IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 318 OF 2010

MULANGALUKIYE AUGUSTINO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

Dated 15th day of June, 2001
in
Criminal Appeal No. 27 of 1999

JUDGMENT OF THE COURT

23rd & 25th November, 2011

MASSATI, J.A.:

The appellant was arraigned before the District Court of Ngara, in Kagera Region and charged with the offence of armed robbery contrary to Sections 285 and 286 of the Penal Code. He was convicted and sentenced to 30 years imprisonment. His appeal to the High Court (Mrema J) was dismissed. He has now come to this Court on a second appeal.

At the trial court, it was alleged that on the 30th day of August, 1997, at about 16.00 hours (at 4.00 pm) at the World Food Programme godown, Kasulo village, in Ngara district, the appellant used actual violence on FLORIDA D/O MERINGI, in order to steal or retain Shs 127,500/= Cash, two pairs of Khanga, worth Shs. 4000 /= and three pairs of skirts worth Tshs 4500.

The facts as found by the lower Courts are that on the 30th August 1997, at 4.pm FLORIDA MERINGI, (PW1) SALIMA ISSA, (PW2), LEONILA IMERUNGI (PW3) and JOYCE LEONARD (PW4) who were employees of the World Food Programme at its godown in Kasulo village, in Ngara District, were returning home after closing shop. Somewhere not far from the office some thugs ambushed them brandishing knives and clubs, and threatened them, before robbing them of their properties including cash, bags and clothes. The victims scuttled into the nearby bush for safety and later reported the incident to the security guards at Lukole Camp and the police station at Benaco. On 2/9/97 the appellant was seen selling some clothes. He was arrested and taken to his tent where he was searched. Some of the victims identified some of their stolen properties. It is on the

basis of this evidence that the appellant was charged. The appellant's defence was not more than a more denial, which was rejected, hence the conviction.

Before this Court, the appellant appeared in person and presented a nine ground memorandum of appeal, but which could conveniently be grouped into four major complaints. The first, is that, the lower courts wrongly convicted him of armed robbery when he was charged with robbery with violence. Secondly, that, he was not sufficiently identified. Thirdly, that none of the properties that he was found in possession with, were properly identified to belong to the victim of the crime. Lastly, that the two courts below wrongly relied on his cautioned statement. The appellant thus urged us to allow his appeal.

The respondent/Republic which was represented by Mr. Pius Hilla, learned State Attorney, did not support the conviction. On the ground that the appellant should have been convicted of the offence of robbery with violence instead of armed robbery, he submitted that, before amendment to the penal code introducing Section 287A in 2004, all types of robberies

were charged under sections 285 and 286. Whether it was armed or ordinary robbery would depend on the evidence as to the type of weapon used. In this case the allegation was that a knife was used. A knife was a dangerous weapon. So, but for his other reservations he had against the conviction the conviction for armed robbery would have been proper. He therefore prayed for the dismissal of this ground of appeal. On the appellant's complaint about weak visual identification, Mr. Hilla submitted that he agreed with this ground for the reason that although the robbery allegedly took place in broadlight, that was the first time any of the prosecution witnesses ever saw the appellant. But there was no effort to describe him nor was there any identification parade. Dock identification of the appellant was not sufficient. On the question of identification of stolen properties, Mr. Hilla hedged his submission on the premise that if the victim of the crime had properly identified any of her stolen properties found with the appellant, the doctrine of recent possession would have caught up with the appellant. But on the authority of the decision of this Court in **JAMES PAUL @ MASIBUKA & ANOTHER vR** Criminal Appeal No. 61 of 2004 (unreported), the doctrine would not apply because, in the present case, the victim of the robbery FLORIDA D/O MERINGI was not

able to identify any of the articles found with the appellant. The properties were identified by PW2 and PW4, but they were not the subject of the charge. Lastly, the learned State Attorney also agreed that the two courts below relied on the appellant's cautioned statement which was objected to by the appellant at the trial but admitted without first holding an inquiry to determine its voluntariness; and it was in any case obtained contrary to the provisions of section 50 (1) (a) of the Criminal Procedure Act (Cap 20 RE 2002). So the cautioned statement (Exh P4) should be expunged from the record.

We think that Mr. Hilla, was right in not supporting the conviction of the appellant. The trial Court was satisfied that there was armed robbery and that it was corroborated by the appellant's cautioned statement , and that he was identified by the prosecution witnesses. The High Court on first appeal, also found that there was sufficient evidence of visual identification, and that this evidence was corroborated by the appellant's cautioned statement, and also the fact that the appellant was arrested trying to sell some of the stolen properties.

We have no doubt that the offence of armed robbery was commited on the victims, PW1, PW2, PW3 and PW4. But we cannot lose sight of the fact that the appellant was charged with robbing only FLORIDA MERINGI. Whatever, PW2, PW3 and PW4 were robbed of, were not the subject matter of the charge facing the appellant. The issue is whether it was the appellant who committed the robbery on Florida Meringi?

There is no dispute that all the witnesses (PW1, PW2, PW3 and PW4) were seing the robbers who ambushed them on the way, for their first time. After the robbery, all the witnesses scuttled away into the nearby bush. Thereafter, there is no evidence, whether any of the witnesses gave a description of any of the robbers to whosoever they first reported. This, was a matter of the highest importance, and failure to do is a serious omission (**SEE Rv MOHAMED BIN ALLUI** (1942, 9 EACA. 72, **IBRAHIM SONGORO vR** Criminal Appeal No. 298 of 1993 (unreported) In **SONGORO's** Case, this Court cautioned that it was strange and sad that a trial Court should accept and rely on such general type of evidence without giving the descriptions relating to the particulars of each of the accused. Equally we find it strange and sad that, the two courts below in the present case accepted and relied on evidence of identification of the

appellant from the witnesses who did not even give prior description of the appellant. There is therefore substance in this ground of appeal.

If the appellant could have been found with any of the stolen properties constituting the subject of the charge, this could perhaps have linked the appellant with the offence by the doctrine of recent possession. But it is settled law that for the doctrine to apply, the stolen property found in possession of the accused must have a reference to the charge laid against an accused person. (**See ALLY BAKARI AND PILI BAKARI vR** (1992, TLR 10, **SALEHE MWENYA AND 3 OTHERS vR** Criminal Appeal No. 66 of 2006, and **JAMES PAUL @ MASIBUKA & ANOTHER vR** Criminal Appeal No. 61 of 2004 (both unreported) But in the present case the subject matter of the charge laid against the appellant are the properties of PW1. But when PW1 was testifying in chief, she said on p. 8 of the record.

"My stolen property I go (sic) nothing"

Those witnesses who identified properties found with the appellant were PW2, PW3, and PW4, but those did not constitute the charge that the

appellant had to answer. So, with due respect, to the two courts below, the doctrine of recent possession, was wrongly applied in the circumstances of the present case. This ground too, succeeds.

The last piece of evidence relied upon by the lower courts is the appellant's cautioned statement. This was tendered by PW5 and received as Exh P4. We entirely agree with Mr. Hilla that the exhibit was wrongly received in evidence. When the statement was about to be tendered by PW5, the appellant said:

"Defence: I object. As I didn't remember what I have told him.

Court: Cautioned statement is record (sic) and marked as exhibit P4"

Procedurally, this was wrong, and this error is incurable. The law requires that, where an accused person objects to the admissibility of a confession, the trial court should stop the trial. In the case of a subordinate court such as in the present one, the trial court has to conduct an inquiry into the voluntariness of the alleged confession. In the case of trial with the aid of assessors, the trial court has to go into a trial within a trial in the absence of assessors. It is only after determining that the

statement was obtained voluntarily that the trial court can admit/receive it in evidence. If it finds that it was not obtained voluntarily, it is rejected, and that is the end of that statement (**See TWAHA ALLY AND 5 OTHERS v R** Criminal Appeal No. 78 of 2004, **SELEMANI HASSANI vR** Criminal Appeal No. 364 of 2008) (both unreported) There is therefore no doubt in the present case, that the cautioned statement of the appellant (Exh P4) was wrongly received in evidence and should be expunged from the records. This ground of appeals also prevails.

Once Exh P4 is expunged from the record and since there is no other cogent evidence on which to base the appellant's conviction, the conviction cannot stand.

For the above reasons, we allow the appeal. We quash the conviction and set aside the sentence. We order the appellant's immediate release from prison unless he is held for some other cause.

DATED at **MWANZA** this 24th day of November, 2011.

E. N. MUNUO
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