IN THE HIGH COURTOF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL CASE NO. 86 OF 2005

ORIGINAL CRIMINAL CASE NO. 221 OF 2004

OF THE DISTRICT COURT OF **KAHAMA** DISTRICT

AT KAHAMA

BEFORE; J. MATOKE – Esq.; PRINCIPAL DISTRICT MAGISTRATE

X.F.621 P.C. ELIFURAHA.....APPELLANT

(Original Accused)

Versus.

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

JUDGEMENT

1st August, 07 & 28th November, 07

KIHIO, J

The appellant, EX. F.621. PC Elifuraha and one Buchika s/o Kalulu who was acquitted for no case to answer were jointly charged with Armed robbery contrary to section 285 and 286 of the Penal code Cap.16 Vol.1 of the laws. He was subsequently convicted of Robbery with violence and sentenced to fifteen (15) years imprisonment.

He is now appealing against both conviction and sentence.

The prosecution case was that, on 21/5/2004 at about 21.00 hours the car, Toyota Cressida, registration numbers T.779 ABN belonging to Abdi Tamimu Mbaruku (PW.1) and driven by his (PW1's) driver, Athumani s/o Shaban was stolen at Kahama when he (PW.1) was at Igunga. He (PW.1) reported at Kahama Police Station where he made his statements and thereafter accompanied the Police to Igalula Village where he (PW.1) saw his motor vehicle while overturned. No.C.6657, Corporal Omari (PW.2), who was the Magu Police line Major, had assigned the appellant and one No.F.5147 PC Raphael to guard Magu N.B.C. Bank from 17/5/2004 to 22/5/2004 but on 17/5/2004, 18/5/2004 and 19/5/2004 he (appellant) did not report on duty as he had E.D and was on rest as shown in the Duty Roster (Exhibit P3). He (appellant) reported on duty on 20/5/2004 but did not report on duty on 21/5/2004 and he (appellant) was absent at his home when PW.2 went there. He (appellant0 was seen at his place of work by PW.2 on22/2/2004 at 9.00 pm. On 21/5/2004 at around 9.45 pm, no. D.4244, Corporal Steven (PW.3) and other two Police officers were on duty at Maronga Police road block and the motor vehicle with registration numbers T.779 ADN came there when a TPDF Soldier, a Police Officer who wore a Police Uniform which has Force no.F.621 written using ball pen and other three people were in that motor vehicle. In June 2004 PW.3 and his co-Police officers were called at Mwanza Police Station to identify the Police Officer whom they saw at the barrier at Maronga and he (PW.3) identified the appellant because he went to the fire where they (PW.3 and others) were warming themselves and sat down and talked with them. He (PW.3) did not identify Buchindika Katuke because it was dark inside the motor vehicle.

No. D. 3761 – Detective Corporal Abrahaman (PW.4) recorded the statement of the appellant (Exhibit P.4) who allegedly admitted to have committed the Armed robbery. He (PW.4) recorded the statement of the complainant, Athumani s/o Shaban (Exhibit P7). A.S.P. Mayila (PW.5), OCS at Kahama Police Station, conducted identification parade on 31/5/2004 and Athumani s/o Shabani identified the appellant as the person who had hired the motor vehicle, Toyota Cressida with registration numbers T.779 ABN and identified Buchindika Katuke as the person who was together with the persons he did not identify and the one who fastened his (Athumani s/o Shaban's) hands and legs with ropes when they removed him from his motor vehicle.

The appellant told the trial court that when he and P.C Raphael were guarding at Magu N.M.B.Bank on 16/5/2004 he felt sick and on 17/5/2004 he went to the hospital where he was given E.D. for three days, that is 17/5/2004, 18/5/2004 and 19/5/2004. He (appellant) further told the trial court that he reported on duty on 20/5/2004 but he was still weak as he was having hourly injections and on 21/5/2004 he returned to the hospital where he was given E.D for 21/5/2004 and 22/5/2004 and he went home to rest. He (appellant) went to the Police Station on 22/5/2004 at 9.00 am where he was put in lock – up and taken to Mwanza where the OCD charged him at Court Martial. He (appellant) informed the trial court that he was taken to Kahama police Station where identification parade was conducted and one youth identified him on allegations that he (appellant) was the one who hired his (PW3's) motor vehicle, allegations which were not true.

The learned Senior District Magistrate said in his judgement.

> ***"In his statement toPW.4, accused (No.F.621 P.C Elifuraha) told the police Officer that at the road block they were not allowed to pass as the road was closed by them. That is also what PW.2 told this court in his testimony. In his defence accused told this court on the date of identification parade one youth came and identified him on the parade. On asking him as to how he had identified him, he (that youth) told him that he identified him as he is the one who had been identified by witnesses at Kahama that he was at Kahama on the fateful day and he did the robbery."***

He also said in his judgement;

> ***"When testifying in court, accused did not ask Questions as to whetherPW.4 who had recorded his Statement, had threatened him or forced him to sign on Exhibit P4. He has just raised so in his defence. But he admits, as prosecution witnesses say, that on the date of conducting the identification parade, one youth identified him to be the one who had approached him on 21/5/2004 to hire his motor vehicle. That has been corroborated by PW.5, who is the one who conducted the identification parade. That youth is Athumani s/o Shaban whose statement was tendered***

in court as per section 34 B of the Evidence Act, as he was not available to attend Court to testify."

He further said in his judgement;

"But there is evidence that accused was in the company of other people when they robbed that motor vehicle from the driver. From Kahama while driving to Isaka direction on the way the driver was thrown away on the road. The motor vehicle proceeded up to Isaka Road block where P3 saw in the motor vehicle one person who had put on TPDF uniform, the accused and other 3 men who were in the car when PW.3 and his fellows went to check it. So accused, who was in the group of the other people while conveying that motor vehicle to Shinyanga direction, this was robbery with violence as the driver had been fastened and threatened all round while the motor vehicle being robbed."

The appellant raised eight grounds of appeal in his Petition of appeal. However, basically, his grounds of appeal are mainly four, namely; 1. That, there was no sufficient identification evidence against him. 2. The learned Senior District Magistrate erred in admitting the statement of Athumani in evidence. 3. The trial District Magistrate erred in admitting the appellant's

caution statement which was retracted without conducting a trial within trial. 4. There was no evidence which proved beyond reasonable doubt the appellant's guilt.

The appellant did not wish to be present during the hearing of his appeal.

The Republic is represented by Mr. Mkoba, learned State Attorney who did not seek to support the conviction.

He submitted that the victim was not called in court to testify and the people who attended the identification parade were also not called to testify. He further submitted that it was doubtful if PW.3 managed to see the number on the appellant's uniform with the aid of fire light He argued that the record does not show that the prosecution made any efforts to trace the victim. He further argued that the appellant objected the tendering of his caution statement as an exhibit on grounds that he did not make that statement and that he was forced to sign the said caution statement but there was no trial within trial conducted at the trial court. He referred this court to the case of Masanja Mazambi V.R. (1991) T.L.R. 200 where the Court of Appeal of Tanzania held that;

> ***"Where the accused objects the tendering of the caution Statement trial within trial should be conducted. He Contended that the evidence under which the appellant Was convicted is doubtful and so the guilt of the Appellant was not proved beyond reasonable doubt."***

The first issue for determination here is whether the statement of Athumani s/o Shaban was properly admitted in court or not.

It is apparent on the trial court's record that on 30/6/2005 when D.3761 Detective Corporal Abrahaman (PW.4) prayed to tender the statement of Athumani s/o Shaban (the complainant) under section 34 B of the Evidence Act, No.6 of 1967 the appellant and one Buchindika s/o Kalula, who was the 2nd accused person by then, objected the application to tender the said statement on grounds that the witness, Athumani s/o Shaban was available within Kahama. However, the said statement was admitted as Exhibit P7.

In the case of D.P.P. V.Ophant Manyancha (1985) T.L.R. 127, my brother, Mwalusanya, J (as he then was) laid down the principle that;

> ***"In order for the statement to be admissible under Section 34 B (2) of the Evidence Act, 1967 all the conditions laid down under that section, to wit, from (a) to(f) must be met."***

The Court of Appeal of Tanzania in the case of MT.5659 PTE Aphonce s/o Mathis V.R. – Criminal Appeal No.127 of1990 (unreported) held, inter alias;

> ***"Section 34 B (2) outlines six conditions, paragraphs (a) to (f) for admitting a statement under that section. Unfortunately the six paragraphs are not connected by***

The conjunction "or" to show that they are in the Alternative. They are merely punctuated by semi colons. We also sadly note that paragraph (e) is not connected to paragraph (f) by a conjunction "and" which would have meant that they are cumulative. However, reading through them we have come to the firm view that they are cumulative, none of the six paragraphs can stand on it's own. If one condition is violated then the statement is in admissible Exhibit D1 offends paragraph (c) in that it does not contain a declaration by the person who made it is true to the best of his knowledge and belief. Therefore Exhibit D1 was in admissible."

In the instant case, Exhibit P7 offends subsection 2 (a) of section 34 B of the Evidence Act, 1967 in that it is not shown that the said Athumani s/o Shaban was outside Tanzania and it was not reasonably practicable to call him as witness or if all reasonable steps had been taken to procure his attendance but he could not be found. Therefore (Exhibit P7) was in admissible.

I entirely agree with Mr. Mkoba's submission that the record does not show that the prosecution made any efforts to trace the victim

The second issue is on identification. The question here is whether there was sufficient identification evidence against the appellant.

The testimony ofD.4244 Corporal Steven (PW.3) at the trial court was that he identified the appellant who had Force number which he had written using a Bic ball pen to be F.6221 at 9.45 p.m at Maronga Road block. His (PW.3's) evidence, in cross – examination, was to the effect that he (appellant) sat with them at the fire and so he (PW.3) easily read his (appellant's) Force number which was written using a Bic ball pen.

It was also his (PW3's) testimony at the trial court that in June, they were called at Mwanza Police Station to identify the Police Officer whom they had seen at the barrier and that they identified him (appellant) at Mwanza as the one who met them (PW.3 and others) at the Road block.

PW.3's evidence that he identified the appellant who had Force number which he had written using Bic ball pen to be F.621 at 9.45 p.m at Maronga Road block is hardly enough. He (PW.3) did not give the features of the appellant. He (PW.3) did not even explain the distance between him and the appellant at the time of identification so as to be able to read the Force number which was written using Bic ball pen.

Unfortunately, PW.3 was not called at the identification parade to identify the appellant as the Police Officer he (PW.3) allegedly saw at the Road block on 21/5/2004. Admittedly, his (PW3's) evidence is of a general nature on the identity of the appellant when he saw him at the Road block.

Mr. Mkoba correctly submitted that it was doubtful ifPW.3 managed to read the Force number allegedly written using Bic ball pen with the aid of fire light.

From the evidence adduced at the trial court, it is doubtful on whether the appellant was properly identified by PW.3.

The third issue is whether the learned Senior District Magistrate properly admitted the appellant's Cautioned statement recorded before D.3761 – Detective corporal Abraham (PW.4).

It is apparent that the appellant objected the tendering of his caution statement (Exhibit P4) as an exhibit on grounds that he did not tell Detective Corporal Abraham anything but he forced him (appellant) to sign on those papers. However, the learned Senior District Magistrate admitted the appellant's cautioned statement as Exhibit P4.

Mr. Mkoba correctly referred this court to the case of Masanja Mazambi V.R (1991) T.L.R. 200 where the court of Appeal of Tanzania held that;

> ***"A trial within trial has to be conducted when ever an Accused person objects to the tendering of any Statement he has recorded."***

The court of Appeal of Tanzania's in the case of Emmanuel Joseph @ Gigi Marwa Mwita V.R – Criminal Appeal No.57 of 2002 – Mwanza registry (unreported) enunciated the principle that;

"Unlike the practice applicable in the High Court where a trial within trial is held in order to establish the Voluntariness of a disputed statement, in the subordinate courts no such practice is applicable. In that case, where a situation arises, say, in the District Court as happened in this case, an enquiry on the Voluntariness or otherwise of the statement can be as certained from the evidence on the record and what the trial magistrate did at the trial."

In the instant case, it is not shown in the trial court's record that the learned trial Magistrate made any enquiry to resolve the issue of the admissibility of the caution statement (Exhibit P4) the appellant objected to it's tendering in court. As there was no enquiry made by the learned Senior District Magistrate to resolve the issue of the admissibility of the caution statement (Exhibit P4) that statement was not properly admitted.

The caution statement (Exhibit P4) was in admissible for failure to make an enquiry to resolve the issue of it's admissibility.

Even assuming that one may argue that the caution statement (Exhibit P4) was properly admitted, the appellant's retracted confession was not properly acted upon to the detriment of the appellant. There was no corroborative evidence on the retracted confession and it was not shown that the trial court warned itself on the dangers of acting upon the uncorroborated confession and was fully satisfied that such confession could not but be true.

The fourth issue is whether there was sufficient evidence which proved beyond reasonable doubt the appellant's guilt.

Once Exhibit P4 is excluded, there is no evidence left under which to base conviction. As I have already indicated, the identification evidence of PW.3 under which the learned Senior District Magistrate based the appellant's conviction is doubtful.

I am satisfied that the guilt of the appellant has not been proved beyond reasonable doubt.

Therefore, the conviction against him was not well founded.

For the foregoing reasons, the appeal is allowed. The conviction is quashed and the sentence is set aside.

The appellant is to be released forthwith unless otherwise lawfully held.

S.S.S. KIHIO

JUDGE

28/11/2007

COURT; - Judgement delivered in the presence of Mr. Mokiwa, learned State Attorney and in the absence of the appellant.

S.S.S. KIHIO

JUDGE

28/11/2007