IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 442 OF 2017

MAGOBO NJIGE..... 1ST APPELLANT
BUPINA MIHAYO.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makani, J.)

dated the 25th day of August, 2017
in
Consolidated Criminal Appeal Nos. 35 of 2016 and 142 of 2015

JUDGMENT OF THE COURT

13th & 17th August, 2021.

MUGASHA, J.A.:

The appellants, Magobo Njige and Bupina Mihayo and Senga Mabilika who is not subject to this appeal, were charged and convicted of five counts of armed robbery and one count of conspiracy before the District Court of Kahama at Kahama. They all pleaded not guilty to the charge. In order to prove its case, the prosecution paraded a total of 19 witnesses and thirteen documentary exhibits. The appellants defended themselves as DW1, DW2 and DW3 respectively and tendered one documentary exhibit.

From the total of nineteen witnesses, briefly, the prosecution account was as follows: It was alleged that, on the night of 26/4/2010, a series of five incidents of armed robbery occurred in Luhaga village, within Kahama District in the Region of Shinyanga. In the said armed robbery incidents, the homesteads of Emmanuel Nkalango (PW3), Madede Tarime (PW1), Issa Mohamed Bubinza (PW2), Kulwa Mashaka (PW6) and Mashaka Juma who did not testify, were invaded by bandits who threatened the victims with machetes, injured some and stole their properties.

After the bandits had left, some of the victims such as, PW6 and PW2 heard gun shots outside their homesteads and later, PW2 found two spent cartridges within his compound. Unfortunately, none of the victims managed to identify any of the bandits because they were not familiar to them prior to the occurrence of the armed robbery incidents. However, at the homestead of PW2, his wife Suzana Petro (PW5) who also happened to be at the scene of crime, claimed to have identified the bandits having described the attire of the two bandits and the height of one of the bandits. Other witnesses who contended to have identified the appellants are Chausiku Marco (PW10) and Kiki Adamu (PW11). However, as will be seen in due course, this was in relation to an incident in which a person with albinism was killed after her arm was chopped off by the bandits. Two days after the series of armed robbery incidents,

the residence of a former Member of Parliament for Bukombe Constituency, was stormed into by the bandits who stole his pistol. According to C 9895 D/Sgt Laurent (PW9) he was assigned to investigate the matter, in the course of the investigation, he recalled to have interrogated the 2nd appellant who in the cautioned statement revealed to have been involved in the series of armed robbery incidents. The respective cautioned statement recorded on 14/5/2010 was admitted at the trial as exhibit P1. Also, according to A/Inspector Lugano (PW12), the 1st appellant confessed to have been involved in the robbery incidents in the cautioned statement which was adduced at the trial and admitted as exhibit P2. In respect of Senga Mabilika who is not among the appellants, D 5581 DCPL Nashon (PW14), told the trial court that in the cautioned statement he confessed to have committed the robberies together with the appellants.

Subsequently, the appellants were taken to Kahama Police station and according to the testimony of ASP Haway Elias (PW15), who conducted the identification parade, the appellants and Senga Mabilika were identified by PW5 and PW10. Moreover, it was also the prosecution account that, the 2nd appellant and Senga Mabilika confessed to have committed the offence in the extra judicial statements which were admitted in the evidence as exhibits P12 and P13. Apparently, the appellants unsuccessfully objected to the admission of the cautioned and

extra judicial statements on ground that they were tortured and forced to make the same. Later, upon receiving information that the spent cartridges were found within the compound of PW2, the house of Senga Mabilika was searched and he was found in possession of eight (8) spent cartridges and five bullets for SMG and SAR which were admitted in evidence as exhibits P9 and P10.

In defence, the appellants denied each and every assertion by the prosecution. They as well reiterated that the cautioned and the extra judicial statements were involuntary.

After a full trial, the trial court was convinced that the appellants were identified at the scene of crime by PW10 and PW11 whose account was corroborated by the identification of the appellants at the parade which the trial court believed to be in order. The trial Court's decision was based on the cautioned and extra judicial statements in which it was believed that the appellants had confessed to have committed the charged offences. Thus, upon being found guilty, the appellants were convicted and sentenced to imprisonment for two years in respect of the count of conspiracy and given a jail term of thirty (30) years in respect of the four counts of armed robbery. They were acquitted of the 6th count on ground that it was not proved.

The appellants were not satisfied with the decision of the trial Court. They unsuccessfully appealed against that decision before the High Court of Tanzania at Shinyanga. At pages 212 to 215 of the record of appeal, like the trial court, the learned High Court Judge was satisfied that, the appellants were properly identified at the scene of crime and the identification parade as corroborated in the cautioned and extra judicial statements which she believed to have been voluntary given by the appellants. Still protesting their innocence, the appellants have preferred the present appeal to this Court fronting five grounds of complaint in the Memorandum of Appeal as follows: -

1. *That, the High Court erred in law to uphold the trial Court's decision in convicting the appellants for the offence of conspiracy to commit an offence as the charge was defective for failure to disclose the date and place of the alleged conspiracy.*
2. *That the cautioned statement of the second appellant Bupina Mihayo (Exh P1), and the caution statement of Magobo Njige (Exh P2 and that of Senga Mabilika (Exh 6) were wrongly admitted and relied upon in convicting the appellants.*
3. *That, the extra judicial statement of the second appellant Bupina Mihayo (Exh P13) and of Senga Mabilika (Exh P12) were wrongly admitted and relied upon in convicting the appellants.*

4. *That, the High Court erred in law as it failed to evaluate and consider part of evidence of the appellants.*
5. *That, the judgment of the District Court that was upheld by the High Court contravened the mandatory provision of section 312(2) of the CPA.*

At the hearing of the appeal, the appellant was represented by Mr. Kamoga Kamaliza Kayaga, learned counsel whereas the respondent Republic had the services of Ms. Wampumbulya Shani and Ms. Immaculate Mapunda, both learned State Attorneys.

In addressing the first ground, Mr. Kayaga's challenged the charge to be irregular on ground that, it does not specify the date and place where the offence of conspiracy was committed, adding that, the particulars therein are not compatible with the facts at the preliminary hearing which alleged that, the conspiracy was in relation to acquire body parts of a person with albinism. On probing the court on propriety of the count of conspiracy in the wake of counts of armed robbery in the same charge, he replied that the count of conspiracy was uncalled for because the offence of armed robbery was already known and alleged to have been committed.

In respect of ground two, the two courts below were faulted for relying on the wrongly admitted cautioned statements to convict the

appellants. On this, the learned counsel pointed out that, although the appellants objected to the admission of those statements because they were tortured and forced to make the statements, no inquiry was conducted by the trial court to establish if the statements were voluntarily made and more worse, following admission, the statements were not read out to the appellants. He added that, the delay to record the cautioned statement was irregular and contrary to section 50 and 51 of the Criminal Procedure Act (Cap. 20 R.E. 2019) (the CPA). Thus, the appellant's counsel urged the Court to expunge the cautioned statements. To support his propositions, the learned counsel cited to us the cases of **HERODE s/o LUCAS AND ANOTHER VS REPUBLIC**, Criminal Appeal NO. 407 of 2016 and **EMMANUEL STEPHANO VS REPUBLIC**, Criminal Appeal No. 413 of 2018 (both unreported).

Moreover, the two courts below were faulted for relying on the extra judicial statements (exhibits P12 and P13) which is the gist of appellants' complaint in the 3rd ground of appeal. It was Mr. Kayaga's contention that, although the extra judicial statements were objected on ground that the makers were tortured and forced to make the same, the inquiry was not conducted so as to establish the voluntariness and as such, the omission prejudiced the appellants on account of not being fairly tried. In this regard, it was argued that, it was not proper to act

on the extra judicial statements to convict the appellants. He urged us to expunge the extra judicial statements.

In relation to the 6th ground, it was the appellants' counsel's submission that, the evidence on visual identification is weak and it was wrongly relied upon to convict the appellants. It was the appellants' counsel argument that, the evidence about the person who passed at the PW10 and PW11's house wearing a bead bracelet and who asked for water at 17.00 hrs. to be the 1st appellant was based on suspicion which however grave cannot be a basis of conviction and as such, it was wrong to ground the conviction. Besides, he added, the evidence given by PW10 and PW11 is not connected with the robbery incidents which occurred on 26/4/2010 and instead, an incident which occurred on 22/4/2010 in relation to killing a person with albinism. In the last ground, the complaint was the manner in which the trial judgment was composed without complying with the dictates of section 312 (2) of the CPA for failure to state in the judgment the provision under which the appellants were convicted. Ultimately, on account of discrepant and weak prosecution evidence, Mr. Kayaga urged the Court to allow the appeal and set the appellants at liberty.

On the other hand, the learned State Attorney outrightly, supported the appeal on ground that, the charge was not proved beyond

reasonable doubt. She agreed with the appellants' counsel submission on the count of conspiracy being uncalled for where the offence of armed robbery has already been committed. To bolster her argument, she cited the case of **STEVEN SALVATORY VS REPUBLIC**, Criminal Appeal No. 275 of 2018 (unreported).

As to the second and third grounds of appeal, the learned State Attorney conceded that, in the absence of an inquiry to establish if the cautioned statements and extra judicial statements were voluntarily made, it cannot be ascertained if the appellants had confessed to commit the offences. She also urged us to expunge the cautioned and extra judicial statements. To support her propositions, cited to us the case of **SELEMANI ABDALLAH AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 384 of 2008 (unreported).

Pertaining to the evidence on visual identification which was followed by the identification parade, the learned State Attorney submitted that, there is no evidence that PW10 and PW11 made a prior description of the appellants before seeing them at the parade. She argued this to be cemented by the evidence of PW15 who told the trial court that he had picked those with same size and height to compose the parade in which the appellants were identified.

Finally, apart from the learned State Attorney conceding that the trial court judgment did not comply with section 312, she was quick to respond that, the appellants were not prejudiced which we agree because all along, they were made aware of the charges and gave their defence. Ultimately, she urged the Court to allow the appeal. Mr. Kayaga had nothing to rejoin.

Having carefully considered the submission by the learned counsel and the record before us, the strength or otherwise of the case against the appellants hinges basically on: **One** the propriety of the count of conspiracy to commit armed robbery in the wake of other counts of armed robbery in the same charge; **two**, whether the appellants were properly identified at the scene of crime; **three**, whether the appellants confessed to have committed the offence of robbery and **four**, whether the charge was proved beyond reasonable doubt.

On the propriety or otherwise of the count of conspiracy against the appellant, this need not detain us. It is settled law that, the offence of conspiracy cannot stand where the actual offence has been committed. In this regard, it was not proper to charge and convict the appellants of the offence of conspiracy. This was emphasised in the case of **STEVEN SALVATORY VS REPUBLIC** (*supra*) as this Court stated that;

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

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

Thus, in the light of settled law, it was not proper to charge the appellants with the offence of conspiracy to commit armed robbery. Therefore, as the offence of conspiracy could not be sustained the appellants were wrongly convicted of that offence.

Next for consideration is whether the appellants were properly identified at the scene. It is settled law that visual identification is of the weakest type unless all possibilities of mistaken identity are eliminated. The importance of proper and correct identification in cases whose determination hinges on identification was reiterated by the Court of Appeal for Eastern Africa in the case of **MOHAMED ALHUI VS REX** [1942] 9 EACA 72. It was held that: -

"In every case in which there is a question as to the identity of the accused, the fact of their having been a descrlption given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."

[See also **RAYMOND FRANCIS VS REPUBLIC** (1994) TLR 100].

In the case at hand, it is not in dispute that the offences occurred at night and given the darkness and identifying witnesses not being familiar with the bandits, certainly the conditions were unfavourable for positive identification. This is fortified by the record which is evident that, though attacked with the bandits at their homesteads, PW1, PW2, PW3 and PW6 they did not identify any of the bandits. As to the alleged identification by PW10 and PW11, the evidence was in relation to the incident of killing a person with albinism and not in connection with the fateful robbery incidents. We say so because, it is on record that, PW3, a victim of the robbery incident had rushed to the residence of PW10 and PW11 and found the bandits had ieft after chopping off the arm of a person with albinism. PW3 did not identify any of the bandits and certainly could not do so because the bandits were no longer at the scene. Therefore, it was with respect, a misdirection on the part of the

learned High Court Judge to conclude that the identification by PW10 was proper in connection with the armed robbery incidents. Be it as it may, the visual identification by PW10 identifying the 1st appellant is wanting as it does not reveal that the person who had asked for water at 17.00 hrs. was among the bandits at night.

We now turn to PW2's wife who testified as PW5. She claimed to have identified the bandits because one of them wore a red T-shirt, one had a white long-sleeved shirt and the other was tall. She also stated to have been aided by the source of light from the torch flashed by the bandits. We found such account wanting and we shall state our reasons. **One,** it is common knowledge that it is easier for the one holding or flashing the torch to identify the person against whom the torch is flashed. **Two,** the flashed torch light made PW5 dazzled by the light and could not therefore properly identify the bandits, and as such, the possibility of mistaken identity could not be ruled out. See - **MICHAEL s/o GODWIN AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 66 of 2002 (unreported). Moreover, while PW5 did not state to have known the appellants prior to the fateful incident, the generalised terms description she gave were not specific to any particular appellant. In this regard, it cannot be safely ascertained as to which appellant was being referred to *vis a vis* the respective terms of description given by PW5.

Next for consideration is whether the appellants were identified at the identification parade. It is also settled law that, if the culprit is a stranger and no identification parade was conducted, it cannot be said that the accused were properly identified. On the propriety or otherwise of the identification parade, it is trite law that for the evidence of an identifying witness to be credible, such witness must have given prior description of the suspect before identifying a suspect at the parade. See the cases of **YOHANA CHIBWINGU VS REPUBLIC,** Criminal Appeal No. 117 of 2015, **MUHIDIN MOHAMED LILA @ EMOLO & 3 OTHERS VS REPUBLIC,** Criminal Appeal No. 443 of 2015, **DANIEL MATIKU VS REPUBLIC,** Criminal Appeal No. 450 of 2016, and **SHABANI HUSSEIN @ MAKORA & ANOTHER VS REPUBLIC,** Criminal Appeal No. 287 of 2019, **RASHID OTHMAN RAMADHAN AND THREE OTHERS VS REPUBLIC,** Criminal Appeal No. 305 of 2017 (all unreported).

In the case under scrutiny, it is glaring that, PW5, PW10 and PW11 who claimed to have identified the appellants at the identification parade, none of them gave a prior description before seeing the appellants at the parade. Giving a crucial description is vital so as to enable those composing the parade to pick the paradees in the light of description given by the identifying witnesses who claim to have seen the suspects at the scene of crime. This was not the case and the

evidence of PW15 cements our doubt as he recalled to have lined up those with same height and size at the identification parade. That apart, the appellants' complaint that having been in the police cells without taking bath for a number of days, probably, might have influenced the identifying witnesses in picking the appellants. On this account, the appellants were not fairly tried and were indeed, prejudiced. Thus, since the requirement of giving prior description of the appellants was not complied with, there is no gainsaying that the evidence obtained from the parade is not credit worthy and as such we expunge the extract of the register of the parade from the record.

Having discarded the weak evidence on visual identification, this takes us to the determination of the 2nd and 3rd grounds of appeal to establish if the appellants confessed to have committed the offence of armed robbery. At the outset we wish to point out that according to section 27 of the Evidence Act [CAP 6 R.E.2019], a confession voluntary made by an accused person to a police officer of a specified rank, is admissible in evidence. However, for the statement to be admitted in evidence, the prosecution must prove beyond doubt that the statement is not involuntary or else the trial court is mandated to reject it.

As correctly submitted by the learned counsel, at the trial the admission in evidence of the cautioned and extra judicial statements

were objected by the appellants and another person not a subject of this appeal. This entailed an inquiry so as to establish the voluntariness or otherwise of the respective statements. This was emphasized by the Court in the case of **DANIEL MATIKU VS REPUBLIC** (Criminal Appeal No. 450 of 2016 CAT (unreported) cementing on the requirement of inquiry, cited with approval the case of **TWAHA ALI AND 5 OTHERS VS REPUBLIC**, Criminal Appeal No. 78 of 2004 (unreported) and stated;

> *"whereby apart from categorically stating that, a confession or statement will be presumed to have been made voluntarily until objection to it is raised by the defence, the Court held:*
>
> *"... if that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within trial) into the voluntariness or not of the alleged confession. Such inquiry should be conducted before the confession is admitted in evidence..."*
>
> *[Emphasis supplied].*
>
> *Omission to conduct an inquiry in case an objection is raised, is a fundamental and incurable irregularity because if the confession*

stands out to be crucial or corroborative evidence, an accused would not be convicted on evidence whose source is doubtful or suspicious."

(See also **RASHID AND ANOTHER VS REPUBLIC** [1969]) E.A. 138 where the erstwhile Eastern African Court of Appeal had the occasion to make the following observation: -

"The correct procedure when a statement is challenged is for the prosecution to call its witnesses and then for the accused to give or make a statement from the dock and call his witnesses, if any."

(See also **KINYORI S/O KARUITU** [1956] 23 EACA 480).

In the matter under scrutiny, the following transpired in relation to the manner in which the cautioned and extra judicial statements were treated by the trial court. At pages 60 to 62 of the record, after the 1st appellant objected the admission of the cautioned statement, the inquiry was not conducted and instead, it is the appellant who commenced to narrate what led to his arrest which was followed by cross-examination by the prosecutor. Then the trial magistrate gave his ruling and admitted the statement as exhibit P2. Yet the statement was not read over to the appellants. On the part of the 2nd appellant, having objected the admission of the cautioned statement, at page 51, the trial magistrate

treated the matter as one of resolving a preliminary objection. Thus, having heard the submission of the prosecutor, he gave his ruling and admitted the statement as exhibit P2 which was yet, not read over to the appellants which is irregular.

Finally, at page 97, when PW19 tendered in court the extra judicial statements, the 2nd appellant objected the admissibility. The trial court wrongly commenced inquiry proceedings by way of cross examination of PW19 by the second appellant and without initially administering oath or affirmation to a witness contrary to section 198 (1) of the CPA which categorically stipulates as follows:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act".*

During the inquiry witnesses thereto must be sworn afresh, failure to do so has fatal consequences on the validity of the respective proceedings. See - **JANEROZA D/O PETRO VS REPUBLIC**, Criminal Appeal No. 269 of 2016, **MWITA SIGORE @ OGORA VS REPUBLIC**, Criminal Appeal No. 54 of 2008 (both unreported) and **SELEMAN ABDALLAH AND TWO OTHERS VS REPUBLIC** (*supra*).

In a nutshell, on account of the stated shortfalls it cannot be safely vouched that the confession of the appellants was voluntarily made and as such, it was unsafe to rely on the cautioned and extra judicial statements to convict the appellants. On this account we hereby expunge from the record all the cautioned and extra judicial statements, that is exhibits P1, P2, P6, P12 and P13.

Having expunged the cautioned and extra judicial statements, we remain with the evidence of the spent cartridge (exhibit P3) alleged to have been found at the house of 1st appellant. This need not detain us. It is wanting as by itself it does not link the appellants with the offence of armed robbery. Besides, none of the witnesses gave any account to the effect that the appellants had fired the two bullets at the scene apart from hearing gun shots outside their residences. Moreover, the ballistic expert report does not eliminate the possibility of another person to have used similar gun with similar bullets. We are fortified in that account because exhibit P11 shows that the spent cartridges picked at the scene of crime and subjected to ballistic examination were of a submachine gun or semi-automatic rifle and not of a locally made gun which was alleged to have been found with one of the appellants. This is cemented by the evidence of PW18 who when cross-examined by the 2nd appellant stated that, it is impossible to use a submachine gun bullet in a homemade gun 'gobore'.

In view of what we have endeavoured to discuss, we are satisfied that, the charge was not proved to the hilt against the appellants. We thus find the appeal merited and allow it. We quash the conviction and the sentence with an order that the appellants be released forthwith unless if held for another lawful cause.

DATED at **SHINYANGA** this 16th day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 17th day of August, 2021 in the presence of the Appellants in person, unrepresented and Mr. Jukael Reuben Jairo assisted by Mr. Nestory Mwenda, both learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL