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

**(CORAM: KIMARO, J.A., MANDIA, J.A., And JUMA, J.A.)**

**CRIMINAL APPEAL NO. 297 OF 2013**
**MESHAKI ABEL EZEKIEL ..... APPELLANT**
**VERSUS**
**THE REPUBLIC..... RESPONDENT**
**(Appeal from the judgment of the High Court of Tanzania at Moshi)**

**(Makuru, J.)**

**Dated 17th day of October, 2012**
**In**
**Criminal Appeal No. 4 of 2011**
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**JUDGMENT OF THE COURT**

**25th June, & 1st July, 2014**

## JUMA, J.A.:

The appellant together with Peter s/o Ernest Lyimo and Thimotheo s/o Siriri Massawe were jointly and together charged before the District Court of Moshi at Moshi with the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 as amended by Act No. 4 of 2004. Particulars of the offence are that on November 11, 2009 at Njiro area in the Municipality and District of Moshi, they stole cash Tshs. 8,500,000/=, one gun (a rifle Calibre 375 No. 23979 CAR No. 00075305) loaded with four round of ammunition and 25 round of ammunition of shotgun the property of Fabian Victor Minja. It was further alleged that immediately

before and immediately after stealing they threatened the owner in order to obtain and retain the stolen properties.

After hearing five prosecution and three defence witnesses, the learned trial Magistrate (G. Shayo-RM) was satisfied that the offence of armed robbery had not been proved as against Peter s/o Ernest Lyimo and Thimotheo s/o Siriri Massawe. However, with respect to the appellant, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt. He was as a result found guilty, convicted and sentenced to serve thirty (30) years in prison.

The appellant was aggrieved. His first appeal to the High Court at Moshi (Makuru, J.) was based on nine grounds of appeal. Four grounds stood out. First is the ground contending that the cautioned statement (exhibit P4) was tendered in court without complying with mandatory provisions of the Criminal Procedure Act, Cap. 20 (CPA). Second ground centred on the complaint that the evidence of PW2, PW3 and PW4 suffered from inconsistencies and contradictions. Thirdly, the appellant questioned the prosecution's failure to bring an independent witness to corroborate the allegations that it was the appellant who led the police to a place where the gun that was stolen from the complainant was recovered.

Fourthly, he complained that the police who allegedly found the stolen gun did not produce any document (like a certificate of seizure) to prove its finding. Finally, he contended that the judgment of the trial court lacked the points of determination and as a result does not comply with section 312 (1) of the CPA. Unfortunately for the appellant, the High Court dismissed his appeal. That first appellate court found that the confessional statement subject of first appeal was in compliance with section 57 and 58 of the CPA.

This second appeal to this Court is based on three grounds of appeal. First, the appellant contends that the charge which the prosecution levelled against him had not been proved to the required standard. Secondly, he still contested the way his confessional statement was admitted, complaining that its admission did not comply with the applicable provisions of the law. Thirdly, the appellant contested the evidence which suggests that he had shown the police the place where the gun subject of the charge sheet was recovered. Finally, the appellant faulted the first appellate court for failing to note that from the very beginning he had been denied his constitutional rights.

Briefly, the background facts leading up to this appeal are in essence captured in the evidence of the complainant, Fabian Victory (PW1) and his wife, Susana Daniel (PW2). It was on 11/11/2009 at around 8:00 p.m., PW2 a mother of eight children had just entered her house leaving one of her children outside still washing her feet. Soon this girl rushed back inside with three men behind her in hot pursuit. The three men entered the house and placed PW2 and her children under what PW2 describes as "arrest". The intruders wanted to know where PW2's husband was. They were not satisfied with PW2's response. They grabbed one of her daughters, and squeezed her breasts hard. The girl let out a loud scream expressing pain. It was this scream that drew the attention of the complainant (PW1). PW1 testified that he found the three men who begun hitting him with sticks demanding Tshs. 10,000,000/=. Although PW1 told the invaders that he did not have the money, they detained his wife and forced her to show where the money was. They forced open the wardrobe taking with them Tshs. 8,500,000/= in cash, a rifle and shotgun. Neither PW2 nor her husband PW1 was able to identify the bandits who had invaded their home.

ASP Zacharia Bernard (PW3) testified on how the appellant was arrested the following day on 12/11/2009. According to PW3, the appellant on his arrest admitted that he took part in the armed robbery and mentioned two other accomplices. Appellant took the police to a place near Longoi River where the gun had been hidden. PW3 recovered a rifle which had a bullet in its chamber. Apart from PW3, detective corporal Jerome, (PW4) was amongst the police officers who were taken by the appellant to where the appellant had hidden a shotgun which they recovered. It was detective Station Sergeant Said (PW5) who on 21/11/2009 took down the appellant's cautioned statement.

When put to his defence, the appellant (DW1) denied the offence. He explained that moments before his arrest, he was in a bar known as "Country Side". Six policemen descended on where he was, rounded him up before arresting him. They ordered him to go along with them to a forest where he was ordered to remove his clothes. He was then subjected to kicks and blows. One police officer went to the extent of pointing a gun at his head. Later, he was ordered to put his clothes back and they drove back to the police station. He was surprised to hear evidence that he had led the police to where they recovered a gun.

When this appeal came before us for hearing on the 25th June 2014 Ms. Elizabeth Swai, learned State Attorney appeared for the respondent Republic. The appellant, who was unrepresented, argued his own appeal. Expounding his complaint that the prosecution case was not proved to the required standard, appellant referred us to the testimony of the complainant (PW1) and that of his wife (PW2), and contended that their respective evidence as to the place where the armed robbery took place, is at variance with what is alleged in the particulars of the offence in the charge sheet. He pointed out that while on one hand the particulars in the charge sheet allege that the offence was committed "on 11th day of November, 2009 at **Njoro area** within the Municipality and District of Moshi in Kilimanjaro Region;" on the other hand, PW1 testified that he is a resident of **Longoi area** Moshi Municipality. Appellant contended that PW2, who is PW1's wife, testified that the incident took place at yet another area when she testified that she resided at **Kawaya** where the incident of robbery took place.

As for his next ground, the Appellant also complained about the way his cautioned statement, was despite his objection relied upon by the two courts below. He submitted that he was arrested on 12th November, 2009

and wondered why it took up to 21st November, 2009 for detective sergeant Saidi (PW5) to record his cautioned statement.

Appellant took exception to the evidence of ASP Zacharia Bernard (PW3) detective corporal Jerome (PW4) who claimed that appellant took them to a place in the forest where the gun subject of the offence of armed robbery was hidden. The appellant wondered why civilians were not included in the trip to the forest to recover the gun. He in addition questioned why PW3 and PW4, the two police officers who went with him to the forest, did not spell out to the court the serial numbers of the gun which they recovered from the forest. Appellant highlighted the contradiction in the evidence of the two police officers. On one part PW3 testified that he saw a rifle at the scene of discovery, on the other part, PW4 saw a shotgun. PW3 on page 18 stated that:

> *"...We saw a big iron bar which he used to dig out the firearm. I saw it is* ***a rifle make, having one bullet in its chambers."*** [Emphasis added].

While on page 22 of the record PW4 stated that:

*"...we dug a place he showed us, we picked up a piece of iron, he used the piece of iron bar to dig the gun we found it,* ***shotgun with one round of ammunition...*** *"* [Emphasis added].

The appellant submitted that the discrepancy between what PW3 and PW4 saw goes out to illustrate the extent the police fabricated the criminal case against him.

In her replying submissions, Ms Elizabeth Swai, learned State Attorney, supported the appeal by pointing out the contradictions and doubts in the evidence should be resolved in favour of the appellant. She began her submissions from the premise that the appellant was not identified by the complainant (PW1) and his wife (PW2) at the scene of the armed robbery. Ms Swai pointed out that amongst the evidence that convicted the appellant includes the evidence of the two police officers, PW3 and PW4; who testified how the appellant took them to the forest, where he had hidden a Rifle calibre No. 375 (exhibit P1). Learned State Attorney expressed her doubts about the probity of this evidence. She

submitted that in the charge sheet only *"one gun make Rifle calibre 375 No. 23979 CAR No. 00075305 loaded with four round of ammunition and 25 round ammunition of shotgun the property of FABIAN VICTOR MINJA...."* is shown to have been stolen from the complainant (PW1). Yet, on page 15 of the record, the complainant gave evidence suggesting that the armed robbers stole a shotgun and 50 rounds of ammunition. This version of evidence of PW1 is different from the 25 round of ammunition which is disclosed in the charge sheet to have been stolen. Ms Swai submitted that this divergence between what is alleged in the charge sheet and what the complainant testifies to have been stolen is a major contradiction suggesting that the complainant was not sure about what was actually stolen during the armed robbery.

Ms Swai raised yet another doubt in the prosecution's case. She wondered aloud as to how the Rifle and ammunition that had been stolen from the complainant, later recovered by the police in the forest, found way back to the complainant who tendered the same as exhibits P1 and P2. Learned State Attorney at very least expected the two police officers (PW3 and PW4) who recovered the rifle and ammunition in the forest to have either identified the same in court or actually tendered these exhibits.

She submitted that this apparent break in the chain of custody creates doubt as to whether the rifle and ammunition recovered by the police is the same as one which the complainant tendered in court as exhibits P1 and P2.

The learned State Attorney added that the doubt is not helped by the way PW3 and PW4 differed on what was actually recovered from the forest, whether they recovered a rifle or a shotgun. Ms Swai believed that the failure of either PW3 or PW4 to positively identify either shotgun or rifle creates doubt whether what the complainant tendered as exhibits P1 and P2 was recovered by the police from the forest after being shown by the appellant.

Like the appellant, Ms Swai also believes that the two courts below erred when they relied on the cautioned statement of the appellant. The learned State Attorney submitted that according to the evidence of ASP Zacharia Bernard (PW3) the appellant was arrested on 12th November, 2009. Further, the learned State Attorney submitted that Staff Sergeant Said (PW5) recorded the appellant's cautioned statement on 21st November, 2009 which was nine days after the appellant's arrest. Placing reliance on our decision in **Mussa Mustapha Kusa and Beatus Shirima**

**@ MANGI vs. R.,** Criminal Appeal No. 51 of 2010 (unreported), the learned State Attorney observed that the recording of appellant's cautioned statement nine days after his arrest violates sections 50 and 51 of the CPA. The Court in **Mussa Mustapha Kusa and Beatus Shirima @ MANGI vs. R.** (supra) stated the following with regard to cautioned statement that are made outside the prescribed period:

> *Section 50 stipulates the basic period available for interviewing a person who is in restraint in respect of an offence shall be four hours commencing from the time he was arrested in respect of that offence. However, this basic period may be extended under s. 51 by the officer in charge of investigating the offence for a period not exceeding eight hours or, on application, by a magistrate for a period he may deem reasonable. The evidence on record does not indicate in any way that there were such extensions before PW2 D/CPL Mabula interviewed the 2nd appellant, if he indeed did so. If the learned trial magistrate was minded to strictly protect the appellants' procedural rights, she would not have admitted exh. P2 in evidence before satisfying herself that it had been taken in full compliance with the mandatory requirements of the law...."*

It is clear from the foregoing submissions that there are two main issues calling for our determination.

**First,** is whether the ***Rifle calibre No. 375*** (exhibit P1) and ***one round of ammunition No. 375 of Rifle*** (exhibit P2) which were tendered by the complainant, were the same as those which were recovered by PW3 and PW4 from the forest after the appellant had shown the police where he had hidden the stolen gun and ammunition. **Second,** is whether or not the appellant's cautioned statement (exhibit P4) was admitted in compliance with sections 50 and 51 of the CPA. In determining these two issues, we are fully aware of the settled law that this Court shall not readily interfere with concurrent finding of facts by the two courts below except in special circumstances such as where there are mis-directions or non-directions, on the evidence: **Omari Mrisho vs. R.,** Criminal Appeal No. 38 of 2012 (unreported).

The trial magistrate (G. Shayo-RM) and the Judge on first appeal (Makuru, J.) made a concurrent finding of fact that exhibits P1 and P2 which were tendered by the complainant, were the same as those which were stolen from the complainant's house during the armed robbery and

later recovered by PW3 and PW4 from the forest. The trial magistrate stated:

> *"...The testimony of principal witness Fabian Victory Minja (PW1) proved among the goods stolen in his house in the material night is shotgun and rifle, whereas accused No. 1 Meshaki s/o Abel Ezekiel took policemen to the forest, where they put and hid one of the stolen firearms, which was rifle put under the ground, they dug it out escorted accused No. 1 with it, to Police station, which gun was tendered before this court as exhibit (P1)...."*

The learned first appellate Judge concurred with the above finding and said:

> *"...The appellant was interrogated. The interrogation was fruitful as the appellant mentioned Timotheo Siriri, Anthony Mandeo and Meshaki as his partners in the commission of the crime. He also led PW3 and PW4 to the place where the stolen gun was hidden. The gun was loaded with one bullet. The gun was identified by PW1 and was tendered and admitted in court as exhibit P1 while the round of ammunition was admitted as exhibit P2..."*

Despite the concurrent finding of facts by the two courts below, we think Ms Swai has with due respect raised a good reason for the Court to interfere with above conclusions. Like the learned State Attorney, we also wonder how come the Rifle and ammunition that had been stolen from the complainant, later recovered by the police in the forest, found way back to the complainant who tendered the same as exhibits P1 and P2. As this Court stated in **Deus Mnyaga @ Zungu Mazunguru and Wilson Gabriel @ Hamidu Shabani vs. R.,** Criminal Appeal No. 123 of 2014 (unreported), stealing always involves *asportation* i.e. the physical taking away of stolen item resulting in the owner losing possession. In the present appeal, after the Rifle/shotgun and ammunition had been stolen during the armed robbery, the complainant lost possession. An explanation is required as to why the complainant (PW1) was still in a position to tender exhibits P1 and P2 after he had lost possession.

We therefore subscribe to what Ms Swai submitted to contend that establishing a chain of custody of exhibits P1 and P2, from the forest where these were recovered, to the police station where these were stored to await trial and to the time they were tendered; is necessary to afford

reasonable assurance that these exhibits tendered at the trial are the same as the ones recovered from the forest.

In **Onesmo s/o Mlwilo vs. R.,** Criminal Appeal No. 213 of 2010 (unreported) the Court found no proof of the chain of custody of the items found regarding the person who took care of them from where they were found up to a point when they were tendered as exhibits P3 and P4 at the trial court. The Court concluded that without such proper explanation of the custody of those exhibits, there would be no cogent evidence to prove the authenticity of such evidence. The Court also referred to its decision in **Iluminatus Mkoka v. Republic** [2003] TLR 245, where it had emphasized that a trial court should know in whose custody those exhibits were kept. The Court concluded that:

> *"...In view of those missing links in the instant case, we are of considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 and P4 leaves open the possibility of those exhibits being concocted or planted in the house of the appellant."*

In **Mussa Hassan Barie and Albert Peter @ John vs. R.,** Criminal Appeal No. 292 of 2011 (unreported) the Court referred to its earlier decision to emphasize the importance of chain of custody:-

> *In **Paulo Maduka and Others vs. R.,** Criminal Appeal No. 110 of 2007 (unreported) this Court underscored the importance of proper chain of custody of exhibits and that there should be:-*
>
> > *"..... chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime....."*

Ordinarily and as Ms Swai has correctly submitted, the gun which was recovered from the forest in the present case should have been tendered by a police officer who was put in charge of the investigation. The two police officers, PW3 and PW4 who recovered the gun, would identify the gun as the one they recovered and explain where the gun was stored to await the trial. The complainant would also identify and confirm

that the gun concerned to be his. The chain of custody would have resolved the contradiction between the evidence of two police officers PW3 and PW4 as to what type of the gun which the police recovered in the forest. As Ms Swai correctly submitted, the doubt should have been resolved in favour of the appellant, which we hereby do.

We propose next to deal with the cautioned statement which Ms Swai pointed out that it was recorded nine days after the appellant's arrest.

Both the trial and the first appellate court did not address the complaint that the cautioned statement (exhibit P4) was tendered in court outside the four hours period after the arrest of the appellant and in the process contravened the mandatory provisions of sections 50 and 51 of CPA. With regard to the cautioned statement, the trial magistrate stated:

> *"...The exhibit P4 is the admission of the accused person committing armed robbery, but he denied the document not to be admitted by the court, as was not well written under the legal procedure. The document exhibit P.4, cautioned statement taken under section 27 (1) of the Evidence Act.... And under section 57 (2) of the Criminal Procedure Act... shows accused person was explained legal rights and signed as questions [were] put to him by the police officer, then he*

*signed his statement before D/S/Sgt. Said. The contents in the statement cannot be exaggerated and written by the police officer, which statement tends to support [the testimony] of prosecution witnesses."*

Like the trial magistrate, the learned Judge of first appeal restricted her determination of probative value of cautioned statement by looking at compliance with the formalities under sections 57 and 58 of CPA. She did not consider compliance with the period available for interviewing a person who is in restraint as mandated by sections 50 and 51 of CPA:-

*"....Mr. Bondo submitted that ...although the appellant stated that the confession did not comply with section 57 and 58 of the CPA, he was of the view that it has no legal basis. It was his stand that the cautioned statement complied with the law.* ***I agree with Mr. Bondo that this point has no legal basis and I see no good reason for departing from the trial magistrate that the legal requirements were met."***

With due respect, apart from formalities under sections 57 and 58 of CPA, the first appellate Judge should have in addition evaluated exhibit P4 and determine whether the mandatory provisions of section 50 and 51

were also complied with. On this, our decision in **Mussa Mustapha Kusa and Beatus Shirima @ MANGI vs. R** (supra) which Ms Swai referred to us, underscores the position of the Court imposing a duty on the trial courts to satisfy themselves that cautioned statements sought to be exhibited as evidence were recorded by the police within the basic periods available for the interview of people under restraint as prescribed by sections 50 and 51 of CPA. The Court has through several of its decisions, gone to the extent of holding that non-compliance with the basic period available for interviewing a person, who is in restraint, makes that statement involuntary under section 27 of the Evidence Act, Cap. 6. In **Richard Lubilo and Mohamed Selemani Mohamed Selemani vs. R.,** [2003] TLR 149 the Court reiterated that placing of the accused person in police custody for fourteen (14) days before taking his caution statement and without taking him to court makes any such caution statement involuntary for the purposes of section 27 of the Evidence Act, 1967. In **Janta Joseph Komba, Adamu Omary, Seif Omary Mfaume and Cuthbert Mhagama vs. R.,** Criminal Appeal No. 95 of 2006 (unreported), the Court said on page 10:

*"We agree with learned counsel for the appellants that being in police custody for a period beyond the prescribed period of time results in torture, either mental or otherwise. The legislature did limit the time within which a suspect could be in police custody for investigative purposes and we believe that this was done with sound reason."*

Now, coming back to the present appeal, there is no doubt that the cautioned statement (exhibit P4) was taken nine days after the appellant's arrest which was well beyond the initial period of four hours prescribed by section 50 of CPA. There is also no doubt that no extensions were requested from the courts and no explanations were furnished why the appellant had to be restrained for nine days before the police took his cautioned statement. The Court in **Martin Manguku Vs. R,** Criminal Appeal No. 194 of 2004 (unreported) had expressed concern when it found out appellant in that appeal, had been in police custody for six days without explanation from the police why they had kept the appellant in police custody for all those six days up to the time he made the statement about the knife. The Court observed that the appellant must have been under very stressful condition.

In the final analysis, this appeal is accordingly allowed, appellant's conviction is quashed and sentence set aside. The appellant shall be set at liberty unless otherwise lawfully held.

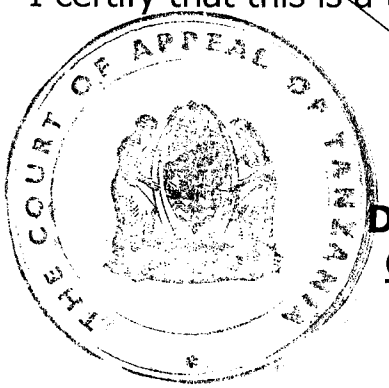
DATED at ARUSHA this 30th day of June, 2014.

N.P.KIMARO
**JUSTICE OF APPEAL**

W.S. MANDIA
**JUSTICE OF APPEAL**

I.H.JUMA
**JUSTICE OF APPEAL**

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




M.A. MALEWO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**