

**IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA**

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CONSOLIDATED CRIMINAL APPEAL NOS. 54 & 55 OF 2021

1. JUMANNE ISSA }
2. IMANI BISANGA } **APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**[Appeal from the Decision of the Resident Magistrate Court of Kigoma
(Extended Jurisdiction) at Kigoma]**

(Mariki, PRM Ext. Jur.)

**dated the 14th day of December, 2020
in
DC. Criminal Appeal No. 11 of 2020**

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JUDGMENT OF THE COURT

6th & 10th June, 2022

KITUSI, J.A.:

The appellants were jointly charged with Armed Robbery contrary to section 287A of the Penal Code [Cap 16. R.E 2019], the prosecution alleging that during the night hours of 3/12/2019 they attacked one Zacharia Raymond with a machete stones and iron bar and stole from him a motorcycle Registration No. MC 547 CHK valued at

Shs.2,300,000/= the property of one Vumilia d/o Rashid Issa, which they had hired to take them from Mwembetogwa area to Masanga area within Kigoma.

The District Court of Kigoma before which they were tried, convicted and sentenced each of them to 30 years imprisonment. Their appeal to the High Court which was transferred to the Resident Magistrate's Court (Hon Mariki, PRM with Extended Jurisdiction) was unsuccessful. Before us they preferred separate appeals, that is, Criminal Appeal No. 54 of 2021 by Jumanne Issa to whom we shall be referring as first appellant, and Criminal Appeal No. 55 of 2021 by Imani Bisanga whom we shall be referring to as the second appellant. We consolidated these appeals under rule 69(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The appellants appeared in person at the hearing with four grounds of appeal.

The first ground of appeal is that the case against them was not proved beyond reasonable doubt. The second ground is that their cautioned statements were wrongly relied upon as they were recorded in violation of section 57 of the Criminal Procedure Act, [Cap 20 R.E 2019] (the CPA). Thirdly that the conviction was based not on the

strength of the prosecution case but on the weakness of the defence. Lastly that the trial Court wrongly acted on the confessions that were recorded in violation of section 27(1) of the Evidence Act [Cap 6 R.E 2019].

After adopting those grounds of appeal, the appellants elected to let the respondent Republic address us first. Ms. Antia Julius, learned State Attorney, who was appearing for the respondent Republic along with Mr. Benedict Kivuma Kapela also learned State Attorney, resisted the appeal. She argued the second ground of appeal first.

She submitted that the complaint in the second ground of appeal, that section 57 of the CPA was violated, was raised as ground 5 before the PRM with Extended Jurisdiction. In the course of dealing with that ground of appeal, the learned PRM with Extended Jurisdiction was satisfied that section 57 of the CPA was complied with and that the appellants never raised any objection to challenge admissibility of the cautioned statements. This ground of appeal is closely related to the fourth ground of appeal which alleges that the appellants' confessions were recorded in violation of section 27(1) of the Evidence Act.

On the fourth ground of appeal, Ms. Julius submitted that the cautioned statements of the appellants were admitted without any objection from them and that they only raised the issue of involuntariness during their defence. She supported the decision of the PRM Extended Jurisdiction pointing out that the appellants did not cross examine PW2 the witness who tendered the said cautioned statements. She sought to support her argument with the case of **Sabas Kalua @ Majawala v. Republic**, Criminal Appeal No. 183 of 2017 (unreported).

The appellants did not have anything to argue in relation to these rather technical issues raised in the second and fourth grounds of appeal.

We shall determine the second and forth grounds of appeal together as they both address the voluntariness of the cautioned statements. We take note of the settled law that a confession is always presumed to be voluntary until the contrary is suggested by raising an objection. [**Tuwamoi v. Uganda** (1967) E. A 91, cited in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010]. In this case the appellants neither objected to PW2's prayer to tender their cautioned statements nor cross-examined him on the alleged

involuntariness. Not only that, but the contention that section 57 of the CPA was violated is too speculative given the nature of that provision which provides for about twenty scenarios. We agree with Ms. Julius that the relevant provisions of section 57 of the CPA are sub sections (2) (d) (e) 3 (a) (i) (ii) and (iii), and they were complied with. We see no substance in the complaint under these grounds of appeal, so we dismiss the second and fourth grounds.

On the third ground of appeal Ms. Julius submitted that the appellants were convicted not on the weakness of their defence but on the strength of the prosecution case. As for the first ground of appeal which contends that the prosecution did not prove its case against the appellants beyond reasonable doubts, Ms. Julius submitted that in a charge of armed robbery, the prosecution needs to prove theft, use of force and the identity of the culprits. She submitted that there was evidence from PW1 that he was hired by two people one of them being the second appellant whom he knew before as they lived within the same ward. The learned State Attorney submitted that the fact that PW1 named the second appellant to PW2 immediately is an assurance of his credibility. She cited the case of **Ally Said @ Tox v. Republic,**

Criminal Appeal No. 308 of 2018 (unreported). In relation to the first appellant she submitted that although he was not identified at the scene, he confessed to the crime.

The first appellant simply reiterated the fact that he was not identified at the scene of crime, and that his confession should not be taken into account because it was made only to spare his skin in the course of the torture. The second appellant referred to discrepancies on the date of PW1's medical treatment, whether it was 3/12/2019 according to PW1 and PW5 or the next day as stated by Vumilia Rashidi Issa (PW3). He pointed out another discrepancy that PW5 contradicted PW1 on which ear was injured during the robbery, was it the right ear as deposed by PW5 or the left ear according to PW1. He also wondered why did the police omit to call the person who gave PW1 a ride to the police station to report the robbery. Lastly he wondered again why only the two of them were charged while the perpetrators of the robbery were said to be five.

To determine the first and third grounds of appeal which are, in our view decisive, we need to set out the relevant part of the evidence for the prosecution and that of the defence.

PW1 was a bodaboda rider using a motorcycle Registration Number MC 547 CHK that belonged to PW3. On 3/12/2019 past midnight, two customers approached PW1 for his service to take them to Masanga area. He identified one of them as Imani Bisanga, a man he used to see at the market and who lived in the same ward at Gungu with him. He did not identify the second man.

They left for Masanga area on PW1's motorcycle but midway at a bushy area they told him to stop, which he did. Suddenly, there emerged other people from that bush and joined the second appellant and the other passenger in attacking PW1. They used a knife and iron bar causing him injuries on his ear and eye. He ran for his life leaving the motorcycle which the bandits made away with.

PW1 reported the matter to the police on the same night, naming the second appellant as one of his assailants. He obtained a PF3 and received medical treatment from PW5 of Maweni Government Hospital. Meanwhile PW2 who was assigned to investigate the case arrested the second appellant on 4/12/2019 in the morning. He was with two colleagues at a restaurant, taking breakfast and one of the two colleagues who turns out to be the first appellant, confessed to the

crime in a cautioned statement admitted as exhibit P1. Second appellant's cautioned statement was admitted as exhibit P2.

In defence the appellants denied committing the offence and raised, for the first time, the contention that the cautioned statements were made through torture by the Police. The first appellant contended that from 1/12/2019 to 3/12/2019 he was taking part in funeral and burial activities of a departed relative, and one Issa Jumanne Gereza (DW3) testified in support.

In its evaluation of the evidence of PW1 and PW2, as well as the cautioned statements, the trial court got satisfied that the first appellant confessed to the offence voluntarily, and the second appellant not only confessed too, but he was identified as one of the perpetrators of the robbery. It rejected the defence. On that basis it concluded that the appellants' guilt had been proved beyond reasonable doubt.

On first appeal, Hon. Mariki, PRM with extended Jurisdiction was satisfied that PW1's familiarity with the second appellant made his evidence of identification free from mistake. He also considered the cautioned statements as being implicating on the appellants and that

their decision not to cross-examine PW2 could only mean that they accepted what was said against them.

In determining these two grounds of appeal, there are two pieces of evidence for our scrutiny. The first is the evidence of PW1 that he recognized the second appellant at the scene of crime after he had hired his motorcycle, and that he named him to PW2 immediately. From caselaw it is now settled law that such naming of a suspect at the earliest opportunity is an assurance of the person's credibility. [**Marwa Wangiti Mwita and Another v. Republic**, [2002] T. Z. R. 39. The second piece of evidence is the appellants' confessions. It is again settled law that *"everything being equal, the best evidence in criminal trial is a voluntary confession from the accused himself."* [**Paulo Maduka and 4 Others v. Republic**, Criminal Appeal No. 110 of 2007, cited in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (both unreported)].

The first appellant submitted that he confessed to avoid more torture. However, we wonder what prevented him from objecting to admissibility of exhibit P1. There is also no explanation for not cross-examining PW2 on the alleged torture. If anything, the prosecution's

case appears credible to us because according to PW2 he arrested three people at the restaurant, the appellants and the third person who was not prosecuted. This fact suggests to us that the charging of the suspects was not random as the appellants would have us believe. The second appellant submitted that there were discrepancies on the date of PW1's medical treatment and whether he sustained injury on the right or left ear. He also picked issue with the prosecution's failure to call the person who drove PW1 to the Police to report the robbery.

We do not share with the second appellant, the view that there are discrepancies on the dates of PW1's treatment, only that the incident took place past midnight, which may pose a challenge in stating dates, and time. The issue of which ear of PW1 was injured is clear from PW5's testimony who said it was the right, but PW1 did not specify whether it was the left or right ear. In his testimony, PW1 stated that he was injured on the left eye, which the second appellant may have mistaken for right ear. In view of that, the argument by the second appellant that there was a discrepancy is misplaced, in our view. As for the person who drove PW1 to the Police not being called to testify, we

do not find him an important witness in relation to what had happened to PW1 before he met him.

In the end, we find the prosecution case to have been proved against the appellants beyond reasonable doubt and their convictions were on that basis, not otherwise. We see no merit in the first and third grounds of appeal.

The entire appeal therefore has no merits and stands dismissed.

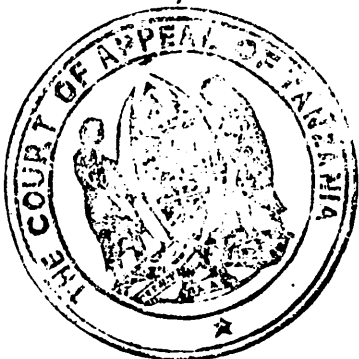
DATED at KIGOMA this 9th day of June, 2022.

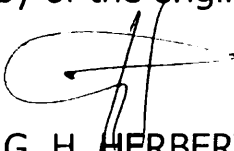
F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on this 10th day of June, 2022 in the presence of the appellants in person, unrepresented and Ms. Happiness Mayunga, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL