

**A THEOBALD CHARLES KESSY AND VICENT
MWAIKAMBO v. REPUBLIC**

**B HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(Mackanja, J.)**

C CRIMINAL APPEAL No. 96 OF 1997

(Original Criminal Case No. 4 of 1996 of the District Court of Ilala at Kisutu,
Mtotela, Esq., Principal Resident Magistrate)

**D Criminal practice and procedure – Exhibits – Disposal of exhibits after closing
prosecution case – Effect thereof – Section 353(1) of the Criminal Procedure
Act 1985.**

**E Evidence – Confessions – Confession made in consequence of a temporal
inducement resulting from violence – Whether proper.**

*Evidence – Confessions – Appellant forced to make admission of guilt in his
cautioned statement – trial court must give due consideration to the matter.*

**F Judgment – Judgment does not meet the statutory requirements – Judgment bad
in law.**

**G The appellants were convicted of armed robbery by the District Court of Ilala at
Kisutu. After their arrest the appellants were taken to a police station, where they
allege they made confessions after being subjected to beatings by the police. When
they wished to repudiate their statements the court did not allow them. After closure
of the prosecution case all exhibits tendered in court were disposed of.**

**H They appealed to the High Court against conviction challenging the decision of
the District Court on various grounds namely, that the court erred in law and fact in
disposing of key exhibits that were tendered before it just after the closure of the
prosecution case in total disregard to the defence case, that the court erred in law and
fact by shifting the burden of proof from the prosecution to the accused, that the trial
court's recording of the proceeding was bad in law and that the trial court's judgment
was bad in law.**

A Held: (i) The disposal of the exhibits in contravention of section 353(1) of the Criminal
Procedure Act 1985 worked an injustice to the defence

(ii) One of the appellants having raised the issue of being forced to make admissions
of guilt in their cautioned statement the trial court was required as a matter of law to
consider that issue and make a finding on it, giving reasons for reaching any conclusion
on the matter; **B**

(iii) In the instant case in which there is evidence of violence before the statements
by the accused persons were recorded, untrue confessions may as well have been a
result of a temporal inducement relating to a possible recurrence of violence if the
accused persons had refused to make an untrue admission of guilt; **C**

(iv) The trial court's judgment does not meet the statutory requirements.

D Appeal allowed.

Cases referred to:

(1) *Tuwamoi v. Uganda* [1967] EA 84

(2) *The Queen v. Lushington, ex parte Otto* [1894] 1 QB 420 **E**

(3) *R. v. Harz* [1967] AC 776

(4) *Ibrahim v. The King* [1914] AC 599

Statutory provisions referred to: **F**

(i) Penal Code, sections 285 and 286

(ii) Criminal Procedure Act 1985, section 312, section 313, section 353(1) and (5)

Dr. Mwakyembe, for the Appellants **G**

Mr. Mallya, State Attorney, for the Republic

JUDGMENT

(Delivered 21 April 1999) **H**

MACKANJA, J.: The appellants were convicted of armed robbery
contrary to sections 285 and 286 of the Penal Code. The offence is **I**

A alleged to have been committed on 28 December 1995 at about 8:30pm along Mosque Street in Dar es Salaam. Raza Hussein Fatch (PW1), the victim of the offence, was at the material time driving Toyota Corolla car with registration number TZF 5112 when the thieves B pounced on him. He swore that he could not remember any of his assailants. He, however, made a report to the police who mounted a search for the alleged robbers immediately. It seems to be the case that a report of the incident was relayed to police officers who were C on patrol, two of whom were PC Avelin (PW2) and PC Ally (PW3). According to the testimony of these two witnesses, they received a radio call of notifying them of the robbery as they were driving a police patrol car with registration number STH 9358 along the Ali Hassan Mwinyi Road. To be precise, they were at Mwenge. Soon D thereafter they sighted the Toyota Corolla, TZF 5112, as it was turning to their right. They flashed lights to its occupants which was followed by a warning shot. The suspects are alleged to have fired back. The vehicle did not stop; so they gave chase to it. It, however, stopped E after it hit a nearby fence. One of the suspects fled but Copl. Avelin (PW2) caught up with, and arrested, him. The suspect was arrested near a local police post and it is in the testimony of PW2 that people F who were near the police post beat up the suspect who later was to be the second accused. It is the prosecution case that the man who was to be the first accused did not flee, he was arrested while he was still on board. And as a result of the search which was mounted the police contingent recovered from the stolen car a pistol loaded G with five rounds of ammunition.

At about 10:00pm the same night the two suspects were handed over to D/Copl, Nicholas (PW4) who was on duty at the time. From his own account the accused persons had bruises on their bodies at H the time they were handed to him. In addition, the second accused wore neither shirt nor shoes. In the end PW4 recorded a caution statement from the first accused. On his part D/Sgt. Jumanne (PW5) recorded the caution statement that was made by the second accused. I It was alleged that both accused person, separately, admitted to have committed the offence.

The accused persons denied complicity in the crimes facing them. A According to his testimony Theobald Charles Kessy (DW1), the first appellant, saw two vehicles, one of which was chasing the other. He B had just alighted from a bus which had taken him from Ubungu when he witnessed the car chase. He also saw the front car hit a fence. He C heard someone ordering him to stop as he decided to proceed to Mikocheni. Immediately he was brought down by a policeman who, he alleged, beat him. He was subsequently taken to the Oyster Bay Police Station where he alleged to have received more beating.

The second appellant testified that he had just arrived in Dar es Salaam, his first journey to Dar es Salaam, when he was arrested at D Makumbusho. Like the first appellant he was also beaten up while he was in police custody at the Oysterbay Police Station.

It is on the strength of the above evidence that the appellants were convicted. They were aggrieved, hence this appeal. They have raised five grounds in their memorandum, namely:

1. that the convicting court erred both in law and in fact in disposing E of key exhibits that were tendered before it just after the closure of the prosecution case in total disregard to the defence case;
2. that trial court erred in law and in fact by shifting the burden of F proof from the prosecution to the accused persons;
3. that the trial court erred in law and in fact by convicting appellants without sufficient evidence;
4. that the trial court's recording of the trial proceedings was bad in G law; and
5. that the trial court's judgment is bad in law.

Let me now say that Mr Mwakyembe, learned advocate, appeared H for the appellants, while Mr Mallya, learned State Attorney, appeared for the respondent Republic. The appeal was argued by way of written submissions. I

A As regards the first ground of appeal it is Mr Mwakyembe's contention
 that as the trial records show, the defence had on the 23 October
 1996 intimated to the trial court that it was going to call a ballistics
 B new light on the motor vehicle, the pistol and bullets which the prosecution
 claimed to have been involved in the said armed robbery incident
 and which had been tendered in court as exhibits. And that it is on
 C record that the court ordered that the items were to be brought in
 court on the 6 November 1996 when the defence case was scheduled
 to resume. According to learned counsel the defence wanted the
 motor vehicle carefully examined by an independent expert because
 it had a hole in its dashboard which the defence believed to have
 D been caused by a bullet deliberately fired from inside the vehicle
 or from very close range by the police themselves to dramatise and
 land credence to their trumped-up story of gun fight between the
 police and the appellants. The defence wanted the pistol properly
 E checked because it believed that the pistol had not been fired contrary
 to the testimony by PW3 and PW4 that the appellants had fired at
 the police. Indeed it is argued that PW3 and PW4 never even bothered
 to show the court one or two used cartridges fired from the said
 F pistol during the so called gun battle. The defence also wanted the
 bullets with magazine re-examined because they were of different
 size and make to fit the pistol which the prosecution exhibited in
 court. These were, according to learned counsel, very crucial issues
 to the defence case which were bound to considerably shake the
 G foundation of the prosecution testimony. Contrary to expectations
 nurtured by the defence, and during a period in which there were 21
 appearances in court spanning over a period of 8 months, no exhibits
 were forthcoming. On the 1 July 1997 the trial magistrate admitted
 H that the exhibits had been disposed of and the defence was left with
 no alternative but to call its last witness and to close its defence by
 written final submission.

I Mr Mwakyembe made the further point that sections 353(1) and
 (5) of the Criminal Procedure Act Number 9 of 1985, does not envisage

disposal of non-perishable exhibits before final disposal of a trial
 and before the period allowed for lodging appeal has elapsed. He
 also made a reference, to apparent shortcomings in the trial court's
 proceedings which I do not find to be cognate to the first ground of
 appeal.

It is the case for the appellants in the second ground that the
 trial court erroneously shifted the burden of proof onto the accused.
 This relates to accusations that were made by the appellants that
 they were tortured while they were under police restraint in a bid to
 C illegally extract confessions and admission from them. This complaint
 appears at page 18 of the typed copy of proceedings. In fact the
 second appellant went as far as showing the trial magistrate the injuries
 he had suffered and asked the magistrate to allow them to repudiate
 D their caution statement by recording new statements. It is now argued
 by learned counsel that a court being a temple of justice ought to
 have taken such complaints seriously and with special concern because
 of one main reason namely, that the appellants were arrested on the
 E 28 December 1995 and taken to court on the second day of January
 1996, i.e. 5 days after their arrest. Thus the finding by the trial magistrate
 that the wounds on the bodies of the appellants were fresh was not a
 simple matter but a confirmation that the appellants had been beaten
 F while in police custody. Instead of acting responsibly, he argues,
 the trial magistrate ended up saying in his judgment that the appellants'
 defence that they were beaten up was mere afterthought. It is consequently
 submitted that no serious tribunal upholding the rule of law could
 G have relied upon the extra-judicial statements tendered in court by
 the prosecution as P7 and P8 on account of the doubts which the
 appellants had raised at the start of the trial. Learned counsel referred
 for authority on the principle that the onus of proving a confession
 was voluntary lies on the prosecution, citing *Tuwamoi v. Uganda*
 H (1), where it was held at page 89 Duffus, Ag P, that:

As a matter of practice or prudence, the trial court should direct itself
 that it is dangerous to act upon a statement which has been retracted in
 I

A the absence of corroboration ..., but the court might do so if it is fully
satisfied in the circumstances of the case that the confession is true.

It is contended in the third ground that there was not enough evidence
upon which the prosecution could secure a sound conviction. In Mr
B Mwakyembe's view, and since the appellants consistently denied
complicity, only the complainants could tell the trial court with any
certainty the people who robbed them. That without direct evidence
the prosecution was simply going to engage in conjecture. Learned
C counsel has urged this court not to lose sight of the fact that the
incident had taken place just six days earlier, for a young person
like PW1 (28 years old) to forget faces of people who had robbed
him at gun point and under bright street lights. Thus in the circumstances
D of this case, the logical conclusion would have been that the real
robbers had not been brought before the court. Learned counsel then
questioned why the prosecution failed to call the wife of PW1 who
was also the victim of the alleged robbery to shed light on the matter
after her husband had failed to recognise the appellants. It is learned
E counsels' view that an important witness for the prosecution had
been deliberately and without sound reasons, excluded from the trial
because the prosecution knew that she wouldn't also recognise them
because the people in court were not the culprits who had attacked
F her at Mosque Street on the 28 December 1995.

Mr Mwakyembe has spoken emotively about how he views the
record of proceedings of the trial court when arguing the fourth
G ground. He contends quite correctly, that a proper record of trial
proceedings is envisaged under section 210 of the Criminal Procedure
Act, 1985 to be an authentic record of what transpired in Court.
Unauthentic accounts do not only undermine the parties right to a
fair hearing at trial level but also completely and unfairly bring to
H ruin the aggrieved party's chances of success in an appeal, or an
application for review and even revision. What learned counsel says
may be right, but there is no proof of his allegations. I would therefore
I give no more considerations to this ground.

The fifth ground of appeal is devoted to what a judgment in a
criminal trial must contain as prescribed under section 312 of the
Criminal Procedure Act 1985. The one – and – a – half page of judgment
of the trial court is roundly dismissed as being dry, rudimentary,
skeletal and devoid of the point or points for determination and the
reasons thereon. Mr Mwakyembe is frustrated by the judgment of
the convicting court, for he says that although he submitted to the
trial court five pages of written final arguments as agreed upon in
Court, the trial magistrate did not address his mind to any of the
several issues he raised for the defence. This does not surprise learned
counsel for at the close of the prosecution's case, he made an hour
long submission in court praying for dismissal of the charge and
acquittal of the appellants on ground that the prosecution had not
been able to sufficiently make out a case against the appellants. The
long-awaited ruling of the trial court was only one sentence: "Prosecution
having closed its case I have found for the prosecution to have established
a *prima facie* case".

There is a further onslaught on the trial court's judgment. Learned
counsel argues that under section 313 of the Criminal Procedure
Act, 1985, a judgment is a public document which can be demanded
free of cost by an accused person or at a prescribed fee by any interested
party of person affected by the judgment. A judgment, therefore,
should always bear testimony to the public that the court is a temple
of justice, that the court had carefully considered all the evidence
tendered before it, had heard all the important arguments and had
arrived at an independent, objective, fair and reasoned decision. In
other words it is through judgments that the public can see justice
being done in the courtrooms. As a result he had not only expected
the judgment of the trial court to revisit the key arguments and issues
raised by both the prosecution and the defence, that also to relate
the prosecution's testimony to the requirements of the charge of
aggravated theft or armed robbery under sections 285 and 286 of
Chapter 16 and to the appellants' proven conduct and state of mind.

A It is on the basis of the above grounds that learned counsel prays that conviction be quashed and sentence be set aside and the two youthful appellants be set free.

B The Republic in a very brief written submission denies that there are any fatal irregularities in the proceedings and in the judgment of the trial court.

C Mr Albert Mallya, learned State Attorney, argues in respect of the first ground the contention that the defence were not accorded an opportunity to call a ballistics expert. It is the case for the Republic that the appellants were given ample opportunity to call witnesses, including a ballistic expert but they chose not to do so. Instead, the defence counsel chose to close, the defence. The third and fifth grounds are equally denied. Both the conviction and sentence.

E As to the second ground of appeal it is Mr Mallya's contention that the claim of torture is not made out, even though he concedes that the appellants drew the trial court to allegations that their statements were taken under coercion and that they were beaten, thereby sustaining bruises.

F Over all the respondent Republic would have me dismiss the appeal. The foregoing were the arguments by learned counsel. I propose, after according them due consideration, to determine the grounds of appeal *seriatim*. In this connection I will make a quick look at Mr Mwakyembe's submissions. He contends that the appellants were denied an opportunity to use in their defence exhibits which were tendered in evidence by the prosecution because they were disposed of while the trial was still pending. It is alleged that the fact that the exhibits had been disposed of was communicated to them on 1 July 1997. According to learned counsel the disposal of the exhibits contravened the provisions of section 353(2) of the Criminal Procedure Act, 1985. This part of section 353 refers to an exhibit which "... is subject to speedy and natural decay ..."

I Where such an item is tendered in court the trial court has discretion at anytime during the proceedings or at any time after the final disposal

A of the proceedings to order that it be sold or otherwise disposed of. It is the contention of Mr Mwakyembe that the disposal was unjustified because the exhibits in question, namely, a car, a pistol, rounds of ammunition and spent cartridges are not of a perishable nature.

B I entirely agree with this contention. In my view those exhibits could only be disposed of in terms of subsection 1 of section 353 of the Criminal Procedure Act, which provides thus:

- (1) Where anything which has been tendered or put in evidence in any criminal proceedings before any court has not been claimed by any person who appears to the court to be entitled thereto within a period of twelve months after the final disposal of such proceeding or if any appeal entered in respect thereof, such thing may be sold, destroyed or otherwise disposed of ...

E So subsection (1) of section 353 makes it a requirement that exhibits which are not covered under the succeeding subsections will be disposed of after the trial, and if there is an appeal, after the appeal. Because the exhibits were not perishable their disposal during the pendency of the trial worked an injustice to the defence. And as Write, J., put it in his judgment in *The Queen v. Lushington ex parte Otto* (2):

F In this country I take it that it is undoubted law that it is within the power of, and is the duty, of, constables to retain for use in court things which may be evidences of crime... I think it is also undoubted law that when articles have been produced in court by witnesses it is right and necessary for the court, or the constable in whose charge they are placed (as is generally the case), to preserve and retain them, so that they be always available for the purpose of justice until the trial is concluded ...

H I said earlier that the disposal of the exhibits has worked an injustice to the defence; this may be so because the disposal may be a ground for a presumption that had the exhibits been available the defence could have created doubts in the prosecution case or that what the defence claims may as well be true. In either case reasonable doubts emerge the advantage of which must go to the appellants. I would, in that circumstance, determine the first ground in the affirmative.

- A The second and third grounds relate to the caution statements the appellants admittedly made, but the contents of which they dispute. It is contended on their behalf that the admissions contained therein were involuntary, and they made it known to the trial court that they
- B made the admissions after police torture. The trial court is on record to say that the appellants bore fresh wounds but it did not allow the appellants to make fresh statements at a time when they were no longer in police custody.
- C The three prosecution witnesses who testified denied that the appellants were tortured while they were under police restraint. That may be quite possible; it may still be quite improbable. It seems to be improbable because the prosecution was not taken by surprise
- D by the allegations that the appellants were severely beaten up at the time shortly before the caution statements were recorded. This is a matter which was made in an open court. One would have expected the prosecution to adduce evidence quite in advance of the defence
- E that the allegations were untrue. This could easily be done by the prosecution calling witnesses from among members of the public to testify that the appellants sustained injuries after they were beaten up by members of the public who happened to be around the time the appellants were arrested. Civilians who witnessed the alleged
- F mob assault of the appellants should have been called to testify. Failure to call anyone who, beside the police who are alleged to have tortured the appellants, was outside the accusations should have entitled the trial court to make an adverse inference that if any such witness
- G was called he would have testified against the prosecution case. The omission, therefore, was another instance in which reasonable doubts emerge, the benefit of which should have gone to the appellants. From the above considerations I am satisfied that it is more probable
- H than not that the confessions were influenced by a temporal fear of further violence.

I Numerous authorities abound regarding the probative value of confessions which are influenced by violence or threats. One is *Tuwamoi's* case (*infra*). I however, would like to emphasize a few aspects. As

A it was said in *R. v. Harz* (3), a statement made by an accused person in relation to, or material to, the subject matter or a charge subsequently brought against him must neither be obtained by a promise of advantage of favour or threat of disadvantage relating to the charge, nor by any other inducement of compulsion in relation to such statement otherwise B than a voluntary statement of the accused himself. And it is now the law in this country that a confession of a crime must not be made in consequence of a temporal inducement resulting from violence from C or by those who arrest the accused person or in whose custody he is placed. Upon identical considerations, and as it was held in the English case of *Ibrahim v. The King* (4), when evidence is tendered against an accused person that consists of a statement that may as well be D admissible on the ground that being against his own interest, it is probably true, the trial court should first consider the circumstances in which it was made. If those circumstances were such that the accused might have been tempted to make such a statement when it was untrue although against his ultimate interests, then the court should take E the safe course of rejecting it in case it might be untrue. In my view, in a case such as the instant one in which there is evidence of violence before the statements by the accused persons were recorded, untrue F relating to a possible recurrence of violence if the accused persons had refused to make an untrue admission of guilt.

G So, in conclusion I am satisfied that the appellant has made out his case in respect of the second and third grounds. I would determine them in the affirmative. As I said earlier there is no proof for the fourth ground. I will therefore proceed to consider the fifth ground in which it is contended that the trial court's judgment is bad in law.

H The fifth ground is based on the provisions of section 312(1) of the Criminal Procedure Act which provides that:

I Every judgment under the provisions of section 311 shall... contain the point or points for determination the decision thereon and the reasons for the decision....

A Mr Mwakymbe argues that the impugned judgment falls far too short of the above statutory requirements. Mr Mallya, though briefly, argues in difference with learned defence counsel.

B Now the impugned judgment is, by any description, very brief. The first paragraph covers the statement of offence and the particulars thereof. In addition all the prosecution witnesses are listed. The second paragraph contains a summary of the evidence for the prosecution. The defence case is summed up in one sentence. In the last paragraph of the first page a reference is made to the doctrine of recent possession and how it applied to the appellants. There then follows a brief reference to some aspects of circumstantial evidence. I will quote the relevant part, namely:

D The prosecution case in brief is that the two accused persons were involved in the armed robbery in which the motor vehicle TZF 5112 was robbed. On the time, date, and place above mentioned PW1 was driving his motor vehicle. He saw three people and one of them had a hand gun. The three
E had ordered PW1 to get out of the M/V. He complied and the three took and drove away the M/V. He reported the incidence at the police station. Then the Police relayed the message of the M/V. being stolen. The M/V was retrieved at Mwenge area. The accused persons were caught red
F handed driving the M/V. One of culprits escaped. The first accused remained in the M/V. He had a pistol and five rounds of ammunition. The hand gun is STAR KF 5645. They were tendered as P2 the hand gun, P5 five rounds of ammunition. The M/V was tendered as P6.

G The first accused's statement was tendered as P7 while that of the second accused was tendered as P8.

H On defence both accused persons denied to have participated in the robbery.

I The accused persons were found driving the m/v within one hour from the time the m/v was robbed. Such short time brushes aside any possibility that the m/v changed hands the moment it was robbed. The inference is that these two accused persons were the very persons who had taken part in the robbery.

A The statements they made were caution statements both of them have conceded to have taken part in the robbery. That is Exhibits P7 and P8.

B According to PW1 one of the robbers had a hand gun and had threatened to use it unless otherwise PW1 got out of the MV and they in turn rob it. The hand gun was retrieved in the MV when the Police impounded and arrested the accused persons. The hand gun was tendered as Exhibit P6. This means that the offence committed was armed robbery.

C The accused persons defences that they were beaten up, and that *alibi* are mere afterthought. I can conclude that the prosecution had proved the charge beyond reasonable doubt. I convict both accused persons as charged.

D There is no doubt that the trial court's judgment does not meet the statutory requirements. This is so because the defence was not accorded any weight. One of the appellants having raised the issue of being forced to make admissions of guilt in their caution statements the trial court was required as a matter of law to consider that issue and make a finding on it, giving reasons for reaching any conclusion on the matter. Indeed, the defence raised the issue of credibility when it was contended by defence counsel in his final address that the bullet hole in the windscreen was caused by a shot from inside the car. And take the repudiated confessions; the trial court did not address its mind to the danger of a possibility of the admissions having been influenced by the violence to which the appellants were subjected. In fact there is no finding that the alleged confessions were voluntary. It is in these circumstances I hold that indeed the trial court's judgment
F is bad in law. Accordingly, the fifth issue is determined in the affirmative.

H Upon the foregoing considerations the appeal is allowed. Consequently the conviction is quashed and the sentence is set aside.