IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY)
AT MWANZA
HC.CRIMINAL APPEAL NO. 163 OF 2019

(Arising from District Court of Chato at Chato in Criminal Case No. 56 of 2017)

1. **YAULIMWENGU S/O MASHINGA @ AY**
2. **SAID S/O JOHN @ HOJA** } **..... APPELLANTS**
3. **SELEMANI S/O RASHID @ MASELE**

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last order: 24.03.2020

Judgment date: 02.04.2020

A.Z. MGEYEKWA, J

The appellants, Yaulimwengu S/ Mashinga @ AY, Said S/O John @ Hoja and Selemani S/O Rashid @ Masele were arrainged in the District Court of Chato and convicted for the offence of armed

robbery contrary to section 287A of Penal Code Cap.16 [R.E 2019]. The particulars of the offence are that it is alleged by the prosecution that the appellants jointly and together on 1st May, 2016 at about 01:00 hours at Kibehe Village within Chato District in Geita Region did steal three mobile phones make Nokia valued at Tshs. 150,000/= and cash money Tshs. 830,000/= all properties valued at Tshs. 980,000/= the property of Medard S/O Philbert and immediately before such stealing did threaten him by using domestic weapons in order to obtain the said properties.

Dissatisfied the appellants filed a joint memorandum of appeal which contains seven grounds of appeal which may conveniently be abridges into six of them as follows:-

1. *That, the Honourable Magistrate erred in law and fact when he failed to properly re-evaluate the evidence as a whole, which includes documental, oral testimonies and where available circumstantial evidence in the case as a whole that helped to prove or establish a fact to the satisfaction of the court that the fact has been proved beyond reasonable doubts thereby coming to an erroneous decision.*

2. *That, the Honourable Magistrate erred both in law and in fact when he let his opinion, emotions, feeling and wishes take precedence over the law thereby reaching a wrong decision hence occasioning a miscarriage of justice.*

3. *That, the Honourable Magistrate erred in law and in fact by reaching at a wrong decision without granting the right to be heard to the parties hence occasioning a miscarriage of justice.*

At the date of hearing this appeal, the appellants appeared in persons while Ms. Fyelegete, learned State Attorney represented the respondent.

Supporting his ground of appeal, the first appellant stated that he was dissatisfied with the lower court decision. He lamented that he was arrested and charged with an offence which he did not commit. He prays this court to set him free.

In his submission, the second appellant argued that he has filed grounds of appeal after being dissatisfied by the trial court decision. He stated that he was arrested on 27th June, 2016 and was arraigned in court on 11th July, 2016. He ended by praying this court to set him free.

The third appellant had not much to say, he prays this court to consider his ground of appeal.

On the other hand, he learned Senior State Attorney opted to submit the grounds of appeal generally, she supported that the visual identification was not well elaborated; PW6 said he was able to identify the appellants by using electricity light but he did not mention the intensity of light and did not mention if he knew them before thus the elements in the case of **Waziri Amani v The Republic** 1980 TLR 250 was not met therefore she supported the first ground of appeal.

She continued to submit that PW6 narrated further that after the arrest of the second appellant, he admitted to having committed the offence and named his two fellows whereas, the Police Officer arrested all of them and they lead the Police Officer to the scene of the crime. She further submitted that PW1, PW2, and PW4 narrated how the appellants committed the offence and PW3 testified that he heard the accused story when they were narrating their story to the Police Officer.

It was Ms. Fyeregete further submission that the prosecution witnesses evidence was corroborated by cautioned statements that were tendered in court and admitted as Exh.PE1, Exh.PE2, Exh.PE3; PW7 tendered Exh.PE1, PW8 tendered Exh.P2 and PW10 tendered Exh.P3. She went on to submit that the appellants did not object the tendering of the cautioned statements and they narrated how they planned the whole incident thus the cautioned statements are heavy enough to ground conviction.

Ms. Fyeregete argued further that the appellants lamented that the appellants did not raise any objection that they were tortured and forced to record their statements, therefore the same is an afterthought since they were required to raise their concern during trial. She urged this Court to disregard this ground of appeal.

The learned Senior State Attorney submitted that the appellants are complaining that they were not represented by any Advocate, she said that the Republic is not responsible for representing the

appellants but they were at liberty to hire an Advocate. She urged this court to disregard this ground of appeal.

It was Ms. Fyeregete further submission that the appellants are complaining that they were detained for a long time before being brought before the court, She said this ground is baseless since they had a chance to cross-examine the Police Officer who arrested them.

Lastly, Ms. Fyeregete refuted that the arresting Officer did not testify because the case was investigated and thereafter the appellants were arrested.

In her conclusion, Ms. Fyeregete prays this court to dismiss the appeal and find that they were rightly convicted as charged.

In his brief rejoinder, the 1st appellant insisted this court to adopt their grounds of appeal and stated that he was tortured and forced to sign the cautioned statement which was already been prepared.

The second appellant maintained his submission in chief and added that PW1 testified that the victim was brought to the hospital on 10th while the alleged crime was alleged to have been committed on 5th. He went on claiming that they were forced to go to the scene of crime. He prays this court to set him free.

In his rejoinder, the third appellant reiterated his submission in chief and argued that he did not make any statement.

Having considered the grounds of appeal and the submissions made by the learned Senior State Attorney and the appellants, I should state at the outset that in the course of determining these grounds, I will be guided by the canon of the criminal cases which places on the shoulders of the prosecution, the burden of proving the guilt of the appellants beyond all reasonable doubt as it was held in the case of **Nathaniel Alphonce Mapunda and Benjamini Alphonce Mapunda v Republic** [2006] T.L.R. 395.

In determining the appeal before me I will determine the issue of ***whether the appeal by the appellant is founded.***

Using this legal benchmark, the prosecution dutifully, lined up five (11) prosecution witnesses, also produced caution statements and PF3 as exhibits, which in total intended to prove the case to the standard required by law. To begin, I am in accord with the learned State Attorney that the evidence of visual identification which is the gist of the 2nd and 3rd grounds of appeal was not proved to the standard requirement of the law. I have perused the trial court records and found that none of the witnesses who alleged that they were robbed could identify the bandits. PW4 and PW5 testified that he identified the accused by electricity light without describing the brightness if it was bright enough to enable her to identify the appellants. The description of the light was material to determine the issue of whether or not the conditions of identification and visibility were favourable.

The cardinal principle of visual identification was set out by the erstwhile Court of Appeal of East Africa in the famous case of **Republic v Eria Sebwato** [1960] E.A 174, which was later thoroughly adopted in the case of **Waziri Amani v Republic** [1980]

TLR 250. Adapting the principle in the two case, the Court in **Raymond Francis v Republic** [1994] TLR 100 stated that:-

> *"... it is elementary that in criminal case whose determination depends essentially on identification, evidence on condition favouring a correct identification is of the utmost importance."*

Failure for the appellant to describe the nature of the light means there was a possibility of mistaken the accused taking to account that the incident occurred at night and that the victim has never met the accused before. In the case of **Riziki Method Myumbo v R 2007,** the first appellant judge said that :-

> *" Visual identification is a class of evidence that is vulnerable to mistake particularly in the conditions of darkness. Courts must as a rule of prudence exercise caution in relying on such evidence. It may result in a substantial miscarriage of justice."*

Based on the above authorities, I am asking myself if the testimonies of PW4 and PW5 could have passed the warnings which have been illustrated in the above holdings, my answer is in the negative. The evidence of PW4 and PW5 was not cogent enough to be safely relied upon in holding the appellants culpable to serious offence as the one which faced the appellants. Had the trial court

cautiously evaluated the testimony of prosecution witnesses in the light of the cited decision undoubtedly, they would have reached a different conclusion.

Addressing the 5th ground of appeal, that the Exh. PE1, Exh. PE2 and Exh.PE3 were obtained under irregularity procedure of law and under the shade of brutality and torture led to involuntarily confessions as well as being detained by police over a period prescribed by law. I had to peruse the court records and found that PW7 interrogated the 2nd accused on 6th July, 2016 and PW7 testified that the interrogation with the 2nd accused led the arrest of the other three accused. PW8 interrogated the 1st accused and PW10 interrogated the 4th accused one Mathayo Constatine. The cautioned statement of the 1st accused (1st appellant) was recorded under section 10 (3) of the CPA and the cautioned statement of the 1st accused was recorded under section 57 of the CPA the 4th accused cautioned statement was recorded under section 57 and 58 of the Criminal Procedure Act, Cap.20 [R.E 2019].

Additionally, there is a contradiction as when the cautioned statements were recorded after being informed by PW7 that he recorded the 2nd appellant cautioned statement and during interrogation the 2nd appellant named other accused. PW9 in his testimony alleged that after the arrest of the 2nd accused, he admitted to have committed the offence being accompanied by his fellow accused, he went on testifying that the 2nd accused information led to arrest the other accused. In the records there is shakeable truth, that the 2nd accused who is alleged to name his fellows was interrogated by Police Officer on 6th July, 2016 at 14:08 hours whereas the cautioned statement of the 1st accused was recorded on 6th July, 2016 at 10:30 hours and the cautioned statement of the 4th accused was recorded on 6th July, 2016 at 11:00 hrs. The cautioned statements are doubtful since the 2nd accused who is alleged to admit committing the crime and who is also alleged to name his fellows was interrogated after the 2nd and 4th accused. The same raises doubt as to how possible the 1st and 4th accused were interrogated by the Police officer before the 2nd accused named them?

Additionally, I have found the most fatal irregularity to be non-compliance with section 50 (1) of the Criminal Procedure Act, Cap. 20 [2019] Section 50 (1) read:-

> " *50 (1) For the purpose of this Act the period available for interviewing a person who is in restraint in respect of an offence is :-*
>
> *(a) subject to paragraph (b) the basic period available for interviewing the person that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence,*
>
> *(b) if the basic period available for interviewing the basic period is extended under section 51, the basic period so extended."*

The court in the case of **Joseph Mkumbwa and Another v R** Criminal Appeal No. 9 of 2007 held that:-

> " ... ***it is now settled law that statements taken without adhering to the procedure laid down in section 48 to 51 of the CPA are inadmissible*** *(see Janta Joseph Komba and 3 others v R Criminal Appeal No.95 of 2006 (unreported). It follows, therefore, that Exh.P27 was not properly admitted. It should therefore be expunged from the records." [Emphasis is mine].*

In the instant case under scrutiny, there is no dispute that the 1st appellant was arrested on 27th June, 2016 and his cautioned statement was recorded on 6th July, 2016, the 2nd appellant was arrested on 29th June, 2016 and was interrogated on 6th July, 2016. The recording of both accused cautioned statements were beyond the basic period of four hours and no extension was sought and obtained in terms of section 51 of the Criminal Procedure Act Cap.20 [R.E 2019]. I have found no credible evidence on record to account for this inordinate delay. That was approximately 7 to 9 days after the appellants were taken under restraint. It follows, therefore, that both Exh. PE1 and Exh. PE2 were illegally obtained and were accordingly improperly admitted in evidence. Thus, I proceed to expunge them from the court record.

Having expunged Exh. PE1 and Exh. PE2 from the court record, I am left with no cogent evidence which is going to implicate the appellants with the armed robbery.

With the foregoing observation, I find no need to discuss the remaining grounds of appeal, which was raised by the appellants as

to do so would be a mere academic exercise. It only suffices to hold that the trial court's conviction against the appellant was not proved beyond reasonable doubt and occasioned to failure of justice on the part of the appellant.

For the foregoing reasons, I have found myself enjoined by law to allow this appeal in its entirety. I quash the conviction and set aside the sentence imposed on the appellants. I accordingly order for their immediate release from prison, unless they are lawfully detained. Order accordingly.

DATED at Mwanza this 2nd day of April, 2020.

A.Z MGEYEKWA

JUDGE

02.04.2020

Judgment Delivered in Court Chambers on 2nd day of April, 2020 in the presence of the appellants and Ms. Fyeregete, the learned Senior State Attorney.

THE HIGH COURT OF TANZANIA
MWANZA

A.Z MGEYEKWA

JUDGE

02.04.2020