AT DODOMA

(CORAM: MSOFFE, J. A., KILEO, J.A., And KIMARO, J. A.)

CRIMINAL APPEAL NO 134 OF 2012

HASSAN MOHAMEDI NGOYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma

[Mwangesi, J.]

dated 26th day of October, 2011
in
Criminal Appeal No 51 of 2011)

JUDGMENT OF THE COURT

23rd & 25th September, 2013

MSOFFE, J. A.:

First and foremost, we wish to paraphrase this judgment by making one observation. The proceedings of the trial District Court of Kondoa show that a total number of 14 witnesses testified in the case. Some of these witnesses were the routine ones i.e. an arresting officer, a witness who drew a sketch plan of the area of incident, etc. With respect, these were the sort of witnesses who could have easily been left out without affecting the quality of the case. We note that the said court conducted a preliminary hearing. It seems to us however that the court did not appear to know and appreciate the import, sense, spirit and rationale behind the provisions of section 192 of the Criminal Procedure Act. (CAP 20 R.E. 2002)

hearing of some sort. This provision was enacted to accelerate trials thereby reducing time and expense. If a true and proper preliminary hearing had been conducted in the case no doubt a lot of time and expense would have been saved because only a few witnesses would have been summoned in the process. If that had been done the trial would have been accelerated thereby achieving the spirit behind the enactment of the above provision. Needless to say, in the past this provision did not exist in our criminal justice system. By virtue of Act No. 19 of 1992 it was introduced into our laws in order to achieve the above stated objective.

The appellant and others who were acquitted appeared before the District Court of Kondoa to answer a charge of, *inter alia*, armed robbery. The strong evidence against the appellant was basically that on 5/10/2009 at 17.00 hours he went to PW1's place of business which happens to be a petrol station cum shop and bought petrol. In the evening he went back to the same place at a time when PW1 Issa Shabani Issa was just about to close the business. The appellant and the others beseeched, or rather pleaded with, PW1 not to close the centre as they were in need of service. Apparently they posed as police officers. PW1 obliged. Once inside the appellant and his confederates attacked PW1 at gun point and made away

was not enough, at 19.00 hours they set in on PW2 Mwajuma Idd, who also happened to operate a shop business, and subjected her to the same treatment as that of PW1 after which they too went away with that day's sales, a mobile phone and credit vouchers. Both PW1 and PW2 were positive that they identified the appellant as a person who hailed from a nearby village and who was also notorious for engaging in the illegal business of selling khat. It was also not yet dark at the time(s), they asserted. The other evidence against the appellant was his cautioned statement in which he confessed to have committed the offence(s). It was basically on the basis of the above evidence that the appellant was convicted with two counts of armed robbery and sentenced to consecutive terms of imprisonment for thirty years. In sentencing the appellant, the trial District Court was very emphatic that he should serve 60 years imprisonment. His appeal to the High Court at Dodoma was dismissed save for the variation of the sentences whereby an order was made for them to run concurrently. Still aggrieved, the appellant has preferred this second appeal. He appeared in person, unrepresented. The respondent Republic had the services of Mr. Godfrey Wambali, learned State Attorney.

The appellant filed a six point memorandum of appeal. In the said memorandum however, there are two basic complaints. **One,** the evidence of identification was not watertight. **Two,** the cautioned statement ought not to have been used in grounding the conviction because it *"was not corroborated from the extra judicial statement from the justice of the peace...."*

We wish to begin with the evidence of identification. There is no dispute that the appellant was known to the prosecution witnesses prior to the date of incident. They lived in neighbouring villages. Before the actual time of incident on the material day the appellant visited PW1 at around 5.00 p.m., as aforesaid. Indeed, the appellant himself admitted that much under cross-examination, thus:-

> *....Yes, on the material date of crime I bought petroleum from the petrol station which was later invaded....*

From the evidence of the prosecution witnesses, notably PW1 and PW2, it is evident that the incident took place before sunset. Their evidence was essentially that there was still sunlight at the time. Thus, the conditions were favourable for correct identification of the appellant. Furthermore, a

stood at close range to each other at the time(s), and the incident(s) took fairly long period(s) of time. It was not therefore, a case in which the often cited and celebrated case of **Waziri Amani v. Republic** (1980) TLR 250 would be brought in in favour of the appellant because, as already stated, the obtaining conditions were favourable for correct identification of the said appellant. Like the courts below, we too are satisfied that the prosecution witnesses identified the appellant on the fateful day and time(s).

This brings us to the cautioned statement. This statement was introduced and produced in evidence by PW4 D7357 D/Cpl. Kichonge on 19/3/2010. The proceedings of that day show that the appellant was given the opportunity to peruse it and say whether or not he had any objection to its production and admission in evidence after which he said:-

> *...I have no objection your honour, it may be admitted in favour of the prosecution case.*

Thereafter, it was produced and admitted as an exhibit in the case. As if that was not enough, in his own defence at the trial the appellant did not

the Public Prosecutor he categorically stated as follows:-

...I was not forced to give caution statement .....

In the midst of all the above, the appellant's oral submission before us that the statement was produced and admitted in evidence against his will is a clear afterthought. Indeed, as correctly submitted by Mr. Wambali, a careful look at the statement will show that it bears out the evidence of PW1 and PW2 on the events of the day in issue.

At any rate, we may as well point out here that objection regarding the voluntariness or otherwise of the cautioned statement should not be raised at this stage. We say so because objection, if any, ought to have been canvassed at the trial by invoking the provisions of section 169(1) of the Criminal Procedure Act (CAP 20 R.E.2002). If that had been done, the prosecution side would then have been called upon to discharge its burden of satisfying the court that the statement should be admitted in evidence in terms of subsection (3) thereto. In the absence of such objection, and consequently a discharge of the burden by the prosecution thereto, it follows that it is too late in the day to raise the point at this stage of the appeal process. In other words, as we stated in **John Petro Mbuguni**

the provisions of section 169 can only be invoked in a trial and not in an appeal.

As already shown above, the appellant is of the view that the cautioned statement ought to have been corroborated by evidence of an extra-judicial statement. With respect, there is no such requirement in law. In an ideal case, a cautioned statement can stand on its own without corroboration.

Before we conclude this judgment, we wish to point out here that there are other features in the evidence which help in lending credence to the prosecution case against the appellant.

One, PW6 Saidi Issa Kidunda testified and told the trial District Court that in the midnight of 5/10/2009 he was asleep. The appellant came to him in need of transport to take him to Busi where he would board another means of transport to Arusha. According to PW6, the appellant told him that he needed transport in order to escape for fear of being arrested in connection with the offence(s) in this case. As a good citizen, PW6 decided to report to the police about what the appellant had told him about his role and participation in the crime(s) in issue. Yet, when the appellant

question regarding this damaging evidence against him. We wish to state here that as we held in **Hamisi Mohamed v. Republic**, Criminal Appeal No. 297 of 2011 (unreported), citing the House of Lords decision in **Browne v. Dunn** (1893) 6R, 67, H.L., it is settled law that a decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear notice of the intention to impeach the relevant testimony. The appellant's failure to cross-examine PW6 on the above point in essence amounted to his acceptance of PW6's testimony to that effect.

Two, it is in evidence that PW1 and PW2 named the appellant to the police at the earliest possible opportunity. This is clearly borne out by the evidence of PW12 E9522 Station Sergeant George who on hearing shots of a firearm quickly went to the scene(s) of crime. On arrival there, the above two witnesses, without wasting time, named the appellant. This was no doubt significant in assuring their reliability and credibility in the case. Indeed, this Court's observation in **Marwa Wangiti Mwita and Another v. Republic** at page 43 is pertinent and relevant in this respect, thus:

... the ability of a witness to name a suspect at the earliest opportunity is an all –important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry....

In conclusion, we are of the settled view that the prosecution case taken as a whole established the appellant's guilt beyond reasonable doubt. Therefore, there is no basis for us to fault the courts below in their concurrent findings of fact.

In the result, we are satisfied that the appeal has no merit. We hereby dismiss it.

DATED at DODOMA this 24th day of September 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL