IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 366 OF 2018

1. **FLANO ALPHONCE MASALU @ SINGU**
2. **JEREMIAH FLAVIAN MGORI**
3. **SADRU KAMUGISHA** ..... **APPELLANTS**
4. **MORRIS JOHN MALIANGA**
5. **SADICK RAMADHAN BWANGA**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Magoiga, J.)

dated the 26th day of October, 2018
in
Criminal Appeal No. 34 of 2018

.....

JUDGMENT OF THE COURT

25th February & 30th April, 2020

NDIKA, J.A.:

On 4th January, 2018, the five appellants named above were convicted by the Resident Magistrate's Court of Dar es Salaam at Kisutu of armed robbery contrary to section 287A of the Penal Code, Cap. 16 RE 2002 ("the Code") and were each handed the mandatory thirty years'

imprisonment. Their first joint appeal to the High Court of Tanzania at Dar es Salaam was fruitless, hence this second and final appeal.

The prosecution produced a total of twelve witnesses to prove what was alleged in the charge sheet that on 22nd December, 2015 at Mabibo Luhanga area within Kinondoni District in Dar es Salaam Region, the appellants, jointly and together, stole US$ 8,600 in cash, TZS. 2,500,000 also in cash, one laptop and four cellphones the property of one Anderson Aloyce Balongo and immediately before and after such stealing, they threatened Zeno Genes Mriwa, Aneth Joseph Paul and John Renatus Mkundi with a hand gun in order to obtain and retain the said properties.

The prosecution case mostly hinged on visual evidence and confessional statements attributed to the first and second appellants. Briefly, it was as follows: on 22nd December, 2015 at 2:00 a.m., an armed robbery occurred at Vina Hotel located at Mabibo Luhanga in Dar es Salaam. The details on how the robbery happened were mainly given by five eyewitnesses: PW1 Zeno Genes Mriwa, the Hotel Manager; PW2 Aneth Josephat, the Receptionist on duty at the hotel; John Renatus Mkundi (PW3), a security guard; PW4 Ismail John, a resident in the hotel; and PW5 Janet Henry, also a security guard.

According to PW2, some of the robbers, notably the first appellant, began to trickle in the hotel in the afternoon of 21st December, 2015 and rented six rooms in total. Around 2:00 a.m. in the following morning, there was a huge blast at the hotel. The hotel was immediately overwhelmed by several armed confederates who then subdued and hogtied PW1, PW2, PW3 and PW5. They ransacked the hotel for up to twenty minutes and eventually made away with two safes (metal boxes) containing money and other valuables after they had also relieved PW1, PW2 and PW5 of their cellphones and money. The hotel proprietor, Anderson Aloyce Balongo (PW12), who rushed to the scene after PW1 had called him, confirmed to the trial court that he found several of his properties stolen by the robbers. These included a laptop, a projector and two safes one of which contained TZS. 2,500,000.00 in cash and US$ 8,600 also in cash.

As regards the identities of the robbers, while PW1 and PW2 testified that, with the aid of light, they saw the first and second appellants at the scene, PW2 added that she, as well, saw the fifth appellant. Both witnesses described certain physical features of the robbers and stated, in particular, that the first appellant wielded a hand

gun. Moreover, PW4 claimed to have been at his bedroom's balcony on the first floor from which he spotted the fourth appellant guiding a motor vehicle at the hotel's entrance. PW5 adduced that she identified the third appellant at the scene. Crucially, none of the witnesses said that the robbers were familiar faces except PW2 who testified that she attended to the first appellant in the preceding afternoon when he went to the hotel to rent a room for the night. It is noteworthy that although PW3 said that he saw the assailants at the scene, he did not point the finger at any of the appellants.

The matter was reported to the police who then visited the scene shortly thereafter and investigations commenced. Inspector Sofia Luguru (PW7) led a contingent of police officers who, acting on a lead from an informer, arrested the first appellant at his home on 29th December, 2015 at midnight. They took him to Magomeni Police Station where his cautioned statement was promptly recorded by D/Cpl. Shaban (PW11). Although he retracted that statement, it was admitted as Exhibit P.7, after an inquiry into its admissibility, as proof that he confessed to the charged offence and that he named the second and fourth appellants as some of his partners in the crime.

Another police officer, Inspector Bernard (PW8), recounted that he and a contingent of police officers were subsequently led by the first appellant to the second appellant's home in Kijitonyama Mapambano where they arrested the latter at 8:30 a.m. on 31st December, 2015. They then searched his home from which they seized two iron bars, a machete, a radio call, a hammer, sisal ropes and two motor vehicle number plates (Exhibit P.5) suspected to have been used in carrying out the robbery. A certificate of seizure was admitted as Exhibit P.4. In addition, PW11 tendered in evidence the second appellant's cautioned statement (Exhibit P.8), recorded on 31st December, 2015, showing that he confessed to the crime and implicated the first, third and fourth appellants.

Admittedly, it is unclear how the third, fourth and fifth appellants were arrested. But, the threesome together with the first and second appellants were paraded for identification in parades conducted on 8th January, 2016 and 15th March, 2016 by PW9 Assistant Inspector Furaha and PW10 Inspector David Mabula respectively. In the parades conducted on 8th January, 2016, PW1 and PW2 separately identified the first and second appellants. On the same day, two further parades were conducted where PW4 picked out the fourth appellant while PW5

identified the third appellant. In the final parade held on 15th March, 2016, PW2 identified the fifth appellant. Corresponding extracts from the parade register documenting the results of the parades were admitted as Exhibits P.5 and P.6.

In their respective defence testimonies, the appellants, by and large, refuted being at the scene of the armed robbery at the material time. In particular, the first appellant maintained his retraction of the cautioned statement (Exhibit P.7) as the second appellant denied having attended or being picked out in any of the parades. The third appellant blamed his woes on the hotel owner (PW12), who happened to be his close relative, with whom he had an acrimonious parting of ways following a disagreement over payment of a debt. The fourth appellant denied to have rented Room No. 104 at the hotel on the fateful day. On the part of the fifth appellant, he complained that PW2 selected him in the parade on 15th March, 2016 after the parade supervisor, PW10 Inspector David Mabula, had pointed his finger at him.

As hinted earlier, the trial court found the appellants guilty beyond reasonable doubt of armed robbery. That finding was premised on the following: first, that the visual identification evidence given by PW1, PW2,

PW3, PW4 and PW5 that placed each of the appellants at the scene of the robbery at the material time was watertight. Secondly, that the appellants were positively identified in the identification parades, which, based on the testimonies of the parade supervisors (PW9 and PW10), were properly conducted. Thirdly, that the first and second appellants confessed to have committed the offence in their respective cautioned statements and implicated their two co-appellants (the third and fourth appellants).

On the first appeal, the High Court upheld the trial court's findings except for the second appellant's cautioned statement which it expunged on the ground that it lacked the said appellant's signature to signify that he recorded it willingly. At the end of the day, the appeal was dismissed.

Still dissatisfied, the appellants have appealed to this Court. Through his Memorandum of Appeal and supplementary Memorandum of Appeal, the first appellant raised eleven grounds of appeal which we have condensed into six complaints: **one**, that the charge sheet was fatally defective. **Two**, that the evidence was recorded in contravention of section 210 (3) of the Criminal Procedure Act, Cap. 20 RE 2002 ("the CPA"). **Three**, that visual identification evidence was weak. **Four**, that

extracts from the identification parade register (Exhibit P.5) were improperly admitted in evidence. **Five**, that the identification parades were improperly conducted. **Finally**, that the retracted confession (Exhibit P.7) was illegally obtained and, alternatively, that it was uncorroborated.

The second, third and fourth appellants had initially lodged a total of sixteen grounds of appeal but, Mr. Nehemiah Nkoko, learned counsel, acting on their behalf, lodged four grounds of complaint in lieu thereof as follows: **one**, that stealing being an essential ingredient of the offence of armed robbery was unproven. **Two**, that the identification parade did not conform to the requirements of Police General Order No. 232. **Three**, that visual identification was contradictory and unreliable. **Finally**, that the retracted confession of the first appellant was uncorroborated.

On his part, the fifth appellant lodged a nine-point Memorandum of Appeal whose thrust is as follows: **one**, that the charge was fatally defective as the charged offence is non-existent and the particulars of the offence insufficient. **Two**, that visual evidence was unreliable and the identification parades were improperly conducted. **Three**, that there was a material variance on the fifth appellant's name as cited in the

charge and the evidence. **Four**, that the first appellant's retracted cautioned statement was uncorroborated and hence it could not incriminate the fifth appellant. **Five**, that the procedure under section 210 (3) of the CPA on the recoding of evidence was not complied with. **Six**, that the procedure under section 214 (1) of the CPA on the succession of presiding magistrate was not complied with. **Finally**, there was no proof of the charge beyond reasonable doubt.

At the hearing of the appeal, the first and fifth appellants appeared in person to prosecute the appeal while Mr. Nkoko joined forces with Messrs. Twaha Taslima and Jeremia Mtobesya, learned counsel, to represent the second, third and fourth appellants. The respondent had the services of Messrs. Nassoro Katuga and Emmanuel Maleko, learned Senior State Attorneys as well as Ms. Aurelia Makundi, learned State Attorney.

We propose to deal, at first, with the grounds alleging procedural irregularities, the first of these being the alleged defect in the charge. It is the common contention by the first and fifth appellants that the charge was incurably defective on account of the following: first, that the statement of offence is defective for non-citation of Act No. 3 of 2011

that amended the Code and introduced section 287A creating "armed robbery" as an offence. Secondly, that the particulars of the offence are insufficient for not stating the place and time at which the alleged armed robbery was committed. Mr. Katuga, on the other hand, disagreed as he contended that the charge was properly drafted as required by section 135 of the CPA and that the particulars of the offence sufficiently notified the appellants of the charged offence.

In terms of sections 132 and 135 of the CPA, every charge must contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. In the light of these provisions, we have reviewed the charge sheet on record. As to the impugned statement of offence, we endorse the learned first appellate Judge's view that the statement on the charge sheet that the charged offence was "armed robbery contrary to section 287A of the Penal Code [Cap. 16 RE 2002]" was sufficient. Citing the amending Act was an unnecessary embellishment because, as rightly held by the learned Judge, in terms of section 12 (2) of the Interpretation of Laws Act, Cap. 1 RE 2002 a "reference in a written law

to a provision of a written law shall be construed as a reference to such provision as it may be amended."

As regards the particulars of the offence, we go along with Mr. Katuga's submission that the impugned charge possesses sufficient particulars indicating the names of the accused persons, the offence allegedly committed and the date and place it was committed. In our view, the statement that the alleged offence occurred at "Mabibo Luhanga area within Kinondoni District in Dar es Salaam" was sufficient. Equally, the actual time of the armed robbery is not an ingredient of that offence and so it needed not be specified as long as the particular date of the commission of the offence was stated. Accordingly, the ground of appeal under consideration fails.

We now consider the complaint that that the evidence was recorded in contravention of section 210 (3) of the CPA, which enacts that:

> *"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."

The above provision enjoins the presiding magistrate to avail every witness an opportunity to have his evidence read over to him after it is recorded and then note down whatever comments the witness makes after his testimony is read over. As we observed in our recent decision in **The Director of Public Prosecutions v. Hans Aingaya Macha**, Criminal Appeal No. 449 of 2016 (unreported), this requirement is intended to ensure that every testimony is properly recorded and that it guarantees against distortion, perversion and suppression of evidence.

The fifth appellant argued that his evidence and that of PW2 were recorded without compliance with the above provisions. While claiming that his evidence was partly distorted, he urged that PW2's evidence be discounted. Mr. Mtobesya went an extra mile, alleging that the said infraction affected not just the testimonies of PW2 and DW5 but also the evidence adduced by PW1, PW3, PW4, PW5, PW6, PW7, DW1, DW2, DW3 and DW4. Citing the decision of the Court in **Mussa s/o Abdallah Mwiba & Two Others v. Republic**, Criminal Appeal No. 200 of 2016 (unreported), he urged us to hold the trial proceedings a nullity. On the part of the respondent, Mr. Katuga conceded unreservedly to his learned

friend's submission but urged that a retrial be ordered in the event the trial proceedings were nullified.

It is indeed true that the trial record shows that both the first and the succeeding trial magistrates did not indicate any compliance with the requirement under section 210 (3) of the CPA after recording the testimonies of PW1 through PW7 and DW1 to DW5. So, it is true that section 210 (3) of the CPA was violated. The issue, then, is what is the effect of this violation? Admittedly, in **Mussa s/o Abdallah Mwiba** (supra), cited by Mr. Mtobesya, the Court held such an irregularity as fatal. However, in our earlier decision in **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 (unreported), where we confronted an identical irregularity, we emphasized that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice. We, then, reasoned that:

> *"In **Richard Mebolokini v. Republic** [2000] TLR 90, Rutakangwa, J. (as he then was) was faced with a similar complaint. The learned judge observed that when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal. We respectfully agree with that observation. **But in the present case the***

authenticity of the record is not in issue, at least, the appellant has not so complained. In the circumstances of this case, we think that non-compliance with section 210 (3) of the CPA is curable under section 388 of the CPA."[Emphasis added]

The above decision was followed in **Athuman Hassan v. Republic,** Criminal Appeal No. 84 of 2013 (unreported), where the Court held:

"The record of proceedings of the trial court shows that there was no compliance with section 210 (3) in the process of recording the evidence of the witnesses. ***However, we do not see the substance of the appellant's complaint because it was the witnesses who had the right to have the evidence read over to them and make a comment on their evidence. We do not even think that the omission occasioned a miscarriage of justice to the appellant.***"[Emphasis added]

See also **Elia Wami v. Republic,** Criminal Appeal No. 30 of 2008 (unreported); **Hans Aingaya Macha** (supra); and **Omari Mussa Juma v. Republic,** Criminal Appeal No. 73 of 2015 (unreported).

We entertain no doubt that the position in **Jumanne Shaban Mrondo** (supra) and **Athuman Hassan** (supra) applies in this case. For, the authenticity of the recorded evidence has not been seriously questioned. Certainly, we heard the fifth appellant contending that his testimony was distorted but he made no effort to substantiate that assertion. At any rate, based on the principle of the sanctity of the record we are inclined to hold that the record is accurate and unimpeachable. In the premises, we do not think that this infraction occasioned a failure of justice and so, we hold that it is curable under section 388 of the CPA. In the result, we dismiss this ground of appeal.

The final procedural issue, raised by the fifth appellant, alleges non-compliance with the procedure under section 214 (1) of the CPA on the succession of a presiding magistrate. Unfortunately, neither the fifth appellant nor the respondent addressed us on the issue. Nonetheless, it being a threshold question we addressed it by examining the trial record.

It is evident that the trial commenced before Hon. H.S. Riwa, PRM who recorded the testimonies of the first three prosecution witnesses until 1st June, 2016. Then, Hon. W.R. Mashauri, PRM (as he then was) took over and continued with the trial from 15th June, 2016 to the end.

The proceedings of that day show that he was aware of the provisions of section 214 (1) of the CPA as he recorded that he had addressed the accused in terms of the said section. He noted down that he had taken over the case following the transfer of Hon. H.S. Riwa, PRM to a new station and that he would start from where his predecessor ended. In our view, the learned succeeding magistrate fully complied with the dictates of the law – see, for instance, **Juma Kuyani & Mussa Daudi v. Republic**, Criminal Appeal No. 525 of 2015 (unreported). We thus find the complaint under consideration unmerited.

Having disposed of the threshold questions above, we turn to the grounds of appeal raising evidential issues, beginning with the main question whether the appellants were positively identified at the scene of the robbery.

On visual identification, Mr. Nkoko submitted that the evidence proffered by identifying witnesses was suspect and that it was not properly evaluated by the two courts below. He urged us to take into account the following: first, that all appellants were strangers to the identifying witnesses even though PW2 alleged to have attended the first appellant in the preceding afternoon. Secondly, that none of the

witnesses explained the source and intensity of the light that enabled them to see and identify the robbers. Thirdly, that the environment was so horrifying after a gun shot was fired. Finally, that PW1's account on identification conflicted with the statement he made to the police (Exhibit D.1), which was admitted in evidence to impeach his credibility. He made reference to the cases of **Mussa Mustapha Kusa & Another v. Republic**, Criminal Appeal No. 51 of 2010 and **Yassin Hamisi Ally @ Big v. Republic**, Criminal Appeal No. 254 of 2013 (both unreported) for the principle that visual identification evidence must be put to proper scrutiny. The fifth appellant echoed Mr. Nkoko's complaint on light but added that the identifying witnesses did not give any description of him prior to the conduct of the identification parades.

Conversely, Mr. Katuga submitted that the evidence of PW1, PW2, PW4 and PW5 was credible and reliable. That it sufficiently proved that the appellants were all seen and identified at the scene. He relied on the Court's decision in **Godfrey Yahe & Another v. Republic**, Criminal Appeal No. 277 of 2010 (unreported) for the proposition that in matters of identification credibility of witnesses is equally important.

It is undisputed that the incident in the instant case occurred in the wee hours of the morning – around 2:00 a.m. Thus, the evidence on how the raiders were seen and identified is so crucial. It is apposite that we refer to the guidelines on visual identification as stated in our seminal decision in **Waziri Amani v. Republic** [1980] TLR 250, where the Court cautioned, at pp. 251 – 252, that:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight****."* [Emphasis added]

Then, the Court stated, at p. 252, that:

> *"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being*

> *tried.* ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.*** *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."* [Emphasis added]

In **Raymond Francis v. Republic** [1994] TLR 100, the Court emphasized that:

> *"It is elementary that a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance."*

See also the decisions of the Court in **Emmanuel Luka & Two Others v. Republic**, Criminal Appeal No. 325 of 2010; **Ally Manono v. Republic**, Criminal Appeal No. 242 of 2007; **Horombo Elikaria v.**

Republic, Criminal Appeal No. 50 of 2005; **Ahmad Hassan Marwa v. Republic**, Criminal Appeal No. 264 of 2005; and **Omari Idd Mbezi & Three Others v. Republic**, Criminal Appeal No. 227 of 2009 (all unreported).

The crucial issue, then, is whether the visual identification evidence in this case met the above guidelines. Both courts below, as alluded to earlier, answered this question in the affirmative. Ordinarily, such a concurrent finding would be binding on this Court as a second appellate court except where there are misdirections or non-directions – see, for example, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). As we shall demonstrate shortly, we are decidedly of the view that the identification of the appellants was not watertight.

In revisiting the evidence of the four identifying witnesses (PW1, PW2, PW4 and PW5), we noted the following: first, that the incident lasted between ten and twenty minutes, which was possibly sufficient and reasonable time to take note of the identity of the attackers. Secondly, that the raiders confronted the witnesses at the scene from a

close range. Thirdly, that the witnesses gave certain description of the robbers in their respective testimonies at the trial and pointed out that the first appellant brandished a hand gun. Fourthly, as regards the first appellant, PW2 said that she attended him during daytime, implying that she had an ample opportunity to observe his identity.

Nonetheless, we think that the possibility of a mistaken identification was not completely eliminated. First, it is notable that PW1, PW2 and PW5 gave a vague account on the light that aided their identification of the raiders all of whom being strangers to them. While PW1 and PW2, who were inside the main hotel building near the reception, simply said "the light was on", PW5, who was outside that main building guarding the hotel, just said there was security light. None of them mentioned the source of the light or described its intensity. We think this is a significant shortfall.

Secondly, although it is in evidence that PW4 told the trial court that he spotted and identified the fourth appellant as he stood near the gate to the hotel with the aid of bright electric bulbs on the fence around the hotel, we think his evidence is patently implausible and unreliable.

We say so because this witness initially testified, as shown at 34 of the record of appeal, that:

> *"I entered in the room [on the first floor] and switched on the TV. While watching TV, I was phoned and I got outside and went to the balcony and started talking .... While talking on the phone* ***two persons emerged*** *...."* [Emphasis added]

The "two persons" that emerged allegedly included the fourth appellant. While he was still on the phone around 11:30 p.m., PW4 saw and observed the fourth appellant for about two minutes. Most tellingly, his narrative, then, proceeds thus:

> *"Thereafter, I returned inside and slept. I first took bath and soon thereafter I heard a sound of a thing which had been pulled on the floor. I did not make a follow up and instead, I went in (sic) bed and slept. About fifteen minutes before I slept,* ***I heard sounds of about 15 persons talking loudly outside and inside the hotel. It was about 1:30 or 2:00 a.m.*** *...."* [Emphasis added]

In response to the loud sounds, PW4 woke up and tiptoed downstairs only to learn of the robbery. It was around 2:00 a.m. What

we ask ourselves, then, is what made PW4 link the person he allegedly saw and identified as the fourth appellant at 11:30 p.m. with the robbery that occurred more than two hours later? The alleged identification of the fourth appellant by PW4 seems highly speculative, if not an outright lie.

We also find it disturbing that it is not in evidence that any of the identifying witnesses gave any detailed description of the identified assailants to the police officers (including PW6 E.2630 D/Cpl. Joston) who rushed to the scene shortly after the incident. We note that PW6's testimony is equally deficient. He did not allude to any description of the assailants having been made to him except the tale by the security guards (PW3 and PW5) that the robbers had masqueraded as residents at the hotel by renting rooms but that they vanished right after the incident. It means that there was no factual basis for the witnesses to purport identifying the assailants in the identification parades. In any event, this fact shakes the credibility of the identifying witnesses.

With all these discrepancies, we do not hesitate to hold that the visual evidence of the four witnesses was not watertight. We thus find merit in this ground of appeal.

We also recall the evidence that the appellants were purportedly identified at several identification parades and that extracts from the identification parade register were admitted in evidence (Exhibits P.5 and P.6). Be that as it may, in view of our above conclusion that the visual evidence was insufficient, we need not deal with the grounds of appeal assailing the propriety of the identification parade and the validity of the parade register extracts. An identification parade presupposes that the person to be identified on it was identified at the scene of the crime, which is not the case in the instant case. In this regard, we find it apt to look back at our holding in **Ahmad Hassan Marwa** (supra) thus:

> *"We wish to restate the law that an identification parade, is itself not substantive evidence, but only admitted for collateral purposes. It derives its corroborative value from section 166 of the Tanzania Evidence Act. So, if well conducted, its value is only to corroborate the evidence of the identifying witness (see* ***Moses Deo v. Republic*** *[1987] TLR 134 (CAT),* ***Dennis Nyakonda v. Republic****, Criminal Appeal No. 155 of 1990 (unreported)). But the purpose of corroboration is only to confirm or support evidence which is sufficient, satisfactory and credible and not to*

give validity or credence to evidence which is deficient, suspect or incredible (See ***Aziz Abdallah v. Republic*** *[1991] TLR 7). It is further the law that for any identification parade to be of any value, the identifying witness(es) must have earlier given a detailed description of the suspect before being taken to the identification parade (See* ***Emilian Aldan Fungo @ Alex & Another v. Republic****, Criminal Appeal No. 278 of 2008 (unreported)).*" [Underlining added]

See also **Yusufu Abdallah Ally v. Director of Public Prosecutions**, Criminal Appeal No. 300 of 2009; and **Clement John Savimbi & another v. Republic**, Criminal Appeal No. 49 of 2003 (both unreported).

We now move to deal with the grounds challenging the legality and probative value of the first appellant's retracted confession contained in Exhibit P.7.

As hinted earlier, Exhibit P.7 was admitted after an inquiry into its admissibility was conducted. It was intended as proof that the first appellant confessed to the charged offence and that he implicated the second and fourth appellants.

Addressing us on the cautioned statement, Mr. Nkoko submitted that the statement was wrongly recorded by an investigator, D/Cpl. Shaban (PW11), who had already recorded several witness statements on the case. Citing the cases of **Shani Kapinga v. Republic**, Criminal Appeal No. 337 of 2007; and the **Director of Public Prosecutions v. Remina Omary Abdul & Two Others**, Criminal Appeal No. 57 of 2019 (both unreported), he attacked the impartiality of PW11 in recording the statement and contended that it was a fatal irregularity for an investigator to record a cautioned statement after having recorded statements of other witnesses. In the alternative, the learned counsel argued that the retracted confessional statement could not be used against the first appellant's co-accused without corroboration.

Mr. Katuga, on the other hand, admitted that the statement was, indeed, recorded by D/Cpl. Shaban, an investigator, but contended that section 58 of the CPA, as amended by Act No. 3 of 2011, does not bar an investigator from interrogating a suspect and recording such person's cautioned statement. He refuted that PW11 was biased when he recorded the statement just because he had already obtained certain information on the case following his recording of the statements of PW4

and PW12. On whether the statement needed corroboration as against the first appellant's co-accused, Mr. Katuga conceded that, in terms of section 33 of the Evidence Act, Cap. 6 RE 2002, corroboration was required. However, it was his contention that the confession was sufficiently corroborated by the testimonies of the identifying witnesses.

The cautioned statement under discussion (Exhibit P.7) indicates that it was made by the first appellant to PW11 D/Cpl Shaban in terms of section 27 of the Evidence Act, Cap. 6 RE 2002 ("the Evidence Act") as well as section 57 (2) and 58 of the CPA. In **Ramadhan Salum v. Republic**, Criminal Appeal No. 5 of 2004 (unreported), the Court highlighted the difference between statements made under section 57 and 58 thus:

> *"Cautioned statements, therefore, are not made exclusively under section 58 and Exhibit P5 in this case is not any less a cautioned statement merely because it was taken under section 57 and not section 58. The circumstances in which the two kinds of cautioned statements are taken are different.* ***The one taken under section 57 may be as a result either of answers to questions asked by the police investigating***

officer or partly as answers to questions asked and partly volunteered statements. The statement under section 58 is a result of a wholly volunteered and unsolicited statement by the suspect." [Emphasis added]

It is evident that Exhibit P.7 was not taken in the form of question and answer and that it purports to be an unsolicited statement wholly volunteered by the first appellant. It is undeniably a statement recorded pursuant to section 58 of the CPA, not section 57 of the CPA. The issue then is whether that statement was unlawful on the ground that the recording officer to whom it was made had conducted the investigation of the case and that he was naturally biased against the first appellant when it was made.

It is undisputed that the recording officer was an investigator of the case. In fact, Mr. Katuga conceded that the said officer had recorded the statements of two prosecution witnesses – PW4 and PW12 before he recorded the first appellant's cautioned statement. In **Shani Kapinga** (supra) relied upon by Mr. Nkoko, the Court deprecated the double roles played in the case by the recording officer, holding that the recording officer was not an impartial, objective witness and that it was a

fundamental irregularity that resulted into a miscarriage of justice to the appellant. The offending statement was ultimately discounted.

Perhaps, we should go back to **Tabu Nyanda @ Katwiga v. Republic**, Criminal Appeal No. 220 of 2004 (unreported), a previous decision of the Court where we had denounced the practice of a police officer assuming multiple roles in the investigation, interrogation and interpreting to the appellant what had been recorded in his cautioned statement. In that case, however, relying on the decision of the erstwhile Court of Appeal for Eastern Africa in **R. v. Sadiki Kiyoyo & Three Others** (1943) 10 EACA 1033 on a similar issue, the Court held that:

> *"In this case, we fully subscribe to the principle enunciated in* ***Sadiki Kiyoyo*** *that it is* ***undesirable for the same investigating officer to assume the role of interrogating an accused person and also to act as an interpreter.*** *However, in this case as there is no evidence on record to show that the involvement of Det. Sgt. Pius Magambo (PW1 in the trial within a trial)* ***prejudiced the appellant in anyway, we are satisfied that the cautioned statement, Exh. P.3 was correctly recorded.****"* [Emphasis added]

We should emphasise that in **Tabu Nyanda** (supra), the Court stressed that there ought to be proof of prejudice against the appellant:

> *"... apart from the mere assertion by Mr. Magongo that PW1 in the trial within a trial having played both the role of an investigator, interrogator and recorder and interpreter of the statement (Exh. P.3) was likely to be biased, it is not shown how the appellant was prejudiced.* ***In the absence of evidence to this effect, it is a matter of conjecture that the appellant was prejudiced. In this case, it would be recalled that Mr. Magongo had no difficulty in conceding that the statement was voluntary.***" [Emphasis added]

We would observe that the stance in **Tabu Nyanda** (supra) is equally applicable in the instant appeal. Neither the first appellant himself nor Mr. Nkoko offered an iota of evidence on how he (the first appellant) was prejudiced.

Above all, we agree with Mr. Katuga that following the amendment of section 58 of the CPA by section 15 of the Written Laws (Miscellaneous Amendments) Act, Act No. 2011, by inserting new subsections (4), (5) and (6) immediately after subsection (3), PW11, as a police investigator,

was competent to record the cautioned statement when he did so on 30th December, 2015. The subsection reads thus:

> *"(4) Subject to the provision of paragraph (c) of section 53,* ***a police officer investigating an offence for the purposes of ascertaining whether the person under restraint has committed an offence may record a statement of that person*** *and shall-*
>
> > *(a) show the statement to the person and ask him to read it;*
> >
> > *or*
> >
> > *(b) read the statement to him or cause the statement to be read to him and ask him whether he would like to add or correct anything from the statement."* [Emphasis added]

See also **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017 (unreported) where the Court held that the above provision settles that a police investigator is competent to record a cautioned statement of an arrested suspect. Accordingly, we find Exhibit P.7 to have been lawfully recorded.

The above finding leads us now to interrogate the issue whether conviction against the first appellant and his two accomplices that he implicated could be founded solely on the retracted cautioned statement.

As rightly found by the courts below, the appellant's cautioned statement, detailing his involvement in the armed robbery along with the second and fourth appellants, amounts to a confession to the charged offence. But, as hinted earlier, he retracted this statement. The law is that where an accused person retracts his confession the court can convict him on the uncorroborated confession provided that it warns itself of the dangers of acting solely on such confession and if it is fully satisfied that the confession cannot be but true – see, for instance, **Hatibu Ghandi & Others v. Republic** [1996] TLR 12. As a matter of practice, however, a retracted confession requires corroboration – see, for instance, **Ali Salehe Msutu v. Republic** [1980] TLR 1.

In the instant case, the learned trial magistrate was satisfied that the retracted confession was freely given and that it was nothing but the truth. That finding, as stated earlier, was upheld by the learned first appellate Judge after he had carefully examined the statement. Since the basis of the first appellant's conviction was, apart from the confession,

the now discredited visual identification, the learned trial magistrate did not have to warn himself of the dangers of basing conviction solely on the uncorroborated retracted confession. All the same, in the circumstances of this case, we are of the firm view that had the learned trial magistrate done so, he would still have proceeded to convict the first appellant solely on the retracted confession. We so hold as we are mindful that the said confession is so detailed and elaborate; that it gives a narrative of the first appellant's personal facts as well as the sequence of events leading to the armed robbery that no other person except a perpetrator of the crime would have known. We would thus sustain the first appellant's conviction solely on the confession.

In terms of section 33 (1) of the Evidence Act the first appellant's confession implicating his two co-appellants could be acted upon against them. But, we agree with Mr. Katuga that the law requires corroboration of such confession. Indeed, section 33 (2) of that Act enacts to that end as follows:

> *"Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused."*

The sticking issue is whether the retracted confession is corroborated as against the second and fourth appellants. Mr. Katuga argued that there was corroboration. With respect, we disagree with him. To begin with the second appellant, apart from his own discounted cautioned statement there were two strands of evidence that would have incriminated him but both of them fell short. Here we refer to the weak visual identification evidence from PW1 and PW2 as well as the seized artefacts of crime that included irons bars and two motor vehicle number plates (Exhibit P.5) but none of which was linked to the charged armed robbery. The same position holds true regarding the fourth appellant against whom there was no other evidence except the discredited visual identification evidence proffered by PW4. In conclusion, we dismiss the first appellant's complaint here but uphold the other appellants' grievance that the said confession was uncorroborated and that it could not be acted against them.

Next, we address, albeit very briefly, the complaint that the charged offence was unfounded because stealing was unproven. On this, Mr. Mtobesya contended, rather fleetingly but valiantly, that on account of the prosecution's failure to produce at the trial any of the stolen

properties as well as the hand gun allegedly used in the robbery, the essential ingredient of stealing was not established and thus, armed robbery was unproven. We note that Mr. Mtobesya had raised the same point before the first appellate court relying on the decision of the High Court in **Julius Billie v. Republic** [1981] TLR 333.

With respect, we cannot take this submission seriously as it appears to be based on a clear misconception of the law and misreading of the principle in **Julius Billie** (supra). To be sure, in that case the High Court (Samatta, J., as he then was), having noted that the prosecution had failed to produce in evidence the stolen head of cattle that had been recovered, held that non-production of a thing which is the subject-matter of court proceedings goes only to the weight and not to the admissibility of the evidence concerning or relating to it. The court did not lay down or restate any principle of law requiring the tendering of the stolen goods or the offensive weapon as a precondition for establishing the guilt of an accused person. Whether or not the prosecution must tender such items depends, on the whole, upon the circumstances of the case. This being the position, we do not see how **Julius Billie** (supra) could advance Mr. Mtobesya's argument.

As rightly argued by Mr. Katuga, in the instant case the prosecution could not produce the stolen properties and the hand gun used in executing the robbery because none of them were recovered. Indeed, stealing is a crucial element of armed robbery, the other key ingredient being using or threatening to use violence to any person in order to obtain or retain the stolen property. Proving the *actus reus* of armed robbery is wholly evidential; it is not in any way tied to producing the stolen goods and the offensive weapon. In the instant case, sufficient proof of the act of armed robbery was provided by the testimonial accounts of PW1, PW2, PW3 and PW5 as well as that of the owner of the stolen properties (PW12). The complaint under consideration is, therefore, without merit. It falls by the wayside.

At this point, it is evident that the alleged variance regarding the fifth appellant's name is inconsequential. We need not address it.

For all the above reasons, we hold that the prosecution case against the second, third, fourth and fifth appellants was not proven beyond reasonable doubt and proceed to allow their respective appeals. In consequence, we quash and set aside the convictions and sentences against the second, third, fourth and fifth appellants. They should be

released from prison forthwith unless they are otherwise lawfully held. However, we sustain the first appellant's conviction as it is soundly founded upon his confession. The thirty years' imprisonment imposed on him remains undisturbed. Consequently, his appeal fails.

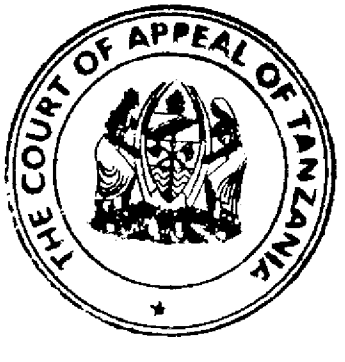
DATED at **DAR ES SALAAM** this 20th day of April, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered on 30th day of April, 2020 in the presence of Mr. Nehemia Nkoko, learned counsel for the 2nd, 3rd and 4th appellants, the 1st and 5th appellants present in person via vedio conference and Ms. Jacqueline Werema, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



B.A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL