IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL CASE NO. 227 OF 2012

1. **MANYANGU MANG'WENA @ MLUGALUGA.....1ST APPELLANT**
2. **ISSAH RASHID @ MULA.....2ND APPELLANT**

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Mushi,J.)

Dated the 19th day of June, 2012

in

HC Criminal Appeal No. 107 of 2010

JUDGMENT OF THE COURT

10th & 21st July, 2015

MASSATI, J.A.:

The appellants and another person not the subject of the present appeal, were charged with and convicted of the offence of Armed Robbery contrary to section 287A of the Penal code. The Resident Magistrate's Court of Kisutu Dar es Salaam, sentenced them to 30 years imprisonment. They unsuccessfully appealed to the High Court. This is now their second appeal.

It was alleged at the trial court that on the 14th day of May, 2008 at 16.30 hrs at Vingunguti Kiembe Mbuzi area, within Ilala District Dar es Salaam, the trio pounced on RAMADHANI SALUM, SAID ATHMAN BUTETA and DIANA SIAME and forcefully stole from them, cash Tshs 1,500,000/= and mobile phone vouchers worth Tshs 2,500,000/= belonging to the said RAMADHAN SALUM and immediately before and thereafter threatened the said persons with a firearm.

Six prosecution witnesses testified for the prosecution. PW1, **SAIDI BUTETA**, PW2 **DIANA SIAME**, and **RAMADHANI SALUM** PW3, testified as victims of the robbery. They all claimed to have identified the culprits by face; PW4 **D 2514 D/SGT OSIAH** and Pw5 **E 9903 D/SGT LAMECK** arrested the suspects and investigated the case. PW5 took cautioned statements from the suspects and tendered them as exhibits PI, P2 and P3. PW6 **Insp. MAREKANI** conducted an identifications parade, and tendered its register as Exh P4.

On his part, the appellant denied involvement in the commission of the offence. He told the trial court that he was arrested on account of riding an unregistered motorcycle.

On the basis of the above evidence, the trial court was satisfied that the accused persons were involved in the commission of the offence charged. The High Court also found that his appeal lacked merit and therefore dismissed it.

Before this Court, the 1st appellant appeared in person armed with six (6) grounds of appeal which he was prepared to argue. The second appellant didn't enter appearance because he is late. The Court was so informed by a letter from the Prison Office, Ukonga, reference 102/DAR/1Vii/226 of 9/7/2015, attached with a certificate of death no 1000029357 of 18/12/2013. So, in terms of Rule 78(1) of the Court of Appeal Rules his appeal abated, and it is so marked. We are therefore left with the first appellant's appeal.

As indicated, the appellant raised and adopted a total of six grounds of appeal, but they can be condensed into two major ones. **First,** identification, and; **Second** the admissibility of his

cautioned statement, (Exh P1). The first, second, third and fourth grounds of appeal seek to challenge the lower courts' findings that the appellant was properly identified. The appellant has bitterly complained that even in the identification parade, PW1, PW2 and PW3 did not identify him. In the fifth and sixth grounds, the appellant's complaint is that his cautioned statement (Exh P1) was irregularly admitted and wrongfully acted upon. In view of these discrepancies, the appellant urged us to allow the appeal.

The respondent/ Republic which was represented by Mr. Nassoro Katuga, learned Senior State Attorney, assisted by Mr. Faraja George, State attorney did not support the conviction, and we think, rightly so. Starting with the admission of Exh P1, (the appellant's cautioned statement) Mr. Katuga submitted that, it is true that, when this statement was about to be tendered, the appellant objected saying it was not extracted voluntarily. Without more, the trial court, overruled the objection and admitted it as Exh P1. This, he argued, was procedurally wrong. The proper procedure after the objection had been raised, was for the trial

court to go into an inquiry or trial within trial to determine the voluntariness or otherwise, before admitting it. For that, he referred us to the decision of this Court in **TWAHA ALI AND 5 OTHERS v R** (Criminal Appeal No. 78 of 2004 (unreported). Therefore the cautioned statement should be discounted/ expunged, he said.

He went on to argue that apart from the cautioned statement (Exh P1) the only other evidence against the appellant was that of the identification parade register (Exh P4), which took him to the general ground of appeal on identification. He observed that Exh P4 flies on the face of the prosecution evidence, because none of the witnesses (PW1, PW2) ever identified the appellant. As to the dock identification, the learned counsel submitted that it was useless if it was not preceded by a successful identification parade. So, he too, urged us to allow the appeal.

We have no doubt in our minds that the conviction of the appellant was predicated upon two pieces of evidence. First the evidence of visual identification by PW1, PW2 and PW3, and

according to the lower courts PW1 and PW2 even identified him at the identification parade. The second piece of evidence is that of the appellant's cautioned statement (Exh P1), which according to the trial court could not have been fabricated because it was so detailed and was similar to the other cautioned statements (Exh P2 and P3) and that it was corroborated by the defence case. On its part, the first appellate court was also satisfied that the appellant was sufficiently identified by PW1, PW2 and PW3 as the conditions for identification were favourable. He also found that the identification parade was properly conducted where *"the 1st and 2nd appellants were identified by PW1, PW2 and PW3"* as well as by dock identification. With regard to the cautioned statement, the first appellate court was also *"satisfied that the cautioned statements for the 1st and 2nd appellants (Exh P1 and P2) respectively were voluntarily and freely made by them, hence the statements were properly admitted into evidence".* The issue is whether these findings are justified ?

The findings of the lower courts on the identification of the appellant is not supported by the evidence on record. Contrary to

their findings according to Exh, P4, PW1, **SAID BUTETA and PW2 DIANA SIAME**, could only identify one suspect, **ISSA S/O RASAAD @ MURRAY.** The present appellant did not even participate in the identification parade. So the finding that the appellant was identified by PW1, PW2 and PW3 in the identification parade, has no factual basis. As to the other aspects of visual identification, PW1, PW2 and PW3, claimed that this was their first time to see the suspects and though they claimed to have been able to identify them by face, they did not give any description of any of the suspects until they were summoned to the police station, Sitakishari, after the suspects had been arrested. This renders their credibility suspect. The credibility of PW1 and PW2 is further dented when they claimed that, when PW1 was examined in chief, (and PW2) in cross examination, that they were able to identify him at the identification parade which, as demonstrated above is not supported by Exh P4. None of the police officers (PW4 and Pw5) ever explained to the Court that the arrests they made including that of the appellant, were caused by the witnesses' previous description of these suspects; which lends

credence to the appellant's defence that he was arrested for a different offence. That is why this Court has repeatedly emphasized the importance of evidence of there having been a description and terms of that description by persons who purport to have identified such suspects. (See **MOHAMED BIN ALUI Vs REX (1942) 9 EACA 72, VITALIS BERNARD KITALE v R** Criminal Appeal No. 263 of 2007 (unreported).

On the question of the admissibility of the cautioned statement (Exh P1) we think that the lower courts failed to distinguish between admissibility, and weight or probative value of a cautioned statement. Admissibility is a question of procedure. When the admissibility of a cautioned statement is objected to on the ground of voluntariness, the trial court has to stop the main trial, and conduct an inquiry or a trial within trial. After a trial within trial, the court would then decide whether the statement was voluntarily made, in which case, it, will admit it or that it was not voluntarily made, in which case, it will reject it. That would be the end of the matter as far as that statement is concerned. But if, and only if, the cautioned statement is admitted, the court

with or without corroboration bearing in mind whether it is repudiated or retracted and after taking the necessary cautions. Like any other evidence, this is the stage when this and the rest of the evidence is evaluated together (See **TWAHA ALLY AND 5 OTHERS v R (supra) TUWAMOI v R UGANDA** (1967) EA. 84.

In the light of the above, it was a serious misdirection on the part of the trial court and the first appellate court to have made findings about the voluntariness of the cautioned statement after it was admitted in evidence despite the appellant's objection. It is for these reasons that we agree with the learned Senior State Attorney and the appellant, that the appellant's cautioned statement (Exh PI) was wrongly admitted and acted upon by the two courts below. It is accordingly expunged from the record.

In view of our above analysis we have no hesitation in finding that the conviction of the appellant is against the weight of the evidence on record. Much as this is a second appeal we are forced to interfere, as these misdirections have resulted into a

miscarriage of justice. The appeal is therefore allowed. The conviction is quashed and the sentence set aside. We order that the appellant be released immediately from custody, unless he is otherwise lawfully held.

DATED at DAR ES SALAAM this 14th day of July, 2015.

S. A. MASSATI
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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL