

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 163 OF 2015

*(an appeal from the judgment of Morogoro District Court delivered by Hon. Riwa RM
on 21st March, 2002 in Criminal Case No. 144 of 2001)*

KESSY MBWALI **APPELLANT**

VERSUS

THE REPUBLIC **RESPONDENT**

JUDGMENT

Date of Last Order: 22/06/2018

Date of Judgment: 11/07/2018

BANZI, J.:

On the 5th day of March, 2001 the appellant together with Idd Muhidini who is not party to this appeal were arraigned before the District Court of Morogoro charged with the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code Cap. 16. At the end of the trial, they were convicted and sentenced to thirty (30) years imprisonment. Dissatisfied with conviction and sentence the appellant preferred an appeal to this Court.

Before this Court the appellant filed a Petition of Appeal with a total of five grounds which may be crystallized into; **one** that, his identification was weak and unreliable; **two** that, cautioned statement was wrongly admitted and **three** that, his conviction was based on contradictory evidence.

The factual background prompted the conviction of the appellant runs as follows; the victim of the incident on Theofil Jackson (PW2) was a security officer at Kipengele Security Guard and on 2nd December, 2000 he was given a gun MG 5662A by Mr. Mbwile and thereafter, he went to guard at Munisi's premises. In the following morning around 0545 hours, PW2 while inspecting around the house six persons armed with bush knives and piece of iron bar attacked him. They assaulted him, robbed his gun and fled. When the appellant was arrested, he was called at police station and managed to identify him. The stolen gun was retrieved at Emilian Renald's farm (PW3) and the same was tendered and admitted as exhibit P2. Also the cautioned statement of Idd Muhidini was tendered and admitted as exhibit P3.

In his defence, the appellant denied any involvement in the commission of the offence. He claimed to be arrested on 26th February, 2001 by police officers while on his way to Chamwino area. They put him in their vehicle where he found another accused who was later shot by the police when they were taken to Mikese area on attempt to procure their confession.

At the hearing of this appeal, the appellant appeared in person and fended for himself whereas the respondent Republic was represented by Mr. Bryson Ngidos, the learned State Attorney.

The appellant commenced his submission by attacking PW2's evidence in respect of his identification. He contended that, PW2 failed to identify his assailants. He added that, in those circumstances the police were supposed to conduct the identification parade but they didn't. The appellant also challenged the confession of the first accused who denied to have mentioned him during cross examination. Finally, he prayed for this this court to allow his appeal, quash his conviction and set aside the sentence.

On the other hand, Mr. Ngidos supported the appeal and he began his submission by faulting evidence of visual identification. He submitted that, the appellant was not properly identified. PW2 failed to explain how he identified the appellant considering that he didn't know him before. In that regard he was supposed to give detailed description of the appellant. He added that, the police failed to conduct identification parade upon the arrest of the appellant, however, the said parade could not have served any purpose as there was no prior descriptions of the appellant given before his arrested. He referred the case of **Frank Michael @ Msangi v Republic**, Criminal Appeal No. 323 of 2013 CAT (unreported) in support of his argument.

Besides that, Mr. Ngidos challenged the admissibility of the cautioned statement. He submitted that, at page 8 of the typed proceeding, the trial Magistrate admitted exhibit P3 without asking the appellant if he has any objection. Therefore, he prayed that exhibit P3 be expunged from record. He further submitted that, in the absence of exhibit P3 the remaining evidence is not sufficient to sustain a conviction.

In addition, the learned State Attorney submitted that, the evidence on record failed to establish the connection between the gun found at PW3's farm and the appellant before the court. PW3 claimed to identify the gun without giving its descriptions. PW1 also failed to describe the stolen gun.

On the issue of contradiction of prosecution evidence, he submitted that, there was material contradiction on the evidence of PW3 and PW4. PW3 at page 6 of the typed proceedings stated that, he saw five people at his farm led by a child of the age of ten who showed them a plastic bag with a gun in it. On the other hand, PW4 at page 8 of the typed proceedings stated that, the first accused was the one who led them to the place they concealed the gun but he didn't mention the exact place. Mr. Ngidos also added that, PW1 said he gave the gun to Tofadi Sikungwe, but PW2's name is Theofil Jackson. Hence, it shows that the person given the gun by PW1 was different from PW2 who was robbed.

Finally, he prayed that this appeal be allowed by quashing the conviction and setting aside the sentence.

Having closely examined the trial court records and the submission by the learned State Attorney, I inclined to agree with him that, the prosecution's evidence was not sufficient to prove the case against the appellant beyond reasonable doubt.

Starting with the first complaint, it is apparent that the evidence concerning the identification of the appellant was very weak. PW2 in his testimony failed to explain how he identified the appellant. From his evidence it is quite clear that the appellant was a stranger to him but yet still he didn't

give detailed descriptions of the appellant before he had opportunity to see him at police station upon his arrest. What PW2 did was dock identification which has no evidential value in the absence of identification parade conducted prior. In the case of **Musa Elias and Two others v Republic**, Criminal Appeal No.172 of 1993 (unreported) it was stated that;

"It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial".

Since PW2 failed to give detailed description of the appellant before his arrest and since there was no identification conducted after the arrest of the appellant, I find no evidential value on the dock identification done by PW2. In that regard it is obvious that, the evidence of identification was very weak and unreliable.

Reverting to the complaint in respect of cautioned statement, taking it as a whole, the first accused mentioned a lot of incidents he was involved in a company of the appellant. Coming to the incident subject to the case at hand, he didn't mention the appellant. In that regard it cannot be taken as the confession of co-accused against the appellant.

Turning to the issue of admissibility, as correctly submitted by the learned State Attorney that, the trial Magistrate admitted exhibit P3 without giving the appellant and the other accused the opportunity to comment on

the statement if they had objection or not. The position of the law on this issue is now settled. It was held in the case of **Twaha Ally and five Others v Republic**, Criminal Appeal No. 78 of 2004 CAT (unreported) that;

"The omission to inform the accused of his right to say something and/or to conduct an inquiry or a trial within a trial in case there is objection raised, result in a fundamental and incurable irregularity". (emphasis supplied)

In the light of the position of the law and since the trial magistrate failed to give the appellant opportunity to say something before receiving the cautioned statement as exhibit, I hereby expunge exhibit P3 from the record along with exhibit P1 and P2 which were admitted following the same irregularity.

Coming to the issue of contradiction, it is apparent that the prosecution evidence was full of contradictions. To start with the contradiction in respect of the person who led the police to the hidden gun, PW3 testified that, it was a young boy of the age of ten who came to his farm and led the police to a place where they retrieved the gun. On the other hand, PW4 said that it was the first accused who led them to the area they concealed the gun. From this contradictions, it is not known who led the police to the place where the said gun was hidden. This casts strong doubt on prosecution evidence if at all the said gun was retrieved from PW3's farm.

Apart from that, there is another contradiction on who was given the said gun before the incident. It was on PW1's evidence that, he issued the

gun to one Tofadi Sikungwe. On the other, the person who claimed to be issued with the gun which was robbed on the incident day was PW2 whose name is Theofil Jackson. In that regard, I inclined to agree with the learned State Attorney that, the gun purported to be robbed was given to a different person other than PW2.

In the upshot, it is clear that the guilt of the appellant was not proved beyond the required standard, and for the reasons thereof, the appellant's conviction cannot be sustained.

In that regard, I accordingly allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. I order his immediate release from prison, unless otherwise lawfully held.



I.K. BANZI

JUDGE

11/07/2018

Delivered in the presence of Bryson Ngidos the learned State Attorney for the respondent and the appellant in person.



I.K. BANZI

JUDGE

11/07/2018