result of torture while in police custody. In this regard, when the investigating officer (PW5) was testifying, Mr. Kayaga, defence counsel for the appellant at the trial raised it for the first time that the statement was obtained through torture. The trial magistrate made an enquiry into the matter. PW5 was subjected to rigorous cross examination at the end of which he was satisfied that the statement was voluntary. Furthermore, apart from the mere claim by the appellant which has been repeated by Mr. Makowe in this appeal, no semblance of some back up evidence

has been shown at least to indicate that the appellant was in fact subjected to torture. This is far from requiring the appellant to prove his case as indeed it is common knowledge that the appellant as an accused in a criminal case assumes no burden at all of proving his innocence. The sort of back up evidence we have in mind would for instance, involve some indication such as that the appellant was so beaten up that he could not walk the following day or a showing of some swollen part of the body such as scars etc. Such we think would go some way to show that the appellant was tortured. As it is, it is nothing but a mere assertion based on the word of the appellant. Above all, though by no means conclusive by it self, it seems rather unlikely that the police investigating officer (PW5) would subject a fellow police officer, the appellant to such unconventional method of investigation. On the whole therefore, having regard to the circumstances of the case, we are satisfied that the statement Exh. P6 was voluntary. We are also of the view that had the learned judge properly addressed himself on the proper criterion regarding the admissibility of the statement (Exh. P6) still he would have come to the same conclusion that the statement was voluntary.

On the basis of the cantioned statement Exh. P6 and the evidence of the ballistic expert (PW12), the learned judge sustained the conviction against the appellant. He was satisfied that it was sufficiently proved that the appellant was connected with the robbery. As already indicated, on behalf of the appellant Mr. Makowe vigorously contended that the circumstantial evidence was not sufficient proof to connect the appellant with the robbery. With respect, we do not agree with him. In the first place, with regard to the cautioned statement (Exh. P6) which as we have found was voluntary and corroborated by Jackson Meri (PW2) and Mariam Simon (PW3) we agree with Mr. Mlipano, learned State Attorney that the appellant was heavily incriminated. The statement gives such a detailed account of the incident leading to the robbery that it is unlikely that it could be given by a person not involved in the crime. Secondly, the evidence of the ballistics expert, Assistant Inspector of Police, Enos Msangawale (PW12) also links the appellant with the robbery incident. From the record, it is apparent that PW12, the police ballistics expert, has had long experience in ballistics matters.

For our part, we have no cause to doubt his expertise and experience in this field. From the submission by Mr. Kayanga challenging the expertise and experience of PW12, we are satisfied that no strong foundation had been shown for doubting the opinion of this expert witness. The courts below were therefore entitled to act upon it. In addition, Mr. Makowe vainly took issue with the fact that possibly the gun was used by other people after the appellant had returned the gun to Paskazia (PW9). So, as found and accepted by the trial Court supported by the learned judge on first appeal according to the ballistics expert, (PW12) some of the empty shells found at the scene of robbery were fired from the gun SMG Serial No. 20052911 Exh. P10. This is the gun which the appellant had taken from the armoury. It means that the gun, Exh. P10 was used in the robbery at about 3 p.m. on the day of the incident after the appellant had taken the gun from the armoury at about 1.57 p.m. In his defence at the trial, the appellant admitted that he collected the SMG Serial No. 20052911 (Exh. P10) at about 1.57 p.m. He also stated that soon after collecting the SMG, he looked for P.C. Paul.

However, according to the appellant before meeting P.C. Paul, the appellant was called by PW4 who informed him that his name had been cancelled from the list of the escort policemen and had also ordered him to return the firearm (Exh. P10) immediately. The appellant adamantly maintains that he returned the firearm (Exh. P10) to Paskazia (PW9) as ordered by PW4.

From the appellant's own version of the statement, supported by PW4, it seems to us that it was not long after the appellant had collected the firearm (Exh. P10) from the armoury at about 1.57 p.m. that he was notifed not to go on the escort duty to Sikonge. Also it looks highly unlikely that the appellant was telling the truth that he returned the ammunition immediately after he was ordered by PW4. On this, Paskazia (PW9) is emphatic in her evidence that the appellant returned the firearm (Exh. P10) at about 5.15 p.m. As found by the trial court and the learned judge on first appeal, she was a truthful witness, and we can find no reason to hold otherwise.

If as testified by Paskazia (PW9) the appellant returned the firearm at 5.15 p.m., two daunting questions arise: First, what was the appellant doing with the firearm all this time since 1.57 p.m. Secondly, why did he not return the firearm immediately after he was notified that he was no longer going on the escort duty to Sikonge. According to the evidence of PW1, PW2, PW3 and the whole circumstance of the case, the robbery took place at about 3 p.m. At that time, the appellant was still in possession of the firearm (Exh. P10). As indicated earlier, we have accepted that the empty shells found at the scene of robbery were fired from this gun (Exh. P10). Therefore, on the totality of the evidence, we are increasingly satisfied that the learned judge on first appeal was justified in his conclusion that the appellant was involved in the robbery by using the gun or availing it to the other members of the gang of bandits to facilitate the robbery. He was therefore properly convicted on the first count of armed robbery.

With regard to the second count of conversion not amounting to theft contrary to section 284 of the Penal Code, we are also

satisfied that the conviction was justified. On the evidence, it is also clear that from the time the appellant was notified of the cancellation of his assignment on escort duty to Sikonge and that he was to return the firearm immediately, he still retained the firearm until 5.15 p.m. when he returned it to PW9. For the period the appellant retained the firearm (Exh. P10) for non-official duty, we think that constituted the offence. He was therefore properly convicted on this count.

All in all therefore, we find no merit in this appeal. It is dismissed in its entirely.

DATED AT DAR ES SALAAM THIS 1st DAY OF AUGUST, 2003.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEA

E.N. MUNUO
JUSTICE OF APPEAL

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

(F.L.K. Wambali)
DEPUTY REGISTRAR