IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., LILA, J.A And NDIKA, J.A.)

CRIMINAL APPEAL NO. 536 & 537 OF 2015

1. **JOSEPH MAGANGA MLEZI**
2. **DOTTO SALUM BUTWA ..... APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mwita, J.)

dated the 3rd day of July, 2006
in
Criminal Appeal Nos. 113 & 114 of 2006

JUDGMENT OF THE COURT

28th October & 4th November, 2019

MUGASHA, J.A.:

The appellants and four other persons who were acquitted were jointly and together charged with armed robbery contrary to sections 285 and 286 of the Penal Code Cap 16 RE: 2002. Upon conviction the appellants were sentenced to thirty (30) years imprisonment. Aggrieved, they unsuccessfully appealed to the High Court where their appeal was dismissed. Still undaunted they have appealed to the Court. In the two Memoranda of Appeal they fault their conviction on the basis of what can be summarized into the following five grounds of complaint:

1. The charge was defective for failure to mention a person who was threatened by the gun used at the robbery incident.
2. Absence of the ballistic expert report to establish if the guns make SMG NO. IC 22134 was used at the robbery incident.
3. Acting on the evidence which was not properly before the court such as the cautioned statement which was not read out to the appellants after it was cleared for admission.
4. Admission of Exhibits without giving the appellants an opportunity to comment on the admission.
5. Failure by the trial court to read out their respective recorded testimonies as required by section 210(1) (a) and (3) of the Criminal Procedure Act.
6. Irregular reliance on the weak defence evidence by the two courts below.

What led to the arraignment and conviction of the appellants is briefly as follows. The prosecution had five witnesses and relied upon

physical and documentary exhibits. It was the prosecution case that, on the fateful day Felix Hobe (PW1) was invaded by armed bandits at his residence where his shop was located. They demanded to be given TZS. 46,000/= which PW1 obliged and then forced to take them at his shop from which they stole an assortment of items. Before vanishing from the scene, the bandits locked PW1 inside the house and he resorted to raising alarm which was heeded to by other people including Marco Amando (PW2) and Simon Clement (PW3). Subsequently, a search was mounted facilitated by following tyre marks on the path from the bicycle used by the bandits to carry the stolen items. As the search team reached at a certain homestead at Kazaroho Village, they saw six people who immediately took to their heels. One of the bandits dropped a fire arm and the other one a magazine with twelve rounds of ammunition. According to E. 3060 PC David (PW4), the appellants herein were pursued and arrested and meanwhile the homestead in question was searched and stolen goods were found therein. All the appellants told the trial court to have been involved in the robbery incident. As earlier stated, following the dismissal of appeal before the High Court the appellants are challenging verdicts of the two courts below.

At the hearing the appellants, appeared in person, unrepresented whereas the respondent had the services of Mr. Tito Mwakalinga, learned State Attorney. Having adopted their memoranda of appeal, the appellants opted to initially hear the submission of the learned State Attorney reserving a right to reply, if need arises.

It was the submission of the learned State Attorney that, the trial was flawed by procedural irregularities and it was vitiated. On this he pointed out that, failure to mention in the charge sheet the person who was threatened on the fateful incident rendered the charge defective. Secondly, he submitted that, the appellants were wrongly convicted on the basis of the evidence which was not before the court because apart from the appellants not being given an opportunity to comment on the admission of the cautioned statement it was not read out to the appellants following its admission which was also irregular. He added that, a similar predicament befell a gun and 12 rounds of ammunition which were admitted as Exhibits P3 and P4 respectively without inviting the comments from the appellants. As such he urged the Court to expunge those Exhibits from the record. He added that, inasmuch as some of the stolen items alleged to have been found in possession of the appellants those items

were not properly identified by the complainant and as such, were wrongly acted upon to convict the appellants. Apparently, the learned State Attorney did not make any submission on the appellants' complaint regarding the non compliance with section 210 of the CPA.

It was the learned State Attorney's argument that, notwithstanding the procedural irregularities which flawed the trial, on record there is the appellants' admission of liability on the occurrence of the robbery which cements the prosecution account given by PW1, PW2 and PW3 who all recalled that, on the occurrence of the robbery and that the culprits were tracked and arrested at Kazaroho.

In reply, the appellants denied any involvement in the robbery incident and shifted the blame to the trial magistrate that he did not record what they said at the trial court. In addition, the 1st appellant faulted the trial proceedings which bear what he did not say. On this he contended to be a peasant and previously, has never been a member of the Tanzania Peoples Defence Force (TPDF) as recorded by the trial magistrate

We are aware that, this being a second appeal, the Court should not disturb the concurrent findings of the courts below unless there a clear

misapprehension of the evidence or a miscarriage of justice or a violation of some principle of law or practice. See: **HAMISI MOHAMED VS REPUBLIC,** Criminal Appeal No. 297 of 2011 (unreported) and **JAFARI MFAUME KAWAWA VS REPUBLIC** [1981] TLR 149.

Having carefully scrutinized the record of appeal, the Memoranda of appeal and submissions of the parties, the issues for determination are whether the trial was flawed by the procedural irregularities and if the trial was vitiated and secondly whether or not the charge was proved against the appellants.

We have opted to begin with the complaint on the charge sheet which is by law a foundation of any trial having not mentioned the person who was threatened in the fateful incident. At this juncture we find it crucial to reproduce the charge which was laid against the appellants:

> *"**OFFENCE SECTION AND LAW**: Armed robbery c/ss 285 and 286 of the Penal Code Cap. 16 Vol. I of the laws as read together with Act No. 10/1989.*
>
> ***PARTICULARS OF OFFENCE**:*

The Joseph s/o Maganga, Dotto s/o Salum Butwa, Moshi s/o Lilanguze Mtazi, Philipo s/o Simon @ Tutazi, Emmanuel s/o Augustino and Machia s/o Maganga are jointly and together charged on 24th day of July, 2001 at about 23:00hrs. at Usimba Village within Urambo District in Tabora Region did steal cash Tshs. 50,000/= three Bed Sheets @ 1,500/= total valued at Tshs. 4,500/= and several shop items total valued at Tshs 300,000/=. All total valued at Tshs. 354,000/= from Felix s/o Hobe and at immediately before and immediately after the such stealing did use Arms make SMG. No. IC 22134 in order to obtain the said properties."

Notwithstanding that, the person who was threatened was not indicated in the said charge sheet, the question for our consideration is whether the appellants could not understand the nature and seriousness of the offence and were inhibited from making a proper defence. The Court was confronted with a similar scenario in the case of **MUSSA MWAIKUNDA VS REPUBLIC** [2006] TLR 387. In that case, the charge which had omitted the essential ingredients of the offence of attempted rape and in addition,

in the respective evidence of the victim, she had not testified to have been threatened by the appellant which is an essential element in that offence. The Court held that the charge facing the appellant was not curable under section 388 (1) of the CPA due to the following reasons:

> " *...One, since threatening was not alleged in the particulars of the offence the effect was that an essential element of the offence of attempted rape missed in the case against the appellant. Two, at any rate, ... the complainant did not say anywhere in her evidence that she was threatened by the appellant."*

In the case at hand, the particulars of the offence were very clear and in our view, enabled the appellant to understand the date and place where the offence of robbery was committed, the weapon involved, the stolen items and Felix Hobe being the respective complainant. In addition, the complainant in his account told the trial court to have been attacked by armed bandits who stole his properties and upon raising alarm which was heeded to by PW2 and PW3 among others; the appellants were pursued and arrested.

In the premises, we are satisfied that, the particulars of the offence together with evidence of PW1 enabled the appellants to appreciate the seriousness of the offence facing them as they were aware that the person threatened at the robbery incident was PW1. This eliminated whatever prejudices and as such, the omission to mention the threatened person being remedied by the testimonial of PW1 is thus curable under section 388 (1) of the CPA. See- **JAMAL ALLY @ SALUM VS REPUBLIC,** Criminal Appeal No. 52 of 2017 (unreported). Therefore, the ground of complaint on the defective charge is not merited.

It was also a complaint of the appellants that the cautioned statement of the appellant following its admission, was not read out to the appellant and as such, the admission was not proper. This was echoed by the learned State Attorney. At page 31 of the record of appeal, after PW4 prayed to tender the cautioned statement of the 1st appellant the following ensued:

> " ***1st accused:*** *The statements belong to me. I have no objection for the same to be admitted as exhibit.*
>
> ***Court:*** *Admitted as exhibit P 7."*

We agree with the parties that, failure to read out the 1st appellant's cautioned statement after it was admitted as an exhibit was a fatal irregularity. We say so because it is a well established principle that, whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out. See - **ROBINSON MWANJISI AND OTHERS VS REPUBLIC** [2003] TLR 218, **WALII ABDALLA KIBUTWA AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 181 of 2006, **OMARI IDDI MBEZI VS REPUBLIC,** Criminal Appeal No. 227 of 2009 (both unreported). The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained in order to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in the evidence is a fatal irregularity. See - **LACK KILINGANI VS REPUBLIC,** Criminal Appeal No. 405 of 2015 (unreported). We thus expunge the 1st appellant's statement from the record.

Pertaining to the complaint on admission of Exhibits at the trial without giving the appellants an opportunity to comment on the admission, at page 25 of the record after PW4 prayed to tender a gun and 12 rounds of ammunition alleged to have been used at the robbery incident, they

were respectively admitted as Exhibits P3 and P4. A similar trend was followed when the trial court admitted three pair of shoes as Exhibit P5 at page 26 of the record. However, prior to that, none of the appellants were asked to comment on their respective admissibility which denied them a right of fair hearing and it occasioned a failure of justice. See- **HASSANU HUSSEIN TINNA VS REPUBLIC,** Criminal Appeal No. 33 of 2011 (unreported). In view of the said infraction, we accordingly discount Exhibits P3, P4 and P5 from the record. In that regard, the appellant's complaint on the absence of the ballistic expert report to establish if the gun make SMG NO. IC 22134 was used at the robbery incident is rendered redundant.

We now address the complaint by the appellants that, their respective testimonies were not read out to them which contravened the dictates of section 210 (3) of the CPA which provides as follows:

> " *The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments*

which the witness may make concerning his evidence."

We found the appellants' complaint not merited because the entire record of proceedings shows that section 210 (3) of the CPA was complied with in the process of recording the evidence of all witnesses. Furthermore, regarding the 1st appellant's complaint raised before us whereby he asserted that the trial magistrate had wrongly recorded his previous occupation to have been a member of the Tanzania Peoples Defence Forces (TPDF) which was not the case. Though this was not raised before the first appellate court, we found the 1st appellant's complaint not merited at all. We say so because at page 30 of the record, C 8400 SGT KENNA who testified as PW5 told the trial court that:

" The 1st accused was a member of TPDF he resigned TPDF while at a rank of a corporal".

Such account was confirmed by the 1st appellant himself at page 36 of the record as he availed more details on his previous occupation having told the trial court as follows:

" I live at Urambo Mjini Village. I am a peasant.

Before that I was a member of TPDF. I was having rank of corporal. At last I was at West Brigade Tabora 25 KJ. In 1986 I was having a kidney problem so I resigned to be a member of TPDF.

In 1984 I was sent to South Africa, as a member of TPDF. I stayed there for one year."

In the premises, as earlier intimated, the appellant's complaint apart from being false is indeed an afterthought.

We have also gathered that, 2 bed sheets, vacuum flask and various types of shop goods alleged to have been found at the residence of the appellants were tendered by PW4 as Exhibit P6. PW1's evidence regarding the identification of the stolen properties is reflected at page 14 of the record as follows:

" While at Police Station I identified the shop properties such as skin oil, toothpaste, sandals, two thermos which was (sic) stolen in my cupboard, torch, 3 bed sheets, pesa za kichele shs. 4000/=.

The three bed sheets were taken on my sleeping bed.

I also identified various types of the shop properties together with the two bags."

Moreover, it was the evidence of PW4 at page 25 of the record that:

" *While at Police Station the complainants identified the shop properties."*

This Court has on numerous occasions emphasized that, in theft cases, identification of allegedly stolen property is a crucial requirement. See- **DAVID CHACHA AND 8 OTHERS VS REPUBLIC**, Criminal Appeal No. 12 of 1997 (unreported). In that case the subject matter of theft was among others, an electric pressing iron which was tendered as an Exhibit. While approving the decision of the High Court that the complainant in that case had correctly identified the object by describing its marks such as a black handle with a broken light indicator spot, the Court emphasized the following:

" *... it is trite principle of law that properties suspected to have been found in possession of the accused persons should be identified by the*

complainants conclusively. ***In a criminal charge it is not enough to give generalized description of the property."***

[Emphasis supplied]

In the case at hand, in the absence of any specific or rather peculiar marks of the stolen properties including the bed sheets as recounted by PW1 and PW4 who merely gave a generalised description of the stolen items, it cannot be safely vouched that PW1 positively identified the stolen items. We thus agree with the finding by the first appellate court that, PW1 fell short of the means he had identified the stolen items. As such, Exhibit P7 is equally discounted from the record.

Having discounted the documentary and physical exhibits the issue for our consideration is whether the remaining oral evidence on record is sufficient to sustain the conviction of the appellants. In one of the points of grievance, the appellants faulted the trial court on its reliance on the weak defence evidence by the two courts below. Apparently, this factual matter was not initially raised before the first appellate court as it is not in the petition of appeal by the appellants at pages 90 and 91 of the record. In that regard, as a matter of general principle, an appellate court cannot

allow matters not taken or pleaded and decided in the courts below to be raised on appeal. See- **KENNEDY OWINO ONYANGO AND OTHERS VS REPUBLIC**, Criminal Appeal No 48 of 2006 (unreported). However, due to the significance of this point we will try to revisit the appellants' own account during the trial and that of the prosecution. From page 36 to 37 of the record, part of the 1st appellant's account before the trial court was to the effect that:

> *" On 25/07/2001 during morning while at Kazaroho village with the 2nd, 3rd , 4th and two others I was surprised to be rounded by villagers. Two of us ran away. We were all ordered to sit down. We were tied by ropes. Then the house was searched. In the search they saw clothes.*
>
> *"I admitted that I participated in the robbery at Usimba Village by using a gun make SMG.... I admitted that we stole shop properties and cash Shs. 50,000/=".*

As for the 2nd appellant at page 40 he testified as follows:-

> *" I admitted that I was with the 1st accused and Hamis s/o Shabani. I admitted that we stole shop properties and cash.*

I admitted that in the robbery we used SMG. I further admitted that I was the one who was armed with a gun and fired 6 bullets during the robbery."

The trial court at page 79 of the record concluded that, the first appellant had implicated himself with the commission of the offence and that the 2nd appellant was among those involved in the robbery at the house of PW1. Notwithstanding such incriminating evidence against the 2nd appellant, he did not cross-examine the 1st appellant as reflected at page 37. Moreover, PW3 who was among those in the team which mounted search to trace the assailants of PW1 testified as to how the appellants were apprehended whereby the 1st appellant had a gun whereas the 2nd appellant had a magazine. Besides, PW3 told the trial court that the appellants were found with the stolen shop items. Crucially, none of the appellants took trouble to cross-examine PW3. As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See- **CYPRIAN A KIBOGOYO VS REPUBLIC**, Criminal Appeal No 88 of 1992, **PAUL YUSUF NCHIA VS NATIONAL EXECUTIVE SECRETARY, CHAMA CHA MAPINDUZI AND ANOTHER**, Civil Appeal No 85 of 2005 (both unreported).

Pertaining to the proof of admissions against the persons making them, **SARKAR, LAW OF EVIDENCE** 16th Edition, 2007 Volume I at page 462 states as follows:

> *" An admission if clearly and unequivocally made is the best evidence against the party making it. It is true that evidentiary admissions are not conclusive proof of facts admitted and may be explained or shown to be wrong,* ***but they do not raise an estoppel and shift the burden of proof on the person making them unless shown or explained to be wrong they are an efficacious proof if the facts admitted."***

Moreover, at page 463 he states as follows:

> *" A concession on a question of fact binds a party...Only voluntary and direct acknowledgement of guilt is a confession."*

The aforesaid position was emphasized in the case of **NYERERE NYAGUE VS REPUBLIC,** Criminal Appeal No. 67 of 2010 (unreported). The appellant was charged and convicted of raping a 70 year old woman. At the trial, in his defence the appellant denied to have committed the offence but admitted that he made a statement and had no objection to its

admission. In cross-examination by the prosecution, the appellant was recorded to have said:

> *" I know the victim. I had carnal knowledge with her once. I seduced her only once and I raped her once."*

The Court concluded that, the charge of rape was proved on account of the cautioned statement of the appellant which was corroborated by his sworn evidence at the trial.

In the present case, the oral account by PW1, PW2 and PW3 which was not doubted by the two courts below on the occurrence of the robbery, the mounted search which facilitated the urgent and direct arrest of the appellants at Kazaroho village in possession of a firearm and rounds of ammunition, is materially corroborated by the sworn evidence of the appellants as they clearly admitted to have been involved in the robbery at PW1's house. That apart, they told the trial court on their participation and role played by each of them in robbery incident Usimba Village at the homestead of PW1. As to the status or rather value of the self incriminating account of the appellants, **BLACK'S LAW DICTIONARY 8 Edition LEGAL MAXIMS** at page 1709 makes a following categorisation:

" a confession made in court is of greater effect than any other proof."

In the event, on the basis of the appellants' clear admission of the the charged offence, in our considered view the offence of armed robbery was proved beyond reasonable doubt against them. As such, we do not find cogent reasons to disturb the concurrent findings of the courts below. We thus, dismiss the appeal in its entirety.

DATED at **TABORA** this 1st day of November, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2019 in the presence of Mr. Tumain Pius, learned State Attorney for the respondent/Republic and Appellants appeared in person, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL