

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., JUMA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO 251 OF 2015

YASIN RAMADHAN SHABAN ..... APPELLANT  
VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es salaam)

(Feleshi, J.)

Dated 27<sup>th</sup> day of February, 2015

in

HC. Criminal Appeal No. 176 of 2014

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JUDGMENT OF THE COURT

23<sup>rd</sup> February, & 4<sup>th</sup> March, 2016

JUMA, JA:

The appellant Yasin Ramadhan Shaban was in the court of Resident Magistrate of Dar es Salaam at Kisutu charged together with Abasi Saidi Sanze and Frank Joseph with offence of armed robbery contrary to Section 287A of the Penal Code [Cap. 16 R.E. 2002] as amended by Act 3 of 2011. The particulars of the offence alleged that on 2/2/2012 at *Msasani Bonde*

*la Mpunga* area of Kinondoni District in Dar es Salaam the three accused persons stole six gold bangles, four gold necklaces, seven gold rings, two gold bracelets, one mobile phone (Nokia E5), all valued at Tshs. 10,000,000/= the property of Ms Sabrina Jussa. It was further alleged that during the stealing, they used an iron bar to threaten her and in order to obtain or retain the stolen properties.

A total of eleven witnesses, including the complainant, Sabrina Jussa (PW1) testified for the prosecution. The complainant recalled that it was around 11:30 a.m. and she was at her first storey house with her child when she heard shouts and noises from outside. Whoever was outside knocking, wanted her to open the door. Believing that it was policemen at their door, Swahila Issa (PW2) the complainant's housemaid urged PW1 to open the doors. The complainant took fright and rushed to the safety of her bedroom where she locked herself in the bedroom toilet, and phoned her husband.

Later, after much banging the complainant relented. She opened the bedroom door. Immediately, about nine bandits rushed in shouting,

carrying sisal ropes and two iron bars. At least four of the nine bandits wore police uniforms. They forced the complainant and her maid to the sitting room where the victims were all tied up. To prevent PW1 from shouting for help, one of the bandits covered her mouth with a plaster. PW1 was assaulted as the bandits demanded money. Fearing for her life, she went back to her bedroom where she retrieved her jewellery, which she handed over to the bandits. When eight of the nine bandits left their house, PW1 managed to find her way out of the house. Once outside, she removed the plaster from her mouth and alerted her neighbours. She warned them those people who had escaped after invading her house were not policemen after all. They were bandits.

It transpired to PW1 that the appellant, who remained behind, did not know that his colleagues-in-crime had left the scene. Michael Mathias Makoti (PW6) testified how while he was busy with his tailoring he saw a man dressed in police uniform entering PW6's house right into one of the rooms. This intruder was soon followed by a group of angry civilians. The mob urged PW6 to let go of the appellant, which he did. That is how the appellant was arrested by the members of the public.

At the close of prosecution case, the learned Senior Resident Magistrate (B. Mashabara) found Abasi Saidi Sanze and Frank Joseph with no case to answer and acquitted them. The appellant was however found with a case to answer. When put to his defence he explained that he was a police officer from 2010 up to February 2012 when he was dismissed following his arrest and being charged with the offence of armed robbery. He explained further that he was arrested whilst wearing police uniform because that very morning he had obtained permission to visit the National Health Insurance Office at Mwenge. On his way back from Mwenge he decided to pay a visit to his friend, who lived at Msasani area along the TANESCO road. Along the way, he was stopped by a civilian who reported to him that there was a vehicle unloading what was suspected to be cocaine. He went to where the vehicle was. The people he was attempting to arrest turned the tables on him, shouting at him as a thief! A crowd soon gathered. He was beaten up and sent to Oyster Bay Police Station.

Two fellow police officers, G. 6473 Joseph Nestory Kanda (DW2) and G. 6472 Enock Ernest (DW3) testified in the appellant's defence. DW2 and DW3 were with the appellant right to around 10:00 a.m. when they parted company, before the incident of robbery.

Appellant was convicted and sentenced to serve thirty years in prison. His first appeal to the High Court did not succeed. In dismissing his first appeal in its entirety, Feleshi, J. expressed his satisfaction with the credibility and cogency of the evidence of PW1 and other prosecution witnesses by stating that:

*"...the evidence of PW1 to PW7 is closely connected chain as regards to what happened inside PW1's house and then in the nearby premises wherefrom the appellant was arrested and severely beaten up..."*

Still dissatisfied, the appellant has preferred this second appeal. His memorandum of appeal has four grounds of complaints which may conveniently be paraphrased. In his first ground, the appellant faults the trial and first appellate courts for relying on the identification evidence of the complainant (PW1), Swahila Issa (PW2), Zainab Selemani (PW3), Hadija Selemani (PW4), Pari Pascal (PW5), Michael Mathias Makoti (PW6) and Hassan Mbarouk (PW7). With regard to the second ground, he faults the two courts below for failing to draw adverse inference from the way

the prosecution failed to bring the evidence of the civilians who had arrested him. The third ground complains the way the two courts below convicted him on the basis of cautioned statements (exhibits P5 and P6) of his co-accused which the appellant insisted lacked corroboration. In his final ground, the appellant contends that the entire case which the prosecution presented against him was not proved beyond what the appellant described as "any speck of doubt". Later on 4/1/2016 the appellant filed Supplementary Memorandum of Appeal containing a total of nine grounds of complaints.

When this appeal was called on for hearing, the appellant appeared in person, unrepresented. The Respondent/Republic was absent even though they were duly served on 7/1/2016 with a notice of the hearing of this appeal. We accordingly ordered the appeal to proceed.

After adopting and placing his full reliance on his grounds of appeal, the appellant opened his oral submissions by faulting the trial and the first appellate courts for convicting him on the strength of the cautioned statements of his fellow accused persons, who were later found with no

case to answer. In so far as he is concerned, the two statements do not show any conspiracy to commit any offence but to carry out an arrest of cocaine dealers. The appellant questioned why the prosecution failed to bring as witnesses the people who actually arrested him and took him to the Oyster Bay Police station. He argued that if he was arrested red-handed as the prosecution claims, the witnesses who arrested him should have testified.

The appellant similarly attacked both the evidence of the complainant who claimed to have seen him at her house and evidence of other prosecution witnesses, who claimed to have seen the appellant as he was taken from the house of PW6 and PW7. Finally, the appellant faulted the way the complainant was allowed to tender the exhibits (plaster, 2 sisal ropes and iron 2 bars) without showing the chain of custody.

From the appellant's submissions on his two sets of memorandum of appeal, one main issue stands out for our determination, namely: whether the evidence of the complainant (PW1) and other prosecution witnesses together with cautioned statements of the PC Frank Joseph and that of

Abasi Saidi Sanze; proved the case against the appellant beyond reasonable doubt. The learned trial magistrate court was similarly convinced that the prosecution had proved its case beyond reasonable doubt. The learned trial magistrate stated the following on page 68:

*"...Having gone through the evidence adduced by prosecution as well [sic] defence side issue arises whether a particular act of accused person amount to Armed Robbery or not.*

*As per prosecution evidence testimony of PW1 and PW8 it is not disputable accused person on material day accused person was saw (sic) and identified by the prosecution witness (sic) at the area of incidence with their fellow who still at large....*

*.....accused person was clearly identified and pointed by all the witnesses PW1-10 as well as corroborated by caution statement made by accused person which admitted as "p3" and police uniform "P2".*



*Therefore this court is satisfied to believe accused person with other at large did committed (sic) the offence of Armed Robbery c/s 287A of the Penal Code....”*

The first appellate court agreed as much with the trial court. Apart from what he described as credibility and cogency of the evidence of PW1 and other prosecution witnesses, the first appellate Judge placed great reliance on the cautioned statements of the appellant’s co-accused, stating:

*“...I took a liberty to revisit the contents of the cautioned statements made by the appellants’ co-accused persons (Exhb P.5 and Exhb P.6) which..... were not opposed at the tendering and admission stage and therefore forms part of the court evidence placed before me for appraisal. The evidence of Exhb P.5 and Exh.P.6... further corroborates evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW9 and P11...”*

There is no doubt the appellant (DW1) completely denied any role in the offence for which he was convicted and sentenced. He presented his own version of evidence. He was returning from Mwenge, and decided to visit a friend at Msasani. Because he was in police uniform, a member of the public sought his assistance over a vehicle, Toyota Hiace, suspected to be loaded with narcotic drugs (cocaine). The suspects he was about to arrest turned against him. That is how he was arrested by the civilians and taken to Oyster Bay police station. He was then transferred to Mwananyamala Hospital for treatment. Later, he was returned back to Oyster Bay police station where he claimed that he was interrogated, beaten up and forced to sign the cautioned statement.

The appellant's version of evidence that he had gone to Mwenge that morning is supported by the evidence of G. 6473 Joseph Nestory Kanda (DW2) and G. 6472 Enock Ernest (DW3) who also visited the Mwenge offices of the National Health Insurance. Like the appellant, DW2 and DW3 were all members of the police brass band at Kurasini. DW2, DW3 and the appellant visited the National Health Insurance Offices and after finishing their business they parted company at around 10 a.m. It was much later

when DW2 and DW3 learnt how the appellant had been arrested and beaten up by an angry mob.

From the totality of the prosecution evidence, the appellant was placed at two scenes. The first scene took place inside the complainant's flat and was testified upon by the complainant herself (PW1), complainant's daughter (PW2), housemaid (PW3), the family cook (PW4) and the house servant (PW5). All these five witnesses identified the appellant whilst in the dock and only PW1 mentioned how the appellant was left in the house after the eight bandits had made their escape. On re-examination, PW2 stated that the appellant was arrested at a place she described as "the place of incidence".

The dock-identification of evidence of PW1, PW2, PW3, PW4 and PW5 was as follows:-

Sabrina Jussa (PW1) "*...I do remember one who put plaster on me. **There is only one person (1<sup>st</sup> accused person) before this court.***"

Swahila Issa (PW2) "...I do remember one of them (pointed at the first accused person) there were other who put on uniform...."

Zainab Suleiman (PW3) "...I know the first accused person (pointed first accused person by witness) he was beneath me in the room."

Hadija Selemani (PW4):- "...Then she decided to give them gold to one of them, is first accused person (pointed by Pw4). I was facing him that is why I did remember him...."

Pari Pascal (PW5) "...we were detained and put on police uniform, one of them is the first accused person pointed by Pw5."[Emphasis added].

The second scene took place inside the house of Michael Mathias Makoti (PW6) in a room rented out to Hassan Mbarouk (PW7) where the appellant had allegedly entered while being hotly pursued by angry

civilians. There is no evidence to show whether PW1, PW2, PW3, PW4 and PW5 who witnessed the event inside the complainant's house, came over to positively identify the appellant when he was arrested by the civilians in the house of PW6. Like other previous witnesses, Pw6 and Pw7 both made dock identification of the appellant while giving their evidence:-

*PW6: "...I was at my house sewing some clothes while ...there [I] saw police men walking on the roof he was put on (sic) police uniform, he came down into my house..... After a while a group of people came and told me, he is thief, they took him he was severely beaten (**pointed first accused**)....."*

*Pw7: "...I was within my room, I heard shouting outside. Askari akaingia humu ndani naomba atolewe.... **I do remember the accused person (pointed first accused person)**...." [Emphasis added].*

It seems clear from the evidence after the first encounter between PW1, PW2 and PW3 and the bandits on 2/2/2012, it took more than three months later till on 23/5/2012 when these witnesses identified the appellant in the dock. There is no evidence to show that the witnesses who were in the complainant's house went to the second scene near the house where PW6 and PW7 lived where the mob arrested the appellant later that day. Not a single witness from PW1's household was able to testify on how the appellant was identified whilst in PW1's house. It is still not clear from evidence how the witnesses identified the appellant whom they were encountering for the first time. No identification parade was conducted and these witnesses did not offer any descriptions of the appellant. It is not enough for witnesses to state in general terms that some of the nine bandits were in police uniforms and then wait to dock-identify the appellant whilst in the dock.

In the circumstances pertaining in this appeal an identification parade was important. In **Thadey Rajabu @ Kokomiti and Two Others vs. R.**, Criminal Appeal No. 58 of 2013 (unreported) PW1 was a stranger to the bandits who had earlier taken part in armed robbery. She was invited at the police Station where she was able to identify the first appellant. There

was no identification parade. She identified the other two in court. This was dock identification. Describing dock identification to be useless if not preceded by an identification parade, the Court referred to **Mussa Elias and 3 Others vs. R.** Criminal Appeal No. 172 of 1993 (unreported) where the Court said:

*"...dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade of which the witness successfully identified the accused before the witness was called to give evidence at the trial.."*

Without the evidence linking the arrest of the appellant with the armed robbery that took place in PW1's household, it is not safe to conclude that the arrest of the appellant by the civilians had any bearing to the offence of armed robbery committed earlier in that house.

We also think that the appellant is entitled to raise great concern why the people who actually arrested him and took him to Oyster Bay police station did not come forward to testify. Had they testified they would have

shown that the appellant was arrested because of his link to the armed robbery that took place in PW1's household and crush the appellant's suggestion that he was arrested because he was about to arrest a vehicle that was downloading cocaine. The four police officers, Detective Sergeant Nehemiah (PW8), Detective Corporal Morris (PW9), PW10 and Detective Corporal Beatus (PW11) were more concerned with recording of cautioned statements than with proper police investigation and actual collection of evidence. The following excerpts from the evidence of the police officers who testified exemplify a very disinterested and lackadaisical investigation which left many evidential gaps:

***PW8...** On 2/2/2012 about 18:00 hrs. I was on duty at my office I was called by RCO of Kinondoni SSP. Wambura he did give me a duty of writing/recording the statement who was as custody PC Yasin Ramadhani.... I did record his statement through cautioned statement. I did explain all his rights to him.... I do remember the statement (I pray to tender as exhibit)....*

...



***PW9**...I work at Police Oyster bay as CID, my duty is to detect, prevent to combat crime. On 2/2/2012 I was at Police Oyster bay Station, I was assigned this file to investigate with RCO SSP Wambura. We were four of us. I did interrogate PC Frank.... I did explain his allegation, armed robbery, then he made statement... I pray to tender as exhibit. ....*

...

There were many investigational lapses the police failed to pursue and fill-up which would have provided the missing link between the civilian arrest of the appellant inside PW6's house, and his alleged participation in the armed robbery inside PW1's household. Such was the lax state of police investigation that it was left to the complainant (PW1) to tender not only the exhibits which were left behind by the bandits ("P.1"-plaster, two iron-bars and two sisal ropes), but also the police uniform (exhibit P.3) which the appellant wore when he was arrested and taken to Oyster bay Police Station. The police did not offer evidence on the chain of custody of these exhibits from the day the offence was committed right up to their

exhibition as evidence, and specifically how the complainant managed to retain the police uniform!

Regarding the question whether the cautioned statements of the appellant's two co-accused sufficiently corroborated evidence of other witnesses, we will begin from the position of the law which this Court articulated in **EX. E.6937 D/C Haruna Pembe vs. R.**, Criminal Appeal No. 44 of 2006 (Unreported) to the effect that the conviction of an appellant cannot be allowed to stand where it relied on the incriminating statement of an accused who was acquitted unless that evidence is corroborated by independent evidence as stipulated under the provisions of the said section 33(2) of the Evidence Act, Cap 6 R.E. 2002.

We took time to read the cautioned statements of PC Frank Joseph and that of Abasi Saidi Sanze. Apart from narrating his familiarity with the appellant both as a fellow policeman and police brass band member, the statement of PC Frank Joseph merely recalled how the appellant disappeared from the police barracks after filling their respective Performance Reports only to learn of his arrest later. In short, the

cautioned statement of PC Frank Joseph has no direct relevance to the offence facing the appellant. In addition, it does not corroborate the evidence of any witness mentioned by the first appellate Judge.

Similarly, the cautioned statement of Abasi Saidi Sanze, a driver of what the bandits had designated as a gate-away car (Toyota Corolla Reg. No. T608 AXB) does not corroborate the evidence of any of the witnesses mentioned by the first appellate Judge. According to his statement, Abasi Saidi Sanze parked his car at Drive-In area and waited the other bandits to complete their mission. Even when the bandits allegedly arrived at rendezvous driving a HIACE minivan, they lost one another when they drove past without noticing where Abasi Sanze had parked his saloon car. Apart from mentioning the minivan (HIACE), these two cautioned statements did not advance any incriminating aspect of the prosecution case against the appellant. The statements neither corroborated the armed robbery inside PW1's household nor the subsequent arrest of the appellant by irate civilians.

In light of the evidential gaps we have outlined, we give the appellant the benefit of doubt. Consequently, his appeal is allowed, conviction quashed and the sentence is set aside. The appellant is to be released forthwith from prison, unless there is another lawful cause for holding him.

**DATED at DAR ES SALAAM** this 29<sup>th</sup> day of February, 2016.

N.P. KIMARO  
**JUSTICE OF APPEAL**

I.H. JUMA  
**JUSTICE OF APPEAL**

R.E.S. MZIRAY  
**JUSTICE OF APPEAL**



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

A handwritten signature in black ink, appearing to read "J.R. Kahyoza", is written over a horizontal line.

J.R. KAHYOZA  
**REGISTRAR**  
**COURT OF APPEAL**