THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 249 OF 2017

ANOLD LOISHIE @LESHAI ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Arusha)

(Maghimbi, J.)

dated the 8th day of June, 2017
in
Criminal Appeal No. 119 of 2016

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JUDGMENT OF THE COURT

13th & 27th September, 2021

KOROSSO, J.A.:

In the Resident Magistrates Court of Arusha at Arusha, the appellant herein together with Justine Ebeneza @Laizer (then the 2nd accused and not subject of this appeal) were arraigned and convicted for the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 RE 2002 now 2019 (the Penal Code). It was the case for the prosecution that on 16/2/2016 at Ngaramtoni area within Arumeru District, Arusha Region, the appellant, jointly and together with Justine Ebeneza @Laizer did steal cash Tshs. 550,000/- the property of Isaria Frank and immediately before and during the stealing did use a machete

and clubs to threaten and injure Isaria D/O Frank in order to retain the said property. The appellant remonstrated his innocence.

The brief facts of the case leading to the arraignment of the appellant for the charges he faced can be extrapolated from what the prosecution presented to prove their case. The prosecution fronted four witnesses and tendered two exhibits, while the appellant and the 2nd accused person were the only witness who presented the case for the defence. According to Esalia Frank Mollel (PW1), on the 16/2/2016, late in the evening, at a bar known as "internet bar", she and her husband having closed sales and collected Tshs. 530,000/-, left the bar together and enroute parted ways, PW1 took the route home, while her husband went to watch a football match elsewhere. While on the way and before reaching home, PW1 met about five young men who greeted her. One of the young men ordered her to give him her cellphone and the money she had. The said young man (who she alleged was the appellant) cut her with a machete on the left part of her head, PW1 fell down while shouting for help. Joyce Joseph Khasani (PW2), who at the time around 10.00 hours was at home, heard someone calling for help, which led her to go outside and call other neighbours. On following up the shouts for help, she saw an injured PW1 with five men. PW2 and some other

people threw stones at the young men to chase them away. However, their efforts to apprehend the culprits failed. PW2 alleged that she recognized the appellant as one of the culprits at the scene of incident enabled by the available light. Emmanuel John Laiser (PW3), a neighbor and the street chairman, testified that upon hearing a call for help, armed with a stick, he rushed to the scene and met five men. He recognized three of them, that is, Silas Michael, one of his employees, the appellant and Justine who worked at Ngaramtoni. PW3 testified that his attempt to chase them was hindered when he was hit on the stomach by a stone thrown by the appellant and cooking oil in a bottle thrown by Silas. PW3 also testified that at the scene of crime there was tube light which aided him to identify the three culprits. However, he failed to arrest any of them as they ran away. Thereafter, an injured PW1 was taken to Serian Hospital where she was treated by a doctor who recorded his findings in a PF3, tendered and admitted into evidence as exhibit P1. According to E5932 D/Sgt. Peter (PW4), the appellant and Justine were arrested by D/Sgt Lucy, while he was the one who interrogated and recorded the cautioned statement of the appellant which was admitted as exhibit P2.

The appellant's defence was that of total denial of committing the offence. He also narrated the circumstances surrounding his arrest on the 17/02/2016 while at his place of work and subsequently, being taken into police custody.

After a full trial, the trial court upon being satisfied that the prosecution side proved the offence charged to the standard required found the appellant to be guilty as charged, convicted and sentenced him to thirty years imprisonment. While the 2nd accused's appeal to the High Court succeeded, the appellant's appeal was unsuccessful. Still aggrieved, the appellant has preferred the current appeal.

The appellant's five grounds of appeal are found in the memorandum of appeal lodged on 27/6/2018 and three supplementary grounds of appeal he presented with the leave of the Court on the day of hearing of the appeal. The substantive grounds found in the memorandum of appeal compressed, expound the following complaints; **One**, that, the trial and the first appellate courts erred both in law and fact convicting the appellant with an offence which was not proved; and **two**, that the trial and first appellate courts erred in law and fact for relying on an improperly admitted appellant's cautioned statement as conclusive proof of his guilt. The supplementary grounds of appeal enlist

the following grievances namely that: **One,** variance between the charge and the evidence on the amount alleged to have been stolen and name of victim; **two**, inconsistencies and contradictions in PW2 and PW4's evidence on visual identification of the appellant; and **three**, propriety of admitting the appellant's cautioned statement which was recorded out of time and failure to inform the appellant on his rights prior to its recording.

On the date when the appeal was called for hearing before us, the appellant was present in person unrepresented, whereas, the respondent Republic was represented by Ms. Adelaide Kassala and Ms. Tarsila Gervas Asenga, both learned Senior State Attorneys.

When the appellant was provided an opportunity to amplify on his appeal grounds, he began by adopting his grounds of appeal and the filed written submission. He then proceeded submitting his grounds in general, beginning by faulting the trial and first appellate courts for failure to deliberate and determine on the variance between the charge and the evidence. He contended that the name appearing in the charge sheet of the person who was victimized, is Isaria D/O Frank, also found in the impugned judgment (pages 1 and 26 of the record of appeal) differs with the recorded name of PW1 when giving her testimony,

which is, Esaria Frank Mollel. According to the appellant, the other variance relates to the cash amount alleged to have been stolen. He argued that while the charge sheet states that on the fateful day, among items stolen from PW1 was Tshs. 550,000/-, when PW1 testified, she stated that the amount she had collected from the proceeds on the respective day, amounted to Tshs. 530,000/-. In the written submission, the appellant argued that the expounded variances in the evidence and the charge sheet should lead the Court to find that by not proving essential facts it rendered the offence unproven by virtue of section 229(1) of the CPA.

With regard to propriety in admissibility of exhibit P1, the appellant conceded that it was admitted without objection from his side, and he had waived his right to call the respective doctor who authored it for cross examination in terms of section 240(3) of the CPA. However, he argued that this did not absolve the trial and first appellate courts from the duty to properly analyze and assess the contents of the charge sheet, exhibit P1 and the evidence of PW1. He contended that if, the same would have been done as expected, the two lower courts would have found that the use of different names for the victim interchangeably, meant the name of the victim was not proved. The

same for the different amounts stated to have been stolen from PW1, and argued that the variance in amount in the evidence and the charge sheet meant the amount stolen was not proved.

The appellant was also aggrieved by the fact that the first appellate court dismissed his appeal while relying on exhibit P2 without considering that the same was improperly admitted in evidence. According to the appellant, the trial court failed to conduct a trial within trial to determine whether the confessional statement was made and its voluntariness, especially after having testified that he had signed a document while unaware of its contents and having been compelled by the torture he was subjected to. Whilst he conceded that he had not raised any objection when exhibit P2 was tendered, the appellant argued that both the trial and first appellate courts absconded from their duty to examine the circumstances pertaining to the recording of the confessional statement and to inform him of his rights under the circumstances. He cited the cases of **Steven Jason and 2 Others vs Republic,** Criminal Appeal No. 79 of 1999 and **Twaha Ali and 5 Others vs Republic**, Criminal Appeal No. 78 of 2008 (both unreported) to bolster his argument. He urged us to find that the prosecution failed

to prove the case to the required standard, allow the appeal and set him free.

In response, Ms. Assenga commenced her submissions by informing us that the respondent Republic was not resisting the appeal. She then intimated that she will focus in arguing the first complaint emanating from the substantive grounds of appeal faulting the prosecution for failure to prove the case beyond reasonable doubt and thus essentially confronting complaints found in other appeal grounds.

The learned Senior State Attorney faulted the first appellate court for being inconsistent in its findings, arguing that while at first, the first appellate court had found the evidence on identification to be unreliable and focused on the cautioned statement of the appellant as sufficient to prove the case against the appellant, subsequently, as the record of appeal shows it went on to hold that the cautioned statement was supported by other evidence of visual identification. She argued that this was a misdirection on the part of the first appellate court calling for interference by the Court. She cited the case of **Joseph Stephen Kimaro and Another vs Republic**, Criminal Appeal No. 340 of 2015 (unreported) to reinforce her argument. In that case, the Court fronted

guidelines to follow where there is insufficient evidence to prove that the appellant was properly identified.

Ms. Asenga reasoned that in the absence of the cautioned statement there is no other evidence to connect the appellant with the offence charged. She contended further that the two lower courts did not direct themselves properly where there is only the confessional statement to link the accused to the offence charged. Ms. Asenga reasoned that although she was aware that a confessional statement on itself may lead to a conviction if the court finds it to be truthful, in the current case the two courts did not venture into testing the truthfulness of the said confessional statement.

According to the learned Senior State Attorney, taking the evidence in totality there was no proof that the cautioned statement was recorded within the required time. This is because the time between when the recording of the statement started and the time the appellant was arrested was not made clear. She thus argued that what is stated by the appellant that the statement was recorded out of time remained undisputed, essentially connotating that the cautioned statement was not properly admitted and should be expunged.

Ms. Asenga contended that if the Court decides to expunge the cautioned statement of the appellant there will be no remaining evidence linking the appellant to the offence charged, taking into account that the first appellate court already discounted the evidence on identification of the appellant at the scene of crime. She thus urged us to allow the appeal, quash the conviction and set aside the sentence imposed and set the appellant free. The appellant's rejoinder was to reiterate his earlier prayers.

Having dispassionately considered the oral and written submissions, cited authorities in relation to the lodged grounds of appeal before us, we venture to initiate our deliberation by considering the first complaint as found in the substantive grounds of appeal, on whether the case against the appellant was proved to the standard required. To sustain the conviction meted on the appellant by the trial court, the first appellate court found that the conviction of the appellant by the trial court was grounded on the evidence on identification of the appellant by prosecution witnesses PW1, PW2 and PW3 together with the confessional statement of the appellant (exhibit P2). With regard to evidence on visual identification of the appellant the first appellate judge at page 52 of the record of appeal stated:

"From the evidence of PW1 and that of PW2 and PW3 none of the witnesses explained in details on the intensity of the light at the scene of crime. They ought to explain (sic) in detail as what made them identify the appellant unmistakably so that the court could be able to determine whether or not the conditions were favourable to proper identification... it is clear that the identification of the appellants at the scene of crime was not watertight so as to warrant a conviction. Prosecution left doubt as to the correct identification of the appellants therefore the benefit of doubt must be resolved in favor of the appellants. Having discounted the evidence of the identification of the appellants at the crime scene, the other remaining evidence is the cautioned statement of the first appellant."

The above excerpt reveals without shadow of doubt that the first appellate court found the evidence on identification of the appellant unreliable and discounted it. We cannot fault the analysis of evidence by the first appellate court on this and as also conceded by the learned Senior State Attorney. The fact that the incident occurred at night around 10.00 hours was not disputed and thus without doubt there was unfavorable conditions for proper identification. PW1, PW2 and PW3 failed to reveal the intensity of light, PW1 and PW2 stating that there

was light while PW3 stated there was tube light at the scene. The proximity to the appellant and the duration of the incident to enable them adequately observe the culprit for proper identification was not revealed. We are alive to the fact that these witnesses testified that they knew the appellant prior to the incident, but apart from this, there was no evidence that alluded to the fact that, having recognized the appellant they gave his name or description as the culprit at the time the incident was reported to the police. PW4 the only police officer did not testify that he was given the names of the culprits by the said witnesses when the matter was reported.

Taking account of the above, undoubtedly, the evidence related to the identification of the appellant was weak failing to align with the factors outlined in **Waziri Amani vs Republic** (1980) TLR 250 and **Said Chally Scania vs Republic**, Criminal Appeal No. 69 of 2005 (unreported) and in essence, insufficient to remove doubts of possible mistaken identity. The remaining component to prove the case against the appellant was the cautioned statement of the appellant.

The second complaint as found in the substantive grounds of appeal and the third complaint in the supplementary grounds of appeal, is on propriety in admitting the cautioned statement of the appellant

(exhibit P2) and the weight accorded to it by the trial and first appellate court. Essentially, in this complaint, the appellant challenges; firstly, contravention of the law governing its recording, arguing that it was recorded beyond the time specified by the law and without being informed his rights. Secondly, it's admissibility into evidence and the weight accorded to it by the two lower courts and which led to his conviction.

In tackling the first concern, the provisions which govern the recording of statements of persons suspected to have committed offences, are sections 50 (1) and 51 of the CPA, which reads:

> *"50- (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.*
>
> *S. 51 - (1) Where a person is in lawful custody in respect of an offence during the basic period*

available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may-

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period\make application to a magistrate for a further extension of that period."

The above provisions without doubt, call for strict compliance. This fact has been restated in various decisions of this Court. In the case of **Emmanuel Malahya vs Republic**, Criminal Appeal No. 212 of 2004 (unreported), the Court held:

"Violation of s. 50 is fatal and we are of the opinion that ss. 53 and 58 are on the same plane. These provisions safeguard the human rights of suspects and they should therefore not be taken lightly or as mere technicalities."

In the case of **Ramadhani Mashaka vs Republic**, Criminal Appeal No. 311 of 2015, it was held that: -

"It is now settled that a cautioned statement recorded outside the prescribed time under section 50(1) (a) and (b) renders it to be incompetent and liable to be expunged".

The Court in its deliberation was influenced by the reasoning in the case of **Morris Agunga and Two others vs Republic**, Criminal Appeal No. 100 of 1995 (unreported) where we stated:

"In our view an alleged confession made after such considerable and unexplained lapse of time is not consistent with the view that the confession was made voluntarily."

In the instant appeal, exhibit P2 shows that it was recorded on 17/2/2016 from 14.20 to 14.40 hours. The evidence of PW1, PW2 and PW3 expounds that the robbery incident took place on 16/2/2016 at 22.00 hours and the culprits ran away thereafter. PW4 who recorded the appellant's cautioned statement stated that he was informed by one D/Sgt Lucy of the arrest of the appellant but did not reveal the date or time of the said arrest. In essence, there was no prosecution witness who showed the time the appellant was arrested. As argued by the learned Senior State Attorney, the only evidence before the Court related to the arrest of the appellant is that of the appellant himself, who nevertheless, only narrated the circumstances leading to his arrest,

stating that he was arrested on 17/2/2016 while at his place of work although he did not expose the time of his arrest.

There being no clear time of the appellant's arrest, as argued by the learned Senior State Attorney, this fact leaves doubts on whether in recording the cautioned statement, section 50 (1) of CPA was complied with. The first appellate court did not consider this aspect of whether or not the statement was recorded within time despite the fact that it was one of the grounds of appeal. There being no other evidence to the contrary, under the circumstances, the appellant should benefit from the above doubts on compliance of section 50(1) of the CPA. We thus hold that the exhibit P2 was not recorded within the time specified in contravention of section 50(1) of the CPA and that such anomaly is as if it was not procured voluntarily.

The above finding is reinforced by the fact that its admissibility in the trial court left a lot to be desired, which was the second component for our determination. The first appellate court had occasion to observe at page 53 of the record, that:

> "... *the cautioned statement was admitted by the trial court without any objection of the 1st appellant then first accused. In the said exh. P2 the accused admitted to have committed the*

offence with friends of his including the second appellant..."

The findings in the above excerpt notwithstanding, the evidence clearly outlined the fact that as conceded by the appellant, exhibit P2 was admitted without objection from the defence. Additionally, allegations by the appellant of undergoing torture and being compelled to sign an unknown document and faulting the trial court for not conducting a trial within trial, we find do not hold water. This is because, his repudiation of exhibit P2 and the allegations above were advanced when he was giving his defence and at that stage, the trial court could not conduct an inquiry on whether or not the statement was made or its voluntariness. However, what cannot be disputed is the fact that the process of recording exhibit P2 was tainted with anomalies as discerned from the record of appeal. Apart from being recorded out of the stipulated time in contravention of section 50(1) of CPA as already alluded to hereabove, there was no explanation from PW4 on the circumstances surrounding the recording of exhibit P2. That is, on whether the appellant was informed of his rights prior to making the statement and thus leaves doubts on how it was procured. We find that the said doubts should benefit the appellant to lead to a finding that there were irregularities in recording exhibit P2. We are of the view that

had the first appellate judge properly considered all the above anomalies, she would not have relied on exhibit P2 in convicting the appellant. The irregularities shown clearly prejudiced the rights of the appellant. In view of the foregoing, we shall henceforth disregard the confessional statement of the appellant, that is, exhibit P2.

Having decided to disregard exhibit P2, we are constrained to find whether there is any remaining evidence to prove the case for the prosecution against the appellant, not losing sight of the fact that in sustaining the appellant's conviction, the first appellate court essentially relied on the said confessional statement. With due respect, the first appellate court misdirected itself in how its finding on the matter was framed. This is because after discounting the evidence on identification of the appellant, it held that the only available evidence to be exhibit P2. Notwithstanding the above subsequently, the first appellate court made reference to the evidence it had earlier discounted to support its findings that led to sustaining the appellant's conviction. The relevant excerpt is found at page 53 of the record of appeal and the first appellate court stated:

> "*The cautioned statement was admitted by the trial court without any objection of the 1st appellant then first accused. In the said EXP2 the*

accused admitted to have committed the offence with friends of his including the second appellant. The PW2 identified the 1st appellant by the clothes he was wearing and he also testified that he said 1st appellant was arrested on the next day. Hence the EXP2 is a corroboration of prosecution evidence that the appellant committed the offence."

With due respect, in view of what we have held above, it renders the above summation a misdirection. Taking into account that, earlier on the evidence pertaining to identification of the appellant was discounted, and thus the said evidence should not have been relied upon the discounted evidence to corroborate the contents of exhibit P2.

In the premises, we find having decided to discount exhibit P2 and the evidence on identification of the appellant at the scene of crime, there is no other available evidence to prove the offence charged against the appellant. Consequently, the prosecution failed to prove the case against the appellant beyond reasonable doubt. On that account, we find no other compelling reason to proceed to determine remaining grounds of appeal.

In the upshot of the foregoing, the appeal is allowed. The conviction is quashed and sentence set aside. The appellant is to be released from prison unless lawful held otherwise.

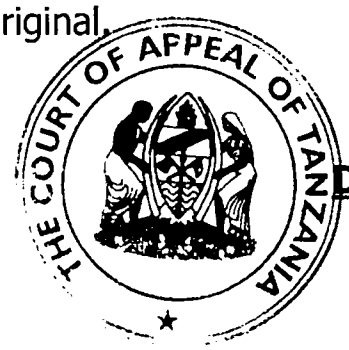
DATED at **ARUSHA** this 27th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 27th day of September, 2021 in the presence of the appellant in person and Ms. Amina Kiango, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



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