IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 172 OF 2019

(Original Criminal Case No. 114 of 2018 of the District Court of Sengerema)

SHUKRANI MAGESA---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

17th February & 24th February 2020

J. C. TIGANGA, J.

In this Judgment the Appellant Shukrani Magesa stood charged together with six others before the District Court of Sengerema with three counts of Armed Robbery contrary to section 287A of the Penal Code [Cap 16 RE 2002] as amended by Act No. 4 /2004.

They were charged to have jointly and together on 31st day of March 2018 at about 02.00hrs while at Bupandwa village within Sengerema District in Mwanza Region stolen cash money Tshs.4, 640,000/=, three mobile phones make Tecno, Halotel and Nokia valued at Tshs. 190,000/=the property of one Mganga Yombo in the first count, while in the second count, on the same date at 02.20hrs while at the same place

they were charged to have committed the same offence but this time against Paulo Kazungu from whom cash money Tshs. 2,052,000/= one knife valued Tshs 20,000/=and a radio valued Tshs.30,000 all total valued Tshs.2,102,000/=were stolen. In the third count, on that very date and at the same place as in the first and second counts, but this time at 02.30hrs they committed similar offence by stealing, cash money Tshs.100,000/=, different airtime voucher valued Tshs.70,000/= and ten mobile phones valued 750,000/=all total valued at 920,000/=the property of one Salumu Hamza and immediately before and after such stealing in all three counts did use a panga and a piece of iron bar in order to obtain and retain the said properties.

On arraignment they all pleaded not guilty to the charge, it was after a full trial which involved seven prosecution witnesses and seven defence witnesses, the 2nd, 3rd, 4th, 5th, 6th, and 7th Accused persons were acquitted while the first Accused now the appellant was convicted and sentenced to 30 years jail imprisonment. The base of the conviction of the 1st accused was his confession statement which the trial magistrate was satisfied that it was voluntary given.

That conviction and sentence aggrieved him, he decided to appeal to challenge it. In his petition of Appeal, the Appellant filed five ground of Appeal as follows;

(i) That the trial Magistrate was incurably erred to convict the appellant by the evidence of the case which was not proved beyond reasonable doubt.

(ii) That the trial Magistrate was grossly erred to base the conviction on the un corroborated confession of the retracted and repudiated cautioned statement which was prepared and taken contrary to the CPA Cap 20

(iii) That the charge was not proved by the evidence as per the typed copy of the judgment there is basic variance about type and number of the said weapons.

(iv) That the trial magistrate was erred to satisfy that the case proved while the copy of Judgment there is no any testimony of whether the said weapons were used to threaten anyone for the robbery as essential matter of the offence

(v) That the trial Magistrate was not fair against the appellant where she rejected evidence of the visual identification for other accused excluding the appellant while he was not identified and named by the most prosecution witnesses

He prayed for the court to quash the decision of the District Court and acquit him.

At the hearing of the Appeal, the appellant did not argue one ground after the other, he argued them generally complaining that the evidence upon which he was convicted was mainly of the police officers. He said the statement which was allegedly recorded was procured by force. He said there is no witness who said he identified him at the scene of crime. He said nobody has come out and said the appellant stole from him. He said

he was convicted and sentenced for the offence he did not commit. He in the end prayed for justice from this court.

In his reply to the petition of Appeal Mr. Castus Ndamugoba learned Senior State Attorney for the respondent - republic supported the Appeal basing on the second ground of Appeal. He submitted that the conviction of the appellant based on the evidence contained in the cautioned statement as tendered by Pw1 one Constable Nyamuhanga as reflected at page 10 of the proceedings. It is his submission that when the evidence was tendered, the accused person now the Appellant was asked whether he was objecting or not, he said that "I do not know such statement". However the trial magistrate recorded that the accused person had no objection to its admission. It is his submission that to his understanding the response of the Accused person meant that he objected the said cautioned statement and therefore the trial magistrate was supposed to conduct inquiry which she did not conduct. Further to that even Pw1 who tendered the statement did not state at all that the appellant recorded his statement at his free will. He submitted at the end that in his opinion the second ground of appeal suffices to dispose the Appeal.

In my opinion the first ground of Appeal is general as its phraseology covers also the rest of the grounds, however since Mr. Castus Ndamugoba while submitting in support of the Appeal has specifically dealt with only the second ground, I will start with the second ground of Appeal thereafter to the first ground of appeal.

On the second ground of appeal, it is true as submitted by Mr. Ndamugoba that the conviction of the appellant was based on the evidence contained in the cautioned statement tendered by Pw1 one F.5450 DC Nyamuhanga as reflected at the last paragraph of page 9 of the judgment of the trial court. The trial magistrate convicted him after she was satisfied that appellant confessed in that statement as he did not object the admission of the said cautioned statement. However the trial magistrate acknowledged the defence by the accused person that he was beaten by the police officer so that he could confess, however she overruled the said defence on the ground that when the statement was tendered the accused did not raise such concern so that inquiry can be conducted.

It is true that the law i.e section 29 of the Evidence Act [Cap 6 RE 2002] and a number of case authority one of them being **Thadei Mlomo & Others Vs Republic** [1995] T.L.R 187 the one relied on by the trial Magistrate allows the involuntary confession to be admissible if the court believes it to be true.

In my opinion as submitted Mr. Ndamugoba the response of the accused person during the tendering and admission of the cautioned statement Exh.P1 that "I do not know such statement" meant that he was either repudiating or retracting the statement. That means the trial magistrate was supposed to inquire into the truthfulness of the said statement by conducting inquiry to satisfy herself whether it was true or not. see. **Annes Allen Vs DPP** Crim. Appeal 173 of 2007 CAT Arusha (unreported) and **Michael John @ Mtei Vs Republic** Crim. Appeal 202 of 2010 CAT Dar Es Salaam (unreported)

In the famous decision of erstwhile Court of Appeal of Eastern Africa in the case of **Tuwamoi Vs Uganda** (1967) EA 84, on the confession. it was held that;

> *"A trial court should accept with a caution a confession which was retracted and repudiated or both retracted and repudiated and must be fully satisfied that all the circumstances of the case that the confession is true"*

The truthfulness of the said statement was supposed to be established through the following methods; **One,** by a procedure of inquiry which in this case was not conducted, **two**, corroboration of the said confession by some other material evidence from an independent witness which is also not available in this case, and **three,** where the confession though not voluntary but has led to the discovery of important facts which points irresistibly to the truth of the confession and consequently to the guilty of the accused, which is not the case in this matter. See **Mabala Masasi Mongwe Vs Republic** Crim Appeal No. 161 of 2010 - CAT DSM (Unreported)

Further to that it is the law, as it is in the case of **Morris Agunga and 2 Others Vs Republic** Crim. Appeal No.100 of 1995 in this case a confession was admitted without objection but the appellant in his defence at the trial, retracted and repudiated the confession the court however held that the trial court was obliged to decide on the question of the voluntariness of the cautioned statement. To borrow the words of the Court of Appeal;

"The trial court had the duty to consider the Appellant's defence as to whether the confession was really voluntary, and if it found that the alleged confession was not voluntary he should have discarded it altogether not withstanding that its admissibility in evidence had not been objected."

This means that even if we find for the sake of argument that the confession was not objected which is not the fact in this case, yet still the trial court still had a duty to consider the defence raised by the appellant, not to just drop it simply because the appellant did not object the admission of the cautioned statement. This said and found, the second ground of appeal is hereby allowed for the reasons given.

Back to the rest of the grounds which are combined into one that whether the prosecution have proved the case to the standard of beyond reasonable doubt,

It is the law i.e section 110 of the Evidence Act [Cap 6 R.E 2002], requires whoever wants the court to give judgment as to any legal right or liability dependent on the existence of facts which he assert, must prove that those facts exists. This means that the burden of proof to prove that the appellant committed the offence of armed robbery was on the prosecution side.

Further to that, section 114 of the same law sets a standard of proof in criminal case to be beyond reasonable doubt. These two sections have been interpreted by a number of case authorities few of which are to be mentioned here i.e **Woodimington Vs DPP** (1935) AC 462 as well as

Mwita & Others Vs Republic [1977] L.R.T 54. The other case law containing the same principle is that of **Jonas Nzike Vs Republic** [1992] T.L.R 213 HC (Katiti, J) (as he then was). These authorities contain a common law of principle of burden of proof which in essence requires the prosecution to prove the case at the standard of beyond reasonable doubt.

Further to that, the authority in the case of **Christian Kale & Another Vs Republic** [1992] T.L.R 302 (CAT), **John Makolobobera & Another Vs Republic** [2002] T.L.R 296, requires insistently that the accused person should only be convicted of an offence charged with, on the basis of the strength of the prosecution case not on the weakness of the defence case.

Now, with these two principles of burden and standard of proof, I find important to add another principle found in the case of **Maliki George Ngendakumana Vs Republic** Criminal Appeal No. 353 of 2014 (CAT) Bukoba (Unreported) which *inter alia* held that:-

> *"...it is the principle of law that in criminal cases, the duty of the prosecution is two folds, one to prove that the offence was committed and, two that it is the accused person who committed it"*

In this case as earlier on found that, the only evidence was based on the confession as recorded in the cautioned statement tendered as exhibit P1. I have already ruled that it was admitted and relied on without following the procedure and therefore has been discredited. Without any other evidence we cannot say that the case was proved beyond reasonable

doubt. That said, the 1st ground of Appeal is also allowed as the case was not proved beyond reasonable doubt.

As these two grounds have managed to dispose the appeal, going to other ground will be of no value but just an academic exercise, on these two grounds, the appeal is allowed, the conviction is quashed and sentence of the trial court is set aside, the appellant is consequently released unless otherwise held for other lawful purpose.

It is so ordered

J. C. Tiganga

Judge

24/02/2020

Right of Appeal explained and guaranteed

J. C. Tiganga

Judge

24/02/2020