IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MJASIRI, J.A., MUGASHA, J.A., LILA, J.A.)

CRIMINAL APPEAL NO. 268 OF 2016

1. PASCHAL MAGANGA
2. EMMANUEL BULEMO @ KADABALAMO } .....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mruma, J.)

dated the 27th day of October, 2014
in
Criminal Session Case No. 126 of 2008

JUDGMENT OF THE COURT

6th & 15th February, 2018

MUGASHA, J.A.:

The appellants were convicted of the offence of murder in a judgment dated 27th October, 2014. The appellants have filed an appeal in this Court to impugn the said decision.

It was alleged that, on 9th March, 2008, at Mbongwe village, within Nzega District, Tabora region the appellants did murder one **NTIMA s/o NSESELA.**

The brief facts underlying the prosecution case are that, on the fateful day at night the bandits armed with a gun stormed into the house of **HONGOKA MASANJA @ MWANASAMAKA** (PW1) and stole

Tshs. 1,000,000/= and a bicycle, make HERO. The commotion was heard by **SELELA MASANJA @ SHIJA** (PW2), the deceased's father and the deceased. Each at his own pace rushed at the robbery incident but the deceased, while on the way was shot by the bandits. The deceased cried for help, his father PW2 rushed to assist him. He complained to have been shot by bandits while on the way to assist PW1. Shortly thereafter, the deceased died. The post-mortem examination report established the cause of death to be severe bleeding due to gunshot. The incident was reported to the Police and the appellants were arrested, interrogated, and arraigned as stated above.

The appellants denied the accusations. In order to establish its case, the prosecution lined up six witnesses, a report on post mortem examination (exhibit P1), a bicycle make Hero (exhibit P11), record of search by the police officer (exhibit P3), and cautioned statements of the appellants (exhibit P V1 collectively).

PW1 recounted that, on 8.3.2008 he had earned a sum of Tshs. 1,000,000/= after selling his six cows at the auction in **USHIRIKA** area. While at the auction he saw **MWANANSAO** a habitual criminal. After the auction PW1 went home riding a bicycle which he hired from

MASANJA MAZELU KASHINDYE (PW3). The brand of the bicycle was HERO with words "safari njema" written on the rear seat. While at his home around midnight, the bandits armed with a gun stormed into his house. He attempted to escape but was pursued by bandits, brought back to his home and forced to surrender Tshs. 1,000,000/= or else be killed. The bandits took the money and the bicycle which PW1 had hired from PW3.

The commotion between PW1 and the bandits was heard by the deceased and his father (PW2). PW2 recounted to have heard the bandits demanding money from PW1 and shot in the air threatening to kill whoever attempted to assist PW1. After the bandits disembarked, just nearby the robbery incident, the deceased was heard crying complaining to have been shot by the bandits while on the way to assist PW1 who was being chased by two bandits. According to PW2, the deceased who sustained injuries on the shoulder succumbed to death before reaching the hospital. Apart from PW1 suspecting **MWANASAMBO** who was at the auction to have been among the assailants, both PW1 and PW2 did not identify any of the bandits. PW1 reported the incident to the Village Executive Officer and the Police.

D.6369 DSSGT PIUS (PW5) the investigator, got wind that, the suspects were residing as tenants in the house of PW4. He made a follow up and arrested the appellants on 11.3.2008. Upon mounting a search in PW4's house, the appellants were found therein and the stolen bicycle was recovered in the 2nd appellant's room. PW5 further told the trial court that, as the appellants admitted to have been at the robbery incident, he interrogated them and recorded the cautioned statements whereby they confessed to have committed the offence. Following the recovery of the stolen bicycle, PW1 went to the police and identified it. PW3 confirmed to be the owner of the bicycle and tendered it in the trial court as exhibit P11. **AGNES SHIJA MAGANGA** (PW6) the 2nd appellant's girlfriend, apart from being among those who witnessed the search which led to the recovery of the bicycle in question, she testified before the trial court that the bicycle in question was brought at their rented room by the 2nd appellant.

The appellants denied to have committed the offence and at the trial, they denied to have made the cautioned statements claiming to have been tortured into making the statements. After a full trial they were convicted and given a death sentence.

Dissatisfied the appellants seek to challenge the decision of the trial Court. In a Memorandum of Appeal, the appellants have two grounds of complaint namely:

1. *That, the learned trial judge erred in law in relying on retracted confessions by the appellants to convict them with the offence of murder c/s 196 of the Penal Code Cap. 16 R.E 2002.*
2. *That, the learned trial judge erred in law and in fact in holding that there was ample circumstantial evidence linking the appellants with death of the deceased one NTIMA SESELA.*

At the hearing of the appeal the appellants were represented by Mr. Mugaya Mtaki, learned counsel. The respondent Republic was represented by Mr. Ildephonce Mukandara, learned State Attorney assisted by Mr. Tumaini Pius, learned State Attorney.

In addressing the first ground of appeal, Mr. Mtaki submitted that, the cautioned statements of the appellants were wrongly acted upon by the trial judge to convict the appellants. He pointed out that, while the fateful incident is alleged to have been committed on 9.3.2008, and the arrest of the appellants was on 12/3/2008, the cautioned statements were recorded beyond four (4) hours after the arrest which is contrary to Section 50(1) (a)

(b) of the CPA. He added that, none of the statements was verified by the appellants as required by Section 57(3) (ii) of the CPA. In this regard, the learned counsel urged us to expunge the cautioned statements from the record.

On probing by the Court, the learned counsel faulted the trial judge's interpretation which was to the effect that, the recording of the cautioned statement is not subject to the time limitation specified under section 50 (1) of the CPA as it is applicable only when the suspect is being interviewed orally.

In addressing the second ground of appeal, Mr. Mtaki submitted that, since none of the appellants was identified at the scene of crime, the link of the bicycle recovered in the 2nd appellant's room with the murder of the deceased is very remote which renders the charge not proved against the appellants. Besides, he added that, the evidence on recovery of the bicycle is weakened by the prosecution's failure to parade as a witness PW4, the landlord of the house which was searched and the bicycle recovered. Finally, the learned counsel urged the Court to discount the evidence of PW6, an additional witness whose evidence was not subjected to the committal proceedings.

On the other hand, the learned State Attorney supported the appeal. In his brief submission, he conceded to the irregular admission of the cautioned statements not recorded as per requirements of Section 50(1) (2) of the CPA. He pointed out that, while section 57 of the CPA regulates the manner of recording the cautioned statements, section 50 prescribes the time limit of recording such statement after the suspect is arrested. The learned State Attorney as well, urged us to expunge the cautioned statements of the appellants.

He further submitted on the impropriety of the learned trial Judge invoking the doctrine of recent possession to implicate the appellants with the charged offence. He pointed out that, since the recovered bicycle was in custody of the police, the manner it found its way back to PW3 who tendered it as an exhibit at the trial leaves a lot to be desired. He argued that such circumstances, adversely impacted on the chain of custody of the exhibit in question which riddles the prosecution with serious doubts.

To support his assertion, he referred us to the case of **PASCHAL MAGANGA AND ANOTHER VS REPUBLIC,** consolidated Criminal Appeals Nos. 24 and 25 of 2016 (unreported).

After a careful consideration of the submissions by counsel and the record of the trial, the crucial issue for our determination is whether the charge of murder was proved against the appellants beyond a shadow of doubt.

The trial court's judgment at pages 175 and 176 of the record reflects as follows:

> *"Nsesela Ntima (PW2) who participated in the chasing of the bandits said he was between four and six bandits he heard gunshot only to realise that it was his son who was shot. His story corroborates the second accused story that they were six bandits in the commission of the offence and that he saw a person being chased on maize farm and a gunshot. Another corroboration can be derived from the evidence of Hongoke Masanja (PW1) who gave the same version of what transpired when he was invaded by the bandits that night and Agnes d/o Shija in connection with the bicycle which was later recovered in the second accused's room."*
>
> *In summary, I find that the (Exhibit PIV) confession was corroborated by the evidence of Hongoke Masanja*

(PW1), Sesela Ntima (PW2) and Agnes d/o Shija (PW6)... PW1 gave even more incriminating evidence corroborating the accused's confessions... both accused stated in their confessions that it is Mwanasambo who led them to PW1's house".

The aforesaid findings of trial judge led him to the conclusion reflected at pages 176 to 177 of the record as follows:

"Thus, taking into consideration the facts that the second accused was found in possession of Hero bicycle (Exhbit P11) few days after it was stolen from PW1, as it is amply demonstrated by the evidence of PW4, PW5, PW6 and the search order (Exhibit P111), on the strength of the confession and the corroborating evidence that the accused were among the bandits who committed the robbery and shot at Ntima Sesela causing his death. I hereby find that the prosecution has been able to prove its case beyond reasonable doubt against the accused persons..."

In a nutshell, in convicting the appellants the trial Court basically relied on the confessional statements of the appellants and the evidence of PW1, PW5 and PW6 that, the bicycle stolen and later recovered by the police in the 2nd appellant's room directly linked the appellants with the killing of the deceased.

At the outset, we wish to begin with the propriety or otherwise of the evidence of **AGNES SHIJA MAGANGA** (PW6) whose account was relied upon by the trial judge to convict the appellants. This was wrong. We say so; having gathered from the committal proceedings that PW6 was not among the sixteen persons whose substantive evidence was read out and made known to the appellants at the committal stage. Before the accused is committed for trial at the High Court, section 246 (1) of the Criminal Procedure Act, requires the subordinate court, upon receipt of the copy of the information and the notice to summon the accused person. Thereafter, section 246 (2) of the CPA gives the following mandatory directions as follows:

> *(2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial".*

It is clear that, the cited provision imposes mandatory conditions in order to enable the accused person to be aware of the nature and the substance of the evidence intended to be lined up by the prosecution at the trial. Where the statement of a witness has not been read out

at the committal proceedings, section 289 (1) and (2) of the CPA gives the following directions:

> *(1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness".*
>
> *(2) The notice shall state the name and address of the witness and the substance of the evidence which he intends to give"*

Compliance with the cited provisions was emphasised in the case of **HAMIS MEURE VS REPUBLIC [1993] TLR 213** where the appellant was convicted of murder and sentenced to death on the basis of among others, the alleged confession made to the Justice of the peace. The statement was not read out at the committal stage and the Justice of the Peace was paraded as prosecution witness without the appellant or his advocate being given reasonable notice. The Court among other things held:

> *"(i) The learned Trial Judge erred in law in allowing evidence of the Justice of the Peace to be given at the trial when his statement had not been read at the*

committal proceedings and no notice had been given to the appellant or his advocate, and therefore, the extra-judicial statement was wrongly admitted;

(ii) Section 289(2) of the Criminal Procedure Act, 1985, makes it mandatory for not only the name and address of the witness to be supplied, but also the substance of the evidence which he intends to give;"

We fully subscribe to the cited decision. In the circumstances, since PW6 was neither listed nor her statement read out to the appellants at the committal proceedings, she was unqualified to testify as a prosecution witness at the trial under scrutiny. We say so, because the prosecution did not give notice to call an additional witness be it to the appellant or his advocate. Thus, PW6's evidence was wrongly received and acted upon to convict the appellant and as such, we are constrained to expunge her entire evidence.

Regarding to the propriety or otherwise of the cautioned statements, we are of the considered opinion that, those statement were taken in violation of section 50(1) (a) and (b) of the CPA. As pointed out by both learned counsel and reflected in the record of appeal, the appellants were arrested on 11/3/2008. However, the 1st appellant's statement was taken on 13/3/2008 while that of 2nd appellant was recorded on 12/3/2008. Besides, at page 59 of the

record, during cross examination, PW5 admitted to have recorded first appellant's statement after 24 hours.

It is now settled law that a cautioned statement recorded outside time prescribed under section 50 (1) (a) and (b), is not consistent with the view that the confession was made voluntary. In **JANTA JOSEPH KOMBA, AND 4 OTHERS VS REPUBLIC,** Criminal Appeal No 95 of 2006 (unreported), the Court underscored that, it is for sound reasons; the legislature did limit the time within which a suspect could be in police custody for investigative purposes. Thus, being in police custody beyond the prescribed period of time has a probability of resulting in torture, either mental or otherwise.

Given the circumstances in the matter under scrutiny, in the absence of any explanation for the delay to record the confessional statements and since no extension was sought and obtained as required by section 51(1) (b) of the CPA, the cautioned statements of the appellants were taken contrary to the mandatory requirements of the law.

Pertaining to the interpretation of the limitation or otherwise of recording the cautioned statement, at pages 165 to 167, the trial judge concluded that, the recording is not subject to the limitation of

four hours as prescribed under section 50(1) (a) and (b) of the CPA. The trial judge was of the view that the prescribed time limit regulates an oral interview of a suspect. With respect, and as rightly submitted by the learned counsel the trial judge's interpretation is not correct. We say so because under the law, the time begins to count after the suspect is arrested. In the case of **JOSEPH MKUMBWA & SAMSON MWAKAGENDA VS. REPUBLIC**, Criminal Appeal No.94 of 2007 (unreported), the Court was faced with a scenario whereby the cautioned statement of the appellant was recorded beyond legally prescribed time limit. Thus the Court said:

> *"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 settled law that failure to observe the time limit in recording a cautioned statement is a fatal irregularity.

We are in agreement with the learned State Attorney that, apart from the manner of recording the cautioned statement being regulated by sections 57 and 58 of the CPA, the time limit for its recording remains to be as prescribed under section 50 (1) (a) and (b)

of the CPA. We are also in agreement with appellant's counsel that, the cautioned statements of the appellants had a predicament of not being certified by them at the end of the record as per mandatory requirements of section 57(3) (a) (ii) of the CPA. Therefore, the cautioned statements of the appellants were recorded in violation of the law. As such, the trial judge wrongly acted on those statements to convict the appellants. We thus agree with the learned counsel and accordingly expunge the cautioned statements from the record.

In view of the stated shortfalls, we wish to point out that, in determining the admissibility or otherwise of the cautioned statement, the trial court must ensure strict compliance with the law.

Having expunged the evidence of PW6 and the confessional statements of the appellants we thus remain with the last issue as to whether or not the bicycle (Exhibit.P11) links the appellants with the killing incident. The said stolen bicycle is said to have been recovered by the Police in the 2nd appellant's room and as such it was in the custody of the police. Thus and as rightly pointed out by the learned State Attorney, it was irregular for the bicycle to be tendered in court by PW3. This sequence of events from recovery, storage at the police and exhibition at the trial rendered the chain of custody broken in the

handling of (Exhibit.P11) This cast a cloud of doubt on the prosecution case as to whether what was exhibited in Court is the same bicycle which was recovered in the 2nd appellant's room. On this accord, we wish to repeat what we said in **ZAINABU D/O NASSORO @ ZENA VS. REPUBLIC**, Criminal Appeal No. 348 of 2015 (unreported).

> *"... on the proposition that as custody of the evidence of exhibits move from one chain of custody to the next, the exhibits concerned must not only be properly handled, but each stage of custody through which the exhibits pass, must be documented till they are tendered in Court."*

The rationale behind is **One**, to ensure integrity of the chain of custody to eliminate the possibility of the exhibits being tampered (**SWAHIBU ALLY BAKARI VS. REPUBLIC**, Criminal Appeal No. 309 of 2010 (unreported) **MAGESA CHACHA NYAKIBALI VS. REPUBLIC** and **Two**, to establish that, the alleged evidence is in fact related to the alleged crime rather than for instance having been planted fraudulently to make someone guilty [See **PAULO MADUKA AND OTHERS VS. REPUBLIC**, Criminal Appeal No. 110 of 2007 (unreported)].

In the light of the cited authorities which we fully subscribe to, in the case at hand, it cannot be safely vouched if the bicycle stolen from PW1 near the crime scene where the murder was committed and later recovered in the 2nd appellant's room is what was exhibited at the trial. As such, we accordingly expunge exhibit P11.

Finally, we are fortified in our view that, since none of the appellants was identified at the scene of crime as correctly found by the trial judge, in the absence of any other evidence to link the appellants with the murder, the charge of murder was not proved against the appellants. We therefore allow the appeal and order the immediate release of the appellants.

DATED at **TABORA** this 12th day of February, 2018.

S. MJASIRI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL