IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 399 OF 2015

(CORAM: MBAROUK, J.A., MWARIJA, J.A. And LILA, J.A.)

1. JOSEPH SHABANI MOHAMED BAY
2. MICHAEL ELIA KALINGA
3. DAMAS LULU MPONEJA
4. OMARI ATHUMANI DANGA
..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Munisi, J.)

dated the 6th day of July, 2015
in
Criminal Session Case No. 9 of 2010

JUDGMENT OF THE COURT

17th February & 10th March, 2017

LILA, J.A.:

The four appellants, namely Joseph Shabani Mohamed Bay, Michael Elia Kalinga, Damas Lulu Mponeja and Omari Athumani Danga (henceforth 1st, 2nd, 3rd and 4th appellants) were sentenced to suffer death by hanging consequent upon their conviction for murder by the High Court (Munisi, J). Dissatisfied, they have preferred this appeal.

Briefly, the prosecution case against the appellants was as follows. Rose Mnzava (PW1) and Gabriel Philip Mnzava (PW4) are wife and husband living in their own house situate at Kipunguni Ukonga area. On 19/2/2007 at around 20.00 hrs., the two were watching television at the sitting room. Then Joy Mnzava (PW3), their daughter, was in her room. Mackdonald Wahenga, the deceased who was their house boy was at the gate. According to PW1 and PW4 suddenly a person entered and told them that *"tumefika, tumefika na mpo chini ya ulinzi"* and then three other people entered. PW1 and PW4 were ordered to lie down. The thugs demanded to be given money but they managed to go away with PW1's handbag containing travel documents, ID passport, cash USD 800 , two novels, two hand phones one make Motorola and another Nokia and a gold chain. The thugs then proceeded to the bedroom. PW3 said while in her room she heard voices at the verandah and after a while two people, one short and another one tall, entered into her room. She came face to face with the two persons for a while. She further said one person had a bush knife and the other had a gun. The one who was short slapped, dragged her down and held her by her shorts and then forced her to take them to her parent's bedroom. They then proceeded to the sitting room whereat, upon

arrival, her father shouted *"wezi wezi".* The bandits ran away following the shouting and while being chased by PW3 and the deceased who was holding a hoe, a gunshot was heard. It was later discovered that the deceased had died. PW3 further said on 24/7/2008 she attended an identification parade where she managed to identify the 3rd appellant. PW1 and PW4 said that because of the shock and the incident taking a very short time, they could not identify any of those persons who invaded their house.

Insp. Charles Kinyungu (PW2), a policeman then working at Stakishari police station conducted the identification parade on 24/7/2008 whereat, among other people lined up, were Damas (3rd appellant) and Omari (4th appellant) but PW3 managed to identify only the 3rd Appellant. His attempt to have the register received as exhibit failed because it was not signed. The register was admitted for identification only. D.8377 D/Cpl. Frank (PW5) told the Court that he investigated the case and on 29/12/2007 he got information that robbers to Mongola Ndege incident have been arrested and when he went there he found out that the 1st appellant was among those arrested having a gun who upon interrogation admitted committing robbery at Kipunguni and he named others he was

with to be the three appellants. He further said that, he recorded the statements of the 3rd and 4th appellants. He tendered the statement of the 4th appellant (exh. P2) which he recorded from 17.38 hrs to 18.45 hrs. He also said a day after the identification parade (25/7/2008) he recorded the statement of the 3rd appellant after he was arrested at Kinondoni and taken to Sitakishari at around 17.00 hrs to 18.00 hrs. He said that, in his statement he mentioned the other appellants to have been involved in the Kipunguni incident. He tendered the statement of the 3rd appellant (exh.P3). PW5 further said that, on 30/12/2007, one Amina Shaban took breakfast to the 1st appellant who she said to be her husband. He said that, Amina Shaban had a phone make motorolla which the 1st appellant had earlier on told him that he had left it with his wife. The phone was identified by PW1 as being among the things taken by the bandits. PW5 insisted that the 1st and 2nd appellants were arrested on 29/12/2007, 3rd appellant on 16/7/2008 at around 2.00 pm and his statement was recorded the next day. When he was cross examined by Mr. Msemwa, PW5 said that the 4th appellant said his handwriting was difficult hence he (4th appellant) could not read, so he was asked to read for him and he did so but he did not indicate in the statement that the 4th appellant could not

read. He further said the statement that he recorded has no questions and answers. He insisted that the 3rd appellant was arrested on 16/7/2008 and his statement was recorded the next day about 18.00 hrs later. The 4th appellant was arrested on 16/7/2008 and he recorded his statement the same day. He further said the late recording of statement was attributed to the commitments which he had which included recording of the statement of the appellants in relation to Mongo la Ndege incident. ASP Adset Vitus Marekani, then a detective, gave evidence as PW6. He said that, on 30/12/2007 he was assigned the duty to record the statement of the 2nd appellant (exh. P4). He said that, he interrogated him and the 2nd appellant admitted committing the robbery at Kipunguni with five other persons including the appellants. He said he did not arrest the 2nd appellant but he could remember that the 2nd appellant was arrested on 29/12/2007 and he recorded his statement between 9.10 and 11 a.m. Insp. Leonard Sosoma (Rtd) gave evidence as PW7 and he said that he recorded the statement of Amina on 30/7/2007 at about 1.00 p.m. Amina had taken breakfast to 1st appellant who she said was her husband. He said that Amina informed him that the phone (exh. P5) he had was taken to her by 1st appellant on 20/7/2007 at 6.00 a.m. he tendered the

statement of Amina under section 34B of the Evidence Act, Cap. 6 R.E. 2002 because efforts to secure Amina so as to appear and testify proved futile. PW5 was recalled and he said that, he collected the postmortem examination report from the Doctor who conducted the postmortem examination of the deceased. He, being an investigator, tendered it and was received by the Court and marked as exhibit P7 and that showed that the cause of death was a gun short leading to brain injury.

In defence, all the four appellants denied involvement in the murder. The 1st appellant (DW1) denied knowing other appellant as well as being the husband of Amina. He said he was arrested on 27/12/2007 while alone. The 2nd appellant (DW2) said that he was arrested on 27/12/2007 at 4.00 p.m. while selling oranges at the roadside. Then at around 20.00hrs taken to Chang'ombe police station and later to Sitakishari police station where he stayed for three (3) days and then taken to Buguruni police station and later back to Sitakishari where his statement was taken. He denied writing his statement (exh. P4). He said, he first met the other appellants at Ilala Court as he did not know them prior to. The third appellant (DW3), a JWTZ employee, told the trial court that he was arrested on 16/7/2008 at 7.00 a.m. at Kinondoni Mkwajuni while enroute

to Uganda for sports. He denied committing the offence as well as knowing other appellants who he first met them at the court on 4/8/2008. He also denied being called *"Full Saba"*. He said exhibit P3 was written by a policeman. Despite being said to have been identified by PW3, he still denied involvement in murder incident. He said his statement was recorded the following day after arrest and he was not given the statement to read before signing.

The 4th appellant (DW4) denied involvement and said he was arrested on 7/7/2008 at Kariakoo at 8.00 a.m. while packing his luggage which he was taking to Tanga as he was a *"sufuria"* businessman and was taken to Msimbazi police station. He further said that he was taken to Sitakishari police station on 9/7/2008 and on 16/8/2008 his house was searched and nothing was recovered. He said that his statement was taken on 21/7/2008. He said he was forced to write the statement and he did not admit to have participated in the murder incident. He said, he first met the other appellants in court on 4/8/2008 when they were charged in Criminal Case No. 359 of 2008.

The trial court was satisfied that the prosecution proved the charge beyond doubts. It accordingly convicted all the four appellants and sentenced each of them to suffer death by hanging. Dissatisfied, the appellants filed a joint memorandum of appeal consisting of fifteen (15) grounds of appeal. The grounds are divided thus; grounds 2, 10, 11, 12, 13, 14 and 15 are for all the four appellants, grounds 3, 4, 8 and 9 are for the 1st appellant, ground 5 is specifically for the 2nd appellant, ground 6 for 3rd appellant and ground 7 is for the 4th appellant.

The grounds of appeal, detailed as they are, read as follows:

1. *That, your lordships, the learned trial Judge erred in law and fact by convicting the 2nd, 3rd and 4th appellants relied on the retracted and repudiated caution statements exh. P2, P3 and P4 by the reason that, they were tendered without objection by all defence counsels while knowing that, exh. P2, P3 and P4 were recorded after expirely of the basic four hours at page 203 line 12-27 contrary to the procedure of law while the appellants stated to have been beaten at page 198 line 16-17.*
2. *That, your lordships, the learned trial judge erred in law and fact by convicting the appellants relied on*

exh. P2, P3 and P4 while she failed to ascertain the credibility of those exhibits during the trial as she totally failed to ask the accused persons/appellants whether they objected the tendering of those cautioned statements exh. P2, P3 and P4 or not while the trial Judge came to value exh. P2, P3 and P4 when she assessed the evidence on her judgment contrary to the procedure of law.

3. *That, your lordships, the learned trial Judge erred in law and fact by convicting the 1st appellant relied on exh. P5 the Mobile Phone which was alleged by PW5 to have arrested with the wife of 1st appellant at page 49 line 11-20 while erroneously failure to tender a certificate of seizure to prove the doctrine of recent possession contrary to the procedure of law.*
4. *That, your lordships, the learned trial Judge erred in law and fact by convicting the 1st appellant relied on exh. P5 and unprocedural testimony of PW1 and PW5 as PW1 failure to tender a purchasing receipt to prove the ownership of the alleged phone exh. P5 while PW5 and PW7 failure to tender an emergency search order and a receipt of seizure to prove that exh. P5 was found with Amina Hassan contrary to the procedure of law, at page 82 line 13, page 49 para two to page 51 para one and page 89-90.*

5. *That, your lordships, the learned trial Judge erred in law and fact by convicting the 2nd appellant relied on the retracted and repudiated caution statement exh. P4 which was unprocedural recorded by PW6 after the lapse of the prescribed period by law as the 2nd appellant was arrested on 29/12/2007 and smuggled into different/several police stations while exh. P4 was recorded on 30/12/2007 at page 195 line 1-5 and page 102 line 12-22 to page 103 line 1-12 contrary to the procedure of law.*
6. *That, your lordships, the learned trial Judge erred in law and fact by convicting the 3rd appellant relied on the retracted and repudiated caution statement exh. P3 which was unprocedural recorded by PW5 after the lapse of the prescribed period by law as the 3rd appellant was arrested on 16/7/2008 while exh. P3 was recorded by PW5 on 17/7/2008 vide page 52 line 10-13, page 53 line 14-16, page 174 line 1-5 an page 192 line 1-10 contrary to the procedure of law.*
7. *That, your lordships, the learned trial Judge erred in law and fact by convicting the 4th appellant relied on the retracted and repudiated caution statement exh. P2 which was unprocedural recorded by PW5 after the lapse of the prescribed period by law as the appellant was arrested on 7/7/2008 at page 109 line*

14-16 while exh. P2 was recorded by PW5 on 16/7/2008 at page 145 line 11 contrary to the procedure of law.

8. *That, your lordships, the learned trial Judge erred in law and fact by convicting the 1st appellant relied on exh. P6 the statement of one Amina Hassani at page 177 line 1-19 which was unprocedural tendered by PW7 u/s 34 B (2) at page 87 line 8-11 to page 88 line 2-5 while the conditions set forth under the provision of S.34 B (2) in paragraph (a)-(f) were not met contrary to the procedure of law.*
9. *That, your lordships, the learned trial Judge erred in law and fact by convicting the 1st appellant relied on the unprocedural and discredited testimonies of PW1, PW3 and PW4 which stated to be coupled with exh.P5 (Mobile phone) and exh. P6 (statement of Amina Hassani) at page 199 line 23-26 while the prosecution side failure to tender any purported document including an emergency search order and certificate of seizure to prove that exh. P5 was found with Amina Hassani while PW1 failure to tender a purchasing recept to establish an ownership of exh. P5 contrary to the procedure of law.*
10. *That, your lordships, the learned trial Judge erred in law and fact by convicting, the appellants*

while the prosecution side failure to prove its charge beyond reasonable doubt as it failed to tender those alleged offensive weapons i.e. fire arms as it was stated by PW5 at page 43 line 7-8 and page 54 last two lines to prove fracas, however the trial court erred in law by admitting in evidence exh. P2 and P3 which were both recorded by PW5 at page 46-48 contrary to the procedure of law.

11. *That, your lordships, the learned trial Judge erred in law and fact by convicting the appellants relied on exh. P7 (Post-mortem examination report which was unprocedural tendered by the Police Officer/PW5 D/Sgt Frank (recalled) at page 94 line 1-10 to page 95 line 1-4 contrary to the procedure of law which required Medical Statements to be testified by Medical Doctors.*

12. *That, your lordships, the learned trial Judge erred in law and fact by convicting the appellants while erroneously differed with the assessors opinions at page 204 line 1-13 which succinctly raises sufficient reasonable hypothesis irresistibly casting doubt about guilty of the appellants.*

13. *That, your lordships, the learned trial Judge erred in law and fact by convicting the appellants relied on the exh. P2, P3, P4, P5 and P6 while the*

Prosecution Case was weak as both PW1 and PW4 stated not to have identified the appellants at the locus in quo at page 21 line 13-17 page 22 line 20-22 and page 39 line 6, 10, 11, 15-16, 18-19 while the unprocedural visual identification of PW3 against the 3rd appellant was well stated and rejected by the trial Judge at page 184 line 2-26, page 185 page 186 line 1-17.

14. *That, your lordships, the learned trial Judge erred in law and fact by convicting the appellants while disregarding the appellant's sworn defence testimonies which raises sufficient reasonable hypothesis casting doubt about guilty of the appellants.*

15. *That, your lordships, the learned trial Judge erred in law and fact by convicting the appellants while failure to conduct the preliminary hearing and to list down the Memorandum of disputed facts and undisputed facts, list of witnesses and the list of exhibits at page 14-16 contrary to the procedure of law.*

At the hearing of the appeal, Mr. Jerome Msemwa, learned advocate appeared representing the 3rd and 4th appellants and Mr. Aloyce Sekule, learned Advocate, appeared representing the 1st and 2nd appellants. Ms.

Neema Haule, learned Senior State Attorney assisted by Mr. Yusufu Aboud, learned State Attorney, appeared representing the Respondent/Republic.

Mr. Msemwa, opted to argue grounds 1, 6 and 7 jointly which he said they relate to admission of cautioned statements by the appellants which were irregularly taken. He contended that exhibit P2 which is the cautioned statement by 4th appellant, exhibit P3 which is cautioned statement by 3rd appellant, exhibit P4 which is a cautioned statement by 2nd appellant were improperly taken. He argued that section 50 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the Act) requires cautioned statements be taken within four (4) hours from the time the accused is arrested. He also said that, under section 50 (1) (b) of the Act, time can be extended to eight (8) hours but it must be indicated that the taking of statement was so extended and the accused must be informed. He also said that, if the time extends to over eight (8) hours, a permission of a magistrate must be sought. He went on to argue that, the 4th appellant was arrested on 16/7/2008 at 09.00 a.m. at Kariakoo but his cautioned statement (exh.P2) was taken on 16/7/2008 at 05.38 p.m. hence it was taken more than four (4) hours after his arrest. He said the 3rd appellant was arrested on 16/7/2008 at Mkwajuni Kinondoni, but the time is not

indicated but his cautioned statement (exh.P3) was taken on 17/7/2008 at 16.45 hrs, hence, it was taken outside the four (4) hours. As for the 2nd appellant, he said, the 2nd appellant was arrested on 29/12/2007 at night but his cautioned statement was taken on 30/12/2007 from 9.10 a.m. to 11.00 a.m., hence taken outside the four hours. Relying on section 50 and 51 of the Act, he accordingly argued that as exhibits P2, P3 and P4 were not properly taken then they should be expunged from the records. In support of his arguments he cited the case of **Abuhi Omari Abdallah and 3 Others vs. The Republic,** Criminal Appeal No. 28 of 2010 (unreported) pages 8 to 9. He further contended that, as the cautioned statements formed the basis of the appellant's conviction, then after being expunged, the prosecution case collapses. He added that, since the evidence of identification of the Appellants did not form basis for their convictions due to the identification register not being admitted as exhibit then there will be no other evidence incriminating the appellants. He urged the Court to allow the appeal, quash the appellants' convictions, set aside the sentences and order their immediate release from prison.

In the alternative, Mr. Msemwa argued on ground 2, 11, 12, 13, 14, and 15 of appeal.

Arguing on the ground 2 of appeal, Mr. Msemwa said that, exhibits P2, P3 and P4 were not credible notwithstanding there being admitted without objection. He pointed out that the court had a duty to see if such exhibits were credible when analyzing the evidence. It was his view that the trial judge did not do so. He said for a cautioned statement to be a confession it should contain the accused's admission of all the elements of the offence he is charged with. In support of his assertion, he referred the Court to the Court's decision in **Abuhi Omari Abdallah's case** (supra) at page 3. He attacked the cautioned statements admitted as exhibits P2, P3 and P4 for not showing that the appellants were afforded a right to have their respective advocates/lawyers, relatives or friends be present at the time their statements were taken, instead, the statements have printed words which he said was not sufficient. He further said that, the cautioned statements do not show who was killed and the relevant law of the offence facing the appellants. He said the appellants' choices on who should be present at the taking of their statements ought to have been shown on the respective statements. He pointed out that the statements were taken in contravention of sections 53 to 57 of the Act. He contended that as the requirements are mandatory, the contravention amounted to serious

irregularities which occasioned injustice hence not curable under section 388 of the Act.

Mr. Msemwa, further attacked the cautioned statements (exh. P2, P3 and P4) for not having been taken in the form of question and answer. In another angle, Mr. Msemwa said the appellants did not say that they did not know how to read and write so they ought to have had written agreeing with the statements. He said that, that was lacking in exhibits P2, P3 and P4.

Mr. Msemwa concluded by saying that the effect of all the above irregularities is that they occasioned injustice to the appellants hence the cautioned statements should be expunged from the record.

Arguing on ground 11 of appeal, Mr. Msemwa pointed out that the Report on postmortem examination was tendered by PW5, a policeman, after he was recalled. He contended that section 291 (1) of the Act requires notice of intention to produce the report on postmortem examination (the report) be given to the appellants. He said, in the present case, no notice was given. He further argued that, under section 291 (3) of the Act, it is the medical officer who was a competent person to

tender the Report and if the maker was not available then another medical officer could tender it as he could properly respond to questions on the Report he being conversant with medical issues. He, therefore, urged the Report be expunged from the record.

Ground 12 of appeal is about assessors' opinion being disregarded by the presiding judge without giving reasons. Arguing on this ground, Mr. Msemwa vigorously attacked the trial judge for differing with the assessors' opinion who found all appellants not guilty without assigning reasons. He said principles of natural justice require reasons be given for any judicial decision taken. He also said that though the assessors consulted each other and gave a joint opinion, which is contrary to section 298 (1) of the Act which require each assessor to give his own opinion, that was not fatal.

Arguing on ground 13 of appeal, Mr. Msemwa further pointed out that conditions on how identification was made coupled with the fact that the extent of light was not disclosed, some bandits had masks and the identification register not being admitted as exhibit made visual identification of the 3rd appellant by PW3 not reliable. He commended the trial judge for not making it a basis for conviction.

Ground 14 of appeal is in respect of the evidence on the phone. Mr. Msemwa attacked such evidence by saying that the phone was not found in possession of the 1st appellant and that Amina, from whom the phone (exh.P6) was retrieved, was not called as a witness. He further said the 1st appellant denied being the husband of Amina. He accordingly said the doctrine of recent possession could not therefore apply.

On failure by the trial judge to conduct a preliminary hearing under section 192 of the Act, Mr. Msemwa contended that it was not proper for the court not to hold it.

In conclusion Mr. Msemwa, urged the Court to allow the appeal, quash the convictions and set aside the sentences imposed by the trial court and acquit all the appellants.

Mr. Sekule, who appeared for the 1st and 2nd appellants, after noting that the arguments by Mr. Msemwa covered all the grounds of appeal and the arguments covered all the appellants, simply supported the arguments by Mr. Msemwa and urged the appeal be allowed.

Ms Neema, supporting the appeal, argued that the 2nd, 3rd and 4th appellants were convicted on the basis of their respective cautioned

statements while the 1st appellant was convicted after being mentioned in the cautioned statements and the phone (exh. P5) which was retrieved from one Amina. She pointed out that the arrest of the 2nd, 3rd and 4th appellants followed their names being mentioned by the 1st appellant upon his arrest. She said, it was surprising that the 1st appellant's statement was not taken. She also conceded that the cautioned statements of the 2nd 3rd and 4th appellants were taken in contravention of sections 50 (1) and 51 of the Act. She thus said, such cautioned statements should be expunged from the record of proceedings. In the absence of the cautioned statements, she argued, there is no other evidence incriminating the 2nd, 3rd and 4th appellants.

Regarding the 1st appellant, Ms. Neema, argued that he was convicted first, on the basis of the cautioned statements which now should be expunged. She accordingly said that, the only remaining evidence is that of a phone (exh. P5) which she, however, said was insufficient to find conviction because the phone was not found in the 1st appellant's possession and Amina, who had the phone did not testify to prove that the phone belonged to the 1st appellant and that she was really the 1st

appellant's wife. In the circumstances, Ms. Neema urged the Court to allow the appellants appeal.

The background information set out above establishes that the conviction of the appellants was mainly grounded on the confessional statements by the 2nd, 3rd and 4th appellants (exh. P2, P3 and P4) which purportedly incriminated all of them and the phone (exh. P5) found in possession of one Amina.

Regarding the confessional statements, Mr. Msemwa forcefully argued against the trial judge's finding that the confessional statements linked all the appellants with the commission of the offence. The attack was fronted through six different angles. **First,** the cautioned statements were taken outside the four hours period stipulated under section 50 (1) (a) of the Act and that if there was any extension to eight (8) hours, the appellants were not notified over such extension and if they were taken beyond the eight hours then the magistrate ought to have given permission. **Second,** the cautioned statements did not disclose the offence the appellants were charged with. **Third,** the appellants were not afforded opportunity to have either their relatives, friends or lawyers be

present at the time their statements were taken. **Forth,** the cautioned statements did not qualify to be confessions, **fifth**, the statements were not in the form of question and answer and, **sixth,** there is no indication that the appellants indicated that they did not know how to read and write.

Following the contentions by Mr. Msemwa, the issue of law which arises for consideration in respect of the cautioned statements is whether the taking of the cautioned statements complied with the legal requirements.

In resolving this issue, we shall consider the time taken before the 2nd, 3rd and 4th appellants' statements were taken.

The periods available for interviewing persons who are under restraint is governed by section 50 (1) of the Act as was rightly argued by Mr. Msemwa. That section provides:-

> *"50 (1) For the purpose of this Act, the period available for interviewing a person who is under 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 the offence. (b) If the basic period available for interviewing the person is extended under section 51, the basic period as so extended." (Emphasis is ours).*

As it can be seen, section 50 (1) (b) of the Act allows the period of interviewing a person be extended in case the interview is not completed within four (4) hours stipulated under section 50 (1) (a) of the Act. Section 51 (1) provides:-

> *"51 (1) where a person is in custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating an 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 concerns accordingly;*** *or*

> *(b) either before the expiration of the original period,* ***make application to a magistrate for a further extension of that period.*** *" (Emphasis is ours)*

In **Joseph Mkumbwa and another vs. The Republic,** Criminal Appeal No. 94 of 2007 (unreported) the Court interpreted what is meant by being *"under restraint"* and when the basic period commences and stated that:-

> *"In our view a person is deemed to be taken under restraint when he is arrested in respect of an offence, and that is when the basic period commences."*

It is apparent that the time allowed for interviewing a person is ordinarily within four hours from the time of arrest and in case an extension is required, for the following eight hours, the Officer Incharge conducting the interview must inform the accused and where more than the eight hours is required, a permission by a magistrate is required. It is worth mentioning here that, in the present appeal there is no evidence at all, be it direct or indirect, suggesting that any of the 2nd, 3rd or 4th appellants was informed that time for his interview was extended by the

Police Officer Incharge or any application was made and granted by a magistrate for a further extension beyond the eight hours. For this reasons the only valid time the interview could be carried out was the four hours as stipulated under section 50(1) (a) of the Act.

Basing on the above position of the law, we now proceed to consider whether the interview of the 2nd, 3rd and 4th appellants which led to their respective statements being taken was conducted within the prescribed four hour time provided under section 50(1) of the Act.

The record of appeal is very clear that the cautioned statement (exhibit P2) is attributed to 4th appellant, cautioned statement (exh P3) is attributed to 3rd appellant and cautioned statement (exhibit P4) is attributed to 2nd appellant.

The record of appeal, as rightly argued by Mr. Msemwa, clearly shows that the 2nd appellant was arrested on 29/7/2007 at night and his statement (exh. P4) was taken on 30/12/2007 at between 9:10 and 11.00 a.m. Exhibit P4 is very clear on this. It is however not indicated at what particular time the 2nd appellant was arrested. This is very unfortunate to the prosecution. The police officer who arrested the 2nd appellant did not

testify. It is, therefore, difficult for the Court to determine whether the 2nd appellant's statement was taken within the prescribed time. It is a cardinal principle in Criminal justice that all doubts are resolved at the appellant's favour (see. **Aloyce Mgovano vs. The Republic,** Criminal Appeal No. 182 of 2011 (unreported).

In the circumstances, the doubts regarding the time the 2nd appellant was arrested is resolved in favour of the 2nd appellant. We accordingly find that since there is no evidence showing that the statement was taken within the required time, the same is not valid.

In respect of the 3rd appellant, the record shows that, he was arrested at Mkwajuni Kionondoni on 16/7/2008 and his statement (exh P3) was taken on 17/7/2008 at 11.45 hrs. According to PW4, the 3rd appellant was arrested at around 1.00 pm on 16/7/2008. Definitely, by his statement being taken on 17/7/2008 at 11.45, it was taken over 22 hours after his arrest.

As for 4th appellant, the record of appeal vividly shows that he was arrested at Kariakoo on 16/7/2008 at around 9.00 am and his statement

(exhibit P2) was recorded on 16/7/2002 at 17.38 hrs. It is open that the statement of the 4th appellant was taken after over eight (8) hours.

Even PW5, a Police Officer who investigated the case and who recorded the statements by the 4th appellant (exhibit P2) and 3rd appellant (exhibit P3), was aware that such statements were recorded outside the prescribed time as it is revealed by the record of appeal at page 54 where, upon being re-examined by Mr. Mrisha, learned State Attorney, he replied thus;

> *"The late recording of statement is attributed to the commitments which I had which included recording of the statements of the same suspects in relation to the Mongo la Ndege incident."*

When considering the issue of delayed recording of the statements by 2nd, 3rd and 4th appellants, the trial judge observed that;

> *"with regard to the times used by the detectives in recording exhibits P2, P3 and P4, as already intimated, strict observance of section 50 and 51 of the Criminal Procedure Act might slightly vary depending on the nature and complexity of each case. For that reason the complexity involved in the effecting arrests particularly those of the 3rd and*

4th accused persons are sufficient to explain the reasonable delay that resulted in recording their statements. Sufficient to state that the delay shown could be looked at and explained within the particularity of this case which constitutes an exception to the general rule. At any rate the delay involved being quite little is in my view explainable and it is within the spirit of the Criminal Procedure Act of ensuring that just procedures in handling suspects are observed while at the same time ensuring that criminality is combated, this is a delicate challenge that the law enforcement and courts have to face while dispensing justice."

With respect to the trial judge, complication in effecting arrest of the 3rd and 4th appellants as a cause of delay in recording their respective statements is not borne out by the record. As indicated above, all that PW5 said is that the delay was caused by other commitments he had that day which involved taking statements of the two appellants in respect of another incident. Further, the provisions of section 50(1) (b) of the Act permits extension of time to interview and record suspects statements. If at all PW5 had, at that time, other commitments such that he could not have had taken the statements of the 3rd and 4th appellants within the

prescribed period of four hours he could have extended the time by abiding to the requirements of section 51(a) and (b) of the Act. The option availed under this section is, no doubt, intended to cater for situations that may cause delay in taking accused statements. Unfortunately, PW5 did not utilize the opportunity availed by the law and we see no reason why the provisions of the law should be circumvented. After all, there is no evidence, on record, that he was the only police officer who could take the two appellants' statement and even if that was the case, the law gives no other leeway other than extending the time according to laid down procedures.

In the present appeal, as we have demonstrated, the statements by the 2nd, 3rd and 4th appellants were taken outside the prescribed period. The issue that immediately arise is what are the consequences of non-compliance with the provisions of sections 50 and 51 of the Act.

Mr. Msemwa referred us to the Court's decision in **Abuhi Omari Abdallah case** (supra) but, unfortunately in it, the Court did not consider the effect of non-compliance with section 50 of the Act. The above, notwithstanding, the Court have, in many occasions been confronted with a similar situation. In **Lumuda Mahushi v The Republic**, Criminal

Appeal No. 239 of 2011 and **Joseph Mkumbwa and Another v The Republic**, Criminal Appeal No. 9 of 2007 (both unreported) the Court, upon finding that the statements were taken outside the prescribe time, proceeded to expunge the statements from the record. In another case of **Pambano Mfilinge Vs The Republic**, Criminal Appeal No. 283 of 2009 (unreported), the Court after quoting extensively sections 50 and 51 of the Act, stated:-

> *"Upon numerous occasions, this Court has been confronted with situation similar to the one at hand. (see the unreported decision of the Court in Criminal Appeal No. 278 of 2008 – **Emilia Aidan Fungo@ Alex and another v. R**, Criminal Appeal No. 51 of 2010 – **Mussa Mustafa Kusa v R**, Criminal Appeal No. 126 of 2011 – **Hamisi Juma @ Nyambanga and another V R**, Criminal Appeal No. 261 of 2011 – **Majuli Longo and another v R**,). In all these decisions the Court held that non-compliance vitiated the particular cautioned statement. To this end, **we are left with no other option than to expunge the cautioned statement from the record.**" (Emphasis is ours).*

The 2nd, 3rd and 4th appellants statements', as demonstrated above, were taken in contravention of the provisions of section 50 of the Act. The learned Senior State Attorney conceded on this. The cautioned statements are hereby accordingly expunged from the record.

In the absence of the cautioned statement which allegedly linked all the appellants and which was the basis for the 2nd, 3rd and 4th appellants convictions, there remains no other evidence incriminating the three appellants. The learned Senior State Attorney also conceded to this. Their convictions should, therefore, be quashed.

It was a common ground at the trial, as it was during the hearing, that the 1st appellant's conviction was founded on being incriminated by the 2nd, 3rd and 4th appellants in their respective cautioned statements and the phone make Motorolla (exh. P5) found in possession of one Amina. As of the cautioned statements have been expunged, the only remaining evidence incriminating the 1st appellant is the phone (exh P5). The evidence on the phone was subject of appeal in ground 14 of the appeal.

On the evidence regarding the 1st appellant's possession of the phone (exh. P5), Mr. Msemwa, argued that it was not established that

Amina was really the 1st appellant's wife and that the phone was not found in the 1st appellant's possession, hence the doctrine of recent possession cannot be applied to convict him. It was his argument that, Amina ought to have given evidence so as to clear the cloud. The learned Senior State Attorney readily conceded to Mr. Msemwa's contentions.

We entirely agree with Mr. Msemwa and the learned Senior State Attorney that, the evidence regarding how Amina was found in possession of the phone (exh. P5) stolen from PW1's house in the fatefully date, fell far short from incriminating the 1st appellant with the offence. The offence the appellants were facing was a grave one the proof of which needed cogent evidence. Amina was a crucial witness in the case. She did not give evidence. PW7 one Insp. Leonard Sosama (Rtd) tendered Amina's statement (exh. P6) under section 34B of the Evidence Act. Masue, learned State Attorney, at page 87 of the record, informed the Court thus:-

> ***"Masue:***
> *Madam Judge, we pray to tender this statement under S. 34B of the Evidence Act, Cap 6 because efforts to secure Amina to come and give evidence have proved futile. The statements the requirements set by the provisions (sic).*

When admitting the phone as exhibit the trial judge noted;

> "***Court:***
>
> *The statement of Amina Hassan recorded on 30/12/2007 is admitted as exhibit P6 under S.34B of the Evidence Act, and it is read out aloud in terms with section 34B(4) of the Act."*

The provisions of section 34B has six sub-sections. A written statement by any person who can not be called to testify is admissible in terms of section 34B (2) of the Evidence Act. Six conditions for admissibility of such a statement are stated therein in paragraphs (a) to (f). Briefly, the conditions are:-

a) The maker of the statement can not be procured without delay,
b) The statement is signed by the maker.
c) The statement contains a declaration that the same is true and is liable to be prosecuted if found untrue,
d) A copy of it is served to each of the parties to the proceedings before the hearing,
e) If none of the parties, within ten days from the service with the copy of the statement, serves a

notice on the party proposing or objecting to the statement being tendered in evidence, and

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

In the case of **Shilinde Bulaya vs. The Republic**, Criminal Appeal No. 185 of 2013, **Fadhili Heri @ Selemani vs. The Republic** Criminal Appeal No. 283 of 2011 and **Twaha Ali and 5 Others**, Criminal Appeal No. 78 of 2004 (all unreported) the Court insisted that all the above conditions laid down in all paragraphs, that is from (a) to (f) of sub-section (2) of section 34B of the Evidence Act are cumulative and must all be met for a witness statement to be admissible under section 34B (1) and (2) of the Evidence Act.

We have endeavoured to peruse the record to see if the court satisfied itself that the above stated conditions were met before the statement by Amina was tendered and received as an exhibit.

As indicated above, it is the learned State Attorney who told the Court that Amina could not be procured. Efforts made to trace the

whereabout of Amina were not disclosed to the Court so that it could be satisfied that section 34B (2) of the Evidence Act could be employed to tender Amina's statement (exh P6). A plausible evidence ought to have been led to establish that Amina could not be procured (see **Twaha Ali and 5 Others** (supra). Besides that, the record of appeal does not show that the statements meets all the requisite conditions stated above. Exhibit P6 was, therefore, improperly received and admitted as exhibit.

The issue that arises is what are the consequences of a statement which is tendered and received as exhibit in clear violation of section 34 B (2) of the Evidence Act. Confronted with the same situation, in **Shilinde Bulaya's case** (supra), **Fadhili Heri Selemani @ Selemani's case** (supra) and **Twaha Ali and 5 others** case (supra), the Court categorically stated that where all the conditions are not complied with the statement should be expunged or discounted.

On the strength of the above authorities, the statement by Amina (Exhibit P6) is hereby expunged from the record. It follows, therefore, that there remains no other evidence incriminating the 1st appellant.

After expunging exhibits P2, P3, P4 and P6, we are settled in our minds that there is no other congent evidence on record on which the appellants' convictions could be based as rightly argued by both counsel for the appellants and the learned Senior State Attorney.

The findings on the above grounds sufficiently disposes of the appeal. We see no reason to consider the remaining grounds of appeal.

For the above reasons, we allow the appeal, quash the convictions and set aside the sentences. The appellants are to be set free forthwith unless held in prison for any other lawful cause.

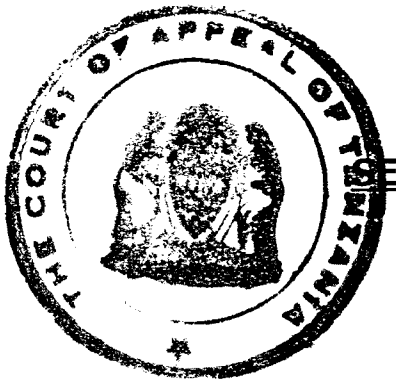
DATED at **DAR ES SALAAM** this 2nd day of March, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL