IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CRIMINAL APPEAL NO. 118 OF 2010

(Original Criminal Case No. 1/2009 of Mpwapwa District Court at Mpwapwa)

1. **MAJUTO LUNGWA**
2. **YARED MNADI**
3. **JUMA NJOLE**
4. **MASHAKA MKALAWA..... APPELLANTS**

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

16/11/2011 & 30/11/2011.

KWARIKO, J:

The four appellants herein had been arraigned before the trial court with one count of Armed Robbery contrary to section 287A of the Penal Code Cap. 16 Revised Edition 202 as amended by Act No. 4 of 2004. It was alleged by the prosecution that the four had jointly and together on the 3rd day of January, 2009 at 23.00 hours at Kinusi village within Mpwapwa District in Dodoma Region stolen a Rifle gun mode 1501 calibre 458 frame No. 8936 made in German and one Gobore (muzzle gun) valued at Tshs. 800,000/= the property of CASIAN S/O KAYAULA and threatened to shoot him with Gobore (muzzle gun) in order to obtain and retain the said property. The four had denied the charge hence a full trial was conducted in that respect.

The evidence from the prosecution at the trial can be summarized as hereunder. That, while one CASIAN S/O KAYAULA, PW1 was asleep at his home on the material night he heard a knock on his door and opened the same where he found four people who asked him for a place to sleep. He welcomed them but soon after they entered inside they put him under restraint and demanded for a muzzle gun, rifle and money. However, he managed to escape but those people who were armed with machetes and gun chased him and caught him. He was assaulted with blunt sides of machetes, and he escaped again and raised alarms where people gathered. When he returned home he found his two guns made rifle and muzzle, knife, children's clothes 5,000/= stolen and the thugs had escaped.

Among the thugs PW1 identified the 4th appellant who was related to him by aid of a lamp in his house. On 15/1/2009 PW1 was summoned by the police to identify his gun which had been cut on the barrel and butt [exhibit P1]. PW1 also tendered five bullets as exhibit P2 collectively. A mat he had offered the fourth appellant and three others to sleep on was admitted as exhibit P3.

ZIPORA D/O MAGUBI, PW2 who said was 1st appellant's ex-girlfriend testified that on 12/1/2009 at 23.00 hours the 1st appellant and unidentified person visited her home and had a gun and a saw. The two cut the gun with the saw into pieces and threw it into her pit latrine and threatened her not to reveal the incident to anybody. They thus left. However, in the morning she reported the matter to the village secretariat. On 19/1/2009 the police came and fished out the gun pieces (exhibit PW4 collectedly) from the latrine.

According to ASP MNYANBWA, PW3 the appellants were arrested on different dates. Upon arrest the 1st appellant confessed about these allegations and mentioned his accomplices in this incident as the 2nd, 3rd and 4th appellants. The 1st appellant was also found upon arrest in possession of a gun made rifle and seven bullets. The gun was identified to be the one stolen from PW1.

The fourth appellant was also arrested where he said that the gun used in the robbery had been hidden in his farm. He showed the same (exhibit P5) to the police. The third appellant was said to have confessed these allegations and his caution statement was written by NO. F. 882 D/CPL ELISHA PW4 and admitted in Court as exhibit P6 whereas 4th appellant's caution statement was admitted as exhibit P7.

In their defence the appellants denied the allegations where the 1st appellant said was at Kidugalo – Morogoro from 3/1/2009 to 7/1/2009 and was arrested on 13/1/2009 on allegations of murder. The 2nd appellant was arrested on 13/1/2009 from his home and the 3rd appellant gave an alibi that was at Kilosa on the material date. The 4th appellant said was arrested on 20/1/2009 at Winza and forced to admit the allegations about possession of exhibit P5.

The trial court thus, found that the prosecution case had been proved against the 4th appellant who was positively identified by PW1 at the scene. That, the 1st appellant was found in possession of PW1's stolen gun and seven ammunitions. Also, PW2's evidence corroborated this evidence. And that the 2nd and 3rd appellants were mentioned by the

1st and 4th appellants to be their accomplices in this robbery. The 3rd appellant complained that he was tortured by the Police to confess. They were thus found guilty, convicted and sentenced to thirty (30) years imprisonment with twelve (12) strokes of a cane each.

Having been dissatisfied with the trial court's decision the appellants filed this appeal where each raised his own several grounds of appeal which were heard together. The appellants, however, complained about the following six major points:

1. **That**, the evidence of identification at the scene was not water tight.
2. **That,** PW1, PW2 and PW3's evidence ought to have been corroborated by independent witnesses.
3. **That**, the trial court erred to convict the appellants on the uncorroborated evidence of co-accused.
4. **That**, trial court erred to admit the the gun without search warrant as required under section 38 of the Criminal Procedure Act.
5. **That,** the 1st appellant's confession did not comply with section 28 of the Tanzania Evidence Act while that of 4th appellant was wrongly admitted.
6. **That**, the 4th appellant's defence was not considered by the trial court.

When the appeal was called for hearing at first the appellants reserved their comments until they heard what the respondent had in respect of their appeal.

On its part the respondent Republic was represented by Ms Mbunda learned State Attorney who supported the 2nd appellant's appeal only and opposed the appeal by the rest. In supporting the 2nd appellant's appeal Ms Mbunda submitted that the 2nd appellant was convicted on the basis of the evidence that he was mentioned by the 1st appellant as his accomplice and there was no corroborative evidence to that effect.

Thus, in opposing the 1st appellant's appeal Ms. Mbunda contended that the 1st appellant confessed to these allegations and that the did not object when his confession was tendered in court. Also, the 1st appellant was seen by PW2 who was his ex-girlfriend with a gun that was believed to be the one used in the robbery and later identified by PW1 as his stolen properly. And the 1st appellant did not explain as to why PW2 could have decided to fabricated the story against him.

As for the 3rd appellant, Ms. Mbunda was emphatic that he was mentioned by the 1st appellant and also he confessed these allegations. Finally, the 4th appellant was identified at the scene by the complainant who knew him before as they were related. Further, the 4th appellant showed a gun that was used in the robbery and was also mentioned by the 1st appellant as his accomplice in this robbery.

In his rejoinder the 1st appellant argued that had he confessed before the police he must have been sent to the justice of the peace. That, PW2 did not explain the time he visited her home and if she really identified what he had carried since she did not allow him entry to her

home. That, he was not found in possession of anything upon arrest at his home otherwise a search warrant must have been tendered to that effect.

The 2nd appellant did not have much to say in his rejoinder as the learned State Attorney had made his situation easy by supporting his appeal.

The 3rd appellant's rejoinder was to the effect that he did not confess to the allegations otherwise there must have been a witness to that. That, he was not found with anything upon arrest and the Village Executive Officer who arrested him did not come to testify.

Lastly, the 4th appellant contended that PW1 did not explain what kind of lamp that he used for identification. That, if PW1 was really invaded there must have been local area leaders or other witnesses to corroborate his story. That, the police essentially took him to PW1 and told him that he was one of his assailants after they had arrested him for a different offence. In that respect the complainant ought to have reported the matter at an earliest opportunity.

Consequent to the foregoing opposing submissions from both parties, the court finds the major issue to be decided is whether the appellants' appeal has merits.

I will start with the 1st ground of appeal. While the appellants contend that the conditions for identification at the scene by PW1 were not favourable, the respondent Republic was of the different view; they said that the 4th appellant was sufficiently identified by PW1 as he knew him before and were related. On this I do agree with the appellants' that the complainant did not explain sufficiently the conditions for proper identification.

Firstly, PW1 did not explain the type of lamp that was at his house and where the same was placed when the thugs entered his house. This is so because different kinds of lamps give varying intensities of light. Also, PW1 did not explain the time he had the thugs under observation since he said soon after they entered in his house they restrained him and demanded guns and money. Then he managed to ran away. Even though PW1 said the thugs chased him outside where he identified the appellants by aid of moonlight but he did not explain how bright the same was. And if he was running ahead of the thugs, then PW1 did not explain how he observed and identified the thugs to be the appellants who were running after him. PW1 did not also describe the thugs appearance.

Therefore, the conditions for favourable visual identification were not met in this case (***See WEREMA MATIKU VR, Criminal Appeal No. 51/2002, Court of Appeal of Tanzania at Mwanza***), Not aware if reported. In that case it was held that;

"Visual identifications is of the weakest kind especially where the conditions for accurate identification are doubtful".

Further, if PW1 had identified any thug at the scene there ought to have been an independent witness to second the same. PW1 said he raised alarms after the invasion and many people gathered but no body else was called to testify in that respect. If people came at the scene PW1 must have told them that he identified his attackers and especially the 4th appellant whom he said were related. No evidence was presented to that effect. Infact no evidence was led to show that PW1 reported this matter anywhere soon thereafter; Not to the local area leaders or to the police. No wonder the appellants were arrested more than a week later since nobody had reported them anywhere. This, positively shows that PW1 did not identify any one at the scene.

In the second ground of appeal, the appellants complain that PW1, PW2 and PW3's evidence was not corroborated by independent witnesses. The learned State Attorney contended that PW1 was corroborated by PW2 and also 4th appellant who showed the robbery gun.

I have already shown above when dealing with the 1st ground of appeal how PW1's evidence ought to have been corroborated. As for the gun allegedly showed by the 4th appellant, there is no evidence to prove that the same was the one PW1 saw at the scene. After all it has been ruled out that there were no favourable conditions for

identification at the scene, thus, PW1 could not have positively identified the gun. He did not even describe the alleged gun and how the same fitted the description of the one the 4th appellant was allegedly found in his possession.

As for PW2, her evidence ought to have been corroborated by the said Village Secretariet where she said had reported the incident. Further, there ought to have been independent witness to corroborate the evidence that police visited her home to fish out the dismanted gun from pit latrine. There must have been ten cells leader or any local area leader when the police had gone to look for the pieces of the gun at PW2's pit latrine. This exercise could not have been conducted without involving the local area leaders. Therefore, PW2's evidence was suspect and taking into account that she said was 1st appellant ex-girl friend without explaining how the two parted ways.

PW3's evidence in relation to the gun he said was found in the 1st appellant's house ought to have been corroborated. On this, local area leader or ten cells leader at the 1st appellant's locality should have been summoned to witness the search at his home. Thus, without an independent evidence, PW3's evidence becames doubtful.

As for the 3rd ground of appeal this court agrees with both parties that the 2nd appellant was convicted on the uncorroborated evidence of co-accused, the 3rd and 4th appellant confessional statements. Also that PW3 said he was mentioned by the 1st appellant. There ought to

have been corroborative evidence to that effect. Thus, his conviction was illegally entered.

In the 4th ground of appeal which relates to the absence of search warrant during the search of the 1st appellant, Ms. Mbunda learned State Attorney did not respond to the same. This court has gone through the evidence of PW3 and found that since the police had prepared to go to the 1st appellant's home they should have prepared a search warrant to that effect. If they had not prepared and had been in an emergency exercise then they ought to have prepared a record of search after the exercise. No evidence was led to show that the police searched the 1st appellant's home on emergency. Thus, the police contravened section 38 of the Criminal Procedure Act Cap. 20 Revised Edition 2002 when they searched the 1st appellant and thus the search was illegal. There also should have been an independent witness to witness the search be it ten cells leader or any local area leader in the 1st appellant's locality.

The 4th ground of appeal is also answered in the positive.

In the 5th ground of appeal the 1st appellant contended that his confession contravened section 28 of the Evidence Act and when he submitted in court said he did not give any statement to the police. Ms. Mbunda contended that the 1st appellant confessed and did not object when his confessional statement was tendered in court.

In essence the 1st appellant was of the view that if he had confessed he should have been taken to the justice of the peace as

per section 28 of the Evidence Act. On this, I would like to inform the 1st appellant that this cited law only gives another venue where a suspect who confesses can give his/her confessional statement. This is in additional to the one which may be given before a police officer as it is provided under section 27 of the Evidence Act. Both confessions may be proved as against the maker. Thus, the law does not say that if one confesses before a police officer then he should be taken to the justice of the peace to confirm his confession. But these two confessions are independent of each other although they may support each other. Thus, the 1st appellant's complaint is unfounded.

However, I have gone through the trial court's record and failed to see where the 1st appellant's confession is placed. The proceedings do not show that there was any such confession tendered in court. What is in record is the evidence by PW3 who testified that, upon arrest the 1st appellant confessed to these allegations. Thus, if there was any such confession the same ought to have been reduced into writing and then tendered in court to prove the allegations. In the absence of such written confession, PW3's evidence becomes empty shell which has no value at all. Therefore, it remains that the alleged 1st appellant's confession was not there and the allegation that he implicated his co-appellants remains unproved.

For the 4th appellant's caution statement the same was illegally admitted in court since he had objected it. The trial court ought to have conducted an inquiry to ascertain the caution statement's admissibility before the same was admitted in evidence. Since the 4th

appellant's caution statement was not good evidence it is hereby expunged from the court record.

There is also the 3rd appellant's confession statement (exhibit P6) which the 3rd appellant did not object when the same was tendered in court as exhibit. The trial court as well as the learned State Attorney believed that this confession was enough evidence against the 3rd appellant. However, this court finds that this confession statement has two major shortcomings which reduce its value to nothing.

Firstly, the 3rd appellant's caution statement is a photocopy and there is no evidence to show why the prosecution tendered the same is such state. The trial court did not bother to inquire why the prosecution tendered a photocopy. Thus, this was not a genuine document which should have been acted upon.

Secondly, the 3rd appellant's caution statement was taken in contravention of the clear mandatory provision of the law. Confession by a suspect may be taken in the ***form of questions and answers*** as provided under section 57 of the Criminal Procedure Act. The caution statement under consideration is just a narrative which does not comply with the cited law.

Also, confession by a suspect may be written by the suspect after he/she has been furnished with any writing materials by a police officer in terms of section 58 of the Criminal Procedure Act. Again the present caution statement does not fit this type of confession.

Therefore, the 3rd appellant's caution statement was incompetent before the court and the same should not have been acted upon ***[See SEKO SAMWEL VR, Criminal Appeal No. 7 of 2003, Court of Appeal of Tanzania, at Tabora, (Unreported)].***

In the last ground of appeal the 4th appellant is complaining that his defence was not considered. Ms. Mbunda learned State Attorney did not respect to this ground of appeal.

This court has gone through the trial court's judgment and found that the trial court did not sufficiently consider not only the 4th appellant's defence but also the 1st appellant's defence. The trial court only considered these two appellants' respective defence in relation to the guns they were allegedly found in possession with. The defence in respect of their identification at the scene was not considered. The 2nd and 3rd appellants' respective defence was not considered at all. This was contrary to a principle of fair hearing which is also underscored in our ***Constitution of the United Republic of Tanzania (See Article 13 (6) (a))***. Failure to consider the appellants' defence vitiated the judgment.

Consequently, I find that the prosecution case against the four appellants was not proved beyond reasonable doubt. Their appeal is thus allowed, conviction quashed and sentences of imprisonment are set aside.

The appellants are ordered to be released from prison unless otherwise lawfully held.

Order accordingly.

(M. A. KWARIKO)

JUDGE

30/11/2011

Court: Right of Appeal fully explained.

(M. A. KWARIKO)

JUDGE

30/11/2011

AT DODOMA.

30/11/2011

Appellants: All Present.

For Respondent: Mr. Nchimbi Senior State Attorney.

C/c: Ms. Komba.

(M. A. KWARIKO)

JUDGE

30/11/2011