IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 234 OF 2010

SALIM PETRO
PAULO PETRO ..... **APPELLANTS**

VERSUS

THE D.P.P. .....RESPONDENT

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

(Msoffe, J.)

dated the 29th day of August, 2003
in
Criminal Appeal No. 60 of 2000

JUDGMENT OF THE COURT

28th February & 1st March, 2011

NSEKELA, J.A.:

This is a second appeal. The appellants (1) Salum Petro and (2) Paulo Petro were charged with armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 R.E. 2002 and were convicted and sentenced to thirty (30) years imprisonment each with twelve strokes of the cane. An order of compensation of Shs 640,040/= to the complainant,

PW1 Short s/o Singh was made against each of them. They unsuccessfully appealed to the High Court (Msoffe, J as he then was), hence this appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic was represented by Mr. Zakaria Elisaria, learned State Attorney. The appellants filed a joint memorandum of appeal with four (4) grounds of appeal and added two more grounds of appeal at the hearing of the appeal.

The thrust of the grounds of appeal was to the effect that **first**, that there was non-compliance with section 50(1)(a) of the Criminal Procedure Act 20 RE 2002 (CPA); **second**, that there was no evidence that PW1, Short Singh, was the owner of the allegedly stolen goods; **third** that one Inspector Rogathe, PW4 acted as both Public Prosecutor and prosecution witness as well; **fourth** that DW3, Haji Iddi was an accomplice and therefore his evidence required corroboration; **fifth**, that the cautioned statements, were wrongly admitted in evidence.

The first ground of complaint raised by the 1st and 2nd appellants concerned the alleged non-compliance of section 50(1) (a) of the Criminal Procedure Act Cap.20 RE 2002. The complaint was to the effect that their respective cautioned statements exhibits P9 and 10 were taken after the expiry of the prescribed four hours and that, there was no application for its extension. Under the circumstances, the statements were wrongly admitted and acted upon in convicting them. Section 50(1)(a) and (b) and 51(1)(a) and (b) of the CPA provide as follows-

> *"(1) For the purposes of this Act, the period available for interviewing the person who is in restraint in respect of an offence is-*
>
> *(a) Subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*
>
> *(b) If the basic period available for interviewing the person is extended under section 51 the basic period so extended*

51(1) where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may

(a) Extend the interview for a period not exceeding eight hours, and uniform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period".

The first appellant, Salum Petro, was arrested on the 25.7.99 and the second appellant was arrested on the 28.7.99. Their respective statements were taken on the 29.7.99 contrary to the basic period available for interviewing a person who is in police custody in terms of sections 50 and 51 of the CPA reproduced above. As correctly submitted by the learned State Attorney, there is no evidence on the record that there was an

application to extend the period prescribed under section 50 of the CPA. This means the statements made by both the appellants were inadmissible in evidence. (See: Criminal Appeal No. 308 of 2007, **Roland Thomas @ Mwangamba V The Republic** (unreported)

The 2nd appellant made a statement exhibit P.10 on the 29.7.99. Inspector Rogathe, PW4 tendered this statement in evidence and the first appellate court relied on it in its judgment. In his submissions which the first appellate judge quoted with approval what, Mr. Kaishozi had submitted as follows:

> *"Interestingly his cautioned statement was tendered and admitted as exhibit P.10 and whenever (sic) objected to it. Then how could he turn back and make an appeal exonerating himself from all these and faulting the trial magistrate for founding him guilty?"*

The issue at hand is that this statement was improperly admitted in evidence since the interview contravened section 50 of the Criminal Procedure Act. The statement should not have been taken into account in

convicting the second appellant. In the same vein, exhibit P9, a statement made by the 1st appellant, Salum Petro, was wrongly admitted in evidence and was taken into account in convicting him.

The second ground of complaint related to the ownership of exhibit P1; the motor cycle battery; exhibit P2, the camera (Yashica); exhibit P3, the rifle; exhibit P4, ammunition, exhibit P5, Radio cassette National Panasonic; exh. P6, blanket; exhibit P7, towel and exhibit P8, black bag (Rebok). All these items were tendered in evidence. PW1, Short s/o Singh, testified all these items belonged to him. PW1 however, did not give any description or some distinctive mark to establish that these items belonged to him. It was alleged that in the 1st appellant's house, a motor-cycle battery and a Yoshica camera were found, but to whom did they belong? The evidence on the cautioned statements has been discounted. It should not have been acted upon to convict the appellants. The prosecution has the burden to establish that the appellants indeed stole these items, but from whom? There is no scintilla of evidence to link ownership of the motor-cycle battery and the Yoshica camera with PW1.

The same thing can be said of the camera which could be traced to the 1st appellant. PW1 did not give any description that the camera belonged to him. This Court in **Omari Musa Juma v Republic**, Criminal Appeal No. 73 of 2005 (unreported) made the following pertinent observations-.

> *"In the circumstances of the case where the only incriminating evidence against the appellant was the bag, we think it was important for the witnesses to describe the bag and its contents by their distinctive colour, marks if any etc. this was important because anybody else for that matter could have owned a bag with similar colour."*

Indeed, in this case did PW1 have the exclusive ownership of the motor cycle battery, exhibit P1; or the camera (Yashica), exhibit P2 or Radio cassette National Panasonic, exhibit P5? In the absence of evidence that PW1 was the owner of these allegedly recently stolen items a court cannot justify an inference of guilt on the part of the appellants.

The learned judge on first appeal adopted the submissions of Mr. Kaishozi whose submissions he quoted. The statement of the 1st appellant was admitted in evidence and used against him. This statement has been expunged from the record and therefore there is no other evidence on the record to link him to the robbery.

The 4th ground of appeal challenged the evidence of DW3 Haji Iddi who was the third accused person during the trial. DW3 testified that the 2nd appellant, Paulo Petro sold him a radio – National Panasonic exhibit P5. This is one of the items that PW1 claimed had been stolen from his premises. This testimony implicated the 2nd appellant in the robbery while at the same time DW3 was distancing himself from the incident. In the High Court DW3 on the facts was convicted of receiving stolen property contrary to section 311(1) of the Penal Code. DW3 was the 3rd accused person during the trial and therefore an accomplice, he participated in the commission of the crime charged with. The evidence of DW3 therefore is unworthy of credit unless corroborated in material particulars. There is the evidence of DW9. Ally Masoud, who testified that the 2nd appellant told him

that he had sold his radio to DW3. The question is which radio, the one belonging to PW1? This evidence is hardly corroborative of DW3's testimony so as to link the 2nd appellant with the offence of robbery. In the case of **R v. Baskerville** (1916) 2kb 658 at page 667 Viscount Reading LCJ said-

> *"We hold that the evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates hi, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it".*

It was therefore not safe for the court to act upon the evidence of DW9, Ally Masoud, and DW3 Haji Iddi.

For the above reasons, we allow the appeal. We do not deem it necessary to consider and determine the other ground of appeal. We quash and set aside the appellants' convictions and sentences imposed upon them and the order for compensation to be paid to PW1. The appellants' should be released forthwith from custody unless otherwise lawfully detained.

DATED at **ARUSHA** this 28th day of February, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR