

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

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

CRIMINAL APPEAL NO. 246 OF 2010

**VUMILIA DAUD TEMI..... APPELLANT
VERSUS**

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court
of Tanzania at Moshi)**

(Mchome, J.)

dated the 26th day of June, 2008

in

Criminal Appeal No. 36 of 2007

JUDGMENT OF THE COURT

6th & 10th June, 2013

KILEO, J. A.:

The appellant was charged with and convicted of armed robbery in the District Court of Hai at Bomangombe. He was sentenced to 30 years imprisonment. His appeal to the High Court was dismissed hence this second appeal.

The appellant's conviction was basically based on two sets of testimonies; One, that he was identified at the scene of crime by the victim of the robbery, one Sister Plasida Mushi (PW1) and secondly that he was found in possession of a mobile phone that was stolen from the victim.

The appellant appeared before us in person, unrepresented. He filed a four ground memorandum of appeal. His major complaint rests on

identification which he submitted was not watertight. He also attacked the lower Court's reliance on a cautioned statement which he claimed was admitted in violation of the law. He further challenged the sentence of 30 years imposed on him while he was only 15 years at the time the crime was committed.

In support of his grounds of appeal, the appellant filed a written submission in which he made reference to a number of authorities including the famous **Waziri Amani v. R.** case-[(1980) TLR 250] on identification.

Mr. Khalili, learned State Attorney appeared for the Republic at the hearing of the appeal. He did not support the conviction. Agreeing with the appellant he opined that the conditions pertaining at the time the crime was committed were not sufficient for watertight identification. He made reference to **Waziri Amani** (supra), **Galous Faustin Stanslaus v. R** - Cr. Appeal No 2 of 2009 (unreported, and **Ackley Paul and Another v. R.** - Cr. Appeal No. 110 of 2008 (unreported) to bring home his point. The learned State Attorney also submitted that the complainant did not give sufficient description of her stolen mobile phone so as to establish conclusively that the handset that the appellant was allegedly found with

was the same one that was stolen from the complainant. He cited **David Chacha and 8 Others v. R**—Cr. Appeal No. 12 of 1997 (unreported) as a case in point.

Regarding the cautioned statement the learned State Attorney conceded that it was wrongly admitted in evidence as the recording of the same was beyond the time allowed by law. Reference was made to **Roland Thomas @ Mwangamra v. R.** – Criminal appeal No. 308 of 2007 (unreported) in support of the assertion.

Mr. Khalili also agreed with the appellant that he ought not to have been sentenced to thirty years imprisonment as he was a juvenile at the time of his conviction.

After having given due consideration to the matter before us, and having heard both the appellant and the learned State Attorney, we have to say outright that the appeal must succeed on all grounds.

Admittedly, the case centered on identification. The incident occurred at night (8.00pm). It has been held time and again by this Court that evidence of visual identification is of the weakest type and Courts should not act on it unless all possibilities of mistaken identity are eliminated. Furthermore, the Courts must be fully satisfied that the evidence clearly

shows the conditions favoring a correct and watertight identification. See **Waziri Amani** (supra), **Raymond Francis v. R.** (1991) TLR 100, **Said Chally Scania v. R.** Criminal Appeal No. 69 of 2005 (unreported) to mention just a few.

In **Said Chally Scania** (supra) the Court emphasized that when a witness is testifying about another in unfavorable circumstances, clear evidence mentioning all aids to unmistakable identification, like the source of the light and its intensity must be given. The Court in **Issa Mgara @ Shuka v. R.** - Criminal Appeal No. 37 of 2005 (unreported) stated:

"...even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here mistakes in recognition of close relatives and friends are often made."

We have carefully examined the evidence of PW1. We observe that though she said that she was able to identify the appellant through electric light, she did not specify the intensity of the electricity light nor did she say whether the electricity light was from street lamps or from houses around. We note further that she did not even name her attacker to the first people

to respond to her alarm. At page 5 of the record PW2 is recorded as having stated as follows:

"... I heard cries of complainant I went to check her I found her on the ground standing complaining bandits robbed money from her she is not sure of bandits one (sic!) she sees them she can identify them...."

The complainant did not say that one of the bandits was not known to her.

Without much ado we are settled in our minds that identification of the appellant by PW1 fell far short of being watertight. The lower Courts ought not to have relied on it to arrive at a conviction.

The issue of identification of the mobile phone that the appellant was allegedly found with need not detain us. There was no sufficient evidence linking the complainant's mobile phone to the one that the appellant was allegedly found with. She did not show any receipt with serial numbers that could have been matched with the serial numbers of the phone said to have been in the appellant's possession. She did not even mention what her mobile number was. Interestingly also, the complainant did not mention to PW2 or PW3 who were the first to get to the scene that her mobile phone was among the items that were stolen. It was linked to the

crime only because allegedly the appellant was seen throwing it to the river. **In David Chacha and 8 Others v. R** (supra) the Court stated:

"It is a trite principle of law that properties suspected to have been found in possession of accused persons should be identified by the complainant conclusively. In a criminal charge it is not enough to give generalized description of the property."

The case before us did not pass the above test.

A consideration of the cautioned statement exhibit P2 leads us to the same conclusion as the appellant and the learned State Attorney that its admission in evidence was in contravention of the law. The appellant was arrested on 18/9/2006 as per testimony of PW3. The cautioned statement was recorded three days later as per evidence of PW4. This was far beyond the time authorized for taking the statement of a suspect under restraint. There is nothing on record to show that the time available for interview was ever extended in accordance with the provisions of section 50 and 51 of the Criminal Procedure Act. The cautioned statement ought to have been expunged from the record.

Coming to the appeal against sentenced we fully agree with both the appellant and the learned State Attorney that the sentence of 30 years imprisonment imposed which is the minimum sentence for armed robbery

was unlawful. Armed robbery falls under the Minimum Sentences Act, Cap 90 R. E. 2002. The appellant was 15 years old at the time of his trial according to his testimony which was not contradicted. It is provided specifically in Section 2 of the Act mentioned above that it shall not apply to juveniles. The term juvenile is defined to mean any person under the apparent age of eighteen years.

In view of our considerations above we find the appeal to have been filed with merit. We accordingly allow it. We quash the conviction that was entered against the appellant and set aside the sentence imposed. We order an immediate release of the appellant from custody unless he is therein held for some lawful cause.

DATED at **ARUSHA** this 7th day of June, 2013.

E. A. KILEO
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