LEGAL PRINCIPAL DISCUSSED

Citation	Parties	Legal Principles Discussed
IN THE COURT OF APPEAL OF TANZANIA AT DODOMA. CRIMINAL APPEAL NO 364 OF 2008. KILEO J.A, MASSATI J.A AND ORIYO J.A.	**SELEMAN HASSAN VS THE REPUBLIC**. (Appeal from the Decision of the High Court of Tanzania at Dodoma, Masanche J.)	1. There is no doubt that a confession to an offense is admissible in evidence. The very best of witnesses in any criminal trial is an accused who confesses his guilt. However, such claims of accused persons having made confessions should not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily. 2. The law is that a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence in the ground that it was not so or it was not made at all. If the objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial Court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence. 3. The omission to inform the accused person of his right to say something and/or to conduct an inquiry or a trial within a trial in case there is an objection raised, results in a fundamental and incurable irregularity. 4. The doctrine of recent possession to be applied, a complainant must show with certainty that the item found with an accused belonged to him.

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., MASSATI J. A. AND ORIYO, J. A.)

CRIMINAL APPEAL NO 364 OF 2008

BETWEEN

SELEMANI HASSANI..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma

[Masanche, J.]

dated 9th May 2007
in
Criminal Appeal No. 8c/F 9 of 2007

JUDGMENT OF THE COURT

17th & 23rd March, 2010

KILEO, J. A.

The appellant Selemani Hassani, along with Ibrahim Hamisi @ Tall Babu Chodo were convicted of armed robbery contrary to section 285 and 286 of the Penal Code and were sentenced to the statutory term of 30 years imprisonment in the District Court of Singida at Singida. On appeal to the High Court Ibrahim Hamisi was set free and the appellant's conviction and sentence were confirmed. Being aggrieved he has come to this Court. In his memorandum of appeal the appellant

has listed 8 grounds. These grounds can however be conveniently condensed into the following grounds:

> *That the cautioned statement, which was taken into account in arriving at his conviction, was not properly admitted in evidence.*
>
> *That his defence was not put into consideration.*
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> *That the search was improperly done; and*
>
> *That the doctrine of recent possession was improperly applied.*

The facts leading to his conviction are briefly to the effect that the complainant (PW1) was invaded by about six robbers who ransacked his house and made away with shs 6 million in cash and some items which included a TV set and its deck (not mentioned in charge sheet), cushions and a small wallet. The incident took place on 10/07/2004 at around 2.15 hours. The complainant did not identify his invaders at the scene. The appellant's conviction was based on:

> (a) his cautioned statement, which nevertheless appear to have been admitted only as "corroboration"
>
> (b) the doctrine of recent possession.

The appellant appeared in person at the hearing before us. The Respondent Republic was represented by Mr. Faraja Nchimbi, learned State Attorney. The appellant did not say much except to implore us to

adopt his grounds of appeal. The Republic did not support the appellant's conviction and sentence.

There are two main questions before us. **One**, did the appellant ever make the cautioned statement? **Two**, was it sufficiently proved that the appellant was found with the stolen properties? We have noted from the proceedings that when he was required to give his defence in the trial court the appellant opted to keep mum and he called no witnesses. His complaint that his defence was not considered in the circumstances shall not detain us.

Submitting before us, Mr. Nchimbi pointed out that the cautioned statement which was among the things that were relied upon in entering a conviction upon the appellant was not properly admitted. The learned counsel stated that once the appellant had denied authorship of the statement, which was the case, then an enquiry ought to have been conducted to ascertain the authenticity of the document. Mr. Nchimbi referred us to the case between **Paulo Maduka and 4 Others and the Republic** –Criminal Appeal No. 110 of 2007(Unreported) in support of his submission. In that case the Court stated:

"There is no doubt that a confession to an offence is admissible in evidence. The very best of witnesses in any criminal trial is an accused who confesses his guilt. However, such claims of accused persons having made confessions should not be treated casually by courts of justice. The prosecution should always prove that **there was a confession made** *and the same was made freely and voluntarily"* (Emphasis ours).

Indeed the record shows that the appellant objected to the tendering of the cautioned statement asserting that he did not author it. He even told the trial court, at the time that PW3 attempted to tender it in evidence, that he did not author it and that even the finger print appearing on the statement was not his. At this time the trial magistrate directed that the statement be taken to the Identification Bureau for authentication. At the same time he admitted it for what he considered to be "for matter of corroboration only". This took place on 12.04.2005. At first we thought that the trial magistrate had said a "matter of identification only", but when we checked the original record we were proven wrong. Admitting a document for "corroboration" no doubt gives it evidentiary value, which is what the magistrate did in this case. The statement was however given evidentiary value without test of its authenticity. The trial magistrate did not say why he had to continue with, and complete the matter,

without the report from the Identification Bureau. Unfortunately, the first appellate court did not address itself to this aspect. We are settled in our minds that failure to do that was a misdirection considering that the cautioned statement was taken into account when arriving at a conviction. On appeal to the High Court the learned first appellate judge made a fleeting reference to the admission of the cautioned statement without its voluntariness being tested. He did not however say anything about the effect of the improper admission of the statement. In **Twaha Ally and 5 Others v. R.** (Criminal Appeal No. 78 of 2004) this Court clearly stated that the law is that a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground that it was not so or it was not made at all. The Court went on and stated:

> *".....If the objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

In the present case, the appellant had denied ever having made the statement. Once objection had been made to the statement and after the trial magistrate had directed that the statement be sent to the Identification Bureau for testing its authenticity in line with **Twaha Alli** cited above, the trial magistrate should have awaited the report from the Bureau before proceeding with the matter and subsequently entering a conviction. The Court in **Twaha Alli** further stated that the omission to inform the accused of his right to say something and/or to conduct an inquiry or a trial within a trial in case there is an objection raised, results in a fundamental and incurable irregularity. In the matter before us it was not established in the trial court that the appellant ever made the statement in controversy. We are settled in our minds that reliance on that statement, alleged to have been made by the appellant in the absence of an inquiry in the circumstances of this case amounted to a serious irregularity.

The other matter in controversy in this appeal is the finding by the lower courts that the appellant was found with the stolen items. Submitting in support of the appellant's contention on this point, Mr. Nchimbi argued that the record was not clear about identification, by the complainant, of the stolen items. He referred us to **Ally Bakari &**

Pili Bakari (1992) T. L. R. 10 where it was held that for the doctrine of recent possession to be applied, a complainant must show with certainty that the item found with an accused belonged to him. The learned State Attorney further pointed out that there was no mention of the deck in the charge sheet though the appellant was said to have been found in possession of the same. Not only that, there were some inconsistencies in the witnesses' testimonies as regards the spot where the appellant was found, the learned State Attorney argued.

A careful scrutiny of the record indeed shows to us that there were some inconsistencies between the evidence of PW1 who was the complainant, and that of PW2 with whom they went to arrest the appellant. While PW1 said that they went to the appellant's house, PW2 claimed that they surrounded a certain area at Mtunduruni where the properties were in the process of being sold. While being cross-examined by the appellant PW2 claimed that the area was a *pagala* (an unfinished house). PW2 claimed that when they surrounded the area other people ran away but they managed to arrest the appellant. PW1 did not mention about other people running away. Another aspect we noted is the fact that whereas PW2 in his evidence said that upon interrogation the appellant told them that the properties belonged to

his sister's husband there is however no evidence that any efforts were made to trace the said brother in law.

We also agree with the learned State Attorney that the complainant did not, sufficiently identify the properties alleged to have been found in possession of the appellant. He did not give any special marks of his stolen TV. He gave a serial number of the deck. However, this deck was not listed in the charge sheet as one of the stolen items and moreover there was no receipt tendered in court to match the serial numbers between the deck and the receipt. As for the cushions, the complainant said that he could identify them "since the covers are the same with tearing marks." The complainant did not adequately show what was different or special in these cushions from others.

We are settled in our minds that if the courts below had given a careful examination of all the circumstances of the case they would have come to the conclusion that the case against the appellant was not proved to the standard required in law.

It is in the light of the above considerations that we find merit in the appeal filed by Selemani Hassani, which is in the event allowed. The

Conviction entered against him is quashed and sentence is set aside. The appellant is to be released from custody forthwith unless he is held for some other lawful cause.

Order accordingly.

DATED at **DODOMA** this 22nd Day of March 2010.

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU

DEPUTY REGISTRAR