IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 551 OF 2016

MAIGE NKUBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Makani, J.)

dated the 25th day of November, 2016
in
(DC) Criminal Appeal No. 84 of 2016

JUDGMENT OF THE COURT

5th & 13th May, 2020

MWARIJA, J.A.:

In the Resident Magistrate's Court of Shinyanga, the appellant, Maige Nkuba was charged together with two other persons, Hamza Hamis and Yahalila Nyaga @ Mwanakabeho who were the 1st and 3rd accused persons respectively (the appellant's co-accused persons). They were jointly charged with the offence of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019). It was alleged that on 8/6/2013 at Mhunze village within Kishapu District in

Shinyanga Region, they stole TZS 7,094,000.00 from Wilson Sospeter @ Lushu and at or before the time of such stealing, threatened the said person with a machete in order to obtain and retain the stolen property.

The appellant and his co-accused persons denied the charge and as a result the case proceeded to a full trial. During the trial, whereas the prosecution relied on the evidence of 6 witnesses and 15 exhibits, the charged persons depended on their own defence evidence. At the conclusion of the trial, the appellant was convicted as charged and his co-accused persons were acquitted.

The background facts of the case which gave rise to this appeal can briefly be stated as follows: On 8/6/2013, Wilson Sospeter @ Lushu was at his home in Mhunze area within Kishapu District. He had returned home from work at about 22.45 hrs. A short while later, while in his bedroom where he was counting the money which he intended to take it to the bank on the next day, he heard the door of his house being pushed. The door which had locked from inside was broken and two persons armed with machetes entered in the room. He wanted to escape from the room but the culprits prevented him from doing so. One of them started to beat him using the flat side of a machete but the other one proceeded to cut the victim on his head. He tried to raise an

alarm but another person arrived and joined the other two bandits and also using a machete, severely wounded the victim. As a result, he lost consciousness and when he regained it, he found himself in the dinning room.

Apparently, the children of one of his neighbours became aware of the incident and informed one Mama Emma who went to the victim's house and assisted to take him to hospital for treatment. The incident was also reported to the police where upon, the victim was issued with a P.F. 3. The appellant and his co-accused persons were later arrested and charged jointly as stated above.

In his evidence, the victim (Wilson Sospeter @ Lushu) testified as PW1. He said that after the incident, he discovered that his TZS 7,094,000.00 was missing. With regard to his assailants, he said that he identified two of them by aid of a "tube light". He contended that whereas one of them was short, the other one was tall. Giving further description of the culprits, he said that one of them had beards and a bald head.

A short while later after the incident, on 22/6/2013 PW1 received a phone call from the police. He was required to report to Kishapu police

station. When he went there, he found that an identification parade had been arranged and the police required him to identify the persons who attacked and robbed him on the date of the incident. It was his evidence that he identified the 1st accused person in the first identification parade and the 3rd accused person in the second parade.

The identification parades were arranged by ASP Gelvas Kundya, who was at the material time the OC/CID, Kishapu District. He testified that PW1 identified the 1st accused person in the identification parade which consisted of ten persons. He tendered the identification parade register as exhibit P.1. His evidence was supported by Shabani Hamisi (PW3) the younger brother of the 1st accused person. PW3 was called by the police and lined him up in the parade. He said that PW1 identified the 1st accused person.

The prosecution relied also on the evidence of No. E 7289 D/Cpl Michael (PW4) who went to re-arrest the 3rd accused person at Uchuga village. The said person's arrest had apparently been caused by the said village's authority and was being held at the VEO's office. PW4 searched the 3rd accused person's house and seized five machetes, four knives and one axe. The same were tendered as Exhibits P.4-12 and the certificate of search as exhibit P.3. Another witness, No. E 4749 Cpl.

Jidimani (PW5) testified that he recorded the cautioned statement of the appellant on 27/6/2013. The statement was admitted in evidence as exhibit P.14. The Justice of the Peace, Julius Marwa (PW6), a Primary Court Magistrate was another witness for the prosecution. In his evidence, he stated that the appellant was taken before him by the police on 26/6/2013. According to his evidence, the appellant was willing to confess. As a result, PW6 proceeded to record the appellant's extra-judicial statement whereupon, at the end, the appellant signed it. The statement was admitted in evidence as exhibit P.15.

In their defence, the appellant and his co-accused persons denied the charge. Each one of them gave a different version of his defence. Since the appellant's co-accused persons are not parties to this appeal, we do not find it necessary to give an account of the substance of their defence. As for the appellant, it was his defence that he was arrested at his home on 24/6/2013. He testified that, prior to his arrest, some cattle strayed into his shamba. He went to drive them away and in the process, a fight ensued between him and the owner of the cattle who later on went to report to the police that he was beaten by the appellant. It was the appellant's further evidence that on the next day, he was arrested and sent to the police. To his surprise, he said, he was

charged not with the offence complained of by the cattle owner but the offence charged in this case.

In his decision, the learned trial Resident Magistrate found that the prosecution evidence did not prove the case against the 1st and 3rd accused persons. He thus found them not guilty as stated above and acquitted them. With regard to the appellant, the learned trial magistrate was of the view that the extra-judicial statement (Exhibit P.15) proved the case against him (the appellant) beyond reasonable doubt. Following his conviction, the appellant was sentenced to 30 years' imprisonment.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was unsuccessful. The High Court (Makani, J.), upheld the finding of the trial court. The learned first appellate Judge found that the appellant was properly convicted on the basis of his confession before the Justice of the Peace.

The appellant was further dissatisfied with the decision of the High Court hence this appeal. His memorandum of appeal consists of 8 grounds of complaint which can be consolidated into 4 as follows: -

1. That the learned High Court Judge erred in law in upholding the conviction of the appellant while the same was founded on the extra-judicial statement which for the reasons stated herein below was wrongly admitted and acted upon:

   (i) The statement was not read over to the appellant in his own language.

   (ii) There was no evidence which supported it.

   (iii) The appellant was not informed of his right to oppose or admit the contents of the statement after having been read over in court.

   (iv) The statement does not show that the appellant made it voluntarily.

   (v) The statement was recorded after 11 days from the date of the appellant's arrested.

2. That the learned High Court Judge erred in law in failing to find that in its decision, the trial court shifted the burden of proof to the appellant.

3. That the learned High Court Judge erred in law and fact in failing to find that the trial court had wrongly rejected the appellant's strong defence.

4. That the learned High Court Judge erred in law in upholding the decision of the trial court which was based on uncorroborated prosecution evidence.

At the hearing of the appeal which was conducted through video conferencing, the appellant appeared in person unrepresented. On its part, the respondent Republic was represented by Mr. Miraji Kajiru, learned Senior State Attorney. When he was called upon to argue his grounds of appeal, the appellant opted to let the learned Senior State Attorney submit in reply to the grounds of appeal and thereafter would make a rejoinder if the need to do so would arise.

Mr. Kajiru resisted the appeal arguing that the appellant's conviction was well founded. On the 1st ground of appeal, the learned Senior State Attorney submitted that the appellant's extra-judicial statement, which formed the basis of his conviction, was properly admitted in evidence. He disputed the above stated contentions (i) – (v) relied upon by the appellant in support of the 1st ground of appeal.

With regard to contention (i), Mr. Kajiru argued that the same is without merit because throughout the proceedings, the appellant did not complain that he did not understand the language of the Court. On contention (ii), it was the learned Senior State Attorney's submission that the extra-judicial statement did not require an independent supporting evidence for it to be relied upon by the Court.

As for the contention (iii) that the appellant was not informed that he had the right of opposing or admitting the contents of the extra-judicial statement after the same had been read over, Mr. Kajiru argued that such is not a legal requirement. He argued further on contention (iv) that before the statement was admitted in evidence, the appellant was asked whether he had any objection. According to the learned Senior State Attorney, the appellant did not complain that he did not make the statement voluntarily, instead he expressed that he did not have any objection for the same to be admitted in evidence. Mr. Kajiru argued therefore, that the appellant cannot now contend that he did not make the statement voluntarily. To bolster his argument, the learned Senior State Attorney cited the case of **Vicent Ilomo v. The Republic**, Criminal Appeal No. 337 of 2017 (unreported).

Concerning contention (v), that the extra-judicial statement was recorded after 11 days of the appellant's arrest hence rendering it invalid, Mr. Kajiru's reply was that, in law there is no time limit for recording of a suspect's statement before the Justice of the Peace. He submitted therefore that the appellant's complaint on that aspect is also devoid of merit.

We have duly considered the contents of the appellant's grounds of appeal and the submission made by the learned Senior State Attorney. At the outset, we agree with Mr. Kajiru that the appellant's conviction was solely based on his extra-judicial statement. In his judgment at page 86 of the record, the learned trial Resident Magistrate stated as follows: -

> *"It appears to me that the only evidence the court can rely on is the evidence of PW6 Julius Marwa the justice of [the peace] who [took] the extra judicial [statement] of 2nd accused who narrated in how they came up with the mission and complete the mission to break the house and steal but there is no enough evidence on the part of the 1st and [3rd] accused person[s].... But regarding 2nd accused prosecution proved beyond*

reasonable doubt and proceeds (sic) to convict him as he stands charged."

That is the position which was also taken by the High Court. Having re-evaluated the evidence, the learned first appellate Judge observed as follows at page 105 of the record of appeal.

"The trial court only relied on the confession by the appellant in the extra-judicial statement before the Justice of Peace one Julius Marwa PW6."

In this appeal, the appellant has challenged the validity of that statement on the grounds stated above. It is noteworthy that, as argued by Mr. Kajiru, when the prosecution sought to tender that statement, the appellant did not object its admission in evidence. The contentions that his statement was not read over in his own language and that he was not informed of his right of objecting or admitting its contents are in our view, without merit. We are in agreement with Mr. Kajiru that since the appellant did not complain that he did not understand the language of the court and because he was afforded the opportunity of objecting the admission of his statement, these complaints are without merit. In fact the appellant followed the

prosecution case and at the end, gave his defence evidence in which he narrated how he was arrested and later charged.

On the contention that he did not give the statement voluntarily, we are of the view that such a complaint is an afterthought. This is because, apart from having not raised an objection to the admission of the statement when he was given the opportunity to do so, he did not raise that complaint in his defence. In the case of **Vicent Ilomo** (supra) cited by the learned Senior State Attorney, the Court cited a passage from the case of **Emmanuel Lohay and Another v. The Republic**, Criminal Case No. 278 of 2018 (unreported). In that case, the Court had this to say when confronted with the situation similar to the one which is applicable in this case:

> *"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross-examination or during defence – **Shihoze Semi and Another v. Republic** (1992) TLR 330. In this case the appellants 'missed the 'boat' by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to*

have been taken before they were admitted in evidence."

On the other contentions; that the evidence of the appellant's extra-judicial statement was not supported by independent evidence and that the statement was invalid because it was recorded after 11 days of the appellant's arrest, we agree with Mr. Kajiru first, that such evidence need not necessarily be supported by independent evidence so as to be acted upon to convict an accused person. Secondly, there is no prescribed time limited for recording a suspect's confession before the Justice of the Peace. For these reasons therefore, we do not find merit in the appellant's first ground of appeal.

The 2nd and 3rd grounds of appeal are in our view, equally without merit. The contention that the trial court shifted the burden of proof to the appellant is not borne out by the record. Similarly, the trial court rightly rejected the appellant's defence because he did not challenge the extra-judicial statement. He merely denied the charge contending that he was wrongly charged with the offence which he did not commit.

With regard to the 4th ground of appeal, the same raises the issue whether or not the evidence upon which the appellant's conviction was

founded required corroboration. In other words, the issue is whether or not conviction can safely be sustained basing on extra-judicial statement. The first appellate court answered that issue in the affirmative. We respectfully agree with that position. In the case of **Mashimba Dotto @ Lukubanija v. The Republic**, Criminal Appeal No. 317 of 2013 (unreported), the Court observed as follows:

> *"... as correctly opined by both learned counsel, the judge was certainly correct in saying that under normal circumstances, a conviction could safely lie so long as the court warns itself of the danger of acting on the statement without corroboration. It is trite law that as a matter of practice a conviction would not necessarily be illegal but it is a matter of practice in such cases for a trial court to warn itself and if the trial is with the aid of assessors to direct them on the danger of convicting without corroboration."*

In the present case, although it is not on record that the trial magistrate warned himself before he convicted the appellant, we are of the settled view that given the circumstances under which the appellant's extra-judicial statement was admitted in evidence, the fact that the trial magistrate did not warn himself did not affect the

appellant's conviction. When the appellant was asked whether he had any objection to the prosecution's prayer to tender his statement, he replied that he did not have any objection. As stated above, he did not further, challenge that statement during cross-examination or during his defence. In the circumstances therefore, the 4th ground of appeal is equally without merit.

For the foregoing reasons, the appeal must fail. In the event the same is hereby dismissed for want of merit.

DATED at **TABORA** this 12th day of May, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Judgment delivered on 13th day of May, 2020 in the presence of the Appellant in person via video conference and Miss Gladness Senya, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL