IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

H.C. CRIMINAL APPEAL NO.23 OF 2018

(*Arising from a judgment of the District Court of Mbulu in Criminal Case No. 121 of 2017 as per Hon. Mnguruta, RM*)

RAMADHANI MUHIBU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

MAIGE, J

JUDGEMENT

This is an appeal against the decision of the District Court of Mbulu convicting the appellant with the offense of armed robbery contrary to section 287A of the Penal Code, Cap. 16, RE, 2002 and sentencing to 30 years imprisonment.

The factual allegations constituting the charge against the appellant was that; on 20th day of June 2017 at or about 10.00 hours, at Sanu Baray village within Mbulu District Manyara Region did steal a cash of TZS 20,000/= and a cellular phone worth TZS 30,000,00/= both the

properties of Amina Lisu. Further that, immediately before such stealing, he did threat the said Amina Lisu with a knife.

The conviction of the appellant was based on two substances of evidence. First, the eyes identification evidence of PW-1, PW-2, PW3 and PW-4. Two the caution statement of the accused (exhibit "P-6").

In the memorandum of appeal, the appellant has raised five grounds which can however be reduced into two grounds. First that the charge against the appellant was not proved beyond reasonable doubt. Two, that the caution statement was illegal exhibited.

On the date of hearing, the appellant appeared in person and was not represented. Miss. Rose, learned state attorney represented the Republic. The appellant was very brief and precise in his submissions. On the first issue, he focused on the issue of identification. He submitted that he was not properly identified. Non of the prosecution witness was able to explain how did he identify him at the scene of the crime. In her submissions, Miss. Rose entirely agreed with the appellant. She submitted that the prosecution evidence was not certain as to how the appellant was identified. Relying on the authority in **Waziri Amir vs. R,** (1980), TLR 250, the counsel has invited the Court to hold that the appellant was not properly identified.

On the second ground, it was the submissions of the appellant that though in the charge sheet the time when the offence was committed was clearly pleaded, there was serious inconsistencies in the prosecution evidence as to the timing of the commission of the offence. He clarified that; while according to the charge sheet the offence was committed on 20.6.2017, PW-1 said it was on 21.6.2017,

The caution statement was, in his submissions criticized on two respects. First, it was taken out of time in that, while he was arrested on 20.06.2017, the caution statement was extracted on 22.06.2017. This was outside the four days prescribed period. On the second place, the appellant submitted, the caution statement was not read out and explained to the appellant before being admitted.

On my part, I have taken time to carefully examine the judgment and proceedings of the trial court. More importantly, I have duly considered the concurrent submissions between the learned state attorney and the appellant. I entirely agree with them that the charge against the appellant was not proved beyond reasonable doubt during trial.

As said above, the conviction of the appellant was partly based on eyewitnesses identification evidence. This kind of evidence in as much it is founded on imperfect human memory, is of the weakest character and most unreliable. As held by the Court of Appeal in PHILIMON

JUMANNE AGALA @ J4 VS. REPUBLIC, CRIMINAL APPEAL NO. 187 OF 2015 *eyewitnesses visual identification evidence though relevant and admissible, should be acted upon cautiously after the court has first satisfied itself that such evidence is watertight and all possibilities of mistaken identity or fabrication have been eliminated.* The same position was stated in WAZIRI AMANI VS. R, **(**1980) T.L.R. 250, LUKANGUJI MAGASHI VS. R,CAT, CRIMINAL APPEAL NO. 119 OF 2007 and SHAMIR S/O JOHN VS. R.,CRIMINAL APPEAL NO. 166 OF 2004.

In this case,**PW-1** and **PW-2** who testified on identification of the appellant did not give any account on how they were able to identify the accused person. Indeed, the prosecution evidence in totality is mute on whether the appellant was known to **PW-1** and **PW2** on the specific descriptions on the basis of which they were able to identify or recognize the appellant. In normal circumstances, the identity of a person whose name is not known can be portrayed by such descriptions as facial appearance, colouring, build, height, or manner of walking or moving. With such a weak evidence therefore, I am inclined to agree with the appellant that he was not properly identified during trial.

The above aside, it is apparent from the proceedings of the trial court of there being a variance between the charge sheet and evidence on the date of the commission of the offence. Whereas in the charge sheet the offence is claimed to have been committed 21.6.2017, in the evidence

of the victim of the crime (PW-1) it was on 20.6.2017. In ANANIA TURIANI VS. R, CRIMINAL APPEAL NO. 195 OF 2009 (UNREPORTED), it was held that *"when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offense was committed by the accused by giving evidence and proof to that effect".* The same position was stated in RYOBA MARIBA @MUNGARE VS. R, CRIMINAL APPEAL NO. 74 OF 2003 (UNREPORTED)where the appellant was charged with committing rape on 20th October, 2000 and the prosecution gave evidence that it was committed in October and November, the Court of Appeal quashed the conviction. This was also replicated in RAJAB SHABAN @SANUKA VS. R, CRIMINAL APPEAL NO. 461 OF 2015. In view of the authorities of the Court of Appeal referred herein above, I am settled that the variance between evidence and charge sheet renders the evidence adduced unreliable.

The **trial court** also relied on the evidence in caution statement (exhibit P-6). It is common ground that exhibit **P-6** was extracted two days after the arrest and incarceration of the appellant. Under section 50 of the Criminal Procedure Act, it is trite law, such a statement has to be extracted within 4 hours from the date of arrest and dentation. There are numerous consistent authorities of the Court of Appeal is support of the view that non compliance of the time requirement under section 50 of the CPA in extraction of a caution statement is an

incurable irregularity which vitiates the caution statement. See for instance, **PAMBANO MFILINGE VS.THE REPUBLIC, CRIMINAL APPEAL NO. 283 of 2009**. On top of that, exhibit **P-6** was admitted into evidence before the contents thereof had been read over to the appellant. As a result therefore, the appellant was denied an opportunity to know the accusation against him in exhibit **P-6**. The trial magistrate was quite wrong in placing reliance on this illegally admitted evidence in sustaining conviction of the appellant.

In the final results therefore, the appeal shall be allowed. The conviction of the appellants by the **trial court** is set aside and the sentence thereof quashed. The appellant should forthwith be released from custody unless otherwise lawfully held

It is so ordered.

I.MAIGE

JUDGE

26/10/2018

Judgment delivered in the presence of Rose, learned state attorney and the appellant in person this 26th day of October , 2018.

I.MAIGE

JUDGE

26/10/2018