IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 579 OF 2017

LEONARD MATHIAS MAKANI ..... 1ST APPELLANT

DOSELA JELARD KALINGA @ HAMZA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mutungi, J.)

dated the 12th day of December, 2017

in

Criminal Appeal No. 94 of 2015

.....

JUDGMENT OF THE COURT

14th March & 11th April, 2023

LILA, JA:

The appellants, Leonard Mathias Makani and Dosela Jelard Kalinga @ Hamza (the 1st and 2nd appellant, respectively) are each currently serving thirty (30) years imprisonment upon being convicted of the offence of armed robbery contrary to section 287A of the Penal Code by the Resident Magistrates' Court of Dar es Salaam at Kisutu. In the same charge sheet, Leonard Leopad Mombeki and Gerald Moses Akyoo (then 3rd and 4th accused, respectively) were each charged with the offence of receiving stolen properties contrary to section 311 of the Penal Code but

were acquitted on the ground that they received the stolen properties innocently. In their joint appeal to the High Court of Tanzania at Dar es Salaam, the appellants challenged both convictions and sentences but they failed. Still aggrieved, they have appealed to this Court.

The appellants' convictions were a result of their being accused of stealing from three different students one lap top make Toshiba worth TZS 680,000.00 and TZS 7,000.00 cash, ATM card, one wallet, one mobile telephone make Samsung and one University of Dar es Salaam identity card belonging to Robert K. Alex (PW2) and one lap top worth TZS 680,000.00, two mobile telephones make Nokia worth TZS 200,000.00 and Samsung worth TZS 400,000.00 the properties of one Kitojo Karani (PW3), one bag and one lap top make HP the properties of one Masalu Elias (PW7). The victims were law students at the University of Dar es Salaam. A short gun was applied to threaten them before stealing and later was used to shoot Robert Alex in order to retain the properties stolen. The incident occurred on 21/6/2013 at night at the University of Dar es Salaam at Yombo One classroom where the trio were studying.

The brief chronological events leading to the present appeal are not difficult to grasp. In that fateful night when the victims were busy studying, two persons not familiar to them but who they thought were

their fellow students at the University, approached them and ordered them to lay down. In the course, they were ordered to surrender their belongings which comprised the items listed above notwithstanding their plea to have their flash discand wallet which had an identification not be taken away. The bandits took those items and immediately vanished into thin air. The trio claimed that the area was well illuminated by tube lights and were therefore able to see the bandits' faces. However, the bandits were not shortly arrested. It was until on 16/7/2013 when PW2 was called by police to identify the culprits in an identification parade whereat he said he was able to identify the appellants. He gave the features of his stolen lap top to be that it was burnt by ironing machine, one of its stands was bound by super glue, the back side had scratches and also identified his mobile phone by its make. He also claimed that he underwent four major operations and still there were rounds of ammunitions which were yet to be removed out of between 35 and 34 rounds of ammunitions which were shot by 1st appellant. On his part, PW3 said he participated in the identification parade at Oysterbay Police Station conducted by Esther Zephania (PW12) who was then the Officer In-charge of Police Station (the OCS) at Msimbazi Police Station on 20/7/2013 and managed to identify the appellants. PW7 claimed that he saw the 1st appellant on the fateful night having a panga and the 2nd appellant had a gun and that he

managed to identify the appellants in an identification parade conducted by Insp. Safia Seleku (PW8). On his part, PW2 said the 2nd appellant had a panga. He was later on 16/7/2013 called at the police station whereat an identification parade was conducted and he managed to first identify the 2nd appellant followed by the 1st appellant.

Whereas the victims gave the above story, the appellants' arrest and recovery of the allegedly stolen items, the evidence on record presented a completely different story. The 1st, 2nd and the then 4th accused were arrested by E. 8431 D/Sgt Mohamed (PW1), who was then In-charge of the Task Force stationed at Kinondoni while in the company of D/Cpl Benatus, Bundala, DC Godfrey and WP D/Cpl Josephine. Acting on a tip by undisclosed informer that the appellants were responsible with the robbery incident at the University of Dar es Salaam and were at Ubungo area looking for one to buy a sumsung mobile phone, PW1 and his team proceeded to Ubungo area where they arrested the 2nd appellant who was accompanied by a woman and upon searching the bag he carried on his back, they found a short gun with one bullet, a panga and a Samsung mobile phone model 3230 which were collectively admitted as exhibit P1 and were enlisted on a search warrant (exhibit P2). Upon interrogation, the 2nd appellant named the 1st appellant as being his companion on the robbery incident and led the Task Force to a playing

ground just behind Ubungo Plaza building where the 1st appellant was arrested and, on being interrogated, he confessed participation in the robbery incident and named then 3rd accused as being the person whom they took the stolen laptops. He led the police to Mwananyamala where the 3rd appellant stayed and was arrested and he told the police that he had sold the laptop to then 4th accused at Kariakoo. He took the police team to Kariakoo and the 4th accused was arrested. Upon his arrest and without hesitation, the 4th accused identified the 3rd accused to be the one who sold to him two Toshiba laptops (exhibit P3). The appellants and the 3rd and 4th accused were taken to the police station. At the police station, the appellants were interrogated on 8/7/2013 and the 1st appellant's cautioned statement (exhibit P9) was recorded by E. 4128 D/Sgt Ndege (PW10) while that of the 2nd appellant (exhibit P10) was recorded by E. 7846 D/Cpl Ernest (PW9). The two cautioned statements were not smoothly received as exhibits as the appellants objected to their admissions as exhibits claiming that they were not freely taken. The trial court conducted an enquiry before each of them was received and, in the course, both PW9 (IPW1) and another policeman one D. 7312 D/Sgt Jumanne who also testified as IPW1 instead of PW10 in the respective inquiry proceedings, told the trial court that at the time of recording the

appellants' cautioned statements there were other persons in the office. To be particular, PW9 said: -

> *"What I recall on 8/7/2013 at around 18:00hrs I was in my office – RCO Kinondoni. I was interrogating the accused in the name of Leonard Mathias and I did record his statement.* ***I was in the office of CID and among the police officer who were present in the office was one Cpi. Ernest..."*** (Emphasis added)

For his part, D/Sgt Jumanne (IPW1), during examination in chief he told the trial court that: -

> *"...I physically did hear D/Ssgt. At the time when introducing himself to the accused.* ***I did hear*** *also at the time when the accused was informed of the offence accused on and when cautioned thus the accused was educated of his right to call relative or advocate thus the accused on his own did opted to record his statement on his own as he claimed to have known how to read and write that he was given a paper and pen and the accused started to write.*
>
> ***I did hear*** *S/Sgt asking the accused to write anything that he knows in connection to the robbery offence happened at the University of Dar es Salaam.*
>
> ***I did later witness D/Ssgt Ndege asking the accused*** *to certify and confirm what he had written and final I did*

see the accused at the time signing his cautioned statement.

Immediately after signing the accused was returned back and hand over to Insp. Shlla.

No torture or threatening had given to the accused. That place is the Government office. ***There were so many movements****. No one can be killed. It was my first time to see the accused. That is all."*(Emphasis added)

When IPW1 was cross-examined by the 1st appellant, he said: -

"I was on the police Osterbay, there was only afande Jumanne in the office of Oysterbay there was no any remandee who was killed on the material date. This procedure of recording cautioned statement was complied with. I was with S/Sgt Ndege using the one table. On the material day. I confirm to have seen the accused at the time writing his statement.

I know six (PW7). I think he was also present *on the material day..."*

Notwithstanding the above narrations by the prosecution witnesses during inquiry proceedings, the trial court was satisfied that the appellants' cautioned statements (exhibits P9 and P10) were freely taken and were properly admitted as evidence.

In their respective defence evidences, the appellants denied involvement in the commission of the charged offence. The 1st appellant claimed that he was arrested by police at a playing ground following a fracas that ensued between those who were playing and was taken on board in the police car and on the way to the police station another person who had laptop was also arrested. He denied being subjected to an identification parade and being identified by the victims. The 2nd appellant denied being arrested while in the company of a woman who was however not called as a witness and also denied being found with exhibit P1. He said he was arrested in a chaos involving his fellow motorcycle transporters famously known as "bodabodas" whereat he had gone to assist the matter be resolved. Both appellants claimed to have been forced to sign some documents while in police custody without being afforded an opportunity to read them and after being tortured. They dismissed the evidence by the prosecution witnesses as being sheer lies and that they found themselves being jointly charged while they were strangers to each other.

In his judgment, the learned trial magistrate raised one issue to guide him in the determination of the case which was whether the evidence adduced by the prosecution witnesses proved the offences charged. In his analysis and evaluation of the evidence by both sides, the

leaned trial magistrate found the charge proved against the appellants beyond reasonable doubt and he convicted them. It was his finding that the sequence of events from the arrest of the 2nd appellant to the arrest of other accused persons including the 1st appellant established a link between the occurrence of the incident and the items recovered. He was satisfied that the appellants confessed to the commission of the offence, they were properly identified both at the crime scene and in the identification parades and also that the items recovered were positively identified to be those stolen during the commission of robbery incident. He then, as stated above, sentenced them to serve the above stated prescribed mandatory sentences.

For similar reasons, the appellants' first appeal to the High Court failed. The learned presiding judge was convinced that the tube lights illuminated the crime scene and the robbery incident took some time which was sufficient enough to enable the appellants be positively identified by PW2, PW3 and PW7 (the victims). She was also moved by the manner PW2 and PW3 identified the two laptops by special marks and supported her finding by the Court's decision in **Kobelo Mwaha vs Republic**, Criminal Appeal No. 173 of 2008 (unreported) in which that requirement was underscored. Regarding the identification parades, she concurred with the trial court that they were properly conducted as they

complied with the provisions of sections 60 of the Criminal Procedure Act (the CPA), section 38 of the Police Force Auxiliary Services Act as well as the Police General Orders which require the suspect be placed amongst at least eight persons of similar age, height, general appearance and class of life during the conduct of an identification parade.

The appellants are still protesting their innocence as evidenced by a host of grounds of appeal seeking to assail the High Court decision. The initial joint memorandum of appeal lodged on 19/3/2019 comprised seven (7) grounds of appeal. The 1st appellant, later on 11/11/2019, lodged a supplementary memorandum of appeal with eight (8) grounds. Subsequently, on 30/12/2019, the appellants lodged a joint supplementary memorandum of appeal containing six (6) grounds but divided into several parts. They, further, on 29/5/2019, lodged a list of authorities to be relied on during the hearing of the appeal followed by another one filed on 5/6/2020. Closely examined, the complaints in those memoranda are repetitive. Common critical challenges by the appellants relate to identification of the appellants both at the crime scene and during the identification parade, cautioned statements not being voluntarily extracted from them and evidence of identification of stolen properties being insufficient. We are of a considered view that these complaints are

decisive in the determination of this appeal. They will therefore be seriously addressed in this judgment.

Neither of the appellants had legal representation all along to this Court. They fended for themselves. For the respondent Republic, Mr. Mwandoloma, learned Senior State Attorney, appeared. He readily supported the appeal.

Before the hearing could commence in earnest, the Court informed the appellants of the affirmed fruitless efforts made by the Registrar of the High Court to procure the missing ruling on inquiry proceeding in respect of the admissibility of the 2nd appellant's cautioned statement (exhibit P9) by the trial court which formed the basis of ground four (4) of the supplementary grounds of appeal lodged on 30/12/2019. Both appellants willingly opted to abandon that complaint and urged hearing of the appeal to proceed based on the remaining grounds of appeal. Since absence of the said ruling could not hinder the Court from proceeding with the rest of the grounds and determination of the appeal justly, Mr. Mwandoioma received the appellants' option appreciatively and the hearing proceeded.

Both appellants rested their cases after adopting the grounds of appeal to which they urged the Court to consider and set them free.

Mr. Mwandoloma began with the complaint on the conduct of the identification parade which was held thrice by PW8, PW11 and PW12 and identification registers (exhibits P8, P11 and P12) admitted as exhibits. He faulted them on the ground that neither of the victims (PW2, PW3 and PW7) gave the description of the persons they saw on the incident night prior to being taken to the identification parades as was stated by the Court in the case of **Hamisi Ally and Three Others vs Republic**, Criminal Appeal No. 596 of 2015 (unreported). He was firm that the record bears out clearly that descriptions of the persons to be identified were not given to any one and the appellants' arrest was not based on such descriptions. The appellants' identification in the identification parades was therefore doubtful, he concluded.

The learned Senior State Attorney also expressed his discontent on the circumstances under which the appellants' cautioned statements were taken. He argued that the record is loud that other people were present in the room where they were taken quite in contravention of the settled law that such statements should be freely taken. To reinforce his argument, he relied on the Court's decision in **Charles Issa @ Chile vs Republic**, Criminal Appeal No. 97 of 2019 (unreported). It was his view that it was not proper to rely on the cautioned statements to convict the appellants.

The learned Senior State Attorney further doubted whether the allegedly stolen and later recovered properties were positively identified by the victims. Central to his argument was that the victims did not provide for special marks that would distinguish the laptops and the Sumsung mobile phone allegedly found with the appellants with the rest of such readily and widely available similar items. Features like type of the laptop being Toshiba, having scratches and being bound with super glue, according to him, were too general hence insufficient. He stressed that it was upon the prosecution to lead the victims properly on how they identified the recovered items as belonging to them. In the circumstances, he submitted, there was no nexus between the stolen items and those recovered rendering the doctrine of recent possession inapplicable to hold the appellants responsible with the commission of the offence. Worse still, Mr. Mwandoloma argued, the seizure certificate (exhibit P4) which would have assisted in establishing the appellants responsibility is not useful because it was not read out to the appellants to enable them comprehend its contents. He prayed the same to be expunged from the record of appeal. With such ailments, Mr. Mwandoloma conceded that the evidence on record did not prove the charge beyond doubts and the appellants' conviction was therefore faulty.

On our part, having scrutinized the evidence on record, like both courts below, we entertain no scintilla of doubts that the robbery incident under discussion occurred at the University of Dar es Salaam and the charged items were stolen. A crucial issue is whether the prosecution evidence sufficiently established the appellants' involvement in the commission of that offence. As demonstrated above, the prosecution mostly relied on the evidence by the victims and the appellants' caution statements to prove the charge against the appellants.

Upon consideration of the learned Senior State Attorney's arguments, we are convinced and therefore join hands with him that this appeal has merit.

We shall begin our deliberation with whether the appellants were positively identified by the victims at the crime scene and at the identification parades. The victims claimed that, using light from tube lights which illuminated the place they were studying, they saw the faces of the appellants as they were uncovered and the incident took some time when they were ordered to lay down and hand over the stolen items. Evidence relied on is therefore visual identification for which the test of its reliability is that it should be watertight for it to found a conviction as was underscored in the often-cited case of **Waziri Amani vs R** [1980]

TLR 250. In that case the Court set guidelines which the court should consider so as to satisfy itself that such evidence is watertight which include; the time the culprit was under the witness observation, witness's proximity to the culprit when the observation was made, the duration the offence was committed, if the offence was committed in the night time, sufficiency of the lighting to facilitate positive identification, whether the witness knew or had seen the culprit before the incident and description of the culprit. In the present case, the victims' evidence suggest that all the requirements were met save for the fact that the culprits were strangers to them and giving description of the appellants. The record is vivid that neither of the victims explained the descriptions of the appellants to the police who conducted identification parade prior to being called to identify the culprits or to any one they first came by after the incident. Even PW1 who arrested the appellants did not act on the descriptions given by the victims but was led by an informer. In the circumstances we are justified to agree with the learned Senior State attorney and we hold that the appellants were not identified at the crime scene. Descriptions of the appellants before arrest serve two crucial purposes; it assists the police to trace and arrest the culprits based on the descriptions and also

in lending assurance as to the person to be identified at the identification parade. That said, it follows that the descriptions of the culprits should be known to the police before the identifying witnesses are taken to the identification parade particularly in situations where, like in the present case, the appellants' arrest was not based on the descriptions given by the victims. As a matter of insistence, we wish to reiterate what we said in **Hamisi Ally vs Republic** (supra), that:-

> *"...We think it was vital, in the circumstances of this case, for the police to give details of the description of the appellants given to them by witnesses which enabled them to single out the appellants for the identification parade."*

This Court consistently maintained that giving a detailed description of the appellants is a pre-requisite condition before the identifying witness is taken to the identification parade for him to identify the person(s) he allegedly saw at the crime scene. (See **Ahmad Hassan Marwa v. The Republic**, Criminal Appeal No. 265 of 2005 and **Athuman Buji V. Republic**, Criminal Appeal No. 118 of 2008 and

Adriano s/o Ayondo v. Republic Criminal Appeal No. 29 0f 2009 (all unreported). For instance, in the last case, the Court stated as follows: -

> *".....it is settled law that for any identification parade to be of any value, the identifying witnesses must have earlier given a detailed description of the suspects."*

The ability of a witness to single out a culprit from a group of persons attending an identification parade based on description given beforehand cements his dock identification as the Court propounded in the case of **Abdul Farjala and Another vs Republic**, Criminal Appeal No. 99 of 2008 (unreported) that: -

> *"It is trite law that the test in an identification parade is to enable a witness to identify a person or persons whom she or he had not known or seen before the incident... An identification parade held soon after the incident in which a witness positively identifies an accused lends assurance to the court of that witness's dock identification of that person..."*

In the instant case, neither of the victims gave the descriptions of the culprits to any including the police prior to being exposed to the identification parades. The parade was therefore of no value at all. Actually, all there is in the record is

a dock identification which, independently, cannot ground a conviction. We therefore entirely agree with the learned Senior State Attorney that evidence placing the appellants at the crime scene is wanting. This takes us to another issue whether the appellants' caution statements were freely taken.

We shall start our deliberation by first acknowledging the legal proposition that an accused person who confesses his guilt is the best witness [see **Twaha Alli and Five Others vs Republic**, Criminal Appeal No. 78 of 2004 (unreported)]. A confession is therefore a full-self-implication to the commission of the offence by the accused person. We also take note of the provisions of sections 57 and 58 of the Criminal Procedure Act under which caution statements are recorded. They provide for the procedure to be followed in taking an accused person's statement which should be adhered to for it to be worth it. They place, among others, an imperative duty on the police recording it to write the questions asked and answers given, to show whether a caution was given and his reply thereof, time of

recording, a requirement that the accused should certify by writing or by hand the statement or even refuse or fail to comply with any of the police requests and the terms of his refusal. They also require the accused to be accorded opportunity to read the statement or the police to cause it to be read out to him if he cannot read before the suspect signs it. Cumulatively and comprehensively examined, those conditions are there to guarantee that the statement is taken freely.

It is settled law that non-compliance with the mandatory provisions of section 57 of the CPA affect the fair trial of the appellant and the statement is liable to be expunged from the record. (See; **TAUTA KIKORIS V. R,** Criminal Appeal No. 94 of 2009, **MEREJI LOGORI V. R**, Criminal Appeal No. 273 of 2011 (both unreported).

Further to the above, the Court had an occasion to consider the probative value of a cautioned statement taken in a situation akin to the present one in the case of **Simon Aron vs Republic**, Criminal Appeal No. 583 of 2015 (unreported) where

voluntariness of the oral confession made by the accused in the presence of at least six people was challenged. The Court, after making reference to the import of the phrase 'cautioned statement' as was amplified by the Court of Appeal of Kenya in **Mohamed Shiraz Hussein vs Republic** [1995] eklr that it extends to oral confession so as ensure its voluntariness, observed that: -

> *"It seems obvious that the treatment whlch the appellant received while in the village lockup was not conducive for him to give a free and voluntary confession..."*

Although the observation made related to oral evidence, it is clear that it was an extension from its usual application in written confessions by accused persons (cautioned statement) that the need to caution an accused person before taking his confession is intended to preserve an accused's freedom at the time of making a confession which is a key element in recording a confession. It is therefore a rule against a cautioned statement being recorded in situations or circumstances which may

interfere or infringe the maker's freedom of expression such as in the presence of many people.

As shown above, in the instant case, the appellants' caution statements were taken by PW9 and PW10 but in the presence of other persons who, definitely infringed their freedoms in recording their respective caution statements. That was a violation of the requirements of sections 57 and 58 of the CPA. The statements were therefore irregularly taken (see **Kisonga Ahmad Issa and Another vs Republic**, Consolidated Criminal Appeals No 171 of 2016 and Criminal Appeal No. 362 of 2017 as well as **Bakari Ahmad @ Nakamo and Another vs Republic**, Criminal Appeal No. 74 of 2019 (Both unreported) all cited in **Chile Issa @ Chile vs Republic** (supra). We, accordingly, expunge them from the record of appeal.

Lastly, we shall examine the evidence relating to identification of the recovered items by the victims. Being found in possession of recently stolen items is another piece of evidence which, if proved and in the absence of satisfactory explanation of how one

legally or innocently came by such items, may ground a valid conviction. Such a conviction is founded on the application of a doctrine of recent possession (See **Ally Bakari and Pili Bakari vs Republic**, [1993] TLR 10. But for the doctrine to apply and therefore establish a charge of armed robbery all the elements stated in that case must be proved that: -

> *"Quite clearly, as a matter of law and logic, it is essential for a proper application of the doctrine of recent possession, that the stolen thing in the possession of the accused must have a reference to the charge laid against the accused. That is to say that the presumption of guilt can only arise where there is cogent proof that the stolen thing possessed by the appellant is the one that was stolen during the commission of the offence charged, and, no doubt, it is the prosecution which assumes the burden of such proof, and the fact that the accused does not claim to be the owner of the property does not relieve the prosecution of that obligation."*

The above proposition of the law, therefore obligates the proper owners or those constructively owning such stolen

properties to properly and positively identify them. For such identification to be sufficient, it must be detailed and must give the description of the stolen property by giving special marks and this should be done before they are shown to the witness and before they are produced as exhibit. That way the court is assured that such properties are the ones stolen from the complaints or victims. This Court, in the case of **Mustapha Darajani vs Republic,** Criminal Appeal No. 242 of 2005 (supra), faced a situation where PW1 alleged that his cattle were stolen but did not give special marks of his cattle he alleged to have been stolen. The Court held that

> *".... In such cases description of specific mark to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits."*

(See also the decisions of this Court in the case of **Bundala s/o Mahona v. Republic** Criminal Appeal No. 224 of 2013, **Mustapha Darajani v. Republic,** Criminal Appeal No. 242 of

2005 and **Godfrey Lucas V. Republic**, Criminal Appeal No. 151 of 2014 (all unreported)

Now, looking back to the nature of the descriptions of the stolen properties given by PW2, PW3 and PW7 by telling the make and scratches, in the light of the settled position of the law, we are inclined to fully agree with Mr. Mwandoloma that they did not meet the test set. Sumsung mobile phone, Toshiba laptops, scratches and being sealed with a super glue are common features of any used laptops.

In the circumstances of the present appeal where the prosecution evidence failed to place the appellants at the crime scene, the cautioned statements having been improperly taken and the victims having failed to establish that the stolen properties belonged to them for failure to identify them by giving peculiar or specific marks, it is obvious that the prosecution evidence, as was rightly submitted by the learned Senior State Attorney, fell short of establishing the appellants'

involvement in the commission of the offence. The charge against the appellant was therefore not proved beyond doubt.

For the foregoing reasons, we allow the appellants' appeal, quash their convictions and set aside the sentences imposed by the trial court and sustained by the first appellate court. They are, therefore, to be released from prison forthwith if not held for another cause.

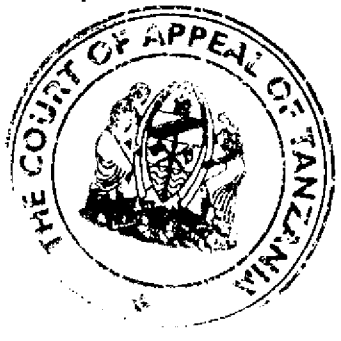
DATED at **DAR ES SALAAM** this 6th day of April, 2023.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment is delivered this 11th day of April, 2023 in the presence of the 1st and 2nd Appellant vide video link from Ukonga prison and Ms. Salome Matunga State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL