IN THE HIGH COURT OF TANZANIA
AT DODOMA

(APPELLATE JURISDCTION)

(DC) CRIMINAL APPEAL NO. 149 OF 2016

(Original Criminal Case No. 91 of 2016 of the District Court of Mpwapwa District at Mpwapwa)

1. MAISHA PASCAL @ MHOKA.....] **APPELLANTS**
2. AIVAN STANLEY @ CHISHOMI.....]

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

15/3 & 28/4/2017

KWARIKO, J

Appellants herein and four others then 3rd, 4th, 5th and 6th accused persons were arraigned before the District Court of Mpwapwa charged with offence of Armed Robbery contrary to section 287A of the Penal Code [CA 16 R.E. 2002] as amended by Act No. 3 of 2011.

Having been denied the charge the appellants and others were tried where the prosecution evidence reveals the following facts.

That, on 31/1/2016 at about 23:00 hours when RAHELI MATIGA PW1 was asleep five armed bandits broke in her home demanding to be given money. They had torch shone to her where she managed to identify the appellants herein. That she was assaulted and forced to lead the thugs to her husband's house. As her husband was spending the night at senior wife's home, she led the thugs there. The senior wife was the 6th accused person at the trial.

It was revealed further that at the senior wife's home the first appellant phoned PW1's husband – EZEKIEL MATIGA PW2 but before he could pick the call it was terminated and the thugs broke the door by a big rock commonly known as '*Fatuma*'. PW2 was after being seriously injured forced to give the thugs money but he had only cash Shs. 370,000/= which he gave them. However, the first appellant forced PW2 to transfer money through mobile phone Tigo-pesa Shs. 500,000/= after he revealed to the thugs his PIN number.

That, after the thugs took the money they led the victims to PW2's house but upon getting there villagers raised alarms and they ran away. PW1 and PW2 said the thugs were carrying, gun, machete and iron bar and fired gun shots in the air. They said they identified the thugs through electricity light outside PW2's house and torch light the thugs had. PW3, ALOYCE KAPINGA and PW4, SAMWEL NDUNGWANDU who were PW2's neighbours also said did hear the commotion at PW2's house and identified thugs from some distance to be the appellants herein by use of the said

electricity light. It was also said that the first appellant had put motorcycle's on helmet and was school mate of PW1.

Further, when villagers gathered, the victims were sent to hospital and report was sent to police where No. E 9168 DC GEORGE PW6 was dispatched to visit the scene of crime. At the scene PW6 said did find the said big rock *'Fatuma' and* pieces of iron used in the local muzzle gun. The iron pieces were admitted in court as exhibit P1. Whereas, after the first appellant admitted the allegations before PW6 in the presence of his in-law and his cautioned statement was prepared the same was admitted in court as exhibit P2.

At the end of the prosecution case the 3rd, 4th, 5th & 6th accused persons were acquitted as they were found with no case to answer. On the other hand the appellants herein gave their sworn defence and called no any other witnesses on that behalf.

In his defence the first appellant denied the allegations and said he was arrested at his home on 01/7/2016 by police officers where he discredited the evidence of identification by the prosecution witnesses and more so as the incident happened at night and was said he had put on a helmet. He also said that he did not admit the allegations.

On his part the 2nd appellant was of the view that he was arrested at home on 01/1/2016 at 7.00 am. He also said the prosecution witnesses did not explain how they identified him at the scene of crime and PW2's evidence contradicted his original statement at the police.

At the end of the trial the court found that the prosecution case was proved beyond reasonable doubt against the appellants hence they were convicted and sentenced to thirty (30) years imprisonment each.

Having been dissatisfied by the trial court's decision the appellants each filed thirteen (13) grounds of appeal but greatly identical raising the following eight (8) common grounds of complaints as follows;

1. *That, the prosecution case was not proved beyond reasonable doubt against the appellants.*

2. *That, there was independent evidence to prove that PW2 transferred money from his Tigo-Pesa account.*

3. *That no PF3 was tendered to prove PW2's injuries.*

4. *That, the evidence of visual identification by PW1, PW2 and PW3 was not sufficient.*

5. *That, no sketch plan map of the scene of crime was tendered to prove that there was door breaking by big rock, Fatuma.*

6. *That, the evidence by PW1, PW2 and PW3 was contradictory.*

7. *That, the trial court erred in law as it did not enter conviction as required under section 235 (1) and contravened section 312 (2) both of the Criminal Procedure Act [CAP 20 R.E. 2002].*

8. *That, the trial court erred in law by failure to consider defence evidence.*

Whereas the 1st appellant raised the following two independent grounds of appeal;

1. *That, the evidence of his confession was not corroborated by his alleged relative.*

2. *That, no inquiry was conducted in relation to his cautioned statement after he raised object on to it.*

And the independent ground of appeal by the 2nd appellant is;

1. *That, the 2nd appellant was wrongly convicted on the basis of uncorroborated co-accused's evidence.*

When the appeal was called for hearing the appellants being lay persons adopted their grounds of appeal with no any further explanation and left the same to be responded to by the learned State Attorney. On the other hand Ms. Kezilahabi learned State Attorney who appeared to argue the appeal on behalf of the respondent Republic started by opposing the appeal and her reasons for that stance will be referred in the course of this judgment. Thus, the issue to decide here is whether he appellants' appeal has merit. I will start with appellants' common grounds of appeal and for the sake of convenience will start to decide the second ground of appeal. As regards this ground of appeal it was Ms. Kezilahabi's submission that although no expert from Tigo mobile phone company testified but it was proved that cash money about Shs. 370,000/= were

stolen at the scene of crime. On its part this court first finds that there is no corroborative evidence to prove that PW2 had the said cash money that he alleged to have been stolen and the said Shs. 500,000/= allegedly transferred through Tigo-pesa were not proved. On this allegation there ought to be proof of the following;

One, phone numbers of the first appellant and PW2 that were allegedly used in the money transaction ought to have been revealed. In the absence of such evidence there remains bare assertion that PW2 transferred money from his Tigo-pesa account.

Two, there ought to be print-out from Tigo-pesa to show that there had been such transaction. That is why as correctly complained by the appellants that Tigo Company expert ought to testify.

Three, the said print-out could have proved that PW2 had such amount of money in his account to be able to transfer. Thus, the second ground of appeal has merit.

In respect of the third ground of appeal it was Ms. Kezilahabi's contention that since the offence charged is armed robbery the absence of PF3 to prove PW2's injuries was not fatal omission. This court agrees with the appellants that a PF3 by PW2 to prove his alleged injuries was a relevant fact in issue. The mere charge of armed robbery is not enough to prove that the same was committed. In this case since PW2 and also PW1 alleged to have been assaulted by bandits and seriously injured and that they were issued with PF3 to go to hospital for treatment, there ought to

be such proof and the PF3 would have been the evidence to prove that allegations. Hence the absence of PF3 by PW2 and also PW1 creates doubt as to their alleged beatings and assaults. The third ground of appeal succeeds.

It was Ms. Kazilahabi's contention in relation to the fourth ground of appeal that PW1, PW2, PW2 and PW3 sufficiently identified the two appellants through electricity and torch light and more so since they are village mates. This court agrees with the appellants that visual identification in this case was not water light. I have the following reasons;

One, the witnesses did not describe the assailants not only the appellants but also the others who were allegedly not identified. Description of their attire ought to have been given to show that the witnesses marked their assailants.

Two, the witnesses did not describe the intensity of electricity light and its distance from the assailants since it was said the light came from security light outside PW2's house. The witnesses did not explain where the security light were fixed; at the fence, wall or roof. In that regard it suffices to say that had the electricity light been sufficient the bandits would not have used torches in that regard. And it is common knowledge that it was easier for the bandits who carried torches to see their victims and not the other way round. This court get support in this view in the case of JUMA MACHEMBA V R, Criminal Appeal No. 102 of 2015 Court of Appeal of Tanzania at Tabora [unreported].

Three, even if PW2 said he had torch in hand but he could not have used it to identify the assailants as he said he was ordered to put it off and drop it soon after the bandints entered his house. PW2 also did not explain intensity of his torch light.

Four, as PW1 said the first appellant had put on motorcycle's helmet obviously his identification in the already said poor circumstances could not have been possible.

Five, even if the witnesses said the appellants are village mates but the conditions for proper recognition must have been conclusive. As already shown above the conditions for proper recognition were not conclusive; (See also the case of MOHAMED SHABANI V R, Criminal Appeal No. 41 of 2009, Court of Appeal of Tanzania at Tabora (unreported)) which quoted with approval the decision of that court in JOHN JACOB V R, Criminal Appeal No. 92 of 2009 (unreported) where it was held thus;

> *".....we wish to point out that the question of familiarity will only hold if the conditions prevailing at the scene of crime were conclusive for correct identification. If the conditions are not conclusive for correct identification, as in this case, then the question of familiarity does not arise at all".*

Conclusively, the evidence of visual identification was not sufficient against the appellants. This ground of appeal has merit.

As regards to the fifth ground of appeal it was Ms. Kezilahabi's contention that the absence of sketch plan map of the scene of crime was not fatal as there was other cogent evidence to support the charge. This court finds appellants' complaint valid since sketch plan map of the scene of crime could prove the alleged breaking of the door, the distance between PW1 and PW2's houses and the position of the alleged security electricity light. Hence, the omission to tender sketch plan of the scene of crime adversely impacted on the prosecution case. Also, the said big rock '*Fatuma*' ought to have been tendered in evidence as it was relevant fact in issue. This ground of appeal has merit.

Ms. Kezilahabi did not specifically respond to the sixth ground of appeal but this court finds as rightly complained by the appellants that the evidence by PW1, PW2 and PW3 contradicted on the issue of who among the bandits carried what. This is because while PW1 said the appellants had machete and gun she did not specifically say who held what if at all she was able to sort out things at the scene. Whereas PW2 said the first appellant had gun and the second appellant had iron bar and torch while PW3 said the first appellant had gun and second appellant had machete. This contradiction only proves that the witnesses did not properly identify the assailants and their description as already alluded herein above. The sixth ground of appeal passes.

In the seventh ground of appeal the appellants complain that the trial court did not enter conviction against them as per section 235 (1) and contravened section 312 (2) both of the Criminal Procedure Act (supra). As correctly submitted by Ms. Kezilahabi learned State Attorney the record

shows that after the trial court found that the prosecution case had been proved beyond reasonable doubt against the appellants it convicted them as charged. I do not think that there was an error in that respect. Also, going through the judgment the trial court did not contravene section 321 (2) of the Criminal Procedure Act (supra) as the judgment contained points for determination, reasons and decision thereon. This ground of appeal thus is non-meritorious.

Further, the appellant complain in the eighth ground of appeal that the trial court did not consider their defence evidence. On her part Ms. Kezilahabi argued that the trial court recorded defence evidence and found that it did not shake the prosecution case. This court is of the view that recording of evidence is different from considering it when decision is made. Having gone through the original judgment it is clear that the defence evidence was not considered at all before decision to convict the appellants was made. It is in record that after the trial magistrate summarized evidence from both sides only considered prosecution evidence and found that it was sufficient to convict the appellants and hence convicted them.

One of the principles of natural justice says that one should not be condemned unheard. Hence, the appellants would have been heard before being convicted if their defence was considered by the trial magistrate. And also non-consideration of defence evidence contravened our Constitution which requires decision making organs to accord accused persons opportunity of being sufficiently heard before being adjudged (*See Article 13(6) (a) of the United Republic of Tanzania Constitution, 1977*).

Henceforth, the omission to consider defence evidence vitiated the trial court's decision. Thus, this ground of appeal has merit.

Additionally, in the first ground raised by the first appellant in relation to his alleged relative not being called as a witness since he was said to witness his confession Ms. Kezilahabi argued that the first appellant confessed and signed his cautioned statement that is why it was admitted in evidence. This court agrees with the first appellant that if at all he voluntarily admitted the allegations in the presence of his in-law as alleged by PW6 the said in-law should have come to testify especially since the first appellant objected to the said statement. Failure by the prosecution to bring the said in-law to testify created doubt as to whether there was voluntary confession. This ground of appeal has merit.

Secondly, the first appellant complained that after he objected to his introduction of his cautioned statement in evidence the trial court ought to conduct inquiry to establish its admissibility. On this the learned State Attorney was of the view that there was no concrete reasons to conduct the inquiry. This court is of the different view. The law says that once the cautioned statement is objected by the accused the trial court ought to conduct inquiry as to its admissibility. In the case of PAULO MADUKA & 4 OTHERS V R, Criminal Appeal No. 110 of 2007 Court of Appeal of Tanzania at Dodoma (unreported) where the court approved its decision in TWAHA ALI & 5 OTHERS V R, Criminal Appeal No. 78 of 2004 (unreported) it was said thus;

> *".....If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged*

confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence....".

Now, if that is the law the trial court erred to hold that the first appellant had no valid reasons to object he confession in the absence of an inquiry to that effect which would have seen evidence from both sides being tendered before ruling on whether or not the confession was voluntarily made.

Thus, the first appellant's confession, exhibit P2 was illegal evidence and it is hereby expunged from the record. This ground of appeal succeeds.

Lastly, the second appellant's complaint that he was convicted on the basis of the uncorroborated co-accused's evidence met resistance from the learned State Attorney when she contended that there was other evidence from other prosecution witnesses who mentioned the second appellant as one of the bandits who invaded the complainant. This court agree with the learned State Attorney. This ground thus fails.

Consequently, be as it may this court is settled in mind that the prosecution case at the trial was not proved beyond reasonable doubt against the appellants and this answers the first ground of appeal affirmatively.

Therefore, this appeal has merit and it is allowed, conviction against the two appellants is quashed and sentence is set aside. It is finally ordered that the appellants be set at liberty unless their continued incarceration is related to other lawful cause.

It is ordered accordingly.

M.A. KWARIKO

JUDGE

27/4/2017

Judgment read over in court today in the presence of the Appellants and Ms. Mgoma learned State Attorney for the Respondent Republic. Mr. Nyembe Court Clerk present.

M.A. KWARIKO

JUDGE

27/4/2017

Court: Right of Appeal Explained.

M.A. KWARIKO

JUDGE

27/4/2017