

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

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

CRIMINAL APPEAL NO. 225 OF 2011

**MARWA RUGUMBA @ KISIRIAPPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court
of Tanzania at Mwanza)**

(Nyangarika, J.)

**dated 10th day of August, 2011
in
Criminal Appeal No. 61 of 2009**

JUDGMENT OF THE COURT

31st July & 1st August, 2013

MSOFFE, J.A.:

The District Court of Nyamagana at Mwanza convicted the appellant of armed robbery contrary to section 287A of the Penal Code mainly on the basis of the evidence of PW3 Maulizo Stanley Cholobi who led evidence that on 13/6/2004 he was asleep when he was awakened by the sound of a big bang from the sitting room. He went to the sitting room where he found all doors open. At the same time his wife who was in the bedroom was shouting "wezi, wezi". As to what happened thereafter, let the record speak for itself:-

I returned to the bedroom, I met this person (bwana). (pointing at the 1st accused). He was together with another person. They were with pangas and rungas. There was a light coming through the window now from outside I too had a torch I light to them. I told them to go outside but they started cutting and beating me. I too had panga in my hand, the... any right hand I had a panga. We all fought each other, there was another person too who was taller I cut him with my panga on the left fore heard. He then went back. The 1st accused came forward he was having a panga, I cut him with a panga at the hand which held the panga. I cut him "nyuma ya kiganja kidogo", we proceeded fighting. Then he appeared/came another robberer who cut me on the left hand ankle. I was at all over my body in different places on the at the right car, in my right fore heard and in my chest. Later on I falled down hence the robberers hand a chance to escape. In my bedroom nothing was stolen but in the sitting room they stole two Deck and one television (screen). I was helped by my neighbours and wife to police station. I have seen the 1st accused before the event of accident, he was at Liberty Street pushing a "toroli".

The first accused referred to in the above extract is the appellant in this appeal. The incident was reported to the police and investigations were carried out. In the process, the appellant and others who were acquitted were charged in court. The appellant made a cautioned statement which was recorded by PW1 E5197 D/Cpl Juma. Following his conviction the appellant was sentenced to the statutory thirty years term of imprisonment and corporal punishment of twelve strokes of the cane. His first appeal to the High Court was unsuccessful hence this second appeal. Before us he appeared in person, unrepresented. The respondent Republic was represented by Mr. Victor Karumuna, learned State Attorney, who opposed the appeal.

In his memorandum of appeal the appellant has listed a total number of seven grounds of complaint. Apparently, some of the grounds raised therein were not canvassed before the High Court in the first appeal. Anyhow, in substance the memorandum coupled with the appellant's oral submissions before us show that the appellant's grievances are based on two main points. **One**, the weight attached by the courts below to his cautioned statement. **Two**, the evidence of identification in the case i.e. that he was not identified on the alleged date and time of incident.

We will begin with the cautioned statement. We appreciate that in his judgment the learned trial Resident Magistrate addressed this aspect of the case in fairly sufficient detail. In the process, he properly directed himself to the law i.e that in practice a repudiated confession requires corroboration. He cited a number of authorities to this effect. The learned judge on first appeal also addressed this point. In the end, he was of the view that the so called repudiation was an afterthought. This is how he reasoned:-

Reverting back on the issue of confession, if it was true as alleged that the confessions were obtained by torture, I think PW4 should have been cross-examined on that when he was testifying or an objection raised to the admissibility of the confession. It seems to me that the so called repudiation or retraction was an afterthought and would not deserve serious consideration...

It seems to us that in order to resolve the point raised by the appellant on the cautioned statement there is need to revisit the record. The proceedings of the trial court dated 18/8/2005 show that PW2 D 2402 D/Cpl. Boniface produced the statement and read it aloud after the court had ordered him to do so. The appellant objected to its production and

admission in evidence. In the endeavor aimed at discharging the burden vested on the prosecution in terms of section 169(3) of the Criminal Procedure Act PW1 attempted to explain why the document should be admitted in evidence by stating that he did not beat the appellant. The court adjourned its Ruling till 1/9/2005. On this date the Ruling was not ready. It was again adjourned till 13/9/2005 when the court stated:-

Court: The cautioned statement of the 1st accused is admitted as being repudiated or retracted. And marked PE1

With respect, the above Ruling did not disclose any reasons as to why the court thought that the burden provided for under subsection (3) of section 169 had been discharged. In the absence of any reasoning to the above effect, we have decided to attach no weight to the cautioned statement.

This brings us to the evidence of identification in the case. On this, like the courts below we too are satisfied that conditions favouring a correct identification of the appellant on the night in issue were adequate. PW3 knew the appellant prior to the date of incident. He was positive that he used to work for gainful employment at Liberty Street "pushing a toroli".

At the time of incident, they stood at very close range to the extent that he managed to cut and "chop off" the appellant's palm of the left hand. The place of incident was well lit with both electricity light and torchlight illuminating the area. A look at the evidence in its totality shows that the incident took a fairly long period of time. With the existence of all these factors, there is no basis for doubting the evidence of identification in the case.

In the event, except for the position we have taken on the cautioned statement, the rest of the appeal is dismissed. The appellant's conviction and sentence were well grounded in that respect.

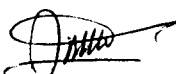
DATED at **MWANZA** this 31st day of July, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL