

**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MUGASHA, J.A.)**

**CRIMINAL APPEAL NO. 301 OF 2015**

**MKWAVI S/O NJETI ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania  
at Iringa)**

**(Werema, J.)**

**Dated the 16<sup>th</sup> day of May, 2007**

**In**

**Criminal Appeal No. 24 of 2006**

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**JUDGMENT OF THE COURT**

19<sup>th</sup> & 25<sup>th</sup> July, 2016

**MJASIRI, JA:**

In the District Court of Iringa District, the appellant Mkwavi Njeti was charged with and convicted of armed robbery contrary to section 285 and 286 of the Penal Code, Cap 16 R.E. 2002. He was sentenced to thirty (30) years imprisonment. He was charged with another person one Yohana Msimule. Aggrieved by the decision of the District Court, they both appealed to the High Court. The appellant's appeal to the High Court was

unsuccessful, hence his second appeal to this Court. Yohana Msimule was found not guilty and was acquitted.

It was the prosecution's case that on the 4<sup>th</sup> day of June, 2004 at about 20:00 hours at Makadupa Village, Ismani area, within the region of Iringa, the appellant and another invaded the house of Hilan Mageni (PW1) and stole 31 heads of cattle valued at Shs 4,000,000. They also stole various other items valued at Shs 270,000. They threatened the appellant with a gun, in order to facilitate the robbery. The appellant was not visually identified by the victims. However two of the witnesses PW1 and PW6, Eliezeri Mgaya claimed to have identified the appellant through his voice. They claimed to have been familiar to the appellant and therefore recognized his voice, when he stormed into the house and ordered them to lie down. The trial court also relied on the cautioned statement of the appellant. PW3 testified that he saw the appellant at a distance in an open space when he was on the search team looking for the stolen cattle.

The appellant presented a ten (10) point memorandum of appeal. However the major grounds of appeal can be summarized as follows:-

- 1. That the prosecution failed to prove the case against the appellant beyond reasonable doubt.*
- 2. That the trial Court wrongly admitted the appellant's cautioned statement without conducting an enquiry.*
- 3. The conviction of the appellant was against the evidence on record.*

At the hearing of the appeal the appellant appeared in person, was unrepresented and had to fend for himself. The respondent Republic had the services of Mr. Adolf Maganda, learned Senior State Attorney.

The appellant being unrepresented did not have much to say. He simply asked the Court to consider his grounds of appeal as part of his submission. He opted for the learned Senior State Attorney to address the Court first.

Mr. Maganda on his part did not support the conviction. He relied on the following grounds:-

- 1. The cautioned statement of the appellant was not properly admitted in court.*

*2. The trial court and the first appellate court  
wrongly relied on voice identification.*

On the first ground he argued that the trial court wrongly admitted the appellant's cautioned statement. According to him, the appellant having objected to the production of the cautioned statement, the trial court should have conducted an enquiry. He submitted that it is dangerous to act on a repudiated or retracted confession. He relied on the case of **Hemedi Abdallah v Republic** (1995) TLR 172. He asked the Court to expunge the cautioned statement.

He also submitted that section 50(1) (a) of the Criminal Produce Act Cap 20 R.E. 2002 (the CPA) was not complied with. Whereas it is a requirement under the law to record a statement of a suspect within four (4) hours after his arrest, the appellant's cautioned statement was recorded after 4 days. No extension was sought. He therefore asked the Court to expunge the cautioned statement.

On ground No 2, Mr. Maganda submitted that the appellant was only identified through voice identification. According to him voice identification by itself is not reliable. He relied on the case of **Nuhu Selemani v**

**Republic** (1984) TLR 93. He contended that none of the witnesses visually identified the appellant. Both PW1 and PW6 relied on voice identification. PW3 claimed to have seen the appellant running away in an open space when the search party found the stolen cattle, however he did not give a description of the appellant nor make a positive identification.

On the appellant's complaint that his defence was not considered, Mr. Maganda confirmed that neither the trial Court nor the High Court considered the appellants defence of **alibi**.

The appellant did not have much to say in reply. He simply agreed with the submissions made by Mr. Maganda.

We on our part, after carefully reviewing the evidence on record, the judgment of the trial Court and the High Court and the submissions made by Mr. Maganda wish to state as follows. The main issues for consideration and decision are:-

- 1. Whether or not the admission of the cautioned statement of the appellant was in compliance with the law.*

2. *Whether or not the appellant was properly identified.*
3. *Whether the conviction of the appellant was against the weight of the evidence on record.*

In relation to the cautioned statement, we are inclined to agree with the learned Senior State Attorney. There are two anomalies as far as the cautioned statement is concerned. The law requires that the statement be recorded within four (4) hours after the arrest of the suspect. The basic period had elapsed and no extension was sought under section 51 (a) or (b) of the CPA.

Section 50 (1) of the CPA provides as under:-

"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 (b) 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 basic period is extended under section 51, the basic period as so extended.*

Since the cautioned statement (Exhibit P4) was taken four (4) days after the appellant was arrested and put in restraint, it was done contrary to section 50 (1) (a) of the CPA. It is now settled law that non-compliance with the provisions of sections 50 and 51 of the CPA is a fundamental irregularity that goes to the root of the matter and renders the illegally obtained evidence inadmissible and one that cannot be acted upon by the Court. See **Janta Joseph Komba and 3 Others versus Republic**, Criminal Appeal No. 95 of 2006; **Joseph Mkumbwa and Another v Republic**, Criminal Appeal No. 94 of 2007; **Christopher Chengula v Republic**, Criminal Appeal No. 215 of 2010 and **Said Bakari v Republic**, Criminal Appeal No. 422 of 2013 CAT (All unreported).

In **Emmanuel Mahahya v Republic**, Criminal Appeal No. 212 of 2004 CAT (unreported) the Court stated thus:-

*"The provisions of section 50 and 51 of the CPA were meant to safeguard the human rights of suspects and should therefore not be taken lightly or as mere technicalities."*

It follows therefore that Exhibit P4 was not properly admitted. This non-compliance is sufficient to expunge Exhibit P4 from the record.

There is however another problem. Following the objection by the appellant to the admission of the cautioned statement, an enquiry was supposed to be held in order to test the voluntariness of the cautioned statement and its admissibility under section 27 of the Evidence Act. This was not done. In **Paulo Maduka and 4 others v Republic**, Criminal Appeal No. 110 of 2007, this Court made reference to the case of **Twaha Ali and Five Others v Republic**, Criminal Appeal No. 78 of 2004 CAT (unreported) where it was stated that a confession will be presumed to have been voluntarily made until objection to it is made by the defence on the ground that it was not so or it was not made at all. The Court stated further:-



*"...If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the alleged confession. **Such an inquiry should be conducted before the confession is admitted in evidence...**"*

*[Emphasis ours.]*

Omission to inform the accused of this right and/or to conduct an inquiry or a trial within a trial in case there is an objection raised, is a fundamental and incurable irregularity.

Once the cautioned statement is expunged from the record, we only remain with the evidence of PW1 and PW6 on voice identification. The evidence of PW3 is not reliable. At at page 8 of the record he stated that he saw the appellant at a distance, which he did not state and did not give a description.

The law is settled, voice identification is not reliable. In **Stuart Erasto Yakobo v Republic**, Criminal Appeal No. 202 of 2004 CAT (unreported) it was stated thus:-

*"the issue is whether voice identification is reliable in law. In our considered opinion, voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it.... There is always a possibility that a person may imitate another person's voice. For voice identification to be relied upon, it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime..."*

*[Emphasis provided].*

See **Badwin Komba @ Ballo v Republic**, Criminal Appeal No. 56 of 2005 CAT (unreported) and **Kanganja Ally Juma Ally v Republic** (1980) TLR 270.

Now coming to the third issue for consideration as to whether or not the evidence on record is enough to ground a conviction, we are of the

considered view that given the nature of the evidence on record the case against the appellant was not proved beyond reasonable doubt.

For the foregoing reason we hereby allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment meted out to the appellant. The appellant is to be released forthwith from prison unless otherwise lawfully held. Order accordingly.

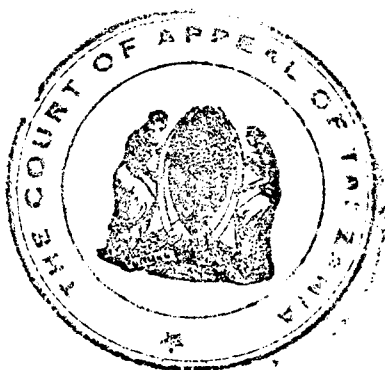
**DATED** at **IRINGA** this 21<sup>st</sup> day of July, 2016.

S. MJASIRI  
**JUSTICE OF APPEAL**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

S. MUGASHA  
**JUSTICE OF APPEAL**

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



  
B. R. NYAKI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**