IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 182 OF 2017

(an appeal from the judgment of Kilombero District Court delivered by Hon. Lyon RM on 3th April, 2017 in Criminal Case No. 224 of 2016)

NASSORO KHAMIS @ LICHOMBERO ..... APPELLANT

VERSUS

THE REPUBLC ..... RESPONDENT

JUDGMENT

Date of Last Order: 08/06/2018

Date of Judgment: 09/07/2018

BANZI, J.:

The appellant appeared before the District Court of Kilombero at Ifakara on a charge containing eight counts; five counts of Armed Robbery, one count of Grievous Harm and two counts of Malicious Damage to Property contrary to sections 287A, 225 and 326 of the Penal Code [Cap. 16 R.E. 2002] respectively. At the end of the trial, the appellant was convicted with all counts as charged and sentenced to thirty (30) years imprisonment. Dissatisfied with both conviction and sentence the appellant preferred an appeal to this Court.

The factual background of this case run as follows; on 27th July, 2016 around 2000 hours, the appellant and his fellows armed

with different weapons blocked the main road of Ifaraka – Mlimba by placing the trees across the road. Thereafter, they robbed various items including cash money, mobile phones, camera from persons who stopped upon finding blockade across the road. Among the persons who were robbed are Ihoye Mhuli Shushu (PW1), Isack Thomas Togocho (PW3) and Paschal John Mushi (PW5). They also damaged the motor vehicles namely Suzuki Carry with registration number T673 CSF and Mitsubishi Fuso with registration number T694 DEF.

The appellant was arrested at the crime scene by MT.109498 PTE Frank Leon Mtolela (PW4) while his colleagues managed to escape. The appellant confessed to the police and Justice of Peace whereby the cautioned and Extra Judicial statements were tendered and admitted without objection as exhibit PE1 and PE3 respectively.

In his defence, the appellant admitted to be at the crime scene on the night of event, but he denied to commit the alleged offence. According to his sworn defence, he was living at farm of one of the prison officer which was nearby the crime scene. He also testified that, on that day around 4pm he went to recharge his mobile phone at his boss's residence. On his way back to the farm he found road blockage and other people who later arrested him claiming to be among the robbers. He denied to be among the robbers.

At the hearing of the appeal, the appellant appeared in person and fended for himself. He firstly filed six grounds and later added twelve grounds but they can be crystallized into the following;

one that, non-compliance of sections 192(3), 9(3), 210(3), 231 and 240(3) of the Criminal Procedure Act; **two** that, his conviction was based on contradictory evidence of PW1, PW3 and PW4; **three** that, his identification was questionable; **four** that, cautioned and extra judicial statements were involuntarily made, wrongly tendered and admitted; and **five** that, the judgment was composed in contravention of section 312(2) of the Criminal Procedure Act.

At the hearing, the appellant had nothing to add whereas he prayed that this court considers his grounds of appeal and set him free.

The respondent Republic was represented by Mr. Bryson Ngidos, learned State Attorney who on the outset opposed the appeal.

To substantiate his stance, Mr. Ngidos began to respond on the ground concerning non-compliance of various provisions of the Criminal Procedure Act [Cap. 20 R.E. 2002]. It was his submission that, trial court record shows that sections 192 and 231 of the CPA were duly complied with by the trial Magistrate. He invited the court to look at page 9 and 30 of the typed proceedings. Hence this complaint lacks merit. Regarding non-compliance of section 9(3) he submitted that, the appellant ought to be supplied with complaint's statement as required by law but the record is silent on that and failure to comply might affect the appellant to prepare himself on defence.

Responding to ground number two in respect of contradictory evidence of PW1, PW3 and PW4 the learned State Attorney submitted

that the evidence of these witnesses was not contradictory to the extent of affecting their evidence in its totality. He added that, each witness testified on what had transpired on the material night. The testimony of PW1 was almost similar with PW3's that the persons who invaded them wore jackets and didn't cover their faces. Also, PW4 apprehended the appellant while trying to mix up with other victims.

So far as visual identification is concerned, he submitted that, identification of the appellant at the crime scene was weak. However, since the appellant was arrested at the crime scene by PW4, the issue of identification does not arise. He supported his argument by referring to the position of the law stated in the case of **Patrick Lazaro and another v Republic**, Criminal Appeal No. 229 of 2014 CAT Bukoba registry (unreported).

Submitting on ground number four concerning cautioned and extra judicial statements, Mr. Ngidos argued that, the appellant's contention that the two statements were procured out of torture does not hold water. He added that, both statements were tendered without being objected by the appellant and therefore there was no need for trial Magistrate to conduct the inquiry. He contended that, since the two statements were admitted without objection, it was right for trial court to conclude that they were voluntary made and the court was right to convict the appellant basing on this confession.

He further submitted that, exhibits PE1 and PE5 were tendered by their makers who are PW2 and PW8 respectively, and hence were

competent witnesses to tender the same. In addition, the appellant had opportunity to cross examined them on the said documents. Therefore, this complaint lacks merit. In respect of exhibit PE2 the mobile phone, the learned State Attorney prayed that the same be expunged from record because it was taken from the appellant without certificate of seizure.

Turning to the last ground, Mr. Ngidos conceded that, the trial Magistrate failed to state the section of the offence with which the appellant was convicted. However, he submitted that the omission was not fatal and can be cured by section 388(1) of the CPA because it did not occasion failure of justice. Finally, he prayed that this appeal be dismissed for want of merit.

In his short rejoinder, the appellant urged to court to consider his defence during the trial and insisted that, he did not commit the alleged offence hence his appeal be allowed.

I wish to begin with non-compliance of section 192(3) of the Criminal Procedure Act [Cap.20 R.E. 2002] (the CPA). Page 7 to 9 of the typed proceedings contained part of preliminary hearing conducted by the trial Magistrate. Before looking at the proceedings containing the preliminary hearing, I find it prudent to reproduce the provisions of Section 192(3) of the CPA as hereunder;

> *"(3) At the conclusion of a preliminary hearing held under this section, the court* ***shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained***

to the accused in a language that he understands, *signed by the accused and his advocate (if any) and by the public prosecutor, and then filed" (emphasis supplied)*

Now turning to the record at page 9 of the typed proceedings, the trial Magistrate after recording the facts from the prosecution, the remaining part was recorded as follows: -

"Memorandum of Agreed Facts

Court – The accused has admitted facts No.1, 11, and 12 and denied the rest.

SGD: T. A. LYON

RESIDENT MAGISTRATE 1

24/10/2016

PP – I intend to call not less than seven witnesses

I also intend to tender four exhibits

Accused's signature

PP's signature

RM's signature".

It is apparent form the excerpt shown above, the trial Magistrate did not fully comply with the requirements of section 192(3) of the CPA because the memorandum of the matter agreed was not prepared, read over and explained to the appellant in a language he understood. This irregularity is fatal and it vitiates the preliminary hearing proceedings. The effect thereof the proceedings in respect of preliminary hearing are hereby nullified (see the case of **Kalist**

Clemence @ Kanyaga v Republic, Criminal Appeal No. 19 of 2013 CAT and **Kanisius Mwita Marwa v Republic**, Criminal Appeal No. 306 of 2013 both unreported. Since the proceedings in respect of preliminary hearing are nullity, all evidence deemed to have been proved in terms of section 192(4) of the CPA should be proved in the ordinary way. This was the position in the case of **Brayson Katawa v Republic**, Criminal Appeal No. 259 of 2011.

I now turn to the complaint in respect of non-compliance of sections 210(3) and 231 of the CPA. Starting with non-compliance of section 210(3) of the CPA, the appellant's complaint as appeared on ground 7 of additional grounds is he was not informed that he is entitled to have his evidence and of other witnesses read over to him. Looking at the proceedings, it is clear that the trial Magistrate failed to comply with section 210(3) of the CPA as at the end of each witness's testimony both prosecution and defence nothing was stated to show witnesses were informed on their right to have their evidence read over to them. Section 210(3) was couched in a mandatory language and failure to comply the same is irregularity. However, not every irregularity is fatal unless it occasioned failure of justice on the part of the appellant. In this particular complaint, nothing has been established to conclude that the appellant was prejudiced and hence the irregularity is curable under section 388(1) of the CPA. Refer the case of **Athuman Hassan v Republic**, Criminal Appeal No. 84 of 2013 CAT (unreported).

On the other hand, it is shown at page 30 of the proceedings that section 231 of the CPA was complied with by the trial Magistrate. Also the appellant indicated how he was going to defend himself. In that regard his complaint in respect of non-compliance of section 231 of the CPA lacks merit.

Coming to the complaint in respect of non-compliance of section 9(3) of the CPA, appellant's contention was that the trial Magistrate failed to furnish him with the statement of the complainant and such omission occasioned miscarriage of justice on his part as he did not know the nature of the case in order to cross-examine and prepare his defence. As conceded by the learned State Attorney that, the record is silence in respect of this issue. Section 9(3) of the CPA provides that;

> *"Where in pursuance of any information given under this section proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information and of any statement made by him under subsection (3) of section 10, to be furnished to the accused forthwith".*

Rationale behind this requirement is to give the accused a clear picture on the charges he is facing and nature of evidence that will be led against him. It was stated in the case of **Republic v Saimon Bernard and three others** [1992] TLR 367 that;

The rationale for this requirement is, I think, fairly obvious. An accused person is entitled to know and have a clear picture as to what charges he is facing and the nature of the evidence that will be led against him. This will enable him to prepare his defence and hopefully be able to utilize such statements to test the very foundations of the prosecution case. It is therefore imperative for such statements to be made available to such an accused person. It is not a favour to him but his statutory right within the prescribed limits".

It is my considered view that, the omission by the trial Magistrate to furnish the appellant with the complainant's statement was fatal and not curable under section 388(1) of the CPA as it prejudiced the appellant to know the nature of evidence that will be led against him considering the fact that the charge had several counts and each count has its own complainant.

Reverting to the issue of identification, I agree with the learned State Attorney that, the appellant was arrested at the crime scene and hence the issue of identification does not rise as per position of the law in the case of **Patrick Lazaro and Another v Republic**, Criminal Appeal No. 229 of 2014 CAT (unreported).

However, the circumstances of the case at hand is different from the cited case above. It is not disputed that, the appellant was arrested at the crime scene. It is also undisputed that, various people were at the crime scene. On the other hand, the appellant in his

defence contended that he was among the persons who stopped there after finding blockage on the road. In these circumstances, the identification of the appellant before he was arrested is very crucial. PW3 and PW4 claimed that, the appellant was standing beside the tree while communicating with his fellows through a mobile phone. He was also holding a club and torch. The witnesses claimed to identify the appellant by using lights from the vehicle but they failed to state the intensity of such light. In these circumstances, the evidence of identification of the appellant before his arrest ought to be watertight as required by law which was not the case in the instant matter. In that regard, defence evidence cast doubt on prosecution evidence if at all the appellant was among the robbers or not.

Apart from that, if the appellant was among the culprits and was arrested with mobile phone, club and torch as contended by witnesses, it is strange the prosecution failed to tender the club which according to charge sheet was among the weapon used in the commission of offence from 1st to 6th counts. For that reason the identification of the appellant before his arrest was very weak.

Turning to the complaint concerning admissibility of cautioned and extra judicial statement, the appellant's contention is that the two statements were wrongly admitted for being tendered by incompetent persons and were admitted without conducting trial within a trial. Starting with competence of persons who tendered the same, the record shows that extra judicial statement (exhibit PE1) was taken before the Ward Executive Officer, Victor Thadeo Mwihawa

(PW2) who according to law is a justice of peace capable of taking the confession from suspects [refer **Magistrate's Courts (Appointment of Justices of the Peace) Notice, 2004, GN No. 369 of 2004**]. Therefore, since PW2 was the author of exhibit PE1 was competent person to tender it. The same applies to the cautioned statement which was tendered by E.7134 D/CPL Gerald (PW6) who interrogated the appellant and recorded his statement. In that regard, both PW2 and PW6 were competent to tender exhibit PE1 and PE3 respectively.

Still in the same complaint, the appellant contended that, the trial Magistrate failed to conduct trial within a trial before admitting the two confessions obtained out of torture. The position of the law concerning admission of accused's confession is now settled. In the case of **Selemani Hassani v Republic**, Criminal Appeal No. 364 of 2008 CAT (unreported) it was stated that;

> *"A confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground, either that it was not voluntarily made or not made at all".*

At page 13 and 24 of the typed proceedings when PW2 and PW6 pray to tender the extra judicial and cautioned statements respectively, no objection was raised by the appellant on the ground that, they were not voluntarily made. In addition, if the appellant intended to object to the admissibility of the two statements he ought to have raised his objection before they were admitted and not during cross examination or during the defence as it was held in the case of

Shihobe Seni and Another v Republic [1992] TLR 330. Hence the complaint that the two statements were involuntarily made in my view is an afterthought.

Apart from that, the appellant did not raise any objection when the prosecution prayed to tender the two statements. It is the position of the law that the court cannot hold a trial within a trial or inquiry *suo motu* to test voluntariness of the confession in the absence of objection to its admissibility. (Refer the case of **Stephen Jason and Another v Republic**, Criminal Appeal No. 79 of 1999 CAT [unreported]). In that regard, since the appellant didn't objection the admissibility of the two statements it was right for the trial court not to conduct trial within a trial or inquiry to test the voluntariness of the confession.

However, passing through the record at page 13 and 24 of the typed proceedings I have noted the irregularity in respect of admissibility of the two statements which I find it prudent discussing the same though was not part of the appellant's complaint. The record shows the two statements after being admitted were not read aloud to the appellant. In the case of **Issa Hassan Uki v Republic**, Criminal Appeal No. 129 of 2017 CAT (unreported) it was held that;

> *"after a document is cleared for admission and admitted in evidence, it should be read out to the accused person to enable him understand the nature and substance of the facts contained therein".*

In another case of **Jumanne Mohamed and Two Others v Republic**, Criminal appeal No. 534 of 2015 CAT (unreported) it was held that;

> *"In all fairness an accused person is entitled to know the contents of any document tendered as exhibit to enable him marshal a proper defence whenever they contain any information adversely affecting him".*

In this case, both statements were not read out to the appellant after being admitted. This omission is fatal as a result both statements are expunged from the record. The same applies to exhibit PE4 (vehicle inspection reports) and exhibit PE5 (the PF3) which were also not read after being admitted.

As far as the last ground is concerned, it is the appellant's contention that the trial Magistrate entered a conviction without specifying the provision of the law. Looking at page 17 of the typed judgment it is apparent that, the trial Magistrate convicted the appellant without specifying the offence and section of the law contrary to the provisions of section 312 of the CPA. For ease of reference, I find it prudent to reproduce section 312(2) which provides that;

> *"In the case of conviction* ***the judgment shall specify the offence of which, and the section of the Penal Code*** *or other law under which, the accused person is convicted and the punishment to which he is sentenced".* (emphasis is added).

The above named section is couched in a mandatory language, and hence failure to comply with it is an irregularity. Now the next question is whether such irregularity occasioned failure of justice. In the instant case, the appellant was charged with three different offences attracting different punishment. But the trial Magistrate did not specify the offence and section of the law in which the appellant was convicted. The appellant was sentenced without knowing type of offences he was convicted with. It is my considered view that, the omission was fatal and occasioned failure of justice on the appellant hence not curable under section 388(1) of the CPA.

Basing on irregularities appeared in the proceedings and judgment as indicated above and in the absence of confession statements, PF3 as well as vehicle inspection report after being expunged from record, the remaining evidence especially identification of the appellant before his arrest remains shaken. For that reason, the appellant's conviction cannot be sustained.

In the upshot, I find the appeal with merit and I accordingly it by quashing the conviction and setting aside the sentence imposed on him. I order the release of the appellant forthwith from prison, unless otherwise lawfully held.

I.K. BANZI
JUDGE
9th July, 2018

Delivered this 9th day of July, 2018 in the presence of Bryson Ngidos, the learned State Attorney for the respondent and the appellant in person.

I.K. BANZI
JUDGE
9th July, 2018

Right of appeal explained.

I.K. BANZI
JUDGE
9th July, 2018