IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO.248 OF 2008

DONALT ANGELUKUSI KANYATA .... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court

of Tanzania at Mtwara)

(Mjemmas, J.)

dated the 4th day of July 2008

in

Criminal Appeal No. 52 of 2007

JUDGMENT OF THE COURT

19 & 29 September 2011.

MUNUO, J.A.

In Mtwara District Court Criminal Case no.133 of 2006, the appellant was charged with 3 different counts namely;

Count 1: Attempted robbery c/s 287 of the Penal Code in that on the 4th December, 2004 at about 8.40pm at Magomeni Mwembeningoje within Mtwara District and Region, with

intent to steal from Haji Maulid, a taxi driver, the appellant threatened the said Haji Maulid by firing a bullet from a pistol no.007507 make Star in order to obtain money from the victim.

Count 2: Possession of arms without a licence in that on the same date, at the same place and hour, the appellant was found in possession of a pistol no.007507 without a licence contrary to the provisions of section 4(1) and 34 of the Arms and Ammunition Act, 1991.

Count 3: Possession of ammunition without a licence c/s 4(1) and 34 of the Arms and Ammunition Act, 1991 in that on the material day, at the material place and time, the appellant was found in possession of three rounds of ammunition without a licence.

The trial court convicted the appellant on the count of attempted robbery. The learned trial Resident Magistrate struck out the other two counts on the grounds of duplicity. Aggrieved by the conviction and sentence of thirty years imprisonment for attempted robbery, the appellant unsuccessfully appealed in the High Court of Tanzania at

Mtwara in Criminal Appeal no.52 of 2007 before Mjemmas, J. Having lost the first appeal, the appellant lodged this second appeal against the conviction and sentence.

It was the evidence of the complainant who testified as P.W.1 that on the material night the appellant hired his taxi and directed PW1 to drive to Kilimanjaro House within Mtwara Township. Before reaching the destination, the appellant asked PW1 to stop to allow him to attend to a call of nature. The complainant complied. On return, PW1 was shocked to see the appellant pointing a pistol on his head demanding money. The complainant hit the appellant's hand causing the pistol to drop. PW1 overpowered the appellant and prevented him from picking up the pistol whereupon the appellant opted to run away and vanish into the bush. The complainant then reported the matter to the police. The complainant said that he identified the appellant when they were negotiating the price of hiring the taxi to Kilimanjaro House. The complainant did not give a description of the appellant but he later identified him in an identification parade mounted by PW3, Inspector Berkmans Marco on the 8th December, 2004.

On the night of the attempted robbery, PW2 ASP Ulaya and other police officers accompanied the complainant to the scene of crime, and there,

recovered the pistol the appellant dropped and upon failing to retrieve it, fled and vanished into the bush. The police lit the scene of crime with the head lights of their vehicle and upon searching the place, they recovered the pistol the appellant dropped down.

It is not clear from the evidence on record how and where the appellant was arrested. However, PW4 Dt/SSGT Augustino deposed that he found the appellant in the police lock up and that he recorded his cautioned statement, Exhibit P3 on the 9th December, 2004, admitting the offence of attempted robbery. The appellant was unrepresented in the courts below and during this appeal.

Before us, the appellant adopted his five grounds of appeal in which he challenged the admissibility of his caution statement, Exhibit P3, despite his objecting to the same at the trial. He complained in the High Court and before us that the trial magistrate ignored his objection to the cautioned statement and advised him to raise the objection in his defence and yet the learned judge held that he had not objected to the cautioned statement. The appellant also complained that he was not properly identified because the offence was committed at night when conditions of identification and visibility were unfavourable. He claimed that the complainant saw him before the parade.

In this appeal, the Republic was represented by Mr. Prudensi Rweyongeza, Senior State Attorney, assisted by Mr. Ismail Manjoti, learned State Attorney. The Republic declined to support the conviction on the ground that the appellant's description was not given by the complainant to prove that he had indeed been properly identified at the scene of crime given that the suspect was a stranger. The learned Senior State Attorney cited the case of **Waziri Amani versus Republic (1980) TLR 250** in which the Court held that identification evidence must be watertight to sustain a conviction. Had the complainant identified the suspect, he would have given his descriptions of attire, appearance and any peculiar marks the suspect had at that time, the learned Senior State Attorney submitted.

Mr. Rweyongeza did not support the conviction for another reason. The cautioned statement, Exhibit P3, was illegally recorded after five days of his arrest, contrary to the provisions of section 50(1) of the Criminal Procedure Act, Cap.20 R.E., 2002. The learned Senior State Attorney cited the cases of **Janta Joseph Komba and Others versus Republic, Criminal Appeal no.95 of 2006** (CA at Dar-Es-Salaam) (unreported); and **Emmanuel Malahya versus Republic, Criminal Appeal no.212 of 2004** (CA at Tabora) (unreported) in which the

Court rejected invalid cautioned statements in which the suspects had been interrogated beyond four hours of their arrest. Section 50 provides, 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) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

The circumstances of extending interrogation beyond the four hours from the time of arrest, are provided for under section 51 of the Criminal Procedure Act, Cap.20 R. E., 2002 which states, and we quote:-

> Section 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 the 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 an application to a magistrate for a further extension of that period.

In this case, the appellant stayed in custody for four days before his cautioned statement was recorded. The record is silent as to why the investigator did not record the cautioned statement within four hours of his arrest or why no extension of time was sought to regularize the delay in recording of the said cautioned statement. Under the circumstances, the learned Senor State Attorney rightly submitted that the cautioned statement, Exhibit P3, was illegally obtained so it is invalid and it should be expunged from the record.

As the Court held in the case of **Janta Joseph Komba and Others** cited *supra*, obtaining the statement of a suspect beyond the 4

authorised hours after arrest and while in police custody, contravenes the provisions of sections 50(1) and 51 of the Criminal Procedure Act, Cap 20. Furthermore, to protect the rights of suspects restrained by the police, section 169 of the Criminal Procedure Act, Cap.20 allows exclusion of statements illegally obtained by stating, and we quote;

Section 169(1) – Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.....

(2) .....

(3) the burden of satisfying the court that evidence obtained in contravention of, in consequence of the

contravention of, or in consequence of the failure to comply with the provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted.

(4) this section is in addition to, and not in derogation of, any other law or rule under which a court may refuse to admit evidence in proceedings.

That violation of the provisions of section 50(1) of the Criminal Procedure Act, Cap.20 is a fundamental irregularity was also affirmed by the Court in the case of **Emmanuel Malahya versus Republic**, also cited *supra*. In that case the Court expunged a statement illegally obtained from the record observing that:-

> "the violation of s.50 is fatal and we are of the opinion that ss.53 and 58 are on the same plane. These provisions safeguard the human rights of suspects and they should, therefore, not be taken lightly or as mere technicalities. ....."

In view of the above, we are satisfied that the learned Senior State Attorney rightly refused to support the conviction founded on a

cautioned statement obtained in contravention of the provisions of sections 50(1) of the Criminal Procedure Act. In the result, the conviction is quashed and the sentence of thirty years imprisonment is hereby set aside. The appellant should be released forthwith if he is not detained for other lawful cause. We accordingly allow the appeal.

It is so ordered.

DATED at MTWARA this 21st day of September, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(M. A. Malewo)
DEPUTY REGISTRAR