AT DODOMA

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 110 OF 2007

1. PAULO MADUKA
2. SAMWEL KIMARI
3. EDWARD BUKANGARA ..... APPELLANTS
4. LUTONJA SAWAKA
5. HASSANI MGUNYA

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Lila, J.)

dated the 26th day of March, 2007
in
(DC) Criminal Appeal NO. 4 cf 5, 6, 7 of 2005

JUDGMENT OF THE COURT

21 & 28 October, 2009

RUTAKANGWA, J.A.

This is a second appeal. The appellants were convicted, as jointly charged, by the District Court of Singida, of the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code, Cap 20. They were each sentenced to thirty years imprisonment.

The evidence which led to their conviction was, briefly, as follows: On 31st August, 2002 at about 01.00 hours a robbery took place at Makiungu hospital in Singida town. The robbers, apparently, were armed with guns and explosives. The guns were fired and this drew a response from PW10 Leonard Gwangwa, a watchman at the hospital. When the firing continued PW10 took cover.

The gunfire aroused from sleep, PW8 Sister Dr. Mariam R. Scenl and PW9 Sister Justina Odimukwe who alerted the police. The two were by then the hospital's doctor in charge and Administrative Officer, respectively. The police responded but by the time they arrived at the scene of the crime, the bandits had already left with their loot.

The police officers led by the O.C. C.I.D. of Singida, PW1 Shilogile Kitambi, inspected the hospital premises to ascertain the damage. It was found out that the cash office had been broken into. The cash safe therein had been blown open and some computers destroyed. Found in the cash office and on some doors and roof, was what was described by PW12 Amini Mahamba (the R.C.O.) as

"**mud used for explosives**" (exhibit PE 10). PW2 No. E 5438 P.C. Opodi drew a sketch map of the scene, at which four G3 rifle and two shotgun empty shells (exhibit PE1) were recovered. The hospital's properties which were allegedly stolen were:-

(i) cash Tshs. 3,000,000/= and US$ 1,500, all in notes,

(ii) a cheque book,

(iii) vehicle ignition keys,

(iv) electric toothbrushes,

(v) one rechargeable torch,

(vi) 25 tubes of crest tooth paste and

(vii) 100 rounds of shotgun ammunition.

Thereafter, police investigations began in earnest.

The investigations led to the arrest of six (6) suspects who included the appellants in Singida and Tabora towns and in Urambo district. All of the appellants, on their arrest were found in possession of cash money, in banknotes, of varying amounts. Part of the money possessed by the appellants, allegedly, had some "**mud**" and "**holes**" on it. The 1st appellant's bag was also found to contain six tubes of crest tooth paste, one **battery toothbrush** and some

clothes. The 4th appellant was also found, at his home in Urambo district, in possession of one piece of toothbrush, two tubes of crest tooth paste, one "***gobore***" and one shotgun. On top of that, all of the appellants, save for the 5th appellant, allegedly confessed to the armed robbery.

Part of the money seized from the appellants was claimed to have been sent to the Chief Government Chemist, Dar es Salaam, for scientific analysis. The Chief Government Chemist's report (exhibit PE 15) showed that the submitted banknotes had traces of nitrates, a chemical used in the manufacture of explosives. On these pieces of evidence, the prosecution sought the conviction of the appellants as charged.

The appellants in their defence, denied committing the robbery. Each one claimed not to have been near the scene of the crime, either before, during or after the commission of the robbery. All claimed that the money and other articles seized from them were their lawfully obtained properties. They vehemently denied the allegations that part of their money had either "**mud**" or "**holes**" or

both on it. The alleged confessions contained in the cautioned statements were either repudiated or retracted. All of them, as they had done on the day they were first arraigned, told the trial court that the police tortured them persistently for a number of consecutive days in order to extract involuntary confessions from them. To support the claims of torture in the hands in the police, each appellant tendered in evidence, without any objection from the prosecution, hospital records evidencing their treatment for injuries sustained.

The learned trial Principal District Magistrate, while accepting that they were physically assaulted, preferred the prosecution version. After holding that the confessions were freely made, she said:-

> "... Following ... the famous case of **Tuwamoi v. Uganda** E.A. 84 (sic) I will not base conviction solely on the confession of accused persons unless corroborated by another evidence ..."

Such corroborative evidence was found in exhibit PE 15. She reasoned that as the cash safe had been blown open by explosives and the banknotes submitted to the Chief Government Chemist had traces of nitrates on it, then the appellants who had failed to account for its possession, got the seized money from the hospital's cash office. She accordingly convicted them.

The appellants' appeal to the High Court was dismissed for similar reasons. The learned first appellate judge went further and held that the "**discovery of the gun used in the commission of the offence**", effectively incriminated them. We should hasten to confess that we have found no scintilla of evidence on record to support this finding of fact.

On the other articles seized from the appellants, the learned judge postulated thus:-

> "... While I agree that the tooth paste and electric torch are common items, but **electric toothbrushes are not common** items. However, I have asked myself what a coincidence is there, all the appellants were

found in possession of money (banknotes) with holes and muddy and 1st and 4th accused being found with tooth paste make crest, electric toothbrush and electric torch. It is my view that by any stretch of imagination this cannot be a coincidence. The facts lead to a conclusion that such things must have been from the same source ... The explanation offered by the appellants that the money, tooth paste make crest, electric toothbrush and electric torch were their respective things **are not acceptable as such accounts do not go to the extent of establishing as to why such money had holes and mud.**

Following the above, I am in total agreement with the learned State Attorney that the doctrine of recent possession was rightly applied by the trial magistrate ..." [Emphasis is ours.]

Aggrieved by the decision of the High Court, the appellants have lodged this appeal. The 2nd and 5th appellants filed a joint memorandum of appeal. For the other appellants, each one filed his own memorandum of appeal. Although on record we have thirty

(30) grounds of appeal in all, the complaints are almost similar. They boil down to this. That:-

(a) their conviction was based on uncorroborated repudiated and/or retracted confessions mostly obtained through torture;

(b) their conviction was wrongly based on the doctrine of recent possession which was predicated on contrived evidence; and

(c) the two courts below abdicated their duty of subjecting the entire evidence to an objective scrutiny and as a result they ended up not considering each appellant's defence either adequately or at all.

To prosecute the appeal each appellant appeared before us in person. The respondent Republic was represented by Mr. Patience Ntwina, learned Senior State Attorney.

The appellants' memoranda of appeal were detailed and elaborated. So they had nothing useful to add to them.

On his part, Mr. Ntwina first supported the conviction of the appellants, on the basis of the core reasons given by the two courts below. However, in the search for solid evidence to bolster his stance, it occurred to him that the 5th appellant never made any cautioned statement at ail, contrary to the holdings of the two courts below. This fact bears out the appellants on their contention that the two courts failed to objectively analyse the entire evidence.

Furthermore, in his bold attempts to present a considered response to the other two grievances, he found out, and candidly conceded, that no evidence was led to prove that the money which was sent to the Chief Government Chemist, was part of the money which had been seized from the appellants. He, therefore, opined that the doctrine of recent possession was wrongly invoked in the circumstances, as the other seized articles were goods of common use readily obtainable from shops. Regarding the disputed confessional cautioned statements, it occurred to him again that the same were irregularly admitted in evidence. The trial District Court admitted them despite objections made, without conducting any inquiry to determine if they were made at all or if they were made

whether they were made voluntarily, he stressed. He accordingly invited us to discount them altogether. He therefore declined to support the conviction of the appellants.

In this appeal, we have two crucial issues to decide. **One,** whether the appellants made any confessions at all and if yes, whether they made them voluntarily. **Two,** whether or not the appellants were found in possession of any of the robbed properties. We shall start with the first issue.

There is no doubt that a confession to an offence made to a police officer, is admissible in evidence. The very best of witnesses in any criminal trial is an accused person who confesses his guilt. However, such claims of accused persons having made confessions should not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily. The confession should have been **"free from the blemishes of compulsion, inducements, promises or even self-hallucinations."** See, **TWAHA ALI AND 5 OTHERS v R,** Criminal Appeal No. 78 of 2004 CAT (unreported).

Were the alleged confessions of the appellants, assuming without deciding here that they were made, so freely made?

In order to answer satisfactorily the above question, it will be instructive to return to the case of **TWAHA ALI** (supra). The Court lucidly said that the law is that a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground that it was not so or it was not made at all. The Court went on to hold:-

> "... If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the alleged confession. **Such an inquiry should be conducted before the confession** is admitted in evidence ..." [Emphasis is ours.]

Omission to inform the accused of this right and/or to conduct an inquiry or a trial within a trial in case there is an objection raised,

the Court held, results in a "**fundamental and incurable irregularity.**" This is because, if the objected confession is the only crucial and/or corroborative evidence, an accused would be convicted on evidence whose source is not free of doubt or suspicion. For this reason, as no such inquiries were made to decide on their voluntariness, we discount the repudiated and/or retracted confessions of the 2nd, 3rd and 4th appellants.

PW12 Amiri S. Mahamba, claimed to have recorded the confessional cautioned statement of the 1st appellant on 31/08/2002. This appellant swore never to have made any statement to the police or to have confessed to the robbery at all, in spite of being tortured by the police for four consecutive days, i.e. from 6th to 10th September, 2002. Evidence of physical assault on him causing actual bodily harm while in police custody is abundant (exhibit DE 1) and went uncontroverted.

We have asked ourselves this simple but pertinent question. If the 1st appellant freely confessed to the armed robbery on the very first day of his arrest, why was he subjected, like the other

appellants, to sustained assaults nearly a week after his arrest, for a number of days? Since the appellants' substantiated claims of torture by the police in order to force them to confess were not controverted by the prosecution, it is our considered conclusion that the alleged confessions relied on by the two courts below, were not voluntarily made by the appellants. If that was the case, should these cautioned statements have been admitted in evidence? The answer to this germane question was provided by this Court in the case of **BRASIUS MAONA AND GAITAN MGAO v R**, Criminal Appeal No. 215 of 1992.

In **BRASIUS MAONA** (supra), the Court said:-

> "Once torture has been established, courts should be very cautious in admitting such statements in evidence even under the provisions of section 29 of the Evidence Act, 1967 which in our considered opinion was not meant to be invoked in situations where the inducement involved is torture."

See also, **DOTTO NGASSA v R**, Criminal Appeal No. 6 of 2002 and **MASELO MWITA @ MASEKE AND ANOTHER v R**, Criminal Appeal No. 63 of 2005 (both unreported).

In view of the above, we respectfully hold that the two courts below erred in law in grounding the conviction of all the appellants on such inadmissible evidence, which is hereby discounted in its totality. This leaves us with the issue of recent possession.

The presumption behind the doctrine of recent possession, in our considered opinion, has to be applied with great circumspection. As this Court clearly held in the case of **ALLY BAKARI AND PILI BAKARI v R** [1992] T.L.R. 10:-

> "... the presumption of guilt can only arise where there is cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged, and no doubt, it is the prosecution who assumes the burden of proof ..."

See also, **JAMES s/o PAULO @ MASIBUKA AND ANOTHER v R,** Criminal Appeal No. 61 of 2004 and **JUMANNE RASHID @ KICHOCHI v R**, Criminal Appeal No. 206 of 2005 (both unreported).

In the instant case the prosecution relied on the monies, tooth paste, toothbrushes and a rechargeable torch found in the possession of the appellants. We have shown that although the learned first appellate judge had accepted that "**tooth paste and electric torch are common items,**" he was of the firm view that "**electric toothbrushes are not common items.**"

We have scanned the entire evidence on record. With due respect to the learned judge, we have failed to glean therefrom a trace of evidence showing that any of the appellants was found in possession of "**electric toothbrushes.**" The only available evidence is that it was the 1st appellant who was found in possession of **one piece of "battery toothbrush."** Furthermore, our scrutiny of the charge sheet has revealed that the appellants had not been charged with stealing either an electric toothbrush or a battery toothbrush. It was PW9 who mentioned "**electric toothbrushes**" in her evidence.

As for the other articles, save for banknotes, we are in agreement with Mr. Ntwina that as these were goods in common use, the prosecution failed to prove that they belonged to Makiungu hospital.

Regarding the money seized from the appellants, we concur with the contention of Mr. Ntwina to the effect that no evidence was led to connect it with the money stolen from the hospital. We appreciate the fact that the hospital administration was not expected to have listed down the serial numbers of the banknotes before keeping the same in the blown up safe. As such, the prosecution had to keep a proper record of the monies seized by recording their serial numbers. This was not done at all. We have found no evidence to prove that the banknotes submitted to the Chief Government Chemist, was part of this money. Admittedly, this was the prosecution's smoking gun. Unfortunately, this "**gun**" misfired. As consistently argued by the appellants and eventually rightly conceded before us by Mr. Ntwina, no iota of evidence was proffered by the prosecution to prove that this money was part of the money seized from the appellants. This was a result of the fatal failure by the police investigators to comply with the mandatory provisions of

section 38 (3) of the Criminal Procedure Act, Cap 20, Vol. I R.E. 2002.

Section 38 (3) of Cap 20 provides thus:-

> "Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of the thing, being the signature of the occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

If these mandatory requirements had been complied with, of necessity, the various denominations of the banknotes and their serial numbers would have been listed. The appellants and independent witnesses would have put their signatures thereon and each retained a copy of the same. Thereafter, a foolproof **chain of custody** would have been set in motion. By "**chain of custody**" we have in mind **the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer,**

analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime – rather than, for instance, having been planted fraudulently to make someone appear guilty. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.

In the case at hand, unfortunately, this salutary guiding principle in criminal investigations, was not observed and enforced. As a result there was no linkage between the money seized from the appellants and the one sent to the Chief Government Chemist, and therefore the money robbed from the hospital. Without this linkage, the entire prosecution case was bound to crumble. Furthermore, as the guns seized from the 4th appellant had nothing to do with the armed robbery, there remains nothing on record, except mere suspicions, to implicate the appellants with any offence.

All said and done, we are constrained to hold that although an armed robbery took place at Makiungu hospital, it was not proved that the appellants were the robbers or part of the robbers. We accordingly allow this appeal in its entirety. The conviction of the appellants and the sentences of imprisonment imposed are hereby quashed and set aside. The appellants are to be released forthwith from prison unless they are otherwise lawfully held. The appellants' seized properties to be returned to them.

DATED at DODOMA this 28th day of October, 2009.

J. H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(Z. A. MARUMA)
DEPUTY REGISTRAR