IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO 131 OF 2012

KHALIFA RAMADHANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

[Kwariko, J.]

dated 21st day of December 2011
in
Criminal Appeal No 110 of 2011)

JUDGMENT OF THE COURT

20th & 23rd September 2013

KILEO, J. A.:

The appellant with another person who was acquitted were arraigned in the District Court of Kondoa with the offence of armed robbery contrary to section 285 of the Penal code. Following his conviction he was sentenced to 30 years imprisonment along with 12 strokes of the cane. He lost his appeal to the High Court hence this second appeal.

It was the case for the prosecution that on the 23rd day of June 2001 at around 00.30 hrs. one Yahaya Mohamed Mneneu who testified as PW1 was invaded by bandits who broke into his house and made away with over shs. 2 million. The bandits also broke into the house of PW2 who was

PW1's father and demanded to be given shs 5,000,000/- which had been given to him by his brother in law. The bandits are also said to have forcibly taken a sewing machine and a radio from PW2.

Both the trial court and the High Court disregarded the evidence of identification. The appellant's conviction was grounded solely on the extra judicial statement he made to a justice of the peace (PW4) and the cautioned statement he made. These were tendered in court as exhibits PE 1 and PE2 respectively.

The appellant's memorandum of appeal contains three grounds. In ground two he is complaining about evidence of identification. Since identification did not form the basis of his conviction we will not deal with it. His main complaint though, (combining ground one and three) is that the evidence of his confession was taken and received in court illegally and further that when everything is taken in its totality, the charge against him was not proved on the standard required in criminal law.

The appellant appeared before us in person, unrepresented. The respondent Republic was represented by Mr. Othman Katuli who was assisted by Ms Lina Magoma, both learned State Attorneys. The respondent's case was presented by Ms Magoma.

When the appeal was called on for hearing the appellant was availed of his right to address the court in support of his appeal. Having been so availed, he opted to wait for the respondent's submission before making a response.

Arguing the case for the respondent, Ms Magoma submitted that reliance, by the lower courts, on the extra judicial statement to base a conviction was proper in the circumstances of the case and it cannot be said that the statement was admitted in evidence illegally. In any case, the appellant never questioned the admission of the statement either when it was being tendered or in the course of his defence, the learned State Attorney argued. Ms Magoma contended that the appellant's denial of the extra judicial statement was an afterthought and such denial should be disregarded. As for the cautioned statement the learned State Attorney conceded that it was not properly admitted in court as it was not tendered by the person who recorded it. Let us say outright that we agree with the learned State Attorney on this aspect. The admission, under section 34B, of the cautioned statement which was recorded by one Cpl Switbert was in contravention of provision of the law as it did not fall under any of the situations envisaged under the above section. The appellant did not have

much to say in response to Ms Magoma's submission other than saying that he is not learned and that his statement was not voluntary.

There is just one issue before us and it is quite simple. This is whether the appellant's confession by way of an extra judicial statement was properly admitted in evidence. A careful perusal of the record shows that the extra judicial statement which was read out aloud was tendered in court without any objection from the appellant. Even in his own evidence in court the appellant admitted to have made the extra judicial statement and there was no mention at all that he was forced into making it. That it was involuntarily made is definitely an afterthought as submitted by Ms Magoma. It sprang up for the first time in the appellant's memorandum of appeal to the High Court. It may be that the justice of the peace before whom the extra judicial statement was made did not fully comply with the Chief Justice's instructions with regard to the taking down of extra judicial statements. Ms Magoma referred us to **Hatibu Ghandi v. Republic**, [1996] T.L.R.12 at pg 13, where it was held:

> *"(v) In deciding whether a magistrate's failure to comply fully with the Chief Justice's Instructions renders extra-judicial statements inadmissible, the question is whether apart from any such non-compliance, other circumstances suggest that the statements were made involuntarily".*

In arriving at the above holding the Court also made reference to **Nyainda s/o Batungwa v. R.** [1959] EA 691 at p 693 where it was stated:

> *"But it must be kept in mind that the Judges' Rules are administrative rules; and breach of them does not automatically result in the exclusion of the statement. The breach is but one of the circumstances, though the important one, for the trial judge to take into account in deciding whether or not the statement is voluntary."*

Indeed, the most important circumstance in determining the admissibility of confessions is whether the statement was voluntarily made.

The Court went on further in the **Hatibu** case to state:

> *"Although this decision concerned the Judges' Rules as they then applied to this country, we are satisfied that the position stated therein applies also to breach of the Chief Justice's Instructions. This means that in as far as the extra-judicial statements of the appellants are concerned, the Court has to consider whether apart from the breach of the relevant formalities, there are other circumstances which suggest that these extra-judicial statements could have been involuntarily made before the magistrates."*

Bearing the above authorities in mind, and applying them to the circumstances of the case before us, we are satisfied that the extra judicial statement which was made before PW4 was nothing but voluntary. In the

statement the appellant very clearly and succinctly narrated the role he played in the commission of the crime. As earlier observed he never challenged it either when it was tendered in court or during his defence.

In the end, we are satisfied that the appellant's conviction and subsequent dismissal of his appeal to the High Court was not in error.

We, in the circumstances dismiss the appeal in its entirety.

DATED at DODOMA this 21st 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