IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

DC CRIMINAL APPEAL NO. 136 OF 2020

(From the decision of the District Court of Mbeya at Mbeya in Criminal Case No. 78 of 2009)

BONIFACE TIMOTH KAMETA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 13/07/2021
Date of Judgement: 03/08/2021

MONGELLA, J.

Boniface Timoth Kameta, the appellant herein was arraigned in the District court of Mbeya together with other persons, not parties in this appeal, for three counts. The first count was conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap 16 of the laws. The second count was armed robbery contrary to section 287A of the Penal Code Cap. 16 of the laws. The third count was unlawful possession of firearms contrary to section 4 (1) and 34 of the Arms and Ammunition Act, 1991, Cap. 223 of the laws.

During the hearing it was alleged that on 04th March 2009 within the rural district and region of Mbeya, the appellant jointly and together with other

seven people namely: Minto Ntulo Mwamkinga, Samweli Amunike Mwakilembe, Betweri Katobike Bisege, Sadick Daniel Ramadhani, Gibson Kisanga, Flora Idimeni Sayota, and Sadiki John Mwafyela, conspired to commit an offence of armed robbery at Mbeya Textile Mill Limited. It was further alleged that, having conspired they went ahead to commit the said armed robbery whereby they stole T.shs. 3,700,000/- USD 350, 3 CDs, one short gun with serial number C26363, two riffles with serial number G 930508 and GFN 71/33434, thirty three (33) rounds of ammunitions, and four short gun bullets, being property of Mbeya Textile Mills.

The count on unlawful possession of firearms concerned the appellant and one Flora Idimeni Sayota. Specifically, the appellant was alleged to have been found in possession of a short gun with serial number GFN 33434.

In the end of the trial, the appellant was convicted on the counts of armed robbery and unlawful possession of firearms. He was sentenced to thirty years imprisonment. Aggrieved by this decision he filed this appeal containing seven grounds. During the hearing of this appeal, the appellant fended for himself and prayed for the grounds of appeal to be adopted as his submission in chief. He opted to have the state attorney representing the respondent reply to his grounds of appeal while retaining his right to rejoin. I shall therefore present the grounds of appeal as the appellant's submission.

On the 1st and 2nd grounds, the appellant claimed that the trial Magistrate erred in law and fact when he convicted him upon believing the

evidence of PW5, PW6 and PW14. He said that PW5 testified to have conducted search in his room and seized a gun, which was tendered as exhibit P4 and P5. PW5 also tendered a search warrant which was admitted as exhibit P8. The appellant argued that the said search was illegally conducted as it was conducted at night in contravention of section 40 of the Criminal Procedure Act, Cap. 20 R.E. 2019. He contended that the said provision requires for search to be conducted between the hour of sunrise and sunset, but upon application by a police officer or any other person to whom it is addressed, the court may permit it to be conducted at any hour. He was of the stance that these conditions were not adhered to by the searching officer. He added that the search was also conducted without involving any local leader, that is, the ten cell leader or street chairman of the area.

Under the circumstances, the appellant contended that there was a huge possibility of PW5 and his fellow officers planting the exhibits in his room as there was no one who searched them before they entered his room. He concluded that the testimony of PW14 supports his assertion because PW14 testified that he was not shown any search warrant, which means he never signed any search warrant.

On the 3rd ground, the appellant contended that the trial Magistrate erred in law and fact by convicting him relying on the cautioned statements, exhibit P14 and P15. He argued that the trial court found that exhibit P14 and P15 corroborated the evidence of PW14 without considering that the cautioned statement was obtained by use of force. He further challenged the admission and reliance on the cautioned

statements on the ground that he was never taken to the justice of peace to have his extra-judicial statement recorded and tendered in court as exhibit.

With regard to the 4th ground, the appellant argued that the trial Magistrate erred in law and fact by relying on the testimony of PW5 and PW6 who testified that the appellant led them to one Sadick Daniel Ramadhan @ Sadi, his co accused. He contended that their testimony was fabricated as it was not corroborated by any other independent testimony.

On the 5th ground, the appellant's stance was that the trial Magistrate erred in law and fact by finding that the evidence of PW14 corroborated that of PW5 and PW6. He argued so saying that PW14 testified that he was only called and shown exhibit P4 and P5 by PW5 and PW6 after the same were already seized. He added that PW14 did not witness the process of search as PW5 failed to produce the search warrant as required under section 38 (3) of the Criminal Procedure Act. On the premises he was of the stance that the evidence of PW14 did not corroborate that of PW5 and PW6.

On the 6th ground the appellant contended that trial Magistrate grossly erred in law and fact in convicting the appellant while disregarding his defence.

Lastly, on ground 7, the appellant contended that the charge against him was not proved beyond reasonable doubt by the prosecution.

The respondent was represented by Ms. Bernadetha Thomas, learned state attorney. Ms. Thomas opposed the appeal. Replying to the 1st ground, she contended that the search followed all the legal procedures. She though conceded to the appellant's argument that while section 40 of the Criminal Procedure Act directs that the search should be conducted between sunrise and sunset or on some other time upon application to the court, the search was conducted at night. She however, went ahead to defend the search conducted at night arguing that it was done under emergency.

Referring to the evidence of PW5, she argued that the police got information from an informer that the appellant was involved in the robbery at Mbeya textile. She submitted that, as testified by PW5, a trap had to be set to arrest the appellant at night. Referring to section 42 (1) of the Criminal Procedure Act, she argued that the law allows the police to search at any time under emergency situations and the search conducted in the matter at hand was under emergency state. Referring further to section 42 (1) (b) of the Criminal Procedure Act, she argued that the law allows for the search to be done without the authorisation or order of the court.

Ms. Thomas challenged the appellant's argument that there was no any local leader present during the search. On this she argued that the law does not put it mandatory for a local leader to be present, but an independent witness can be present. She argued that in the matter at hand an independent witness, that is PW14, was present. Referring to the testimony of PW14, she submitted that the appellant and PW14 rented the

same house, thus resided together. She said that PW14 testified on how the search was conducted whereby he said that on the material day, that is, on 09th March 2009 the police knocked his room and that of the appellant. The appellant did not open the door and the police had to break his door. Therein they found the appellant with his wife.

Replying to the allegation that the police were never searched before entering the appellant's room, thus must have planted the gun, Ms. Thomas argued that it is not the requirement of the law that the police must be searched before searching the suspect. She referred to the testimony of PW14 who testified that he saw the police entering the appellant's room and they carried no gun, but when they came out of the room they came out with a gun and bullets. PW14 also stated that he saw bullets in the appellant's room. She further contended that as per the testimony of PW5, PW6, and PW14, the appellant was found with the weapon, exhibit P4, and bullets, exhibit P5 when searched. She said that a search order signed by the appellant was also tendered and admitted as exhibit P8.

With regard to the 3rd ground of appeal, Ms. Thomas argued that during the hearing the appellant was given the opportunity to object to the caution statements, but only said that he does not recognise the statement. The trial court rejected the objection and admitted the statement as exhibit P15. She was of the stance that the appellant's claim that he was forced to issue the statement is an afterthought. She further argued that at this stage of appeal trial within a trial cannot be conducted. The appellant ought to have raised the issue during trial. To

cement on her argument she referred the court to the case of ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (CAT at Arusha, unreported).

Replying to the claim that the appellant was never taken to a justice of peace to have an extra judicial statement recorded; Ms. Thomas argued that there is no law directing that a cautioned statement must be followed by an extra judicial statement. She added that an extra judicial statement is recorded only if the accused shows interest to be recorded his statement before a justice of peace. On the other hand however, she concluded that if the court finds that the caution statement was objected by the appellant and no inquiry conducted, the court should expunge it from the record.

Replying to the 4th ground, Ms. Thomas argued that under section 143 of the Evidence Act, the prosecution is not compelled to bring a specific number of witnesses. She contended that PW5 and PW6 were found to be credible witnesses by the court as they testified that it was through the appellant that the said Sadiq was arrested.

Ms. Thomas challenged the 5th ground under which the appellant claimed that PW5 failed to tender the search warrant as exhibit. She argued that under section 38 (3) of the Criminal Procedure Act it is directed that receipts are given when items are seized. However, the same is not mandatory as no rights of the appellants were prejudiced. It does not direct that a search warrant must be presented. She further

contended that PW5 tendered a search order, which was admitted as exhibit P8 without the appellant objecting.

Ms. Thomas further argued that though in the case at hand a search was conducted and no receipt was issued, the absence of the receipt cannot render all the evidence inadmissible. She referred to the case of ***Jibril Okash Ahmed v. The Republic***, Criminal Appeal No. 331 of 2017 whereby the Court of Appeal ruled that non issuance of receipt does not affect the substance of the certificate of seizure.

Ms. Thomas also challenged ground six of appeal in which the appellant claimed that his defence evidence was not considered by the trial court. She referred the court to page 16 to 18 of the trial court judgment arguing that in these pages it is evident that the defence evidence was considered. She argued that in his defence the appellant denied all the prosecution evidence and claimed not to have been involved in the act. That he explained how he was arrested, the items seized and that he was beaten while at police whereby he was taken to hospital. She added that the appellant also claimed that no identification parade was conducted for one Angelina John to identify him.

Ms. Thomas further argued that all that the appellant testified was considered by the trial court, but in the end the trial court found that the appellant committed the offence. She argued that the trial court in its judgment took into account his cautioned statement which was corroborated by the testimony of PW14 and exhibits seized from his house. She added that the trial court also considered the fact that the appellant

was found with weapons stolen from the scene of crime. That the trial court considered the doctrine of recent possession whereby the appellant admitted that the weapon was not his, but failed to give sufficient explanation.

Arguing on the last ground of appeal, Ms. Thomas submitted that the prosecution proved its case beyond reasonable doubt through its witnesses and exhibits. She insisted that the appellant was found with stolen items and failed to explain how he came to possess the said items. In support of her argument she referred to the case of ***Omary Said Nambecha @ Nguvu v. The Republic***, Criminal Appeal No. 109 of 2012 (CAT at Mtwara, unreported) in which the CAT held that the person found with stolen properties must give sufficient explanation as to how he came to possess the said items. Basing on this case, she argued further that the appellant was found with a gun and bullets, property of Mbeya Textile Ltd, the victim of crime.

She contended further that PW1, PW2, and PW3 proved that their industry was invaded and theft occurred whereby three weapons were stolen and cash amounting to 3.7 million. She added that PW4 being the custodian proved the loss of the said items and PW5 proved that part of the gun was found at the crime scene. The said part was admitted as exhibit P3. She concluded her submission by praying for the appeal to be dismissed.

The appellant made a brief rejoinder. He insisted that the search was conducted in contravention of the law as the search warrant was not

issued. He claimed that exhibit P8 was fabricated as he never signed it. Referring to the testimony of PW14, at page 82 of the proceedings, he said that PW14 also said that he did not sign and document. He added that the police stated that they got information on 8th and they conducted the search on 9th. He was thus of the stance that the police had all the time to prepare for the search warrant and organise the local leaders to witness the search, but did not do that. Insisting on calling of material witnesses, he contended that one named Job and another named "Mama Sara" were supposed to be brought as witnesses, but were never brought.

The appellant also maintained his stance that the cautioned statement was wrongly admitted. He contended that exhibit P14 and P15 were tendered by police officers, PW9 and PW10, who claimed to have recorded his cautioned statement. He argued that he tendered PF3 in opposing the cautioned statement, however the Hon. Magistrate did not conduct inquiry. He prayed for this court to keenly scrutinize the evidence of PW9 and PW10.

Lastly, he argued that the police was supposed to conduct identification parade, but did not. He challenged the testimony of PW2 who claimed to have recognised him without identification parade. He prayed for this court to consider his grounds of appeal as having merit and allow his appeal.

After considering the arguments by both parties and thoroughly gone through the trial court record, I find that the grounds of appeal can be

reduced into four issues to be determined by this court. These are: one, whether the search was conducted in accordance with the law; two, whether the appellant's cautioned statements, exhibit P14 and P15, were properly admitted and considered by the trial court; three, whether the trial court properly evaluated and considered the defence case; and four, whether the prosecution proved its case beyond reasonable doubt.

I shall however, start to address the issue regarding evaluation of defence evidence generally by considering the directions settled under the law. Under this ground, the appellant claims that the Hon. trial Magistrate did not consider his defence case hence arrived at an unjust decision.

Under the law, none consideration of the evidence of the parties renders the decision defective. However, as decided in a number of cases, the first appellate court is empowered to evaluate and consider the evidence adduced in the trial court and deliberate accordingly. See: ***Musa Jumanne Mtandika v. The Republic***, Criminal Appeal No. 349 of 2018 (CAT at Dodoma, unreported); ***Yasin Mwakapala v. Republic***, Criminal Appeal No. 604 of 2015 (CAT, unreported); and ***Prince Charles Junior v. Republic***, Criminal Appeal No. 250 of 2014 (CAT at Mbeya, unreported).

In consideration of the above cited authorities I shall evaluate and consider the evidence adduced in the trial court. However, I shall do that while deliberating on the rest of the issues in this appeal.

Regarding the search conducted in the appellant's house, the appellant faulted the evidence of PW5, PW6 and PW14 who happened to conduct

the search at the appellant's home. He claimed that the search was conducted in contravention of section 40 of the Criminal Procedure Act as it was conducted at night without the order of the court and with no search warrant from the court. He as well claimed that there was no independent witness during the search as the police refused to have the local leaders around during the search. As a result the police used the opportunity to plant the gun and bullets in his room.

Ms. Thomas on the other hand defended the search conducted by PW5 and PW6 on the ground that it was an emergency search permitted under section 42 of the Criminal procedure Act. Regarding presence of an independent witness she argued that PW14 was present to witness the search as an independent witness. Section 40 of the Criminal Procedure Act provides:

> *"A search warrant may be issued and executed on any day (including Sunday) and may be executed between the hours of sunrise and sunset but the court may, upon application by a police officer or other person to whom it is addressed, permit him to execute it at any hour."*

The search as testified by witnesses from both sides was conducted at midnight. To be exact, PW6 testified that it was conducted at around 2:45am. Ms. Thomas reiterated the testimony of PW5 to the effect that it was impossible to obtain a court order as the search was conducted under emergence. PW5 testified that they got information from an informer on 08/03/2009 and had to set a trap to arrest the appellant at

night. PW6 specifically stated that they got information in the afternoon at 12:00am.

Considering the testimony of PW5 and PW6, I do not agree that the search falls under emergency situation. The fact that the police obtained information in the afternoon, got a search order from the police in charge of the station and prepared a trap to arrest the appellant at night signifies that it was prepared search and not an emergency search.

Under the circumstances, the police ought to have complied with the requirement of section 40 by obtaining a court order to search the appellant's house at night. On the other hand, it is my opinion that if it was really impossible to obtain the court order, PW5 and PW6 should have provided thorough explanation in their evidence as to the efforts taken by them and what precluded them from obtaining the court order. The requirement of obtaining a court order for searches beyond sunset not on emergency was expounded by the CAT in the case of ***Shabani Said Kindamba v. The Republic***, Criminal Appeal No. 390 of 2019 (CAT at Mtwara, unreported) whereby it held:

> *"It must be pointed out that under section 40 of the CPA search may be executed between the hours of sunrise and sunset, except with leave of the court. This is the same as what is provided under Regulation 2 (b) of the P.G.O 226. Therefore, it beats us why this search, not being an emergency, was conducted at night and without permission of the court. This aspect compounds the illegality of the search in this case."*

On the strength of the above authority, I find the search and seizure conducted in contravention of the law. The search was a prepared one.

The appellant also complained that the items allegedly seized from his house were planted by the police as there was no any local leader present to witness the search and seizure. Ms. Thomas, referring to the testimony of PW5 and PW6 submitted that there was an independent witness, PW14 for that matter. However, I have gone through the testimonies of these witnesses and found material contradictions. Under the circumstances, I have the obligation to address the said contradictions. See: ***Mohamed Said Matula v. Republic (1995) TLR no. 3.***

While PW5 claimed that he wrote a search order in the presence of the appellant (the 5th accused) and his neighbours, PW14 who was brought to testify as the independent witness on the search testified that he was not shown any search warrant. PW14 further testified that he did not witness the search, but was only called and shown the bullets and the gun after the police had searched and found the items.

The appellant in his defence also claimed that the search in his bedroom was conducted while he was in the living room. This fact was not cross examined by the prosecution, which entails acceptance of the allegation. See: ***Martin Misara v. The Republic***, Criminal Appeal No. 428 of 2016 and ***Issa Hassan Uki v. The Republic***, Criminal Appeal No. 129 of 2017. Under the circumstances, it becomes difficult to refute the allegation by the appellant that the items seized were planted in his room.

The other issue for deliberation concerned the admissibility of the cautioned statements by the trial court. Ms. Thomas argued that the appellant's argument is an afterthought as he did not object the admission of the cautioned statements during trial. She further argued that the appellant only stated that he did not recognise the cautioned statement, which in her view did not amount to an objection. With all due respect, I do not subscribe to Ms. Thomas's argument that the appellant's statement that he does not recognise the cautioned statement is not an objection in the eyes of the law. In my settled view, if the accused says that he does not recognise the cautioned statement, it is a good as saying that he never made such statement.

I have gone through the record and found that two different cautioned statements allegedly made by the appellant were tendered by PW9 and PW10 respectively. The same were admitted as exhibit P14 and P15 respectively. PW10 when asked as to why there were two statements, he said that the appellant had been involved in a number of incidences thus different statements recorded thereof. When exhibit P14 was tendered, the appellant objected on the ground that he was forced to sign the document. When exhibit P15 was tendered the appellant also objected on the ground that he does not know the said document. Basically the alleged confessions were repudiated/retracted.

It is trite law that once a confession is repudiated/retracted, the courts, in this case a subordinate court, is obliged to conduct and inquiry. See: ***Nyeura Patrick v. Republic***, Criminal Appeal No. 73 of 2013 (CAT at Mwanza, unreported); and ***Twaha Ally & 5 Others v. Republic***, Criminal

Appeal No. 78 of 2004 (CAT, unreported). In both incidences, the trial court overruled the objections without conducting an inquiry. This, in my settled view is a fatal irregularity.

In addition, the appellant in his defence insisted that the cautioned statements were obtained involuntary as he was subjected to torture. The Hon. trial Magistrate when deliberating on the offence of conspiracy to commit an offence, as seen at page 25 to 26 of his judgment, expunged both cautioned statements after satisfying himself that they were obtained through torture, thus involuntary.

However, surprisingly, when deliberating on the offence of armed robbery, he considered the expunged cautioned statements on the ground that they were corroborated by the evidence of PW14. With all due respect, I find that the Hon. Magistrate misdirected himself in analysing the evidence by considering the cautioned statements. If he had already expunged the cautioned statements from the record on the ground that they were involuntary obtained, he could not again consider them. At this point the cautioned statements were non-existent on record.

The deliberations made hereinabove dispose of the issue on whether the prosecution proved its case beyond reasonable doubt. The trial court convicted the appellant basing on possession of the bullets and gun allegedly found at his home and the caution statements allegedly made by him. With expunged cautioned statements and in consideration of my observation regarding the search conducted at the appellant's home, I find that there is no tangible evidence on record to hold the conviction

against the appellant. The trial court judgment is therefore quashed. The appellant should be released from prison forthwith, unless held for some other lawful cause.

Dated at Mbeya on this 03rd day of August 2021.

L. M. MONGELLA

JUDGE

Court: Ruling delivered at Mbeya through video conference on this 03rd day of August 2021 in the presence of the appellant and Ms. Mwajabu Tengeneza, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE