IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 09 OF 2022

(From the decision of the Resident Magistrates' Court of Mbeya at Mbeya (Hon. J. C. Msafiri, SRM) in Criminal Case No. 143 of 2019)

NASSIBU JUMA MZUMBE @ BITO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 24/08/2022
Date of Judgement: 05/09/2022

MONGELLA, J.

In Criminal Case No. 143 of 2019 in the Resident Magistrates' Court for Mbeya, the appellant was charged, together with other 4 persons, on two counts being: **one**, armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002; and **two**, burglary contrary to section 294 (1) and (2) of the Penal Code, Cap 16 R.E. 2002.

The facts of the case are to the effect that: on 15.04.2019 at 09:30hours at night, at Nzovwe area within the city and region of Mbeya, the appellant and his co accused, the 2nd accused, jointly and together did steal cash money T.shs. 47,000/-, one mobile phone make Tecno Camon X Pro valued at T.shs. 550,000/-, one laptop make HP valued at T.shs. 800,000/-,

one camera make Nikon N 5300 valued at T.shs, 1,600,000/-, all items totaling at T.shs. 2,997,000/-, properties of one Festo s/o Anthony and immediately before and after the stealing threatened the said Festo s/o Anthony by a machete and a knife in order to obtain such properties. With regard to the offence of burglary, it was alleged that on the date of the offence, the two did break the house of the said Festo s/o Anthony.

The 2nd accused absconded thus the case was conducted in absentia against him. The appellant denied the charges necessitating the prosecution to furnish evidence to prove the offences. In the end the trial court was convinced that the charges were proved beyond reasonable doubt thus entered conviction against them on both counts. It sentenced the accused persons to 30 years imprisonment for the first count and 20 years imprisonment for the second count. Aggrieved by the conviction and sentence, the appellant filed the appeal at hand on eight grounds as hereunder:

1. *That the trial court erred in law when convicted the appellant without taking into account that the voice identification done by PW1 was very weak and doubtful to rely on it to convict the appellant.*

2. *That the trial court erred in law when convicted and sentenced the appellant without solving the issue of visual identification due to the facts that as testified by PW1 the said culprits was wearing masks to cover their faces which make difficult to PW1 to identify any of them very properly.* (sic)

3. *That the trial court erred in law when convicted the appellant relying on which claimed as cautioned statement exhibits PE9 which is recorded without following the procedure such as section 57 and 58 of the CPA Cap 20 R.E. 2019 and section 27 (2) and (3) the TEA Cap 6 R.E. 2019. And also the said cautioned statement was recorded out of time against the law.* (sic)

4. *That the trial court erred in law when convicted and sentenced the appellant without taking into account that the doctrine of the recent possession was not bound the appellant but was bound 3rd, 4th, and 5th accused.* (sic)

5. *That the trial court erred in law when convicted the appellant relying on the evidence of PW1 that he identified the said voice as from the appellant without regarding that PW1 and the appellant were not familiar.* (sic)

6. *That the trial court erred in law when convicted and sentenced the appellant relying on the evidence PW8 which violated section 240 (3) of the CPA Cap 20 R.E. 2019.* (sic)

7. *That the trial court erred in law when convicted and sentenced the appellant relying on the evidence of PW4 which is doubtful and showed torture and threats against the appellant while under custody of police and handcuffed at the fateful day before PW4.* (sic)

8. *That the sentence passed by the trial court by the second count is very excessive and the prosecution side was not proved the charges as per law while the appellants' defence was not considered by the trial court.* (sic)

The appellant appeared in person. He prayed for his grounds of appeal to be adopted as his submission and to hear first from the learned state attorney.

The respondent/Republic was represented by Ms. Zena James, learned state attorney. She supported the appeal, particularly on the 1st, 2nd, 5th grounds and partly the 8th ground. She argued collectively the 1st, 2nd, and 5th grounds as they basically challenge the identification at the crime scene. She said that she supported these grounds of appeal in consideration of the testimony of PW1, who was the key witness in the case. Referring to the evidence of PW1, she submitted that PW1 testified that the offence occurred at 09:30 hours at night and the attackers had put on face masks thus he could not identify them. That, PW1 stated that he was attacked by a machete and some of his properties were stolen. That on 26.05.2019 he was called by phone and told that his attackers were arrested and was required to go to the police station. At the police station he identified the appellant through his voice and eyes. That, on cross-examination, he again said that he identified the appellant by his voice.

Ms. James continued to submit that in accordance with the law, there is no such weak evidence in criminal offences, like voice identification. She

said that PW1 never stated anywhere about the light and the intensity of the light. He as well never told the police that he would identify the attackers if he hears their voice and never described the appearance of the attackers nor explained before about the kind of voice and what the attackers said to him at the crime scene to identify their voices.

She added that it is trite law that when offences are committed at night the only evidence to be considered is that of identification in consideration of factors such as light, time of observation, distance, and whether the witness and the offender knew each other before. She contended that these factors were not fulfilled and no identification parade was conducted to for PW1 to identify the appellant. In the premises she conceded to the ground of appeal that the appellant was not properly identified by PW1 at the crime scene and the trial court erred in convicting the appellant in those circumstances.

With regard to the cautioned statement challenged under the 3rd ground, she supported the appellant's contention that it was illegally recorded as it was recorded out of the prescribed time under the law. Referring to the evidence of PW6, the arresting officer, and PW7, the officer who recorded the statement, she argued that PW6 testified that the appellant was arrested on 14.05.2019 and PW7 testified that the cautioned statement was recorded on 15.05.2019 at 09hours in the morning. Considering the requirement under the law, she contended that under **section 50 of the Criminal Procedure Act, Cap 20 R.E. 2019**, the statement is to be recorded within 4 hours after the offender is arrested. Where the same is recorded outside the 4 hours there has to be justification for extension of time. She

remarked that in the evidence on record, there appears no justification provided for recording the appellant's statement out of time. In the premises, she prayed for the cautioned statement to be expunged from the record.

The appellant, on the 8th ground, lamented, among other things, that the sentence given to him for the offence of burglary was excessive and that the prosecution did not prove the offence. Referring to section 294 (1) and (2) under which the appellant was charged with the offence of burglary, Ms. James conceded that the sentence was excessive as the sentence provided under the provision is 14 years imprisonment, but the trial Magistrate sentenced him to 20 years imprisonment.

With regard to the whether the offence was proved, she reiterated her submission under the 1st and 3rd grounds of appeal as above and conceded that the offence was not proved by the prosecution. In the circumstances she prayed for the conviction and sentence against the appellant to be set aside and he be set free.

The appellant had nothing to rejoin, he supported the submission by the learned state attorney and prayed to be set free.

I have considered the grounds of appeal and the submission by Ms. Zena James, learned state attorney. I have as well thoroughly gone through the trial court record. Ms. James has supported the 1st, 3rd, and part of the 8th grounds of appeal. I find that the 1st and 3rd grounds suffice to dispose the whole appeal as they are centred on the main point as to whether the

offence was proved by the prosecution. Under these grounds, the appellant claims that he was not identified at the crime scene by the victim (PW1), and he as well challenges the cautioned statement tendered and admitted in court as evidence.

With regard to identification, it is clear that the offence was committed at night, at 09hours. In the situation the question of identification becomes paramount. PW1, as seen at page 15 to 16 of the typed proceedings, testified that the people who broke into his house at 09:30 hours at night on 15.04.2019 had put on face masks. Then on 26.05.2019 he was called by the investigation officer who informed him of some robbers being arrested. He was told to go and identify them whereby he identified two of them. He said that at first he identified the first accused (the appellant herein) through his voice and eyes. On cross-examination by the appellant, PW1 stated that it was the first time he saw the appellant and identified him through his voice and eyes.

The testimony of PW1 shows that he identified the appellant visually and through voice. With regard to visual identification, the law requires the witness to first describe the offender as to his features and clothes before identifying him at the police or anywhere else. The law also requires the witness to describe the source of light that enabled him to identify the witness; the distance between him and the offender, and the time he spent observing the offender. See: ***Jumapili Msyete vs. Republic,*** Criminal Appeal No. 110 of 2014 (CAT at Mbeya, unreported); ***Waziri Amani v. Republic*** [1980] TLR 250 and that of ***Jaribu Abdallah v. Republic***, Criminal Appeal No. 220 of 1994 (CAT at DSM, unreported). As argued by Ms.

James and also clear on the record, these factors do not feature in PW1's evidence.

With regard to voice identification, it is settled law that voice identification is the most unreliable. See: ***Nuhu Selemani v. Republic*** [1984] TLR 93. It can only be relied upon where it is established that the witness is very familiar with the voice in question as being the same voice of the person at the scene of crime. See also: ***Stuart Erasto Yakobo v. Republic***, Criminal Appeal No. 202 of 2004 (CAT, unreported). In the matter at hand PW1 never stated how he became aware of the appellant's voice to the extent of identifying it. Since he stated that it was the first time he met the appellant it can definitely be ruled that he was never familiar with the voice. In addition, as argued by Ms. James, he never even stated what words the appellant said to him at the crime scene for him to identify his voice. His testimony is not worthy of credibility.

With respect to recording of the cautioned statement, the law requires that it be recorded within 4 hours after the offender is arrested. This is provided under **section 50 of the Criminal Procedure Act, Cap 20 R.E. 2019**. As argued by Ms. James, and also vivid at page 33 and 40 of the typed proceedings, PW5 stated that the appellant was arrested on 14.05.2019 and PW6 stated that the cautioned statement was recorded on 15.05.2019. This is contrary to the requirement under the law. If recorded outside the prescribed time there have to be cogent reasons explained to the court and recorded. As argued by Ms. James, no reasons were furnished for recording the statement after four hours. Under the law, a cautioned statement recorded in infringement of the law is

bound to be expunged. See: ***Shabani s/o Hamisi vs. The Republic***, Criminal Appeal No. 146 "A" of 2017 (CAT at Tabora, published at Tanzlii); ***Director of Public Prosecutions vs. Festo Emmanuel Msongaleli & Another***, Criminal Appeal No. 62 of 2017; and ***Sia Mgusi @ Wambura & 2 Others vs. The Republic***, Criminal Appeal No. 125 of 2015 (CAT, unreported). In the circumstances, the appellant's cautioned statement is hereby expunged from the record.

Given the observation as hereinabove, I agree with both parties that the offences of armed robbery and burglary against the appellant were not proved beyond reasonable doubt. In the premises, the conviction and sentence by the trial court are hereby quashed. The appellant should be released from prison custody forthwith unless held for some other lawful cause.

Dated at Mbeya on this 05th day of September 2022.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 05th day of September 2022 in the presence of the appellant appearing in person, and Mr. Steven Lusitamaila, learned state attorney representing the respondent.

L. M. MONGELLA

JUDGE