

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 275 OF 2018

STEVEN SALVATORY APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

dated the 13th day of July, 2018

in

(DC) Criminal Appeal No. 68 of 2016

JUDGMENT OF THE COURT

14th & 20th February, 2020

KWARIKO, J.A.:

The appellant, Steven Salvatory and two others namely; Khatibu Khatibu @ Banju and Kazumari Mwema @ Baloteli and four others were charged at the District Court of Masasi with one count of conspiracy contrary to section 384 and five counts of armed robbery contrary to section 287A and 286 both preferred under the Penal Code [CAP 16 R.E. 2002] (the Penal Code). All denied the charge but before the trial commenced, the charge against the then second accused was withdrawn in terms of section 91 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002] and he was accordingly discharged. At the end of the trial, only the appellant, Khatibu Khatibu @ Banju and Kazumari Mwema

@ Baloteli were convicted of conspiracy and a lesser offence of robbery contrary to 285 and 286 of the Penal Code. They were sentenced to 3 years imprisonment in the first count and 30 years imprisonment each for the rest of the counts. The sentences were ordered to run concurrently. The other three accused persons were acquitted.

Aggrieved by that decision, the appellant and two others preferred an appeal to the High Court. That court upheld the conviction of the appellant in respect of the offence of conspiracy and the fourth count of armed robbery, primarily on the basis of his confessional statement admitted as exhibit P1. The appellant's appeal was dismissed and the sentence of three and thirty years imprisonment respectively were maintained. His co-appellants' appeal was allowed. The appellant is before this Court on a second appeal.

At this juncture, we find it appropriate to recapitulate a brief account of the facts which led to the appellant's conviction as follows. On 29/5/2015 at about 04:00 hours, Mvita Selemani (PW1) of Mkuti area in Masasi was driving his car from a hospital where he had taken his tenant's relative for treatment. He was in the company of other people. On his way back, he stopped after he found a log on the road. Shortly thereafter, several people wearing masks emerged from the

forest and invaded them, smashed his car and took away his mobile phone make Nokia. About seven other cars were claimed to have been waylaid and properties stolen. When the thugs left, the victims reported the incident to Ndanda police station and eventually the appellant and others were arrested.

The appellant was interrogated on 29/5/2015 by No. E. 3903 Detective Corporal Suleiman (PW2) who testified that the appellant confessed to the allegations. PW2 recorded the appellant's cautioned statement which he tendered and was admitted in the trial court as exhibit P1.

In his defence, the appellant denied the allegations and said that he was arrested on allegations involving peeping at a woman who was in a bathroom. When he was taken to the police station, he was joined with his co-accused in the case. In the end, he was convicted and sentenced as indicated earlier.

In his memorandum of appeal filed by Mr. Rainery Songea of Phoenix Advocates, the appellant raised four grounds namely: -

- "1. That the Honourable judge erred in law and in fact in upholding the conviction and sentence while*

there was no proper identification of the Appellant to (sic) the scene of the crime;

- 2. That the Appellant's caution statement recorded on the 29th May, 2015 tendered and admitted as Exhibit P1 was wrongfully relied upon by the Judge in upholding the conviction;*
- 3. That the appellant herein was denied fair trial as the caution statement that was tendered and admitted as Exhibit P1 was not read to accused; and*
- 4. That the case against the Appellant herein was not proved beyond reasonable doubts."*

At the hearing of the appeal, Mr. Songea, learned advocate and Mr. Joseph Muggo, learned Senior State Attorney, appeared for the appellant and the respondent Republic respectively.

In his submission, Mr. Songea dropped the first ground and opted to argue the second and third grounds of appeal together. He submitted in that respect that the only evidence against the appellant was a cautioned statement (exhibit P1) which was tendered by PW2. However, he argued, the cautioned statement suffers from two shortcomings. First, the Court's record shows that during the trial there were six accused persons but when the cautioned statement was tendered in evidence, the court did not indicate who among them was asked to say

anything concerning its admission. Secondly, the cautioned statement was not read over upon admission and he made reference to the Court's earlier decision in the case of **Robinson Mwanjisi and Three Others v. R** [2003] T.L.R 218. He also referred to **Jumane Mohamed & 2 Others v. R**, Criminal Appeal No. 534 of 2015, **Kurubone Bagirigwa & 3 Others v. R**, Criminal Appeal No. 132 of 2015 and **Erneo Kidilo & Another v. R**, Criminal Appeal No. 206 of 2017 (all unreported). The learned counsel argued that the omission rendered exhibit P1 incompetent deserving to be expunged from the record.

It was Mr. Songea's further argument that, after discarding exhibit P1 from the record, the remaining evidence cannot sustain the appellant's conviction. This is so because, he argued, PW1 who was the eye witness testified that he did not identify any thug at the scene. It was his submission that although the High Court stated that the appellant's confession corroborated PW1's evidence, with the discardment of exhibit P1, PW1's evidence is wholly worthless.

In respect of the fourth ground, Mr. Songea contended that in view of the glaring gaps in the prosecution evidence, the prosecution case was not proved beyond reasonable doubt against the appellant. He thus prayed that the appeal be allowed.

Responding to the Court's inquiry regarding conspiracy, Mr. Songea submitted that, in this case the conviction in respect of the offence of conspiracy was not necessary because the actual offence was said to have been committed. Further, the High Court should not have sustained conviction on the offence of conspiracy after allowing the appeal in respect of other appellants who were alleged to have conspired with the appellant to commit armed robbery.

In his reply, Mr. Muggo began his submission by supporting the appeal. He concurred with the submission by Mr. Songea that failure to read the contents of the cautioned statement after its admission was a fatal irregularity which rendered it evidentiary worthless. In this respect, he also made reliance to the Court's decision in **Robinson Mwanjisi and Three Others** (supra). The learned Senior State Attorney conceded that the remaining part of PW2's evidence was not sufficient to ground conviction against the appellant.

We have considered the submissions from the counsel for the parties and find that there are two issues for our determination. **One**, whether the appellant's cautioned statement was properly relied upon in convicting him. **Two**, whether the prosecution case was proved beyond reasonable doubt against the appellant.

As regards the first issue, it is clear from the record and as rightly submitted by Mr. Songea and conceded by Mr. Mauggo, that exhibit P1 was not read over in court after admission. This means that the appellant admitted something whose content he did not know. In the case of **Robinson Mwanjisi and Three Others** (supra), the Court held *inter alia* at page 220 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.**"* (Emphasis added).

Applying the above stated legal position to the instant case, it is clear that after exhibit P1 was tendered and cleared for admission, it did not complete the third stage of being read out in court so that its contents could be heard by the appellant. Thus, exhibit P1 was improperly admitted in evidence. For that reason, we accordingly expunge it from the record. The Court has done so in similar cases, including **Jumane Mohamed & 2 Others, Kurubone Bagirigwa & 3 Others** and **Erneo Kidilo & Another** (supra) referred to us by Mr. Songea. The first issue is thus answered in the negative.

Having answered the first issue in the negative, the determination of the second issue will be easy. We are in agreement with both learned

counsel that after expunging exhibit P1, there will be no other evidence to link the appellant with the offences with which he was charged and convicted by the trial court and sustained by the first appellate court. This is so because, PW1 who is the only eye witness admitted that he did not identify any of the assailants alleged to have covered their faces with masks. We can therefore safely conclude that the prosecution case was not proved beyond reasonable doubt against the appellant. The second issue is also answered negatively.

Finally, we find it compelling to say something on the offence of conspiracy, for we agree with the learned advocate for the appellant that the offence of conspiracy cannot stand where the actual offence has been committed. In our earlier decision in the case of **John Paulo @ Shida & Another**, Criminal Appeal No. 335 of 2009 (unreported), we held that: -

"It was not correct in law to indict or charge the appellants with conspiracy and armed robbery in the same charge because, as already stated, in a fit case conspiracy is an offence which is capable of standing on its own."

In any event, the conviction of the offence of conspiracy could not be sustained against the appellant after the first appellate court had allowed the other conspirators' appeal.

Eventually, we find merit in the appeal and we hereby allow it, quash the conviction and set aside the sentence meted out against the appellant. We order the immediate release of the appellant from prison unless he is continually lawfully held.

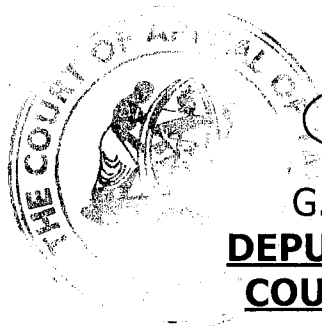
DATED at **MTWARA** this 19th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2020 in the presence of appellant and Ms. Tecla Kimathi, learned counsel for appellant and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL