IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: JUMA, C.J., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO 219 OF 2018

1. **SALUM YUNUSI NGONGOTI**
2. **IDD HAMAD KAGOLO**
3. **ADAMU SHABANI HAJI** } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Hon. E.J. Mkasimongwa, J.)

dated the 16th day of July, 2018

in

HC. Criminal Appeal No. 332 of 2016

JUDGMENT OF THE COURT

10th & 18th February, 2021

JUMA, C.J.:

SALUM YUNUSI NGONGOTI, IDDI HAMAD KAGOLO and **ADAMU SHABANI HAJI**, from now on the first, second, and the third appellant respectively, were tried and convicted by the District Court of Temeke on two counts, one of armed robbery contrary

to section 287A of the Penal Code, Cap 16 (as amended by Act 4 of 2004) and a second count of gang rape contrary to section 131A (1) and (2) of the Penal Code, Cap 16 (R.E. 2002).

On the count of armed robbery, the prosecution alleged that on 21st January 2011 at about 02:00 hours at Magogoni Kigamboni area within Temeke Municipality in Dar es Salaam, they stole three laptops, TOSHIBA, DELL, and IBM; a camera, two satellite digital receiver, one screen DVD, two wrist-watches, two pieces of the golden chain, eight pairs gold earrings, a golden chain, seven different mobile phones, six pairs of vitenge cloths and 400,000 shillings in cash, all property of HAMIS NGALENI. The prosecution further alleged that immediately before stealing they threatened the owner by a machete in order to obtain the stolen property.

The second charge of rape against the appellants stated that on the same day at the same place and time, the appellants had unlawful carnal knowledge of a sixteen-year-old girl who, for the sake of her modesty, we shall refer to as **PW6**.

The background leading up to this second appeal is as follows. It was around 2:00 am, Hamisi Ngalemi (PW1) and his wife, Tausi

Hassani (PW4), were asleep together with their 18-month baby when approximately seven bandits broke into their bedroom. They threatened to kill them if they failed to hand over money. As they tied up PW1 with ropes, the bandits ordered them to remain silent. PW4 told the bandits to collect shillings 100,000/=, which was in her purse. She also surrendered her wallet containing shillings 300,000. When the bandits finally left, they took with them PW4's gold chain and her marriage ring. They also took away her seven sets of kitenge clothes. Wristwatches, earrings, laptop, digital camera, and DVD Machine were similarly stolen. The bandits led PW4 to one of the corridors where they tried to sexually assault her when they ordered her to undress. She adamantly refused, and raised her voice in protest. The bandits relented went into the girls' room where, according to PW4, they raped PW6.

PW1's sibling, Mr. Hashemi Ngalemi (PW3), was sleeping in another room when bandits entered shining torchlight, wielding a machete, and demanded to see the owner of the house. Their mission, according to PW3, was to collect twenty million shillings, which they believed was in the house.

PW6 testified on how the bandits pushed open an unlocked door to her room, and three men entered. PW6 described one as tall and wore a dark hat, and he also carried a machete. PW6 did not identify the remaining two bandits. They demanded money, while the one wielding a machete asked whether she had a mobile phone. They took 2,000 shillings from a draw. They pulled off the bedsheet, which she had used to cover her face, and used it to tie her hand to her legs. They stuffed a piece of cloth into her mouth before one bandit pulled down her underpants and inserted his hands into her vagina. He next zipped down his trousers and proceeded to rape her. The rest took turns to rape her. PW6 reported to Kigamboni Police Station, who referred her first to Kigamboni hospital, which in turn referred her to Mwananyamala hospital.

Meanwhile, while PW3 was returning home in a police car after reporting the armed robbery he spotted several youths walking along the road. PW3 and the police gave chase. They caught up with the first appellant who was carrying a bag.

Before retiring from the police force, James Kabombo (PW9) was a police officer at Kigamboni Police Station. Immediately after receiving

the report on armed robbery, he drove to the crime scene and participated in the first appellant's chase and arrest. PW9 testified how the police arrested other appellants following the information they received from the first appellant.

Placed on their defence, the appellants gave sworn evidence and denied responsibility. The 1st appellant testified that on 21/1/2011, he was at Vijibweni kwa Urasa Magengeni area of Kigamboni. He was refereeing playing on a pool table at a local liquor bar when the police arrived and asked him what he was doing. Police forced him into their waiting police car where he found another person lying on his stomach with a bag beside him. The police drove them to Kigamboni police station where they were locked up in the police cell.

The second appellant testified how on 24/4/2011 as he was preparing to board a commuter bus at Magomeni to take him to Ubungo, three police officers accosted and arrested him. They took him to Magomeni Police Station. He urged the trial court to dismiss the case because the two main prosecution witnesses, PW1 and PW6, did not place him at the crime scene. He stated further that even the two

police officers who alleged that they arrested him, gave a contradictory account of how they stopped him.

The third appellant recalled that his arrest on 25/5/2011 arose from a civil case over a parcel of land, between him and one Aisha. A police investigator had advised him to refund shillings 450,000/= back to Aisha in order for Aisha to return his land title. The third appellant claimed that he gave the police investigator money to take to Aisha. That, instead of handing over the money to Aisha, the officer not only kept it for himself but arrested and charged him in court, together with the other two appellants.

After the trial, the trial court convicted the three appellants on both counts of armed robbery and gang rape. He sentenced each of them to thirty years imprisonment for each count. The trial magistrate ordered the sentences to run concurrently.

Aggrieved by the trial court's conviction and sentence, the appellants appealed to the High Court at Dar es Salaam in Criminal Appeal No. 334 of 2016. The first appellate court (Mkasimongwa, J.) agreed with the trial court's finding that it was the appellants, who committed the armed robbery and the gang-rape. Apart from the

conclusion that witnesses at the scene of the crime identified the first appellant, the first appellate court relied on his cautioned statement (Exhibit P7), to which he did not object its admission. The first appellate Judge was similarly satisfied with the second and third appellants' confessional statements were voluntary. The High Court upheld the three appellants' convictions and sentences.

The appellants brought this second appeal, which raises eight grounds coming down to the following complaints. The first Appellant faulted how his cautioned statement (exhibit P7) was employed to convict him without assessing its validity. He complained that the trial court failed to warn him of the dangers he faced for failing to object to his cautioned statement's admission. Secondly, the appellants fault how the two courts below relied on the evidence of visual identification of PW4 and PW6, which they described as insufficient to meet the required standard for unmistaken identification. Thirdly, the appellants complained over their conviction based on the doctrine of recent possession since the prosecution did not tender any seizure notice to prove the first Appellant's arrest, search, and being found in possession of exhibits P1-P3 found on pages 71 and 72 of the record of appeal.

They also pointed out that the owners of the stolen properties (PW3 and PW4), who were present during the arrest did not give a detailed description of their properties.

In their fourth ground, the Appellants faulted the two courts below for upholding the second Appellant's conviction based on a retracted cautioned statement (exhibit P4) whose admission did not follow the procedure of reading out its contents after being admitted. The fifth ground of appeal complained over how the two courts relied on the third Appellant's cautioned statement to convict without establishing whether it was voluntary. In their ground number six, the appellants faulted the charge sheet on the second count of gang-rape describing it defective. The seventh ground of appeal complains about contradictions in the evidence of PW3, PW4, PW6, and PW9 over the items found in the bag in possession of the first Appellant. The eighth ground of appeal claims that the two courts below failed to evaluate the evidence on record objectively.

At the hearing of the appeal on 10/02/2021, Ms. Sabrina Joshi learned State Attorney represented the respondent Republic. The appellants who appeared in person by video link from prison, preferred

to let the State Attorney first submit in response to their eight grounds of appeal.

At the very outset, Ms. Joshi supported the appellants' appeal.

On the first appellant's complaint that he was not warned about the dangers of failing to object when his cautioned statement (exhibit P7) was admitted, Ms. Joshi pointed out that there is no law, which obliges the trial magistrate, to warn the appellant about the dangers he faced for failing to object to the admission of his confessional statement. The learned State Attorney conceded an anomaly that E6052 D/CPL Kushoka (PW12), an investigator who tendered exhibit P7, was not the proper witness to tender that confessional statement which was recorded by another officer, C4312 D/SSGT MPENZWA. In so far as the learned State Attorney is concerned, PW12 violated the procedure under section 34B of the Evidence Act, Cap 6 which guide when a witness can present the evidence on behalf of another. She urged us to expunge the confessional statement which PW12 presented in court without explaining the absence of C4312 D/SSGT MPENZWA.

Turning to the second ground of appeal, which challenges the visual identification evidence of PW4 and PW6, Ms. Joshi agreed with

the appellants that these witnesses gave contradicting evidence regarding the lighting to facilitate unmistaken identification. For support, she referred us to **SELEMAN NASSORO V. R.,** CRIMINAL APPEAL NO. 3 OF 2018 (unreported) which identifies some of the important factors that guarantee unmistaken identification of a suspect at night. These factors include proximity to the person identified, the source of light, its intensity, the length of time the identified person was under observation, and familiarity. She argued that the identification evidence of Tausi Hassan (PW4) on page 65 of the record did not disclose the source of lighting, which helped to identify the appellants. She submitted further that other witnesses, PW1, PW2, and PW3, did not identify the first appellant at all.

Concerning PW6, who accused the appellants of gang-raping her, Ms. Joshi submitted that she did not specify the amount of time she and the appellants spent together to prove that she without mistake identified the appellants. All in all, Ms. Joshi agreed with the appellants that identification evidence of the prosecution witnesses was weak, contradicting and cannot be relied on to convict the appellants.

Ms. Joshi also addressed the several issues that the appellants raised under their third ground of appeal. These relate to the application of the doctrine of recent possession to convict them. She rejected the complaint that the doctrine of recent possession cannot apply to convict the first appellant simply because the prosecution neither made nor produced the seizure notice to prove his arrest, search, and finding him in possession of exhibits P1, P2 and P3. She explained that looking back at how the police arrested the first appellant, it was not possible to issue seizure notice because the police arrested the first appellant in an emergency situation that does not require seizure notice under section 42 of the Criminal Procedure Act, Cap. 20.

The learned State Attorney however agreed with the appellants that the doctrine of recent possession cannot apply in the circumstances of this appeal, to convict the appellants. She referred to the conditions in **JOSEPH MKUMBWA AND ANOTHER V. R.**, CRIMINAL APPEAL NO. 97 OF 2007 and **SELEMAN NASSORO MPELI V. R.** (supra), which the prosecution evidence failed to meet in order to invoke the doctrine of recent possession to convict the appellants:

"First: That, the property was found with the suspect.
Second: That, the property is positively proved to be the property of the complainant.
Third: That, the property was recently stolen from the complainant.
Fourth: That, the stolen property constitutes the subject of the charge against the accused."

The learned State Attorney elaborated that items like *vitenge* clothes, mobile phone (SAMSUNG), gold bangles, and gold chain pass hands quickly. Without the complainants indicating their specific marks or descriptions of their properties, the two courts below should not have applied the doctrine of recent possession to convict the appellants. She added that the supposed owners did not say anything during their evidence about how they identified their stolen properties which were found with the first appellant. Because the conditions required to apply the doctrine of recent possession were not satisfied, the appellants should not be convicted on the basis of that doctrine, she submitted.

Ms. Joshi conceded to the complaint by the second appellant that the prosecution did not follow the laid down procedure to tender his cautioned statement (exhibit P4), which he also retracted during the trial. She referred us to page 84 of the record of proceedings where the second appellant objected when Detective Sergeant Mathew (PW7) asked to produce exhibit P4. The learned State Attorney faulted how the trial magistrate casually overruled the objection without so much as asking PW7 to read out its contents. She referred us to **SAGANDA SAGANDA KASANZU V. R.**, CRIMINAL APPEAL NO. 53 OF 2019, where the tendering witnesses did not read out their contents after the trial court admitted seizure certificate and valuation reports. The Court considered this to be wrong, prejudicial and expunged them from the record. She urged us to expunge exhibit P4 from the record of this appeal.

Just like in the fourth ground of appeal, the learned State Attorney faulted the procedure the trial court followed in admitting the third appellant's cautioned statement (exhibit P6). The third appellant objected when Detective Corporal James (PW10) offered to tender exhibit P6. Ms. Joshi submitted that the trial magistrate should have

conducted an inquiry on the cautioned statement's voluntariness immediately after the objection. She urged us to expunge the cautioned statement because the trial court did not carry out an inquiry in the follow-up to the third appellant's objection.

The learned State Attorney next addressed the question of defective charge sheet on the second count of gang-rape. In their sixth ground of appeal, the appellants faulted the failure to cite to the provisions creating the offence of rape as an integral part of gang-rape. The learned State Attorney conceded that in a charge of gang-rape, it is not sufficient to refer to sections 131A (1) and (2) of the Penal Code alone, without also citing sections 130 and 131 of the Penal Code, which create the offence of rape. She referred us to **ROBERT S/O MADOLOLYO & MASUNGA DUDU @ MLEKWA V. R.**, CONSOLIDATED CRIMINAL APPEALS NOS. 46 AND 428 OF 2019 (unreported) to support her submission that provisions creating rape are an essential element of the offence of gang-rape. In the referred decision, the Court in essence restated the position that citation of the provisions creating the offence of gang-raping under section 131A (1)

and (2) must also include the citation of the provisions creating the offence of rape:

> *"Our understanding from the above provisions of the law is that it specifically describes gang rape which is a more serious type of offence of rape and together with its punishment. As it is, it explains the circumstances under which an offence of rape can be categorised to be gang rape. As such offence of gang rape cannot stand on its own under this provision without citing any of the provisions under section 130 (1)(2)(a) to (e) of the Penal Code which specifically provide for specific offences of rape. In this regard, it is our considered view that, in the circumstances of this case the charge against the appellants ought to have not only predicated under section 131A of the Penal Code but also under section 130 (2)(a) of the same Code..."*

Thus, Ms. Joshi urged us to strike out the second count of gang rape on account of the defect.

The learned State Attorney concluded by arguing grounds number seven and eight together. She submitted that after expunging the cautioned statements, discounting the application of the doctrine of recent possession and the evidence of visual identification, there

remains no evidence linking the appellants to the remaining charge of armed robbery. She urged us to allow the appeal and order the immediate release of the appellants.

On their part, each one of the appellants had nothing to add in reply other than, each appellant agreed with the learned State Attorney. They urged us to set them free.

We propose to begin with the sixth ground of appeal on defective charge of gang-rape, to which Ms. Joshi, the learned State Attorney, had readily conceded. We think, our decision in **ROBERT S/O MADOLOLYO & MASUNGA DUDU @ MLEKWA V. R.** (supra) which Ms. Joshi referred, is an authority that a charge of gang-rape is defective if it cites sections 131A (1) and (2) of the Penal Code alone without also citing sections 130 and 131 of the Penal Code, which create the offence of rape. In so far as the appellants faced an incurably defective charge of gang-rape, they were prevented from appreciating all the statutory ingredients of the offence of gang-rape facing them.

In **GEROLD MORIS HUGO V. R.**, CRIMINAL APPEAL NO. 204 OF 2016 (unreported), the Court reiterated its understanding that a charge

sheet in a criminal trial is the foundation of any prosecution facing an accused person, as it provides him with the road map of what to expect from the prosecution witnesses during the trial of his case. Relating this understanding to this appeal before us, failure to cite in the second count the provisions creating the offence of rape denied the appellants road map of what to expect from prosecution witnesses. We agree with Ms. Joshi the second count of gang rape is incomplete and unsustainable in so far as it omitted to cite any of the provisions under section 130 (1) (2) (a) to (e) of the Penal Code, which create several distinct categories of rape. We hence allow the sixth ground of appeal.

We next advert to the evidence of visual identification. Ms. Joshi has correctly articulated the conditions governing evidence of visual identification when done at night, which is accepted as identification under difficult conditions. Over the years since **WAZIRI AMANI V REPUBLIC** (1980) TLR 280, this Court has decided that no court should act on visual identification evidence unless there are no possibilities of mistaken identity and the Court is fully satisfied that the proof before it is watertight. Ms. Joshi is therefore correct in her submission that the visual identification evidence of PW4, PW6, PW1,

PW2, and PW3 was neither sufficient nor satisfactory to meet the required standard to make a watertight identification of the appellants at the crime scene. We have revisited the evidence of these five prosecution witnesses. All are silent about conditions necessary for unmistaken identification.

The identification evidence of PW4, PW6, PW1, PW2, and PW3 did not meet the preconditions set out in the case of **SELEMAN NASSORO MPELI V. R.** (supra), which Ms. Joshi referred to us.

On the question of applying the doctrine of recent possession, we agree with Ms. Joshi that it cannot, in the circumstances of this case, extend to convict the first appellant where the supposed owners did not identify in court their stolen properties found with the first appellant. In **KENNEDY YALED MONKO V. R.,** CRIMINAL APPEAL NO. 265 OF 2015 (unreported), the District Court of Manyoni had convicted the appellant of stealing nine cattle. The High Court at Dodoma dismissed his first appeal. In his second appeal, the Republic supported the appeal, arguing that the owners did not identify their heads of cattle in court, which the prosecution found in the appellant's possession. Nowhere in his evidence did the owner of stolen livestock formally

identify the nine heads of cattle as his, or did he give any special identification mark on any of the nine cattle heads.

In this appeal, the prosecution relied on the cautioned statements of the second appellant (exhibit P4) and that of the third appellant (exhibit P6). The learned State Attorney, in our view, restated the law correctly when she stated that failure to read out exhibit P4 after their admission is a fatal irregularity, which should result in the exclusion of this exhibit as evidence on record.

Similarly, we agree with the learned State Attorney that the admission of the third appellant's cautioned statement (exhibit P6) did not follow the procedures after the third appellant objected to the exhibit. The trial magistrate did not carry out an inquiry to determine the third appellant's cautioned statement's voluntariness after he objected to the admission. This procedural irregularity must lead to expunging exhibit P6 from the record of evidence. **OMARI IDDI MBEZI, VISITOR CHARLES, JOHN ANDREW & JAFARI IDDI MBEZI V. R.** CRIMINAL APPEAL NO 227 OF 2009 (unreported), the Court insisted on the procedure of carrying out an inquiry where an accused person objects the admission of his cautioned statement.

The Court in **OMARI IDDI MBEZI, VISITOR CHARLES, JOHN ANDREW & JAFARI IDDI MBEZI V. R** (supra) also spelled out the consequences for failing to follow the established procedure when an accused person object a proposed admission of a confessional statement. The trial court must stop the trial and immediately conduct an inquiry or a trial within trial to determine the point the accused person is objecting. The inquiry determines the voluntariness of the confession. If the trial court fails to follow this procedure, the confessional statement cannot be relied on to convict because its voluntariness will not be established.

We as a result expunge the second and the third appellants' cautioned statements (exhibits P4 and P6) from the record of this appeal.

The respondent Republic supported the appellants' appeal. We agree with the learned State Attorney there is no evidence linking the appellants with the remaining first count of armed robbery.

We are satisfied that this appeal has merit, which we allow by quashing their convictions, set aside their sentences. We order the

appellants' immediate release from prison unless they otherwise lawfully held for other lawful cause.

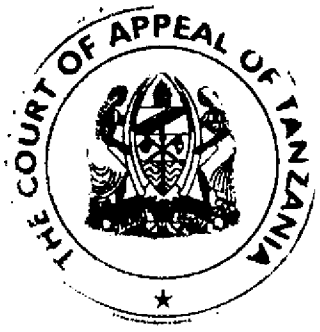
DATED at **DAR ES SALAAM** this 16th day of February, 2021.

I. H. JUMA
CHIEF JUSTICE

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered on 18th day of February, 2021 – linked via video conference at Ukonga Prison in the presence of the 1st, 2nd and 3rd appellants in person and Mr. Benson Mwaitenda, learned State Attorney for the respondent Republic, and is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL