IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 203 OF 2004

HASHIMU SELEMANI POLO MADUKA
AND 2 OTHERS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Kaganda, J.)

dated the 22nd day of September, 2004
in
Criminal Appeal No. 22 of 2003

JUDGMENT OF THE COURT

4 & 17 March, 2008

MUNUO, J.A.:

This is a second appeal from Newala District Court Criminal Case No. 88 of 2002 in which the appellants were jointly charged with the offence of armed robbery c/s 285 and 286 of the Penal Code, Cap 16 as amended by Act No. 10 of 1989. The appellants allegedly broke into the house of one Adinani Abdallah Machwiha on

the night of the 11th January, 2002 and therein stole assorted clothing and valuables including cash Sh. 145,000/=, the total value of stolen items being Tsh. 547,000/=, the property of the complainant, and at the time of stealing, the appellants used actual violence by threatening to shoot the victim with a pistol besides cutting him on the face with a panga. The trial court grounded a conviction and sentenced the appellants to thirty years imprisonment. The trial court further ordered the appellants to pay Tsh. 547,000/= compensation for the stolen property. Aggrieved, the appellants appealed to the High Court vide Criminal Appeal No. 22 of 2002 in the High Court of Tanzania at Mtwara. The appeal was dismissed by Kaganda, J. giving rise to this appeal.

The facts of the case are not complex. On the material night, a gang of about six suspects struck at the house of the complainant, P.W.1 Adinani Abdallah Machwiha, and upon entering the house, hit the victim with a panga thence inflicting a cut wound on his face. P.W.1 tendered his PF3 to show that he suffered a cut wound on the frontal part of his head measuring 200ml long and 1 inch deep, by a sharp object. P.W.1 said that he identified the appellants by face.

His wife, P.W.2 Philomena Augustino, who escaped from the house when the gangsters stormed in, said that she only identified the 3rd appellant by his voice. With the assistance of the victim of robbery, the police arrested the appellants a few days later. P.W.3 No. C.2020 Dt/Clp Juma recorded the statements of the appellants under caution. According to P.W.3, the appellants admitted the offence but during their defences they retracted the alleged confessions saying the police extracted the caution statements through torture.

Each appellant filed an elaborate memorandum of appeal reiterating that they were not identified by the single eye witness, that the conditions of identification during the night were difficult so possibilities of mistaken identity existed, and that the prosecution evidence against them was riddled with serious contradictions so the conviction should be quashed and set aside. The appellants did not wish to appear for the hearing.

Mr. Luena, learned State Attorney, represented the Respondent Republic. He did not support the conviction principally because the identification evidence was not watertight. Observing that the robbery was committed at night, the learned State Attorney doubted

whether the sole witness, PW1, identified the gangsters given that he only had torch light and the size of the torch or the intensity of its light was not disclosed. He referred us to the cases of **Waziri Amani versus Republic (1980) TLR 250; Mohamed Musero versus Republic (1993)** TLR 290; and **Nuhu Selemani versus Republic (1984)** TLR 93 in which the court quashed convictions based on poor/weak visual and unreliable identification by voice.

The learned State Attorney contended that although the complainant stated that he identified the appellants by torch light, he did not give their descriptions to prove that he recognized them on the material night. P.W.2, on the other hand, said that she escaped from the scene of crime and yet she claimed to have identified the 3rd appellant by voice. She, however, did not say what words the 3rd appellant spoke during the robbery or how she identified him by voice when she escaped from the scene of crime implying she had no opportunity to identify the robbers. Given the doubtful and weak evidence of identification, the learned judge ought to have quashed the conviction, the learned State Attorney argued.

With regard to the retracted caution statements, Exhibit P3 to P5, the learned State Attorney opined that the said statements were erroneously admitted because the trial court did not put the exhibits to the appellants before admitting them. This is reflected on Page 10 of the record:

> *P.W.3 I pray for them (statements) to be accepted and mentioned as exhibits.*
>
> *Court: The caution statements accepted and mentioned as Exhibits P3, P4 and P5 respectively as tendered in court.*

All in all, the learned State Attorney found it unsafe to support the conviction given the weak identification evidence on record and the plausible defence of the appellants that the police extracted the caution statement through torture.

The issue before us is whether the two eye witnesses, P.W.1 and P.W.2 properly identified the appellants.

In the case of **Nuhu Selemani versus Republic** cited *supra*, the Court held that –

> *It is notorious that voice identification by itself is not very reliable.*

As observed by the learned State Attorney, the robbery was committed at night. It appears there was no light save for the torch light of the complainant. Conditions of identification were definitely difficult and unfavourable for there was no reliable source of light at the scene of crime. According to P.W.2 she identified the 3rd appellant by his voice, but she did not disclose how familiar she was with the particular voice or what words the 3rd appellant uttered at the scene of crime to enable P.W.2 to recognize his voice. In fact P.W.2 said that she fled from the room when the suspects invaded their house. It being night time, P.W.1 and P.W. 2 might not have identified the suspects visually, let alone P.W.2 managing to identify the 3rd appellant by voice.

It appears that there is no proof on record that the caution statements, Exhibits P3 to P5 were made voluntarily by the appellants. Furthermore, the caution statements were not put to the

appellants to get their comments before they were admitted. Section 127 of the Evidence Act, Cap 6 R.E. 2002 states, *inter-alia*:

> *27. (1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.*
>
> *(2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.*
>
> *(3) A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority.*

As the caution statements, Exhibits P3 to P5, could have been obtained involuntarily as alleged by the appellants, and because the appellants had no opportunity to challenge their admission during the trial, we find it unsafe to rely on the said caution statements.

In the light of the above, the learned State Attorney correctly declined to support the conviction in view of the weak identification evidence against the appellants.

We accordingly allow the appeal, quash the conviction, and set aside the sentence and the compensation order. We order that the appellants be released forthwith if they are not detained for other lawful cause.

DATED at DAR ES SALAAM this 11th day of March, 2008.

E. N. MUNUO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR