IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 240 OF 2020

(*Appeal from the Judgment of Kinondoni District Court, Criminal Appeal No. 509 of 2018 before Hon. Jacob **RM** dated 31/08/2020*)

MOSSES MATHIAS HAULE.....1ST APPELLANT
HASSAN JUMA @KAWAWA.....2ND APPELLANT
RAMADHANI RASHID @ RAMA FILIBOGA .....3RD APPELLANT
DOTO MATEI SHABAN @DOTO KUBESI.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

25th Oct 2021 & 3rd Dec 2021

E.E. KAKOLAKI J.

The appellants before this Court were convicted before Kinondoni District Court on one count of Armed Robbery; Contrary to section 287A of the Penal Code, [Cap 16 R.E 2002] as amended by Act No 3 of 2011. It was alleged by prosecution that, on 13th day of October, 2018 at Kinondoni, Hananasifu area within Kinondoni District at Dar es Salaam Region, Appellants did steal cash money Tsh. 1,6620,000/= two mobile phones one makes HUAWEI valued at Tsh. 240,000/=, Nokia valued at Tsh. 90,000/=, one watch valued

at Tsh. 7,000/=, one Bible valued Tsh.15,000/= and one handbag valued at Tsh. 35,000 all properties valued at 2,007,000/= the properties of Rehema Paulo Mveyange, and immediately before and after such stealing did cut the complainant with a machete on her hand and threatened one Ramadhani Kitwana with the said machete in order to obtain and retain the said stolen properties. When called to answer to their charge all appellants denied the accusation levelled against them.

During the trial prosecution paraded six (6) witnesses and 6 exhibits in a bid to prove its case, while appellants fended for themselves and had no witnesses to call or exhibits to tender. At the end of the trial, the Court was convinced that prosecution case was proved against all appellants beyond reasonable doubt, found them guilty as charged before convicting and sentencing them to 30 years imprisonment.

Aggrieved with both conviction and sentence, appellants logged this appeal and preferred 12 grounds of appeal going thus:

(1) *The trial Magistrate erred in law and fact in convicting the accused person relying on insufficient evidence of identification which was not analyzed by the trial Court.*

(2) The learned magistrate erred in law and facts by convicting the accused on uncorroborated evidence of the prosecution witness.

(3) The learned magistrate erred in Law and fact by convicting the accused person on the defective charge.

(4) The learned magistrate erred in law and fact by convicting the accused person based on hearsay evidence of the prosecution witness.

(5) The learned trial magistrate erred in law and fact by convicting the appellants based on caution statements which were received without sufficiently informing the accused persons who were not represented the purpose of the inquiry hence failed to satisfy the voluntariness of the accused persons.

(6) The learned magistrate erred in law and facts by convicting the accused person based on the caution statements without satisfying himself on whether prosecution has discharged the burden of proof beyond reasonable doubts.

(7) The learned Magistrate erred in law and fact by convicting the accused person while relying on his belief that, the first and the

second issue for determination deserved to be answered in affirmative without properly analyzing the evidence.

(8) *The learned Magistrate erred in law and facts by convicting the accused persons on armed robbery relying on the testimony of pw3 who was not at the scene of crime.*

(9) *The learned Magistrate erred in law and facts by convicting the accused persons on armed robbery based on alleged cut to PW2 without prosecution tendering the evidence of the cut.*

(10) *The learned Magistrate erred in law and facts by convicting the accused persons to the charge without prosecution tendering the Pf3 as exhibit hence failure to adhere on Section 240 (3) of the Procedure Act [Cap 20 R.E 2019]*

(11) *The learned Magistrate erred in law and facts by convicting the accused persons based on the prosecution case which had serious contradiction and inconsistencies*

(12) *The learned Magistrate erred in law and facts by convicting the accused based on the prosecution case without considering that the prosecution case did not prove the charge*.

On the strength of the said grounds, the appellants prays this court to allow the appeal by quashing the conviction and set aside the sentence against them.

At the hearing of the appeal, appellants appeared represented by Mr. Rashid Hezron Kyamba, learned advocate while the respondent enjoyed the services of Mr. Adolfu Kisima, learned State Attorney. The appeal was disposed by way of written submission. As alluded to earlier, appellants raised 12 grounds of appeal. Counsel for the appellants responded to all grounds of appeal, while on the other hand Mr Adolf Kisima State Attorney for the Respondent chose not to argue them in seriatim but rather grouped the same into four main grounds to wit; issues of identification of the appellants, cautioned statements, defectiveness of the charge sheet and whether the case was proved beyond reasonable doubt against the appellants. He then responded to them as such. What is gleaned from the record, judgment and submissions made by both parties is that the complained of conviction of the appellants is based on evidence of recovery of one of the stolen property, a mobile phone, make Huawei white in colour (exh.P2) and confessions reduced from the caution statements, exh.P1 for the 2nd Appellant as tendered by PW1, exh.P4 by the 3rd appellant as tendered by PW1, exh.P5 for the 1st Appellant

as tendered by PW5 and exh.P6 for the 4th Appellant as tendered by PW6. I so say as none of the prosecution witnesses testified to have identified any of the appellants during the commission of an offence. Now the issues for determination before this court therefore are two. **One**, whether it was right for the trial court to ground appellants' conviction on their caution statements and **secondly**, whether the prosecution case was proved beyond reasonable doubt against the appellants.

To start with the first issue it was Mr. Kyamba's submission that the trial court erred to rely on the appellant's caution statements to base their conviction as the same were illegally obtained, un-procedurally tendered and admitted in court. He said all of them were recorded out of prescribed time limitation of four hours after arrest of the accused or without extension of eight hours contrary to section 50(1)(a) and 51(1)(a) of the Criminal Procedure Act, [Cap. 20 R.E 2019] hereinafter referred to as CPA. He added exh.P1 tendered by PW2 was wrongly admitted as the said witness never took oath or affirmed before testifying and tendering the said exhibit in contravention of the provisions of section 198(1) of the CPA. He therefore prayed the court to uphold the ground and expunge them from the record.

In his reply the learned State Attorney did not labour much to counter the above raised irregularities by Mr. Kyamba on recording and admission of the said statements, instead he unconditionally admitted the fact that, the said caution statements of the 2nd, 3rd and 4th appellants were wrongly admitted but on the reason that, the same were admitted without being read aloud in court. Nevertheless Mr. Kisima stated exhibit P1, the caution statement of the 1st appellant was voluntarily and willingly obtained and rightly tendered, admitted and read out aloud in court hence it was correct for the trial court to base its conviction on it. As for the rest of the caution statements he argued, in this case prosecution's failure to read aloud the documents admitted in evidence occasioned a serious error amounting to miscarriage of justice and thus the said documents ought to be expunged from the records. It is true and I embrace Mr. Kisima's submission that, failure to read aloud the documents after their admission is prejudicial to the accused right of fair hearing for denying him with an opportunity to know the nature and content of the document tendered against him. The same is therefore fatal irregularity which is not curable. There is plethora of authorities expounding this stance. In the case of, **Robinson Mwanjisi Vs. Republic**, [2003] TLR 218 the Court of Appeal on similar matter observed that:

*"…whenever it is intended to introduce any document in evidence, it should **first be cleared for admission, and be actually admitted, before it can be read out**." (Emphasis supplied)*

In another case of **Kifaru Juma Kifaru and Others Vs. R**, Criminal Appeal No 126 of 2018 Court of Appeal of Tanzania at Dar es Salaam page 14, expressly stated that:

"…the document was not read out to enable them to know what was contained therein, hence convicted using evidence which was not known to them thus condemning unheard."

The consequences of none compliance with such mandatory procedure were well adumbrated in the case of **Robert P. Mayunga and Another Vs. R**, Criminal Appeal No 514 of 2016, where the Court of Appeal had this to say:

*"It is a settled law in our jurisprudence which is not disputed by the learned senior state attorney that documentary evidence which is admitted in Court without it being read aloud to the accused is taken to have been **irregularly admitted and suffer the natural consequences of being expunged from record of proceedings**." See also **Ramadhani Mboya Mahimbo v Republic**, Criminal Appeal No 325 of 2017. (CAT-Unreported)" (Emphasis supplied)*

In light of the above cited authorities, it is apparent to me that, in this matter the omission to read over the cautioned statements to the appellants

rendered them valueless and unreliable as the appellants' right to fair hearing was infringed for failure to be notified of the nature and contents of the said statements. It follows therefore that, they ought to suffer the consequences of being expunged from the record. I however disagree with Mr. Kisima that the 1st appellant's statement does not suffer the said omission of not being read out aloud in court. It is the law, the *documentary evidence which* ***is admitted in Court without it being read aloud to the accused is taken to have been irregularly admitted*** *and suffer the natural consequences of being expunged from record of proceedings.* The case of **Robert P. Mayunga and Another** (supra). In this it is not clear whether exh. P5 for the 1st appellant when admitted in court the same was read and if so was read aloud as per the requirement of law. The record at page 49 of the typed proceedings tells it all as quoted hereunder:

> ***Order:***
> *I have heard the PW5 and had a chance to peruse the said statement, I cannot fault it. It was done on time and through the procedure. It is thus admitted and marked as exhibit P5.* ***Thereafter a witness reads for whole court to hear****.*
>
> ***Jacob-RM***
>
> ***27/01/2020***

From the above quoted order it is not clear to this court whether by using the statement "***Thereafter a witness reads for whole court to hear***" in its order the court was directing the witness to read the statement for the whole court to hear or was reporting that the same was read. Be it as it may, if the trial magistrate was intending to indicate compliance of the law he ought not to have included it in the order for admission of the exhibit as it ought to be in a separate order, failure of which enjoins this court to hold the statement was not read aloud in court. I thus for the reasons given above expunge all four caution statements admitted in evidence in serious infraction of the procedure during their admission.

From the foregoing finding the next issue for determination is whether upon expunge of all caution statements the prosecution case survives with the remaining evidence. In other words I would pose a query as to whether with the remaining evidence the prosecution case remain proved beyond reasonable doubt against the appellants after expunging all four caution statements. Having expunged the caution statements of all appellants and in absence of any other evidence to connect them with offence with which they were charged with save for the 2nd appellant whose fate is to be determined soon, I hold the conviction against the 1st, 3rd and 4th cannot

stand. As to the 2nd appellant, Mr. Kyamba argued the charge of Armed Robbery was not proved beyond reasonable doubt on the following reasons. One, there is a contradictory evidence on the place in which the alleged offence was committed. He said, while the offence is alleged to have been committed at Hananasifu area within Kinondoni District, both PW2 and PW3 at pages 37 and 40 respectively testified the location was Mkwajuni Katumba Road and Mkwajuni. As to the use of weapon which is a necessary ingredient of the offence of armed robbery he submitted, PW2 who was not in company of PW3 as alleged, at page 37 of the proceedings is recorded not to have stated robbers were armed and that she was injured with any weapon and issued with the PF3 contrary to the testimonies of PW1 and PW3 who said PW3 was cut with machete or knife and issued with the PF3 which was not tendered in court though. Mr. Kisima did not respond on this line of argument concerning the 2nd appellant instead he concentrated on establishing his guilty by applying the doctrine of recent possession. It is Mr. Kisima's submission that, basing on the evidence of PW4 to the effect that it is the 2nd appellant who sold him a mobile phone make Huawei, white in colour which was retrieved from his possession by PW1 being led by the 2nd appellant himself, the doctrine of recent possession is applicable to him and

with such evidence his conviction can be safely base on. He therefore implored this court to so find and uphold his conviction on that account by dismissing his appeal. It is a cardinal principle of criminal justice in Tanzania that the prosecution bears the burden of proving its case beyond reasonable doubt. See the case of **Daimu Daimu Rashid @ Double D Vs. R**, Criminal Appeal No. 5 of 2018 (CAT-unreported). It is also the law for the one to establish the offence of armed robbery under section 287A of the Penal Code, the prosecution must prove the following elements: one, theft and two the use of dangerous or offensive weapon or robbery instrument against a person at or immediately after the commission of robbery. See the cases of **Kashima Mnadi Vs. R**, Criminal Appeal No. 78 of 2011, **Shaban Said Ally Vs. R**, Criminal Appeal No. 270 of 2018 and **Charles Simon Vs. R**, Criminal Appeal No. 134 of 2019 (All CAT-unreported), to mention few. In this case there is no dispute that PW2 was robbed of her several properties as mentioned in the charge sheet. However, apart from PW1 and PW3 testifying that PW3 was cut with machete or knife though not mentioned by PW1 to be in her company at the scene of crime, PW2 herself did not prove that fact nor claimed the said robbers to have applied threats to her. More so, no PF3 was tendered by either PW2 or PW1 and PW3 to prove the ingredient of the

offence that, there was use of dangerous or offensive weapon during commission of the said offence. All those deficiencies in evidence brings this court to the conclusion that the offence of armed robbery was not proved against the 2nd appellant.

I now turn to consider application of the doctrine of recent possession as submitted on by Mr. Kisima in which Mr. Kyamba submits, is inapplicable to the facts of this case against the 2nd appellant as he was not found in recent possession of the alleged mobile phone make Huawei which was retrieved from PW4 who failed to account for sufficiently on how he came into possession of the same. For the doctrine to be applicable four elements must be successfully established by the prosecution as well adumbrated in the case of **Joseph Mkumbwa and Samsom Mwakagenda Vs. R**, Criminal Appeal No. 94 of 2007 (CAT) as well cited in the case of **Charles Simon** (supra) where the Court of Appeal said:

> *"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved* ***first, that the property was found with the suspect****; **second**, that the property is positively proved to be the property of the*

*complainant; **third,** that the property was recently stolen from the complaint; **lastly**, that the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above…"*

In this case Mr. Kyamba asserts the element of being found in possession of the suspect was not proved. It is true one of the condition for proof and application of the doctrine of recent possession is that prosecution must prove the alleged retrieved item/property was lastly found in possession of the suspect. To the contrary in this case the mobile phone alleged to have been robbed of from PW2 was found in possession of PW4 and not the 2nd appellant. However it is in the testimony of the PW1 which evidence is corroborate with that of PW4 that it is the 2nd appellant who took him to PW4's home hence recovery of the said phone after being surrendered by PW4. I was prepared to apply the principle of constructive possession as well state in the recent case of **Yanga Omary Yanga Vs. R**, Criminal Appeal No. 132 of 2021 (CAT-unreported), but for the fact that the charge of armed robbery itself was not proved, I refrain from so doing. Since the 2nd appellant was not found in possession of the said mobile phone make Huawei (exh.P2), I hold the doctrine of recent possession does not apply to him in the

circumstances of this case. In totality, I hold the case was not proved against all appellants beyond reasonable doubt, thus the second issue as raised above is answered in negative.

Having so found, the resultant consequence in this appeal is that, I allow the appeal, quash the conviction and set aside the sentence imposed on all appellants and order that they should be released from prison unless lawful held for another cause.

It is so ordered.

DATED at DAR ES SALAAM this 03rd day of December, 2021.

E. E. KAKOLAKI

JUDGE

03/12/2021

Judgment delivered at Dar es Salaam in chambers this 3rd December, 2021 in the presence of Mr. Rashid Hezron Kyamba, learned Counsel for the Appellants and Ms. Monica Msuya and in the absence of the Respondent and Ms. Monica Msuya, court clerk.

E. E. KAKOLAKI
JUDGE
03/12/2021