

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., ORIYO, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 96 OF 2012

1.DASTAN VENANCE MREMA

2.MOHAMED JULIUS @ MAKOKO MUDIAPPELLANTS

VERSUS

THE REPUBLICRESPONDENT

(Appeal From the Judgment of the High Court of Tanzania

at Arusha)

(Massengi, J.)

Dated the 24th day of January, 2012

in

Criminal Appeal No. 42 of 2010

.....

JUDGMENT OF THE COURT

21st & 25th June, 2013

ORIYO, J.A:

This is a second appeal. In Criminal Case No. 522 of 2009, in the District Court of Arusha, at Arusha, the appellants were jointly charged with two offences of Armed robbery contrary to Section 287A of the Penal Code. The trial court duly convicted them and sentenced them to a custodial sentence of thirty (30) years imprisonment each. The sentences were to run consecutively. Aggrieved with both convictions and sentences, they appealed to the High Court. The High court dismissed the appeal

save for the sentences which were ordered to run concurrently instead of consecutively, hence this second appeal.

Briefly stated, the prosecution case from a total of six witnesses which was found credible by the trial court was as follows. On the material date, that is, 30/8/2009, at around 7p.m in Arusha, Karim Issa, a taxi driver, in Arusha, (PW4) was hired by two male passengers. One passenger sat at the front seat (DW1) while the second one sat at the back (DW2). Before reaching the agreed destination, they asked him to stop the car briefly to enable them make a call to an undisclosed person. As he obliged, the passenger at the back grabbed him by the neck while the passenger at the front took a knife and stabbed him twice, on the back and neck. Thereafter they shifted him to the back seat. The one at the front seat took over and drove the car while the one at the back shifted to the front seat. After a while they took him out of the car and dumped him in the bush. In the meanwhile they searched his body and stole his mobile phone and some shs 60,000/= in cash. The car with registration number T 168 AJZ make Toyota Corolla was subsequently found parked at a certain house in Moshi. Inside the car was a knife and a piece of Khanga, both of which were smeared with blood. PW4's pair of shoes was also found in the car.

The incident was reported to the police station where PW4 was issued with a PF 3 (Exh P3) and went to hospital for treatment.

The appellants were convicted on the basis of their respective confessions in the form of cautioned statements, made to the police, Exhibits P8 and P9, respectively and Extrajudicial Statements, made to a Justice of the Peace, (PW5), Exhibits P5 and P6, respectively.

In this Court the appellants jointly lodged three grounds of complaint, namely:-

1. After finding prosecution witnesses, PW1 to PW5, not credible, the first appellate court erred in upholding the conviction of the appellants.
2. The first appellate court erred by failing to determine the competency of the Caution Statements.
3. The first appellate court ought to have upheld grounds 1,2,3,4 and 5 of appeal after holding that there were, contradictions and discrepancies in the prosecution evidence.

The appellants appeared in person, undefended, at the hearing of the appeal. The respondent Republic was represented by Mr. Marcellino

Mwamnyange, learned State Attorney, who initially did not support the convictions. But upon reflection, he changed his stand and supported the conviction. He submitted that upon further scrutiny of the record, he realized that the appellants' complaints were unfounded. He gave example of the complaint that their defence evidence was not considered. The learned State Attorney submitted that there is adequate evidence on record that the trial court took into consideration the defence evidence. Regarding the Cautioned Statements, the learned State Attorney submitted that they were properly admitted in the absence of any objection from the appellants.

It has been pointed out that the appellants were convicted basically upon their respective cautioned statements and extrajudicial statements. The cautioned statements were taken by the police, PW6, D7222 CPL Ally Bakari Mshiriki.

In their cautioned statements, the appellants confessed to have participated in the alleged robbery and at the same time implicated the co-accused. It is trite law that a confession is admissible only when it is **freely** and **voluntarily** made., see **Petro Teophan v R**, Criminal Appeal No. 58 of 2012, **Paulo Lusulo and Another v R**, Criminal Appeal No. 481

of 2007, **Emmanuel Joseph @ Gigi Marwa Mwita vs R**, Criminal Appeal No. 57 of 2002, (all unreported).

In their oral submissions before us the appellants challenged the legality of the cautioned statements allegedly having been taken out of time as prescribed under sections 50 and 51 of the Criminal Procedure Act. The first appellant also complained that he made the cautioned statement after being assaulted and injured.

According to the evidence on record, the cautioned statements were authored by PW6. The record clearly shows that at the end of the evidence of PW6, the appellants' cautioned statements were tendered in court without any objection from them as can be seen at page 31 of the record:

"PW6-1 pray the motor vehicle and caution statement of the accused to be taken as exhibits....."

Sgd

28/10/2009

1st accused:- no objection with caution statement.

2nd accused:- no objection with caution statement."

With this evidence on record, the appellants have decided to challenge the voluntariness of the cautioned statements belatedly; on a second appeal.

May be it was an afterthought. Whatever their intentions, it is against the spirit of section 169(1) of the Criminal Procedure Act, which provides:-

"169-(1) Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person

(2) N/A

(3) The burden of satisfying the court that evidence obtained in contravention of, in consequence of the contravention of, or in consequence of the failure to comply with a provision of this Act should be admitted, in proceedings lies on the party who seeks to have the evidence admitted."

The appellants should have raised the objection in the trial court against the admission of the cautioned statements on the ground of them having been extracted from them illegally, in terms of section 169(1) (supra). This

objection would have put the prosecution on notice to account for or give any explanation in response to the objection in terms of subsection (3) of section 169 (supra). The appellants had ample opportunity to raise their objections at the trial. Each had an opportunity to give his defence on oath, which they did, (DW1 and DW2). They were given opportunity to cross examine the prosecution witnesses and to call their own witnesses. The first appellant summoned two witnesses to testify on the alleged defence of **Alibi**. The second appellant declined to summon a witness to cement his defence.

But even assuming that we were to agree with the appellants that the cautioned statements were illegal and expunge them from the record, there would still remain sufficient evidence to convict the appellants, including the testimonies of Extra judicial statements, evidence of PW1, PW2, PW3, the last two being blood relatives of the first appellant.

We have made reference to the Extra judicial statements of the appellants made to PW5, a justice of the peace in which they implicated one another. We made reference to their respective extra judicial statements while alive to the legal principle that a confession made by an

accused person may be taken into account against a co-accused in terms of section 33 of the Evidence Act, Cap 6, as amended' section 33 provides:-

*"33-(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, **the court may take that confession into consideration against that other person.***

(2) Notwithstanding subsection (1), a conviction, of an accused person shall not be based solely on a confession by a co-accused.

(3)N/A." (emphasis ours).

Therefore, the confession of the first appellant can be taken against the second appellant and vice-versa. The confessions would be corroborated by the testimonies of other witnesses, in particular, those of PW2 and PW3 who witnessed the appellants when they visited them in Moshi with the allegedly stolen car which had been robbed from PW4, the taxi driver, in Arusha.

without sufficient cause of complaint. It is accordingly dismissed in its entirety.

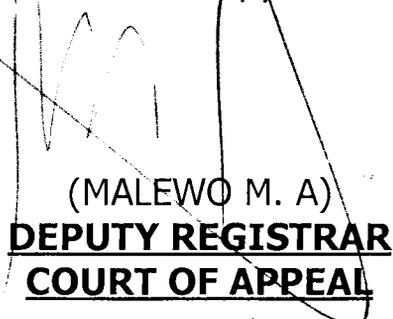
DATED at ARUSHA this 24th day of June, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(MALEWO M. A)
DEPUTY REGISTRAR
COURT OF APPEAL