IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 37 OF 2021

(Arising from Criminal Case No. 195 of 2020 of Kasulu District Court Before I.E. Shuli, RM

BARAKA S/O AMOS NGANDAMA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

17th & 18th August, 2021

A. MATUMA, J.

The appellant stood charged in the District Court of Kasulu at Kasulu for Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2019.

He was alleged to have stolen one Television make Zec, one Azam decoder, one Radio make Aitkensen and one DVD player make Singsum the properties of one Emmanuel S/O Machage whose total value was Tshs. 830,000/=. It was further alleged that the offence was committed on the 4th day of October, 2019 at the dead night and that the appellant used an iron bar and machete (panga) to threaten the said Emmanuel

Machage (the victim) who is in fact a Police Officer in order to obtain such properties. The appellant stood charged with two other co-accused persons who are not subject to this appeal as they were not convicted of this offence.

The trial court was satisfied with the prosecution case to have been proved beyond reasonable doubts, consequently convicted the appellant and sentenced him to suffer a custodial sentence of 30 years.

The appellant became aggrieved with the conviction and sentence hence this appeal with a total of six grounds of appeal but all of them connotes a single complaint that the Prosecution case was not proved beyond reasonable doubts against him.

At the hearing of this appeal the appellant appeared in person while the respondent/Republic was represented by M/S Happiness Mayunga learned State Attorney.

Both parties were not at issue and were in consensus that the prosecution case was not proved beyond reasonable doubt for want of proper identification of both the appellant, wrong admission in evidence and reliance on the Cautioned Statement of the Appellant (exhibit P6) and failure of the identifying witness PW1 to name the Appellant at the earliest opportunity for he purported to have known him well even by name.

The brief facts of the matter are that; the victim on the 4th October, 2019 was asleep in his home with the light on. Suddenly he was invaded by the group of people among whom he identified the Appellant by his name as they knew each other since 2017 as the Appellant used to carry for him some cargoes/luggage. His various properties as herein above named were robbed from him.

The appellant on his party denied completely to have anyhow committed the offence.

I agree with both parties that the prosecution case was not proved beyond reasonable doubts on the strength of the arguments of the learned State Attorney in support of Appellant's Appeal.

As rightly submitted by the learned State Attorney, the Appellant was arrested on 20/4/2020 as testified by PW5 G. 7527 D/C Andrew and the Appellant himself. His Cautioned Statement exhibit P6 was however recorded on 27/04/2020 without any explanation for the delay in recording such statement.

The statement was thus taken beyond the prescribed time under section 50(1)(a) of the Criminal Procedure Act Cap. 20 R.E. 2019 as rightly submitted by the learned State Attorney and ought not to have been admitted in evidence. Even after its admission the same is liable to be

expunged on this appeal in terms of section 169 of the Criminal Procedure Act and various case laws including that of **Abdi Msumo Kimaro versus The Republic,** Criminal Appeal no. 8 of 2007 as cited to me by the learned State Attorney.

Not only that but also, the Appellant clearly objected the admissibility of the said Cautioned Statement on the ground of torture and force to confess but an Inquiry was not carried on. His objection was arbitrarily overruled without holding an Inquiry as the law enjoins. In his objection at page 21 of the proceedings the Appellant stated;

> *"I object this statement because I was beaten by the police and I was forced to give my statement and agree to the commission of the offence. They should not be admitted in court"*

With this objection the trial court was legally bound to conduct an Inquiry whether or not the statement should be admitted. In the case of ***Nyerere Nyague Versus The Republic,*** Criminal Appeal No. 67 of 2010, the court of appeal held at page 6 and 7 that an objection to the admissibility of a cautioned statement may be taken on two grounds, one under the evidence act as to the voluntariness or otherwise of the statement, that it was made or not made at all in which case it is either retracted or repudiated. In that respect, an inquiry or trial within trial is called for.

But if the objection is taken in second limb of the ground about violation of procedural rules under the CPA or otherwise the court would only be required to determine the substance of the objection as far as procedural rules are concerned.

In the instant case, an objection made by the appellant that he was forced to confess was a retraction to the statement and the trial magistrate ought to have held an inquiry as to its admissibility or otherwise.

The prosecutor was also duty bound to remind the court on the procedural requirements when such objection was raised. But it seems the trial magistrate and the prosecutor were in hurry to convict thereby ignoring completely the procedural requirements which are there to ensure a fair and just trial. In that respect the cautioned statement exhibit P6 is hereby expunged.

On the question of identification of the Appellant at the crime scene, I once again join hands with the learned state Attorney that the same did not eliminate all possibilities of mistaken identity. As rightly submitted by the learned counsel, the victim PW1 testified to have known the appellant even prior to the crime as he used to carry luggage (mizigo) in the locality and had once carried for him a fridge. He knew him even by name. unfortunately, the records do not show whether he named him to police

immediate after the incident. The Appellant was only arrested six months later after having been named by some other accused persons in the Police cell to be their companion in the crime. There is no explanation for the delay to arrest the appellant to such extent while he was allegedly identified and well known by name and his duties/work. In the case of ***Marwa Wangiti Mwita and Another versus Republic (2002) TLR 39*** the Court of Appeal held;

> *'The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability,* ***in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry.'***

In the instant case there is no evidence either that the victim named the appellant to the relevant authority at the earliest possible time nor that the Appellant was nowhere to be seen for the purpose of arrest in connection to this case until six months later.

Not only that but also the identifying witness PW1 purported to testify that he was asleep with the light on;

> *'There was a light on. That is why I was able to identify the first accused (the Appellant). I normally sleep with the lights on'*

Apart from such statement by the witness, there is nowhere on record it is explained what was the source of light and its intensity.

Issa s/o Magara @ Shuka V R, Criminal Appeal No. 37 of 2005 (unreported) the Court Appeal speaking on the needful to have the source of light and its intensity held:

> *'In our settled minds, we believe that* ***it is not sufficient to make bare assertions that there was light at the scene of the crime.*** *It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in evidence sufficient details the intensity and size of the area illuminated.'*

The Court went on:

> *'We wish to stress that even in recognition cases where such evidence may be more reliable than identification of on stranger,* ***clear evidence on sources of light and its intensity is of paramount importance.*** *This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made.'*

In the circumstances that the victim did not name the appellant at the earliest possible time despite of having known him prior to the crime and that the source of light and its intensity was not stated, the appellant's identification cannot be said to have eliminated all the possibilities of mistaken identity. I thus agree that the appellant was not properly identified at the crime scene.

With the herein above anomalies, I find this appeal to have been brought with sufficient cause. The same is hereby allowed. The appellant's conviction is quashed and the sentence of 30 years meted to him is set aside.

I order his immediate release from prison unless held for some other lawful cause. Right of further appeal explained.

It is so ordered.

A. Matuma

Judge

18/08/2021

Court: Judgment delivered today 18th day of August, 2021 in the presence of the Appellant in person and M/S Happiness Mayunga learned State Attorney for the Respondent/Republic.

Sgd. A. MATUMA

JUDGE

18/08/2021