IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 300 OF 2017

ALFRED MAKARANGA ..... APPELLANT
VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es salaam)

(Feleshi, J.)

Dated the 31st day of July, 2015
in
Criminal Appeal No. 86 of 2014
.....

JUDGMENT OF THE COURT

12th & 27th July 2021

MAIGE, J.A.:

The appellant and eight others who are not parties to this appeal (the eight others) , were charged before the District Court of Ilala (the trial Court), with the offences of conspiracy to commit an offence and armed robbery contrary to sections 384 and 278A, respectively of the Penal Code, [Cap. 16, R.E., 2019]. The factual allegation in relation to the first offence was that, on the date, time and place not known, the appellant jointly with the eight others and others not arraigned at the trial court conspired to commit an offence of armed robbery. On the second offence, it was alleged that, on 8.10. 2008 at

or about 04.00 hours , the appellants jointly and together with the eight others and others not parties to the trial court, at Tabata Matumbi area within Ilala District in Dar Es Salaam Region did break and enter into the Godown of Yusuf Jabir and steal therefrom air conditions worth TZS 39,500,000.00, the properties of the said Yusuf Jabir and that soon before such stealing, they injured Alfred Sigareti with a panga and gun in order to obtain the said properties. While the eight others were acquitted, the appellant was convicted of both the offences and sentenced to seven years imprisonment for the first offence and thirty years imprisonment for the second.

The brief facts of the case as may be gathered from the record are as follows. Yusuf Jabir (PW4), was an agent of Philips and West Points, the companies based in France and Denmark, respectively. He was a dealer in importation and supply of among others, air conditions and electronic materials manufactured by the said companies. He was the owner of a godown at Tabata Matumbi area within the Ilala District in Dar Es Salaam Region which was used for storage of such goods.

The appellant and Fred Segereti, (PW3) were the security guards of the godown on the material date and time. Together with them, there were Selemani Rajabu, the third accused in the trial and Juma Sultani who was not a party to the trial. PW3 was the command in charge of the security guards and was on the front side of the godown on the material day. The appellant who was holding a shotgun (exhibit P4), was in patrol of the area surrounding the godown. The third accused was at the gate whereas Juma Sultan at the back side. Though, it was in the mid night, there was electric lights surrounding the godown, said PW3.

Suddenly, PW3 testified further, the appellant and Juma Sultan in a company with an unknown person, attacked PW3 and covered him with a sweater on his mouth. When he asked as to the going, the appellant told him that; "*Tulia tufanye kazi godown hili la kwako ni la ndugu yako*". As PW3 was struggling to rescue his life, the gun fell down. PW3 was thereafter taken to unknown place and severely beaten with a hard instrument. He was left unconscious. PW3 told the trial court that, although it was during night, he was able to identify the appellant and the said Juma with the aid of electric light because

they were his fellow security guards. He was also able to identify the appellant by his voice.

In accordance with the testimony of PW3, at the godown, there is a compound wherein Hashimu Abdallah, the supervisor, resides. On the material date at 23.00 hours, PW3 testified, the said Heshimu closed the main gate with padlock and went to bed. In his evidence in chief, PW4 claimed to have been informed of the incident by the said Hashimu. In his further testimony on cross examination, he stated as follows:-

> *"Hashimu Abdallah told me he saw the whole act of stealing but he was afraid to be attacked by robbers"*

D.2831/ D/Sgt Laurent (PW2) was among the police officers who inspected the scene of the crime soon after the incident. He arrived thereat at around 5.00 hours on the material date in a company of PW4 and OCCID, Buguruni Police Station. They found the third accused there who informed them that the appellants were among the persons who committed the crime. He took them to where PW3 was and they found him dumped while unconscious. His clothes were full of blood. He said, at the scene of the crime, they also found the short

gun believed to be used in the commission of the crime (exhibit P4). Subsequently, PW2 interrogated the appellant who confessed to have committed the offence (exhibit P3). In accordance with the testimony of Inspector Ibrahim (PW1), about 46 pieces of air conditions, which were believed to be among the stolen properties (exhibit P-1) were, upon investigation, discovered, on 23/10/2008 at Sinza, in a garage yard near Lion Hotel.

Though, the testimony of PW2 is silent on whether they did take PW3 to hospital, in his own oral account, PW3 claimed to have been taken to Amana Hospital by the same police officers and underwent treatment in terms of PF3 (exhibit P5).

In his defense, the appellant denied commission of the offence. He said, on the material date, he was on duty in the night shift. At about 19.30, he received information about sickness of his child. Upon being permitted by PW3, he left the place at 20.00 hours and he did not know what happened thereafter as he never came back. He was arrested on 21.10.2008 and he denied to have confessed commission of the offence.

In his judgment, the trial court convicted the appellant with both the offences. It was persuaded by the testimony of the prosecution eye witness PW3. In relation to the first offence, the trial magistrate stated as follows:-

> *The evidence of PW3 is direct in respect of 2nd accused person and another person namely Juma sultan who is not in court did approach him and attacked him jointly while telling him not to resist as the said godown is not his property, they need to do their "work" there. Hence the act of 2nd accused working together with his fellow said co-guard to suppress PW3. Manifested their ill intention planned before to commit the crime (sic).*

On appeal, the first appellate court confirmed the finding of the trial court. In the opinion of the learned High Court Judge, the visual identification evidence of PW1 coupled with the appellant's own confession (exhibit P3), established ,beyond reasonable doubt that, the appellant committed the offences. The learned High Court Judge did not agree with the submissions from both sides that, the confessional statement in exhibit P3 was improperly admitted for want of an inquiry. In his opinion, as exhibit P3 was produced without there being an

objection by the appellant and his counsel, the requirement for conducting an inquiry did not arise.

Still aggrieved, the appellant has instituted this appeal. In his amended memorandum of appeal, he has raised six grounds which in our reading can be reduced into two main complaints. **First**, the trial court wrongly relied on the confessional statement of the appellant which was improperly admitted. **Second**, the case against the appellant was not proved beyond reasonable doubt.

In the conduct of this appeal, the appellant appeared in person and was not represented. The Respondent/ Republic was represented by Janipher Massue and Ester Martin, learned Senior State Attorney and learned State Attorney, respectively. In his submission, the appellant adopted the memorandum of appeal to read as his submissions and urged the Court to allow the appeal.

As we expected, MS. Massue supported the appeal and urged the Court to set the appellant free. She informed the Court that, the confessional statement in exhibit P3 was irregularly admitted in evidence in that, it was not preceded by an inquiry to establish if it was procured voluntarily. She submitted that, the omission is fatal. She

therefore, advised the Court to expunge exhibit P3 from the record. Once the confessional statement is expunged from the record, she submitted, there is no sufficient evidence to sustain the appellant's conviction.

On the second complaint, it was her strong submission that, the visual identification testimony of PW3 was not water tight to pass the test propounded in **Waziri Amani vs. Republic**, (1980) TLR 250. She assigned three reasons. **First,** even though the crime was committed during midnight, PW3's oral account is silent on the intensity of the electric tube lights by the aid of which he identified the appellant. **Second,** the evidence does not account for the duration of time within which PW3 observed the appellant without interruption and the proximity between him and the appellant. **Third**, the identity of the appellant was not disclosed at the earliest possible time. She concluded therefore, that, the visual identification by PW3 did not eliminate all possibilities of mistaken identification.

On our part, we have considered the concurrent submissions by the parties in line with the judgments and proceedings of both lower courts. In principle, we agree with them. We shall rationalize our opinion as we go along.

On the first complaint, while we agree with the first appellate court that, an inquiry was not required in the circumstance since the appellant through his counsel did not object to the production of the confessional statement, we have observed from the uncontested evidence on the record that, the cautioned statement of the appellant was extracted outside the statutory time of four hours from the date when the appellant was put under restraint. Though, the prosecution unreasonably omitted both in the memorandum of facts and oral evidence to disclose the date of the arrest of the appellant, it is express in exhibit P3 as well as in the oral account of the appellant that, he was arrested and put under restraint on 21st October, 2008 at bout 9:00 hours. Exhibit P3 on the face of it, was recorded on 23rd October, 2008 from 16:00 to 17:00 hours. It was therefore hopelessly beyond the statutory time limit of four hours imposed by section 50 (1) (b) of the Criminal Procedure Act, Cap. 20 [R.E. 2019]. In our opinion, therefore, and guided by our decision in **RAMADHANI SEIFU @ BAHARI AND TWO OTHERS VS. REPUBLIC,** Criminal Appeal No. 221 of 2010 (unreported), as the caution statement of the appellant was recorded after expiry of the statutory limit without there being an

extension order, it was procured illegally and ought to have been rejected. We accordingly expunge it from the record.

Having expunged exhibit P3 from the record, we agree with the learned Senior State Attorney, there remains no sufficient evidence from the record to support the conviction. We shall demonstrate this in the course of considering the last complaint.

On the last complaint, we agree with the learned Senior State Attorney that, the case against the appellant was not proved beyond reasonable doubts. The conviction of the appellant was based on visual identification of PW3. In his evidence, PW3 claimed to have recognized the appellant his fellow security guard by aid of electric light and by his voice despite the fact that the incident happened during night. There is no clarification of the intensity of the light and the duration of time in which he was able to observe the appellant without interruption at the scene of crime. In accordance with the principle in **Amani Waziri** *(supra)* these were pertinent facts in eliminating possibility of mistaken identities. That aside, throughout his testimony, PW3 does not say to whom did he disclose the identity of the appellant subsequent to the incident. We note that, when he was being taken

by PW2 from the scene of the crime, PW3 was not conscious enough to narrate what went on. The evidence in exhibit P5 does not however suggest that he was admitted. As matter of common sense therefore, PW3 would have disclosed the identity of the appellant soon upon recovery which he did not.

Both PW1 and PW2, the police officers who investigated into the crime, do not mention PW3 as the person who reported the incident to them. PW2 suggests that it was the owner of the godown, PW4 who reported. The evidence of PW4 indicates that, the incident was reported to him by Hashimu who was one of the eye witnesses. Both the testimonies of PW3 and PW4 are in agreement that, the said Hashimu was working in the godown as a supervisor and was residing in a compound located at the godown. In accordance with the testimony of PW4, this person was able to observe what was going on without any interruption. Therefore, if the appellant, the person who was obviously known to him as the security guard was behind the move, why didn't the said Hashimu disclose his name to PW4. Why didn't the prosecution call the said Hashim as one of the eye witnesses despite being mentioned in the list of the prosecution witnesses.

These unanswered questions have much to be desired on the prosecution case.

In the circumstance, we shall draw an adverse inference for unreasonable failure of the prosecution to summon Hashimu Abdallah who was a material witness on the occurrence of the fateful incident. This is in line with the authority in **Boniface Kundakira Tarimo vs. Republic**, Criminal Appeal No. 350 of 2008 (unreported) where it was held that:

> *"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, mis not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."*

In view of the foregoing, we have no doubt that, the evidence of PW3 on visual identification of the appellant was not credible and probable enough to eliminate reasonable possibilities of mistaken identity and or recognition. Consequently, the case against the appellant at the trial court was not proved beyond reasonable doubt as to justify the conviction of the appellant.

In the final result and for the foregoing reasons, therefore, the appeal is allowed. The judgments of both the lower courts are set aside. The conviction is set aside and the sentence thereof quashed. We accordingly order for immediate release of the appellant from prison unless he is withheld for some other lawful causes.

DATED at **DAR ES SALAAM** this 23rd day of July, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 27th day of July, 2021 in the presence of the Appellant in person linked via video conference facility from Ukonga Prison and Ms. Ester Kyara, Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL