IN THE HIGH OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 312 OF 2017

(Originating from Criminal Case 390 of 2016 of the District Court of Temeke at Temeke, before Hon. Mfanga - RM)

SALMA JUMANNE @ NGUNGU ..... 1ST APPELLANT

MOHAMED JUMA MBONDE .....2ND APPELLANT

SEIF HAMIS MACHELA .....3RD APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

7/6/2018 & 19/6/2018

I.C. MUGETA, J.

On 27th July, 2017, the appellants were convicted of armed robbery c/s 287A of the Penal Code [Cap 16 R.E 2002] of the Laws of Tanzania by the District Court of Temeke District at Temeke. The particulars of the offence in the charge sheet are that on 15th June, 2016, at Double Machine ya Maji area within Temeke District in

Dar es Salaam region, the appellants did steal a motor cycle with Reg. No. MC232 BFW, make Boxer the property of Hashim Abdul and immediately before such stealing did threaten with a machete one Said Maulid Mpoloya in order to obtain the said property. The conviction was followed by the statutory minimum sentence of jail term imprisonment for thirty (30) years. They are aggrieved by both conviction and sentence hence this appeal.

The petition of appeal is joint in that it contains the grounds of appeal for both appellants. The first appellant has seven grounds of appeal while the second and third appellants have five grounds each. This makes a total of seventeen grounds of appeal.

When the appeal was called for hearing, all appellants said they have nothing to add on the grounds of appeal submitted. Each of them prayed the court to find merits in the appeal and to finally quash the conviction, set aside the sentence and set them free. The Republic, represented by Ms Honorina Munishi did not support the conviction for two major reasons. Firstly, that there was no proper identification and that the caution statement of the second and third appellants which grounded their conviction was improperly introduced in evidence in that they were admitted without holding an inquiry after both the second and third appellant repudiated them.

I have considered the seventeen grounds of appeal which are interrelated and I need not to reproduce them here. This is because

they boil to one major ground of complaint that the charge was not proved beyond reasonable doubts.

I find merits in this complaint for reasons I shall hereunder endeavor to demonstrate, at the same time covering arguments by the learned State Attorney.

These are the brief facts on the case. Even though the charge sheet does not mention the time of the event, PW1, Said Maulid Mpoloya (the victim) testified that the robbery occured at 23.00 hrs. His evidence is that on the material time the 1st appellant (1st accused in the charge sheet) hired him (PW1 is a "bodaboda" rider) to take her to double M Bar. That the first accused was his customer as she had also hired him on 13/6/2016 and 14/6/2016 (PW1 did not say where he took the 1st accused on these dates). That on arrival at double M Bar, PW1 was attacked by two men who finally robbed his motor cycle and drove away. Then he reported to the police station who launched the investigation under the superintendence of PW4, one E 2937 D/Sgt Matiku.

Later, PW1 learned that the 1st accused lives at Tandika. He informed the owner of the motor cycle Hashim Abdul, who being assisted by PW3, Issa Richard, they arrested all the 1st, 2nd and 3rd appellants.

According to PW4, the 2nd and 3rd appellants were arrested after being mentioned by the 1st appellant during interrogation. He testified further that in their statements both the 2nd and 3rd

appellants admitted to have committed the offence. Their respective statements were admitted as exhibits P1 and P2 despite their objection. As submitted by the learned State Attorney, no inquiry was held to determine admissibility of the same after the objections were raised.

In their defence, all accused persons denied to have either committed the offence or admitting involvement to commit the crime in their caution statements. The statement of the 1st accused person was not tendered in court.

In the judgment, the learned trial magistrate made the following findings: -

i) Robbery was actually committed.
ii) The robbery was perpetrated by the appellants.
iii) The statements of the 2nd and 3rd accused persons containing their confession are true.

Let us see if the learned trial magistrate directed his mind to the evidence properly to make these finding of facts in light of the available evidence.

I start with the first finding and this is what the learned magistrate said in answer to the question he posed that is whether there was any stealing: -

> *"The answer is yes There was stealing of motorcycle namely Boxer with Reg. No. MC 232 BFW property of Hashim Abdul. Was proved by the testimony of PW1 who*

identified the entire accused person to be the person who were involved in the staling of the mentioned motorcycle. PW2 also collaborated PW1 statement by telling the court that he was informed on the material date of the stealing of the motor vehicle which he was the owner of it"

Indeed, in his evidence, PW2 said he was informed about the theft by PW1. Therefore, his evidence about the incident is hearsay. With respect to the learned magistrate, hearsay evidence cannot corroborate another evidence because, by its nature, is not admissible. It follows, therefore, that the only evidence on the occurrence of the incidence is that of PW1. I do not doubt the evidence of PW1 on occurrence of the incident. Therefore, the trial magistrate was right to hold that there was stealing even if his reasons to support the holding are erroneous.

I move to the second finding of fact. Was the robbery committed by the appellants? An affirmative answer to this issue depends on proper identification of the 1st accused by PW1. This is because the evidence of PW1 is that at the scene of crime he identified the first appellant only. For this reason, the it is an established legal principle that since the incident occurred at night, conditions favouring proper identification must be described. In **Raymond Francis Vs R [1994] TLR 100** it was held that all criminal cases whose evidence rely on identification, the evidence on condition favouring a correct identification is of utmost importance.

In his evidence PW1 never described the conditions that led to his identification of the 1st appellant. Indeed, he said the 1st appellant had been his customer for the past two days before the incident but this was not sufficient condition for him to identify her when she approached him at almost midnight. At least PW1 ought to have explained special factors which facilitated their familiarity to warrant him to identify her even at night. Since such description is missing the evidence on conditions favouring proper identification of the 1st accused is missing. Therefore, as rightly submitted by the learned State Attorney, condition favouring proper identification of the 1st accused ought to have been described. No such description was offered so I hold that the 1st accused (appellant) was not properly identified.

Regarding the 2nd and 3rd appellants PW1 admitted in his evidence that he did not identify them at the scene of crime because it was dark. According to PW4 they were arrested after the 1st appellant mentioned them during interrogation. If this interrogation was reduced into a caution statement, the same was not admitted in court to corroborate PW4. In this regard I hold that the finding by the learned trial magistrate that the robbery was committed by the appellants is unjustified by evidence.

I turn to the third finding of facts which is about statements of the 2nd and 3rd accused persons. This is what the learned magistrate said about them in his judgement: -

"The allegation that the accused were beaten and forced to sign documents they never know what written inside cannot be allowed to stand as defence because such type of defence is now accustomed to this court. It would suffice if they were physically and mentally affected by the acts of the Police Officer. The court admits that sometimes the police use some force to find the truth but that force must be reasonable".

Even though is not clear what exactly the learned trial magistrate wanted to say, the following is discernible from the content of the above paragraph: -

i) That the police used reasonable force to extract information from the 2nd and 3rd accused persons.

ii) That the force used never resulted into physical or mental effect to both the 2nd and 3rd accused persons.

iii) From his experience it is common for accused persons to allege that they were beaten to extract a confession and such allegations are regularly advanced by suspects.

With respect to the learned Magistrate a complaint that the confession was extracted by force does not become false by the mere fact that it is being raised regularly by other suspects in different cases. It is important to judge each situation independent of the other. Further, if such allegations are common they are indication of something amiss and should not be taken lightly.

On the holding that the police used reasonable force to extract the information which force cause neither mental nor physical effect, I think these are extraneous matters. There is no evidence to this effect and if the learned trial magistrate was expressing opinion, this was not right because the same concerns a matter of fact which needed proof.

Be as it may the statement of the 2nd and 3rd accused persons were introduced without passing the admissibility test. It is now a common practice that once an accused person repudiates/retract a statement containing a confession, an inquiry must be held to determine if the maker made it freely. The 2nd and 3rd accuse persons objected to admissibility of their caution statement. However, the learned trial magistrate proceeded to admit the same without first holding an inquiry. This was not procedurally right. For this error, I hereby expunge the two statements (exhibits P.1 and P2) from court record for being improperly admitted. This leaves no evidence upon which the 2nd and 3rd accused person can be convicted.

In the event I hold that the appeal has merits. Consequently, the conviction is set quashed and sentence is set aside. The appellants to be released from custody unless otherwise held for another lawful cause.

I.C. Mugeta

JUDGE

19/6/2018

19/6/2018

Coram: Hon. I.C. Mugeta, J

For the Appellant: All present in persons

For the Respondent: Erick Shija

Cc: Mayalla

Court: Judgment delivered in chambers.

I.C Mugeta

JUDGE

19/6/2018