IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM.

CRIMINAL APPEAL NO. 132 OF 2016

(Originating from Criminal Case No. 574 of 2014 of Kinondoni District Court)

SHABANI SALUMU MSONGONI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Last Order: ***30/04/2018.***

Date of Ruling: ***28/05/2018.***

JUDGMENT

I. ARUFANI, J.

The appellant, Shabani Salumu Msongoni was charged in Criminal Case No. 574 of 2014 of the District Court of Kinondoni with an offence of armed robbery contrary to section 287A of the Penal Code, Cap 16, R.E. 2002. After a full trial, he was found convicted and sentenced to serve 30 years imprisonment. After being aggrieved by the decision of the trial court he appealed to this court to challenge both conviction and sentence imposed to him. The appeal was heard before my learned sister, Madam Justice W. B. Korosso but she failed to prepare the judgment of the appeal as she was transferred to another station before getting the record from the lower court and thereafter the file was reassigned to me for continuation.

According to the charge sheet and the evidence that was adduced before the trial court, the offence was committed on 5th day of November, 2014 around 17.30 hours at Mabibo External area within Kinondoni District in Dar es Salaam Region. In that event cash money Tshs 18,000,000/= the property of Asma Ally Selemani was stolen. The appellants' conviction was based on the evidence of identification by PW1, Asma Ally Seleman and PW2, Olivery Kelvin Shirima who stated to be at the scene of the crime when the offence was committed.

PW1 told the trial court that, she is a business woman selling beer at Tabata Mikongeni. She said on the date of event she was at their place of Business with PW2 who is her husband together with their workers. She continued to say that, at the time of event she was going to their home while alone and she had carried a basket and hand bag which had cash money Tshs. 18,000,000/=. She testified that, before reaching to their home she saw some people who were in hurry coming to her and she decided to let them to pass. She said instead of those people passing they showed her a pistol and after seeing were not good people she gave them her hand bag which had the money inside. PW1 said further that, after robbing her the money the robbers fired a bullet to stop people to go to the place of event and said she didn't manage to shout for help as she felt bad. PW1 identified the appellant before the court as one for the robbers stole the money from her on the date of event.

PW2 testified before the trial court that, on the date of event he was at their place of business with PW1 who is his wife up to 17:00 hours when they closed their business. He said after closing the business he carried PW1 together their two workers in his motor vehicle and after reaching close to their home he stopped the motor vehicle to let PW1 disembarked as the motor vehicle do not go up to their home. PW2 said to have seen two motor cycles make Boxer which were black in colour parked at the area where he stopped.

PW2 said that, PW1 disembarked with a basket and hand bag which had Tshs. 18,000,000/= and proceeded to their home. He said after a short period of time from when PW1 departed he heard a gunshot and thought PW1 had been robbed the money. PW1 said that, after a short period of time he saw two guys coming with a basket and hand bag of his wife and took the motor cycles and departed. He said to have followed them up to Mandela road by using his motor vehicle and while those robbers were passing through the service road with the motor cycles, on his part he was using the main road to follow them and were heading to Ubungo.

He said after reaching at Puma Petrol station the robbers' motor cycle collided with another motor cycle and the robbers fell down. He said after that accident the robbers ran to the bonde la mchicha with everything they robbed from PW1 and left the motor cycle at the place of accident. PW2 said the police came and took the motor cycle which had Registration No. T278 CRZ to the police station. PW2 said to have

seen those robbers while running from the place of accident and identified the appellant before the court as one of the people robbed money from PW1.

Kassim Hashim Shamte, PW3 told the court is the owner of the motor cycle with Reg. No. T278 CRZ which was involved in the event of robbing money from PW1 which was admitted in the as an exhibit P3 and its Registration Card was admitted in the case as an exhibit P1. PW3 said he had handed the motor cycle to the appellant who used to pay to him Tshs. 50,000/= per week. PW3 said that, the appellant failed to pay him for two to three days and when he made a follow up he found the appellant sick and the appellant told him he was involved in an accident.

PW3 said that, after following the motor cycle at External Police Station he was told the motor cycle was used in armed robbery and he was arrested and put in police lock up. PW3 said to have taken the police to the home of the appellant and the appellant was arrested and taken to the police station. The Policeman with No. E 7764, PW4 said to have participated in arresting the appellant and said when he arrested him on 7th day of November, 2014 he found him with a lot of injuries on his face and plaster and bandage. PW4 recorded the cautioned statement of the appellant which was admitted in the case as an exhibit P2.

In his defence the appellant said he used to do business of selling fish. He said on 7th day of November, 2014 he followed his money to Said Kanyama who told him he had no money. He said after being told by his debtor to do whatever he want he was provoked and fight with him but people separated them. He said to have followed his money to another customer who is called Said Athuman and when he was returning Said Kanyama followed him while in a company of three people who introduced to him as police officers. He said those people arrested him and took him to Mbezi Police Station. He said to have been kept in the police custody up to 28th day of November, 2014 is when he was taken to the court. He said he know nothing about the offence of armed robbery levelled against him.

It is from the above evidence the appellant was convicted and sentenced as indicated at the outset of this judgment. The petition of appeal filed in this court by the appellant contain seven grounds of appeal which after scrutinizing all of them the court has found they can conveniently be summarized as follows:-

1. That the appellant was not correctly identified at the scene of crime.
2. That the retracted cautioned statement was admitted in the case as evidence without inquiry being conducted.
3. That the material witnesses were not summoned to testify before the court.

4. That the trial court's judgment is lacking points for determination contrary to the requirement of the law.
5. That the case was not proved beyond all reasonable doubt.

When the appeal came for hearing the appellant was unrepresented and the Republic was represented by Miss Recho Magambo, learned State Attorney. The appellant being a layman he simply prayed the court to consider his grounds of appeal, quash the conviction, set aside the sentence imposed to him and set him free. On the other hand the learned State Attorney told the court that, after going through the evidence adduced before the trial court and the grounds of appeal they do not support the conviction and sentence imposed to the appellant.

The learned State Attorney told the court in relation to the identification of the appellant as one of the people committed the offence of armed robbery against PW1 that, the evidence adduced to establish the offence did not meet the standard required by the law. She said the evidence of PW1 and PW2 who said to have identified the appellant as the culprit of the offence was unreliable hence the trial magistrate erred in taking the same as a truthful evidence. She argued that although PW1 and PW2 said the event occurred at about 17:30 hours and said to have managed to identified the appellant but they didn't explain the brightness of the light enabled them to identify the appellant, the distance from where they saw the appellant and

the time they stayed with the appellant to establish they managed to identify the appellant properly.

To support her submission she referred the court to the case of **Waziri Amani V. R,** [1980] TLR 250 where the factors to be considered by the court before relying on the evidence of visual identification to convict an accused person were stated. She submitted that, according to the circumstances of the case the evidence of visual identification adduced before the trial court was weak and there is no identification parade which was conducted to remove possibility of mistaken identity of the appellant.

With regards to the admissibility of the cautioned statement the learned State Attorney stated that, although the appellant objected the same to be admitted as evidence in the case but the trial court magistrate proceeded to admit the same as evidence in the case without conducting an inquiry to establish the same was made by the appellant voluntarily. She submitted that, this irregularity is fatal and its consequences is either to expunge the cautioned statement from the record or order retrial of the case. She said as they have already submitted the evidence of visual identification is weak they cannot pray for retrial of the case.

As for the failure to call important witnesses to testify before the trial court the learned State Attorney explained that, as stated by PW4 the appellant reported at Magomeni Police station and he didn't

go to Mbezi Police station and said he had a lot of bruises. The learned State Attorney submitted that, more evidence was required to be adduced to strengthen the prosecution's case by explaining what caused bruises found on the appellant's body as while the appellant said he fought with Said Manyama, the prosecution witnesses said he was involved into a motor cycle accident after committing the offence of robbery.

The learned State Attorney argued in relation to the issue of proof of charge beyond reasonable doubt that, PW3 who alleged to be the owner of the motor cycle which was admitted in the case as an exhibit P3 did not identified the same but he went to the police station to claim for the motor cycle. The learned State Attorney stated further that, there is contradiction in the evidence of PW1 and PW2. She said while PW1 said when she was robbed the money she was alone and she had left PW2 at their shop, PW2 said he closed their shop and took PW1 and their two workers in his motor vehicle.

PW2 said that, after reaching near to their home PW1 disembarked from the motor vehicle and proceeded to their home as the motor vehicle could have not gone up to their home and when PW1 was going to their home is when she was robbed the money. PW2 said to have heard a gun shot and after seeing the appellant with the basket and hand bag of his wife he followed them by using his motor vehicle up to the place where the robbers' motor cycle collided with another motor cycle and the robbers who one of them was the appellant ran

to bonde la mchicha. She submitted that, the said contradictions and all what have been stated hereinabove shows the prosecution failed to prove the case beyond reasonable doubt.

After considering the submission of the learned State Attorney the court has found in relation to the first ground of visual identification of the appellant as one of the person participated in the event of robbing PW1's money and come to the finding that, as correctly argued by the learned State Attorney the evidence used to convict the appellant in the charge he was facing before the trial court is the evidence of visual identification. The court has found the trial court Magistrate stated at page 9 of his judgment that, PW1 said to have seeing all the robbers and managed to identify the appellant whom she saw at the scene of the crime and she managed to identify him in the trial court room.

The trial magistrate stated that, PW2 said after hearing the gun shot he saw guys coming with the basket and handbag of his wife and they took their motor cycles and departed. PW2 said to have followed the robbers up to near to the Puma Petrol station where the robbers' motors cycle collided with another motor cycle and the robbers ran to the bonde la Mpunga and PW2 came to identify the appellant before the court.

The evidence of PW3 established the motor cycle used to rob the money from PW1 was the property of PW3. Despite the fact that PW3

said the appellant was his motor cyclist but he didn't produce any evidence to establish the appellant was his motor cyclist. No contract of hiring the appellant or any other evidence of handing over the motor cycle to the appellant by PW3 was adduced before the trial court. As for the evidence of PW4 the court has found principally this witness stated to have arrested the appellant and recorded his cautioned statement which the learned State Attorney has stated was admitted in the case without complying with the requirement of the law.

That being the evidence used to convict the appellant, the court has found proper to state at this juncture that, the position of the law in relation to the use of the evidence of visual identification to ground conviction of an accused person is now well established. The same was laid down in the famous case of **Waziri Amani V. R** [1980] TLR 250 cited by the learned State Attorney in her submission where it was held inter alia that:-

> *"... no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight"*

The above cardinal principle has been followed in number of cases and expounded further in the case of **Scapu John V. R** Criminal Appeal No. 197 of 2008, CAT at DSM (Unreported) where it was stated

that, when the court is dealing with the issue of watertight evidence of visual identification which entails exclusion of all possibility of mistaken identity it should take into consideration the following factors:-

- *"How long the witness had the accused under observation.*
- *What was the estimated distance between the two.*
- *If the offence took place at night which kind of light did exist and what was its intensity.*
- *Whether the accused was known to the witness before the incident.*
- *Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the letters concentration."*

Upon applying the above conditions in the case at hand the court has found there is no dispute that the appellant was stranger to the witnesses who said to have identified him at the scene of the crime and before the court. PW1 and PW2 who said to have identified the appellant as stated above said that, before the robbers took the basket and handbag which had money from PW1 they made a gunshot. To the views of this court it cannot be said without doubt that, under that circumstances where there was a gunshot the appellant was properly identified as one of the robbers participated in the event of robbing money from PW1.

The court has also entertained doubt if PW1 and PW2 managed to identify the appellants at the scene of the crime as it is not stated anywhere in the proceeding of the trial court if they stated to anybody that, they managed to identify any of the robbers invaded PW1 and robbed her the money on the date of event. It is until when PW1 and PW2 came to identify the appellant in the court room during the hearing of the case.

The importance of a witness to mention the suspect and describe him immediately after the event if he managed to identify him was stated in the case of **Marwa Wangiti Mwita and Another V. R**, Criminal Appeal No. 6 of 1995 which was quoted with approval in the case of **John Gilikola V. R**, Criminal Appeal No. 31 of 1999, CAT at MWZ (Unreported) that, it gives assurance that the witness managed to identify the suspect properly. Since the witnesses did not mention to anybody immediately after the event that they managed to identify the robbers and as there is no identification parade which was conducted to test if the witnesses managed to identify the appellant then the court has entertained doubt if they managed to identify the appellant at the place of event. In the premises the court has found the evidence of visual identification was not water tight.

As regards to the ground relating to the admissibility of the retracted cautioned statement of the appellant the court has found as submitted by the learned State Attorney, when the prosecution prayed the cautioned statement to be admitted in the case as an

exhibit the appellant objected its admissibility by stating that, the same was not made willingly. Following the said objection, an enquiry was supposed to be held in order to test the voluntariness of the cautioned statement and its admissibility under section 27 of the Evidence Act.

The inquiry was not conducted as after the appellant objected the cautioned statement to be admitted in the case the Public Prosecutor resisted the objection of the appellant and made a submission to show the cautioned statement was made voluntarily and prayed the same to be admitted in the case as an exhibit. Following the submission made by the Public Prosecutor the trial court overruled the objection raised by the appellant and admitted the cautioned statement in the case as an exhibit P2 without conducting an inquiry to be satisfied if it was made voluntarily or not.

That was not proper in law because as stated by the Court of Appeal of Tanzania in the case of **Paulo Maduka and 4 Others V. R.** Criminal Appeal No. 110 of 2007, whereby the Court of Appeal made reference to the case of **Twaha Ali and Five Others V. R**, Criminal Appeal No. 78 of 2004 CAT (unreported):-

> *"...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..."

By being led by the above decision of the Court of Appeal it is the view of this court that, as rightly submitted by the learned State Attorney omission to conduct an inquiry in the case where the appellant had raised an objection that the cautioned statement was not voluntarily is a fundamental and incurable irregularity. Therefore reliance on the said cautioned statement to convict the appellant in the offence of armed robbery was not proper as it was not ascertained if it was made voluntarily or not.

With regards to the non-calling of the person who is stated his motor cycle collided with the motor cycle of the robbers of the money of PW1 left some question unanswered. As argued by the learned State Attorney it was not stated why the motor cyclist whose motor cycle collided with that of the robbers was not called to testify on the prosecution side. In addition to that no witness was called from the Police station where the appellant alleged to have reported his event of fighting with somebody and be injured to establish if there was no such a report at their police station. Although section 143 of the Evidence Act, Cap 6 R.E 2002 states no particular number of witnesses is required in proving any fact but those witnesses would have established if appellant involved in a motor cycle accident and injured as stated by PW2 and PW3 or the injuries found in the body

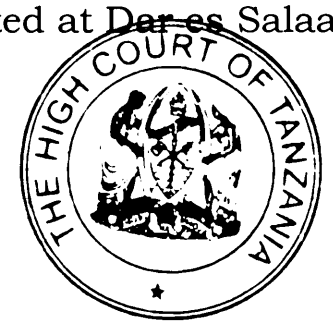
of the appellant was caused by fight between the appellant and Kanyama.

Coming to the ground relating to the lack of point for determination in the judgment of the trial court which is based on the requirement of section 312 (1) of the Criminal Procedure Act, the court has found this ground has no merit because the trial court Magistrate stated clearly in the judgment of the court that, the main issue to determine in the case was whether the accused (Appellant in this appeal) committed the offence of armed robbery levelled against him. As for the last issue which is stating the prosecution failed to prove the charge levelled against the appellant beyond reasonable doubt the court has found that, as the court has already find the evidence of visual identification was not water tight as required by the law and the cautioned statement admitted in the case as an exhibit P1 and relied upon by the trial court to convict the appellant was not established was made voluntarily before being admitted in the case as an exhibit then it is quite clear that, the evidence adduced by the prosecution witnesses before the trial court did not manage to prove the charge of armed robbery preferred against the appellant beyond reasonable doubt as required by the law.

In the premises the court is an agreement with the appellant and the learned State Attorney that, the appeal of the appellant deserve to be allowed because of the above stated reasons. Consequently, the conviction entered against the appellant is hereby quashed and

sentence of thirty years imprisonment imposed to him is accordingly set aside. The court is ordering the appellant to be released immediately from prison if there is no any other lawful cause of incarcerating him in prison.

Dated at Dar es Salaam this 28th day of May, 2018



I. ARUFANI
JUDGE
28/05/2018