IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 652 OF 2021

FRED MAIKO .....1ST APPELLANT

ELIBARIKI GEOFREY .....2ND APPELLANT

ABDALLAH JUMA .....3RD APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Kagomba, J.)

dated 12th day of November, 2021

in

DC Criminal Appeal No. 128 of 2020

.....

JUDGMENT OF THE COURT

9th & 20th February, 2024

ISMAIL, J.A.:

This is a second appeal that traces its origin from the trial proceedings which were conducted in the District Court of Singida at Singida in Criminal Case No. 105 of 2018. The proceedings related to a charge of armed robbery that was preferred against the appellants and two other persons who were acquitted at different stages of the trial proceedings. An amended charge sheet which was filed in court on 14th November, 2018, informs that the appellants and their fellow assailants were involved in a robbery incident in which cash

sums and assorted electronic gadgets and airtime recharge vouchers, whose aggregate value was TZS. 17,445,000.00, were robbed from Simon Mbenejo. The incident allegedly occurred on 14th April, 2018, at 21.00 hours at St. Calorus Hospital Area, Mtinko Ward, Mtinko Division within the District and Region of Singida. The assailants are alleged to have used machetes and iron bars to threaten the victim to obtain the said properties.

The brief facts of this case, as gathered from the record, are to the effect that Simon Mbenejo, the victim of the incident (PW4), was operating an outlet that offers mobile money services and sale of airtime recharge vouchers. The outlet was located within St. Calorus Hospital compound in which his dwelling house was also located. At about 21:00 hours of the fateful night, PW4 was in the company of his wife, Joyce Erinest (PW5), walking back home. PW5 was holding a handbag in which assorted items were kept, including money, mobile phone handsets, and recharge vouchers all of which were valued at TZS. 17,445,000.00. As they were about to get into their house, a gang of more than ten people, wielding machetes, knives and iron bars emerged. They all covered their faces with caps to hide their identities. They attacked PW4, inflicting an injury on his ear as a result of which he fell down, unconsciously. The assailants snatched the bag from PW5 and made away with it. When PW4 regained consciousness, he found himself on a hospital bed.

The incident was reported to police who took control of the proceedings and investigation began in earnest, with full cooperation from PW4. The police swoop, spearheaded by F 1097 D/Cpl. Exaver (PW6) led to the apprehension of several suspects, five of whom were arraigned in District Court of Singida at Singida, facing the charge of armed robbery. Prior thereto the said suspects, including the appellants herein, were interrogated and allegedly confessed to their involvement in the robbery incident. Their statements, which were tendered during trial as exhibits P1, P2, P3, P4 and P5, were recorded by PW6, G 2428 PC Shita (PW7), Zacharia Simon Yona (PW8), and Ferdinand Michael Njau (PW 9).

The trial proceedings that saw the prosecution marshal attendance of 12 witnesses against four for the defence, and admission of 8 exhibits, culminated in the conviction of appellants. Abeid Seleman @ Nkuki, the 5th accused person was found not have had a case to answer, while Noel Aloyce, the 1st accused, was acquitted. The appellants were sentenced to a custodial term of 30 years.

The conviction and sentence meted out to the appellants were too much to bear. Feeling rattled, they preferred an appeal to the High Court through a 15-ground appeal. The High Court that sat as the 1st appellate court was convinced that the trial court's findings which were based on the appellants' own confessions were unblemished. They were upheld, thereby dismissing the appeal. This verdict ignited the appellants' journey to this Court. The

memorandum of appeal that instituted the instant appeal is composed of six grounds of appeal. For reasons that will be apparent in due course, we choose not to reproduce the said grounds of appeal herein.

When the matter was called on for hearing, the appellants were represented by Mr. Leonard Haule, learned advocate, whilst Ms. Rehema Mgimba, learned Senior State Attorney, assisted by Ms. Elizabeth Barabara, learned State Attorney, represented the respondent.

Ms. Barabara who submitted on the respondent's behalf got us under way. She began by informing the Court that the respondent was in support of the appeal and that her support is predicated on grounds 1, 2, 3 and 4 of the appeal. She chose to submit her arguments without any particular reference to the grounds of appeal. With regard to cautioned statements, Ms. Barabara argued that the record of appeal shows at pages 113 and 114 that the appellants' conviction was based on the confessional statements. The learned State Attorney argued that these statements were recorded in contravention of the provisions of section 50 (1) (a) and (b) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (CPA). She added that, whereas page 22 of the record of appeal shows that the 1st appellant was arrested on 30th April, 2018 and had his statement recorded on 30th May, 2018, the 2nd and 3rd appellants were arrested on 2nd May, 2018 and had their statements

recorded on 3rd May, 2018. Ms. Barabara acknowledged, as well, the fact that section 50 (2) of the CPA allows reckoning of time by justifying the delay but none was given in this case. She discounted PW6's assertion as the same did not account for delayed time.

Still on the statements, Ms. Barabara punched another hole by submitting that 3rd appellant's statement carried a defect which rendered it inadmissible. She argued that the same had a certification done under section 10 (3) of the CPA instead of section 58 of the CPA. He urged the Court to expunge it from the record.

In her submissions on the 1st and 2nd appellants' extra-judicial statements, the learned State Attorney argued that, in none of the statements have the appellants confessed to their involvement in the robbery incident. She wound up her submissions by urging the Court to expunge all the confessional statements (cautioned and extra-judicial). She implored the Court to hold that the residual testimony is too insufficient to prove the case for the prosecution. Ms. Barabara prayed that the appeal be allowed.

On his part, Mr. Haule was in full support of his counterpart's submissions. Besides, he invited the Court to stick to its previous decision in **Abdallah Ally @ Kulukuni v. Republic**, Criminal Appeal No. 131 of 2016 (unreported) and hold that the cautioned statements were defective. With

regard to one of the extra-judicial statements (exhibit P5), the contention by Mr. Haule is that the same was extracted from a person who was not charged in court.

Submitting on the alleged contradictions as complained in ground 4 of the appeal, Mr. Haule contended that variances are visible in three areas, namely; stolen property, owner of the property, and the type of weapon used. He fortified his contention by citing our previous decision in **Erasto John Mahewa v. Republic**, Criminal Appeal No. 287 of 2020 (unreported).

The unanimous position taken by counsel for the parties has narrowed the issues for our determination. The singular question for our determination remains the same throughout different stages of the conduct of this matter. It is whether the prosecution proved its case from which concurrent findings of fact by the lower courts were extracted. It is noteworthy, that as we delve into the heart of the matter, it is not lost on us that, on second appeal, the Court is to desist from interfering with the concurrent findings of fact. The only lee way for intervention is if such findings are manifestly perverse, demonstrably erroneous or evidently unreasonable or a result of complete misapprehension of the substance, nature or non-direction of the evidence or violation of a principle of law or procedure. Significant, as well, is the fact

that the anomalous findings must result in the deflection of the course of justice – see: **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387.

Glancing through the record of appeal, it is clear that conviction of the appellants was mainly predicated on the confessions that the appellants allegedly made through exhibits P1, P2, P3, P4 and P5. These are confessional statements in which the appellants are recorded as admitting to the commission of the robbery incident. This came after both courts ruled out the visual identification as both PW4 and PW5 testified that their assailants wore caps to hide their identity.

In the instant matter, however, determination of probity and weight of the confessional statements appears to have been nipped in the bud, thanks to the unanimous position taken by both counsel, that legitimacy of said statements, admitted as exhibits P1, P2, P3, P4 and P5 is on the line. **One**, with regard to cautioned statements, because their recording was done in excess of the basic period of four hours provided under section 50 (1) (a) and (b) of the CPA. None of the prosecution witnesses came out clean on why time for recording the same was exceeded. **Two**, that certification of the said cautioned statements which is governed by section 57 (3) of the CPA was done under section 10 (3) of the CPA.

We shall begin with the cautioned statements (exhibits P1, P2 and P3). In the case of the 1st appellant, the statement he is connected to is exhibit P2 which appears at pages 84 to 86 of the record of appeal, while his defence testimony is at pages 75 and 76 of the record of appeal. At page 75, the said appellant is recorded as having testified that he was arrested at 18:00 hours on 31st April, 2018. His cautioned statement shows (at page 84) that it was recorded on 3rd May, 2018 between 11:46 hours and 13:03 hours. That, the recording was done after three days since his arrest is, in our view, a no brainer.

As for the 2nd appellant, his testimony appears at page 77 of the record of appeal. Whereas he was apprehended at 08:00 hours on 2nd May, 2018, he remained in incarceration for in excess of 24 hours before his statement (exhibit P1) was recorded on 3rd May, 2018, between 10.33 hours and 11.24 hours. As for the 3rd appellant, his testimony which appears at pages 78 and 79 of the record of appeal paints a similar picture. He was put under restraint at 17.00 hours on 2nd May, 2018. It took the investigators 17 hours to have his statement recorded on 3rd May, 2018, at between 10:33 hours to 11.24 hours.

What is clear in all the statements is that none of them complied with the requirement of section 50 (1) (a) and (b) of the CPA. These statements

were recorded outside the basic period of four hours available for interviewing a person who is under restraint. As to the recourse, the unanimous contentions by learned counsel represent the correct position of the law and we cannot but agree with it. In **Pambano Mfilinge v. Republic**, Criminal Appeal No. 283 of 2009 (unreported), the Court guided on the consequence of contravention with the law when it held:

> *"The period available for custodial interview by the police is regulated under sections 50 and 51 of the Criminal Procedure Act.... Upon numerous occasions, this court has been confronted with situations similar to the one at hand.... In all these decisions the court held that non-compliance vitiated the particular cautioned statement. To this end, we are left with no other option than to expunge the cautioned statement from the record."*

Ms. Barabara pointed out yet another anomaly which is with regard to certification of the statements. She contended that such statements were certified under section 10 (3) of the CPA. This contention is correct but only with respect to exhibit P3, as the rest of the statements were certified under section 57 (3) of the CPA, and we have no qualms about that. We agree with Ms. Barabara, however, that exhibit P3, extracted from the 3rd appellant, was certified under the wrong provision of the law (see page 89 of the record of

appeal). This is in view of the fact that, applicability of section 10 (3) is limited to recording of statements that emanate from examination, by a police officer, of any person who may be acquainted with certain facts in a case. It has nothing to do with certification of any statement, including statements extracted from a person for purposes of ascertaining if such person has committed an offence.

Ms. Barabara has urged us to hold, as a consequence, that the statements shrouded in the said anomaly be expunged. We agree with her that such statements, and in our case exhibit P3, should not be left to see the light of the day. It is a statement that contains a confession whose authenticity is suspect, if not uncertain, that it cannot be left to serve as a foundation for the prosecution's urge to hold the 3rd appellant blameworthy – see: **Juma Omary v. Republic**, Criminal Appeal No. 568 of 2020 and **Christina Damiano v. Republic**, Criminal Appeal No. 178 of 2022 (both unreported). In both of the cited decisions we held that the consequence is to chalk off the anomalous statement.

It should be clearly understood that, as we poke our fingers into and fault the trial process that led to the admission of the said exhibits, we are not oblivious of the enduring position of this Court which was accentuated in numerous decisions, including the case of **Nyerere Nyague v. Republic**,

Criminal Appeal No. 67 of 2010 (unreported), in which we held that admission of evidence obtained in contravention of the CPA is in the absolute discretion of the trial court, and that the court must take into account all necessary matters before a decision is made to admit or reject it. The decision to admit must be for the benefit of the public and without trampling the rights and freedoms of the accused.

We observe in the instant matter, that while matters relating to admissibility were in the absolute discretion of the trial court, when they were contested, nothing can be inferred from the record that admission of the said statements was for the benefit of public interest, and that the appellants' rights were not unduly prejudiced. We are of the considered view that, given the gravity of the patent anomalies on the statements (exhibits P1, P2 and P3), exercise of such discretion was injudicious and prejudicial to the rights of the appellants. In consequence, we accede to the counsel's prayer and we hereby expunge the said statements from the record.

Turning to extra-judicial statements, we begin by restating that the settled position of the law is that, like confessions extracted from cautioned statements, an extra-judicial statement by an accused person may be used to inculpate him. To be able to rely on it, the same must have the qualities of a confession, in that it must contain an admission (under section 3 (1) of

the Evidence Act) which sees the maker admit to have played a role in the offence he is accused of. In **Emmanuel Lohay and Udagene Yalooha v. Republic**, Criminal Appeal No. 278 of 2010 (unreported), we underscored that a confessional statement must:

> *"... shed some light on how the deceased concerned met his death, role played by each of the accused persons, such details as to assume the courts concerned that* ***the maker of the statement must have played some culpable role in the death of the deceased."*** [Emphasis is supplied.]

We have unfleetingly reviewed exhibits P4 and P5 (pages 90 to 94 of the record of appeal), extra-judicial statements made by the 1st appellant and the 2nd appellant. What we discern from these exhibits is that, the 1st and 2nd appellants were in the gang that was involved in the robbery incident but the actual perpetrator, a certain Mr. Mang'ola, ran away with the objects of the incident. At page 93 of the record of appeal, the 2nd appellant is recorded as stating as follows:

> *"...mimi sihusiki kwenye unyang'anyi nilifosiwa na Mang'ola tukiwa na Fred kwenda kwenye huo unyang'anyi tukiwa hatujui tunachoenda kufanya."*

As for the 1st appellant, his confession is found at page 95 of the record of appeal. It is as follows:

> *"Kwenye hili tukio nilishIrikishwa na aliyenishirikisha ameshakimbia anaitwa Mang'ola kwa jina la nyumbani. Mang'ola alimnyang'anya mwanamke mkoba halafu akakimbilia Magharibi sisi tukakimbilia Mashariki..."*

From these excerpts the question that lingers in our minds is: are what are said to be confessions consistent with other facts which have been ascertained and proved? Our unflustered answer to this question is in the negative. None of these fits well with what the prosecution alleged and the evidence that it led in court. The statements have fallen way short of revealing that the appellants played a culpable role in the robbery incident with which they were charged, and we agree with Ms. Barabara that none of that was of any assistance in proving guilt of the accused.

With exhibits P1, P2, P3, P4 and P5 out of our way, the question that follows is whether the remainder of the prosecution evidence holds the requisite potency for holding the appellant guilty and support the conviction. In our considered view, we do not think it does. It is acutely insufficient to ground any conviction against any of the appellants. We hold, therefore, that conviction and sentence of the appellants as subsequently upheld by the 1st

appellate court was not based on any solid foundation. Stated otherwise, the prosecution case was not proved at the required standard.

In fine, we allow the appeal, quash the convictions and set aside the sentence. We also order that the appellants be immediately set free unless held for some other lawful cause.

DATED at **DODOMA** this 19th day of February, 2024

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

This Judgment delivered this 20th day of February, 2024, in the presence of Mr. Leonard M. Haule, learned counsel for the Appellants, who are also present and Mr. Francis M. Kesanta, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL