IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 99 OF 2014

1. **BAVEN HAMIS**
2. **OMARY SAID @ MAMI**
3. **JOSEPH YONA SANGA** ..... **APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)

(Muruke, J.)

dated the 6th day of January, 2014
in
Criminal Appeal No. 13 of 2013

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JUDGMENT OF THE COURT

24th May & 6th June, 2016

MASSATI, J.A.:

This is a second appeal. It was filed by the appellants, pursuant to their conviction for the offence of armed robbery by the District Court of Morogoro, and the consequent sentence of 30 years imprisonment, and a dismissal of their first appeal by the High Court (Muruke, J.) on 6/1/2014.

When they first appeared at the trial court on 18/11/2010, it was alleged that on the 25/10/2010 at about 23:30 along Station Road in Morogoro Municipality they robbed one motorcycle make SUNLG No. T.998 BJH Chassis No LPF WKOIC 4 A241809, valued at Tshs. 1,700,000/= by cutting with a bush knife the rider of the said motorbike one, OMARY S/O HASHIM on his left leg immediately before such stealing. The owner of the motorbike was one JUDITH d/o AUGUSTINO.

The undisputed facts were that JUDITH AUGUSTINO is the owner of the motorbike, which she had bought from M/S Kahama Import and Export Commercial Agent Ltd on 30/8/2010. She entrusted the bike to one Omar Hashim, to use it for commercial hire. On 25/10/2010, at Mji Mpya, in Morogoro Municipality, the motorbike rider was approached by some persons who wished to hire him to take them to Station Road. Although, he was about to retire for the night, he nevertheless agreed to the business proposal. He took them to OASIS, along Railway Station Road, and was about to be paid Tshs. 1000/= when some other persons emerged. Flashing some bush knives, they cut him on some parts of his body, robbed him of the motorbike and rode away. But the motorbike rider summoned some courage, struggled with one of the robbers and

overpowered him with the help of some good samaritans who converged to assist him. The matter was then taken to the police. He was given a PF3 and went to Nunge hospital where he was attended to.

The prosecution case was that, the appellants and another person were the ones who robbed the motorbike. To prove it, they produced 10 prosecution witnesses, and 6 documentary exhibits. PW1, **OMARY s/o HASHIM**, the victim of the robbery, narrated the incident and claimed to have identified the present appellants and the other one who was acquitted, as the ones who robbed him. He also told the trial court that he closely struggled with and overpowered the first appellant at the scene of crime. He identified the motorcycle which had already been admitted as Exhibit P1 when the 5th accused pleaded guilty earlier, and also produced his PF3 as Exhibit P2.

PW2 **JUDITH d/o AUGUSTINO** showed that she was the owner of the motorcycle and was the one who handed over the bike to PW1 for commercial hire. She also identified the motorcycle (Exhibit P1) and produced her purchase receipts and the vehicle registration card as Exhibit P3 collectively. PW3, PW4, PW5 and PW6, were all police officers, who were involved in the arrest, and investigation of the case. PW3 No. F.

3248 PC MJARUBI is the one who arrested the first appellant on 25/10/2010. When he reached the scene of crime he found that the appellant was already under restraint by a civilian. On 8/11/2010 PW4 F. 386 D/Sgt Dott interrogated one of the suspects who had already been arrested and later charged as the 4th accused. He is the one who named the appellants. The 4th accused's cautioned statement was admitted by the trial court as Exhibit P4. On 26/10/2010, the first appellant was interrogated by PW5 E 145 D/C Andrew. He admitted to have committed the offence and named the other appellants as his cohorts and even revealed where they had sent the stolen motorbike. Upon this information a team of police investigators went to Turiani to follow up the motorbike.

On 5/11/2010, PW5 got information that the 2nd, 3rd and 4th accused persons had been arrested at Ubungo, Dar es Salaam. He went to collect them and on interrogation, they disclosed that the motorcycle in question had been sold to one Mbuzini. The motorcycle was eventually recovered. The 3rd appellant gave a cautioned statement which was admitted as Exhibit P5. PW6 D. 4429 D/Sgt Lukuba testified on how Mbuzini agreed to have bought the motorcycle in question and identified the first and second appellants as the persons who sold it to him. PW7 HASSAN s/o ABDALLAH

@ MBUZINI was formerly charged along with the appellants as the 5th accused, with two counts, of receiving stolen property and having in possession of goods suspected to have been stolen. On 21/12/2010, he pleaded guilty to those counts, convicted and sentenced to 1 year imprisonment, suspended for 6 months. After that, he volunteered to testify for the prosecution. He identified the 2nd, 3rd and 4th accused persons as the persons who sold the motorcycle to him, which was tendered as Exhibit P1.

PW8 D. 7986 D/CPL MANFRED interrogated the second appellant and took his cautioned statement which he tendered as Exhibit P6. PW9 DR. AMANDUS s/o KIMARIO who was on duty at Nunge hospital, attended PW1 on 26/10/2010 and was the author of the PF3. PW10 HAMZA s/o MATAGI was the last prosecution witness. He was the Kwelikwedi village executive officer. His testimony was to the affect that on or about or between 30/10/2010 to 3/11/2010, he witnessed the search at PW7's house, for a stolen motorcycle, and heard PW7 telling the search team that the motorcycle they were looking for was at Lusanga village. He didn't go there.

On that evidence, the trial court found that the appellants had a case to answer.

The first appellant who decided to give evidence without oath, simply said:-

> *"Your honor, I have nothing to say. Let this Honorable Court pronounce its judgment against me. That is all."*

The second appellant gave his evidence on oath. He told the trial court that he was arrested at Dar es Salaam on 8/11/2010, taken to Morogoro and forced to sign a statement which he never wrote. He refuted what PW1 told the court, and denied to have gone to Turiani to recover the motorcycle, and that all the prosecution witnesses lied against him. He denied committing the offence.

On his part, the third appellant also gave his evidence on oath. He told the trial court that on 25/10/2010 at 11:00 p.m. he was at home asleep. On 27/10/2010, he travelled to Dar es Salaam to visit his sick father. On 1/11/2010, while in Dar es Salaam, he was arrested for being a vagabond, and was locked up in a police cell up to 5/11/2010, when he

was handed over to the Morogoro police. On 18/10/2010, he was charged with armed robbery. He criticised the evidence of all the prosecution witnesses on account of various discrepancies. He said that the charge against him was not proved beyond reasonable doubt.

After hearing the prosecution and the defence cases, the trial court convicted these appellants, and as shown above, sentenced them to the mandatory sentence of 30 years imprisonment. On first appeal, the learned judge found no substance on the grounds of appeal, and so dismissed the appeal and upheld the conviction and sentence meted out by the trial court. Aggrieved, the appellants have lodged the present appeal.

In this appeal, the appellants appeared in person. The respondent/Republic was represented by Ms. Christine Joas, learned Senior State Attorney, who was assisted by Mr. Yusuf Aboud, learned State Attorney.

The first appellant filed his own memorandum of appellant comprising seven grounds, which may be summarized as follows: **First** since the source and intensity of light was not described by PW1, the evidence of visual identification on him was wanting. **Two**, PW1's mere statements of recognition without a detailed description of the appellant

was insufficient. **Three**, the civilian who arrested the first appellant at Mji Mpya, did not testify. **Four**, in view of the provisions of the Criminal Procedure Act (the CPA) regarding search and seizure, there was no cogent evidence that the appellants led to the recovery of the stolen motorcycle. **Five**, had the evidence of PW10 been properly evaluated it would have been found that it was useless as he neither witnessed the sale of the motorcycle to PW7, nor its recovery. **Six**, as the appellant was restrained without trial for more time than that allowed by law, the courts should have considered him favourably and allow his appeal. **Seven**, as the appellant was not represented in such a serious crime, he was denied a fair trial.

The second and third appellants filed a joint memorandum of appeal comprising eight grounds, and in addition, the second appellant filed a supplementary memorandum comprising three grounds.

In their joint memorandum, the appellants' complaints are that, **first,** the evidence of PW1 was incredible, consisting of only dock identification. **Two,** the motorcycle alleged to have been robbed (stolen) was not properly identified as the identification in the registration card Exhibit P3 differs from that described in the charge sheet. **Three,** PW7 should not

have testified without the consent of the court, in compliance with the provisions of the CPA.

Four, the lower courts did not properly evaluate the evidence of PW5, PW6, PW7 and PW10 which was not consistent as to the place where the motorcycle was seized from. **Five**, the appellants were convicted on the basis of weak evidence of chain of custody of the motorcycle (Exh P3). **Six,** the lower courts did not direct their minds on the validity of the cautioned statement, (Exh P6) with regard to the time of arrest and recording of the statement. **Seven**, the third appellant was not given opportunity to cross examine PW5 after tendering his cautioned statement (Exhibit P5). This was an error both in law and fact. **Eight**. Overall, the learned judge did not objectively assess the prosecution evidence before relying on it to dismiss the appellants' appeal. In his supplementary memorandum, the second appellant raised three additional grounds, namely:-

First, the cautioned statement of the second appellant was tendered by the public prosecutor, not the witness, which was irregular. **Two**, the alleged stolen motorcycle was not positively identified by the prosecution witnesses before and after admitting it in evidence. **Three**, the trial

magistrate applied double standards in acquitting (the 4th accused person), and convicting the second appellant on the same evidence.

For those reasons, the appellants prayed that their appeals be allowed.

At the hearing, all the appellants who appeared in person, opted to let the respondent begin to submit before they took their turns.

Responding to the grounds of appeal generally, Ms. Joas was, unfortunately, vacillating. At first, she sought to support the convictions, but later changed her mind and settled for the position, not to support the convictions. The major ground for her new position was that the identification of the motorcycle, the subject matter of the charge of armed robbery, was not proved beyond reasonable doubt.

Based on the respondent's new position all the appellants were at one. They supported her stand and urged us to allow the appeal.

Although there are so many grounds of appeal, for the purposes of analysis we shall categorise them into two broad groups. The first group consists of those grounds which complain of procedural lapses. The second one comprises those grounds that challenge the sufficiency of

evidence, on which the convictions of the appellants are based. From these categories, two broad issues arise which call for determination. The first issue is whether there were any procedural irregularities in the trial of the appellants? And if there were any, whether the said irregularities occasioned a miscarriage of justice? The second broad issue is whether the prosecution case was proved beyond reasonable doubt?

From all the memoranda of appeal the appellants have raised a total of seven procedural infractions. **Firstly**, there is a complaint that in recovering the alleged stolen motorcycle the provisions of the CPA as to the search and seizure and chain of custody were not complied with. **Secondly**, that there was a detention without trial for more time than that allowed by law. **Thirdly**, that the appellants were not accorded legal representation in such a serious offence. **Fourthly**, that it was wrong for a person who was a co-accused who pleaded guilty, to turn around and testify for the prosecution without the consent of the trial court. **Fifthly**, the cautioned statements Exhibits P5 and P6 were not properly recorded and introduced into evidence and evaluated. **Sixthly**, after admitting Exhibit P5 into evidence, the third appellant was not given opportunity to cross examine on it. **Lastly**, that in evaluating the totality of the evidence

before it, the trial court applied double standards to the appellants' and the 4th accused person, who, on the same evidence, was acquitted. Let us now examine those complaints.

We first wish to remark that appeals to this Court are governed by statutes, namely; the Constitution, the Appellate Jurisdiction Act, and the Court of Appeal Rules, 2009 (the Rules). Rule 72 (2) of the Rules requires a memorandum of appeal to set forth concisely, the grounds of objections to the decision appealed against:-

> *"specifying ....in the case of any other appeal the points of law which* ***are alleged to have been wrongly decided.***"

In the present case the grounds relating to detention without trial denial of legal counsel, or application of double standards by the trial court, all infringing the right to fair trial were neither raised nor decided by the High Court, let alone, wrongly. So, we do not think it is proper to raise them at this stage or for us to determine them. This is because, although at times the Court may deal with points of law not raised and decided by the lower courts, it would only be proper to do so, if all the parties in the

appeal were heard on the said points of law (See **MARWA MAHENDE vs R.**, Criminal Appeal No. 30 of 2008 (unreported).

In the present case, the appellants have raised in their memorandum of appeal significant points of law, relating to the accused's' pretrial rights to be promptly charged before the court, the right to legal counsel in serious offences, and the right to equality/before the court during trial (not to be judged differently on the same evidence). Such points require nature arguments before determining them. Unfortunately, they were neither raised nor decided by the High Court, nor fully argued by the parties before us. In addition, the complaint on double standards is made when the party that would be affected thereby is not here. We shall therefore decline to go into them in this judgment. Let us now briefly examine the remaining grounds relating to procedural irregularities.

The first complaint relates to the violations of the provisions relating to search, seizure, and chain of custody of the motorcycle in question (Exhibit P3).

It is true that searches and seizures of things with respect to which offences are alleged to have been committed, are governed by the provisions of the CPA, particularly sections 38 to 45. The purpose of those

provisions of the CPA is to facilitate the search, seizure and prosecution of evidence that may be used in a trial.

Generally, a search has to be preceded by a written authority, either of a police officer in charge of a police station (search order) or by a court (search warrant) and where anything is seized in pursuance of such powers, a receipt of acknowledgement has to be issued (section 38 (3). But section 42 of the CPA allows searches in emergencies, in which case no search orders or warrants are necessary. (**See SEIF SALUM vs R.,** Criminal Appeal No. 150 of 2008 (unreported).

On the other hand, the principle of chain of custody is rooted in section 38 (3) of the CPA as well as Police General Order 229. Its purpose is to preserve evidence so as to minimize the possibility of its being tampered with, and thereby avoid the possibility of planted evidence. (See **PAULO MADUKA AND OTHERS vs R.**, Criminal Appeal No. 110 of 2007 (unreported).

In this case, there is no dispute that no search order or search warrant or receipt was produced in court to show how and where the motorcycle in question was seized, and finally find its way in court. We acknowledge that this was a procedural lapse, but one that only goes to

affect the weight of the evidence adduced against the appellants. It does not, in our view, affect their right to a fair trial, or to the admissibility of such evidence. In this case the seriousness of the lapse in the procedure complained of, is diminished by PW7's plea of guilty and his testimony, in which he not only identified the motorcycle in question, but also the appellants as the persons who sent it to him.

The next complaint is that PW7 was allowed to testify without the permission of the court. It is difficult to comprehend what this complaint is really about.

It is true that, PW7 was formerly charged along with the appellants as the 5th accused. On a second appearance, he changed his plea to that of guilty. So, he was convicted and accordingly sentenced. The question is, did such a witness need leave of the court before testifying for the prosecution?

Competency of witnesses is governed by Chapter V of the Evidence Act Cap 6 R.E. 2002 (the Evidence Act). The governing provision is section 127 (1) which provides:-

(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."

In this case, PW7, was in all respects, a competent witness, in terms of section 127 (1) of the Evidence Act. So, if, by that complaint, the appellants intended to insinuate that PW7 was a co accused, the answer is that his evidence was relevant and could be taken into consideration against them in terms of section 33 (2) of the Evidence Act; save that such evidence ought to be corroborated as a matter of law. But if they meant to impute that PW7 was an accomplice, he was still a competent witness in terms of section 142 of the Evidence Act. The position of the law is that uncorroborated evidence of an accomplice may found a conviction provided that a court warns itself of the danger of convicting on uncorroborated accomplice evidence (See **PASCHAL KITIGWA vs R**. (1994) TLR 65.

But there is another dimension, to this complaint. PW7 first gave evidence on 7/5/2011; but on 19/9/2011, he was recalled for further cross examination by the accused. Indeed, on that day, he was intensively cross

examined by the 2nd, 3rd and 4th accused persons. If therefore, by this complaint, the appellants meant that PW7 was recalled without leave, it is not borne out by the record. PW7 was recalled at the request of the appellants and the court allowed the prayer, which is permissible under section 147 (4) of the Evidence Act. So, this complaint is devoid of substance.

Another procedural lapse was about the admissibility of the cautioned statements of the 2nd and 3rd appellants, (Exhibit P5 and P6). This complaint has two legs.

The first leg is that the said exhibits were recorded outside the prescribed times. The periods are prescribed under sections 50 and 51 of the CPA. According to these provisions, the prescribed period is four hours from the time of arrest, unless it is extended according to law, or unless there are exceptional circumstances.

According to the established facts in this case, the second appellant was arrested in Dar es Salaam on 1st November, 2010, but his cautioned statement (Exhibit 6) was taken on 5/11/2010 that is, after four days. The third appellant was arrested on 5th November, 2010 at Ubungo, Dar es Salaam, but his statement (Exhibit P5) was recorded on 6/11/2010 after

one day. It is therefore true that Exhibit P5 and P6 were taken outside the prescribed time. There is nothing on record to justify the delay in recording these cautioned statements, or to show that there were exceptional circumstances.

The second leg to this complaint is that the third appellant was not allowed to put questions to the witness after the admission of Exhibit P5.

According to the record, Exhibit P5 was tendered after PW5, E 145 D/C Andrew, had testified. Indeed, after admitting the exhibit, there is no record that the third appellant was given opportunity to cross examine PW5. To that extent, the testimony of PW5 is of no consequence.

In conclusion, we think that failure to comply with the provision of sections 50 and 51 of the CPA in recording the cautioned statements of the 2nd and 3rd appellants, affected their admissibility (See **JANTA JOSEPH KOMBA AND 3 OTHERS vs R.**, Criminal Appeal No. 95 of 2006 (unreported). Furthermore, the omission by the trial court to allow the third appellant to cross examine PW5, denied him a fundamental right in that respect. In the circumstances, we agree with the appellants that this complaint is meritorious and we accordingly expunge Exhibits P5 and P6 from the record. These apart, and as demonstrated above, we do not

think that, the other procedural infractions raised by the appellants have impacted negatively on their trial as we are unable to detect any failure of justice arising therefrom.

We now move on to consider and determine the issue whether the prosecution case has been proved beyond reasonable doubt?

As shown above, apart from the cautioned statements (Exhibits P5 and P6) which we have expunged, the conviction of the appellants is based on several other pieces of evidence. These include visual identification by PW1, the appellants' own conduct and evidence, and the evidence of PW7.

First, on the issue of visual identification, we have no reason to doubt the evidence of PW1 that he was robbed of the motorcycle on the night of 25/10/2010. There is no evidence however, as to what light, source and its intensity, enabled him to identify the appellant and recognize them even by name. However, it is in evidence that he struggled with and overpowered the first appellant at the scene, which enabled his immediate arrest. So, for the first appellant, the question, of mistaken identity does not arise.

Then, there is the oral confession from the first appellant which he gave to PW5 in which he named the other appellants. This confession is admissible and was rightly taken into consideration against the second and third appellants, under section 33 (2) of the Evidence Act.

After the arrest of the appellants, they led to the person to whom they sold the motorcycle (PW7). This information is relevant in terms of section 31 of the Evidence Act, as it led to the discovery of the stolen motorcycle. (See **DOTTO NGASA vs R.,** Criminal Appeal No. 6 of 2006 (unreported).

Then, there is the evidence of PW7, who was initially charged along with them as a co-accused. He identified the 1st and 2nd appellants as the ones who sold the motorcycle (Exhibit P1) in question to him. It is not insignificant that when PW7 first testified on 17/5/2011 none of the appellants to cross examined him. It was only four months later, on 19/9/2011, that they decided to recall him for cross examination. But his evidence remained unshaken.

However, we are alive to the fact that, in law, the confession of the first appellant against the others requires corroboration, and that of PW7, as an accomplice, requires it as a matter of practice. PW7's evidence is

corroborated by that of PW6 D/SGT Lukuba who took the 1st and 2nd appellants to PW7's house, where in the presence of PW10, one of them asked PW7 to release the motorcycle which they had sold to him. PW7's version that the appellants had gone there without the registration card is corroborated by the production of the real registration card (Exh. P3) in court by PW2, to which the appellants neither objected, nor cross examined on.

The first appellant's conduct in court by deciding to say nothing in defence invited a strong adverse inference. In fact, he gave no defence at all, worth to be considered. This boosted PW1's credibility who testified that on the fateful night, he identified and arrested the first appellant along with the other appellants at the scene of crime.

All said, we are satisfied and so find as a fact that there was an armed robbery of a motorcycle from PW1, and that the appellants participated in that armed robbery. What remains to be resolved that arises from the appellants' grounds of appeal, is whether the stolen motorcycle in question has been identified satisfactorily.

We must at once note that according to the substituted charge sheet dated 24/12/2010 the motorcycle alleged to have been stolen is described as.

SUNLG NO. T. 998 BJH CHASSIS NO LFFWK 01C42L11809

According to PW2, she bought that cycle on 30/8/2010 vide Tax Invoice no. 406 which also records the Chassis No. as LFFWK 01CA42L11809. According to the Motor Vehicle Registration Card, the Chassis No. is LFFWK 01C4A2L11809. So, there is no variance between the Chassis number appearing in the charge sheet and that appearing in the documents of title. But, apart from chassis number, the motorcycle could also be identified by its engine number which is shown to be:

156FM 16B2281748

This number tallies in both documents and the one in the charge sheet. This leads us to believe that the motorcycle described in the charge sheet is the same as the one identified by PW1, PW2 and PW7 and that it was the very motorcycle that was stolen.

So, in conclusion we find that there was an armed robbery on 25/10/2010, that the appellants committed this offence, and that the

motorcycle recovered from PW7 was the one that was stolen and sold to PW7 by the appellants. The prosecution case was therefore proved beyond reasonable doubt.

With due respect to the learned Senior State Attorney, we think that this appeal has been lodged without sufficient grounds. It is accordingly dismissed in its entirety.

DATED at **DAR ES SALAAM** this 31st day of May, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL