

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)**

AT MTWARA

CRIMINAL APPEAL NO. 60 OF 2021

*(Originating from Criminal Case No. 41 of 2021 of Ruangwa District
Court at Ruangwa)*

SHAIBU SAID MTUMBILA & ANOTHER.....APPELLANTS

VERSUS

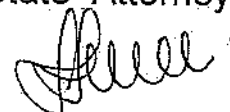
THE REPUBLIC..... RESPONDENT

JUDGMENT

Muruke, J.

At the District Court of Ruangwa at Ruagwa, the appellants Shaibu Said Mtumbila and Juma Mohamed Mwanya were charged for an offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E 2019. They were convicted and sentenced to thirty (30) years imprisonment. Being dissatisfied, they filed present appeal raising eight grounds and also filed four additional grounds as articulated in the petition of appeal.

On the date set for hearing, respondent was represented by Enosh Kigoryo, State Attorney, while 1st appellant appeared in person, he thus prayed for his grounds to be received as his submission in chief, and reserve his right to make rejoinder if any, prayer which was not objected by respondent counsel. Court then, asked learned State Attorney to

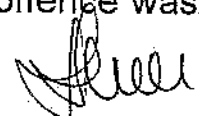
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submit replying grounds of appeal. Counsel for the respondent supported conviction and sentence meted by trial court. Respondent counsel submitted that, complaint on identification, is not true at page 10 of the proceedings PW1 proved how he know appellant before. Identification was properly done. Appellant was not stranger to PW1, thus ground one lacks merits.

On ground two complaint is that, exhibits P6, P9, P10 and P11 were not read after being received. At page 16 of the trial court proceedings exhibit P6 was not read in court. However, the details of the same was given by PW5. Equally so, exhibit P9 and P10 was not read in court after admission, while exhibit P11 does not exist in court records, as exhibit ended with P10. Despite the fact that exhibit P6, P9 and P10 were not read in court after admission, records show that, appellant did not object exhibit P9. Failure to object, indicate that they knew what was being tendered, Exhibit P10 was not read, yet same be expunged from the court records.

On ground three, respondent submitted that, there is no contradictions in the evidence of first and second appellants. However, second accused at the trial court confessed that, they went with first accused to show exhibit P3. The defense is on who spoke at the scene. Appellant is the one who showed where exhibit P3 was, thus ground 3 lacks merits. Ground 4 complaint is on trial court cross examining the prosecution witness. Proceedings does not show where trial court cross examined the prosecution witnesses. Ground 5 complaint is failure by the trial court to evaluate evidence of PW2 and PW3 as were the witness with interest to serve. That is not right, they were competent witnesses.

Complaint on ground 6 is that, PW1 was not called to identify exhibit P5 Motorcycle. Exhibit P5 was not an issue at trial. The offence was armed

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robbery, in which 10 million was stolen, there was no dispute on motorcycle. Ground 7 is on failure by trial court to take into account motorcycle found with PW2 was taken to police but PW3 is the one who tendered the motorcycle. PW3 is the owner of the motorcycle, thus, is the proper person to tender as he has the knowledge on the property.

Ground 8 complain is the failure by the prosecution to prove the offence. Respondent submitted that, appellants were using stone to threatened PW1 and managed to take the property. PW1 evidence proved the offence. PW1 evidence was corroborated by other witnesses, thus, offence against appellant was proved beyond reasonable doubts.

Ground 1 in the additional ground, is on failure to issue receipt after seizure. Exhibit P10 was received without following procedure, thus, let the court expunge the same. Ground two is the same as ground number 3 of petition of appeal, thus request to adopt his submission in ground 3 in respect of this ground. Ground 2 is failure by trial court to evaluate evidence of defense. That is not true, at page 10 of judgment, court referred evidence of the appellant properly, when considered defense of alibi and discounted the same. Diffence evidence was considered and reason of discounting the same was explained in court. On ground 4 respondent reiterated what he was submitted in ground 2 of the main grounds of appeal.

In rejoinder, appellant submitted that, it is true Sudi Bakari PW4 identified appellant. He knows appellant he employed appellant in his shamba, but failed to pay appellant. The one was found with motorcycle did not tender the same. 2nd appellant was the one found with money. 2nd appellant tried to escape by jumping the wall. Trial court did not do justice. All the exhibits were not received properly for failure to read in court.



Having heard both sides, grounds of appeal and gone through evidence on records. In disposing this appeal only ground 2 of the main grounds and ground 4 of the additional grounds will suffice to dispose this appeal


The complaint in these two grounds is on failure to read exhibits P6, P9, P10 and P11. It is a settled principle of law that once a document is intended to be relied upon in court, such document should be tendered by a witness who is a maker having knowledge with the contents of that document. Once being admitted in court, the contents of that document should be read over in court to the extent that the accused can hear. The rationale behind is to afford an accused an opportunity to know the contents of such document so that he can understand the case and prepare his defense. Likewise, the failure to do so it is fatal, thus, such document may be expunged from the court records. In the case of **Gode Cleophance Vs. The republic, Criminal Appeal No. 41 of 2019**(unreported), the court stated that;

"Apart from the prosecution witnesses who testified in court, there were three exhibit which when tendered before trial court and admitted namely, the certificate of seizure, valuation form and inventory form. However, all these documents were tendered but not read in court to allow the appellant to know the contents and challenge them. This procedure error is contrary to the agreed principles of laws which have been stated by the higher court."

A similar aspect occurred in the case of **Mathias Dosela@Adriano Kasanga Vs. The republic, Criminal Appeal No. 212 of 2019**(unreported) at Mwanza, the court stated that;

"With respect to miss. Lazaro, as correctly submitted by Mr. Mutalemwa, the stand of the law as elaborated in the two cases authorities cited by Mr. Mutalemwa makes it a necessity for the document admitted in evidence to be read in court....."

The remedy of failure to read the contents of the document(s) admitted in court is to expunge the said document from court records. This position

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was pronounced in the case of **Mbaga Julius Vs. The republic, Criminal Appeal No. 131 of 2015** (unreported) at Bukoba, court stated that;

"Failure to read out documentary exhibit after their admission renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record."

Prosecution tendered exhibits P6, P9, P10 and P11 as reflected at page 16, 18, 19 and 24. Exhibit P6 the sketch map of the scene of crime, exhibit P9 seizure warrant, exhibit P10 and exhibit P11 (PF3) form. Appellant complained that although the exhibits were admitted, but they were not read loud in court to the accused to afford him to understand the contents and nature of the case to afford appellant to prepare his defense. I have reviewed the evidence on record, it is true, the said exhibits were admitted by trial court but they were not read loud. At page 16 of the typed proceedings the evidence of PW5 during tendering the named above exhibits was recorded as follows: -

PW5. I pray that the same be admitted in court as exhibit.

Court: The sketch map of the scene of crime is admitted in court as exhibit "P6"

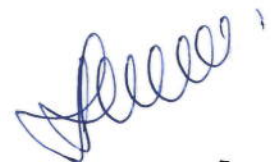
Page 18. I will identify the seizure warrant. I pray to tender it as exhibit.

Court: admitted as exhibit "P9"

Page 19. I will recognize the warrant it bears the signature of the second accused persons. I pray it be admitted as exhibit.

1st accused. I object it does not bare my signature

2nd accused. I object I was forced to sign.

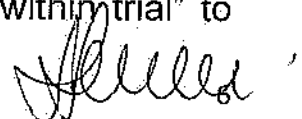


Court: The accused person is objecting of the reasons that they were forced to sign but the issue will be determined with other piece of evidence, I continue to admit as exhibit "P10".

The above evidence shows that, although the trial court admitted exhibits P6, P9, P10 and P11, they were not read loudly in court by PW5 as required by law. Failure to read the contents of exhibits during admission is fatal and the remedy is to expunge the exhibits(documents) from court record. Respondent counsel argued that, even if the said documents is expunged from the records still PW5 explained in details the contents of the said exhibits. He of the view that PW5 oral evidence is water tight and suffice to convict the appellant. With due respect, I don't agree with counsel for the respondent. Failure to read exhibits not only fatal, but the appellant prejudiced and denied his rights of knowing their contents as a result accused will not be able to make his lawful defense which may occasion to failure of justice. In the case of **Michael Luhiye Vs. R. [1994] TLR 181** it was held inter alia:

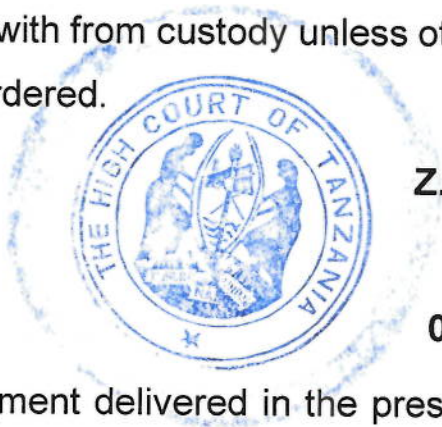
"For a trial in a criminal case to be a nullity it must be shown that irregularity was such that it prejudiced the accused and therefore occasioned failure of justice."

Moreso, exhibit P9 (seizure warrant) is the foundation of investigation which give power to the investigator to seize properties alleged to have been stolen or involved in the commission of an offence. Seizure warrant was not properly admitted for failure to be read loudly in court. Indeed, exhibit P9 and P10 were objected by accused during tendering and admission. Unfortunately, despite of the objection raised by appellant, the trial court proceeded admitting the document without following the mandatory procedure of law to conduct "inquiry" or "trial within trial" to



satisfy itself if the objection has merits or not. In the light of the position of the law, whenever important document(s) is objected, a trial court is duty bound to conduct either 'a trial within trial' or 'an inquiry' depending on circumstances of the case. The consequences of failure to conduct 'trial within trial' or an inquiry, endangers such document to be expunged from the court record as observed by the Court of Appeal of Tanzania in the case of **Nelson George @ Mandela and Five Others vs The Republic, Criminal Appeal No. 31, 93 and 94 of 2010** (unreported). The Court of Appeal observed that, since the confession statement were admitted in to evidence, the remedy is to expunge it from the records.

Therefore, in this case also exhibit P.6, P9, P10 and P11 are expunged from the records. Having expunged named exhibit, I find the appeal merited and hence, allow it, quash the proceeding, judgment and set aside the sentence. I order that the appellant Shaibu Saidi Mtumbila be released forthwith from custody unless otherwise held for other lawful reasons. It is so ordered.



Z.G. Muruke

Judge

05/08/2022.

Judgment delivered in the presence of Wilbroad Ndunguru Senior State Attorney for the Respondent and appellant in person.



Z.G. Muruke

Judge

05/08/2022.