IN THE HIGH COURT OF TANZANIA

AT DAR DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO 282 OF 2017

(OIGINATING FROM CRIMINAL CASE NO 480 OF 2013 IN THE DISTRICT COURT OF KINONDONI BY HON J. MUSHI, RM)

YASSIN ABASI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last order:14/06/2018

Date of the judgment:28/06/2018

JUDGMENT.

MAGOIGA, J.

The appellant was charged in the district court of Kinondoni on one count of armed robbery contrary to section 287A of the Penal Code, [Cap 16 R.E 2002] as amended by Act no 3 of 2011. After full trial, the appellant was found guilty as charged, convicted and sentenced to 30 years' imprisonment. Aggrieved and dissatisfied the appellant has come to this court armed with 6 grounds of appeal to contest for his innocence, hence this appeal.

The facts of this appeal are simple and straight forward. That on 28th day of September, 2013 the appellant with the other person not in this appeal at Manzese area within Kinondoni District in Dar es salaam Region stole cash money amounting to Tshs. 2,300,000/=, different vouchers valued at Tshs. 1,500,000/=and a mobile phone Nokia valued at Tshs. 80000/=the property of DORINE FRANCIS and immediately before such stealing used pistol to threaten one DORINE FRANCIS in order to obtain the said properties. Further the facts go that on the same day the appellant was arrested on the scene of crime and was later taken to police and investigation carried and was later charged and pleaded not guilty to the charge.

The appellant filed a memorandum of appeal containing six grounds of appeal couched thus:-

1. That the learned trial magistrate erred by not directing that the charge preferred against the appellant was concocted where he was arraigned before court three months after his apprehension with no plausible explanation.
2. That the learned trial magistrate grossly erred by holding that prosecution proved their case where no direct evidence was led to establish as to how he was arrested or re-arrested.
3. That the learned trial magistrate erred in holding to un-credible and unreliable visual identification of PW1 against the appellant where no distinctive description of the invaders was advanced at all.
4. That the learned trial magistrate erred in holding to a retracted cautioned statement exhibit P1 without noting huge contradiction from PW4 as to when it was obtained (actual date)
5. That the learned trial magistrate grossly erred by failing to discern that it wouldn't have been possible to apprehend the invaders with a pistol or stolen or stolen money to directly connect them/him to the crime.
6. That the learned trial magistrate erred by failing to hold that the prosecution did not prove the appellant's guilty beyond reasonable doubt as charged.

When this appeal was called for hearing, the appellant appeared in person and unrepresented and was ready for hearing. The Respondent, Republic was represented by Ms. Selina Kapange. The learned state attorney informed the court that she supports the appeal. Upon that information, the appellant opted the defer his submission until the State Attorney submits. Submitting in support of the appeal the learned state Attorney pointed that they support the appeal on ground number 5. The evidence for prosecution is that the appellant was arrested in the scene of crime and were arrested with a pistol and money robbed. It seems the co accused ran away. Failure to bring the pistol and money robbed in the circumstances without plausible explanation of this appeal creates doubt to be decided in favour of the appellant. PW1 testified that two people were brought to him with a gun, but how it

disappeared is very uninteresting, she concluded, inviting the court to allow the appeal and set the appellant free.

On the other hand, the appellant when invited to submit in support of his appeal he just said he had nothing to add and concur fully with the submission by the State Attorney. That marked the end of the hearing.

Before going into the details of ground number 5 of the memorandum of appeal submitted by parties, this court has noted procedural irregularity which am inclined to address. The admissibility of Exh PE1 leave a lot to be desired and in fact is the court which in its ruling as to its voluntariness that admitted the exhibit not even the prosecution witnesses introduced it for admission. This is against the procedure of admissibility of exhibits and against the elaborative way of doing inquiry as stipulated in the case famous case of inquiry or trial within trial of **SELEMAN ABDALLAH AND TWO OTHERS V. REPUBLIC, CRIMINAL APPEAL NO 384 OF 2008 (Unreported) Dar es salaam, (CAT),** in this case elaborative procedure was given on how to admit exhibit which its voluntariness is put into question when it is intimated to be tendered. The twelve steps that are akin to follow which are:-

i. When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.
ii. The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of voluntariness. The witnesses must be sworn or affirmed as mandated by section 198 of the Criminal Procedure Act, Cap 20.
iii. Whenever a prosecution witness finishes his evidence the accused or his advocate should be given an opportunity to ask questions.
iv. Then the prosecution to re-examine the witness.
v. When all witnesses have testified, the prosecution shall close its case.
vi. Then the court is to call upon the accused to give his evidence and call witnesses, if any. they should be sworn or affirmed as the prosecution side.

vii. Whenever a witness finishes, the prosecution to be given an opportunity to ask questions.
viii. The accused or his advocate to be given an opportunity to re-examine his witnesses.
ix. After all witnesses have testified, the accused or his advocate should close his case.
x. Then the ruling to follow.
xi. In case the court finds out that the statement was voluntarily made (after reading the ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. The should accept and mark it as an exhibit. The contents should then be read in court.
xii. In case the court finds out that the statement was not made involuntarily, it should reject it. [emphasis mine]

Guided by the above elaborative procedure there is no dispute that step number ix was not followed at all. The record is clear as day light that the trial court in the instant appeal admitted the cautioned statement by itself during the ruling before resuming to the main proceedings and marked it as PE1. This was irregular and was against the decision and guidance of the Court of Appeal of Tanzania on this point.

Yet another anomaly the case of for defense in the inquiry was not closed by the appellant (by then accused person) as directed procedure number ix.

The next question that I asked myself is what is the status of an exhibit that was not tendered in the main trial but admitted and marked during ruling on inquiry? In fact, and in law there was nothing that was admitted in the main trial as such I unhesitatingly hold that it was fatal to the prosecution case and I proceed to expunge it from the court record.

Now what remain is the oral testimony of prosecution witnesses. This court has been invited by the parties to find merits in ground number 5 and allow this appeal. The facts of this case as read during preliminary hearing and the evidence of the prosecution witnesses was that the appellant was arrested

immediately after the act of armed robbery and good number of items were stolen such as cash money, vouchers and mobile phone nokia make the properties of the complainant-PW1 but none was tendered. I know that tendering of exhibits stolen is not an ingredient in proving the offence of armed robbery but each case must be decided on its own merits and circumstances. The circumstances pertaining to this appeal calls for tendering of stolen items, if true the accused was arrested at the scene of crime immediately after theft. Failure to tender it raises very serious doubt that have to be resolved in favor of the accused/appellant for this matter. It on the same vein I agree with the submission by learned State Attorney that failure to tender exhibits recovered from the scene of crimes creates doubt on the story of the republic. The appellant testified under oath that he was arrested by police in court, taken to Magomeni police station who asked him bribe but refused and ended up being fixed up in this case. This testimony creates serious doubt to prosecution story of Manzese of armed robbery. The amount stolen if true is huge that one cannot afford to hide. Failure to bring items alleged to have been stolen and in particular to robbers who is red-handed leave a lot to be desire on the prosecution case.

All the above considered, am inclined to hold that the appellant's appeal has merits. The case for the appellant was not proved to the standard required in criminal case. And it is on the same vein I hereby quash the judgment of the district court and set aside the conviction and sentence meted out against the appellant. I further order the immediate release of the appellant from prison unless held otherwise for a lawful cause.

It is so ordered.

Dated at Dar es salaam this 28 day of June, 2018.

S.M. MAGOIGA.

JUDGE.

28/06/2018