IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 175 OF 2010

JUSTINE KAKURU KASUSURA @ JOHN LAIZER.....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

dated the 23rd day of June, 2010
in
HC. Criminal Appeal No. 98 of 2007

JUDGMENT OF THE COURT

11th April & 9th May, 2016
MBAROUK, J.A.:

In the Resident Magistrate's Court of Dar es Salaam at Kisutu, the appellant and six others were charged with five counts. However, the six other accused persons are not subject to this appeal. In the **First Count,** the first five accused persons (the appellant included) were charged with the offence of conspiracy to commit an offence contrary to Section 384 of the Penal Code Cap. 16 of the Revised Laws. The

Second Count, for the first five accused (the appellant included) were charged with the offence of armed robbery contrary to Sections 285 and 286 of the Penal as amended by Act No. 10 of 1989. The **Third Count,** as an alternative to the second count, the first five accused were charged with the offence of stealing contrary to Section 265 of the Penal Code. The **Fourth Count,** was directed to the sixth accused who was charged with the offence of receiving stolen property contrary to Section 311 (1) of the Penal Code. Finally, the **Fifth Count,** was directed to the seventh accused who was also charged with the offence of receiving stolen property contrary to Section 311 (1) of the Penal Code.

The fourth and fifth accused persons were later found to have no case to answer and hence discharged and set free under the provisions of section 280 of the Criminal Procedure Act, 1985. Later on, the trial court also found the second, third, sixth and seventh accused persons not guilty of the offence they stood charged with. The record shows that it was the appellant alone who was found guilty on the second and third counts and therefore convicted under section 235 of the Criminal

Procedure Act, 1985. He was then sentenced to serve five (5) years imprisonment for the second count (stealing) and thirty (30) years imprisonment with twelve (12) strokes for the third count (armed robbery). Being aggrieved by the conviction and sentence, the appellant unsuccessfully appealed to the High Court. Undaunted, the appellant has preferred this second appeal.

Briefly stated, the prosecution evidence upon which the conviction was predicated was as follows:- That according to Said Mussa Hamisi (PW1) on 2nd August, 2001 they were instructed together with the appellant by the Manager of Knight Support called Darren to go and collect cargo at the airport and transport it to CITIBANK at the city centre. PW1 said, as a practice, the appellant who was a driver was given a firearm with round of ammunitions. He added that, on his part, he was given a mobile phone for the purpose of effecting communications. PW1 further testified that before living at their work place, he noted that the radio call in the motor vehicle was defective, he therefore notified the officials, and the radio call was repaired and fitted into the motor vehicle. He added that, before reaching the

airport, they stopped at the filling station for fueling the motor vehicle and went to Terminal one at DAHACO where they met and dealt with a Falcon Company official at the Airport called Mr. Mwakitosi who was responsible for clearing the cargo. He contended further that at about 10.00 am, the appellant was called. He signed the documents and the cargo was handed over to him. They then left the airport and the appellant informed Mr. Darren by a mobile phone that they are leaving the airport area. PW1 added that the cargo was put behind the box body of the motor vehicle, which he locked and kept its keys.

On their way to the City centre, PW1 said that they passed via the airport Police Station and saw a car parked on the pavement. The appellant parked the motor vehicle infront of that car. He was then told by the appellant that the business is over. The appellant then demanded from PW1 the keys and ordered him to open the box body while pointing a gun at him. The appellant then took the keys and the mobile phone from PW1. PW1 further contended that, he saw two people he didn't know who were involved in that armed robbery. He

then raised an alarm and one person responded and then went to the police station. Thereafter, officials of Knight Support were informed.

The second prosecution witness, Amiri Virji (PW2) who was a technical manager of the Knight Support (a Security Firm) testified to the effect that, at 11:00 hrs, he received a call from one Amiri Mshana who told him that he had seen their cash in transit motor vehicle parked on a road pavement near the airport and that PW1 was at the Police Station while the appellant was missing as well as the cargo. From that information, PW2 went to the scene of crime where he found PW1 under Police custody. When he arrived, PW2 was told by PW1 that the cargo was taken at gun point by the appellant who then disappeared with it. Thereafter, PW2 with other officers of Knight Support went to report the incident at Sitakishari Police Station. A thorough search was then conducted by Police to find the culprits.

Inspector Richard Tadei (PW8) testified that on 24th December, 2001 at about 21:00 hrs. while at his home in Mbeya, an informer told him that at "Three in one" Guest House there was a criminal who was being traced by the Police. The informer further told PW8 that the said

criminal was introducing himself as John Laizer, but his real name was Justine Kasusura. PW8 further deposed that after he satisfied himself that it was the appellant who was living in that Guest House, they made a trap with his fellow policeman. At around midnight, the appellant entered his room accompanied by a lady whereupon he was arrested. PW8 testified that, they managed to recover T.Shs. 256,000/= from him as well as a receipt of Moon Dust Guest House. He said that when they interrogated him, he told them that his name was John Laizer and he had been conducting business of finger millet at Sumbawanga. Thereafter, PW8, took the appellant to Central Police Station.

In his defence, the appellant categorically denied to have committed the offences charged against him. The appellant contended that, on 2nd August, 2001 at about 07:15 hrs. after arriving at his work place at Knight Support as a driver he was ordered to go to the airport to collect a parcel. He said, he was accompanied by PW1 who was given a firearm because he was a guard. At the airport, they went to Terminal one where they collected the parcel while PW1 guarding it and they placed it in the box body of the motor vehicle where it was locked.

He then informed the Manager of cash in transit that they have already collected the parcel. He further contended that on their way back to the city centre, while still at the airport compound he received a call from the Manager of cash in transit that the latter was outside the airport waiting for them. Indeed when he reached out of the gate, the said Manager signaled him to stop and the appellant complied. He further deposed that, after he stopped, the said Manager told him that he had to take another motor vehicle and to accompany Fidelis while PW1 would drive the motor vehicle with the parcel. The appellant added that he complied with the Manager's instructions and handed over the keys of the motor vehicle he was driving to PW1. He thereafter refuted the allegations by PW1 that he demanded the keys at gun point, because on that day, he was not in possession of any firearm.

The appellant further contended that, after he had taken the other motor vehicle as directed by the Manager he went with Fidelis as instructed and took the luggage to Wazo and ultimately returned the motor vehicle to the Company premises. At about 15:00 hrs. while at

the office, he was called by the Manager of cash in transit who assigned him to send a luggage to Mbeya Cement where there was a branch of Knight Support. He said that on 3rd August, 2001 he thus travelled to Mbeya and slept at Luna Guest House at Songwe. He deposed further that on the following day he was surprised to find in the Nipashe Newspaper that money was stolen from their company – Knight Support. He said, he made a call to his boss, the Manager of the cash in transit to inquire as to what has happened, but the Manager told him that it was not true and he had to continue with his business. On the 4th August, 2001 he reported at the Knight Support branch at Mbeya Cement where a Branch Manager assigned him some duties of the employee who was on leave. The appellant, further said, he remained in Mbeya until 24th December, 2001 when he was arrested at Moon Dust Guest House. He totally denied that there was a time when he went to Tanga, Arusha and Sumbawanga. He said, he was sent to those places later by policemen.

After he was not satisfied with the decision of the first appellate court, on 4/6/2015, the appellant lodged in this Court a memorandum

of appeal containing nine grounds of complaint, but in essence they fall into the following grounds:-

(1) *That the learned appellate judge misdirected himself when he upheld the sentence against the appellant which was illegal because the law constituting such punishment of thirty years jail term was not yet in place at the time of committing the offence and conviction causing a total miscarriage of justice.*

(2) *That the learned appellate judge misdirected himself when he upheld conviction and sentence based on a retracted repudiated cautioned statement (Exh. P. 8) obtained contrary to the provisions of the Criminal Procedure Act, Cap. 20 R.E. 2002 where the prosecution failed to prove its voluntariness and this occasioned a serious miscarriage of justice.*

(3) That, the prosecution has failed to prove their case beyond reasonable doubt.

At the hearing, the appellant who fended for himself opted to allow the learned State Attorney representing the respondent/Republic to submit first and, if the need arises, to respond thereafter.

In this appeal, Mr. Tumaini Kweka, learned Principal State Attorney assisted by Ms. Cecilia Mkonongo, learned Senior State Attorney represented the respondent/Republic. From the outset, Mr. Kweka indicated not to support the appeal. In his reply to the 1st ground of appeal, Mr. Kweka submitted that looking at the record of appeal, the charge sheet shows that the appellant was charged in the second count with the offence of armed robbery contrary to Sections 285 and 286 of the Penal Code as amended by Act No 10 of 1989. The learned Principal State Attorney further submitted that, when the offence was committed, Act No. 10 of 1989 was in place; hence the sentence of thirty (30) years imprisonment imposed on the appellant was proper. However, Mr. Kweka urged us to find that it was not proper for the appellant to be sentenced to five (5) years imprisonment

for the offence of stealing when he was already sentenced to serve thirty (30) years imprisonment for the offence of armed robbery. He added that, according to the charge sheet, the offence of stealing was an alternative offence. For that reason, he therefore further urged us to invoke section 4(2) of the Appellate Jurisdiction Act and revise the five (5) years imprisonment sentence which was wrongly imposed on the appellant and remain with the sentence of thirty (30) years imprisonment meted out against the appellant on a charge of armed robbery. He then prayed for the first ground of appeal to be found devoid of merit.

On our part, we fully agree with the learned Principal State Attorney that at the time of the commission of the offence Act No. 10 of 1989 which amended the Penal Code was in place and the same provided as follows:-

> *"(ii) by adding immediately after paragraph (b) the following new paragraphs-*
>
> *"where any person is convicted of armed robbery, the court shall sentence him to*

imprisonment for a term of not less than thirty years....."

In the instant case, the trial court convicted the appellant with the offence of armed robbery and sentenced him to thirty (30) years imprisonment. We have found that it was wrong for the trial magistrate to sentence the appellant to serve five (5) years imprisonment on an alternative count after convicting him with the offence of armed robbery. For that reason, we invoke the powers of revision conferred upon us under Section 4(2) of the Appellate Jurisdiction Act and revise that part which wrongly sentenced the appellant to five (5) years imprisonment. All in all, we find the first ground of appeal devoid of merit.

In his reply to the second ground of appeal that the cautioned statement was admitted contrary to the provisions of the Criminal Procedure Act, the learned Principal State Attorney submitted that the provisions of Sections 50 and 51 of the Criminal Procedure Act were not complied with in view of the fact that the appellant's cautioned statement was not recorded within the prescribed four hours after he

was arrested. He added that non compliance with sections 50 and 51 of the Criminal Procedure Act renders the cautioned statement liable to be expunged.

However, the learned Principal State Attorney further submitted that, even if the Court opts to expunge the appellant's cautioned statement (Exhibit P.8), the evidence of PW1 who was with the appellant at the scene of crime, taken along with the evidence of PW2, PW5, PW12 and PW14, the conduct of the appellant after the commission of the offence and, further considering the contents of Exhibit P.1,2,4,5 and 7 all together goes to show that it was the appellant and no one else who committed the offence of armed robbery. He therefore urged us to find the second ground of appeal devoid of merit too.

As conceded by the learned Principal State Attorney, we accept that the appellant's cautioned statement (Exhibit P.8) was admitted contrary to the requirement under Sections 50 and 51 of the Criminal Procedure Act (the CPA), because, the record shows that the appellant was arrested on 24/12/2001 but his statement was recorded on

26/12/2001. The record does not show that an extension of time was granted in terms of section 51(1) (a) of the CPA. In the event, we expunge the cautioned statement (Exhibit P.8) which was tendered in contravention of the requirements of the Law. See the decision of this Court in the case of **Janta Joseph Komba and Three others v. Republic,** Criminal Appeal No. 95 of 2006 (unreported).

Responding to the third ground of appeal that the case was not proved beyond reasonable doubt, Mr. Kweka submitted that even if the appellant's cautioned statement is to be expunged, but the evidence of PW1, PW2, PW5 PW12 and PW14 combined with the appellant's conduct after the commission of the offence together with the documents tendered as exhibits, in their totality goes to show that the case for the prosecution was proved beyond reasonable doubt. He added that, even if the documents tendered did not reflect clearly as to what has been stated in the charge sheet, that defect has not gone to the root of the matter and did not prejudice the appellant because the ingredients of the offence of armed robbery were proved and established in this case. He therefore urged us to find that the case

against the appellant was proved beyond reasonable doubt, hence the appeal to be dismissed.

In his re-joinder submissions, the appellant deposed that **firstly,** there is a variance between what is stated to have been stolen as it appeared in the charge sheet as against what was stated by the prosecution witnesses and the documents tendered as exhibits at the trial. He said that, in the charge sheet, it was shown that he was charged of having stolen 2,000,000 US Dollars, but the evidence of the prosecution witnesses and the exhibits tendered have shown that it was "currency" without stating clearly the contents therein. **Secondly,** the appellant submitted that, no official from the CITIBANK as the owner of that alleged imported consignment was called as a witness to testify as to whether they had ordered "currency" consignment from HSBC. He asserted that Knight Support were mere transit agents. In support of his argument, he cited to us the decision of this Court in the case of **Leonard Sedekia Marate v. Republic,** Criminal Appeal No. 86 of 2006 (unreported).

Thirdly, the appellant contended that no one was called from Knight Support Company to testify as to whether he was given a gun on that day. He was reacting to the testimony of PW1 which stated that the appellant had a gun and pointed it at him to surrender the keys. After all, he said that PW1 was not a reliable witness being an accomplice who was once charged in connection to this case.

All in all, the appellant submitted that, the prosecution failed to prove their case beyond reasonable doubt. He therefore prayed for his appeal to be allowed and to be released from prison.

With due respect, we wish to state from the outset that in this case we have noted with great concern that this case has been badly investigated and consequently, poorly prosecuted.

On the point as to whether the prosecution has proved their case beyond reasonable doubt or not, we fully agree with the appellant that there is variance between what has been stated in the charge sheet and the evidence adduced by the prosecution witnesses. At this juncture, we have seen it prudent to reproduce the particulars of the offence

charged appearing thus in the judgment of the trial court which provides as follows:-

> ***"PARTICULARS OF THE OFFENCE***
>
> *That on or about the 02nd day of August, 2001 around the Dar es salaam International Airport area within the City and Region of Dar es salaam the first five accused* ***did steal US Dollars 2,000,000 the property of City Bank*** *Dar es salaam, and immediately before such stealing threatened one Said Mussa Hamisi with a pistol in order to obtain and retain the said amount of money."*
>
> (Emphasis added).

As shown herein above, the particulars of the offence clearly states that what was stolen was 2,000,000 US Dollars, but that allegation was neither supported by the evidence from either the prosecution witnesses or the documentary evidence tendered as exhibits at the trial court. All along the prosecution witnesses testified

on a parcel/ cargo as the item which was received by the appellant and PW1 at the airport. Even the Import Declaration Form tendered as Exhibit P.7 describes the imported goods as "currency" without elaborating the amount and the type of currency. Similarly, the air way bill (Exhibit P1) gives description of the said consignment as "1Pkg currency" without elaborating what type of currency. Indeed, the description of the same consignment given in the Tax Invoice (Exhibit P2) is 20 kgs. Furthermore, the Delivery Note (Exhibit P5) depicted the fact that the appellant received 1 package described as "currency". Again, Eusebio David Kitosi (PW3) who cleared the same consignment stated that he cleared the "cargo".

From the foregoing brief discussion, it is clear that the evidence was not forthcoming from the prosecution witnesses on what was contained in the "Cargo" actually received. If anything, the sum of the alleged US Dollars 2,000,000 only features in the appellant's cautioned statement (Exhibit P8) whose evidence we have expunged for the

reasons already given. Once Exhibit P8 is expunged, we are left with no evidence on how much if any was stolen and in what currency.

There can be no doubt that the appellant was called upon to answer a charge in which a specific amount of a specific currency was allegedly stolen. In the circumstances of this case, one would have expected that the alleged owner, CITIBANK Dar es Salaam would have given evidence on what was actually stolen. One would also have expected a consignor of the "Cargo" to give evidence on what kind of "Cargo" was sent to the CITIBANK, and whether or not the sum of USD2,000,000 allegedly stolen belonged to the CITIBANK. As the evidence on record does not tally with what was stated in the charge sheet, we are of the view that there was failure of justice in that the identified owner of the money allegedly stolen did not testify. That anomally has created reasonable doubt which we are prepared to resolve in favour of the appellant.

Besides, we also agree with the appellant that failure to call an official from CITIBANK as the owners of the imported consignment, created doubt as to the type and amount of currency which was

imported. This is because as we stated earlier the tendered exhibits do not support the amount stated in the charge sheet. This Court in the case of **Leonard Zedekia Maratu** (supra) held that:-

> *"In our view, from the charge sheet, it was expected that the prosecution side would lead evidence to prove that the appellant stole the above sum of money the property of Peter Zakaria and that immediately before such stealing he fired two bullets in order to retain the money. In the circumstances, we are of the view that Peter Zakaria ought to have given evidence to show that his sum of money amounting to Tshs 4,375,000/= was actually stolen by the appellant. After all, being the* ***owner*** *of the money in issue, evidence from him ought to have been forthcoming to the effect that his money was actually stolen. As it is, in the absence of his evidence it is not certain whether the above sum of money actually belonged to him. As*

already stated, ***we are of the settled view that there was failure of justice in that the identified owner of the money did not testify. In the absence of his evidence, it is not therefore easy to say with certainty that Peter Zakaria, being the owner of the stolen money, was deprived of the said money, thereby constituting "theft" within the above definition of "theft."*** *[Emphasis added].*

That apart, we do not agree with the learned Principal State Attorney that the appellant's conduct after the alleged robbery could have suggested that he must have necessarily committed the offence which he was convicted of.

In the upshot, the cumulative effect of our foregoing discussion leads us to the conclusion that, the case against the appellant was not proved beyond reasonable doubt. We therefore find the 3rd ground of appeal to have merit and hence we allow the appeal, quash the conviction and set aside the sentence of imprisonment and corporal

punishment. We consequently order the appellant to be released from prison forthwith unless lawfully held.

We so order.

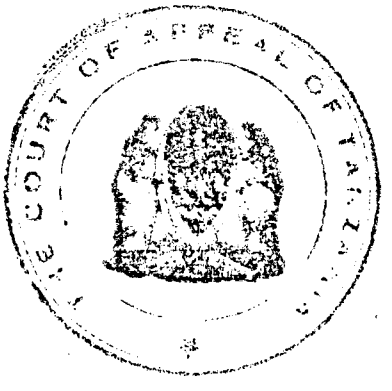
DATED at **DAR ES SALAAM** this 3rd day of May, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

I certify that this is a true copy of the original



Z.A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL