IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 90 OF 2017

(Appeal from the Judgment of the District Court of Arusha/Arumeru before Hon. D.K. Kamugisha, RM Dated the 22/11/2016 in original Criminal Case No. 303 of 2012)

KELVIN KAUNDA MANYAMA @ KEVO.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT ON APPEAL

S.M. MAGHIMBI, J:

At the Arusha Resident Magistrates Court (Hon. Kamugisha R.M) the appellant herein along with four others were charged with the offence of Armed Robbery c/s 287A of the Penal Code, Cap 16 R.E 2002 (The Penal Code). The appellant was the only accused convicted of the offence hence this appeal on the following grounds:

1. That, the trial Court erred in law and in fact by not finding that the purported cautioned statement was recorded outside the period stipulated under Sections 50(1)(a)(b) and 51(a)&(b) of the Criminal Procedure Act, Cap. 20. R.E. 2002 (The CPA).
2. That, the trial Court erred in law and in fact for conducting the Criminal Case procedurally.

3. That, the trial Court erred in law and in fact in convicting and sentencing the Appellant without proper evaluation of the evidence on record and exhibit admitted in the course of hearing.
4. That, the trial Magistrate erred in law and misdirected himself by failure to accord due weight of the appellant's defence and decided the matter basing on the prosecution case its own.
5. That, the trial Court erred in law and in fact in convicting the appellant for an offence which was not proved by concrete evidence

The Appellant prayed that this Court allow his appeal in its entirety by quashing and setting aside the decision of the District Court of Arusha/Arumeru and thereby acquit him.

In this appeal, the appellant appeared in person while the respondent was represented by Ms. Janeth Sekule, learned State Attorney. Before I proceed to the merits of this appeal, it is prudent that the brief background of the matter is narrated. The incident leading to this appeal happened on the 13th day of December, 2012 when a motor vehicle with Registration No. T 499 AJQ Toyota Corolla driven by the then first Accused person was hijacked by armed bandits. It was alleged that on the fateful 13th December, 2012, PW2 and PW3 who are assistant accountant and accountant at Kibo Palace Hotel respectively, were on their way to Barclays Bank using motor vehicle with Registration No.T 499 AJQ Toyota Corolla driven by the 1st accused person. When they got at the Tropical Institute area here in Arusha City, their vehicle was blocked by a motorcycle with two passengers on it. At the gun point, they bandits ordered the 1st accused person to drive to Njiro area in Arusha City and later on to Lemara

also within Arusha city. Upon reaching there the bandits stole from PW3 150,000 USD and 10,165 Euro, the property of their employer, Kibo Palace Hotel (the hotel) and fled.

In due course of investigation, Onesmo Joseph @ Nanyaro (1st Accused), Priscus Edisi Kiondo @ Kachaa (2nd Accused), Innocent Julius |@ (3rd Accused), Edward Mshone Tarimo @ Bob Christo (4th Accused) and Kelvin Kaunda Manyama @ Kevo (5th Accused) were suspected, arrested and charged with armed robbery c/s 287A of the Penal Code, Cap 16 R.E 2002. At the trial, all Accused recorded a plea of not guilty and upon conclusion of the trial, the appellant herein was convicted and sentence to serve an imprisonment term of thirty years hence this appeal.

On the day of the hearing, the appellant submitted that the trial court convicted him basing on the cautioned statement without considering that the said statement was taken outside the time prescribed by the law and procedures. That he was arraigned at Arusha Central Police on 10/11/2012 at 9.00 am and the purported statement was recorded on the 11/11/2012 at 1605 hrs. He argued that it is hence obvious that the statement is outside the 4-8 hours prescribed by the law as there was no any authorization by the court that the prosecution was allowed to record the purported statement outside the prescribed time. Further that the purported statement was recorded outside the prescribed time against Section 50(1)(a)&(b) and Section 51(a)&(b) of the Criminal Procedure Act, Cap. 20 R.E 2002 (The CPA). He submitted further that a similar situation was decided by the Court of Appeal sitting in Arusha in the case of **Abraham Spear @Mushi & Others Vs. R, Criminal Appeal No.**

04/2016 whereby in that case the Court expunged from record a cautioned statement because it was taken outside the time prescribed by the law.

The appellant submitted further that the trial court conducted the trial without following the prescribed procedures. That on page 127 of the proceedings, the prosecutor turned into a witness by praying to tender the purported cautioned statement. He argued that the duty of the prosecutor is to prosecute the case and not turning himself into a witness. That the prosecutor was required to pray to the court that the exhibit is received and leave it upon the court to decide. That it was therefore against the procedure of conducting a trial for the prosecutor to assume dual roles at the same time by being a prosecutor and a witness by tendering an exhibit. He argued that the court was required to realize that the prosecutor was not in a position to be cross examined by the accused because he is not a witness. He supported the argument by citing the case of **Thomas Ernest Msungu @ Nyoka Mkenya Vs R, Criminal Appeal No. 78/2012** whereby in that decision the court held clearly held that a prosecutor cannot have dual roles at the same time, that of prosecutor and a witness.

He submitted further that on page 130 of the proceedings, despite the fact that the prosecutor tendered the cautioned statement, he was also allowed to tender the statement for identification purpose which was after the PW7 testified in an inquiry. That the court received the statement for identification purposes as prayed by the prosecutor and the same was received by the court before he was allowed to cross examine the witness and even before the conclusion of a trial within trial. He submitted further

that the court was not supposed to allow prosecutor to tender the statement as exhibit and at the same time tender the same for identification purposes. That a close scrutiny at the statement, one will find that the statement was not made in the prescribed form as it was not in a question and answer form. It is hence obvious that the same was in contravention of Section 57(2)(a) of the CPA and that if the same was taken u/s 58(1)(a) then the appellant was to be given a pen and paper so that he could record his own statement.

The appellant submitted further that the statement was taken in total contravention of the procedures prescribed under the CPA as the ruling delivered by the court in an inquiry was too brief and did not analyze the adduced evidence. That in the same ruling, the court did not give reasons for receiving the said statement despite the fact that the court had promised to give reasons for its decision in the next mention as shown on pg 135 of the proceedings. That however, until the conclusion of the trial, the court never advanced its reasons to do so. He argued that in that ruling, the court received the purported statement as exhibit without considering the fact that the statement was tendered by the prosecutor for identification purposes. Further that the court should have considered the fact that the statement was tendered by the prosecutor for identification purposes and not as exhibit as is shown on page 130. That the ruling of the court on pg 135 is clear that the court said it will receive the statement, hence the court did not officially admit the cautioned statement. He argued that, this is against the law as the statement was not received in court as exhibit but it was the same statement used to convict him. That despite

the fact that the court said it will receive the statement, but until the conclusion of the trial there is no place showing that the statement was received as exhibit.

The appellant submitted further that the court convicted him on the cautioned statement which was never read over in court, he argued that this is against the prescribed law and procedure which require the statement to have been read over in court. He argued that the statement was therefore not to be used as basis of my conviction.

It was the appellant's further submission that the trial court further erred by failure to consider his defence which was supported by DW5 Bahati Chiaga found on page 171-173 of the proceedings. The same is also on page 175 to 176 of the typed proceedings and that in the said defence, he told the court clearly the day that he was taken to Arusha police, that is 9.00 am of 10/11/2012. That he also testified on the number of days that he was kept at police custody without being taken to court and that all these testimonies were corroborated by the evidence of DW5, his witness.

The appellant submitted further that the court further erred by basing his conviction on the evidence of PW7 who admitted not to have known the day and time that he was taken to Arusha Police. He argued that his testimony, the witness did not deny the fact that the appellant was taken at Arusha Police on the 10/11/2012 as he had informed the court. That on page 128 of the proceedings, it is clear that the prosecutor lied to the court that he was taken into police custody on 11/11/2012 while he was not at the station at that time and was not a witness at the trial, neither did he

have any evidence to prove the allegation. He argued further that since it was the duty of the prosecution to prove the case beyond reasonable doubt, they were hence duty bound to bring the evidence including one, the prosecution was duty bound to bring the police officer who took him to Arusha police to say the date and time that he took him there. Further that the prosecution were also to bring the police officer who received the appellant at Arusha police and that they were also duty bound to bring the certificate of handing over between those two policemen so that the court can see the date and time that the handing over took place. Further that they were also required to bring the remand register of the station so as to show the court the day and time that he was brought to police. He the argued that the prosecution could not bring any of these evidence because they knew that it will support the issues the appellant had raised that he was taken to police on 10/11/2012 at 9 am and the statement was hence taken outside the prescribed time.

The appellant went on admitting the fact that the prosecution has no limit on the number of witnesses to bring to court, but he argued that they were duty bound to bring the officer who arrested him so that he can explain the date and time that he took him to Arusha Police. He supported this argument by citing the case of Abdi Ali Vs. R, Criminal Appeal No. 398/2013 whereby in that case, the Court of Appeal emphasized on the importance of the prosecution to prove their case beyond reasonable doubt

The appellant's prayer was that the testimony of PW7 be disregarded and the purported cautioned statement be expunged from the record. He

further prayed that this court allow his grounds of appeal and quash the judgment of trial court by D.K Kamugisha and set the appellant free.

In her reply, Ms. Sekule supported the conviction arguing that the prosecution proved the case against the appellant beyond all reasonable doubt. She submitted that the appellant was convicted on his cautioned statement which was corroborated by the evidence of PW2 and PW3 as is shown on page 19-20; 26-27 of the proceedings. That the court convicted the appellant on the cautioned statement after having warned itself as required by the law. She argued that the trial court was satisfied that the purported statement was true and was given within the prescribed time and voluntarily by the appellant after having conducted an inquiry and hearing witnesses from both sides. That on pge 6 of the judgment, the court explained how it cautioned itself before considering such evidence, it referred to the case of **Tuwamoi Vs. Uganda, 1967 EA 84** and the case of **Hatibu Ghandhi and Others Vs. Republic, 1996 TLR 12**.

She submitted further that the appellant has made lengthy submissions but in a nutshell the court after having conducted an inquiry found the statement to have complied with the law hence received the statement ad formed the basis of its decision.

On the appellant's submission that it was the prosecutor who prayed to tender the statement, Ms. Sekule replied that on pg 127 of the proceedings, the court recorded that it was PW7 who prayed to tender the statement as exhibit. That it is therefore clear it was the witness who prayed to tender the exhibit in court. That after PW7 prayed to tender the

exhibit, the appellant objected to the tendering and an inquiry was conducted and thereafter the statement was received as exhibit and not for ID purpose as alleged by the appellant. The same was received as exhibit P1 and that the witness had prayed that the statement be taken as ID purpose during the inquiry.

On the argument that the statement was not recorded in the prescribed form, Ms. Sekule's submission was that the statement was taken in the prescribed form and that is why the court was satisfied and hence admitted the same. That the Section58 of the CPA he cited also allows the police officer to record the statement and thereafter give the appellant to read the same before he signs it.

On the appellant allegation that the court did not consider his defence, and that of DW7; Ms. Sekule's reply was that on page 7 of the judgment, it is clear that the trial magistrate considered the defense of the appellant and was satisfied that the same did not raise any doubts against the appellant and that is why he was convicted. She argued that it is the duty of the prosecution to analyze the witness they ought to bring to prove their case. That the appellant was charged with the offence of armed robbery and the appellant admitted the offence vide cautioned statement and the court was satisfied that the statement was made by the appellant.

On the issue that the reasons of the ruling were not given by the court, Ms. Sekule submitted that her recollection was that the reasons were given by the court on a later date. She admitted that the same is not featured in the typed proceedings. She submitted further that to her recollection, the

cautioned statement was read over in court after it was admitted although she did not see it in the typed proceedings, she urged the confirmation of the court whether in the original proceedings the same is featured, which I confirmed that it did not. Ms. Sekule's prayer was that the appeal is dismissed.

In his rejoinder, the appellant counter argued on the submission of the respondent that the cautioned statement supported the evidence of PW2 and PW3. His argument was that there is no place in their evidence that they explained the date and time that he was taken to Arusha police. Further that it was therefore evident that he was taken to police on 11/11/2012. The appellant submitted further that PW7 did not say the time that the appellant was taken to police hence the statement was c/s 50 and 51 of CPA. That the respondent neither denied the fact that she lied to the trial court when she said that the appellant was .taken to police on 11/11/2012.

The appellant submitted further that Ms. Sekule submitted that PW7 prayed to tender the statement as exhibit as shown on page 127, but she as a prosecutor was not required to base on one side by saying that they pray to tender the exhibit because that will be against the law. Further that at the trial, the same prosecutor also repeated the prayer on pg 130 when she prayed to tender the statement for identification purposes. That his records are that the reasons for receiving the statement were never advanced and the statement not read over in court. To that end, the appellant reiterated his prayer that the cautioned statement and the evidence of PW7 is expunged from recor and further prayed to be set free.

I have gone through the petition of appeal, the records of this appeal and the parties' submissions thereto. My determination of this appeal shall begin with the first ground of appeal that the trial Court erred in law and in fact by not finding that the purported cautioned statement was recorded outside the period stipulated under Sections 50(1)(a)(b) and 51(a)&(b) of the Criminal Procedure Act, Cap. 20. R.E. 2002 (The CPA). In his submissions, the appellant further raised an argument that after the court did not give reasons for receiving the said statement despite the fact that the court had promised to give reasons for its decision in the next mention as shown on pg 135 of the proceedings. That however, until the conclusion of the trial, the court never advanced its reasons to do so. He also submitted an argument that after the statement was received in court it was not read over to him.

I have gone through the records of the appeal and particularly the cautioned statement of the appellant received as exhibit P1. Beginning with the issue of time that the statement was recorded, the record shows that the EXP1 was recorded at Arusha on the 11/11/2012 at 1605 hrs by PW7 one Inspector Bosco Komba. But the accused was arrested on the 08/11/2012. At the trial, when the PW7 was about to tender the EXP1, Mr. Osujaki, learned Counsel representing the accused person raised three objections on the statement of appellant (then 5th accused). One was that it was recorded outside the time prescribed u/s 50(1)(a) of the CPA. In their reply, the prosecution argued that the accused person was arrested in Mbeya and was to be transferred to Arusha first and that his statement was recorded when he got to Arusha.

During the hearing of this appeal, Ms. Sekule further argued that the trial court was satisfied that the purported statement was true and was given within the prescribed time and voluntarily by the appellant after having conducted an inquiry and hearing witnesses from both sides. But she did not rebut the appellant's argument that no reasons were advanced for the admission of the statement. I am surprised where Ms. Sekule got the strong conviction that the statement was true and given voluntarily within time by the appellant. As far as the records go, no reason were advanced by the trial magistrate.

On his part, the trial magistrate decided to make findings on the legal objections as well as the factual issue upon conclusion of an inquiry which to the appellant's detriment, he never advanced his reasons for overruling the objection raised by the appellant. This was to the accused fatal, he had a right to be heard and the reasons for the decision were to be advanced. For instance, the trial magistrate ought to have commented how he was convinced by the prosecution argument that the statement of the accused had to be recorded in Arusha while there is also a police station in Mbeya. He also ought to have analysed whether or not an extension of time was sought u/s 51 of the CPA before the statement was recorded out of time. Since no reasons were advanced for his decision to overrule the objection, the effect is as good as if the appellant was condemned unheard on the objections he raised. It is trite law that the right to be heard is fundamental right that goes to the root of dispensation of justice. It is so fundamental that a decision reached without adherence to this right is declared a nullity even if the same decision would have been reached if the parties were

heard. (see **Criminal Appeal No. 256 Of 2015, Ibrahim Said Mrabyo@ Maalim & Sebi Hassan @ Shebi Vs. The Republic** (unreported)).

That notwithstanding, there is also an argument advanced by the appellant that after the purported statement was admitted as exhibit, it was never read over in court to him. Ms. Sekule's reply was that to her recollection, the cautioned statement was read over in court after it was admitted. She admitted not to see that particular fact in the typed proceedings, she urged that the original proceedings will have that record.

On my part, I am privileged to be in possession of the original handwritten proceedings of the trial court and as correctly so argued by the appellant, it does not show that after the statement was un-procedurally admitted, it was read over in court. The records of the trial court after admitting the EXP1 is as such:

COURT: Main trial resumes.

PW7: Re-sworn and continues to state as follows:

XD Continues: .....

Evidently so, there is no place on both the typed proceedings and the original handwritten records of the trial court which shows that the statement (EXP1) was read over to the appellant after it was admitted. It is trite law that after a statement is admitted in court as part of prosecution exhibit, and after it is so admitted, and then it should be read over in court for the both sides to know the contents thereto. The omission of the trial

court to read over the statement by the witness at the trial was fatal. Owing to the this and the aforementioned reason, I am left with no choice but to expunge, which I hereby proceed to so do, the statement of the appellant, (then 5th accused) which was admitted as EXP1 from the records of the trial court.

Having expunged from the record the EXP1, let us see what is remained of the prosecution evidence. It is evident that the trial magistrate based his conviction solely on the cautioned statement of the appellant then 5th accused. On page 6 of his typed judgment he wrote:

> *"I will ultimately turn to the 5th accused person.* ***The only evidence on record against the 5th accused person is his cautioned statement*** *which was repudiated. The court of law can convict the suspect solely based on his retracted or repudiated confession provided it warns itself about the danger of acting upon uncorroborated repudiated statement of the accused person.* ***The court is under the circumstances required to be satisfied that the statement was nothing but the truth****. That position was put clear in the case of Tuwamoi Vs. Uganda (1967)E.A 84...."*

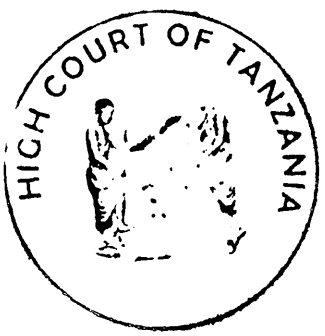
He continued on the same page 6 to page 7:

> *"I have read the statement in full and it is my opinion that the same us nothing but the truth and it is safe to convict him solely based on it. The statement has a long and detailed story about how the crime was designed, executed and the proceeds applied"*

He then took the narrations of the statement and supported then with the testimonies of the prosecution witnesses. But I have stopped to ask myself that in the absence of the EXP1, did the prosecution witnesses manage to establish the case against the appellant. The answer is definitely NO as according to the prosecution witnesses, the appellant was not even present at the scene of crime. The trial magistrate pegged the statement of those witnesses to fit into the averments of the appellant in his cautioned statement. Having the statement so expunged from the records, the evidence of the prosecution, apart from PW7 who arrested the appellant did not talk of the appellant to have warranted his conviction.

Having made those findings, I allow the first ground of appeal. Since the same is sufficient to dispose this appeal, I need not dwell on the remaining grounds of appeal. This appeal is hereby allowed. The judgment and conviction by the trial court are hereby quashed and the sentence so passed against the appellant set aside. The appellant is to be released from custody henceforth unless he is otherwise lawfully held.

Dated at Arusha this 21st day of June, 2018.



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S. M. MAGHIMBI

JUDGE