IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 125 OF 2019

(Arising from Original Criminal Case No. 156 of 2018 of the District Court of Urambo at Urambo)

BAHATI DAUDI ..... 1ST APPELLANT

CHARLES MASASILA ..... 2ND APPELLANT

JULIUS MASASILA ..... 3RD APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

KIHWELO, J.

In the District Court of Urambo, the three appellants, Bahati Daudi, Charles Masasila and Julius Masasila, stood jointly arraigned for two counts which were all predicated under the relevant provisions of the Penal Code, Chapter 16 of the laws, R.E 2002 (the Code). More particularly, on the first count, the arraignment was for armed robbery contrary to section 287A of the Code. The particulars were that on 2nd November 2017 at about 02:00 hrs at Kisoko Makonde Village within Urambo District in Tabora region the appellants jointly and together did steal Tshs. 500,000.00, one luxury bicycle valued at Tshs. 130,000.00, 22 pieces of "vitenge" valued at Tshs.

194,000.00, two mobile phones valued at Tshs. 219,000.00 the total value of which is Tshs. 1,043,000.00 the property of Khaji Lukoba and immediately, before and after such stealing did use gun and machete in order to obtain the said property.

On the second count, the statement of the offence was for grievous harm contrary to section 225 of the Code. The particulars were that on 2nd November 2017 at about 02:25 hrs Kisoko Makonde Village within Urambo District in Tabora region the appellants jointly and together unlawfully did harm one Bahati Masanja by using machete.

When the charge was read over and explained to the appellants at the commencement of the trial, they both denied the charge, whereupon the prosecution featured 7 witnesses and a host of documentary exhibits. After full trial, the appellants were all found guilty of the first count as charged and were convicted and sentenced to a jail term of 30 years. As regards to the second count the trial court found the first accused guilty as charged and convicted him and he was sentenced to serve a jail term of 12 months. The other two appellants were acquitted of the second count.

Being unhappy with the said convictions and sentence, the appellants lodged separate petitions of appeal but since they both originated from the same criminal case they were consolidated into one. The first appellant marshalled five grounds of complaint couched thus:

1. *That, the appellant didn't commit the alleged serious offence as established by the crown (sis) witness during the trial, furthermore he pleaded not guilty to the charged offence.*

2. *That, the learned trial magistrate erred on point of law and fact in finding that PW2, PW3, PW6 and PW7 gave true and credible testimony.*
3. *That, the learned trial magistrate totally erred both in law and fact for failure to observe that the evidence of one Bahati s/o Masanja raised a doubt in all proceedings.*
4. *That, the learned trial magistrate wrong (sic) received and relied on the extra judicial statement (exh. PW).*
5. *That, the victim of the alleged (sic) claimed to have identify the appellant by solar light, the victim and fellow witness did not disclose the intensity of the solar light, their evidence have a(sic) full questionable.*

On the other hand, the 2nd and 3rd appellants jointly levelled five (5) grounds of complaint as follows:-

1. *That, the trial court/magistrate erred in law and fact by convicting and sentencing the appellants without satisfying itself that their confessions were true.*
2. *That, the trial Magistrate erred in law and facts by not directing her mind to the alibi set up by the appellants.*
3. *That, the appellants was (sic) not positively identified at the scene of the crime.*

4. *That, the trial Magistrate failed to deliver the judgment according to the provisions of section 312 (1) of the criminal procedure Act Cap 20 R.E. 2002.*
5. *That, the prosecution failed to prove the offence of armed robbery beyond reasonable doubt to the appellants.*

At the hearing before this Court, the first and third appellants were fending for themselves, unrepresented, whereas the second appellant had the service of Mr. Goodluck Bernard learned advocate and the respondent Republic was represented by Mr. Innocent Rweyemamu learned State Attorney.

In beginning to fault the decision of the trial court Mr. Goodluck submitted that the trial court convicted the appellants without satisfying itself that the confession that they made was freely made because when the appellants were tried they informed the trial court that they were tortured and when they were taken to the justice of peace the police threatened them that, if they don't confess they will be tortured to death.

To hammer home his line of argument he cited the case of **Michael Luhiye vs R** (1994) TLR 181 in which the court religiously held that it is important to look for collaboration in support of a retracted confession in order to find a conviction. He further referred this court to the celebrated case of **Tuwamoy vs. Uganda** [1967] EA 84 where the court held that, the trial court should accept any confession which has been retracted with caution and it will act on it to lead to conviction if it is satisfied that the confession is true. He forcefully argued that in the instant case there is

nowhere the trial magistrate evaluated the evidence to come to the conclusions that the confession was nothing but true.

Mr. Goodluck further submitted that, the appellants were not correctly identified at the scene of crime and went to argue that PW1 in his testimony said he knew the appellants by names and face but failed to state who among them cut him with machete and by virtue of the prosecution's evidence the incident occurred at night. He referred this court to the decision in the case of **Shabani Bakari vs R,** Criminal Appeal No. 118 of 2015 Court of Appeal of Tanzania at Dodoma (unreported) in which the Court of Appeal outlined some guidelines to be considered in identification for offences that occurred during the night and according to him none of those were observed by the trial court.

Mr. Goodluck strenuously argued further that, the trial court's judgment offends the provision of section 312 (1) of the Criminal Procedure Act, Cap 20 R.E 2002 ("the CPA") in that the decision of the trial court did not consider the defence case. To buttress further his point, he cited the case of **Shemwita v. R** (1985) TLR 228.

Finally, Mr. Goodluck strongly argued that the prosecution did not prove the case against the appellants and referred this court to the provision of section 110 of the Tanzania Evidence Act, Cap 67 R.E 2002 ("the Evidence Act") which requires that he who alleges must prove the allegations.

On their part the 1st and 2nd appellants did not have much to say except to adopt the grounds of appeal and support all what the learned counsel for the 1st appellant submitted.

In response Mr. Rweyemamu learned State Attorney while supporting the appellants' conviction and sentence he submitted that, the extra judicial statement of the 3rd appellant was admitted in evidence during trial and without any objection and in that statement the accused stated the role he played in committing the offence while accompanied with the 1st and 2nd appellants.

The learned State Attorney referred to page 22 of the typed proceedings where Chilemba Hassan Chikawe (PW7), a Justice of Peace testified how he found the appellants before recording the extra judicial statements and that the 3rdappellant told him his involvement in the commission of the crime in collaboration with the 1st and 2nd appellants. He also confessed how much money they stole.

According to the learned State Attorney traversing the records of the trial court in particular pages 7 and 8 of the typed proceedings it is conspicuously clear that the witness said he knew those people by names and by their faces, after the incident Khaji Lugoba (PW1) mentioned those bandits to be Masanja Lugoba (PW2) and that it is on that circumstances the prosecution's evidence proved the charges against appellants beyond reasonable doubt.

In response to the non-compliance of section 312(1) of the CPA, the learned State Attorney vehemently argued that looking at the records of the trial court from page 2 to 9 of the trial court judgment, the trial magistrate evaluated the prosecution and defence evidence and came to the conclusions that the prosecution evidence was watertight.

In rejoinder the learned counsel submitted that, the duty of the trial court was to evaluate the evidence something that the trial magistrate never did.

I have carefully considered the rival arguments of the trained minds, the grounds of appeal and the records of the trial court and I believe that the only issue before me is whether or not the appeal before me is meritorious. Before doing so, it is crucial to state that, this being a first appeal is in the form of re-hearing. Therefore, as the first appellate court, I have a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at my own conclusion of fact. See-**D.R. Pandya V Republic** (1957) EA 336.

I find it convenient to begin with the appellants' complaint about confession which according to the learned counsel for the 2nd appellant the trial court convicted the appellants without satisfying itself that the confession that they made was freely made because when the appellants were tried they informed the trial court that they were tortured and when they were taken to the justice of peace the police threatened them that, if they don't confess they will be tortured to death.

I therefore think it is appropriate here to recapitulate briefly the law on confession. Simply put, a confession voluntarily made by the accused person to a police officer of, or above the rank of corporal, is admissible in evidence. However, in order for such statement to be admissible in evidence, the prosecution must prove beyond reasonable doubt that the same was made voluntarily. If it shown it was not voluntarily made, the trial court is empowered to reject it. This is provided under section 27 of the Evidence Act.

In the instant case the cautioned statement of the 2nd and 3rd appellants were objected as clearly seen at page 16 and 17 of the typed proceedings on account that they were not freely made, yet the trial court admitted them.

I think that the law relating to admissibility of a confession is now fairly settled, after the decision of the case of **Twaha Ali and Others v Republic**, Criminal Appeal No. 78 of 2004 (Unreported) which was quoted with approval in the case of **Seleman Abdallah and 2 Others v Republic,** Criminal Appeal No. 384 of 2008 (Unreported) in which the Court observed inter alia, I quote.

> *"If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

In that case, the accused persons (Appellants) were charged with armed robbery. The most crucial evidence on the prosecution side was the cautioned statements of the appellants, which were tendered as exhibits without the appellants being asked whether they objected or otherwise.

In the instant case the tendering of the cautioned statements (exhibit P2) was objected. It follows therefore that the trial court ought to have conducted an inquiry, to ascertain its voluntariness. That was not done. The cautioned statements of the 2nd and 3rd appellants ought not to have been admitted without conducting such an inquiry and should not therefore have been relied and acted upon by the trial court to ground conviction.

Traversing the records of the trial court in particular page 23 and 24 of the typed proceedings the 1st accused objected to the admissibility of the extra judicial statement (Exhibit P4) but the court went ahead to admit without determination of its voluntariness, and by parity of reasoning the same consequences will befell the cautioned statement whose voluntariness was questioned. Therefore, the extra judicial statement (Exhibit P4) should not therefore have been relied and acted upon by the trial court to ground conviction. I shall, at a later stage of my judgment, revert to this disquieting aspect of the proceedings below to determine the consequences of exhibit P2 and exhibit P4.

It is insignificant to remark that, there is another anomaly which this Court caught an eye, that is the PF3 which was tendered in court by PW5 and admitted in evidence as exhibit P1 but proceedings do not show if the same was read out in court after admission. Admittedly, this omission is

fatal as it is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court. See the case of **Issa Hassan Uki v Republic,** Criminal Appeal No. 129 of 2017, (Unreported) where the document under discussion was a valuation report.

I shall now resume to discuss the consequences of exhibit P1, exhibit P2 and exhibit P4 which were irregularly admitted in evidence during trial. Given the plethora of authorities which I have discussed above, I thus expunge exhibit P1, exhibit P2 and exhibit P4 from the record.

Having expunged exhibit P1, exhibit P2 and exhibit P4, I am, admittedly, left with a skeleton of the prosecution case which somehow is not sufficient. If anything, it is a mere suspicion and not a very strong one at that. It is trite law that a mere suspicion alone, however strong cannot ground a conviction.

Unfortunately, with due respect, the learned trial magistrate did not warn himself of the danger of convicting the appellants based upon an uncorroborated evidence as required by law.

It is instructive to interject a remark, by way of a postscript that the prosecution evidence shows that, the first appellant when arrested he was found with cash Tsh. 60,000.00, one mobile phone and pieces of clothes, it was alleged by the prosecution which allegations were believed by the trial court that the first appellant admitted to the police that they invaded Khaji Lukoba and took from home Tsh. 500,000.00 two mobile phones and pieces of wax which they shared among themselves, and when other

appellants were arrested they also admitted to have committed the offence.

However, it leaves a lot to be desired if the first accused was found with those stolen properties as the prosecution's witnesses testified, those items could be in the list of exhibits the prosecution would rely on to prove its case but that was never done. In my considered opinion the trial magistrate was misdirected by the prosecution and convicted the appellants on mere suspicion. It is trite law that a mere suspicion alone, however strong cannot ground a conviction.

Next, I will consider the issue of identification of the appellants at the scene of crime. The counsel for the second appellant submitted that, the appellants were not correctly identified at the scene of crime and went to argue that PW1 in his testimony said he knew the appellants by names and face but failed to state who among them cut him with machete and by virtue of the prosecution's evidence the incident occurred at night.

It is plain and certain that, the law is now settled when a court of law is to rely on the evidence of a witness on visual identification, it has to consider some guidelines so as to avoid mistaken identity of a suspect. The said guidelines were laid down in the case of **Shabani Bakari v Republic** cited by the counsel for the second respondent. The said guidelines are as follows:-

"1. If the witness is relying on some light as an aid of visual identification he must describe the source and intensity of that light.

2. The witness should explain how close he was to the culprit(s) and the time spent on the encounter.

3. The witness should describe the culprit or culprits in terms of body build, complexion, size, or peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence.

4. Ideally, upon receiving the description of the suspect(s) the police should mount an identification parade to test the witness's and then at the trial the witness should be led to identify him again."

In the instant case PW1 and PW4 testified during the trial that they identified the culprits who invaded their house at night and robed them. However, none of the guidelines laid down in the case **Shabani Bakari v Republic** applied and therefore I find considerable merit in the submissions that the appellants were not properly identified. I am fortified further by the fact that the appellants were not even identified in the dock by PW1, PW2, PW3 and PW4, leave alone the fact that no identification parade was conducted at the police.

Finally, the issue of the defence case not being considered has exercised my mind quite considerably. Looking at the records of the trial court from page 2 to 9 of the trial court judgment where it is alleged by the learned State Attorney that the trial magistrate evaluated the prosecution and defence evidence and came to the conclusions that the prosecution evidence was watertight. A cursory perusal of the trial court's judgment

from page 2 to 9 it is conspicuously clear that the trial court merely summarized the testimony of prosecution and defence witnesses and did not analyze the evidence as the learned State Attorney would wish this court to believe. Let the records of the judgment at page 9 paint the picture;

"Therefore, from the above evidence there is no doubt that the prosecution side has proved the charge of Armed Robbery against all three accused persons to the required standard of proof and I find all three accused persons guilty of the offence of Armed Robbery c/s 287A of the Penal Code, Cap 16 RE;2002 and I convict all three accused persons as charged under section 235(1) of the CPA, CPA (sic) 20 re (sic) 2002"

I therefore find considerable merit on the appellants' complaint that the trial court did not consider the defence case in the course of the judgment and before conviction. The Court of Appeal has restated the principle of law in this regard that when a defence, however weak, foolish, unfounded or improbable, is raised by an accused person charged with a crime, that defence should fairly and impartially be considered by the trial court in order to vouch a miscarriage of justice on the accused. Where it may be found that the court(s) below did not observe this principle, there is no better option but to allow the appeal. See **Martha Swai v Republic,** Criminal Appeal No. 247 of 2013. In this case the Court of Appeal noted that the trial court in its entire judgment did not analyze the defence evidence and the same error was done by the first appellate court despite the appellant complain in ground 6 of the appeal.

For the foregoing reasons, I find the appeal with merit and consequently, I allow it. The appellant's conviction is quashed, the 30 years imprisonment sentence on the first count is set aside with order of immediate release of the appellants from prison unless lawful held in on another cause. As to the second count I take judicial notice that the first appellant has served the sentence to its completion.

P.F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.

P. F. KIHWELO

JUDGE

10/12/2020

Date: 17/12/2020

Coram: Hon. B.R. Nyaki, Deputy Registrar

Appellants: 1st - Present in person

2nd - Present in person

3rd – Present in person

Respondent: Absent

B/Clerk: Grace Mkemwa, RMA

Court:-

Judgement delivered this 17th day of December, 2020 in the presence of all the Appellants, but in absence of the Respondent.

Right of appeal explained.

B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020