IN THE HIGH COURT OF TANZANIA
AT BUKOBA
APPELLATE JURISDICTION

HIGH COURT CRIM. APP. NO. 8 OF 2007
(Arising from Karagwe District Court Crim. Case No. 305 of 1999 - before Komba D.D. Esq. DM).

ADOLFU ANGELO &
HABIBU KHASIM ... ... APPELLANTS
Versus
THE REPUBLIC ... ... RESPONDENT
24/08 & 19/11/07

JUDGMENT

Lyimo, J.

This Appeal is consolidated with Criminal Appeal No. 10 of 2007. The Appellants Adolfu Angelo and Habibu Khasim were charged before the Karagwe District Court in Criminal Case No. 305 of 1999 jointly and together with another accused who was acquitted, with the Offence of Armed Robbery contrary to Sections 285 & 286 of the Penal Code. During the trial, the first appellant – Adolfu Angelo was the 3rd accused, while

the second appellant – Habibu Khasim was the first accused. For the purposes of this appeal, I will refer to their respective positions they held at the original trial.

The particulars of the Offence alleged that the three accused persons, jointly and together on 10th February 1999 at around 1.00 a.m. in Rwambaizi Village, Karagwe District, robbed from one Richard Maguru an assortment of merchandise valued at Tshs. 720,000/- and that at the time of the robbery used a firearm in order to obtain or retain the said stolen property.

After the close of the prosecution's case and the three accused persons having given their sworn evidence, the trial District Magistrate convicted the first and third accused persons as charged but acquitted the second accused person for lack of sufficient evidence. The first and third accused persons have now filed their appeals against conviction and sentence. In their separate appeals which have been consolidated, they have raised three major grounds of appeal.

In the first ground of appeal, the two appellants have complained the trial District Magistrate grossly

misdirected himself in law in admitting under Section 34B of the Evidence Act, the statements of prosecution witnesses whom the Police had failed to summon. In their second ground of appeal, appellants have complained that the trial Court seriously erred in law to convict them basing its decision on the repudiated cautioned statements which they deny to have made, and that they were tortured before being brought to trial. In the third ground of their appeal, they have also challenged the trial court's decision in accepting the evidence of the second accused – an accomplice in the matter, and which evidence lacked corroboration.

At the hearing of this appeal, the first appellant – Adolfu Angelo reiterated his grounds of appeal in that the evidence was insufficient to convict him. Further, that the statement of the Complainant which was tendered under Section 34B of the Evidence Act, was contradictory to that of the other prosecution witnesses (Pw3) and the statement of Pastory. On the other hand, the second appellant - Habibu Kassim had nothing new to add, other than assert that the

complainant did not give evidence and that the items had not been sufficiently identified as his property.

First, let me start by observing that this is one of the cases poorly handled by the prosecution. Although the second appellant was the first to be arrested and charges read to him on 6th December 1999, it was not until July 2002 when the hearing of the case took off. The prosecution case was riddled with several procedural errors to which the trial District magistrate did not address his mind properly. My duty will be to try and put together the facts and evidence derived therefrom, in order to be satisfied whether their convictions can be sustained.

The prosecution summoned three witnesses only - A.L. Olomi SP, the investigator of the case as Pw1, No. C.3019 D/Sgt Beatus – Pw2 and No. E.8878 D/Cpl. Masanga as Pw3. After the evidence of the above police officers, the prosecution closed its case and the appellants were put on their defence.

Pw1 SP Olomi testified before the court that on 10/02/1999 he received information that the shop of one Richard Maguru had been broken into by armed robbers. That the door to the shop was blown up by a big boulder, commonly referred to as "Fatuma" and that a variety of various commodities had been stolen. As the officer in charge, he detailed one police officer, Detective Sgt. Beatus to proceed to the scene of crime and conduct investigations. As a result, D/Sgt Beatus and other officers managed to recover a total of nine (9) cartridges from outside the shop. They observed that the shop was indeed broken into and various commodities stolen.

Pw1 further informed the court that 12/02/1999 he also received credible information that the suspects were hiding at a certain house at Omurushaka. He kept surveillance over the said house up to 21.00 hrs and he did not see any person enter the same. He left the area and went to prepare for the arrest of the suspects. According to him, he returned to the area at around 1.00 a.m. when he saw two people sitting outside the house. He then went to the house of the

third accused (the 1st appellant – Adolfu Angelo) and met his wife called Juliet who told him that those who had ran away were her husband and one Edwin. He then went to the house of the second appellant – Habibu Kassim whereby he found the door locked from outside with a latch - "komeo", and when he opened the door, he found the second accused asleep. Upon Pw1 interrogating the second accused he reported that he was a mere visitor of the 2nd appellant and that he was proceeding to Murongo where he works as driver. Pw1 arrested the 2nd accused, impounded two bags, a small one and another big one with a padlock. As the second accused did not have the keys to the big bag, they were taken to the Police station. When the big bag was opened at the Police station, there were found an assortment of clothes, including one SMG firearm with a magazine containing 12 live rounds of ammunition. The second accused denied any knowledge about those items but he was nevertheless arrested.

Two days later, on 14/2/1999, Pw1 learnt that the 1st appellant – Angelo had been arrested. He was arrested

by the local vigilantes 'sungu sungu" while hiding in a thicket. Pw1 went on to testify that when he interrogated the 1st appellant, he admitted to have participated in the robbery at Rwambaizi and that the 2nd appellant named **Ayubu Kassim**, **Edwin Domisiani** and one **Sukita** as his collaborators. That the 1st appellant took him to these suspects but did not find them. He later required D/Sgt Beatus to record the statement of the 1st appellant, a matter which he complied with.

In the course of his evidence, SP Olomi further testified how he managed to send the firearm and the munitions to the ballistic expert, and made reference to the report he received. He also stated that in December 1999 the 2nd appellant was arrested while at Benaco and upon interrogating him, the 2nd appellant also admitted to have participated in the Rwambaizi incident. According to Pw1, the owners of the stolen articles were called and managed to identify the properties. And as the ballistic report on the firearm revealed that it was the same firearm that had been used in a separate homicide incident the appellants

were also charged with murder. I will revert to this aspect later in the course of the judgment especially as it relates to the various charges laid at the doors of the appellants.

According to Pw1, after the complainant had identified the articles stolen from his shop, the appellants were then charged with two counts, one of armed robbery, and the other, of being in unlawful possession of firearms. In conclusion, he tendered the list of items stolen from the complainant's shop as Exh. A collectively.

Pw2 – D/Sgt Beatus gave evidence to the effect that on 10/02/1999 he was directed to go to Rwambaizi to conduct investigations into allegations of armed robbery. The complainant was one Richard Maguru who alleged that during the robbery, various commodities including cash money was stolen. At the scene of the crime, he observed that the door to the shop had been smashed by the use of "fatuma" and that he also managed to retrieve nine (9) spent cartridges of an SMG firearm. He interviewed the

complainant who could not properly identify the robbers. So he finally submitted the cartridges to the OC-CID. The rest of his evidence related to how he had recorded the cautioned statements of the 1st appellant on 15/02/1999 and that of the 2nd appellant on 2/12/1999, which statements were tendered as exhibit **C** and **D** respectively.

Pw3 – E8878 D/Cpl Massanga, gave evidence on how he received the two bags referred to above. He opened them, and from one of the bags, an SMG firearm together with live ammunitions. In his evidence, he stated that when the police officers interrogated the suspects, it was the 2nd accused (who was acquitted) who named the others and said that the gun was used on several incidents involving robbery. And that it was the second accused who led the police to where the other accused were. After the evidence of Pw3, the prosecution closed its case and the appellants were then put on defence.

In his defence, the 1st appellant (Adolfu Angelo) testified that he was arrested on 14/02/1999 by the

vigilantes on an arrest warrant issued by the District Court for jumping bail in Criminal Case No. 227/1997. That after the arrest, he was tortured and forced to record statements in relation to various cases – such as Crim. Case No. 224/98, Criminal Case 5 of 1999 and Criminal Case 43 of 1999. He disputed the evidence of Pw2 alleging that he had been beaten and forced to admit that he committed robbery in concert with the 2nd appellant. In effect, he retracted the contents of the statement recorded by Pw2 – exhibit D.

The second appellant, just like the 1st appellant, gave evidence on oath and stated that on 27/11/1999, he was at Ngara, when he met Pw1 who arrested him and took him to Police Station Kayanga the next day (28/11/1999). He stated that while at Kayanga Station, he was interrogated by police officers who showed him a list of names of suspected criminals. He alleged that he was given that list and was required to indicate which of those he could identify. Since he could not do so, he asserted that he was beaten until he lost consciousness and fearing for his life, he gave a cautioned statement which then tendered in court as

exhibit C. He disputed the evidence of Pw1 and Pw2 and complained about the procedure adopted by the trial court in admitting the statements of those witnesses who did not come forward to testify. Both the 1st and the 2nd appellants did not call witnesses in support of their evidence.

In his Judgment, the learned trial District Magistrate made a review of the evidence of Pw1, Pw2 and Pw3, including the defence case. And as can be seen from pages 4 to 6 inclusive of the typed judgment, the trial magistrate relied very heavily on the statements by Richard Maguru the complainant and Pastory Pancras, which were tendered under Section 34B of the Evidence Act. In this Appeal, the two appellants have strongly attacked the decision of the trial magistrate in admitting the statements made by Richard and Pancras.

In the case of *DPP Vs. Ophant Monyancha 1985 TLR 127 (HC) Mwanza Registry; Mwalusanya J. considered* among other issues, the admissibility of statements made to the Police – and where the statement were

tendered in court in the absence of their makers in line with the Evidence Act 1967, s. 34B(2). In that case, the respondent was charged with two offences of corruptly soliciting and receiving a bribe c/s 3 of the Prevention of Corruption Act 1971. The prosecution sought to rely on Police statements made by two witnesses but the two witnesses were not in court. The trial magistrate held that the statements were inadmissible in evidence. In the event the prosecution failed to prove its case beyond reasonable doubt and the respondent was accordingly acquitted. The Director of Public Prosecutions appealed to the High Court arguing that the trial magistrate erred in rejecting the statements because the conditions for admitting them had been fulfilled according to s.34B(2)(a) of the Evidence Act, 1967. The court held –

> *"The correct interpretation of s.34B(2) of the Evidence Act, 1967, is that in order for a statement to be admissible under that section,* ***all the conditions laid down in all the paragraphs, that is from (a) to (f), of the subsection must be met****. As the conditions laid down in some of the paragraphs were not met in this case, the trial magistrate correctly rejected the admission of the two statements."* (Emphasis mine)

In dismissing the appeal, the court made reference to the case of **Rep. Vs. Hassan Jumanne**, High Court, Dodoma Criminal Revision 2 of 1983 (unreported). In that case, honourable Mr. Justice Lugakingira as he then was; had this to say:-

> ***"The provisions of s. 34B (2) are cumulative and all the paragraphs (a) to (f) have to be satisfied.*** *Hence to admit the statement, it must be reasonably impracticable to call the deponent; the statement must have been signed by him; it must contain a declaration of the person who read it to the effect that it was so read."* (End of quote, emphasis mine.)

In our instant case, at the top of pg. 28 of the typed proceedings, the PP on 30/09/2000 stated and I quote:-

> ***"P.P. The Intended witnesses are no where to be seen. I pray to tender their statements u/s 34 B of the TEA.***
> ***Order: Accused to be supplied with those witness statements."***(End of quote.)

And on the next date of hearing, the statements were tendered after being read aloud in court. It will be seen that the prosecutor never ever attempted to make any effort to prove any of the conditions warranting the

admission of those statements. That was wrong. I have read carefully the two statements tendered by the prosecution. As pointed out by the first appellant, the two statements materially contradict each other just as they do contradict the evidence of Pw3.

The complainant - Richard Maguru recorded his statement on the next day following the robbery incident. In that statement, which took place during the night, he purported to have identified all his assailants, both by naming them and by stating their places of residence. He identified the following people:

1. Florian Alphonce @ Mapato (who had an axe)
2. Amdani Kaihura from Nyarwere
3. Adolfu Angelo – ex-employee of sub-treasury Karagwe
4. Habibu Kassim from Kamegambo, and
5. Edwin Domician – ex-schoolmate

From the statement submitted by Pastory Pancras it is shown that immediately after the bandits blew up the door of the shop, the complainant ran for his safety. Pancras states and I quote:-

"Nilipofika niliona watu wapatao kama sita....mmoja kati yao alikuwa kama umbali wa hatua saba toka kwenye mlango wa duka la Richard....Wakati huo Richard alikuwa ndani na hapo walikuwa wameshavunja tayari na wengine walishaingia ndani. Ndipo mimi alinifuata mtu aliyekuwa pembeni aliponifikia nilimkamata, nilipomkamata niligundua alikuwa na silaha – bunduki hiyo niliing'ang'ania hiyo bunduki wala hatukuongea kitu, alipoona nataka kumzidi nguvu aliwaita wenzake walete panga tummalizie huyu, kisha alifyatua risasi hewani bado nikawa nimemng' ang'ania, wale wenzake walianza kutoa mali ya duka na wanapokezana; na wakati huo Richard alikuwa ameshakimbia baada ya kusikia mlio wa risasi, nilijaribu kuwaita walinzi lakini hawakujitokeza hata mmoja... Mimi sikutambua mtu hata mmoja kati ya majambazi hayo..."(End of quote).

The robbery took place at night. According to the complainant, there was a lantern burning. He asserted that he managed to identify those robbers by use of light from the lantern. However, Pancras who responded to the alarm raised by Richard stated categorically that it was dark and he could not identify any of the robbers. None of the Police Officers who gave evidence at the trial bothered to explain what happened to the rest of the suspects who were said to have been identified by Richard. Those were Florian

Alphonce@ Mapato, Amdani and Edwin Domician. Secondly, going by the statement of Richard in respect to the stolen goods, there is no indication on how he had identified them at the Police. Admittedly, those were common goods, ordinarily available from shops or the open market. Richard was not summoned to testify on how he identified the commodities. It cannot be said that the goods were sufficiently identified to be those stolen from his shop on the night of the incident. The statements made by Richard and Pancras should not have been admitted in evidence. As it is, once the statements by Richard Maguru and Pancras are struck off the record of proceedings, there is not much left to support the convictions of the appellants. There is yet another important legal point raised by the appellants.

During the hearing of the appeal, it was pointed out by the appellants themselves and the State attorney for the Republic that the conviction of the 1st appellant was based on three factors -

a) The confession of the co-accused (2nd accused Ibrahim Ramadhani)
b) The finding of the stolen properties and

c) The cautioned statement of the appellant himself.

Touching on the confession of the co-accused it must be pointed out that before such statement can be relied upon; there must be independent evidence to support it. The second accused was a person with some interest to serve. He was an accomplice who could not and should not have been relied on. While in court, he merely stated that he was a stranger in the area, that he just came across the 1st appellant who was his uncle and that as he was going to Murongo, he agreed to spend the night at his uncle's room. To the contrary, a search at the Karagwe District Court Registry has revealed that apart from the Crim. Case No. 305 of 1999 wherein the second accused was jointly charged with the appellants, he was also facing charges in ***Karagwe District Court Econ. Crim. Case No. 5 of 1999*** where he was the first accused, and the appellants as co-accused persons.

In the case of ***Asia Iddi Versus the Rep. (1989) TLR 174,*** this Court, Nchalla J. as he then was, examined the evidence of confession by a co-accused and held -

(i) *Conviction cannot be based solely on a confession by a co-accused. There must be, in addition, other independent testimony to corroborate it;*

(ii) *Evidence of a person who has an interest to serve also needs corroboration as such it cannot be used to corroborate other evidence.*

In that case, the appellant Asia d/o Iddi was jointly charged in the District Court at Kondoa with another person, Clemence s/o William, with the offence of stealing by servant c/s 270 and 265 of the Penal Code, Cap. 16. The appellant Asia, and her fellow accused, Clemence, were convicted of the offence of theft by public servant c/s 270 and 265 of the Penal Code and were each sentenced to five (5) years imprisonment under the Minimum Sentences Act, 1972. Asia was not satisfied with the decision of the District Court, she appealed to against conviction only. The 2nd accused, Clemence, did not appeal. The State Attorney did not support the conviction that was entered on the appellant by the District Court. He therefore conceded to the appeal.

In yet another case of ***R. v Kusenta Cheligia & another [1978] LRT No. 11*** Mr. Justice Mnzavas (as he then was) held, inter-alia that –

> *"where an accused person implicates himself with an offence, his statement that a co-accused participated in the commission of the offence must be corroborated by other independent evidence pointing to the guilt of his co-accused."*

In that connection the court considered also the decision in ***Abraham Wilson Saiguran v R. [1981] TLR P.265.*** Having considered the evidence on record, once the statements of the complainant and that of Pancreas are struck out, and the evidence of 2nd accused Ibrahim Ramadhani discounted, then there is no other evidence on record to go by in order to justify a conviction.

There is another point which calls for consideration in respect to the charges laid at the door of the appellants. It is to be observed that at the original trial, the appellants (together with the 2nd accused who was acquitted) were also charged with the Offence of Receiving Stolen Property contrary to Section 311(1) &

(2) of the Penal Code. In view of the fact that no evidence was adduced to show how the items recovered by the police were identified by the complainant, and since the complainant did not give evidence at the trial, it goes without saying that the prosecution did not prove its case to the required standard. In the upshot, the conviction entered against both appellants is hereby quashed and the sentences set aside. The appeals are allowed in their entirety.

Order accordingly.

Lyimo J.

At Bukoba
19/11/07