IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MJASIRI, J.A., KAIJAGE, J.A And MUSSA, J.A.)

CRIMINAL APPEAL NO. 302 OF 2014

1. OMARY SAID@HABIBU
2. ABDALLAH JUMA @ NASORO ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Mwaimu, J.)

dated the 22nd day of August, 2013
in
Criminal Appeal No. 45 of 2012

JUDGEMENT OF THE COURT

10th & 16th February, 2015

MJASIRI, J.A.:

The appellants Omary Said @ Habibu and Abdalla Juma @ Nassoro and two others were charged in the District Court of Monduli at Monduli, with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 RE 2002. Only the first and second appellant were convicted and sentenced to thirty years imprisonment. The others were found not guilty by the District Court. Their appeal to the High Court was dismissed, hence this second appeal to this Court.

The case for the prosecution was that on January 29, 2010 at about 2:00 hours at Monduli township within Monduli District in Arusha Region, the appellants broke into the premises of Sister Christina Anthony and stole various items with a value of TShs 3,376,000 and immediately before and after the time of stealing the said properties, they used a machete, an iron bar, and a screw driver to threaten PW1, Sister Christina Anthony and PW2, Agnes Lomnyaki in order to obtain the said properties.

The basis for the conviction of the appellants by the trial Court was the identification of the appellants by PW1, and PW2 and the cautioned statements made by them to PW3, D/Sergeant Joseph. PW1 testified that she recognized the second appellant by torch light flashed by the second appellant. Apart from stating that the second appellant was wearing a coat, she did not give any description of the second appellant. She also testified that she identified the second appellant at the police station but she did not indicate that an identification parade was conducted. PW2 also testified that she identified both appellants with the aid of torch light used by the second appellant. She did not give any description of the appellants. Both appellants were strangers to PW1 and PW2. However PW1 stated that the invaders spent around three hours at her premises. The trial Court was

satisfied that the circumstances surrounding identification were favourable and there was no possibility of mistaken identity. The trial magistrate also relied on the cautioned statements of the two appellants, Exhibits P1 and P2.

The appellants filed a joint five (5) point memorandum of appeal. The five grounds of appeal can be summarized as follows:-

1. *The case against the appellants was not proved beyond reasonable doubt.*
2. *The identification of the appellants was not watertight.*
3. *The conviction of the appellants was against the weight of the evidence.*
4. *The cautioned statements of the appellants were obtained contrary to the requirements under the law.*
5. *The appellants' defence was not considered.*

The appellants appeared in person and were unrepresented while the respondent Republic had the services of Ms Ellen Rwijage, learned State Attorney.

At the hearing of the appeal, both appellants requested the Court to adopt their memorandum of appeal as part of their submissions and they

opted to make their submissions after the learned State Attorney had addressed the Court.

Ms. Rwijage did not support the conviction for the following reasons. In relation to ground No. 2 she submitted that PW1 and PW2 testified that they identified the second appellant without giving a proper description and without indicating how the appellants were identified. She submitted further that even though the two witnesses indicated that they saw the appellants with the aid of a torch light and by switching on the lights, the intensity of the light was not stated.

On ground No.4, she argued that there was non-compliance with the law as the cautioned statements were recorded contrary to the requirements of sections 50 and 51 of the Criminal Procedure Act, Cap 20 RE 2002.

With regard to grounds No. 1,3 & 5 the learned State Attorney was of the view that the prosecution did not prove the case against the appellants beyond reasonable doubt given the circumstances which the appellants were identified and the position of the cautioned statements which was the basis of the conviction of the appellants.

Both the Courts below considered and evaluated the evidence and accepted the evidence of the PW1 and PW2. It is settled law that very rarely does a higher appellate Court interfere with concurrent findings of facts by the Courts below unless there are mis-directions or non-directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice. See **Amratlal D. M. trading at Zanzibar Silk Stores v A.H. Jariwala t/a Zanzibar Hotel 1980 TLR 31, Pandya v R** (1957) EA 336 and **The Director of Public Prosecutions v Jaffari Mfaume Kawawa** (1981) TLR 149 and **Mussa Mwaikunda v R.,** Criminal Appeal No. 174 of 2006 CA (unreported).

In order to convict the appellants for the offence of armed robbery the prosecution must prove that;

(1) There was an armed robbery.

(2) It was the appellants who committed the Robbery.

In this case there was no dispute at the trial, and indeed in the first appeal for that matter, that the robbery incident took place on the stated date and time. The crucial question is, whether the prosecution evidence

established beyond reasonable doubt that the appellants were the ones who committed the robbery.

The first point for consideration and decision in this case is whether the appellants were sufficiently identified as being the culprits. The issue of identification is very crucial. The prosecution case relied on the evidence of PW1 and PW2 for identifying the appellants. We need to establish whether the conditions were favourable for adequate and correct identification. See **Waziri Amani v Republic** (1980) TLR 250, **Saidi Chally Scania v R**, Criminal Appeal No. 69 of 2005, CA (unreported).

After a careful evaluation of the entire evidence on record, and reading of the judgment of the High Court and consideration of the grounds of appeal and Ms. Rwijage's submissions, we entirely agree with the learned State Attorney that the appellants were not sufficiently identified. The incident occurred at night. We are fully aware that the evidence of visual identification is one of the weakest kind and should only be relied upon when all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely water tight. See for instance the cases of **Anthony Kigodi v Republic**, Criminal

Appeal No. 94 of 2005 CA (unreported); **Raymond Francis v Republic** (1994) TLR 100, **Shamir John v Republic**, Criminal Appeal No. 202 of 2004 CA (unreported) and **R v Turnbull** (1976) ALL ER 549.

In this case the conditions for identification were not favourable. The complainants did not know the appellants before. Under the circumstances, we are increasingly of the view that there was room for mistaken identity.

Likewise, we have found ourselves inclined to expunge exhibits P1 and P2 from the record. This is because the learned trial magistrate did not comply with the provisions of section 50 (1) (a) and 51 of the Criminal Procedure Act. The basic period available for interviewing them under section 50 (1), that is four hours commencing at the time when the appellants were placed under restraint by the police had elapsed and there was no evidence that this period was extended by the relevant authority in accordance with section 51(1) (a) or (b) thereof. The appellants were arrested on February 3, 2010 and their statements recorded on February 8 and 9 respectively, more than five (days) had elapsed after their arrest.

In the case of **Emmanuel Mahahya v Republic,** Criminal Appeal No. 212 of 2004 CAT (unreported) which was referred to in **Saidi Bakari v**

Republic, Criminal Appeal No. 422 of 2013 CAT (unreported) we explained that the provisions of section 50 and 51 of the Criminal Procedure Act were meant to: *"safeguard the human rights of suspects and should therefore not be taken lightly or as mere technicalities":*

The law is settled that non compliance with the provisions of section 50 and 51 of the Criminal Procedure Act is a fundamental irregularity that goes to the root of the matter and renders the illegally obtained evidence inadmissible and cannot be acted upon by the Court. See - **Janita Joseph Komba and Three Others v Republic,** Criminal Appeal No. 95 of 2006 CAT (unreported).

Having expunged the cautioned statements, Exhibits P1 and P2 respectively and having found that the evidence of PW1 and PW2 is based on shaky and unreliable identification there remains no cogent evidence on record upon which a conviction could stand.

At the hearing of the first appeal in the High Court, the learned State Attorney submitted that the cautioned statements did not comply with the law and he asked the Court to expunge the statements from the record.

The High Court did not expunge the said statements. However the learned High Court Judge stated thus:-

> *"It is my view that even if the cautioned statements could be expunged from the record as part of the prosecution evidence, I hold that there was sufficient evidence by the eye witnesses as reflected above to prove the charged offence."*

This is evident that the High Court Judge was of the view that the cautioned statements were to be expunged.

In the light of the non compliance of the procedural requirements, there was sufficient basis for the two courts below to attach little, if no weight at all to the cautioned statements.

It is the principle of law that in all criminal cases, the burden of proof rests upon the prosecution to prove the charge against the accused person beyond reasonable doubt. The burden never shifts to the accused. What the accused has to do is to raise a doubt on the prosecution case. See-

Woolmington v DPP (1935) AC 462 and **Matula v R** 1995 T.L.R. 3. Short of other evidence for the prosecution to prove the case against the appellants, there is no sufficient evidence to justify the conviction of the appellants.

In the event, we find the appeal by the appellants has merit and we allow it. We quash the conviction and set aside the sentence. We also order the immediate release of the appellants from prison unless they are being held for any other lawful purpose. It is so ordered.

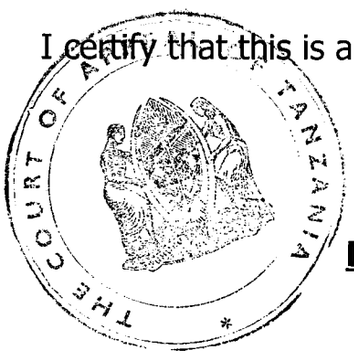
DATED at ARUSHA this 13th day of February, 2015.

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL