THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO.70 OF 2021
(Originating from Criminal Case No. 15 of 2019,
Court of Resident Magistrate of Mbeya at Mbeya)

PASCARI s/o ARON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

15th & 22nd November, 2021

KARAYEMAHA, J

In the Resident Magistrate Court of Mbeya at Mbeya, the appellant Pascari Aron was charged with two counts of Armed Robbery contrary to section 287A of the penal code [Cap 16 R:E 2002] as amended by section 10 of the Written Laws Miscellaneous (Amendment Act) No. 3 of 2011.

The trial court convicted them of the offence and sentenced him to serve a minimum sentence of thirty years imprisonment. Dissatisfied with the decision, he appealed to this court.

Before the trial court the prosecution had alleged that the appellant, on 1st December, 2018 at Mwakibete Primary School area within the City and Region of Mbeya, did steal Tshs 253,000/= cash, one phone make

TECNO valued at Tshs 50,000/=, three CRDB bank cards and four business card valued at Tshs. 303,000/= the properties of Edson Mwasubila. In the same transaction, he stole another phone make TECNO valued at Tshs. 145,000/= the property of Fatuma Asagwile. It was further alleged that immediately before and after stealing the appellant used a machete to threaten the victims in order to obtain and retain the said properties.

On the bases of five prosecution witnesses and one exhibit (the appellant's cautioned statement P1), the appellant was convicted as already hinted. His petition of appeal raises raising nine (9) grounds. However, for the reasons which will be apparent shortly, for the purpose of this judgment, I do not intend to reproduce them herein.

When the appeal was called on for hearing on 15/11/2021, the appellant appeared in person (unrepresented) while the respondent was represented by Mr. Kihaka the Learned State Attorney. Guided by the court, the appellant preferred the learned State Attorney to submit first and would see if there was a necessity of rejoining.

The bottom line of Mr. Kihaka's submission was on the propriety of the cautioned statement and whether the prosecution case was proved to a required standard. Mr. Kihaka commenced submitting by supporting the appeal. Submitting on the issue of identification, Mr. Kihaka was convinced that the appellant was not properly identified because the incident took

place at about 22:00hrs. He stated that Edson Mwasulila (PW1) and Fatuma Asanguile (PW2) told the court that they did not identify the robbers due to darkness

He submitted that the trial court grounded its decision on the appellant's cautioned statement (Exhibit P 4) in which he explained how he attacked and robbed the 1st and 2nd victims. He contended that even if the appellant was found in possession of the stolen properties, the certificate of seizure (exhibit P3) which was tendered by PW4 as not read over to the appellant who informed the trial court that he did not know how to read and write. That, to him was a total failure to comply with the procedure articulated in ***Robinson Mwanjisi v R*** [2003] TLR 218 that a documentary evidence must be cleared for admission, must be admitted and must be read over so that the accused may know its content. The learned State Attorney observed that failure made the certificate of seizure liable to be expunged from the record.

In respect of the cautioned statement, the learned State Attorney argued that the appellant was not identified at the scene of the crime but was linked by his cautioned statement whose admissibility was challenged by the appellant. He stated that apart from the appellant informing the trial court that the statement was not his the court proceeded to admit it as Exhibit 4 instead of conducting inquiry first to satisfy itself that the

appellant made a statement and if the statement was made voluntary. To support his proposition he cited the case of ***Mawasa Jeki @ Kamanga v. R***, Criminal Appeal No. 253 of 2018 Court of Appeal of Tanzania at Mbeya at page 13-14.

The learned State Attorney prayed the cautioned statement to be expunged from the records. Since the cautioned statement was the only evidence connecting the appellant with the commission of the offence, he observed that the remaining evidence is insufficient to sustain conviction and therefore the appeal be allowed.

The lay appellant had nothing to rejoin.

I have considered the submissions by parties and the records of the trial court. The grand issue calling for determination is whether this appeal is merited.

Let me start with the issue of failure by the trial court to cause Exhibit P3 to be read over to the appellant. Proceedings of the trial court have been exhaustively read over and considered. As rightly submitted by Mr. Kihaka, the certificate of seizure was tendered through Insp. Khalifa Wiliam Ngonyani (PW4). The appellant immediately told the trial court, in response, that he did not know how to read. It is vivid in the record that the trial magistrate went on and admitted it as exhibit P3 without the same being read over to the appellant as a legal requirement. It is now a legal

requirement that when a document is tendered in evidence and admitted be it that it is objected or not it must be read over to the accused to let him the contents of the same. The rationale behind this position is to have a well informed and fair trial. This settled principal has been overemphasized in a plethora of authorities including cases of ***Mbaga Julius v Republic***, Criminal Appeal No. 131 of 2015, Court of Appeal at Mwanza, ***Rashid Kazimoto & Another v Republic***, Criminal Appeal No. 558 of 2016, Court of Appeal of Tanzania at Mwanza and ***Robinson Mwanjisi v R*** [2003] TLR 218 where in the later the court directed that documentary exhibit must be cleared for admission, must be admitted and must be read over so that the accused can understand its content. That procedure was violated by the trial court since the certificate of seizure was not read to the accused so that he can understand its content. In the event, exhibit P3 is expunged from the record.

A similar anomaly befell on the cautioned statement of the appellant. The same was tendered by the prosecution through E 1864 D/CPL Joel. As it was observed by Mr. Kihaka, on tendering it, the appellant informed the court that *"I do not object. The statement is not mine."* I might somehow agree with the trial magistrate that he was captured by the first sentence. But since he wrote the second sentence, he was legally bound to stay the hearing of the substantial case and conduct the inquiry with a view of

ascertaining the voluntariness of the statement. In this case as can be reflected at page 16 was not done. This procedure was wrong both in law and practice. The constant practice which, in my considered opinion, has crystallized itself into law is that when the accused repudiates the cautioned statement, the main case is to be stopped and conduct an inquiry with an intention to establish the voluntariness or otherwise of the statement through evidence. This position was emphasized by the Court of Appeal of Tanzania in ***Twaha Ally and Others*** (supra) that:

> *"If the objection is made after the 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 trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

See also ***Paul Mduka & 4 others v R***, Criminal Appeal No. 110 of 2007 and ***Athuman Rashid v R***, Criminal Appeal No. 138 of 1994, Court of Appeal at Mwanza (both unreported).

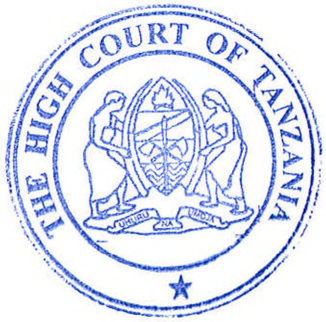
This trite position has endured for long and no magic can reverse it. In this case no inquiry was conducted. In my considered opinion the trial Magistrate was not better positioned to appreciate all the circumstances in which the confession was retrieved from the accused person hence a gross shortcoming. In the whole, the effect of non compliance with the legal

procedure ends in expunging the statement. In the event, exhibit P4 is hereby expunged from the record.

Having expunged exhibit P4 the next question is whether there is any iota of evidence linking the appellant with the commission. Briefly, no any substantial evidence connecting the appellant with the offence. PW1 and PW2 who were key witnesses testified with honesty that since it was dark they were unable to identify the robbers. Placing the whole prosecution evidence pertaining to this case on the balance, it becomes clear that what we have is insufficient to sustain conviction. In the circumstances, I hereby allow this appeal, quash conviction and set aside sentence of imprisonment made by the trial court. The appellant must be released from prison immediately unless he is being held for other lawful reason.

It is so ordered.

DATED at **MBEYA** this **22nd** day of **November, 2021**



J. M. KARAYEMAHA
JUDGE