IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 1 OF 2010

ALLY SAID @ NASSORO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Teemba, J.)

dated the 28th day of April, 2009
in
Criminal Appeal No. 34 of 2008

JUDGMENT OF THE COURT

25 March & 4 April, 2011

LUANDA, J.A.:

The appellant Ally s/o Said @ Nassoro was charged in the District Court of Handeni, along with three others who were discharged under the provisions of Section 91 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (henceforth the CPA), with armed robbery contrary to sections 285 and 287A of the Penal Code. After full trial he was convicted as charged and sentenced to thirty (30) years imprisonment.

Aggrieved by the finding of the trial court, the appellant appealed to the High Court where he was unsuccessful. Still dissatisfied the appellant has come to this Court on a second appeal.

The appellant had the services of Mr. Stephen Sangawe learned advocate. Mr. Sangawe had filed four grounds of appeal. The four ground raised can be paraphrased and condensed into three grounds hereunder.

1. That the cautioned statement of the appellant was taken beyond time limit allowed in law and tendered without ascertaining whether it was made voluntarily.
2. That the conditions prevailing at the time of the commission of the offence was not favourable for correct identification.
3. That the appellant raised a reasonable doubt in his defence which the lower courts failed to consider.

The respondent/Republic was represented by Mr Faraja Nchimbi and Ms. Pendo Makondo learned State Attorneys. Mr. Nchimbi did not support the conviction. He submitted that the basis of the appellant's conviction was

the cautioned statement and identification which fell short of the well known principles.

Briefly, the prosecution case was that on the fateful day at around 7:15 p.m Adelina Sebastiane Kimaro (PW2) and Paulina Gabriel Ngowi (PW3) and Oliver Prosper (PW4) who were shop attendants had closed the shop and were inside their residential house. PW2 was in her room whereas PW3 and PW4 were at the sitting room watching television. Suddenly a group of bandits armed with guns managed to enter inside their residential house first in the room of PW2 and then turned to those who were at the sitting room. The three were ordered to open the shop which they complied and the bandits took cash money Tshs. 2.7m/= all mobile phones and vouchers.

While inside the shop, the bandits shot PW2 on her stomach with a gun and gun shots were also heard outside the shop. It is said some bandits were outside the shop who shot randomly to scare would be rescuers who might turn up and give a helping hand to PW2 and her colleagues. PW2 was unconscious and was rushed to hospital. Police were informed and they went to the scene.

In the same night at around 10.30 p.m. police were informed by an informer that one suspect was at a place called Chogo. They rushed to the place only to find that the information was not true. Then they went to the house of the appellant. They did not say why in particular they went to the appellant's house. Whatever the position, they searched the house and found a toy pistol which was alleged to have been used in the robbery incident and which PW3 and PW4 claimed to identify. The appellant was arrested on the very day night and remained in police custody until on 14/10/2005 when his cautioned statement was taken at Tanga which was later exhibited in court during trial.

Following the appellant's remand in police custody for four days, it was Mr. Sangawe's submission that the cautioned statement taken from the appellant was not taken in compliance with the mandatory provisions of Sections 50 and 51 of the CPA which require the taking of such statement from a person who is under restraint to be recorded within four hours after he is put under restraint in respect of an offence he is alleged to have committed unless the period is extended under S.51 of the CPA. Failure to do so, under S. 169 of the CPA it renders the evidence receivable not admissible in Court.

Mr. Nchimbi was of the same view. He urged this Court to expunge that evidence. The Court had the occasion previously to discuss the import of sections 50, 51 and 169 of the CPA. In **Janta Joseph Komba and three Others VR** Criminal Appeal No. 95 of 2006 (unreported) the Court observed, we reproduce:

> *"We agree with learned Counsel for the appellants that being in police custody for a period beyond the prescribed period of time result in torture, either mental or otherwise. The Legislature did limit the time within which a suspect could be in police custody for investigative purposes and we believe that this was done with sound reason."*

As for failure to abide with the time provided under the law for taking the statement from the suspect, the Court said:-

> "The *obtaining of the statement of the appellant while still in custody outside the time provided under the law for investigative custody, contravened the provisions of the law.*

Section 169 of the Criminal Procedure Act provides for exclusion of evidence illegally obtained."

Section 50 of the CPA provides as follows:-

50 (1) For the purpose of this Act, the period available for interviewing a 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 basis period available for interviewing the person is extended under section 51, the basic period as so extended.

And Section 51 of the CPA reads:-

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 person be further interviewed, he may -

(a) extend the interview for a period not exceeding eight hours and inform 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.

In the instant case we have seen that the cautioned statement of the appellant was taken beyond the basic period of four hours and without the same being extended. That contravened sections 50 and 51 of the CPA. In

terms of S. 169 of the CPA that evidence ought not have been admitted. We entirely agree with Mr. Nchimbi and Mr. Sangawe that the cautioned statement was taken contrary to the provisions of sections 50 and 51 of the CPA. The same is hereby expunged from the record.

From the foregoing, it is obvious that the other limb of Mr. Sangawe's submission as to whether the statement was voluntary made does not arise.

The other set of evidence which the prosecution case relied on is the evidence of visual identification. Mr. Sangawe argued with force that the conditions prevailing during the commission of the offence were not conducive. Mr. Nchimbi joined hands with Mr. Sangawe. He submitted that the evidence on record is silent as to whether the witness knew the appellant before; the time taken was not stated; the size of room was not also stated and last but not least the intensity of light was not spelt out.

In dealing with this set of evidence the trial court observed, we quote:-

"The evidence on record is of how the theft was conducted, how the bandits invaded John Shayo's place and found his workers at the sitting room watching television, there was enough light, accused had not covered his face but his colleagues did cover their faces. They also entered the shops and the lights were put on and in such there was enough lights to identify someone."

The learned appellate Judge like the trial court was satisfied that the conditions prevailing were conducive for positive identification. She said thus, we quote:

" In the instant case the robbers spent time in the house with the victim/witnesses. There was light in the sitting room, in the bedroom and they also switched on lights in the shop..."

This being a second appeal we are alive to the well established principle of law that this Court will not interfere with the concurrent

direction.

We have gone through the record to satisfy ourselves whether the witnesses positively identified the appellant. In her evidence in chief PW2 did not testify to have seen the appellant. It is in the re – examination when she mentioned the appellant to have carried a small gun. She did not say whether she saw the appellant and if so by what kind of light as it was a dark night. She did not say the distance from where she positioned herself vis-a-vis the appellant.

PW3 said she identified the appellant at the scene of crime and at the identification parade. She further claimed that the lights were on. She did not state the kind of light and the intensity it illuminated. As regards to identification parade, no police officer came to testify as to whether the same was conducted and PW3 managed to identify the appellant. Further, when she was cross examined by the appellant, PW3 said, we quote:

> *"I did not enter the shop when the crime was committed. I was at the sitting room lying on the ground face downwards."*

Yet in re-examination she maintained that she identified the appellant because there was enough light! We are wondering whether under the aforesaid circumstances one would be in a position to identify his assailants.

In the light of the foregoing were the conditions favourable for correct identification?

In **Raymond Francis VR [1994]** TLR 100 at page 103 this Court observed the following:-

> *"..... it is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the atmost importance."*

We have shown that the witnesses did not state the source of light; its intensity, the size of the room, the length of time the appellant being identified was within view etc. In short, the evidence of identification before the trial court which the High Court concurred falls far short of the

TLR 250. We are unable to go along with the lower courts on this point. We again agree with Mr. Nchimbi and Mr. Sangawe.

Since the prosecution failed to prove its case to the standard required, there is no need to discuss the remaining ground.

In the event, and for the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison forthwith unless he is otherwise lawfully detained.

DATED at TANGA this 1st day of April, 2011

J. H. MSOFFE
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL