IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A, MJASIRI, J.A And JUMA, J.A)

CRIMINAL APPEAL NO. 273 OF 2011

MEREJI LOGORI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Nyerere, J.)

dated the 11th day of March, 2011
in
Criminal Appeal No. 14 of 2010

JUDGMENT OF THE COURT

4th & 6th March, 2013

JUMA, J.A.:

This is a second appeal by the appellant MAREJI LOGORI seeking to overturn his conviction and sentence for armed robbery contrary to Section 287A of the Penal Code, Cap. 16 RE 2002. Only two witnesses testified for the prosecution, PW1 DETECTIVE CPL KISASILA who recorded appellant's caution statement; and PW2, REBECCA JACKSON the victim of the alleged armed robbery. The appellant testified as DW1 for his own defence. The District Court of Arusha (Criminal Case No. 1130/2006) sentenced the appellant to thirty years imprisonment. Appellant's appeal to the High Court, (Nyerere, J.) was dismissed.

At the hearing, the appellant was present and was represented by Mr. Nelson Siokino Merinyo, learned Advocate. Mr. Zakaria

Elisaria, learned Senior State Attorney, appeared for the respondent Republic. The appellant at first filed three grounds in his initial memorandum of appeal. He later filed a supplementary memorandum of appeal with three additional grounds. In his six grounds of appeal, the appellant faulted the visual identification of the appellant as perpetrator of the crime. He also questioned the admissibility and probity of the medical examination report (PF-3) and the voluntariness of the cautioned statement. Appellant believes that the ingredients constituting the offence of armed robbery were not proved beyond reasonable doubt.

Briefly, the incident for which the appellant was charged, convicted and sentenced reportedly occurred at around 08.30 in the morning of 3rd November 2006 at Metropole area within Arusha Municipality. PW2, Rebecca Jackson a missionary and social worker had just parked her car in order to catch a taxi. She alleged that the Appellant made an attempt to snatch her handbag from behind, thereupon she sought help by shouting "thief, thief." There followed a short scuffle between the two. The appellant slashed her right hand twice with a knife and succeeded to snatch her bag away as she followed him close behind. The noise and the commotion soon attracted a crowd who gave chase while throwing stones at the appellant who dropped the handbag as he ran towards a nearby river towards the Chinese Restaurant. The police on patrol soon arrived. They took over the matter while Rebecca sought first aid treatment at nearby Monas Pharmacy. On these facts the appellant was tried,

convicted and sentenced by the courts below, hence this second appeal.

Mr. Merinyo first submitted on the cautioned statement which the trial court admitted as exhibit P1. The learned advocate observed that although the appellant could neither read nor write, the taking of his cautioned statement did not satisfy the mandatory conditions prescribed by the provisions of section 57 (4) of the CRIMINAL PROCEDURE ACT, CAP. 20. He highlighted several areas of the record of this appeal where the illiteracy of the appellant was testified on. Mr. Merinyo referred us to pages 17 and 18 of the record of this appeal where the appellant informed the Court that he did not know where the cautioned statement attributed to him, came from since he could neither read nor write. With illiteracy of the appellant known to the police officer who recorded it and also to the trial court, Mr. Merinyo submitted that that statement (exhibit P1) should have complied with the mandatory requirements of the above cited paragraphs (a), (b) and (c) of subsection (4). Amongst these requirements, is record showing where the appellant was specifically asked whether he would like to correct or add anything to the statement or correct, alter or add to the record. According to Mr. Merinyo, the police officer who took down the question-and-answer cautioned statement of the appellant, failed to certify at the foot of that statement (page 21 of the record of appeal) that he complied with Section 57 (4) of the Criminal Procedure Act. Instead of certification of exhibit P1 showed compliance with Section 10 (3) which, does not apply for certification of cautioned statements where

an accused person does not know how to read and write. For failing to comply with conditions prescribed by Section 57 (4), Mr. Merinyo urged us to expunge the cautioned statement from the records of the trial court.

There was another reason apart from non – compliance with Section 57 (4) of the Act, which Mr. Merinyo advanced to urge us to expunge the cautioned statement (exhibit P1). The way the cautioned statement found its way into court records he submitted, deserves our attention. He referred us to page 9 of the record of this appeal to illustrate how the cautioned statement exhibited as PW1, was admitted through PW1, Detective Cpl Kisasila. Proceedings leading to admitting it went on like this:

> **PW1:** *"Court since accused person is illiterate I pray witness to read over before the court so that I can ask if accused person is admit or not."*
>
> ***Accused:-*** *I have objection I did not commit such unlawful act.*
>
> ***Court:-*** *Exhibit admitted as P1.*
> ***Sgd: B.N. Mashabara RM'***

Mr. Merinyo urged us to discount the cautioned statement because the trial court failed to conduct an inquiry to determine its voluntariness. According to the learned advocate, after the appellant had expressed his objection, the trial court should have conducted an inquiry to find out why the appellant took the objection. The trial

magistrate did not conduct the inquiry but proceeded to admit the statement as exhibit P1.

Mr. Merinyo also questioned the admissibility of the medical examination report (exhibit P2) which PW2, the complainant tendered, to prove the nature of violence committed during the commission of the offence. The learned Advocate expressed his awareness that exhibit P2 was designed by the prosecution to prove the ingredient of violence which constitute the offence of armed robbery. He pointed out that the appellant was denied of his statutory right under section 240 (3) of the CRIMINAL PROCEDURE ACT to request the attendance of the medical officer who prepared the PF – 3, to testify on the medical examination report. Mr. Merinyo urged us to expunge exhibit P2 from the records. Once we expunge this piece of evidence, the learned advocate added, there would be no proof on the nature of violence that was done on PW2, the complainant.

Mr. Merinyo does not believe that the remaining evidence of visual identification of the appellant by PW2 is sufficient to sustain a conviction. The learned Advocate submitted that the claim by PW2 that her handbag was snatched from behind, then cut twice with a sharp instrument does not provide conducive environment for positive identification within the space of two minutes of skirmishes. In addition, the learned Advocate noted that the area where the attack took place is a very busy street with many people carrying on their different activities. Coupled by the fact that the complainant and

the appellant did not know one another, the learned advocate doubted whether positive identification was possible. To support his position, Mr. Merinyo referred us to our decision in CRIMINAL APPEAL No. 156 of 2011, SAID SALIM VS THE REPUBLIC (unreported) where we declined to accept evidence of identification of a culprit after finding that the witnesses' description of the culprit was wanting in details and the scene of crime was such that it was difficult to see what was happening.

In his replying submissions, Mr. Zakaria Elisaria the learned Principal State Attorney although conceding that the cautioned statement (exhibit P1) and medical examination report (exhibit P2) were wrongly admitted, he was at first prepared to still oppose the appeal on the basis of the identification evidence of PW2, the complainant. Mr. Elisaria pointed out that the incident took place at 08:30 in the morning. That the chain of events that followed after the appellant had snatched the handbag, and where members of the public gave chase leading to the arrest of the appellant all facilitated positive identification of the appellant without any possible mistaken identification. The learned Senior State Attorney also noted that on page 18 of the record of this appeal, the appellant is acknowledging that he was arrested at the scene of crime. While admitting that the police officer who actually arrested the appellant should have testified to corroborate the testimony of the victim of the crime Mr. Zakaria Elisaria at first maintained that the prevailing circumstances ruled out any possible mistaken identification of the appellant. We

shall later show how the learned Senior State Attorney later supported the appeal.

After hearing the submissions made by the learned counsel for the parties and after going through the record, we noted that the appellant faced the offence of armed robbery c/s 287A of the Penal Code, Cap 16 as amended by Act No. 4/2004. For purposes of the facts of this appeal, the salient ingredients of this offence are stealing of the handbag, together with violence in the nature of an instrument the appellant is alleged to have used to take or retain the stolen handbag. On 3rd November 2006 when the offence was allegedly committed, section 287A as a result of an amendment of the PENAL CODE by the WRITTEN LAWS (MISCELLANEOUS AMENDMENTS) (NO. 2) ACT, 2004 [ACT NO. 4 of 2004] provided:

> *287A. Any person who steals anything, and at immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and at or immediately before or immediately after the time of the stealing uses or threatens to use violence to any person, commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment.*

The conviction of the appellant was apparently based partly on having been positively identified by PW2 at the scene of crime. His conviction was also partly based on the evidence of cautioned statement which was admitted through PW1 as exhibit P1. To prove

that the complainant was injured during the course of stealing, prosecution tendered a medical examination report (exhibit P2).

We agree with the two learned counsel that the cautioned statement which was recorded by PW1, Detective Constable Kisasila, was taken in contravention of the mandatory provisions of Section 57 (4) of the CRIMINAL PROCEDURE ACT. We reached this conclusion by relating the provision of Section 57 (4) with the evidence on record. Section 57 (4) provides:

> 57 (4) Where the person who is interviewed by a police officer is unable to read the record of the interview or refuses to read, or appears to the police officer not to read the record when it is shown to him in accordance with subsection (3) the police officer **shall:-**
>
> *a) Read the record to him, or cause the record to be read to him;*
> *b) Ask him whether he would like to correct or add anything to the record;*
> *c) Permit him to correct, alter or add to the record, or make any corrections, alterations or additions to the record that he requests the police officer to make;*
> *d) Ask him to sign the certificate at the end of the record; and*
> *e) Certify under his hand, at the end of the record, what he has done in pursuance of this subsection.* ***[EMPHASIS PROVIDED]***

On its first page, exhibit P1 [a Police Form (PF No. 2A)] is a standard form with information that is designed to inform a person being interviewed by the police. It informs the interviewee that the

offence for which he is facing: that he is not obliged to say anything, and whatever he says will be used against him in the court of law; and that he is free to bring along his friend or relatives to witness the interview. Then there is a blank space to be filled showing that the accused person understood the conditions and was prepared to be interviewed by the police. After filling – in the form, the interview with the appellant went along in a format of questions-and-answers.

Upon our re-evaluation of exhibit P1, we think the appellant had a good reason to complain that his cautioned statement was taken in contravention of the applicable law. We have failed to find anywhere on the record where PW1 reads, or caused to be read to the illiterate appellant the contents of the questions-and-answer record he had compiled. In **Criminal Appeal No. 94 of 2009, TAUTA KIKORIS VS THE REPUBLIC (unreported)** we expunged from the record of appeal cautioned statement of an accused after finding that it was recorded in contravention of the mandatory provisions of S. 57 (4) of the CRIMINAL PROCEDURE ACT.

We have also noted that in his judgment, the learned trial magistrate did not evaluate the probity of the cautioned statement. He solely relied on the testimony of PW1 D/CPL Kisasila who had recorded that statement and also testified that the appellant made statement freely without fear, intimidation, inducement, misrepresentation, and all his rights were duly explained. The learned trial magistrate, without so much as conducting an inquiry to determine its voluntariness, concluded that the cautioned statement

had credence to establish the offence leveled against the appellant even where the appellant had objected and the trial magistrate did not conduct an inquiry.

There are several decisions of this Court which have settled the law that once an accused had taken an objection against the admissibility of a caution statement at a subordinate court, the trial court concerned has a duty to first determine the voluntariness of the confession by conducting an inquiry. We restated this duty in **CRIMINAL APPEAL NO. 29 OF 2005, 1. KULWA ATHUMANI @ MPUNGUTI, 2. HAMISI JUMA SHOKA, 3. HARUNA HASSANI @ KICHWA, 4. RAMADHANI SALUM @ BABU MSENDA- VS. THE REPUBLIC (unreported)**. Later in **CONS. CRIMINAL APPEALS NO. 31, 93 & 94 OF 2010, 1. NELSON GEORGE @ MANDELA, 2. ABUBAKARI SADICK @ ABUBA, 3. SIRAJI YAHAYA, 4. MENGI RAMADHANI** and **5. HASHIM SAID VS THE REPUBLIC** (all unreported), we emphatically said that if the prosecution intends to admit a cautioned statement in evidence in a subordinate court, and the accused objects to its admissibility, the next step is to make an inquiry as to the voluntariness of the statement. Once this question is determined and the court finds that the statement was made voluntarily, it admits it, and proceeds with the trial. We said also that if this inquiry is not done, and the court receives such evidence, the statement would have been improperly received; and the court cannot act on such evidence.

In the present appeal, the cautioned statement which was used as prosecution evidence was not subjected to any inquiry by the trial subordinate court. Records further show that the appellant took an immediate objection against the cautioned statement whereupon the trial court proceeded to admit the cautioned as exhibit P1 without conducting any inquiry as expected of a subordinate court placed in similar circumstances.

From the foregoing, we find that the cautioned statement was improperly admitted as exhibit P1 and we hereby expunge it from the records of the trial court. We also expunge the medical examination report (exhibit P2) from the record because the appellant was not informed of his rights under section 240 (3) of the CRIMINAL PROCEDURE ACT to prevail the attendance of the medical officer for cross – examination.

Having expunged the cautioned statement and the medical examination report, the only evidence remaining on record placing the appellant at the scene of armed robbery is the identification evidence of PW2, the victim of the alleged offence. We commend here the decision by Zakaria Elisaria the Senior State Attorney to change his previous stand and support the appeal. As an officer of the court, Mr. Elisaria drew our attention to an inadvertence by the trial court on page 28 of the record of this appeal suggesting that PW1 Corporal Kisasila corroborated the visual identification evidence of PW2 Rebecca Jackson. In fact, PW1 was not at the scene of crime and could not provide visual identification evidence to corroborate

that of PW2. PW1 only recorded the cautioned statement of the appellant which we have expunged.

The presence of the appellant at the scene of armed robbery and his participation in the armed robbery that fateful day needed to be proved beyond reasonable doubt. This proof of his physical presence was important before we even look at the ingredients of the offence of armed robbery. The appellant, testifying as DW1, claimed that he was with other passersby when the police on patrol, arrested him. On her part, PW2 testified how on the material day the appellant had come from behind, snatched her bag as she tried to resist. The appellant threatened her by cutting on her hand with a knife two times. Again, it was upon cross-examination by the appellant when PW2 ventured to testify that she managed to identify the appellant because she was facing him when they were struggling over the handbag.

On page 51 of its judgment, the High Court as the court of first appeal believed the account given by PW2 on identification of the appellant. The learned Judge suggested that since the appellant had briefly struggled with PW2 over a hand bag, that interlude coupled with the fact that the appellant did not hide his face with any cover made the High Court to believe that PW2 was in a position to properly identify the appellant. With due respect, we agree with both learned counsel that the evidence of PW2 needed independent corroboration which is wanting. Apart from stating that she could identify the appellant to be her assailant, PW2 did not furnish any descriptions of the appellant. This description was important because

the police officers who allegedly arrested the appellant and took him to the station did not testify. The appellant was arrested in a very busy street with so many onlookers, yet not a single person who actually witnessed the arrest or gave chase, testified. Therefore, there is no evidence showing how the appellant was actually arrested and how he was taken to the police station.

This Court has always insisted that great care should be taken before relying solely on identification evidence. In **NELSON GEORGE @ MANDELA (*supra)*** we said that in matters of identification it is not enough merely to look at factors favouring accurate identification. Although evidence of a single witness can sustain a conviction, the law is all the same clear that utmost caution is needed before convicting where the evidence of identification is that of a single witness. The decision of this Court in the **WAZIRI AMANI V REPUBLIC** [1980] TLR 250 case in essence articulates the proper position of the law prevailing in Tanzania where the evidence of identification is that of a single witness. We at pages 251-252 said:-

> *"... evidence of visual identification, as Courts of in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows, therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

Applying the principles we laid down in **Waziri Amani v Republic (*supra*)** to the present appeal, we do not think all possibilities of mistaken identity were eliminated with respect to the appellant. Possibility that someone else other than the appellant was responsible for the offence that took place in a busy street cannot be ruled out. Such doubts should operate in favour of the appellant.

Ultimately, therefore, we shall allow the appeal, quash the conviction and set aside the sentence of thirty years imprisonment which lower courts had imposed. The appellant is to be released from prison unless he is lawfully held.

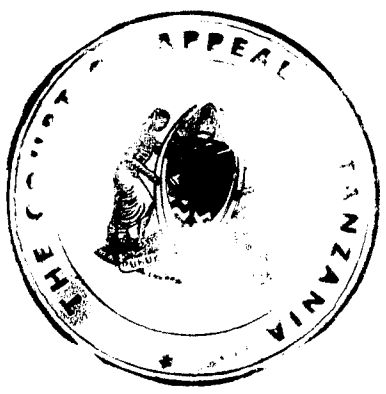
DATED at ARUSHA this 6th day of March, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



Z.A.MARUMA
DEPUTY REGISTRAR
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