IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 59 OF 2020

(C/F Criminal Case no 152 of 2019 of Mpanda District Court)

MATATIZO S/O KIBONA ..... 1st APPELLANT

FADHILI S/O IDDI ..... 2nd APPELLANT

WILLIAM S/O RICHARD ..... 3rd APPELLANT

VRS

THE REPUBLIC ..... RESPONDENT

01 & 29/09/2021

JUDGMENT

Nkwabi, J.:

The appellants were charged with six offences. 4 counts of armed robbery contrary to section 287A of the Penal Code. It was alleged that the appellants on 22nd day of May, 2018 on or about 02:00 hours at Nsemulwa area within Mpanda Municipality did steal cash money at T.shs 3,000,000/= among other items the properties of Alkim S/O Omary @ Sabuni (1st count), NMB card among other properties the property of Khadija Issa @ Kipingu (2nd count), 1 Samsung galaxy tablet the property of National Bureau of Statistics (3rd count) and 1 Dell laptop the property of Mpanda District Council (4th count)

whereas immediately before such stealing did use maces and axe in order to retain the stolen properties and overcome resistance from the owner of the said properties.

The 5th count is in the alternative for the 3rd appellant which is being in possession of properties suspected of having been stolen. The last count is the 6th one which was grievous harm to Alkim s/o Omary @ Sabuni against all the appellants.

During the trial, the prosecution brought 13 witnesses and tendered 14 exhibits in an endeavour to prove the charge they laid at the door of each appellant. The charge sheet was instituted on 01/10/2019, whereas the appellants pleaded not guilty.

On 23/12/2019 when the case was called up for further orders, Mr. Thomas Masola, learned State Attorney informed the court that investigations were not complete yet. Thereupon, Mr. Sindamenya, learned counsel for the 3rd appellant, lamented before the trial court that it is too pathetic that the appellants were in custody for one year and a half. It is against the law to

detain a person in custody for such a time without reasonable efforts on prosecution side to ensure that the matter is heard and concluded in time. He prayed for his client and other accused persons to be acquitted.

Responding to that concern, the learned prosecution attorney informed the court that the absence of the 2nd accused was the challenge that caused the delay, and so long as he was present then, he hoped the matter would proceed as normal.

It is unclear however, why the investigation took so long while the accused persons were arrested and some of the properties recovered promptly. It was after that revelation that the trial court observed that it was true that the accused persons were in custody for one year and five months but conceded that the delay of the matter was caused by the second accused who was at the High Court of Tanzania sitting at Sumbawanga pursuing his appeal on another matter. He then directed the public prosecutor to make sure that the matter reaches to an end within a reasonable time.

Thereafter, on 13/02/2020 a preliminary hearing was conducted in which the prosecution indicated that the 1st appellant (Matatizo) was arrested on 27th May 2018 (five days after the incidence) at his home whereas some of the robbed properties were recovered and a certificate of seizure was filled in (but in evidence PW1 Insp. Godfrey said nothing was seized from there). The 1st appellant led the police to the residence of the 2nd appellant (Fadhili), nothing was recovered thein. The 2nd appellant led the police to the residence of the 3rd appellant (William) where nothing was recovered and the 1st and 2nd appellants were sent to the police station Mpanda where their caution statements were recorded in which they confessed the offence. The 3rd appellant was arrested on 17/06/2018 at Kamalampaka village in Mlele District where some robbed properties were retrieved. The 3rd appellant was recorded a caution statement in which he is allegedly confessed the offences.

There is no any mention in the facts of the case on whether there was another case which was withdrawn or not. Meanwhile, all the appellants admitted their personal details only.

At the hearing of the appeal, the appellants appeared in person while the respondent (the Republic) was represented by Mr. Simon Peres, learned Senior State Attorney.

I should be noted at the outset that this being the first appellate court is duty bound to re-evaluate the evidence before the trial court as per **C. 6237 P.C. Edwin and Another v R. [1985] TLR 31** (HC) Mushi J:

> *This court being the first appellate court, is duty bound to re-evaluate the evidence which was before the trial court and draw its own inferences and conclusions, where the circumstances demand as in this case, as would have been done by the trial court had it properly directed its mind to the evidence. For this proposition of law, I am guided by the decision in Dinkerrai Ramksishan Pandya v R. [1957] E.A. 336. This was a decision of the former Court of appeal for East Africa which is still sound. The same principle has been restated recently by Tanzania Court of Appeal in the case of Martha Michael Wejja v Hon. the Attorney General and Three Others, which is a Court of Appeal*

Civil Case No. 3 of 1982 (unreported) in which it quoted with approval the same principle in the case of Yuill v Yuill [1945] 1 ALL. E.R. 183.

During the hearing, Mr. Simon Peres learned Senior State Attorney respondent, to the submissions of the appellants that the charge sheet had 6 counts, the court convicted the appellants but it was not clear it if convicted them for all the counts or which one. There were armed robbery from 1st – 4th counts, and others, on 18th page of judgment the judgment is not clear the counts on which the appellants were convicted with and that offended section 335(1) of the Criminal Procedure Act.

The second irregularity is on the sentence. The trial court sentenced them on six counts while on the conviction, it is not clear. Sentence was omnibus and how they would serve, be it concurrent or consecutively, he cited see **Jumanne Ramadhani V.R. [1992] TLR 40**. Therefore, the conviction and sentence are illegal under section 388 of Criminal Procedure Act. Therefore, justice failed. He prayed that the trial court's file be returned so that the

convicts are convicted in accordance with the law and sentenced in accordance with the law.

In their respective rejoinders the appellants maintained their innocence and prayed they be released.

I will examine the case of one appellant after the other. I begin with the case of the 2nd appellant. In this appeal he asserted that on the fateful day, he was a convict serving 5 years imprisonment and he tendered the judgment (copy) of the sentence. It was objected as his name was not there but it was there on the 2nd page. He was not satisfied with the decision of the trial court he implored this court to do him justice.

On the preliminary hearing, the prosecution advanced that the 1st appellant led the police to the home of 2nd appellant where nothing was recovered and the 2nd appellant led them to the home of the 3rd appellant where also nothing was recovered. So going by that, the 2nd appellant was found in possession of nothing in respect of the offence. In my view I am supported

by **L. Hubert v. Republic Criminal Appeal No. 28 of 1999** (Unreported) (CAT) (MWANZA):

> *Mr. Feleshi submitted that the appellant understood what was contained in the memorandum because he signed it. With respect, we agree that generally the signing of a document signifies that one signing it understands the contents of the document.*

effect of signing a document in respect of the facts prepared by the state attorney. The prepared facts of the case are a serious matter which has to be taken seriously, that is why when a fact is admitted in the preliminary hearing, there is no need of proving that fact.

When considering his involvement in the offence, the trial court had these to say:

> *Dw2 failed to adduce evidence to prove his version that he was in custody serving the said sentence when this incident took place ... no other evidence was adduced by the accused person to cement his assertion.*

The above decision of the trial court violated the authority in **Elias Kigadye and Others v R. [1981] TLR 355** (C.A) at p. 358 the Court of Appeal of Tanzania held:

> *"The judge in his judgement stated, in reference to the death of Twiga:*
>
> > *Admittedly, the defence had no obligation to prove positively that Twiga died of natural causes, they had only to raise the possibility of it, in other words, to show that death by natural causes had not been excluded.*
>
> *Mr. Lakha criticised this proposition. We agree it is a misdirection; it is for the prosecution to exclude the possibility of death by natural causes. The defence has no onus placed on it.*

It could be that he was identified by PW3 during the identification parade, however, the trial magistrate correctly held that the identification, in the circumstances was unreliable. So, now what remains is the uncorroborated confession statement of the 2nd appellant which was obtained outside the prescribed time which by practice and prudence requires corroboration,

there is nothing to corroborate it. The basis for my view is **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006** (C.A.T.):

> *"We think that a lot of what is stated as above by the learned trial Principal Resident Magistrate with Extended Jurisdiction was speculation. ... Conviction in a criminal matter must be based on good ground and speculation has no room.*

In his trial through to his mitigation, the 2nd appellant maintained that he was serving a 5 years term of imprisonment at the time the alleged offence was committed. That ought to have been taken seriously, by the prosecution and the court as a notice of alibi duly entered in the court given the fact that the 2nd appellant is a layman. The prosecution would have made follow-up in prison and come with something cogent rather than mere denial and impliedly admission of the alibi that the 2nd appellant was indeed fighting a case in the High Court and with respect, with ill motive, without disclosing its case number. He attempted, during his trial, to tender the alleged judgment in vain as it was successfully objected to by the prosecution, though in my view, wrongly objected on matters of fact (content) rather than legal objection on points of law. The trial magistrate had himself observed

on 23/12/2019 observed that the matter was delayed by the second accused who was at the High Court of Tanzania at Sumbawanga pursuing an appeal in another matter. The same was inferred by the prosecutor. The matter could be appeal against that conviction and sentence or defend against confirmation of the sentence. It would appear, the trial magistrate as well as the prosecuting attorney had forgotten the views of the High Court in in **Republic v E. 5766 PC Expirius v. R** Cr. Sessions case no. 1 of 2000. (HC DSM) (Unreported):

> *"Our law enforcing Authorities, that is, the police and the DPP should be bold enough to protect the innocent members of the Public when there is no offence legally committed by accused persons rather than just leaving it to the court whereby people suffer in remand custody while waiting for their cases to reach the desk of a judge."*

It is trite law that an accused person is not duty bound to prove his case. What the trial magistrate did was to require the accused person prove his defence that indeed he was in prison on the fateful day. With due respect, a

prudent prosecutor would have made follow-up of the claim and come with evidence to prove him wrong not like the way he did. In the circumstances, the case against the 2nd appellant was not proved beyond reasonable doubt and he ought to have been acquitted. I proceed to do so. For avoidance of doubt, it is at this juncture, I venture to say that it is because of circumstances in which PW3 positive claim of identifying the 2nd appellant, whom I believe was in prison, that he was at the scene of the offence that makes me accede to the trial magistrate finding that the identification of the 1st and 2nd appellants by PW3 was not watertight.

I advance to discuss the case against the 3rd appellant. He argued, in this appeal that the trial court convicted him on insufficient evidence. He was recorded his statement at Inyonga Police Station not Mpanda. He was not recorded a statement. He pleaded this court to do him justice.

Considering his case, the trial court remarked about his defence:

> *Dw3 sworn and said that he came to meet with his co accused persons in court and charged alongside with them in this case,*

he said further that he was arrested while in possession of 1 Samsung tablet and laptop computer make dell which are said to have been stolen from the house of the victims in this matter, but he denied to have stolen them as it is alleged, he had advanced a loan to one Exavery Hapmark who then surrendered the said items on him as the security to that loan. The said Exavery Hapmark was arrested in connection with this case but now he is not in court and Dw3 is not aware on his whereabouts.

After the above remark, the trial court held:

In top of all that the 3rd accused was found in possession of a laptop make Dell and tablet make sum sang which are amongst of the properties that were stolen from the scene, the latter had resisted the arrest as the result extra force was applied to apprehend him so this implies that he was aware of what he had committed from the scene of crime therefore he had a guilty consciousness therefore he was trying for his level best to evade the course of justice ...

It would appear that the 3rd appellant was arrested and prosecuted on the doctrine of recent possession. That is the view of the respondent in submission. That is why he is charged with all counts of armed robbery, grievous harm and being in possession of properties suspected of having been stolen, as an alternative count. The alternative count in my conviction, was in adverted charged on the 3rd appellant since the recovered properties had their owners being known. The properties recovered being one Dell laptop and one Samsung galaxy tablet. My conclusion, I hope, is supported by **Jackson James v. R. [1967] HCD no. 273**, Georges, C.J.

> *Held: (2) A conviction cannot be maintained under section 312 if the articles in question can be identified as the property of any known person. If the owner is identified, it is no longer a question of suspicion, and the charge should be laid under a section of the Penal Code dealing with stealing or possession or receiving stolen property. Citing R. v. Msengi s/o Abdallah (1952) 1T.L. R. (R) 107; R. v. Shabani Saidi, 1.T.L.R. (R) 77.*

His being arrested with the properties, considered with his defence coupled with the disappearance of some of the suspects/accused persons merely cast

grave suspicion on the 3rd appellant which however, cannot ground conviction as per **G. Ntinda v. Republic Criminal Appeal No. 17 of 1991** (Unreported) (CAT) (MBEYA):

> *"There was, we agree, a lot of suspicion against the appellant as the person who killed the deceased, but, as the trial judge will no doubt agree with us on reflection, suspicion no matter how grave cannot be the basis of a conviction in a criminal charge."*

As such the 3rd appellant was wrongly charged, convicted and sentenced for the offence of being in possession of properties suspected to have been stolen. Such conviction and sentence are quashed and set aside respectively.

Next, I consider the 3rd appellant's conviction and sentence on the armed robbery and grievous harm offence. The evidence against him on the offences seems to be those of caution statement which was repudiated/retracted in the sense that it was recorded outside the prescribed time, hence need corroboration which in my view is wanting on the record, see **Rashid Ally and Another v. Republic Criminal Appeal No. 40 of 2001** (Unreported) (CAT) (Tanga):

"... A confession obtained through torture is not admissible and the onus of proving that it was voluntarily made lies to the prosecution. Where a confession is repudiated, as opposed to its being retracted, the prosecution has first to prove that it was in fact made, and then prove that it was voluntarily made before the court looks for corroboration and or determines that it is a confession of truth.

The respondent too in proof depends on the claim that the 3rd appellant was arrested in possession of properties recently robbed. It would appear that the prosecution was relying on **Ally Bakari v. Republic Criminal Appeal No. 47 of 1991** (Unreported) (CAT) (DODOMA).

"If upon a charge for murder it is proved that the deceased person was murdered in a house and that the murder stole goods from the house, and that the accused was a few days afterwards found in possession of the stolen goods, that raised the presumption that the accused was the murderer and unless he

can give a reasonable account of the manner in which he became possessed of the goods, he would be convicted of the offence."

In my view, the prosecution did not pay attention to the fact that the 3rd appellant gave a plausible explanation that the same were left to him as security for the loan by Exavery. The same Exavery confessed before the police and the persons in authority, which is acceptable as per **Shihobe Seni and Another v. Republic Criminal Appeal No. 96 of 1992** (Unreported) (CAT) (MWANZA):

A village secretary and chairman are persons in authority hence a confession can be made to them under S. 27 of Tanzania Evidence Act 1967.

It is unfortunate that Jackson Exavery Hapimark mysteriously vanished on unknown charge to this court. It was claimed, by the defence of course and the prosecution that he jumped bail. If he jumped bail, then he was charged not with armed robbery, then the court wonders why was he charged with a bailable offence instead of armed robbery which is unbailable? The circumstance the 3rd appellant was found in possession of them too, is inconsistent with his guilty. The trial magistrate dwelt much on his attempt to fight against his arrest. In my view, the learned trial magistrate based on the weaknesses of the defence rather than strength of the prosecution case. Had he given attention to the circumstances in which these suspects/accused

who persons jumped bail while they ought to have been charged for armed robbery as per the above authority would have been left with a lot to be desired from the prosecution case which gives the benefit of doubt to the 3rd appellant. See **Bawali Abeidi v. Republic [1967] HCD 11**

> *The ship owner identified an ordinary looking pair of khanga in the possession of the accused as one of the items stolen. The defence that the accused had legitimately purchased the items was in the trial court rejected on the ground that he had produced no receipt. Exhibition of a pair of khanga not distinguishable from other such items by special marks or features from those stolen, the burden is not upon the accused to prove his defence but upon the prosecution to disprove it beyond reasonable doubt.*

I say unknown charge sheet to this court since the prosecution, be it the prosecutor on the facts of the case never mentioned of any charge sheet against the appellant and the vanished supposedly suspects during the preliminary hearing in this case. The 3rd appellant alleges that they had been charged in another charge sheet, but the prosecution is dump founded on that. This court does not know why. In the event that some of the

suspects/accused persons allegedly jumped bail has exercised my mind, without any answer. The answer, with respect, is in my view, best known to the prosecution (respondent). On this I remember, and the same too has to remind the respondent, the words of Hon. Manetho, J., as he then was, in **Republic v E. 5766 PC Expirius v. R** Cr. Sessions case no. 1 of 2000. (HC DSM) (Unreported):

> *"Our law enforcing Authorities, that is, the police and the DPP should be bold enough to protect the innocent members of the Public when there is no offence legally committed by accused persons rather than just leaving it to the court whereby people suffer in remand custody while waiting for their cases to reach the desk of a judge."*

Unlike in the case of **Richard Matangule and Anothers v. Republic [1992] TLR 5** (CAT).

> *"... these deliberate lies and the refusal to give an explanation corroborate the case for the prosecution that the appellants are responsible for the death of the deceased".*

in this case, the 3rd appellant did not refuse to give explanation, since the person who is allegedly sent the properties was left to be at large, it is difficult, in my view, to challenge the 3rd appellant's explanation. I hold that the 3rd appellant gave a plausible explanation which cannot be ignored by this court. In the circumstances he was wrongly charged, convicted and sentenced for the offences of armed robbery and grievous harm. The prosecution did not prove the case against him to the required standard.

I now revert to deliberate on the case against the 1st appellant. In his appeal he contended that the trial court did not do him justice. The respondent did not prove that they reached at the scene of offence. The visual identification was held not sufficient as well as that of identification parade. No witness came to testify apart from the police that he made a caution statement. He entreated to be released.

His case is based on the retracted confession (that he was kicked in the stomach) and it was recorded almost seventeen days from his being arrested and he did not make it, which need corroboration to sustain conviction. The

doctrine of recent possession for the recovered articles does not apply to this accused person since nothing in respect of the offence was impounded at his premises, according to PW1 Godfrey. The purported identification by PW3 was held by the trial court to be unreliable, and in my conviction, properly so.

If one closely looks at the three alleged caution statements of the appellants, one will find that they are nothing but false. They are inconsistent on how the door was opened, one statement has it that it was through melting the padlock while the other reveals that it was through taking the key that was hanging on the door and was used to open the door. The amount of share of T.shs 3,000,000/=, if one accepts that they shared each T.shs 800,000/=, then where did the remaining T.shs 600,000/= go. If one agrees that the 2nd appellant got a share of T.shs 80,000/=, is inconsistent of him being the ring leader. There is also inconsistence in respect of where the trio met and headed to the victims' home, whether they met at the house of the 1st appellant or the 2nd appellant. Apart from that the police and prosecution did not heed to the advice of the Court of Appeal in **Bushiri Mashaka and 3 others v. R. Criminal Appeal no. 45 of 1991** (Unreported) at DSM:

Those charged with the duty of investigating criminal cases are reminded once again that upon an accused person intimating to make a confession, the safest course to adopt is to have them repeat his statement before a Justice of Peace.

Analyzing the evidence in respect of the guilty verdict of the 1st appellant the trial magistrate had these to say:

On his part the 1st accused had initially denied to have been interrogated at police station ... but when adducing his defence he quickly changed the story and said that he was interrogated at the police station by one DC Augustino. In that situation it is obvious that this person is not trustful, and that was a mechanism to rescue him.

In my considered view, that was convicting the appellant on the weakness of his defence which is illegal, see **Christian s/o Kale and Rwekaza s/o Bernard v R. [1992] TLR 302** (CA) Omar JJA, Ramadhani JJA, Mnzavas JJA:

Although second appellant's defence, like that of his co-accused, was a cock-and-bull story of what happened on the material day; and it must be conceded that he obviously has a talent for fiction; an accused ought not to be convicted on the weakness of his defence but on the strength of the prosecution case.

Nothing was recovered from his home, his identification by PW3 was not water tight, his caution statement repudiated/retracted and was contradictory with other confession statements of the other appellants, hence needed corroboration, and there is no such corroboration in the record. There is therefore no cogent evidence that proved the charge against the 1st appellant beyond reasonable doubt. Conviction by the trial court of the 1st appellant was not grounded on evidence rather speculation.

In his submissions, Mr. Peres was of the view that justice was failed in the trial court. He prayed this court to return the trial court's file so that the convicts are convicted in accordance with the law and sentenced in accordance with the law. He was of the view that the evidence which is in

the court file is sufficient to convict the appellants. E.g. Recent possession for 3rd convict. There is evidence that proves against both convicts. The 1st and 2nd convicts were identified. The evidence proves the involvement of the convicts in the offences. The trial court analyzed the evidence properly. His orison was that the convicts be convicted properly, and then they may argue the appeal on evidence properly.

With the above discussion and deliberation, it is apparent that the prosecution failed to prove the case to the required standard against all the appellants on the respective counts. The evidence of the prosecution was weak to ground convictions. It is inadvisable for this court to accept the prayers of the respondent in the circumstances.

The culmination of the above deliberation, I allow the appeal as it has merits. I agree with the appellants that in the circumstance of this case, convictions have to be quashed and sentences set aside, I proceed to do so. The appellants have to be set free unless they are otherwise held for other lawful cause(s).

It is so ordered.

DATED and **SIGNED** at **MPANDA** this 29th day of September 2021.

J. F. Nkwabi

Judge