IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NSEKELA, J.A., MASSATI, J.A And MANDIA, J.A.)

CONS. CRIMINAL APPEALS NO. 31, 93 & 94 OF 2010

1. **NELSON GEORGE @ MANDELA**
2. **ABUBAKARI SADICK @ ABUBA**
3. **SIRAJI YAHAYA**
4. **MENGI RAMADHANI**
5. **HASHIM SAID**

..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Decision of the High Court of Tanzania, at Bukoba)

(Lyimo, J.)

dated the 19th day of February, 2010
in
H/C Criminal Appeals No. 42, 43, 45, 46 and 47 of 2008

JUDGMENT OF THE COURT

15th & 22nd November, 2011

MASSATI, J. A.:

The five appellants were among the six persons who were charged with six counts of armed robbery contrary to sections 285 and 286 of the Penal Code in the District Court of Bukoba. The 6th accused, one **Atbuman** Musa, was found to have had no case to answer and was acquitted after the close of the prosecution's case. The 1st and 2nd appellants had also pleaded guilty to the first count and were convicted

and accordingly sentenced to 30 years imprisonment and twelve strokes of the cane each. After a trial that lasted for about 13 months, in which the prosecution paraded twelve (12) witnesses, and 10 exhibits, the appellants were convicted of all the six counts, and sentenced to 30 years imprisonment with twelve (12) strokes of the cane each, the sentences to run concurrently.

It was alleged before the trial court that on the 16th day of January, 2007 at about 5 p.m. in the evening, the five appellants together with another, pirated in the waters of Lake Victoria and, with the aid of ammunitions, robbed 4 boat engines with divers horse powers, two shot guns, a cell phone, a bag of sugar, a bagful of clothes and shs. 400.000/= cash belonging to Hidaya Adamu (PW1) Kagera Security Company, Lameck Mazugo (PW3) Peter Charles (PW7) Medard Kaijage (PW8) and Shabani Deto Ikeja, who did not testify.

At the first appeal, the High Court found all the convictions justified and dismissed their appeals except the one on the 6th count and allowed their appeals against that conviction. The rest of their grounds were

dismissed. They have now lodged the present appeals in this Court which were consolidated.

It may be appropriate to briefly revisit the facts. HIDAYA ADAMU (PW1) owns a passenger boat christened the TITANIC, which shuttles between Bukoba Municipality and Kerebe Island, in Lake Victoria. It is captained by one MUDRIKAT IANZA (PW6) and powered by two YAMAHA make engines with 40 and 9 HP each. Before setting sail in the evening of 16/1/2007 from Bukoba, PW1 realized from the passenger manifesto that there were about 40 passengers in the boat. They set off. On the way, before reaching Kerebe Island, PW1 heard the sound of a gunshot, and an order for all to lie down. It was from one of the passengers. Men were ordered to put off their trousers, and surrender their money and mobile phones. One passenger was made to part with his cash Tshs. 2,000,000/= Shortly thereafter, a patrol boat appeared and one of the robbers beckoned to it for assistance, but when the patrol boat came near the TITANIC with a view to rescuing the passengers therein, the cruisers of the patrol boat realized that they were tricked, and there then followed an exchange of fire in which one of the pirates was hit by a bullet in the leg. However, the patrolmen were eventually overpowered. It was then that the pirates collected whatever they could take from the TITANIC, together

with its bigger boat engine, transferred them to the patrol boat which they took charge, taking the patrolmen along as hostages and fled, leaving the TITANIC to be moored by oars up to Bukenya Island, from where it was pulled to Kerebe Island. Later, the incident was reported to the police Bukoba. On or about 18/1/2007 PW1 and other victims were called to Mwanza, where they identified their stolen properties. An identification parade was then conducted at Bukoba, on 26/1/2007 where the appellants were said to have been identified. It is on the basis of the identification parade, visual identification, and cautioned statements of the 1st and 2nd appellants and discovery of some of the stolen properties, that the appellants were charged and convicted by the lower courts.

Before this Court, all the appellants appeared in person and filed separate memoranda of appeal containing between four to seven grounds of appeal. Except, for the first and second appellants, who in their grounds also challenge their pleas of guilty, the appellants' grievances can conveniently be grouped into six major ones. **First**, that there was weak evidence of visual identification marked by a poor identification parade; **two,** that the appellants were wrongly associated with the recovered stolen properties; **three**, the lower courts wrongly admitted and acted on

the cautioned statements of the first and second appellants (Exh P7) **fourth,** that there were contradictions and inconsistencies in the testimonies of the prosecution witnesses; **fifth** that the defence case was not considered; and **lastly**, that the prosecution case was not proved beyond reasonable doubt. The memoranda of appeal of the second, fourth and fifth appellants also referred to us a number of decisions as authorities. They are **LAWRENCE MPINGA V R** (1983 TLR. 166, **ISRAEL KAMUKOISE AND ANOTHER V R** (1953, 23 EACA 521 **SAIDI HEMED V R** (1987) TLR 120, **SMITH V DESMOND** (1969, EA; **HASSAN MZEE MFAUME V R** (1991) TLR. 167, **GABRIESL KAMAN NJOROGE V R** 1982 – 1988 1 KAR 113. **SALEHE MMENYA AND OTHERS V R Criminal Appeal No. 66 of 2006** (unreported). **ASIA IDD V R** (1989, TLR 1, and **MOHAMED ALLUI V R** (1942, 9 EA CA. 72. At the hearing, the appellants just adopted their memoranda and had nothing to amplify.

The respondent/Republic was represented by Ms Jacqueline Evaristus Mrema, learned State Attorney. At the outset she made it plain that, while she fully supported the convictions of the 1st and 2nd appellants for the first count, to which they unequivocally pleaded guilty, she did not support the rest of the convictions of the appellants, including the second to fifth

counts for the first and second appellants. She advanced a number of reasons in support of her position. **First**, the cautioned statements of the 1st and 2nd appellants, were received without as much as an inquiry by the trial court. Although the High Court realised this mistake, it decided to ignore it and proceeded to rely on it in confirming the convictions. This, she submitted, was wrong and Exhibits P7 collectively should neither have been received nor acted upon. She referred us to the decision of **TWAHA ALLY AND 5 OTHERS V R Criminal Appeal No. 78 of 2008** (unreported). **Second**, according to the record, the 1st and 2nd appellants were not accorded an opportunity to cross examine PW2 who tendered Exhibit P2, presumably because they had already pleaded guilty to the first count. This was wrong, because PW2 had come to testify on the 3rd count. Failure to grant opportunity to cross examine was a denial of a fair trial, according to **MASOME ROBERT V R Criminal Appeal No. 321 of 2007** (unreported). **Thirdly**, the trial court wrongly sentenced the 1st and 2nd appellants for the second time, when it imposed an omnibus sentence of 30 years imprisonment on all the accused persons on each count. The High Court did not notice this error. **Fourthly**, with regard to the 3rd 4th and 5th appellants, the two courts below wrongly acted on Exhibit P7 which were not only wrongly received, but even if they were regularly received did not implicate all the appellants. Apart from Exh. P7, the rest of the

evidence of visual identification was weak; the evidence of identification parade which would have corroborated that of visual identification was fraught with discrepancies. The admission of exhibits also left much to be desired because, although the exhibits were seized by PW12, they were tendered by PW11 and PW5. The 5th appellant was lumped together with witnesses who later identified him at an identification parade. The learned counsel went on to submit that although the 5th appellant had complained in his defence that the identification parade was irregular, which was admitted by PW6, the two courts below never considered this side of the defence case. This was wrong, she submitted, referring to **HUSSEIN IDDI AND ANOTHER V R** (1986) TLR. 166 and **MKAIMA MABAGALA V R Criminal Appeal No. 267 of 2006** (unreported). Lastly, Ms Mrema, addressed us on the contradictions and inconsistencies in the testimonies of the prosecutions witnesses. She contended that it was implausible for PW2 to have lied prostate on the deck of the boat, and yet be able to see and identify and 2nd and 5th appellants as well as hear the 5th appellant barking orders. She also referred to us the contradictions between the evidence of PW2 who said the patrol boat had three people but PW4 said that there were five people. She insisted that PW12 obviously lied to the trial court when he testified that the witnesses did not see the suspects before they were brought to the identification parade, because PW6

confirmed that he was in the same room with the suspects at Kirumba police and later boarded the same boat to Bukoba for the identification parade. PW10 also confirmed when asked by the 5th appellant, that, someone had complained about the irregularities in the conduct of the identification parade. In sum, it was the learned counsel's submission that, on the evidence there are grave doubts on the safety of the convictions of the appellants, and therefore urged us to allow the appeals of all the appellants (except the 1st and 2nd) on all counts and those of the 1st and 2nd appellants on the second to the sixth counts. The appeals against the convictions on the 1st count by the 1st and 2nd appellant should be dismissed.

There is no doubt that the convictions of the 1st and 2nd appellants depended partly on their pleas of guilty to the first count and partly to the other pieces of evidence which we shall examine below. The 1st and 2nd appellants have raised in this Court the complaint that their pleas of guilty, were not unequivocal.

We have looked at the pleas and the proceedings of the trial court and the High Court on first appeal. The appellants are not disputing that

when the charge of armed robbery was read over to them they both pleaded to the first count as follows:-

"1st Accd. It is true I did the robbery.

2nd Accd. It is true I did the robbery."

They pleaded "it is not true" to the rest of the counts. When the facts of the first count were read over to them they pleaded:-

"The facts are correct and true.

We admit them"

In the facts, it was alleged that the duo stole a boat engine, owned by one Hidaya Adam, and immediately before and after the said stealing they fired a few bullets in the air. So basically, all the ingredients of armed robbery were disclosed in the narration of the facts; and the appellants agreed that they were correct.

We are satisfied that all the tests for an unequivocal plea of guilty set in **R V YONASANI EGALU AND OTHERS** (1942) 9 EACA 69 were met.

We therefore find no substance in this ground of appeal and we accordingly dismiss it.

The convictions of the other appellants, in all the counts (and the 1st and 2nd appellants on counts two, three, four and five) were grounded on the following pieces of evidence. **First**, the cautioned statements of the 1st and 2nd appellants (Exhibit P7 collectively; **second,** visual identification coupled with an identification parade (Exp P 6) and lastly Exhibits P1, P2, P3, P4, P5, P8, P9 and P10.

We agree with Ms Mrema, that, Exh. P7 was not properly received. As correctly pointed out by her, in law, if the prosecution intends to admit a cautioned statement in evidence, and the accused objects to its admissibility, the next step (and if it is a subordinate court as in the present case) is to make an inquiry as to the voluntariness of the statement. Once this question is determined and the court finds that the statement was made voluntarily, it admits it, and proceeds with the trial. (See **TWAHA ALLI AND 5 OTHERS V R** (*supra*). If this process is not done, and the court receives such evidence, the statement would have been improperly received; and the court cannot act on such evidence as

the High Court did in this case on first appeal. Exhibit P7, should therefore be expunged from the record.

Ms Mrema, had the impression that since the cautioned statements were improperly received, the whole trial was tainted. That impression had no legal foundation. The cure to improper admission of evidence is found in section 178 of the Evidence Act Cap. 6 R.E. 2002, which reads as follows.

> *178: "The improper admission or rejection of evidence shall not be on itself a ground for a new trial, or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that the rejected evidence had been received, it ought not to have varied the decision".*

The question in each case, therefore, where the Court finds that evidence which ought not to have been received in evidence, has been received or which ought to have been received, has been rejected, is

whether, the decision can still be supported by some other evidence, independent of the one objected to, or rejected.

We now turn to examine whether in the present case, there was any other independent evidence to support the convictions of the appellants.

In its judgment, the High Court was satisfied that the appellants were sufficiently identified by PW1, PW2, PW4 PW5 and PW6, considering the time these witnesses spent with the bandits and because the trial court found those witnesses to be credible, and that these were corroborated by Exhibits P7, the first and second appellants' cautioned statements.

We have consistently observed in the past that in matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification may be ideal but that is no guarantee against untruthful evidence (**See JARIBU ABDALLAH v R Criminal Appeal No. 220 of 1994** (unreported) Credibility of a witness may be tested by his demeanour, or coherence of his own evidence or by its cogency in relation to the evidence of other witnesses, including that of the accused persons. (**See SHABANI DAUDI v R Criminal Appeal No. 28 of 2001**

(unreported) It must therefore be noted that when assessing the credibility of a witness all the evidence must be considered and assessed; not just selected portions of the evidence.

Now, in the present case, as Ms Mrema has rightly pointed out, certainly, the testimonies of PW1, PW2 and PW4 are not consistent. The evidence of PW6 and Pw12 is also contradictory, in so far as the identification of the suspects was concerned. The said contradictions are in our view, substantial, because they all go to the issue of the identification of the suspects which was a crucial one in the case. But most importantly, if the witnesses recognized the alleged bandits why didn't they give their descriptions to the police in Bukoba where they first reported the robberies. (See **MOHAMED BIN ALLI V R**) (*supra*). Why did the police in Mwanza have to rely on their data bank of lake pirates and go for a confession from the 5th appellant before 'unveiling' the identities of the other suspects? With these questions, we have considerable doubts in our minds, whether the witnesses were able to identify the robbers/ on their own without some sort of aid or guide. The appellants deserve the benefit of those doubts. It is therefore in our judgment that the appellants were not properly, visually identified, let alone by the botched up identification parade which fortunately, the High Court has already

discarded. This discrepant piece of evidence could not have been capable of being corroborated, on its own right (See **AZIZ ABDALLA V R** (1991, TLR 71), let alone by Exh P7 (the confessions of co accuseds) which were not only retracted and wrongly admitted, but also, even without those short falls, they also needed corroboration as a matter of law and so cannot corroborate another (See **ALLY MSUTU V R** (1980) TLR. 1

The last major pieces of prosecution evidence we have on record are exhibits P1, P2, P3, P4, P5, P8, P9 and P10. Apparently, according to the two courts below, the value of these exhibits is derived from the fact that they were discovered "following revelations" in the first and second appellants' cautioned statements. (Exh P7) We have already discussed the probative value of Exhibit P7. But Ms. Mrema has also bitterly complained that the said exhibits were irregularly tendered by a witness who did not recover them; and the one who recovered them did not tender them so as to match the descriptions between what he recovered and what were tendered. But what is worse none of the appellants were found with any of the stolen exhibits. We entirely agree.

In law, recent possession of property recently stolen or unlawfully obtained can be the basis of a conviction for any crime connected with the asportation of that property. (See **ALLY BAKARI v R PILI BAKARI** (1992, TLR. 10, **MWITA WAMBURA v R Criminal Appeal No 56 of 1992** (unreported) But for that doctrine to be invoked, four conditions must be met. **First,** that the property must be found with the suspect. **Second,** the property must be positively identified as that of the complainant. **Third;** that there must be evidence that the property was stolen from the complainant; and **lastly** the theft of the property must be recent. And in order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen properly, and any discredited evidence on the same cannot suffice, no matter from how many witnesses. (**See CHRISTOPHER RABUT OPAKA v R** Criminal Appeal No. 82 of 2004 (unreported)

In the present case Exh P1 (boat Engine HP 40) was tendered by PW1 which she identified at Mwanza. Exh P2 was identified and admitted by PW2. Exhibit P3 was tendered by PW3. Exh P4 was tendered by PW4. PW6 also admitted Exh. (P40 (but correctly it is Exh P5) but none of these witnesses disclosed where those exhibits were seized from. Certainly none

of them testified that they were found in the possession of any of the appellants. If not for the plea of guilty to the first count, it would have been difficult to link Exh P1 with the 1st and 2nd appellants. Indeed, those exhibits were recovered and identified by the witnesses on 18/1/2007 before the appellants were arrested on 20/1/2007. PW11 E 8987 D/SG HAJI NYAMBO just received the appellants and some of the exhibits in Bukoba from Mwanza. They were brought by Sgt Michael. Those were exhibits P8, P9 and P10 the cash (shs 770,000/=) When cross examined by the 5th appellant, PW11 said he did not have a copy of the search warrant. This witness did not assist the court on whether the appellants were found with any of the exhibits. PW12, told the court that they first recovered 5 engine boats and two shotguns, at Mihama village along Lake Victoria shores, before hunting for the 5th appellant who was already in their data bank for lake bandits. It is not in evidence, who led them to discover these caches or whether the engines identified by the witnesses (PW2, PW3, PW4, and PW6) were among those dug out from Mihama village. Only after mounting some arrests that some "admissions" started coming out, but long after the alleged stolen articles had already been discovered and taken by the alleged owners. According to PW12 the 1st appellant was also allegedly found with an SMG gun and 14 cartridges in a black bag, but the warrant for its search was not produced,

nor did any independent witnesses to the search testify, considering the credibility of PW12. But even then, this gun and the cartridges were neither any of the stolen guns (there, the stolen guns were shot guns) nor was it alleged and proved that the alleged gun was used in the banditry. All the evidence that there is on record, is that, a gun was used, but there was no evidence, what type of gun it was. Neither was the 1st appellant charged with being in unlawful possession of a firearm and ammunition. On the basis of the current law excepting the plea of guilty to the first count therefore there was no sufficient evidence of recent possession of any of the stolen articles to link the appellants with any of the robberies.

When all is said and done, we entirely agree with Ms Mrema, that the prosecution case by itself is too weak to sustain the conviction of the appellants. So, we allow the appeals of the third, fourth and fifth appellants and quash all their convictions and set aside their sentences. We also allow the appeals of the 1st and 2nd appellants on the 2nd, 3rd, 4th and 5th counts and quash the sentences imposed upon them. However, we dismiss their appeals against convictions on the first count. The 3rd, 4th and 5th appellants are to be released forthwith from custody, unless they are otherwise held for some other lawful cause.

It is so ordered.

DATED at MWANZA this 19th day of November, 2011

H. R. NSEKELA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL