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 192 OF 2014

SHIDA LUANDA AIDAN @ EMMILIAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwakipesile, J.)

Dated the 2nd day of April, 2014

In

Criminal Appeal No. 26 of 2013

JUDGEMENT OF THE COURT

8th April & 20th June, 2016

KAIJAGE, J.A.:

This is a second appeal. The appellant and other two persons were convicted, as jointly charged, by the Resident Magistrates' Court of Dar es Salaam at Kisutu (the trial court), of offences preferred on two (2) counts. Each was consequently sentenced to serve a term of seven (7) years imprisonment on the 1st count of Conspiracy to Commit an Offence contrary to section 384 of the Penal Code and thirty (30) years imprisonment on the 2nd count of Armed Robbery contrary to section 287A of the same Code. The

sentences were ordered to run concurrently. They were aggrieved. Their joint appeal to the High Court sitting at Dar es Salaam was successful as against the appellant's co-accuseds who were acquitted on both the said two counts. The appellant's appeal was partly allowed. Like his co-accuseds, he earned an acquittal on a conspiracy charge. His appeal against the conviction and the sentence on the second count was dismissed, hence this second appeal.

The evidence upon which the appellant's conviction on the 2nd count of Armed Robbery was grounded came from PW1 No. D 4729 Sgt. Bakari, PW2 No. 8334 Dtc. Cpl. Philip, PW3 ASP Rogati Magodi as well as the two statements made to the police authorities on 6th and 13th December, 2010 by Said Chande, one of the victims of robbery. The one taken on 13/12/2010 was an additional statement.

The only evidence disclosing what allegedly transpired at the scene of crime could be gathered from the statements of Said Chande which were collectively tendered by PW2 and admitted in evidence under section 34B of the Evidence Act, Cap 6 R.E. 2002 (the Evidence Act). The said statements were admitted by the trial court "*to form part of the evidence*" in lieu of oral

direct evidence of Said Chande who was then studying in Canada. It is worth noting that these statements were admitted without being marked as exhibits.

From the statement which PW2 obtained from Chande on 6/12/2010 it is recorded that during the night of the 5/12/2010 at 00.01 hours, Chande and his friend, one Irfam Othman, were having a friendly conversation in a TOYOTA IPSUM car with Registration No. T818 ARM which was, at that hour of the day, parked at a gate leading to the residential compound of the former's parents situated at Mikocheni near 'KK' Security Offices in Kinondoni District within the City of Dar es Salaam.

The same statement further has it that the duo's conversation was interrupted by unexpected arrival of three (3) armed bandits on a motorcycle which stopped few paces away from the said parked car. Two bandits one of whom was carrying a pistol and another armed with a shotgun approached a parked car and, at gun point, ordered Chande and his friend to alight therefrom, which they did. After they had forcibly dispossessed their victims of the car keys and two mobile phones, the robbers hastily drove away in the victims' car and disappeared to the unknown destination.

In the same statement, Chande is further recorded to have stated that the robbery incident occurred on 5/12/2010 at 00.01 hours and that sufficient light at the scene of crime, enabled him to identify one of the bandits whom he described as being tall, fat and of a dark complexion. It is noteworthy that no specific finding was made by the two courts below on whether or not that description fitted the appellant.

Indeed, in his additional statement taken on 13/12/2010 after the conduct, on the same day, of an Identification Parade (ID Parade), Chande claims to have identified the appellant who fitted the description given in the earlier statement taken on 6/12/2010. The conduct of the ID parade was superintended by PW3 ASP Magodi, one of the investigators of the case, who tendered the ID parade Register which was admitted in evidence and marked as Exh. P2.

The testimonial account of PW2 Cpl. Philip has it that the robbery incident was reported at Oysterbay Police Station immediately after its occurance. He further told the trial court that he obtained and recorded the appellant's cautioned statement (Exh.P1) on 12/12/2010 following the latter's arrest on 11/12/2010. In Exh.P1, the appellant is recorded as having

admitted to have committed the robbery on 5/12/2010 together with other persons.

In his sworn defence, the appellant completely disassociated himself from the robbery incident of 6/12/2010 stating, among other things, that the cautioned statement (Exh.P1) was obtained after he was tortured by the police officers and promised to be taken to hospital for the treatment of serious injuries he had sustained in the course of police interrogations.

Relying heavily on both the contents of Chande's statements and the appellants cautioned statement (Exh.P1), both courts below made concurrent findings of fact that the charge of armed robbery was proved beyond reasonable doubt as against the appellant.

From the appellant's memorandum of appeal, we have culled the following substantive grounds of complaint:-

1. That, the two courts below erred in convicting the appellant upon the latter's cautioned statement (Exh.P1) which was illegally obtained.

2. That, the two courts below erred by relying on the statements of an unprocured witness which were illegally admitted.
3. That on the whole of the evidence on record, the case for the prosecution was not proved beyond reasonable doubt as against the appellant.

Before us, the appellant appeared in person, fending for himself. He opted to adopt the foregoing grounds of complaint, reserving his right of reply to the respondent's counsel's submission in the event of his appeal being resisted. The respondent Republic was ably represented by Ms. Janethreza Kitali assisted by Ms. Anetha Sinare, both learned Senior State Attorneys who, incidentally, did not resist the appellant's appeal.

Submitting on the 1st ground of appeal, Ms. Kitali asserted that the appellant having been arrested by the police and taken under restraint on 11/12/2010, the recording of his cautioned statement (Exh.P1) by PW2 on 12/12/2010 contravened the provisions of sections 50 and 51 of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA). She consequently implored us to expunge the evidence in Exh.P1.

Having examined Exh.P1, we have found merit in Ms. Kitali's submission on the 1st ground of appeal. Admittedly, the period available for custodial interviews by the police is regulated under sections 50 and 51 of the CPA from which we take the liberty to extract the relevant portions:-

"50(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-

(a) Subject to paragraph (6) ***the basic period*** *available for interviewing the person, that is to say,* ***the period of four hours commencing at the time when he was taken under restraint*** *in respect of the offence;*

(b) If the basic period available for interviewing the person is extended under section 51, the basic period as extended.

51- (1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with

an offence, and it appears to the police officer in charge investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may:-

(a) ***extend the interview for a period not exceeding eight hours*** *and inform the person concerned accordingly; or*

(b) *either before the expiration of the original period or that of extended period, make application to a magistrate for further extension of that period."*

[Emphasis is ours.]

On the strength of the evidence on record, we are satisfied that the appellant was taken under restraint by the police on **11/12/2010**. Notwithstanding the fact that the record is silent on the exact time he was so taken, we have no doubt in our minds that his cautioned statement (Exh.P1) which was taken and recorded by PW2 on **12/12/2010** starting from 10.15 am until 11.45 am offended the clear mandatory provisions of sections 50 (1) (a) and 51 (1) (a) of the CPA hereinabove cited. When this

Court was confronted with identical situations, it held that non-compliance with sections 50 (1) (a) and 51 (1) (a) of the CPA vitiated the particular cautioned statement. (See, for instance; **GREGORY DAVID MAAKOLA @ MBUGA V. R.**, Criminal Appeal No. 238 of 2009, **PAMBANO MFILINGE V.R**; Criminal Appeal No. 283 of 2009 and **MAJULI LONGO AND ANOTHER V.R**; Criminal Appeal No. 261 of 2011 (all unreported).

In this case, Exh.P1 having, inarguably, been taken and recorded outside the basic period stipulated under section 50 (1) (a) without the requisite extensions in terms of section 51 (1) (a) and (b) of the CPA, the said exhibit was thereby vitiated and ought to be expunged, as we hereby do.

Once the appellant's cautioned statement (Exh.P1) is expunged from the record of evidence, the only remaining incriminating evidence against the appellant is that which is found in statements of Said Chande which were collectively tendered by PW2 and admitted in evidence under section 34B of the Evidence Act. This takes us to the next ground of appeal.

Arguing the second ground of appeal, the learned Senior State Attorney took the position that Chande's statements did not qualify to be admitted into evidence because the conditions precedent stipulated under section 34B of the Evidence Act were not fully satisfied. She thus urged us to discount the evidence in Chande's statements.

Once again, we are in full agreement with the learned Senior State Attorney. As observed in **MAJULI LONGO AND JUMA SALUM @ MHEMA V. R**; Criminal Appeal No. 261 of 2011 (unreported), a statement by a person who cannot be summoned can only be admissible in lieu of oral direct evidence upon satisfying, cumulatively, the conditions – precedent stipulated under section 34B (2) (a) to (f). We shall hereunder take the liberty of reproducing the relevant provisions of section 34B of the Evidence Act which reads:-

> *"34B. (1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be*

admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written statement may only be admissible under this section:-

(a) Where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the services of the copy of the

statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."

[Emphasis is ours.]

In this case, Chande's statements were admitted into evidence by the trial court without conditions (c) and (d) of section 34B (2) of the Evidence Act being met. Condition (c) is a requirement for a declaration by a maker of the statement that he made the statement while knowing that it were tendered in evidence and that he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true. Condition (d) requires that before the hearing at which such a statement is to be tendered in evidence, a copy of the same should be

served, by or on behalf of the party proposing to tender it, on each of other parties in the proceedings.

Going by the record, it is evident that Chande's statements do not reflect the necessary declarations made in terms of paragraph (c) of section 34 B (2) of the Evidence Act. Indeed, there is nothing showing or suggesting that copies of Chande's statements were served on the appellant before the hearing of the case as required under paragraph (d) of the same section. Upon this brief observation, we are satisfied that the cumulative effect of these shortcomings rendered Chande's statements inadmissible. Unfortunately, both courts below did not advert to the imperatives of section 34B (2) of the Evidence Act. Like what befell Exh. P1, we shall also hereby discount the evidence in Chande's statements.

After discounting the evidence in both Exh. P1 and Chande's statements, we have found ourselves left with no credible evidence to link the appellant with the offence he was convicted of. As matters stand, we certainly see no legal basis upon which to sustain the appellant's conviction.

Accordingly, we allow the appeal. The conviction entered and the sentence meted out against the appellant are, respectively, quashed and set aside. We order the appellant's release from prison forthwith unless he is held upon some other lawful cause.

DATED at **DAR ES SALAAM** this 14th day of June, 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.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL