IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 182 OF 2021

HARUNA MSAFIRI @ NYANDA ..... 1ST APPELLANT

IDDY ALLY @ KIDESU @ IDDY BONGE ..... 2ND APPELLANT

ISSA ALLY @ KIDESU ..... 3RD APPELLANT

KUDRA MOHAMED KHAMIS ..... 4TH APPELLANT

KHAMIS MUSTAFA @ MPARE ..... 5TH APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Arising from the decision of the District Court of Kinondoni at Kinondoni in Criminal Case No. 276 of 2018)

JUDGMENT

13th & 30th June, 2022

KISANYA, J.:

At the District Court of Kinondoni at Kinondoni, the appellants, HARUNA MSAFIRI @ NYANDA, IDDY ALLY @ KIDESU @ IDDY BONGE, ISSA ALLY @ KIDESU, KUDRA MOHAMED KHAMIS and KHAMIS MUSTAFA @ MPARE were charged with an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16, R.E. 2002 (now R.E. 2019).

It was alleged by the prosecution that, on 13th January, 2018 at Rose Garden, Mikocheni area within Dar es Salaam, the appellants did steal five laptops make Samsung valued at Tshs. 750,000/=, three laptop make HP all valued at Tshs. 3,000,000, three CPU Samsung both valued at Tsh.

3,600,000, one flat screen TV 50 inches make Samsung both valued at Tshs. 1,500,000, two projector both valued at Tshs. 3,100,000, one flat screen TV 32 inches make Samsung valued Tshs. 800,000, one mobile phone make Huawei valued at Tshs. 350,000, cash money Tshs. 2,300,000/ and cash USD 15,600 equivalent to Tshs. 34,800,000 and one internet devices of CISCO Company valued at Tshs. 24,500,000 all properties valued at Tshs. 85,000,000, the properties of CDS Logistics Company Limited and that immediately before and after such stealing, they threatened one SYLVESTER THOMAS and JOHN PAUL with a pistol and machetes in order to obtain and retain the stolen properties.

In addition to the above named accused person, the case involved others three accused person who are not a party to this appeal. These were JAMALDIN TANU and KIMULI SIMON KIMULI who were charged with the offence of being in possession of property suspected of having been stolen or unlawful possession acquired contrary to section 312 (1) of the Penal Code and BAKARI MAKONO whose charge was receiving properties unlawfully obtained contrary to section 311 of the Penal Code (supra).

The trial court was convinced that the prosecution had proved its case beyond all reasonable doubts. It went on convicting the appellants before sentencing them to serve a sentence of thirty years imprisonment. As to JAMALDIN TANU and KIMULI SIMONI KIMULI they were sentenced to six

months imprisonment while BAKARI MAKONO was sentenced to serve twelve months imprisonment.

Aggrieved by the trial court's conviction and sentence, the appellants filed the present appeal on seven grounds which can be paraphrased as follows:-

1. That the learned trial magistrate erred in law and fact by convicting the appellant relying on the footage of Exhibit PE10 (Flash Disc).
2. That the learned trial magistrate erred in law and fact by convicting the appellant relying on Exhibit PE9 (certificate of seizure).
3. That the learned trial magistrate erred in law and fact by convicting the appellants relying on the cautioned statements (Exhibits PE1, PE2, PE3 and PE4) which were recorded and/or admitted contrary to the law.
4. That the learned trial magistrate erred in law and fact by convicting the appellants basing on unreliable identification evidence.
5. That the learned trial magistrate erred in law and fact by convicting the appellants while an evidence showing the handling, transfer, storage of the car was not produced and that it failed to read out the certificate of seizure (part of Exhibit P6).

6. That the learned trial magistrate erred in law and fact by convicting the appellants while the items listed in the charge sheet are at variance with evidence adduced by PW1, PW2, PW3 and PW6.
7. That the learned trial magistrate erred in law and fact by convicting the appellants while the prosecution failed to prove its case beyond all reasonable doubts.

At the hearing of this appeal, the appellants appeared in person whilst the respondent was represented by Ms. Lilian Rwetabura, learned State Attorney.

When called upon to submit in support of the appeal, the appellants prayed to adopt the grounds appeal as part of their submission and went ahead asking this Court to consider the said grounds. They also reserved to make rejoinder submission after hearing the respondent's submission.

Responding, Ms. Rwetabura indicated at the very outset that the Respondent was supporting the appeal. She was of the view that the grounds of appeal raised in the petition of appeal centres on one complaint, namely, whether the prosecution proved its case beyond all reasonable doubts.

Starting with the issue of identification, the learned State Attorney submitted that the trial court considered that the 1st, 2nd and 3rd appellants

were identified by PW2 and PW3 who were at the scene of crime. However, she contended that PW2 and PW3 did not state how they identified the said appellants. It was her humble submission that since the offence was committed during the night, the said witnesses were required to testify on the source of light which aided them to identify the appellant, the distance at which the appellants stood and the time under which the appellants remained under their observation. To cement her submission, Ms. Rwetabura cited the case of **Waziri Amani vs R** [1980] TLR 250.

As regards the identification parade conducted by PW9, the learned State Attorney submitted that it was not properly conducted. Her submission was premised on the reason that the identifying witness (PW2 and PW3) did not give the appellants' description. She also pointed out that Identification Parade Register was not read out after being admitted in evidence. Therefore, relying on the case of **Robinson Mwanjisi and Others vs R** [2003] TLR 218 and **Richard Otieno @Gulo vs R**, Criminal Appeal No. 137 of 2019, CAT (unreported), she implored me to strike out Exhibit P7.

It was also the learned counsel's submission that another evidence relied upon by the trial court is the cautioned statement of the first appellant (Exhibit PE1). However, she argued that the said exhibit was not read out after its admission. In that regard, she was of the view that it deserves to be expunged from the record.

Submitting further, Ms. Rwetabura contended that the trial court considered that the stolen items were found in possession of some of the accused persons as depicted in evidence of PW10 and the Certificate of Seizure (Exhibit P9). As it was in the previous documentary evidence, this Court was invited strike out Exhibit P9 on the account that it was not read out upon being admitted.

With regard to the certificate of Seizure (Exhibit P8), the learned State Attorney submitted that the items listed thereon were not identified by any witness. She was of the view that, such evidence ought to have been adduced by PW1 and that PW6 who was called on to testify on that fact did not tell the trial court how the stolen items belonged to CDS. Again, the Court was moved to strike out the list of stolen properties tendered by PW6 on the same reason that it was not read over after being admitted in evidence.

Ms. Rwetabura further submitted that another evidence relied by the prosecution is the CCTV footage tendered in evidence by PW12. However, she contended that PW11 and PW12 did not testify whether the persons therein are the appellants. She argued further the said electronic evidence was in contravention of section 18(2) and (3) of the ETA on the reason that its authenticity was not proved. Further to this, it was argued that PW12 did not lay foundation before praying to tender the said exhibit.

Lastly, Ms. Rwetabura was of the view that the remaining evidence is the cautioned statement of the fourth appellant (Exhibit PE4) which was objected by the fourth appellant on the ground that it was recorded out of time. The learned counsel submitted that the prosecution did not prove that the said document was indeed recorded within time specified by the law. In view of the foregoing submission, Ms. Rwetabura asked this Court to allow the appeal.

In their rejoinder submission, the appellants had nothing to add other than agreeing with the submission made by the learned State Attorney.

Having considered the petition of appeal and submission of the learned State Attorney, I am of the view that the main issue is whether the appeal is meritorious. As rightly observed by the learned State Attorney the petition of appeal is essentially based on the ground that the prosecution did not prove its case beyond all reasons. I am going to address that ground by considering the issues raised by the appellants and submissions from Ms. Rwetabura.

In relation to the issue of identification of the appellants at the scene of crime, the first question is whether the trial court considered that the 1st, 2nd and 3rd appellants were identified by PW2 and PW3. Reading from the record, I have noted that PW2 and PW3 testified to have identified 1st, 2nd and 3rd appellants. However, the said evidence on visual identification by

PW2 and PW3 did not form the basis of the trial court's decision and findings. For that reason, I will discuss the law governing the visual identification evidence and whether the factors were favourable for PW2 and PW3 to identify the appellants.

As far as identification is concerned, the trial considered, among others, that the scene of crime had security cameras and that the 1st, 2nd and 3rd appellants were captured in the CCTV footage. It is on record that, the said CCTV footage was produced vide the disc flash tendered by PW12 and admitted as Exhibit P10. In this appeal, the trial court is being faulted for admitting the CCTV footage in contravention of the law governing admission of electronic evidence.

It is common ground that CCTV footage is electronic evidence. That being the case, its admission in evidence is governed by section 40(1)A of the Evidence Act [Cap. 6, R.E. 2019] read together with section 18(2) of the ETA. The latter provision provides for conditions to be complied with before admitting the electronic evidence as:-

a) *The reliability of the manner in which the data message was generated, stored and communicated;*
b) *The reliability of the manner in which the integrity of the data message was maintained;*
c) *The manner in which the original was identified; and*

d) Any other factor that may be relevant is assessing the weight of evidence"

The law further provides, under section 18(4) of ETA, that in determining whether the electronic evidence is admissible, an evidence may be produced to state any set standard, procedure, usage or practice on how electronic records are to be recorded or stored, with regard to the type of business or endeavors that used, recorded or stored the electronic record and the nature and purpose of the electronic record may be produced. The said conditions were enacted to assure authenticity of the electronic evidence.

Reverting to this case, the CCTV footage in question was retrieved by PW12. He introduced himself as an expert in image analysis. His evidence was to the effect that the scene of crime had CCTV Cameras and that he transferred the pictures from DVR before storing them in a flash which was tendered in evidence (Exhibit P10). Reading his evidence as a whole, I am of the considered view that the provisions of section 18 (2) and (4) of the ETA were complied with.

However, the issue is whether Exhibit P10 implicated any of the appellants in the case at hand. In his evidence, PW12 did not tell the court whether the appellants were seen in Exhibit P10. Such fact is reflected in the evidence of PW1 and P11 who stated on oath that the 1st, 2nd and 3rd

appellants were recognized in the CCTV footage. However, their respective evidence was given at the time when Exhibit P10 had not been tendered in evidence. They were not recalled to demonstrate how the persons seen in Exhibit P10 are the appellants. It is also my considered view that, PW12 being an expert in image analysis was expected to highlight on how the persons seen in Exhibit P10 are the appellants at hand. Since the prosecution did produce evidence to link the appellant with Exhibit P10, I am in agreement with the parties that, the CCTV footage was not required to be considered in determining the case before the trial court.

Other evidence considered by the trial court is the fact that the 2nd and 4th appellants confessed to have committed the offence whereby the former named the 1st and 5th appellants. Certainly, the cautioned statements of the 2nd and 4th appellants were admitted in evidence as Exhibit PE1 and PE4 respectively.

Starting with the cautioned statement of the 2nd appellant (Exhibit PE1), the record displays that it was not read after being admitted. There is a plethora of authorities on the position documentary evidence must be read out upon being admitted in evidence. This requirement is aimed at ensuring that the accused person understands the nature of the evidence given against him and be able to cross-examine the witnesses and prepare the defence. It is also settled position that the recourse to be taken against the

document admitted in contravention of said laid procedure is to strike out the same. See for instance the case of **Robinson Mwanjisi** (supra). That being the position, Exhibit P2 is hereby expunged from the record.

In relation to the cautioned statement of the 4th appellant (Exhibit PE4), the proceedings reveal that an objection against its admission was to be premised on ground that the said cautioned statement was recorded out of time. The 4th appellant contended to have been arrested on 14/02/2018 and Exhibit PE4 recorded on 19/2/2018.

The issue as to the time within which to record the cautioned statement of the accused person is set out under section 50 of the CPA. It is a mandatory requirement that such statement must be recorded within four hours of arresting the accused. The law is settled that a cautioned statement recorded out of time specified by the law should not be admitted in evidence and/or considered unless it is proved that there are cogent reasons for failure to record the same within the time set out by the law. See for instance the of **Mawazo Mohamed Nyoni @ Pendo and 2 Other vs R**, Criminal Appeal No. 184 of 2018 (unreported) in which the Court of Appeal underscored:

> *"There is a plethora of legal authorities which all underscore that non-compliance with that provision of the law is a fundamental irregularity that goes to the root*

of the matter and renders the illegally obtained evidence inadmissible and one that cannot be acted upon by the court. See the case of ***Mkwavi s/o Njeti v. Republic,*** *Criminal Appeal No. 301 of 2015 and* ***Said Bakari v. Republic,*** *Criminal Appeal No. 422 of 2013 (both unreported). The effects of non-compliance with these provisions is to render such documents bad evidence liable to be expunged from record. Thus, we find that the cautioned statements of the second and the third appellants is bad evidence and accordingly expunge them from the record."*

In the present case, PW5 did not tell the court as to when the 4th appellant was arrested. He testified that he was, on 19th February, 2018 instructed to go to Temeke where he took 4th appellant. Such fact implies that the appellant had been held at Temeke. Indeed, it is deduced from PW8's testimony that the 4th and 5th appellants were arrested on 16th February, 2018. In that regard, the 4th appellant's complaint that the cautioned statement was recorded out of time was meritorious. Considering further that PW5 did not testify on the time when the 4th appellant was taken from Temeke on 19th February, 2018, I find that the prosecution failed to prove that Exhibit PE4 was recorded was within four hours. For the foresaid reason, Exhibit PE4 is also expunged from the record.

Next for consideration is the trial court findings at page 13 and 14 of the judgment that the stolen properties were found in possession of the 6th,

7th and 8th accused persons. The issue is whether the properties found in possession of the 6th, 7th and 8th accused belong to the complainant (CDS).

It was PW10's testimony that the 2nd appellant was first to be arrested and that he named the 1st appellant who led the police to the 8th accused person to whom the stolen properties were sold. PW10 went on testifying that the 8th accused person informed the police that the properties had been transported to 7th accused in Dodoma. He stated on oath that the 6th and 7th accused person were searched at their respective shops and found in possession of some laptops and electronics. However, as rightly pointed by Ms. Rwetabura, PW10 did not give details or particulars of the properties found in possession of the 6th, 7th and 8th accused persons.

With regard to properties taken from the 6th accused, PW10 tendered the certificate of seizure (Exhibit P8). However, the prosecution did not produce evidence connecting the items listed in Exhibit P8 and the properties stolen from CDS.

As regards the properties alleged to have been found in possession of the 7th accused, PW10 tendered the certificate of seizure (Exhibit P9). Upon perusal of the record, I agree with Ms. Rwetabura that Exhibit PE9 was not read out immediately after being admitted in evidence. Therefore, being guided by the settled law stated afore, Exhibit PE9 is hereby expunged from the record. In the absence of Exhibit PE9, there remains no evidence to

prove the properties found in possession of the 7th accused let alone evidence as to whether the said properties are the same properties stolen from CDS.

I have considered that the prosecution marshalled PW6, an IT officer from CDS. He was expected to give evidence leading to identification of the properties alleged to have been found in possession of the 6th, 7th and 8th accused as the properties of CDS. This was not done. In lieu thereof, PW6 tendered the list of laptops of CDS which was admitted in evidence as Exhibit PE5. As it were in other document, Exhibit PE5 is hereby expunged because it was not read out after its admission. In absence of Exhibit PE5, oral evidence of PW6 does not link the properties which he identified at the police and the properties stolen from CDS. This is so when it is considered that PW6 did not testify on how he identified any of the properties.

It is settled law that one of the ingredients of the offence of armed robbery is stealing. Other ingredient is the use of actual or threat of violence to obtain or retain the stolen property. There is a list of authorities on that stance, including, the case of **Ally Said @Tox vs R**, Criminal Appeal No. 308 of 2018 in which the Court of Appeal cited with approval its decision in the case of **Fikiri Joseph Pantaleo @Ustadhi v. R**, Cr. Appeal No. 323 of 2015(unreported) where it was observed that: -

"...we agree with Ms. Mdegela the learned State Attorney over her doubts whether the element of stealing in the offence of armed robbery was proved at all. For purposes of instant appeal, the main elements constituting offence of armed robbery section 287A are first stealing. The second element is using firearm to threaten in order to facilitate the stealing . . ."

In the instant case, the ingredient of stealing was not duly proved because the evidence to link the properties tendered in evidence and the properties alleged to have stolen from CDS is wanting. As a result, I agree with the appellant and the learned State Attorney that the offence of armed robbery was not proved beyond all reasonable doubts.

In the upshot of all this, the appeal is found meritorious. I, accordingly, proceed to allow the appeal, quash the conviction of the appellants and set aside the sentence meted on them. Further to this, it is ordered that the appellants, HARUNA MSAFIRI @ NYANDA, IDDY ALLY @ KIDESU @ IDDY BONGE, ISSA ALLY @ KIDESU, KUDRA MOHAMED KHAMIS and KHAMIS MUSTAFA @ MPARE be set free unless that are held for other lawful cause.

DATED at DAR ES SALAAM this 30th day of June, 2022.

S.E. Kisanya
JUDGE

COURT: Judgment delivered this 30th day of June, 2022 in the presence of the appellants and Ms. Yasinta Peter, learned Senior State Attorney.

S.E. Kisanya
JUDGE
30/06/2022