

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)
APPELLATE JURISDICTION
AT IRINGA**

(DC) CRIMINAL APPEAL NO. 41 OF 2019

(Originating from Mufindi District Court Criminal Case No. 101 of 2018)

YOTAM KADUMA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: 09/03/2020

Date of Judgment: 23/03/2020

JUDGMENT

MATOGOLO, J.

Yotam s/o Modestus @ Kaduma who is the appellant in this appeal along with Joel s/o Lameck @ Chura were jointly charged of the offence of armed robbery contrary to Section 287A of the Penal Code [Cap. 16 R. E. 2002].

It was alleged in the particulars of offence that the two accused persons on 12th day of May, 2018 at Kinyanambo "A" area in Mafinga Township within Mufindi District Iringa Region did steal one Laptop make HP with serial No. CND 44113 worth T.shs. 3,000,000/=, four mobile

phones Sumsung and Blackberry worth Tshs. 2,400,000/= five watch worth Tshs. 1,350,000/= eternal drive worth Tshs 100,000/= and Cash Tshs. 400,000/= all together valued at Tshs. 7,250,000/= properties of one Grace d/o Onjack @ Kasumba and immediately before or after stealing the said properties did assault one Joel s/o Kalinga who was the security guard using iron bar and machetes in order to retain the said properties. The appellant pleaded not guilty. A trial followed and after the closure of the prosecution case, the second accused Joel Lameck @ Chura was acquitted after the trial court found that he had no case to answer.

However the present appellant was found with a case to answer and at the end of trial he was found guilty convicted and sentenced to thirty years imprisonment.

Aggrieved with both conviction and sentence he has appealed to this court in which he filed four grounds petition of Appeal.

At the hearing the appellant was represented by Mr. Jackson Chaula learned advocate. Mr. Alex Mwita learned State Attorney appeared for the respondent Republic.

In his submission in support of the appeal, Mr. Chaula submitted on each ground raised. The first ground relates to identification of the appellant for which he said the evidence on record reveals that the appellant was arrested and identified at 00.00 hours. But the identifying witness did not describe the intensity of the light which enabled him to

identify the appellant. He said the conditions for proper identification laid in the case of ***Waziri Aman vs. Republic (1980) TLR 280***, was not met.

In the second ground of appeal it is the submission by Mr. Chaula that the trial court erred to hold that the appellant was arrested at the scene without being there any piece of evidence to show that he was arrested at the scene. But there is evidence by PW1 that the appellant was found along the road at the time PW1 was coming from the scene.

He said the appellant explained he had just arrived from Dar es Salaam and was looking for a place where he could get food. The appellant's conviction basing on the fact that he was found at the scene was just a trial magistrate invention without been there any evidence.

Regarding the third ground of appeal it is the submission by Mr. Jackson Chaula learned advocate that the trial court erred to found the appellant confessed to have committed the offence basing on the cautioned statement. In short he said the cautioned statement was taken beyond the period provided under Section 50(1)(a) of the Criminal Procedure Act. Secondly the said cautioned statement was not read in court after been admitted. But also the said cautioned statement was repudiated by the appellant. He said it is the principle of law that where the suspect's statement is recorded outside the given time is illegal as it was held in the case of ***Bakari vs. Republic (2015) EA 2***.

Not only that before the cautioned statement is admitted in court the same should be cleared first for admission per the decision of the Court of Appeal in the case of ***Robison Mwanjisi and 3 Others vs. Republic (2003) TLR 218***.

Mr. Chaula submitted further that the cautioned statement bear two different dates on which it was recorded that is on 13/05/2018 and 18/05/2018. The difference of dates ought to have been resolved by the prosecution.

Regarding the fourth ground, it is the submission by the learned counsel that the prosecution failed to prove the charge against the appellant beyond reasonable doubt as it is trite law that the prosecution has the burden to prove the offence against the accused beyond reasonable doubt. If there are doubts the same should be resolved to the accused's benefit as it was held in the case of ***Joseph Makune vs. Republic (1986) TLR 44*** and in the case of ***Woolmington vs. DPP (1935) AC 462***. It is the submission by the learned counsel that the prosecution has failed to prove the case against the appellant beyond reasonable doubt and prayed for the appeal to be allowed, quash the conviction and set aside the sentence imposed against the appellant and the appellant be released from the prison.

On his part Mr. Alex Mwita learned State Attorney did not support the appellant's conviction and thus supported the appeal basing on what was submitted by the appellant's advocate.

He said the appellant was convicted basing on the evidence of identification and the appellant's cautioned statement. But he said due to the fact that there was darkness there was no proper identification and the condition set out in ***Waziri Amani case*** were not fulfilled.

As to the cautioned statement, the same was recorded on 13/05/2018 at 10:00 am while the appellant was arrested on 12/05/2018 as explained by PW1 thus Section 50(1)(a) of the Criminal Procedure Act was violated. But after the cautioned statement was admitted, its contents were not read in court. The conditions laid in ***Robinson Mwanjisi Case*** (supra), was not met. He prayed for such cautioned statement, exhibit P6 to be expunged from the court record. If the cautioned statement is expunged and due to the fact that there was no proper identification, there is no any other evidence remaining thus he prayed to the appellant's conviction to be quashed and sentence to be set aside.

From the foregoing submissions by the learned counsel for the appellant as well as the learned State Attorney, and according to the evidence on record there is no dispute that the case against the appellant was not proved beyond reasonable doubt. In actual fact there is no evidence connecting the appellant with the charged offence.

It is on record and according to the testimony of PW1, the appellant was found along the road where he was arrested and interrogated. The reason as to why he was connected to the charge is because he did not give satisfactory explanation as to why he was found at that place at that

particular time. This is according to the testimonies of PW1, PW2, PW4 and PW5. It appears therefore that the appellant was just charged on suspicion. But there is no evidence linking him to the committed offence apart from his failure to give satisfactory explanation after met with the police along the road at the time they were coming from the scene of crime. But suspicion however strong cannot form basis for conviction as it was held in the case of ***Richard Matangule and Another vs. Republic [1992] TLR 5.***

It was correctly submitted by both learned counsel that the only evidence relied upon by the trial court in convicting the appellant is the evidence of identification and appellant's cautioned statement. But there is no evidence proving that the appellant was properly identified at the scene, but he was just suspected after been found on the road by the police while coming from the scene of crime.

And for the cautioned statement provided that it was recorded in violation of Section 50 (1)(a) of the Criminal Procedure Act and due to the fact that the said cautioned statement was not read in court after been admitted the same cannot be acted upon. It is hereby expunged from the court record. Apart from the cautioned statement which is expunged and absence of evidence for proper identification of the appellant, there is no any other evidence connecting the appellant with the alleged committed offence. Thus the prosecution did not prove the charge against the appellant beyond reasonable doubt. This appeal has merit the same is allowed. The conviction against the appellant is hereby quashed and the

sentence of 30 years imprisonment imposed against the appellant is set aside.

The appellant is to be released from the prison custody immediately unless held for other lawful causes.

DATE at IRINGA this 23rd day of March, 2020.


F. N. MATOGOLO
JUDGE
23/03/2020

Date: 23/03/2020
Coram: Hon. F. N. Matogolo - Judge
Appellant: Present
Respondent: Mr. Alex Mwita State Attorney
C/C: Charles


Mr. Alex Mwita - State Attorney:

My Lord I appear for the Respondent/ Republic. The appellant is present and represented by Mr. Jackson Chaula learned advocate. The appeal is for judgment we are ready.

COURT:

Judgment delivered this 23rd March, 2020 in the presence of the appellant and his advocate Mr. Chaula and in the presence of Mr. Alex Mwita learned State Attorney for the Republic.




F. N. MATOGOLO
JUDGE
23/03/2020