IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 372 OF 2014

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

TANO JOHN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Mwangesi, J.)

dated the 10th day of December, 2010
in

Criminal Appeal No. 58 of 2009

JUDGMENT OF THE COURT

26/05/2015 & 28/05/2015

KILEO, J.A.:

This appeal emanates from the decision of the District Court of Manyoni where the appellant Tano s/o John was charged with and convicted of armed robbery contrary to sections 285 and 287A of the Penal Code. Upon conviction he was condemned to serve a thirty year prison term. His appeal to the High Court was unsuccessful hence this second appeal.

The appellant fended for himself at the hearing of the appeal. The respondent Republic was represented by Mr. Angaza Mwipopo, learned Principal State Attorney. The decision of the High Court is impugned on seven grounds which could conveniently be condensed into four grounds, namely:

1. That the appellant was not sufficiently identified at the scene of crime.
2. That that his cautioned statement was improperly admitted in evidence.
3. That the case for the prosecution was wanting for failure to call in evidence a crucial witness
4. That his defence was not considered.

Briefly, the case for the prosecution hinged on the testimonies of four witnesses. According to the complainant (PW1) who was in the company of PW2 on the material date as she was riding her bicycle she was confronted by the appellant who demanded money from her. When she told him she had no money he threatened her with a bush knife, took away the bicycle and disappeared. It is not exactly clear how the appellant was arrested but what we have on record is only the evidence of PW3, the police officer who interrogated the appellant and took down his cautioned statement. PW4

claimed that the appellant sold a bicycle to his brother. This bicycle was believed to be the one that was stolen from PW1. The brother was not called to testify.

At first, Mr. Mwipopo supported the conviction and sentence that was meted out against the appellant. He did so basing on his understanding that the appellant from his own testimony during cross-examination had stated that it was he who led the police to the recovery of the bicycle that was robbed from PW1. It was when it dawned on him that the appellant did not actually admit to have led the police to PW4 who claimed that the appellant had sold the bicycle to his brother. As it transpired from the record what the appellant had stated upon cross-examination is that he led the police to Mbekoo. PW4 claimed that he was a resident of Tambukareli. There was no evidence that Tambukareli and Mbekoo were one and the same. Upon reflection the Principal State Attorney conceded that conviction could not be sustained. He conceded that identification was problematic as well as the admission of the cautioned statement in evidence. Mr. Mwipopo also conceded that the failure by the prosecution to call the person to whom the bicycle was allegedly sold and who took the same to the police considerably weakened the prosecution case.

The matter need not detain us. We agree with both the appellant and the learned Principal State Attorney that the case for the prosecution was wanting in a number of aspects. It appears that both the High Court and the trial court relied heavily on the cautioned statement and their understanding that it was the appellant who led the police to the recovery of the stolen bicycle. It is on record however that the appellant objected to the receipt of the cautioned statement on the ground that it was involuntarily taken after he was tortured. Though the appellant said that he was tortured into making the statement the trial court did not take it upon itself to inquire into its voluntariness. Section 27 of the Evidence Act, Cap 6 R. E. 2002 requires that only those statements that are voluntarily taken may be proved as against the maker. It states:

> **(1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.**
>
> **(2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.**
>
> **(3) A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other**

prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority.

When an accused alleges that he or she was tortured into making a statement as was the case here, a trial court can only determine that the statement was voluntarily made after it has conducted an inquiry or trial within trial as is commonly done in the High Court. The failure by the trial court to conduct an inquiry into the voluntariness of the statement after the appellant had alleged torture in our considered view amounted to a substantial irregularity.

Another aspect of the case the courts below ought to have considered with circumspection was the failure by the prosecution to summon the person to whom the bicycle was allegedly sold and who eventually took it to the police. We are mindful of the provisions of section 143 of the Evidence Act which provides that no particular number of witnesses shall in any case be required for the proof of any fact. However, in the circumstances of this particular case we are satisfied that it was necessary for the prosecution to summon PW4's brother to re-enforce their case. The bicycle itself was not found with PW4. It was said that it was with

PW4's brother who allegedly took it to the police after it was discovered that it was stolen property. The failure to call PW4's brother left more questions than answers. Both the High Court and the trial court also misapprehended the appellant's statement during his cross-examination where he stated: *"……it was me who directed the police to go to Mbekoo to show where the bicycle (sic!)……..we reached the house where the bicycle was sold….."*

As it has been stated earlier, PW4 who claimed that the appellant sold the bicycle to his brother was a resident of Tambukareli. The appellant did not say that he led the police to Tambukareli so it cannot be said that his own statement gave credence to the case for the prosecution.

On the question of identification we share both the appellant's and the learned Principal State Attorneys' submission that it was not sufficient. Though the incident is said to have occurred during daytime however the appellant was not known to the witnesses before. There was no identification parade conducted, the prosecution relied only on dock identification. There are grave dangers in relying on dock identification. The normal practice in instances where a culprit is not previously known to

a victim is to hold an identification parade where the suspect gets apprehended. The holding of identification parades to have suspects identified is intended to ensure that the identification of a suspect by a witness takes place in circumstances where the recollection of the identifying witness is tested objectively under safeguards by placing the suspect in a line made up of like looking suspects. It is also to be noted that in this case the identifying witnesses never stated that they gave a description of the appellant to the police, and as mentioned earlier it was not clear how the appellant was arrested. **In Raymond Francis v. R.** (1994) T. L. R. 100 the Court held:

> *"Since all the witnesses admitted seeing the appellant for the first time during the incident that day it was necessary in their evidence of identity to describe in detail the identity of the appellant when they saw him at the time of the incident."*

Putting all the above into consideration we are led to only one conclusion and that is conviction against the appellant cannot be sustained. In the circumstances we allow the appeal by Tano s/o John. His conviction is

quashed and the sentence meted out is set aside. We order his immediate release from prison unless he is otherwise held for some lawful cause.

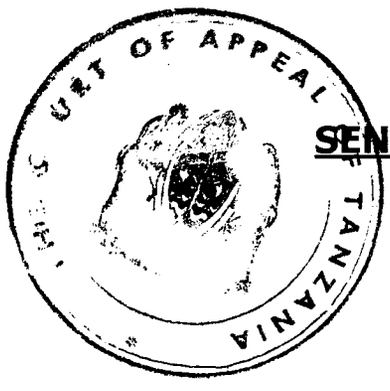
DATED at DODOMA this 27th day of May, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL