IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CRIMINAL APPEAL NO. 37 OF 2009

(Originating from Manyoni District Court Criminal Case No. 424 of 2006)

DANIEL PAULO MPONDO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

19/7/2010 & 07/9/2010.

KWARIKO, J:

The appellant herein was arraigned before the trial Court for the offence of Armed Robbery contrary to section 285 and 286 of the Penal Code Cap. 16 Vol. 1 of the Laws Revised Edition 2002. He had denied the charge and at the end of the trial the appellant was found guilty of the offence, convicted and sentenced to thirty (30) years imprisonment and an order of compensation of stolen property was made.

The appellant was partly advocated at the trial by Mr Kidumage learned Counsel and upon being dissatisfied with the trial court's

decision he filed this appeal through Mr Kuwayawaya learned advocate where they raised the following three grounds of appeal;

1. **THAT**, the Trial Magistrate erred in law and in fact in convicting the appellant without proof of his guilty on required standard.

2. **THAT**, the Trial Magistrate erred in law and in fact in failing to evaluate the evidence tendered in court.

3. **THAT**, the Trial Magistrate erred in law and in fact in failing to properly observe the law.

A brief account of the facts of the case at the trial can be given as follows; one **FANUEL ELIA KINGU**, PW2 was traveling in a lorry make Fuso from Itigi to Dar es Salaam on 11/10/2006 and was carrying some crops in the motor vehicle. The motor vehicle was driven by someone else and they spent the night of 11/10/2006 at Manyoni. In the early hours of 12/10/2006 they started the journey towards their destination and when they reached Muhalala area at between 5.00 am and 5.15 am they saw some stones on the road which prevented the motor vehicle to pass. The driver stopped the motor vehicle and shortly they heard gun shots in the air hence the driver tried to reverse the motor vehicle but since there was a hill beside the road he could not go on with the exercise and he stopped. Thereby they saw two people approaching them and one of them was armed with a muzzle loader gun (gobore). One of the invaders

approached the driver's door and demanded to be given money. Another thug with the gun approached PW2's door and ordered him to give him money but he had none.

Since PW1 had no money the thug opened the door and took his (PW'1) brief case containing money mobile phone made Nokia and NBC bank card all total valued at Tshs. 300,000/=. PW1 identified the person who robbed him through bus lights to be the appellant herein as he knew him before as he used to see him at Singida and was a carpenter. He did not identify the other thug. The matter was reported to the police and the appellant was arrested at Singida on 16/10/2006.

The appellant was interrogated on 18/10/2006 by No. E. 9609 D/Sgt KITENGE where he confessed these allegations. His caution statement was taken and was video recorded during interrogation. Also, the appellant led the Police to the place he had hidden the robbery gun and the same was found near the scene of crime. At the scene one thug who was with the appellant had been killed by the Police and his dead body was filmed on a video camera at the mortuary and so as the scene of crime.

Thus, a gun that was said to have been found with the deceased thug was admitted as exhibit P1, the gun the appellant

showed the police-exhibit PII, video compact – exhibit PIII and accused's caution statement – exhibit PIV.

In his defence the appellant denied the allegations and raised an ***alibi*** to the effect that on the material day he was at Singida attending his sick mother. This evidence was supported by his sister ***JULIANA PAULO***, DW2. Also the appellant discredited the prosecution evidence in that PW2 could not have identified any thug at the scene since he said that he was confused during the robbery. Thus, an identification parade ought to have been conducted and that PW1's evidence contradicted his earlier statement at the police.

The trial court found that the prosecution evidence against the appellant in respect of identification of the appellant was sufficient. That, also the appellant's confession before the police which was evidenced in his caution statement and video compact leaved no doubt that the appellant committed this offence.

When the appeal came before the court for hearing Mr Kuwayawaya Advocate appeared and argued the appeal on behalf of the appellant while the respondent Republic was represented by Ms Mdulugu learned State Attorney.

Firstly, both Counsel contended that the trial Magistrate erred in law and in fact to believe that the appellant was satisfactorily identified to be among the thugs who robbed the complainant.

This court agrees with the counsel for the parties that PW2 could not have identified the appellant in the circumstances at the scene. This is so because at first he told the court that the lorry's head lights helped him to identify the appellant among the two thugs who had invaded them, but in spar of a moment PW2 testified during cross-examination that it is bus lights that helped him to identify the appellant. Then in re-examination PW2 testified that it was moonlight which helped him to identify the appellant. This kind of evidence is doubtful and it does not prove that PW2 identified any thug with help of any light. There is also evidence by PW2 which says that the appellant was the one who had approached his door and robbed him thus he was in a better position to identify him. This evidence also is not watertight since PW2 testified that this incident had confused and frightened him so much so that he unconsciously urinated and defecated himself. Thus, the court is of the opinion that in that state PW2 could not be in a position to observe properly his assailants. PW2 did not also explain the thugs' appearances and their outfit in order to cement his identification evidence.

PW2's testified that it was the police who identified the appellant along with his colleague who was killed at the scene. PW2

did not testify that any thug was killed at the scene and he did not mention that the police reached at the scene before the thugs had left. He did not testify that there were any gun shots from other people apart from the thugs whom he said had shot once in the air.

Secondly, the trial court believed the alleged appellant's confession on a video tape and caution statement. Mr Kuwayawaya was of the view that the appellant had retracted his confession and a ruling on a trial-within-a-trial, in that respect was not delivered by the trial Magistrate. Ms Mdulugu supported the trial court's decision on the basis of the appellant's confession.

On the part of this court I have found that the appellant's interrogation violated a mandatory provision of law under section 50 (1) (a) of the Criminal Procedure Act, Cap. 20 Vol. 1 of the Laws, Revised Edition 2002 here-in-after the Act which provides;

> ***"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"

Thus, according to the above cited law a person who is under restraint should be interviewed within the first four hours after arrest in respect of the offence. However, in the case at hand the evidence shows that the appellant was arrested on 16/10/2006 and he was interrogated on 18/10/2006. This period was by far from the basic period provided of four hours. PW1 did not indicate that the basic not period had been extended as it is provided under section 51 of the Act. What was being done to the appellant for two days before interrogation was not revealed.

Therefore, the appellant was illegally interrogated and the caution statement and a video compact said to contain his confession were illegal evidence and they are hereby expunged from evidence.

The evidence also shows that the appellant was interrogated twice by two different police officers and it was said that in both occasions his caution statements were recorded. How could a normal

human being be subjected to this kind of pressure from police officers and expected to remain under normal thinking composure? Definitely, one could not withstand such pressure. It is to the appellant's relief that the second caution statement was not acted upon by the trial court since the Magistrate did not give its ruling after a min-trial had been conducted following the appellant's objection of the caution statement.

It was also evidenced that following the appellant's confession he led the police to the scene and showed there a place where he had hidden a gun and actually it was found there. First of all there was no corroborative evidence in relation to this exercise since it is the police only who testified in that respect. If the appellant had confessed and was willing to show the robbery weapon then the police ought to have` looked for an independent person(s) to witness the exercise of showing the gun. This could have spelt fears that the police were not telling the truth in their evidence.

Secondly, it was not proved that the gun allegedly shown by the appellant was the one used in the robbery incident.

Surely, as rightly submitted generally by Mr Kuwayawaya, the trial Magistrate failed to evaluate the evidence on record before he reached his decision; had he done so as herein-above he may not have reached to a conclusion as he did. The prosecution evidence

was doubtful in relation to the appellant's involvement in the same. I have also found it strange that the driver of the lorry that was said to have been invaded by thugs was not called as a witness. The driver could have corroborated the evidence of PW2 in relation to this incident. No reason was given as to why the driver was not called and this court draws an adverse inference to the prosecution in that respect [***see AZIZ ABDALLAH VR (1991) TLR 71]***

Consequent to the foregoing analysis this court finds that the prosecution case was not proved against the appellant beyond reasonable doubts. I therefore allow this appeal, quash the conviction and set aside the sentence and an order of compensation. The appellant is ordered to be released from custody unless his continued incarceration is in relation to other lawful causes.

I so hold.

(M. A. KWARIKO)

JUDGE

07/9/2010

Court: Rights of Appeal fully explained.

(M. A. KWARIKO)

JUDGE

07/9/2010

AT DODOMA

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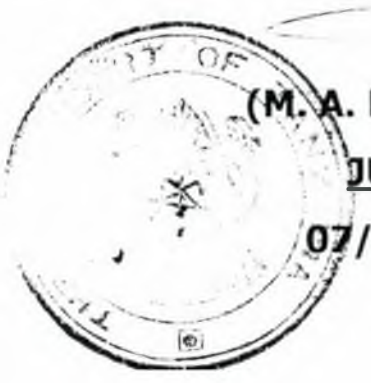
Appellant: Present/Mr Kuwayawaya Advocate.

For Respondent: Mr Katuli State Attorney.

C/c: Ms Judith.



(M. A. KWARIKO)

JUDGE

07/9/2010