IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CRIMINAL APPEAL NO. 219 OF 2009

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

ABDALLAH RAMADHAN ..... APPELLANT
VERSUS
THE D. P. P. .... RESPONDENT

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

(Sambo, J.)

dated the 12th day of March, 2009

in
Criminal Appeal No.45 of 2008

JUDGMENT OF THE COURT

22nd & 24th February, 2012

MUNUO, J.A:

Appellant, Abdallah Ramadhan was, jointly and together with other suspects who are not parties to this appeal, charged with the offence of armed robbery c/s 285 and 286 of the Penal Code, Cap. 16 R.E 2002. He was found guilty and convicted in Criminal Case No. 535 of 1998 in the District Court of Arusha. Aggrieved, he lodged Criminal Appeal No. 45 of 2008 in the High Court of Tanzania at Arusha which appeal he lost. Hence this second appeal.

The Prosecution alleged that on the night of the 23rd July, 1998 at about 23:30 hours at Njiro area within Arusha Municipality in Arusha District and Region, the appellant stole a radio cassette make national Panasonic valued at Tshs. 90,000/=, a clock valued at Tshs. 5,000/=, 2 crate of beer valued at Tshs. 25,000/= and cash Tshs. 80,000/=, total valued at Tshs. 175,000/= the property of Salima s/o Selemani and before the time of such stealing used a pistol and a knife to threaten the complainant Salima Selemani in order to obtain and retain the material property. The appellant pleaded not guilty. He was, nonetheless found guilty and convicted of the charge of armed robbery. The learned Judge upheld the decision of the trial court giving rise to present appeal.

The complainant P.W.1 Salima Selemani deposed that on the material night she was on duty at Paradise Bar serving beer and chips to customers. Meanwhile, three bandits stormed into the bar and ordered Salima to step back three paces and squat. It was the evidence of P.W.1 that the bandits were armed with a pistol, knife and panga. The robbers looted cash Tshs. 25,000/=a Panasonic radio watch, a thermos and Tshs. 55,000/= from a customer. The invaders locked P.W.1 and the customers in the kitchen and vanished with the loot they stole. After the robbers had

disappeared, P.W.1 climbed through the window and informed her neighbours about the armed robbery that had taken place shortly before at the bar.

In her examination in chief, the appellant did not say how she identified the appellant save that she stated in cross-examination that the appellant had been drinking at the bar for an hour or so during the day. Upon finding the appellant guilty, the trial court convicted and sentenced him to 15 years imprisonment. The sentence, we hasten to state, is unlawful for the statutory minimum sentence for armed robbery is thirty years imprisonment.

In this appeal, the appellant was unrepresented. The respondent Republic was represented by Mr. Zakaria Elisaria, learned Senior State Attorney.

The appellant filed a memorandum of appeal and additional grounds of appeal, challenging among other things, the identification evidence against him.

Mr. Zakaria Elisaria, Senior State Attorney supported the conviction on the ground that P.W.1 identified the appellant and what is more, the appellant recorded an implicating cautioned statement, Exhibit P2. The learned Senior State Attorney conceded, however, that the record does reflect the date and time the appellant was arrested. The cautioned statement shows that it was recorded on the 31st July, 1998 10:00 hours. The learned Senior State Attorney conceded also that since the date and time of the appellant's arrest is not reflected in the record of appeal, it is impossible to tell, in such circumstances, whether the provisions of section 50 (1) (a) of the Criminal Procedure Act, Cap. 20 R. E. 2002 were complied with.

The crucial issue before us is whether the identification evidence on record established the guilt of the appellant beyond reasonable doubt.

Section 50 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E 2002 allows the police to interrogate a suspect within 4 hours of his or her arrest by stating *inter-alia:*

"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) ..... (not applicable)."

Only two witnesses testified for the prosecution in this case namely the complainant, Salima Selemani and P.W.2 C 5097 Detective Corporal Isaack, the investigating officer. The latter stated that he arrested the appellant and another suspect at Kwa Mbauda area with pistols, one real, the other a toy, and 4 bullets,. The real pistol, a revolver no. 1917 36-344 was tendered in evidence as Exhibit P1. The appellant disclaimed ownership of the pistol, Exhibit P1.

However, P. W.2 did not record the date and time he arrested the appellant. In those circumstances, we are unable to determine whether

the recording of the cautioned statement, Exhibit P2, complied with the provisions of section 50 (1) (a) of the CPA. Hence, we are constrained to expunge, and hereby expunge, the cautioned statement from the record.

With regard to identification evidence, it appears P.W.1 made no attempt to describe the conditions of identification or even state in her evidence whether she knew the appellant before the alleged armed robbery or whether there was electricity or some other source of light at the scene of crime . P.W.1 stated in cross-examination that the appellant had been at the bar for about an hour during the day.

We are mindful of the decisions in the cases of **RV Mohamed Bin Akui (1942) 9 E. A. C.A 72** and **Ibrahim Songoro versus Republic Criminal Appeal No. 298 of 1993 (CA) at Dar es Salaam)** (Unreported) wherein it was held that where a suspect has been identified, the name, attire or description of the suspect should be made at the earliest opportunity. In this case, had the complainant identified the bandits, she would have deposed the same in her examination in chief instead of glossing over the same during cross-examination.

In the cases of **Republic versus Elia Sebwato (1960) E. A 174** and **Abdallah Wendo and another versus R (1953) XX EACA 166** the now defunct Court of Appeal for East Africa held that identification evidence must be watertight to sustain a conviction. In **Waziri Amani versus Republic (1980) TLR 250 at page 252,** the Court observed that:

> *"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seemed clear that the issue of identification would not be properly resolved unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried....for example.....questions such as the following ..... The time the witness had the accused under observation; the conditions in which such observation occurred, for instance, whether it was day or night time; whether there was good or poor lighting at the scene; and further whether the*

witness knew or had seen the accused before or not."

In the present there is hardly any identification evidence on record to connect the appellant with the charged offence.

In the light of the above we find that there is merit in this appeal. We accordingly allow the appeal. We quash the conviction and set aside the sentence. We order that the appellant be released forthwith if he is not detained for other lawful cause.

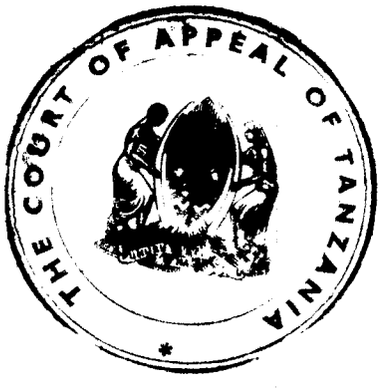
DATED at ARUSHA this 23rd day of February, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
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