IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MWAMBEGELE, J.A., RUMANYIKA, J.A. And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 407 OF 2022

RASHID YUSUPH @ MARTIN...1ST APPELLANT

RASHID SHAIBU...2ND APPELLANT

MSAFIRI WILLIAM.. 3RD APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tanga)

(Mansoor, J.)

dated the 8th day of July, 2019

in

DC Criminal Appeal No. 62 of 2017

JUDGMENT OF THE COURT

24th April, & 8th May, 2024

RUMANYIKA, J.A.:

In the District Court of Tanga, at Tanga ("the trial court"), Rashid Yusuph @ Martin, Rashid Shaibu and Msafiri William, (the 1st, 2nd, and 3rd appellants) respectively, were charged with offence of armed robbery, contrary to section 287A of the Penal Code, Cap. 16 ("the Penal Code"). Consequently, they were convicted and sentenced as charged. It was alleged that, on 11th March, 2018, at about 07:00 AM at Magaoni area in the District, region and city of Tanga, the appellants invaded the house of Allen Daudi Kidamu. They threatened Grace Daudi, David

Ngilisho and Lazaro Benjamin with a shotgun and stole an assortment of items. The items included TZS. 7,000,000.00, one laptop make Dell worth TZS. 400,000.00, one mobile phone make TECNO L9 valued at TZS. 250,000.00, one cellular phone make Itel valued at TZS. 35,000.00 and some TZS coins. All the property stolen totally valued at TZS. 7,685,000.00. Upon a full trial, the appellants were convicted as charged and sentenced to thirty years imprisonment. Aggrieved, they unsuccessfully appealed to the High Court of Tanzania. Still aggrieved, the appellants are now before us on second appeal.

PW1 stated that, the appellants and others who are at large arrived in a car make Toyota RAV 4. One of them wore a police uniform and that they introduced themselves and posed as policemen who wanted to know the whereabouts of PW2. So, at first, PW1 and colleagues did not doubt them. However, a moment later, they put them under arrest, tied them with ropes while demanding money. They, in the process, threatened them with a pistol. Additionally, PW1 testified that he could recognize the appellants easily because during the incident they did not hide their faces. They stole his mobile phone make itel, they broke into the PW2's bedroom and stole therefrom, a number of items, including TZS. 7,000,000.00, a mobile phone, make Tecno L9 and a Del Laptop. Then they disappeared. Allen Daud Kidamia (PW2) stated

that, his house was invaded and robbed on the material date when, he and some members of the household were away in church attending mass for that Sunday. One Eva, the house maid and PW1, a tenant thereof remained at home. Fanuel Daudi (PW3) is the one who raised alarms for help immediately after the incident.

The case was reported at Chumbageni Police Station and to the local street chairman. The local OCCID, one Jumanne Njoka (PW8) and his colleagues took up the matter and followed it up immediately. At about noon, Insp. Bitamale (PW7), who was on duty that day, he intercepted the appellants' car at Kabuku road block. Upon searching them, he recovered a toy pistol, two pieces of iron bars, one machete, a radio call, a police uniform, one roll of plaster, some coins amounting to TZS. 140,000.00 coins and some notes to the tune of TZS. 777,000.00. The respective certificate of seizure (exhibit P3) was accordingly executed. Sgt Juma (PW10) kept the exhibits. Further, it is alleged that, at Chumbageni police station, the 3rd appellant confessed his guilt and DC. Sgt Saidi (PW5) recorded his cautioned statement. PW6 interviewed the 1st and 2nd appellants who also confessed and he recorded their cautioned statements. Charles Hiza Mndolwa (PW9) an ex-police officer, supervised the respective identification parade where the appellants were singled out as the offenders.

At the end of it all, the appellants were convicted and sentenced. Being aggrieved, they approached the High Court but lost the battle, as alluded to before. Still aggrieved, the appellants have preferred the present appeal, with eight points of grievance, which are paraphrased as follows;

1. *That the learned Judge grossly erred in law and in fact by sustaining the conviction and sentence meted out to the appellants basing on defective charge.*
2. *That the learned Judge erred in law and fact by acting upon weak, doubtful and unreliable visual identification by PW1.*
3. *That, the police identification parade was conducted contrary to law.*
4. *That the learned Judge erred in law and in fact by upholding the conviction of the appellants relying on improperly procured and admitted cautioned statements (Exhibits P1, P2 and P5).*
5. *That the search and seizure of the exhibits alleged to be conducted by PW7 contravened the law.*
6. *That the exhibits P6, P7, P8, P10 and P11 were admitted in evidence contrary to the law.*
7. *That the learned Judge improperly considered and evaluated the appellants' defence evidence.*
8. *That the learned Judge erred in law in not holding that the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellants appeared in person unrepresented. The respondent Republic was represented by Mr. Paul Kusekwa and Ms. Sarah Wangwe, learned State Attorneys.

Upon taking the floor, the appellants stood by their grounds of appeal and let the learned State Attorney respond to them, while reserving a right to rejoin, should the need arise.

Mr. Kusekwa opposed the appeal. On the 1st ground, he contended that, in fact, the charge preferred against the appellants was drawn within the confines of law. Because, he asserted, the charge sheet contained a precise statement and particulars of the offence charged. However, he added, the charge sheet may have missed out names of some owners of the items stolen, but the omission is curable under section 388 of the Criminal Procedure Act Cap. 20 R.E. 2022. He cited the Court's decision in **Kubezya John v. R.**, Criminal Appeal 488 of 2015) [2019 TZCA 472 (12 December 2019; TanzLII), bolstering his point.

About the 2nd ground of appeal, on the alleged unreliable visual identification of the appellants, Mr. Kusekwa contended that, PW1 had sufficient time to identify the appellants at the crime scene without mistakes. The reason being, they had relatively long conversations with

the victims about the whereabouts of PW3 and where they kept money, as culprits did not hide their faces. However, Mr. Kusekwa was quick to recall and generally admit that the evidence of visual identification is of the weakest kind, unless the possibilities of mistaken identity are all ruled out. He cited our decision in **Luziro Sichone and Another v. R.**, (Criminal Appeal 131 of 2010) [2011] TZCA 80 (5 July 2011; TanzLII), to support his proposition.

As regards the 3rd ground of appeal, on the alleged improperly mounted identification parade, Mr. Kusekwa readily conceded to the complaint. He contended that, placement of the participants on the parade and guidance of the witnesses contravened the Police General Orders number 232 (2) (n), which sets out the procedure to follow. Because of this anomaly, Mr. Kusekwa urged us to expunge the respective identification parade register (Exh.D1) from the record. When this evidence is gone, he added, the 6th ground of appeal will also follow suit, together with the 3rd ground.

For the 4th ground of appeal, Mr. Kusekwa contended that, in the wake of the Court's decision in **Yusuph Masalu @ Jiduvi and Others v. R.**, (Criminal Appeal 163 of 2017) [2018] TZCA 609 (13 March, 2018; TanzLII), the appellants' cautioned statements were recorded within time, which is four hours of their restraint and that they did not

repudiate or retract them. Therefore, he asserted, in terms of section 3 (1) (a) of the Evidence Act Cap. 6 R.E. 2019, the appellants confessed the guilt and therefore, the first two courts cannot be faulted for finding the appellants guilty of the offence charged. To reinforce his point, Mr. Kusekwa cited our decision in **Nyerere Nyague v. R.**, Criminal Appeal 67 of 2010) [2012] TZCA 103 (21 May, 2012; TanzLII) that, the best evidence comes from an accused who confesses his guilt.

As regards the 5th ground of appeal, on the propriety or otherwise of the seizure certificate, (exhibit P3), Mr. Kusekwa contended that the complaint is but an afterthought. This is because the appellants were found in possession of the stolen items immediately after the robbery incident and they signed the respective certificate of seizure to accept it.

About the 7th point of grievance which relates to the alleged improper evaluation of the appellants' defence by the two courts bellow, Mr. Kusekwa contended that, what is discerned from pages 123 – 125 and page 232 of the record of appeal, clearly expresses proper evaluation of the evidence by the courts.

Regarding the 8th ground of appeal, Mr. Kusekwa contended that, all the foregoing considered, it will follow that, the prosecution case was proved beyond reasonable doubt. Because, he added, the appellants

threatened the victims with a short gun and robbed them. To advance the prosecution case, he contended, the appellants told lies, that they did not know each other before the incident. He cited our decision in **Masumbuko Matata @ Madata and Others v. R.**, (Criminal Appeal 318 of 2009 [2010] TZCA 45 (11 June 2010; TanzLII) to bolster his point.

Upon being prompted by the Court, on the propriety or otherwise of the High Court Judge to uphold the conviction, while there is no evidence of using a shotgun but a toy pistol to threaten the victims, Mr. Kusekwa admitted that a toy pistol is not a shotgun or at all, an arm. However, he contended that the appellants had cut the long story short by confessing their guilt, which is the best evidence ever against the confessor. He, therefore, asserted that to call other eye witnesses additional to PW1 it would have not added any evidential value. To cement his point, he referred us to section 143 of the Evidence Act, Cap. Revised Edition of 2022, that, it is not the quantity of the evidence that counts but its quality.

The 1st appellant, with regard to the issue whether it is a shotgun or a toy pistol which was used to threaten the victims in the alleged robbery, he urged the Court to resolve the doubts in favour of the appellants. Similarly, he asserted that, the prosecution's failure to tender

the alleged stolen items as exhibit left much to be desired, because PW1 did not name the appellants or describe them at the earliest possible time to show that he identified them at the crime scene.

On his part, the 2nd appellant made no useful submission. He only complained against PW6, for denying him the rights when recording his cautioned statement. And that, the alleged eye witnesses, including PW1, did not mention the Registration Number of the car which was involved in the commission of the alleged offence.

The 3rd appellant's submission was a general denial of the charge and his involvement in the robbery. He contended that he was arrested at Kange area and not at Kabuku, as alleged.

It is worth noting that, before the High Court, the appellant fronted ten points of grievance in a memorandum of appeal which are more or less a replica of the eight grounds presented in the present appeal. However, the learned judge picked the 4th ground only, because she found that, on the strength of the appellants' cautioned statements (exhibits P2, P4 and P1) their conviction was inevitable. The said exhibits appear at pages 254-258, 251-253 and 260-263 of the record of appeal. For clarity, we take the liberty to quote the relevant part of the learned

judge's finding to such effect, appearing at page 235 of the record of appeal:

> *"....It will be totally unbecoming for this court to spend time adjudicating on other grounds before this ground which if found in the affirmative [it] may wash away every other grounds..."*

No wonder, the learned judge found the prosecution case proved beyond reasonable doubt. With respect, we agree with her. For that reason, therefore, we shall conveniently begin with the 4th ground of appeal, about the impact of the appellants' cautioned statements on the prosecution case.

We note that the appellants, in their cautioned statements, gave a similar and common version. Essentially, all confessed to their guilt. For instance, the 1st appellant, in his cautioned statement appearing at pages 254-258 of the record of appeal, he is recorded to say:

> *"...majira ya saa 07.00 asubuhi tukaamka siku ya Jumapili tarehe 11/03/2018 BHONGE akasema twende kazini, tukaingia ndani ya gari tukiwa watu watano, ... BHONGE alikuwa amevaa nguo za kufanana kama suti, ...BHONGE akamwambia WHITE avae uniform za polisi... WHITE akavaa zile sare... tukapaki karibu na geti la nyumba....baada ya dakika kama*

tatu....nikashuka mimi na MAYAI, tukawachukua wale watu waliokuwemo ndani ya ile nyumba wanne tukaingia nao sebuleni na BHONGE alikuwa ameshika Radio call mkononi na akawaamuru wale watu walale chini, ... BHONGE na MAYAI waliingia vyumbani, kuvunja na kuiba na baada ya muda...tukatoka nje ya geti tukapanda gari tukaondoka tukaanza safari ya kurudi DAR ES SALAAM na BHONGE alikuwa na pistol toy na tukagawana pesa TSH. 120,000/= kila mmoja wetu na tukabakisha machenji chengi yalikuwa kwenye mfuko wa Rambo, tulipofika KABUKU tulisimamishwa na polisi... tukashuka wote kwenye gari...tukakamatwa...polisi wakafanya upekuzi kwenye gari wakapata sare ya polisi ya kijani, bastola toy nyeusi, Radio call na vipande vya nondo vya kuvunjia... na pesa..."

Literally meaning that, upon conspiring to steal, on 11/03/2018 at about 07:00 Am they started their journey from Dar es Salaam to Tanga. And that on arrival, they invaded the house and put the victims under arrest, before they robbed them some property. Then they drove their car back to Dar es Salaam. However, they were apprehended by policemen at Kabuku road block while in possession of the property they robbed in the incident, the subject of the charge and the instant appeal.

From the above quoted excerpt, extracted from the 1st appellant's cautioned statement, we note the appellants' common intention for the plot and how it worked out. We also note that, when PW6 was about to tender it as an exhibit, the reason given by the 1st appellant to object it was significantly trivial. That: "*I have an objection since there was no independent witness....*" No wonder his objection was overruled and the copy was admitted as Exhibit P3. Moreover, on this aspect of evidence, Mr. Kusekwa contended, rightly in our view, that the three cautioned statements were but voluntary confessions of the appellants. For, they neither repudiated nor retracted the statements. We wish to remark for more clarity that, under section 3(1) (a) of the Evidence Act, Cap 6 R.E, a confession is defined as:

> " *words or conduct, ...from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence...* "

From the foregoing, the issue that arises is whether the appellants' cautioned statements alone, were sufficient to found the conviction. We answer it in affirmative. We hold that, the appellants' cautioned statements give a true account of it all, resulting to their conviction. By

finding so, we are persuaded by the decision of the defunct Court of appeal of East Africa in **Tuwamoi v. Uganda** [1967] EA 89. We have subscribed to that decision in a number of our decisions including in **Alex Ndendya v. R**, (Criminal Appeal 207 of 2018) [2020] TZCA 202 (6 May 2020; TanzLII).

We wish to stress that, in any judicial proceedings, the effect of the accused's confession cannot be overstated enough than what has been articulated in a number of the Court's decisions, including in **Ibrahimu Ibrahimu Dawa v. R**, Criminal Appeal No. 260 of 2016 (unreported). In this case, while following our decision in **Mohamed Haruna @ Mtupeni and Another v. R** (Criminal Appeal 259 of 2007) [2010] TZCA 141 (4 June 2010; TanzLII) we held that:

> *"The very best of witnesses in any criminal trial is an accused person who freely confesses his guilt".*

It is worth noting that, such freely made confessions of the appellants is an expression that they knew the case better than anybody else. That, they are the perpetrators of the offence charged, and are ready for the consequences.

The appellants have raised a contention in the 1st ground of appeal that, the charge which was laid at their door is defective, we have

painstakingly read the corresponding statement and particulars of the offence, appearing at page 3 of the record of appeal. Like Mr. Kusekwa, we are satisfied, that, taken in wholesale, the respective charge sheet comprises all what is required under section 132 of the Criminal Procedure Act Cap 20 R.E. 2019. The 1st ground of appeal is dismissed for being misconceived.

As regards the 2nd ground of appeal, about the alleged improper visual identification of the appellants by PW1, and that one he made later at the identification parade supervised by PW9, we agree with them that, possibly they were not identified. The reason we are saying so is that, PW1 did not describe the appellants to anybody at the earliest possible opportunity, who should have appeared to verify the story, as required by law. However, that evidence could not come out. In view thereof, our considered view is that the identification of the appellants by PW1 at the parade and later on during the trial from the witness box was not reliable. For, chances are there that it is but an afterthought. We wish to reiterate what the Court restated in **Geofrey Gabinus @ Ndimba and Two Others v. R.**, Criminal Appeal No. 273 of 2017 and **Christopher Ally v. R.**, Criminal Appeal No. 510 of 2017 (both unreported) that, ability of a witness to name the accused at the earliest possible opportunity is an assurance of his reliability that indeed the

accused was properly identified. See also-**Marwa Wangiti Mwita and Another v. R** [2002] T.L.R. which we followed in **Christopher Ally** (supra).

Nonetheless, we note, in the instant appeal that, the appellants were tracked and arrested about eight hours after the incident while escaping. It was more or less a silent hot pursuit of the appellants. Moreover, they were arrested while in possession of the items stolen in that robbery incident. Therefore, the appellant's cautioned statements advanced the prosecution's case, and, on that basis, the 2nd and 3rd grounds of appeal also crumble.

About the 4th ground of appeal, on the alleged improperly procured cautioned statements, logically, this complaint has been dealt with sufficiently and resolved in the course of discussing the preceding ground. It is dismissed, together with the 5th and 6th grounds of appeal, about the validity of seizure and their admission in evidence, of the respective property.

Lastly, are the 7th and 8th grounds which are about the alleged improper evaluation of the appellants' defence. Again, we are satisfied that, what we have discussed earlier on is good enough to dispose of the two grounds of appeal. This is because, from the very outset, the

appellants cut the long story short. They voluntarily confessed to their guilt, as observed earlier on. It follows therefore, that the issues of improper search, seizure and improper admission of exhibits P6, P7, P8, P10 and P11 in evidence are neither here nor there and so is their complaint about the first appellate court skipping the appellants' seven grounds of appeal, leave alone the alleged denial of the right to be heard. Delving into the heart of the cornerstone of the proceedings, we wish to refer to section 287A (1) of the Penal Code which clearly establishes an offence of armed robbery as follows;

> *"s. 287A- A person who steals anything, and at or immediately before or after stealing is **armed with any dangerous or offensive weapon or instrument** and at or immediately before....threatens to use violence to any person in order to obtain or retain the stolen property, commits an offence of armed robbery..."*
>
> (Emphasis added)

We note that, the particulars of the offence charged are that, during the robbery, the appellants threatened the victims with a shotgun. However, PW1, in his testimony which appears at page 27 of the record of appeal he talks about a pistol, which however turned out to be a toy pistol as

shown in the certificate of seizure (exhibit P3) and by the appellants in their cautioned statements.

From this factual reality, we venture to ask, can use of a mere toy pistol to threaten the victim establish the offence of armed robbery? We note that, by inspiration, when section 287A of the Penal Code is read together with section 70(1) of the Firearms and Ammunition Controls Act No. 2 of 2015, a firearm includes a toy pistol. The section reads as follows:

> *70(1)- **An imitation firearm or toy gun shall,** notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or otherwise missile, **be deemed to be an offensive weapon or instrument for the purposes of section 286 of the Penal Code".***
>
> (Emphasis added)

Therefore, reading it from the quote above, what counts most is that the toy pistol was used to instill fear of violence. It is so, because, at that material time, the victim is reasonably in terror and fear and he cannot read the minds of the culprits. He cannot tell if what threatens him is a counterfeit weapon. Therefore, he will inevitably give up preferring his life to the property which is being targeted by the robber. So, it is no wonder he will easily mistake a toy pistol for a pistol, an imitation gun

for a submachine gun, or a mango for a hand-driven bomb, if he is so threatened.

However, as observed above, since for about nine years now a fire arm includes a toy pistol, it follows therefore, that the offence of armed robbery was established. Therefore, whether the appellants used a shotgun to threaten the victims, as shown in the particulars of the offence charged, or a toy pistol, as stated by PW1 and appellants in the cautioned statements, it is immaterial. We wish to stress, in passing that, in all fairness, and in the wake of the overriding objective principle, courts of law cannot just sit back and observe the mischiefs caused by draftsmen of the charges or by case investigators prevail. That kind of shortfalls should only be used as a shield and not as a sword by accused. It cannot be used as an escape-route for criminals to get out of the courts free, or result in the conviction of the innocent. See- **Samson Kitundu v. R**, Criminal Appeal No. 195 of 2004 (unreported), where we cited **S** (an infant) **v. Manchester City Recorder and Others** [1969] 3 All E.R. 1230.

Before we conclude our judgment, we wish to remark on the prosecution's failure to tender the alleged stolen items in the list (exhibit P3). The failure may not necessarily express a level of irresponsible investigators and poor case management. However, that failure raises a

million dollar question, much as the list was not of the perishables which may have not been kept long waiting for trial.

In view of the discussion above, therefore, we are satisfied that the prosecution case was proved beyond reasonable doubt against the appellants. Consequently, we find the appeal to be unmerited and it is dismissed.

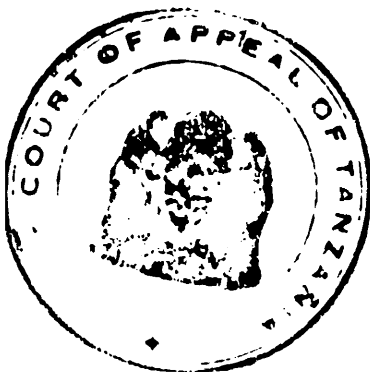
DATED at **TANGA** this 8th day of May, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgement delivered this 8th day of May, 2024 in the presence of the Appellants in person, and Mr. James Rugaimukamu, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL