IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

DC CRIMINAL APPEAL NO. 94 OF 2020

(Appeal from the decision of the District Court of Momba at Chapwa in Criminal Case No. 86 of 2018)

ALEX MWASHILINDI.....1ST APPELLANT

DANIEL SHOMBE.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Hearing : 24/08/2020
Date of Judgement: 06/10/2020

MONGELLA, J.

In the District Court of Momba at Chapwa, the appellants were charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 as amended by Act No. 3 of 2011. It was alleged that on 27th March 2017 at night hours at Mwaka area within Momba District in Songwe Region, the appellants did steal one motorcycle with reg. no. MC 409 BNM make T-better valued at T.shs. 1,840,000/- belonging to one Vumilia daughter of Samwel. Immediately before and after stealing did threaten one Lazaro son of Mwasile with a knife and machete for purposes of retaining the said motorcycle. The trial court convicted them and sentenced them to the minimum term of thirty years

imprisonment. Aggrieved by this decision they have preferred this appeal. I shall present the grounds of appeal as I summarise the submissions of the parties on the same.

On the first ground, the appellants, who appeared in person, averred that the trial Magistrate failed to consider the defence evidence as required under the law. They called for the court to consider the case of ***Goodluck Kyando v. Republic*** [2006] TLR 363 and that of ***Hussein Idd v. Republic***, Criminal Appeal No. 28 of 2015 (CAT at Mbeya, unreported). In reply, Ms. Sara Anesius, learned State Attorney for the respondent first conceded that the appellants' defence was not considered. She however argued that this omission is curable as this Court being the first appellate court has powers to evaluate and consider the evidence and make decision. To support her argument she referred the court to the case of ***Prince Charles Junior v. Republic***, Criminal Appeal No. 250 of 2014 (CAT at Mbeya, unreported), which settled that position.

On the second ground, the appellants claimed that the trial Magistrate erred in law and fact by relying on the cautioned statements which were taken involuntary and in violation of the law by being recorded by police officers with the rank of constable instead of officers with the rank of corporal. On this ground, Ms. Anesius replied that the Evidence Act was amended by Act No. 3 of 2011, at section 3, by providing that the rank of police officers starts from police constable and no corporal as claimed by the appellants. She thus argued that the police officers who administered the cautioned statements were legally permitted under the law.

On the third ground, the appellants aver that the trial Magistrate erred in law and fact by relying on hearsay evidence regarding the invasion of PW1 by the appellants with machete and knife. They argued that there was no any machete or knife tendered in court and no any driving license of the motorcycle drivers was tendered in court. Ms. Anesius replied that the charge was of armed robbery whereby the prosecution is obliged to prove that the victim was threatened and by which kind of weapon. She argued that the witness explained the event as seen from page 6 to 12 of the typed proceedings. She contended that non-tendering of the driving license and the weapons do not render the prosecution as failed to prove the case beyond reasonable doubt. She added that this being not a traffic case, the requirement to tender the driving license is irrelevant.

On the fourth ground, the appellants contended that the trial Magistrate erred by convicting the appellants relying on contradictory evidence of PW1, PW2 and PW6 regarding the time of commission of the offence. They contended that while PW2 stated that the incident occurred on 27th August 2018, PW1 stated that it was on 27th March 2017, and PW6 stated that it was on 28th March 2017. In reply, Ms. Anesius opposed the assertion. She contended that there was no any contradiction as proceedings show that PW6 stated that he was called over the phone on 28th March 2017 and informed of the event that occurred on 27th March 2017.

On the fifth ground, the appellants argued that the trial Magistrate erred by convicting the appellants relying on exhibit PE1 and PE4 tendered by PW1 and PW4 respectively, while no one was identified as being the owner of the said properties/exhibits. On this ground Ms. Anesius argued

that the conviction was not solely based on exhibit P1 and P4, but on prosecution evidence as a whole. Regarding exhibit P1, she argued that the same was tendered by PW1, the driver of the motorcycle, who also mentioned PW6 as the true owner of the motorcycle. She added that PW1 also testified that the appellants also destroyed the helmet in the process of taking the motorcycle. She further contended that the evidence of PW1 was corroborated by that of PW4, a police officer, who stated that he went to the crime scene and drew a sketch map and found the helmet at the crime scene. The said helmet was tendered by PW4 as exhibit PE4.

On the sixth ground, the appellants claim that the trial Magistrate erred by convicting the appellants without taking into account that they were not identified as required under the law. They specifically referred the court to the testimony of PW3 who stated that on the night of the incident he did not see them properly and came to know them at police station. They invited the court to be guided by the principles set in the case of ***Waziri Amani v. Republic*** [1980] TLR 250 and that of ***Jaribu Abdallah v. Republic***, Criminal Appeal No. 220 of 1994 (CAT at DSM, unreported).

Ms. Anesius, on this ground was of the view that though the appellants challenged the evidence of PW3, the court should consider the evidence of PW1, the victim. She argued that PW1 identified the appellants clearly whereby the 2nd appellant was carried by PW1 as a passenger, but also he knew the appellants from before as they used to be his fellow motorcycle drivers. She added that though the incident occurred at night there was light from the motorcycle and from the houses around the

crime scene. The event involved struggle over the motorcycle, thus it was a face to face event.

On the seventh ground, the appellants argued that the trial Magistrate erred by convicting the appellants basing on the cautioned statement that the appellants admitted to have committed the offence while the same was not repeated as required under the law. They referred the court to the case of ***Bushiri Mashaka and Three Others v. Republic***, Criminal Appeal No. 45 of 1991 (CAT at DSM, unreported) in which it was held that "*if the accused person has confessed while at police station the safest way to adopt was to let him repeat his or her confession before the justice of peace.*"

On this ground, Ms. Anesius argued that the law does not make it mandatory that one has to be taken to the justice of peace after his cautioned statement is recorded. She added that the record does not show that the appellants requested to be taken to the justice of peace and were denied that right.

On the eighth ground, the appellants argued that the trial Magistrate erred by convicting the appellants while the prosecution side failed to prove its case beyond reasonable doubt. They invited the court to consider the case of ***Said Ally Mtinda v. Republic***, Criminal Appeal No. 55 of 2012 (CAT at Dodoma, unreported) in which while quoting in approval its previous decision in ***Samson Matiga v. Republic***, Criminal Appeal No. 205 of 2007 (unreported) the CAT held that "*...the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an*

accused person. Such evidence must irresistibly point to the accused person and not any other as the one who committed the offence." In reply, Ms. Anesius briefly contended that the case was proved beyond reasonable doubt whereby the prosecution mounted seven witnesses and five exhibits.

On the last ground, the appellants claimed that the trial Magistrate erred in law and fact by entering conviction against the appellants without reminding them of their charge before passing judgement as required under the law. Ms. Anesius contended in reply that there is no provision under the law providing for such requirement. She added that the appellants knew from the beginning the nature of the charge against them and were able to cross examine all the prosecution witnesses. She invited the court to be guided by the principle set in the case of ***Kubezya John v. The Republic***, Criminal Appeal No. 488 of 2015 (CAT at Tabora).

After considering the grounds of appeal and the arguments by both parties, I am of the following observation:

On the first ground, it is not disputed that the trial Magistrate did not evaluate the evidence of both parties in reaching her decision. However, as argued by Ms. Anesius while citing the case of ***Prince Charles Junior*** (supra) this court has powers to evaluate the evidence and determine the matter. In reading the proceedings, it is clear that the appellants denied committing the offence on the basis that they were not identified by the prosecution witnesses as the event is alleged to have occurred at night. They as well challenged the voluntariness of the cautioned statements.

Since aspects related to the defence evidence are also presented in the coming grounds of appeal, I shall evaluate and consider the same as I deliberate on the rest of the grounds of appeal.

On the second ground, the appellants challenged the admission of the cautioned statements by the trial court on the ground that they were administered by police officers with the rank of police constable which is contrary to the law and that they were obtained involuntarily. As argued by Ms. Anesius, the position of the law got amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011, whereby the definition of the term police officer was amended to include that of a rank of police constable. Under section 4, Act No. 3 of 2011 categorically states:

> *"The principal Act is amended in section 3 by-*
> *(a) Deleting the definition of the term "police officer" and substituting for it the following new definition: "Police officer" means a member of the Police Force of or above the rank of constable;"*

Considering the above provision I agree with Anesius that the cautioned statements were administered by officers permitted under the law. Regarding voluntariness, both appellants challenged voluntariness in making the cautioned statements. The first appellant objected the admission of the cautioned statement on the ground that he never made such a statement, but signed the same on the belief that he was signing bail documents as he was told so by the police officer. Basically the alleged confession was repudiated. It is trite law that once a confession is repudiated/retracted, the court, in this case a subordinate court, is obliged to conduct and inquiry. See: ***Nyeura Patrick v. Republic***, Criminal

Appeal No. 73 of 2013 (CAT at Mwanza, unreported); and ***Twaha Ally & 5 Others v. Republic***, Criminal Appeal No. 78 of 2004.

In the matter at hand, as seen at page 17 to 21, of the typed proceedings, when the 1st appellant objected to the admission of the cautioned statement as stated above, the trial Magistrate invited the prosecution to reply to the objection by way of submission. She then invited the first appellant to reply by way of submission in rejoinder and thereafter proceed to make a ruling and admitted the same as exhibit PE2. With all due respect to the learned trial Magistrate, an inquiry is conducted by recording evidence from the witnesses to prove the challenged voluntariness of the cautioned statement and not by making submissions as done in this case. In the circumstances therefore, it is my finding that no inquiry was done after the voluntariness in obtaining the confession from the 1st appellant was challenged. This is a material irregularity which renders the cautioned statement of the 1st appellant to be expunged as I hereby do.

On the other hand, the 2nd appellant also objected to the admission of his alleged cautioned statement on two grounds being: first, that it was obtained through torture and threat whereby he was beaten; and second, that it was obtained after the lapse of four hours as directed under section 50 (1) (a) of the Criminal Procedure Act. The record indicates that the trial Magistrate conducted an inquiry and deliberated on the first limb of the objection whereby she found the 2nd appellant's assertions unsubstantiated. I subscribe to the findings of the trial Magistrate

as the 2nd appellant did not prove in any way the allegations that he was beaten and had his fingers cut to counter the prosecution evidence.

On the second, limb of objection, it was undisputed that the 2nd appellant was arrested at Mlowo on 2nd April 2017, taken to Vwawa on 3rd April 2017 and then to Tunduma on 4th April 2017 whereby the interrogation took place and the cautioned statement recorded. PW4, the investigator of the case explained that he got a report from Mlowo police post on the arrest of the 2nd appellant on 4th April 2017 on another offence. When he went there he found he was shifted to Vwawa police post whereby he went and transferred him to Tunduma police station whereby the caution statement was recorded. This fact was also admitted by the 2nd appellant in his defence whereby upon being cross examined he contradicted his earlier statement that he was taken to Tunduma on 3rd April 2017 and stated that he entered Tunduma police station on 4th April 2017. Considering these facts, I find that the cautioned statement of the 2nd appellant was properly admitted.

With regards to the third ground, the appellants faulted the conviction by the trial court on the ground that no weapon claimed to be used in the robbery or driving license was tendered in evidence. First of all, I am in agreement with Ms. Anesius that the argument on tendering driving license is baseless in proving the case at hand. Further, I am of the view that the act of not tendering the weapon in court does not amount to failure on the prosecution side to prove the case of armed robbery. The prosecution can still be able to prove a case of armed robbery even without tendering the weapon used in court, especially where the

weapon is nowhere to be found, but there is some other evidence connecting the accused to the crime charged. In the case of ***Michael Joseph vs. Republic(1995) TLR 278*** the CAT stated:

> *"...it is clear that if a dangerous or offensive weapon or instrument is used in the cause of a robbery, such constitutes 'armed robbery'..."*

Therefore, basing on this decision, the prosecution has to prove that a dangerous or offensive weapon or instrument was used and it is not necessary that the said weapon must be available to be brought to court as evidence. If the weapon is found it shall be brought to court as evidence and if it is not found the prosecution will use some other evidence to prove the commission of the offence charged. The prosecution also has to show to whom the offensive weapon was used. What matters is the credibility of prosecution witnesses. (See, ***Angulile Jackson @ Kasonya v. The Republic***, Criminal Appeal No. 126 of 2018; ***Ally Idd v. The Republic, Criminal Sessions no. 88 of 2014 and Tayai Miseyeki vs. Republic, Criminal Appeal no. 60 of 2013, (all unreported***). In the case at hand, PW1 testified how the appellants attacked him on the material date. He explained how the 1st appellant cut his helmet with a machete in the course of struggle for the motorcycle. The 2nd appellant confessed in his cautioned statement, exhibit PE5, on how they attacked PW1. I thus find this ground to be devoid of merits and therefore dismiss it.

Regarding the fourth ground, the appellants claimed that there was contradiction on the evidence of prosecution witnesses, particularly PW1, PW2 and PW6 on the date of the event. Starting with the testimony of

PW6, I have gone through the proceedings and I agree with Ms. Anesius that she clearly stated that she was informed on the incident on 28th March 2017. She thus testified on the date she received the news and not the day the event occurred. Regarding the contradiction between PW1 and PW2, the law is settled to the effect that contradictions on time are not fatal to the extent of vitiating the proceedings and judgment. See: ***Abasi Makono v. The Republic***, Criminal Appeal No. 537 of 2016 (CAT at Arusha, unreported) and ***Emmanuel Josephat v. Republic***, Criminal Appeal No. 323 of 2016. I therefore find the contradictions to be minor also taking into account that the first appellant admitted to have been arrested on 27th March 2017 in connection to the offence charged.

On ground five, the appellants challenged the conviction relying on exhibit PE1, the motorcycle and exhibit PE4, the helmet, on the ground that the owner was not proved. I first of all agree with Ms. Anesius' argument that the conviction did not solely base on those exhibits. In addition, I see no relevance of allowing this ground to detain me much. This is because the offence was committed against PW1. Therefore, the evidence that exhibit PE1 and PE4 were with the PW1, the victim of the offence of armed robbery suffices to prove that the offence was committed. This ground stands dismissed as well.

With regard to ground six, I can say that the crucial evidence in proving the case at hand is that of PW1, the victim, and not PW3 as claimed by the appellants. PW1 claimed to have seen the appellants through the aid of the lights on the motorcycle and from the nearby houses. Most important he testified that he knew both appellants from before. Basically

the identification by PW1 was by recognition. In the case of ***Jumapili Msyete vs. Republic,*** Criminal Appeal No. 110 of 2014, the CAT at page 14 & 15 stated:

> *"... in recognition cases, the foundational evidence would be how the victim came to know the suspect. Assistive evidence would include, the time of the day the incident happened, the type and intensity of the light etc. which enabled the victim to ascertain the identity of the suspect. Corroborative would consist of say, the suspect being found in possession of the victim's property stolen in the course of theft; or naming the suspect at the earliest."*

In ***Nebson Tete vs. The Republic,*** Criminal Appeal no. 419 of 2013, the CAT at page 5 stated:

> *"The situation is different where the evidence of identification is by recognition, which has been held by courts to be more reliable than an identification of a stranger, but caution should as well be observed in that, when the witness is purporting to have recognized someone known from before, mistakes cannot be ruled out."*

See also ***Marwa Wangiti Boniface Matiku Mgendi vs. Republic,*** Criminal Appeal No. 6 of 1995 (unreported) which was cited by the CAT in ***Nebson Tete*** *(supra)*. In this case it was observed that:

"The ability to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."

In my view, where a witness/victim claims to have known the suspect prior to the commission of a crime, then the identification thereof falls under identification by recognition and not visual identification which is applicable on strangers, see, ***Jumapili Msyete, (Supra)***. In this case the Court of Appeal has given guidelines on the kind of evidence needed to prove the identification by recognition being: foundational, assistive and corroborative evidence. The CAT stated that, in foundational evidence, the victim must explain how he came to know the suspect. In assistive evidence the victim must explain, among other things, the time of the day the incident happened, the type and intensity of the light which enabled the victim to ascertain the identity of the suspect. In collaborative evidence, facts like the suspect being found in possession of the victim's property claimed to have been stolen in the course of theft, or naming the suspect at the earliest would be material.

In the case at hand, the victim, PW1, gave foundational evidence by stating that he knew the appellants before the incident happened. He said that, the 2nd appellant was a fellow motorcycle driver before he moved to IT driving and later to selling gas at Tunduma area. He said that he knew the 2nd appellant by his name, that is, "Daniel." Even during cross examination PW1 further explained how familiar he knew the appellant as they were fellow motorcycle drivers for a long time between 2012 and

2013. He also described how the 2nd appellant moved into other jobs but the two continued to see each other. He as well testified knowing the 1st appellant as the 2nd appellant's friend whom he used to see while visiting his friend, the 2nd appellant.

In assistive evidence, PW1 stated that the incident occurred on 27/04/2017 at 23hours at Mwaka area. He stated that there was enough lightening from the motorcycle lights and the neighbouring houses, which enabled him to see the appellants clearly. He also stated that he and the appellants had a conversation while struggling for the motorcycle. In collaborative evidence, PW1 named the suspect, that is, the 2nd appellant at the earliest whereby he told PW2 immediately after his arrival to the crime scene.

Although identification by recognition is taken to be the most reliable among the three identification types, still cases of mistaken identity can happen and thus caution has to be exercised by the court. (See, ***Jumapili Msyete at page 15 and Nebson Tete at page 5-6*** (supra). In the case at hand I am of the view that, since PW1 and the appellants had a face to face conversation for a while before being attacked and struggled with them in defending his motorcycle from being taken, the question of possibility of a mistaken identity is ruled out. In addition the 1st appellant was arrested after being chased while trying to escape. I therefore find the ground lacking merit and dismiss it accordingly.

On the seventh ground, I agree with Ms. Anesius that the law does not make it mandatory to have a confession be taken before a justice of

peace after the same is made before a police officer. The case of ***Bushiri Mashaka and Three Others v. Republic*** (supra) relied upon by the appellants did not set a mandatory requirement. The Court only advised that it is safe to have a confession taken before a justice of peace as well, but did not rule that if the same is not done then the one taken before a police officer lacks legal legs to stand upon. The ground is thus unmeritorious and is dismissed as well.

Under ground number eight, the appellants claimed that the prosecution case was not proved beyond reasonable doubt. My consideration on the prosecution evidence as recorded in the proceedings leads me to conclude that the case was proved beyond reasonable doubt. Though the caution statement of the 1st appellant has been expunged, there is still other overwhelming evidence connecting the 1st appellant to the offence committed. Both appellants were clearly identified by PW1, who knew them from before. The 1st appellant was arrested while trying to escape. The 2nd appellant confessed in the caution statement admitted as exhibit PE5.

My observation on ground nine, which is the last, is simply to the effect that, the appellants have misconceived the procedure on the requirement to read the charge. Under the law, it is only mandatory to read the charge when the accused is first arraigned in court and on the first hearing date before the prosecution witnesses start to adduce evidence. See: ***Emmanuel Malahya v. The Republic***, Criminal Appeal No. 212, (unreported); ***Cheko Yahaya v. The Republic***, Criminal Appeal No. 197 of 2013; and ***Jafari Ramadhani v. The Republic***, Criminal Appeal No.

311 of 2017. There is no requirement that a charge must be read on the date of judgment. If the same is done then it is done on the discretion of the court, but failure to do so does not vitiate the decision of the court. Besides, the appellants have not stated how they were prejudiced by the non-reading of the charge on the date of judgment. This ground is dismissed as well.

Having observed as above, I find the appellants' appeal devoid of merits and I dismiss it accordingly.

Dated at Mbeya on this 06th day of October 2020

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya through video conference on this 06th day of October 2020 in the presence of the appellants, and Ms. Zena James, learned State Attorney for the respondent.

L. M. MONGELLA

JUDGE