IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO. 8/2009

FROM DISTRICT COURT MASASI AT MASASI

ORIGINAL CRIMINAL CASE NO. 50/2008

(BEFORE: B.M. MASHABARA – RM)

HAMISI SELEMANI - - - - - - - - - - - -APPELLANT

VERSUS

THE REPUBLIC - - - - - - - - - - - - - -RESPONDENT

4/8/2010 and 30/8/2010

JUDGMENT

S. A. Lila, J.

The appellant, Hamisi Selemani, really deserved to appeal to this court against the decision of the district court of Masasi which convicted him and sentenced him to serve five (5) years imprisonment for the first count of burglary contrary to section 294(1) and five (5) years imprisonment for the second count of stealing contrary to section 265 of the Penal Code. The appellant indicated his intention not to appear during the hearing of the appeal

while the learned State Attorney, Miss Mangu, appeared for the republic and declined to support the appellant's convictions.

The charge sheet alleged that on 17/3/2008 at about 02:00 am the house of Amani Chunlai @ Jogia (PW3) was broken into and nine cushions, valued at Tshs.9500/=, one Toyota injector pump value at Tshs.1,000,000/=, one chargeable lamp value at tshs.45,100/= and one torch valued at Tshs.5,000/= all total valued at Tshs.1,149,100/= were stolen. These stolen items were alleged to belong to PW3.

The prosecution evidence on record shows that Hassan Selemani (PW1), a cushion mendor, on 17/3/2009 went to one Alex Mashingo (then 2nd accused) to mend cushion whereat he saw nine cushions at the toilet side and was told that the appellant (then 1st accused) wanted to use then, as bond for Tshs.20,000/=. He said the following day at night time, police went to him and requested him to witness search in 2nd accused house whereat nine cushions were recovered. That the appellant and the cushion were taken to police station. E.9686 Sgt Democracy, a policeman, who investigated the case told the trial court that he was on 18/3/2008 informed that Hamisi Selemani (appellant) had committed an offence at Jogia's residence. That they went to Hamisi Selemani's (appellant's home) where they found injector pump while at the 2nd accused they found set of cushions. He said all the properties were identified by Jogia. The appellant, in court, objected the cushions being admitted as exhibit for the reason that they were not found in his house. He

similarly objected the injector pump be received as exhibit because it did not belong to him. PW2 told the trial court that the appellant admitted committing the offence and his cautioned statement was taken (exhP3). The appellant objected the production of the cautioned statement stating that he did not state that he committed the offence in the cautioned statement. Jogia (PW2), told the trial court that on 17/3/2008 at about 02: hrs he was asleep and he heard a noise indicating that the door was being opened. He said he got up and at the corridor he met face to face with accused persons who took a bag and cushions and ran away. He said those persons were the ones who visited his house on 17/3/2008 seeking to rent his house and they agreed the rent to be Tshs.120,000/= whereby 100,000/= was rent and 20,000/= as commission.

In their sworn defences the appellant and one Alex Mashingo who did not appeal denied involvement in the commission of the offences. The appellant alleged that on 18/3/2008 he was arrested by police after they were accused that they had broken his house.

The appellant have raised substantially eight grounds of appeal but his major complaints rest on the fact that he was not seen breaking and stealing from the house of PW3, impropriety in the way the cautioned statement was taken and the search warrant was not produced in court. He also complains that the copy of judgment supplied to him did not show the evidence of the prosecution witnesses.

As indicated above, the appellant did not enter appearance when the appeal came for hearing. He did not wish to appear.

Arguing the appeal before me, Miss Mangu, learned State Attorney, declined to support the appellant's conviction basically on three grounds. **Firstly,** she said the appellant was not properly identified at the scene as the offence was committed at night time (2:00hrs). She said PW3 did not tell if there was light that enabled him see and identify the appellant and did not provide the description of the person he said to have seen and identified contrary to the conditions set in the case of **Waziri Amani V. R. (1980) T.L.R 250**. **Secondly,** she said PW3 did not tell the special marks distinguishing the stolen items from other such items so that he could be taken to have properly identified them to be his and among the stolen items. She argued that the mere assertion that he identified them was insufficient. **Thirdly**, and lastly, she argued that the appellant's cautioned statement was wrongly admitted as exhibit and acted upon for failure by the presiding magistrate to conduct an inquiry so as to satisfy himself that the same was voluntarily made by the appellant after he had denied making it.

With respect, I agree with the learned State Attorney that the appellant's conviction was founded upon insufficient and unsatisfactory evidence. There are four issues upon which this appeal must stand. The evidence implicating the appellant with the charge preferred against him was entirely of identification, confession and being found in possession of stolen items.

First, there is the issue of search. On the evidence on record, it is clear that search was conducted at the appellant's house. The provisions of section 38 of the criminal Procedure Act, 1985 (Cap 20 R.E. 2002) requires that search be conducted by persons issued with search warrants unless such search is conducted under immergency situations (S.42 of the CPA). In this case we are not told that the search was an immergency one. So PW2 who allegedly conducted the search ought to have carried with him a search warrant authorizing him to conduct search in the appellant's house. Also the recovered items ought to have been filled in the certificate of search and persons in attendance during the search should sign the same (S.38(3) of the CPA). That was not done. The search was therefore illegally conducted.

Identification of the appellant at the scene is another issue upon which this appeal must stand. On the evidence, the offence was committed at night time (at 02:00 hrs). As rightly argued by the learned State Attorney, identification of the appellant was insufficient. PW3 simply said he, at the verandar, met the accused persons face to face. As rightly argued by the learned State Attorney, PW3 did not tell if there was light at the area. For offences committed at night this court have time and again held that to eliminate the chances of unmistaken identity, the witness alleging that he saw and properly identified the accused should tell not only if there was enough light at the area but also its source. This was insisted by the court of appeal in the case of **Mussa Omari V.**

Republic Criminal Appeal No. 83 of 2000 Dar es salaam Registry (unreported). In this case PW1 neither said that there was light at the area nor did he mention the source of such light. This was not all. PW2 did not tell the distance at which he met the accused persons face to face and the time he had such persons in observation. On the evidence it is clear that the meeting was brief and PW3 met more than one person and he was taken by surprise for he was not prepared to meet such people. It was thus difficult for him to have concentrated his attention on any one of the persons he met. The conditions, as gleaned in the trial court record were difficult for a proper and unmistaken identification. The conditions set for proper identification at light in the case of **Waziri Amani V.R**. (supra) were therefore not met. Besides, PW3 never gave any description of the persons he saw that night that led him to conclude that one of them was the appellant. Neither did he tell the trial court that he revealed such features to any one including the police or to have mentioned the appellant who he said went to his house the previous day. Worsly, PW3 did not tell the court how he came to know and conclude it was the appellant who committed the offence charged. The need for a witness to provide details and description of the person identified have been insisted in many decisions to mention but few are **Augustin Kente V. R (1982) T.L.R 122 and Rashidi Ally V.R. (1987) T.L.R. 97.** in all these cases it was held that identification of an accused person is not sufficient where it is not accompanied by necessary details. I am satisfied, therefore, that the evidence on identification of the appellant at the scene of crime was most unsatisfactory. Quite obviously, the trial court had not

tested that evidence on identification up to the required standard. Actually, what the trial magistrate did was to summarise the evidence and conclude that the appellant was guilty for both offence without analyizing the evidence.

Thirdly, is the issue of identification of the stolen items. The learned State Attorney, arguing this appeal, said PW3 simply said he identified the stolen items to be his. Actually, on the evidence, PW3 said nothing about his identifying the recovered items at the police station. Neither did he tell the trial court that he outlined the special marks of his stolen items at the police station when he reported the incident. Infact it is PW2, the investigator, who said PW3 identified at the police station the custions and injector pump as being among his stolen. **Worsly,** PW2 did not tell the trial court how PW3 managed to identify the things found at the police station as being among his stolen items. The injector pump and cushions are articles of common manufacture and could be bought and owned by any one. To identify them PW3 ought to have given special marks or features distinguishing them from such other similar items. In the case of **Baman Abedi V. R. (1967) H.C.D n.11**, the question of identification of stolen khangas was in issue and Saidi, J. (as he then was) held;

> *"Exhibition of a pair of khanga not distinguishable from other such items by special marks or features will not support a finding that they are the same as those stolen."*

On the above authority therefore, if PW3 simply, at the police station, said he identified them to be his stolen items as PW2 told the trial court, then that assertion was a bare one and insufficient to identify such common articles which could be bought from the shop and owned by anyone.

Lastly, the issue of the cautioned statement. As rightly argued by the learned State Attorney, the cautioned statement was wrongly admitted in evidence on the ground that no inquiry was conducted by the presiding magistrate before its admission. The trial Court record is clear that the appellant objected such cautioned statement from being admitted as exhibit because he did not make such statement. The legal position is now settled in the case of **Masasila Mtoba V.R. (1982) T.L.R 131 at page 132**, as rightly argued by the learned State Attorney, it was held that where the prosecution seeks to tender a cautioned statement as exhibit and the accused disputes or objects its so being tendered, as was the case in this case, the trial magistrate is required to take up the matter and inquire into the circumstances leading up to the taking of the statement and ask the accused whether he plans to challenge the admissibility of such statement. This is done so as to enable the trial magistrate determine whether the statement was voluntarily made before its admissibility. In many of our decisions magistrates have been condemned for not conducting inquiries without actually putting in place the procedure to be followed in doing so. That has been very

unfair. The Court of Appeal of Tanzania in **Selemani Abdallah and 2 Others V. The Republic Criminal Appeal No. 384 of 2008** (Dar es salaam Registry) observed the above anormally and it decided to put in place the procedure to be followed by magistrate in conducting inquiries. It held that since the end result of a trial within a trial conducted in the High Court and an inquiry is the same then the procedure of conducting a trial within a trial should also be applicable in subordinate courts when conducting an inquiry save that portion pertaining to retirement and recalling of assessors. The Court of Appeal went on to hold that the procedure of conducting trial within trial is stated, in a number of cases including **Rashidi and Another V.R. (1969) E.A. 138** where the East African Court of Appeal observed;

> *"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 V. Republic (1956) 23 E.A.C.A 480*** *and* ***Ezekia Simbamkali V. Republic H.C.D 192 (EACA)).***"

The Court of Appeal of Tanzania then went on to lay down the procedure to be followed in conducting an inquiry. For clarity, I wish to quote the same in extenso;

"The procedure entails the following:

(i) When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.

(ii) The trial Court should commence a new trial from where the main proceedings were stayed and all upon the prosecutor to adduced evidence in respect of that aspect of voluntariness. The witnesses must be sworn or affirmed as mandated by ***section 198 of the Criminal Procedure Act, Cap 20.***

(iii) Whenever a prosecution witness finishes his evidence the accused or his advocate should be given opportunity to ask questions.

(iv) Then the prosecution to re-examine its witness.

(v) When all witnesses had testified, the prosecution shall close its case.

(vi) Then the court is to call upon the accused to give his evidence and call witnesses, if any. they should be sworn or affirmed as in the prosecution side.

(vii) Whenever a witness finishes, the prosecution to be given opportunity to ask questions.

(viii) The accused or his advocate to be given opportunity to reexamine his witnesses.

(ix) After all witnesses have testified, the accused or his advocate should close his case.

(x) In case the court finds out that the statement was voluntarily made (after reading the Ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings he is still on oath and should allow him to tender the statement as an exhibit. The court should accept and mark it

as exhibit. The contents should then be read in court.

(xii) In case the court find it out that the statement was not made voluntarily, it should reject it.

In summary form the procedure is like this:

INQUIRY

PROSECUTION DISE

PW1 (Inquiry prosecution witness 1), name, age, Religion, Sworn/affirmed

XD In chief

XXD By the accused/Advocate

RXXD by the Prosecutor

XD: Court: If any

NB: *If there are several witnesses the procedure is the same.*

Prosecutor: To close its case

DEFENCE

DWI (Inquiry Defence Witness)

Name, Age, Religion, Sworn/Affirmed

XD In Chief:

XXD by the prosecutor

RXXD by an advocate, if any

NB: *If there are several witnesses the procedure is the same.*

Defence: To close its case

Court: To make a Ruling"

The above guidance, The Court of Appeal held, would help magistrates when conducting an inquiry.

The above cited procedure was not abided by the trial magistrate. The cautioned statement of the appellant was therefore erroneously admitted as exhibit. The trial court, in the circumstances was therefore wrong in relying and acting upon it to ground the appellant's conviction.

In the final analysis therefore, I allow the appellant's appeal. I quash the conviction and set aside the sentences imposed and hereby order his immediate release from prison unless held therein for any other lawful cause.

S. A. Lila
Judge
30/8/2010