IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 39 OF 2020

(C/f Criminal Case No. 102 of 2018, in the District Court of Mwanga at Mwanga)

ELIA ESAU @ ELISA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant was arraigned before the District Court of Mwanga at Mwanga (trial court) with the offence of armed robbery contrary to **section 287A of the Penal Code, Cap 16 R.E 2019.**

According to the evidence adduced at the trial court, it was alleged, on 2nd July, 2018 at about 23:00hrs at Maliasili area within Mwanga District in Kilimanjaro Region, the appellant stole one NMB Cheque book, Mwanga Community Bank Cheque book, two stamp pads, CCM Membership Card, ADET Education Institute ID card,

National ID card, Voting Card, Dictionary, black hand bag, one mobile phone make Samsung and cash money Tshs. 250,000/= properties of Vitalis Kwembe Nguzo, (PW1). It is on record that on the material day the complainant (PW1) a teacher by profession felt hungry and was in need of food. By then he was at capital lodge and was to locate to Angela hotel. He boarded the appellant's motorcycle (bodaboda) to look for food.

On the way at Maliasili, the appellant switched and pulled off the road into the maize plantation. While still wondering what could be happening PW1 suddenly saw several gangsters (5 in number) appear and started attacking him. They ordered him to lay down and surrender his properties which were in a black bag. Meanwhile the appellant who had with him a "panga" (bush knife) threatened to cut him and tried to do so by hitting him on the shoulder using the blunt side of the said "panga". In the course the appellant and his fellow gangsters went away with the victim's bag (PW1) containing several items as listed in the charge sheet and page one of this judgment.

After about two days the police while on patrol at Vidoi Secondary School area, (PW2 and PW4) got wind from good Samaritans that, in one of the deserted houses there

were thungs hiding therein. As they entered the said house they managed to arrest some thungs and the appellant was among this group. Upon interrogation and search, the appellant was found in possession of Tshs. 150,000/= which he admitted had been robbed from the appellant. He promised to take the police to where they had damped the victim's bag. Since the victim had managed to be rescued by civilians and taken to police station, the police were able to trace him. He was accordingly contacted on his phone and when he reached the police station, the appellant quickly identified him as the passenger they had robbed. He volunteered and took them in a well where they had damped the bag at vidoi.

The police managed to retrieve the black bag with some of the stolen items therein. Thereafter PW3 took down the appellant's caution statement (Exhibit "P3") where he admitted to have robbed the victim (PW1) of his bag containing several items. The prosecution in support of what had transpired tendered the seizure certificate and cash Tshs. 150,000/= (Exhibit P4) together with the stolen bag with several items including a CRDB ATM Card, National ID, an ID Card, 2 business Cards, collectively Exhibit "P1".

The victim had further elaborated he was able to identify the appellant through the lights which were on at capital lodge and the touch lights during the robbery. On the other side of the coin, the appellant defended himself that, it took him by surprise to see the police arrest him at his home place. He had committed no crime and had never met the victim (PW1).

The appellant pleaded not guilty to the above allegations but after a full trial which involved four (4) prosecution witnesses, three exhibits and one defence witness the trial court found him guilty. He was convicted and sentenced to serve 30 years imprisonment. Aggrieved with the decision, the appellant has raised a total of 10 grounds of appeal, however the 1st, 2nd, 3rd, 4th, carry the same substance and will be summarised as the 1st ground. The grounds are as hereunder: -

1. That, the learned trial magistrate erred in law and fact in holding that the appellant was positively identified at the crime scene while the circumstances and conditions were not conducive.
2. That the trial magistrate grossly erred in law and fact in admitting P1 collectively, but failed to note how the

said exhibits found their way to PW1 who tendered them in court.

3. That, the trial magistrate erred in law and fact in failing to note that exhibits P2 and P4 were never read aloud in court after being tendered as exhibits.
4. That, the trial magistrate erred in law and fact in failing to note that Exhibit P3 was recorded outside the prescribed time by the law. The same was also not read aloud before being admitted in court as evidence.
5. That the trial magistrate erred in law and fact in convicting and sentencing the appellant basing on weak, inconsistent, incoherent, contradictory and wholly unreliable evidence from prosecution side.
6. That the trial magistrate erred in law and fact in convicting the appellant while the prosecution failed to prove the charged offence to the required standard by the law.

During hearing which was done by way of filing written submissions, the appellant appeared in person and unrepresented whereas the respondent was represented by Ms. Grace Kabu, learned state attorney.

Supporting the appeal, the appellant on the 1st ground stated, the alleged offence was committed during the late night hours around 23:00hrs in the middle of the maize field hence the surrounding conditions for proper identification were not conducive. He argued, PW1 claimed to have identified the appellant by the aid of the torchlight but its intensity was never ascertained.

The appellant proceeded to query the trial magistrate in her judgment where it was reasoned, PW1 properly identified the appellant's facial appearance as he drove him on his motorcycle from Capital Lodge heading to Angela Hotel which was almost two kilometres away. However, the record does not show any stated description of the appellant in terms of facial or physical appearance. In that regard the trial court's observation was a mere speculation. He cited the case of **Karim Ramadhani & 2 Others Vs. Republic, Criminal Appeal No. 113 of 2009 CAT at Arusha (unreported)** where the importance of properly identifying the assailants as to their facial or physical appearances was underscored.

He further questioned how the trial magistrate came to know of the "two kilometres" since this is not in evidence. On the 4th ground, it was appellant's further submission

that, Exhibit P3, (the caution statement) was unprocedurally procured, tendered and admitted as evidence. He asserted, he was arrested on 2nd July, 2018 but the caution statement was recorded on 3rd July, 2018 contrary to requirements of **Section 50 of the Criminal Procedure Act, CAP 20, R.E. 2019**. To top it all, no inquiry was conducted to ascertain its voluntariness. Lastly the said statement was read out aloud before being admitted into evidence hence the same should be expunged from the record. The appellant did not submit on other grounds of appeal but finally prayed this court allows the appeal, quashes the conviction, sets aside the sentence and set him free.

In reply Ms. Kabu supported the appeal and was in all fours with the appellant that, there was no proper identification and the caution statement was taken out of 4 hours prescribed by the law. She also conceded to the fact, there was a serious contradiction on what was seized as PW2 stated that they never seized money while PW3 stated that they found the appellant with Tshs. 150,000/=. Further, it is also not certain how the seized items came into the possession of PW1 who tendered them in court. On these grounds, she prayed the appeal be allowed.

After a careful perusal of the trial court's proceedings and judgment, I as well support the appeal. The case hinges around the aspect of identification which has not been well established and proved. The fact that the incident occurred at night, the proper and correct identification of the appellant was of utmost importance. The case of **Waziri Amani Vs. Republic, (1980) TLR 250** set out the guidelines which were not fulfilled in this case. The same are: -

> *"The principle of identification is that, where a witness is testifying about identifying another person in unfavorable circumstances like during the night. He must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and whether the person is familiar or a stranger".*

In the appeal at hand, apart from the fact that PW1 saw the appellant for the first time that night, the intensity of the light generated from the torch in the middle of the maize field where he was allegedly robbed was not established.

Equally the distance between the appellant, the torchlight involved in the identification and where PW1 stood, was not pointed out. Worse off, even the alleged light at capital lodge had its source not disclosed nor its intensity ascertained.

The trial magistrate observed, the long distance of almost 2 kms which the appellant spent with the PW1 before the robbery was enough for him to remember his face. I with much respect however disagree with her findings considering PW1 was a passenger on the appellant's motorcycle hence he was facing the appellant's back and not the face.

The foregoing notwithstanding, PW2 and PW4 testified to have found 3 people including the appellant in the deserted house after they received information regarding their criminal acts. They testified, they arrested the appellant who allegedly admitted to have committed the offence, seized PW1's robbed properties found within the premises, and concluded it was the appellant who committed the crime as no information was given regarding other persons found at the said house.

Be as it may, failure to observe proper identification procedures such as identification parade has negatively

impacted this case and enhanced the possibility that there was absolutely no watertight identification of the appellant made. I am guided in my opinion by the authority in **Waziri Amani's case (supra)** that: -

> *"No court should act on the evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight"*

In the present case likewise, where the possibility of mistaken identity has not been eliminated, a conviction grounded based on such evidence is wanting.

Coming to the second point supported by the respondent, is that it is undisputed the appellant's caution statement admitted in evidence as Exhibit P3, was taken a day after his arrest instead of 4 hours as required by the law. The law is clear under **section 50 (1) (a) of the CPA** that, a caution statement has to be taken within four hours' time frame commencing from the time of arrest. In **Janta Joseph Komba, Adamu Omary, Seif Omary Mfaume and Cuthbert Mhagama Vs. Republic, Criminal Appeal No. 95 of 2006 (unreported),** the Supreme Court of this land held: -

"We agree with learned counsel for the appellants that being in police custody for a period beyond the prescribed period of time results in torture, either mental or otherwise. The legislature did limit the time within which a suspect could be in police custody for investigative purposes and we believe that this was done with sound reason."

The trial court's records indicate, the incident occurred on 2nd July, 2018, the appellant was arrested on 3rd July, 2018 but the caution statement taken on 4th July, 2018 which is more than 4 hours as provided for by law. Further, it is undisputed that no extension of time was secured and no explanations were furnished why the appellant had to be restrained for that period before his caution statement taken. Be as it may, the caution statement was read out loud in court before it was admitted in evidence. The omission is fatal and calls for the document to be expunged from the record as the same was not cleared for admission.

Additionally, as rightly submitted by the respondent, the custody of the seized properties is highly questionable. PW2 and PW4 testified to have seized PW1's robbed items

hence it is safe to conclude they were under police custody. However, it is on record PW1 was the one who tendered them in court and there is no clear explanation as to how he got hold of them.

In light of the foregoing analysis, the submissions made, my perusal of the trial court's records as stated earlier, I find this appeal meritorious and hence is allowed. The conviction entered is thus quashed, sentence set aside and the appellant is ordered to be released forthwith unless held in custody for lawful reasons.

It is so ordered.

B. R. MUTUNGI
JUDGE
14/10/2021

Judgment read this day of 14/10/2021 in presence of the Appellant and Miss Lilian Kowelo (S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
14/10/2021

RIGHT OF APPEAL EXPLAINED.