IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CRIMINAL APPEAL NO. 8 OF 2007

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

ABDI MSUMO KIMARO ..... APPELLANT
VERSUS

THE REPUBLIC .... RESPONDENT

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

(Mussa, J.)

dated the 26th day of July, 2007

in

Criminal Appeal No. 82 of 2002

JUDGMENT OF THE COURT

13th & 21st February, 2012

MUNUO, J.A:

In Criminal Case No. 33 of 2000 in the Babati District Court, the appellant and two others who are not parties to this appeal, were charged with the offence of armed robbery c/s 285 and 286 of the Penal Code. The appellant was convicted of armed robbery as charged whereupon he was sentenced to a term of thirty years imprisonment. He was also ordered to refund Tarangire Safari Lodge the sum of Tshs. 6,128,980/= which was not

recovered. The recovered sum of Tsh. 3,313,000/= was restored to the complainant, the Tarangire Safari Lodge. Thereafter, the appellant unsuccessfully preferred Criminal Appeal no. 82 of 2002 in the High Court of Tanzania at Arusha. Still aggrieved by the conviction and sentence, the appellant lodged this second appeal.

The prosecution alleged that on the 29th September, 2000 at the Tarangire Safari Lodge, the appellant and other gangsters jointly and together stole cash Tshs. 9,441,980/= the property of Tarangire Safari Lodge and at the time of seizing the money cut one Emmanuel Roman with a bush knife in order to obtain and retain the stolen money. One Fazila Abdi Kimaro, the wife of the appellant, was charged with the offence of receiving stolen property c/c 311 (I) of the Penal Code for allegedly receiving Tshs. 3,313,000/= believed to be part of the stolen Tshs. 9,441,980/= from the appellant on the 1st October, 2000 at Minjingu Village within Babati District in Manyara Region. She was convicted and sentenced to 12 months imprisonment. She, however, is not appealing.

As for the robbery at Tarangire Safari Lodge, it was around 2.30 a.m on the material date, when bandits stormed into the lodge, cut the

watchman on duty, one Emmanuel Roman, overpowered him and seized cash Tsh. 9,441,980/= from the receptionist on duty. The receptionist on duty was one Mohamed Nassoro Kabelwa who testified as P.W.8. He stated that after the banditry he informed P.W. 11 Stg. Anania Mshana of Minjingu Police Station who immediately imposed a curfew on the employees of the material lodge.

In his sworn defence, the appellant denied involvement in the armed robbery. He stated in his sworn defence that the lodge's watchman was seriously wounded by the bandits. The houses of the employees were searched after the robbery but nothing was recovered. Apparently, the appellant left the lodge without seeking permission from his in charge causing himself to be suspected. He, however claimed that he had a stomach ache so he left the lodge to get medical treatment at Minjingu. He was orally interrogated by P.W7. After that interrogation, the appellant led P.W3, PW7 and P.W11 to his home at Kwa Sadala in Hai District. There, the police recovered cash Tshs. 1,260,000/= the appellant had buried in the ground in his house, some other cash Tshs. 800,000/=was retrieved between two corrugated iron sheets at the roof. The appellant led the police to a second discovery. He took them to his mother in law's

home at Mwanga in Kilimanjaro region where the police recovered Tshs. 932,000/= in a plastic bag. In total, the discovery, at his home and at Mwanga, enabled the police to recover a total of Tshs. 3,313,000/= out of the robbed Tshs. 9,441,980/=. Thereafter, the appellant was prosecuted for the offence of armed robbery. We wish to observe that after the visits to the appellant's home at Kwa Sadala and at Mwanga, the appellant recorded the cautioned statement in which he admitted participating in the robbery in question on the 29th September, 2000.

In his memorandum of appeal, the appellant denied the charge. He appeared in person before us and he adopted his grounds of appeal. The respondent Republic was represented by Mr. Juma Ramadhani, learned Principal State Attorney who resisted the appeal and urged us to sustain the conviction and sentence. The appellant's three grounds of appeal are:

1. That the Courts below erroneously admitted the cautioned statement which was recorded without complying with the mandatory provisions of sections 50 and 51 of the Criminal Procedure Act, Cap. 20 R.E. 2002.

2. That the learned judge erroneously held that the case had been proved beyond all reasonable doubt.
3. That the learned judge failed to address the credibility of the prosecution witnesses.

The learned Principal State Attorney conceded that the cautioned statement, Exhibit P4 was taken beyond the authorized four hours after the arrest of the appellant. The appellant, he observed, was arrested on the 4th October, 2000, that he led to the discovery of the money he robbed on the 6th October, 2000 and that on the next day he was taken to Babati Police Station where his cautioned statement was recorded on the 7th October, 2000. The traveling to Kwa Sadala and to Mwanga in pursuit of the stolen money occasioned the delay to record the cautioned statement, the learned Principal State Attorney submitted. In the circumstances, the cautioned statement fell under the exception stipulated under the provisions of section 50 (2) (a) of the Criminal Procedure Act, the Republic argued, urging us to find that the said cautioned statement was properly admitted which was why the appellant did not object to its admission during the trial. The learned Principal State Attorney cited the case of **Zakaria Martin versus Republic Criminal**

Appeal No. 178 of 2008 (CAT at Arusha) (unreported) at page 5 wherein the Court considered the issue of non-compliance with the provisions of section 50 (1) (a) of the CPA thus:

> *"The second ground of appeal relates to the admissibility of the cautioned statement of the appellant (exhibit P1) Mr. Elisaria, conceded that the statement was taken on 7/3/2001 whereas the appellant was arrested on3/3/2001. This was beyond the period of interview prescribed under section 50 of the Criminal Procedure Act. He submitted that on the basis of the current case law, such statement was illegally taken and should not have been received in evidence."*

After referring to section 50 (1) (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002, the Court further observed:

> *" The point we want to make is that the whole of section 50 must be read together. This is because*

subsection (2) of the section provides exceptions to subsection (1), such as the period taken to await a friend or relative or counsel of an accused person before the interview begins which should be excluded in reckoning the period."

The Court continued:

" So, before a trial court decides to invoke section 50 (1) it must be satisfied that the case does not fall under any of the exceptions. The burden of proving that the case falls under any of the exceptions is on the prosecution. If the prosecution fails to discharge that burden, the court would be bound to follow the dictates of section 50 (1) (a) of the CPA."

Section 50 (1) (a) and (2) (Cap. 20 of the CPA provides, *interalia*;

" For the purposes 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 basis 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)

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time which the police officer investigation the offence restrains from interviewing the person, or causing the

person to do any act connected with the investigation of the offence

(a) ..... (c)..... Not applicable

Did the fact that the appellant led the police to the discoveries at Kwa Sadala and at Mwanga which enabled the recovery of Tshs. 3,313,000/= qualify as an exception under section 50 (2) of the Criminal Act to justify taking the cautioned statement three days after the arrest of the appellant? It appears to us that the cautioned statement could easily have been taken before the discovery when the appellant disclosed that he had infact been involved in the armed robbery and that he took the money he robbed to his wife at Kwa Sadala in Hai District and some other money to his mother in law at Mwanga. It was this disclosure which led to the discovery and recovery of part of the money the appellant and his co-bandits looted from Tarangire Safari Lodge on the material night. In these circumstances we are unable to agree with the learned Principal Sate Attorney's contention that the delay to record the cautioned statement, Exhibit P4 falls under the exception stipulated under the provisions of section 50 (2) of the Criminal Procedure Act. Since the cautioned statement, Exhibit P4, was recorded more than 72 hours after the arrest of

the appellant instead of the authorized 4 hours under section 50 (1) (a) of the Criminal Procedure Act, we are constrained to strike out the cautioned statement which we hereby do.

Nonetheless, we are of the view that there is overwhelming evidence on record to prove beyond all reasonable doubt that the appellant committed the offence he was charged with. The appellant took P.W. 3 Inspector Rogath Ndewina, PW. 7 C3076 D/ CLP Godfrey Mmary and P.W11 Stg. Anania Mshana to his home at Kwa Sadala and to his mother in law's home at Mwanga in Kilimanjaro Region where a total of cash Tshs. 3,313,000/= was recovered. This discovery was caused by the appellant's oral admission that he had taken part in the armed robbery and that he had stashed away the ill gotten proceeds at his house at Kwa Sadala. That the recovered money had been buried in the ground in his house and also tucked between corrugated iron sheets on the roof of his house, do not augur with innocence. The appellant also took the police to his mother in law's home at Mwanga where they recovered cash Tsh. 932,000/=. Without the appellant's disclosure the police would not have been able to recover the said money. We are satisfied, therefore, that the guilt of the

appellant was proved beyond all reasonable doubt. The appeal is devoid of merit. We accordingly dismiss the appeal.

DATED at Arusha this 14th 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.

THE COURT OF APPEAL OF TANZANIA

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL