IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 72 OF 2013

SAMWEL S/O BATROMEO.....APPELLANT

VERSUS

THE REPUBLIC.....REPUBLIC

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Wambaii, J.)

dated the 17th day of February, 2010
in
DC. Criminal Appeal No. 126 of 2009

JUDGMENT OF THE COURT

20th & 25th September, 2013

MBAROUK, J.A.:

In the District Court of Kahama at Kahama, the appellant, Samwel Batromeo was charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 Vol. 1 of the laws as amended by Act No. 4 of 2004. However, the trial District Court convicted him of the offence

sent PW4 to the hospital, while PW1 and others started to look for the culprit. He said, while they were on the search they noted foot prints leading to the house of the father of the appellant and they saw him hiding at the back of the house. They reached there at around 05:30hrs going to 06:00hrs. PW1 said, initially, they asked PW4 (victim) whether he recognized any one, and PW4 named the appellant. PW1 further added that the appellant escaped from his father's house and the information spread all over the surrounding wards. On 19th September, 2008, the appellant was arrested while at Mpunze village and sent to the Police Station.

PW4 (the victim) testified to the effect that he recalled on the night of 26th July, 2008 while at home, strangers entered in his house. He then switched on the torch and found the appellant and others to whom he did not know them. He said, the bandits stole a bicycle, "gobore" – gun and a "panga". He said, after they took those properties, they severely beat him and fell him down. Thereafter, his children

raised an alarm and the appellant escaped but later arrested at Mpunze village.

In his defence, the appellant simply discredited all the prosecution witnesses to the effect that their evidence did not establish the offence charged against him. He added that, the evidence from the prosecution witnesses, PW1, PW2 and PW4 was not water-tight at all. He even argued as to how could PW4 managed to identify him at that night time.

In this appeal, the appellant filed a memorandum of appeal containing six grounds of appeal, but they can conveniently be reduced to two grounds of complaint, namely:-

(1) That, there was no inquiry made to prove the voluntariness of the cautioned statement (Exhibit P1).

(2) That, the identification of the appellant was highly questionable.

learned State Attorney urged us to find that the cautioned statement was wrongly admitted.

On our part, we have gone through the entire record and found that the two courts below apart from identification, they relied on the evidence found in the cautioned statement tendered as Exhibit P1. We fully agree with the learned State Attorney to the effect that the cautioned statement allegedly taken from the appellant was wrongly admitted. This is because, it is a trite law that where an objection has been raised as to its admissibility in order for a cautioned statement to be admitted in evidence, the prosecution must prove beyond reasonable doubt that it was made voluntarily by the accused person. If the accused claim that it was not voluntarily made, the trial court is obliged to conduct an inquiry if the matter is before the subordinate court as provided by section 27 of the Evidence Act. Whereas if the matter is before the High Court, a trial within trial has to be conducted.

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In the instant case, the record shows that, when the cautioned statement was admitted in court the proceedings were as follows: -

> *"**PP**: I pray to tender the cautioned statement as exhibit before this Court and that it be admitted.*
>
> ***Accused**: Your honour, in the name of my God, I had not stated anything before this officer of police. What I recall I had been tortured by his pliers and pressing at my penis. I object to be admitted as I was forced to sign.'*
>
> ***PP**: ...There is no any proof if he recall was tortured by being pressed his penis by using a powers. I thus pray that his objection not to be entertained anyhow by this Court.*
>
> *R. H. MAHAMBALI – RM*
>
> *05/02/2009*

Court: *The said cautioned statement is admitted and marked as exhibit P1. The accused has got a right to cross-examine the witness, but so long as there is his signature and that the presidlng officer has a rank above copral officer, the objection is over ruled.*

F. H. MAHAMBALI – RM

05/02/2009"

With all due respect to the learned trial magistrate, we think he wrongly admitted the said cautioned statement (Exhibit P1) without conducting an inquiry as the accused/appellant indicated that there was an element of torture inflicted on him before the statement was taken by PW3. This Court in the case of **Twaha s/o Ali and Others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported) stated as follows; -

> ***"If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry*** *(or a trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

In the instant case, such a procedure was not followed by the trial court. A clear procedure to be followed in conducting an inquiry before subordinate courts or even during trial within trial at the High Court has been stated in various decisions. For example, in the case of **Rashid and Another V. Republic** (1969) EA 138, the erstwhile East African Court of Appeal, stated as follows: -

"the correct procedure when a statement is challenged is for the prosecution to call its witnesses and then for the accused to give or make a statement from the dock and call his witnesses, if any."

This Court in the case of **Selemani Abdallah and Two others v. The Republic**, Criminal Appeal No. 384 of 2008, (unreported), has been more specify in giving a procedure to be followed when a subordinate court conduct an inquiry or the High Court conduct a trial within trial. The same states as follows: -

The procedure entails the following: -

i) When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.

ii) The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of that aspect of voluntariness. The witnesses must be sworn or affirmed as mandated by section 198 of the Criminal Procedure Act, Cap. 20.

iii) Whenever a prosecution witness finishes his evidence the accused or his advocate should be given opportunity to ask questions.

iv) Then the prosecution to re-examine its witness.

v) When all witnesses had testified, the prosecution shall close its case.

vi) Then the court is to call upon the accused to give his evidence and call witnesses, if any. They should be sworn or affirmed as in the prosecution side.

vii) Whenever a witness finishes, the prosecution to be given opportunity to ask questions.

viii) The accused or his advocate to be given opportunity to re-examine his witnesses.

ix) After ail witnesses have testified, the accused or his advocate should close his case.

x) Then a Ruling to follow.

xi) In case the court finds out that the statement was voluntarily made (after reading the Ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. The court should accept and

mark it as an exhibit. The contents should then be read in court.

xii) *In case the court find out that the statement was not made voluntarily, it should reject it.*

All in all, the record shows that the trial court in this case failed to conduct such an inquiry even after the appellant pointed out clearly that there was an element of torture before the cautioned statement was taken by PW3. For such failure of the trial court not to conduct an inquiry, we are strongly of the view that the cautioned statement was wrongly admitted, hence it can safely be discounted from the record. For that reason, we find this ground of appeal with merit.

Apart from the evidence from the cautioned statement, the trial court and the first appellate court relied on the evidence of identification to find the appellant guilty and hence convict him. As on the issue of identification, the learned

State Attorney submitted that there were several doubts leading to a mistaken identity of the appellant. In support of her argument, the learned State Attorney submitted that, the record shows that the alleged offence was committed during the night time. She said, PW4 (the victim) testified that he was able to identify the appellant by the help of a torch light. However, she said, PW4 failed to give the distance from where he was, to the place where he saw the appellant. Failure to disclose such a distance created doubt as to whether the appellant was correctly identified.

In addition to that, the learned State Attorney submitted that, the record is silent on the intensity of the torch light which enabled PW4 (victim) to identify the appellant properly. She further submitted that, to avoid mistaken identity when the offence is committed during the night time, it is important for a witness to clearly state the source of light and its intensity and even the distance from the source of light was, to where the accused stood. In support of her argument she

cited to us the decisions of this Court in the cases of **Maselo Mwita @ Maseke and Another v. Republic**, Criminal Appeal No. 63 of 2005 and **Mkombozi Ezekiel v. Republic**, Criminal Appeal No. 129 of 2008 (both unreported).

The learned State Attorney also submitted that the record is silent as to which source of light and its intensity enabled PW1 to trace the foot prints from PW4's house to the house of the father of the appellant. She said, that also created doubt. In addition to that, she submitted that the record is silent on the source and intensity of the light which enabled PW1 and others to identify the appellant when he hid at the back of his father's house.

Ms. Jane Mandago urged us to find that the totality of those doubts remained without being cleared, hence the issue of mistaken identity could not have been avoided. She then urged us to give such benefit of those doubts to the appellant and allow the appeal.

On our part, we think the record is clear that neither the intensity of the torch light held by PW4, nor the distance from the said torch where the appellant stood was stated by PW4. In several decisions of this Court, the importance of stating clearly the intensity of the source of light and the distance which enables a witness to identify the accused at the scene of crime have been emphasized. See for example, this Court in the case of **Maselo Mwita @ Maseke** *(supra)* stated as follows: -

> *"**Different lamps produce light of different intensities.** Light from a wick lamp is incomparable to that from a lantern, or a pressure lamp. The evidence of PW1 does not show the size of the room which, going by this evidence, was a bedroom – cum – shop. It is possible that*

identified at the scene of crime and even at the place where he hide himself before he ran away.

Given those shortcomings in the prosecution's case, we are constrained to find the appeal with merit. In the event, we hereby allow the appeal, quash the conviction and set aside the sentence. In addition to that, we order the appellant to be released from prison forthwith unless otherwise he is held for some other lawful purpose.

DATED at TABORA this 25th day of September, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL