THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 5 OF 2019

(Original Criminal Case No.474 of 2019 of the Resident Magistrates Court of Arusha, at Arusha)

SALIMU KIWELE @ MSAMILA..... 1ST APPELLANT

SHABANI JAFARI KAMBONGO..... 2ND APPELLANT

ISSA MOHAMED @ LUSWAGA..... 3RD APPELLANT

VERSUS

THE DPP..... RESPONDENT

JUDGMENT

09th August & 14th September, 2022

TIGANGA, J.

This appeal originates from the decision of the Court of Resident Magistrates of Arusha, at Arusha in Criminal Case No. 474 of 2019. The appellants were all arraigned before the court with a charge of armed robbery contrary to section 287 of the Penal Code, [Cap. 16 R.E 2002] now (R.E 2022). They were all convicted and finally sentenced to serve a mandatory sentence of 30 years in jail.

In the particulars of the offence as reflected in the charge sheet, and the evidence given in support of the prosecution case, it was

alleged that, on 5th day of September 2017 at Impala Round About area within Arusha city, in Region of Arusha, all three accused persons jointly and together did steal cash money Tanzania shillings one hundred seventeen million four hundred sixty-two thousand (Tshs. 117,462,000/=), the property of one Leopard Tours Limited and immediately before, during and after such stealing, did use pistol, gun and hammer to threaten one Imran s/o Abeid Ismail in order to obtain and retain the said property.

Both, conviction and sentence meted against all the appellants aggrieved them. Therefore, they decided appeal to this Court against both the conviction and sentence. Hence, this appeal.

Before the trial court, in order for the prosecution to prove their case, paraded nine witnesses. Those witnesses were Imran s/o Abeid Ismail (PW1), Abraham Maruya (PW2), F. 2596 DCPL Abdallah (PW3), F. 2162 DCPL Francis (PW4), F. 754 DCPL John Ngowi (PW5), G. 2155 DC Yusuph (PW6), G. 2909 PC Zakayo (PW7), H. 2261 DC Mongu (PW8) and WP. Sophia Kigombola (PW9). Also, the cautioned statements of Salimu Kiwere @ Msamila (Exhibit P3), Shabani Jafari @ Kambongo (Exhibit P6), statement of PW1 (Exhibit D1), Identification Parade Register (Exhibit P7), Certificate of seizure (Exhibit P1) were also

tendered in court in order to prove the cases beyond reasonable doubt as per the requirement of the law.

On their part, the appellants before the trial court did neither have exhibit(s) nor witness to back-up their defence. They personally defended their case.

Initially in this appeal, the appellants had fronted about 16 grounds of appeal faulting the decision of the trial court, but during hearing, they combined some of the grounds only to remain with nine arguable grounds of their own choice and style. The grounds as merged are as follows:

1. That, the trial magistrate erred in law and fact when she relied on weak, unreliable and unsatisfactory identification parade.
2. That, the trial court magistrate erred in law when she relied on the cautioned statement of the 1st appellant (Exhibit P3) to the conclusion that, he admitted to have committed the offence.
3. That the trial magistrate erred in law and fact basing her decision on retracted cautioned statement of DW1 without first conducting an inquiry as per the requirement of the law.

4. That, the charge against the appellants was not proved beyond reasonable doubt.

5. That the search was illegally conducted and no receipt was issued to that effect.

6. That, the trial court magistrate wrongly concluded that, the motor vehicle model Toyota Altezza with registration number T327CJY and a motor cycle with two helmets were involved in the commission of the offence without being tendered in court.

7. That the evidence of prosecution side is full of inconsistencies and material contradictions.

8. That the trial Magistrate grossly erred when she failed to consider the appellants defence or even make any reference to it before finding the appellants guilty.

9. That, the learned trial magistrate erred when she failed to take into account the appellants' defence evidence before reaching to the findings.

The hearing of this appeal, was at the request of the appellants, and by the leave of this court it was conducted by way of written submissions. The appellants appeared in person, unrepresented whereas

the respondent Republic had the service of Ms. Akisa Mhando, Senior State Attorney.

Principally, upon being served with the submissions in chief, Ms. Mhando conceded to ground eight and in part, ground five. Under ground five she said, non-issuing of the search receipt is fatal and prayed for the seized items to be expunged from the record. However, she maintained her position that those who were involved in the search are credible and reliable witnesses to prove the seized amount as the one being part to the robbed money.

On ground eight Ms. Mhando argued that, according to the law, failure to consider the defence case is fatal and vitiates conviction. She cited the cases of **Andrea Lonjine versus The Republic**, Criminal Appeal No. 50 of 2019 CAT at Dodoma and **Moses Mayania @ Msoke versus The Republic,** Criminal Appeal No. 341 of 2017 (both unreported).

I have uniquely started with these two grounds purposely because if at all my findings will rest on positivity, obvious the remaining grounds will have no different results even if they are proved negative. Likewise, I have started with the argument by the respondent due to the apparent reason that, the appellants are taking cover of the undisputed grounds

by the respondent. probably, that is why the appellants did not file rejoinder to contentiously argue the reply submission by the respondent, Republic.

I will start with ground five on the issue of non-issuance of seizure receipt after conducting search. The governing provision of the law on the issue of seizure receipt is section 38(3) of the Criminal Procedure Act, [Cap 20 R.E 2022] which provides that:

> *"Where anything is seized in pursuance of the powers conferred by subsection (1)* ***the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing****, bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".* **(Emphasis added).**

The applicability of the above provision of the law was interpreted in various case laws by the Court of Appeal of Tanzania. In the case of **Godfrey Kitundu @ Nalongwa and Another versus The Republic,** Criminal Appeal No. 96 of 2018 CAT at Dar es salaam (unreported) the Court observed that:

> *"Our reading of this provision is that it provides for the requirement to issue receipt of the things seized out of*

the search. The purpose of issuing the receipt was stated in the case of ***Selemani Abdallah & 2 others*** *(supra) which is, to ensure that the property seized came from no place other than the one shown in the receipt".*

Guided by the above authority, I am also settled that, in the circumstances the money was seized there was a need of issuing the receipt showing that the seized money was taken from the house of the second appellant as per exhibit P1 (seizure certificate). This is because, there is a possibility of money being changing hands so quickly and bring a different expected exhibit. As a result, therefore, the seizure certificate has no evidential value. It must be expunged from the record as a I hereby do.

However, expungement of the said exhibit does not mean that the said money 7,514,000/= was not seized from the conduct of the search to the house of the 2nd appellant. I say so because there is no dispute as to whether the said money was seized from the house where the 2nd appellant was living. This is justified by the testimony of the 2nd appellant himself. At page 68 of the typed proceedings of the trial court Shaban Jafari Kasongo (2nd appellant) said:

"They asked me to open the door and (sic) they should open the door. I opened the door. They entered inside and conducted search. They found money cash (sic) Tshs. 7,514,000/- they took them(sic). I asked why are you taking my money (sic), they said you shall go and give your statements at police(sic)."

The above testimony by the 2nd appellant is vividly clear that, there is no dispute of the said money being found in the place where he lived. The dispute here might be whether, such money forms part of the robbed amount, the question to be dealt soon in the analysis to follow. This means the fact that the receipt was not issued in respect of the exhibit seized, did not mean there was no evidence that the search was conducted, the money was found. Thus, the circumstance of this case is distinguishable to the requirement of section 38(3) of the Criminal Procedure Act, as interpreted in the case cited herein above.

I now turn to the eighth ground, as said, Ms. Mhando conceded that, the trial court did not consider the defence evidence as alleged by the appellants, that, not considering the defence evidence vitiates conviction. She cited section 312(1) of the Criminal Procedure Act, [Cap. 20 RE 2019] now RE 2022. Also, she cited the case of **Andrew Lonjine versus The Republic**, Criminal Appeal No. 50 of 2019 CAT at Dodoma

(unreported) in which the case of **Moses Mayania @ Msoke versus The Republic**, Criminal Appeal No. 341 of 2017 (unreported) was cited. The authorities were submitted in line with the case of **Hussein Ramadhani versus The Republic**, Criminal Appeal No. 195 of 2015 CAT cited by the appellants.

When I was preparing to respond to this ground, I would at the outset, divulge to the Senior State Attorney, Ms. Mhando's view that, failure to consider the defence evidence does not vitiate conviction but rather requires the appellate court to step into the shoes of the trial court and evaluate the said evidence. The resultant emanating therefrom, determines the end of the matter. In the case of **Antony Jeremia Sorya versus The Republic**, Criminal Appeal No. 52 of 2019 CAT at Dodoma (unreported) the Court of Appeal of Tanzania regarding the issue of failure to consider the defence evidence observed as follows:

> *"We think on the issue of failure to consider appellant's defence, which was raised as a distinct ground of appeal, the High Court should have lived up to its duty to subject the appellant's evidence to a fresh re-evaluation and come to first appellate own conclusion. All is not lost at this stage because we can step into*

the shoes of the first appellate court to address the appellant's complaint that his defence evidence was not considered."

Also see the cases of **Ismail Shabani versus The Republic**, Criminal Appeal No. 344 of 2013, CAT at Tabora, **Bahati s/o Ndobofu versus The Republic,** Criminal Appeal No. 8 of 2013, CAT at Iringa, **Augustino Samson versus The Republic,** Criminal Appeal No. 254 of 2014, CAT at Mbeya (all unreported).

Basing on those authorities illuded to above, this court is enjoined to re evaluate the evidence of the defence side and reach to its own conclusion as to whether the offence of armed robbery was committed or not. This task however shall be dealt with during answering other issues connected with the case being proved beyond reasonable doubt or otherwise.

After answering those two issues conceded by Ms. Mhando, I revert to the first ground which is on impropriety of the identification parade. The appellants jointly, contended that, the trial Magistrate wrongly based her conviction on the identification parade done by only a single witness (PW1) and that such evidence of the single witness is dangerous to sustain conviction. The buttress was put through the case

of **Godfrey Richard versus The Republic**, Criminal Appeal No. 365 of 2018 (unreported) where the court said;

> *"To convict an accused person relying on the identification parade by single witness is dangerous,* ***but a conviction so based, cannot, in law be regarded as invalid****." (Emphasis added)*

Ms. Mhando in reply contended that, at pages 10 and 11 of the trial court typed proceedings PW1 managed to provide the description of the appellants during the commission of the offence and also gave an account on how they appeared on the fateful day. That, during commission of the offence it was a broad day light at 16:00 hours. Also, that, PW1 was interrogated by the police after the incidence whereby he explained on each appellant including breaking the window of his vehicle the act which was done by the 3rd appellant.

Ms. Mhando went on arguing that, at pages 56 to 58, PW9 explained to the court the identification parade was arranged into two groups whereby the 1st and 2nd appellants were in the first group and the 3rd into another. She further added that, the first parade was made up with 8 members and the reason and right for conducting the parade was given. Also, that the identification parade register was tendered in court which was received as exhibit P7. Lastly on the ground, Ms.

Mhando fortified that, according to Exhibit P7 there was no objection which was raised by the appellant otherwise it could have been recorded in the exhibit P7.

According to the case of **Godfrey Richard versus The Republic** (supra) cited by the appellants themselves, it is not fatal to rely on the evidence of a single witness who attended the identification parade but it makes the court cautioned on the danger of relying on such evidence. Section 60 of the criminal Procedure Act, the governing provision on issues of identification parade provides as follows;

> *Any police officer in charge of a police station or any police officer investigating an offence may hold an identification parade for the purpose of ascertaining* ***whether a witness can identify a person suspected of the commission of an offence****. (Emphasis Added)*

In my settled opinion, this provision does not require a number of witnesses in order to ascertain as to whether the person suspected of the commission of the offence is identified. What is important is credibility and reliability of the witness. In this case, the facts show very clearly that, at the time the robbers invaded PW1, at Impala round-about he was alone in the motor vehicle model Altezza with registration

number T327CJY. It could be awkward and misleading to require another person to attend the identification parade for the incident he did not witness. For the foregoing reasons, this ground fails.

The 2nd ground is about relying on the cautioned statement of the DW1(now the 1st appellant) by the trial magistrate which is said to have been retracted without conducting an inquiry.

The appellants quoted in part the testimony of the said 1st appellant at page 31 of the typed trial court proceedings as hereunder;

> *"I object because I was beaten and asked to sign (sic). I was injured my nails, the (sic) statement was not taken to central police but (sic) Engutoto it was on 12/09/2017 about 1400 hours' afternoon hours (sic). It was Tuesday."*

The appellants further submitted that, owing to such repudiation, the law requires the cautioned statement be corroborated before acting on it. To cement on the contention, the case of **Morris Agunda & 2 Others vs R** (2003) TLR 449 was cited. That, since the said cautioned statement required corroboration it cannot be used to corroborate another uncorroborated evidence.

On her part, Ms. Mhando argued the ground with pages 32 to 36 of the trial court typed proceedings. She said that, an inquiry was conducted and the trial magistrate was satisfied that the statement was made voluntarily that is why the cautioned statement was received and admitted as exhibit P2. Further that, according to page 8 of the said proceedings the cautioned statement was corroborated by the evidence of PW1.

It is apparent that, the trial court conducted an inquiry in order to satisfy as to whether the cautioned statement was freely and voluntarily taken. As said by Ms. Mhando, the inquiry conducted is envisaged under page 32 of the typed proceedings. The trial court satisfied itself that the cautioned statement was voluntarily taken and therefore proceeded to admit it. In comparison between what is testified by PW1 and the cautioned statement, it is clear that there is correspondence to each other which takes this court to believe that the evidence of PW1 corroborated the said cautioned statement.

The appellant in his cautioned statement said;

> *kuna mhindi wa Leopard anakujaga pale kazini na gari aina ya Altezza anakuja kuchukua pesa nyingi anaweka kwenye bag na yupo mwenyewe tutafute watu tufanye*

hiyo kazi mimi na Shaban tukakubaliana tufanye hiyo kazi.

During cross examination, PW1 said:

We always take the (sic) money there. May be people were following me so many (sic). I went every week to take the money(sic)

Reading the above percept, it is crystal clear that, what the 1st appellant said in the cautioned statement that, the plan was arranged before for the commission of the offence after following PW1 for quite sometimes match with the testimony of PW1 who testified that, he regularly went to the bank to draw some money after being sent by the office to do so.

Also, the motor vehicle which was involved for carrying the said money is Altezza the property of PW1 which was also mentioned in the cautioned statement by the first appellant. In this regard, I am convinced that, the challenged cautioned statement was voluntarily taken and the trial magistrate was right to treat it so. This ground is also dismissed for lack of merit.

The complaints on the third ground is that the trial magistrate erred in law and fact basing her decision on retracted cautioned

statement of DW2 (Exhibit P3) without first conducting an inquiry as per the requirement of the law.

The appellants contend that according to page 41 of the impugned proceedings the second appellant complained of being denied his rights during interrogation. That, such complaint alone was enjoining the trial court to stop taking proceedings instead conduct inquiry in order to test voluntariness of the cautioned statement before admitting it, the duty which was not done. Therefore, the appellants argued this court to disregard such exhibit P3 as it was wrongly acted upon.

Counteracting, Ms. Mhando argued that, the 2nd appellant only raised objection in according to section 53 of the Criminal Procedure Act, [Cap. 20 RE 2019]. That, the said objection is not based on the voluntariness of the accused person during interrogation as per section 27(3) of the Evidence Act, [Cap. 6 R.E 2019]. That the 2nd appellant did not show to the trial court that, the said exhibit P3 was either obtained by threat, promise or other prejudicial means to him during recording. She added further that had the 2nd appellant raised the concern of being threaten during recording of his statement, would have been forced the court to conduct inquiry to test his voluntariness. To cement on the argument, she cited the case of **Samson Chacha @ Mwita Pius@**

Kipepeo versus The Republic, Criminal Appeal No. 76 of 2018 CAT at Mwanza (unreported).

I have revisited page 41 of the challenged proceedings. The following objection by the 2nd appellant was raised to wit:

> ***"2nd ACCUSED:*** *I have objection. I was not given my rights. It is not true that I was given my right as he said. Your honour, the one who is under police officers do obey. If to be called relatives, we was (sic) supported (sic) to do so because we did not do that he break (sic) the law. So I was not given my rights and of (sic) the exhibits (sic) should not be received."*

In this ground I totally agree with Ms. Mhando that, the complaints raised by the 2nd appellant are taken care off by section 53 of the Criminal Procedure Act (supra). They are complaints which have nothing to do with the court's inquiry in order to test the voluntariness of the accused person when recording his cautioned statement, which is among the rights to be informed to the persons under restraint. I am at such settled view because, the appellant did not complain of being threatened and forcefully made to record his statement but rather complained of the issue of calling relatives.

Section 27(3) of the Evidence Act reads:

"A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority."

Passing through the complaints by the 2nd appellant there is nowhere it is noticed that, he was complaining for being induced to give his statement by any threat, promise or other prejudicial acts by the police officer who recorded his statement which would have enjoined the trial court to conduct inquiry. This ground also lacks merit. It is dismissed.

Ground 4 is reserved for obvious reasons that it will be covered by re-evaluation of evidence as observed during analysis of ground 8. Thus, I jump to the determination of ground 6.

With regard to this ground, appellants are contending that so long as the prosecution side alleged the involvement of the motor vehicle with registration No. T327CJY, Altezza, they were duty bound to make sure that, the said motor vehicle is exhibited to the court in order to prove that, it reality existed and the window alleged to have been broken was supposed to be seen by the court. That, the prosecution maliciously withheld such exhibit because they knew if it would have

been exhibited might have been unfavourable to their side. Fortifying their arguments, they cited the cases of **The Republic vrs Uberle** (1938) 5 EACA 58 and **Cosmas Vicent and Another vrs The Republic,** Criminal Appeal No. 17 of 2018, HC (unreported).

Ms. Mhando did not say anything on this ground. She did not indicate as to whether she concedes or contends the ground. However, this court is required to respond on it because it is the ground raised by the appellants and deserves the response. Coming to the ground itself, in the case of **Mustapha Darajani versus Republic**, Criminal Appeal No. 242 of 2015 (unreported) the Court of Appeal stated that:

> *"In such cases, description of special mark to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits."*

The alleged robbed property is the amount of money at the tune of 117,462,000/= which is proved to be the property of Leopard Tours Limited. There is no dispute about that. The motor vehicle alleged to have been carried the said amount of money with registration No. T 327 CJY, Altezza also has no dispute as to whether it is the property of PW1 or not. The appellants are disputing on the involvement of the commission of the offence and not that the offence of robbery was

committed. In such circumstances, what the car which is not in dispute should serve if at all will be brought to court as an exhibit? Obvious it will serve nothing. In my view, exhibits which are suppose to be exhibited in court are those intending to prove the commission of the offence or disapprove it. For instance, the motor vehicle and motor cycles which were used by the robbers to block the vehicle of PW1 from moving further and those which transported the robbers and the robbed amount are relevant exhibits if at all, might have been discovered and impounded. That said, this ground also is dismissed for want of merit.

Ground 9 is summarily dismissed. The reason is very apparent that, it does not stand a chance of being called a ground of appeal but rather a summary of other grounds adduced by the appellants. It has no merits to be determined.

Lastly, I turn to grounds 4, 7 and the reserved ground 8 on the issue of re-evaluation of evidence. I have jointly tacked these grounds because discrepancies and inconsistencies of evidence of the prosecution side sire out the proof beyond reasonable doubt being tainted. This proceed is normally achieved through evaluation and analysis of evidence and in this regard, the evidence of both sides.

In this case the only eye witness to the incident is PW1 who was invaded by the pandits. The money at the tune of 117,462,000/= was robbed. It is evident that after and during the commission of the said offence the fire arm, Pistol was used to threaten PW1 so that he could give the bandits the money which was in the black bag. The said money was testified to have been taken from Bank M by PW2, Abraham Maruya who was an operation manager of the said Bank M Arusha Branch. PW3, PW4, PW5, PW6, PW7, PW8 and PW9 are police officers who testified the incident since it was reported, investigated, the appellants were arrested, cautioned statements were taken and until when the appellants were arraigned in court for prosecution.

I have also gone through the evidence of the defence side; they are all denying being involved in the commission of the offence they are charged with. They all denied from knowing each other. That, they were joined together by the police. A very wanting question here is if the appellants were not knowing each other before being arrested, why their cautioned statements which were taken at different times suggest the resembling story? The story which in fact also in most cases is in coherence with that given by PW1.

However, there is an argument by the appellants that, the evidence of PW3 at page 43 of the impugned proceedings is inconsistent. That PW3 said, the amount of money which was recovered from the 2nd appellant is 8,500,000/= while the court admitted only 7,541,000/=. Ms. Mhando disputed this alleged inconstancy and said that, the appellants are misleading the court because at the said page of the challenged proceedings, there appears no such allegation.

I have taken time to revisit the evidence of PW3, F2596 DCPL Abdalah, firstly, his evidence does not go such far at page 43. It only ends at page 30. Secondly, PW3 when giving his testimony at page 27 said;

> *"We seized (sic) phone make Huawei and Tshs. 7,514,000/= signed by me, Tina and Remy Msuya"*

PW3 at the same page continues saying:

> *"The said money were Tshs. Note (sic) of 10,000/= 501, Tshs. 5000 note (sic)= 500 note (sic) and 1000 note (sic) =4 note (sic). Total value 7,514,000/=. I pray to tender the said money collectively as exhibit."*

Reading the above testimony, I concur with Ms. Mhando that, the arguments by appellants were put in the mouth of PW3. He did not say as they contended.

In the result therefore, reading the evidences of the appellants under scrutiny, it is inferred that, the same was not strong enough to shake weight of the evidence adduced by the prosecution. Grounds 4 and 7 have also failed. In consequence thereof, it is my determination that, the prosecution proved their case beyond reasonable doubts.

The totality of the foregoing leads to the conclusion that, the prosecution side proved their case beyond reasonable doubts in accordance with the requirement of our criminal jurisprudence. The appeal is hereby dismissed on its entirety for the reasons given herein above.

It is accordingly ordered.

DATED at **ARUSHA** on the 12th day of September 2022.

J.C. TIGANGA

JUDGE.