IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., NSEKELA, J.A. And LUANDA, J.A.)

CRIMINAL APPEAL NO. 48 OF 2006

1. KENEDY OWINO ONYACHI
2. CHARLES JOHN MWANIKA NJOKA
3. ABDULKARIM IBRAHIM MONGI .....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kalegeya, J.)

dated 19th December, 2005
in
Criminal Appeal No. 125 of 2005

JUDGMENT OF THE COURT

LUANDA, J. A:

This criminal appeal originates from the Dar es Salam Resident Magistrate Court sitting at Kisutu and then it went to the High Court on appeal. Finally, it landed in this Court also on appeal. A brief factual background to the matter will be helpful.

The above named appellants namely Kennedy Owino Onyachi, Charles John Mwanika Njoka and Abdulkarim Ibrahim Mongi (herein after referred to as the 1st, 2nd and 3rd appellants respectively) with five others, were jointly charged with two counts under the Penal Code, Cap. 16. The first count was conspiracy to commit an offence contrary to Section 384. And the second one was armed robbery contrary to Sections 285 and 286.

After a full trial, the trial court acquitted all eight accused persons, including the three appellants on the ground that the evidence was not strong enough to ground a conviction. However, the trial court convicted two out of those eight accused persons (not the appellants) for a minor offence of neglect to prevent a felony (sic) contrary to Section 385 of the Penal Code, Cap. 16. We wish to pose and point out right away that by virtue of Section 2 (1) and (2) of Act No. 14 of 1980 – Penal Code (Amendment) Act, 1980 the distinction between a felony and misdemeanor has been abolished and both are treated as offences. The amendment reads:

2 (1) All distinctions between felonies and misdemeanors in the Penal Code and in any other written law for the time being in force in Tanganyika are hereby abolished.

(2) A reference to a "felony" or " misdemeanor" in the Penal Code or in any other Witten law for the time being in force in Tanganyika, shall be construed as a reference to "an offence" and the term "the felony" or the misdemeanor" shall be construed accordingly.

We are of the settled view that the inclusion of the word "felony" did not occasion any failure of justice to those who were convicted. Be that as it may, each was sentenced to two (2) years imprisonment.

Those convicted with a minor offence and the Republic were not satisfied with the finding of the trial court. They appealed to the High Court where it overturned the finding of the trial court namely, those convicted were set free for lack of evidence and among the five

acquitted, the three (the appellants) were convicted with the offence of armed robbery and each was sentenced to 30 years imprisonment.

Dissatisfied, the appellants have lodged their notices of intention to appeal to this Court. The notice of intention to appeal of the 3rd appellant who was not present when judgment and sentence were passed was lodged by his advocate one Mr. Mbamba from Mbamba & Company Advocates. The 1st and 2nd appellants separately filed their memorandum of appeal. There is no memorandum of appeal lodged by the 3rd appellant.

When the appeal was called on for hearing, Mr. Stanslaus Boniface, learned Principal State Attorney for the Republic informed the Court that as the whereabouts of the 3rd appellant is not known, so he is yet to be served with the record of appeal. Mr. Mbamba, according to the record, was only retained to lodge the notice of intention of appeal. Under these circumstances, since there is no specific rule governing the situation, Mr. Boniface prayed the Court to invoke Rule 3 (2) (a) of the Court of Appeal Rule, 1979 and strike

out the appeal of the 3rd appellant so that we proceed with the appeals of the 1st and 2nd appellants.

We agree to invoke Rule 3 (2) (a) of the Court of Appeal rules, 1979. However we find the appropriate order to make under the circumstances, is to dismiss the appeal. This is because the 3rd appellant is the one who intended to appeal and he showed no interest to prosecute the same even when the notice was published in the news papers. We are satisfied that the appropriate order to make is to dismiss the appeal, which we hereby do.

Back to our appeal. The 1st appellant had raised four grounds of appeal in his memorandum of appeal. We reproduce the grounds as follows:

(1) That the honorable (sic) judge erred in law and facts when the (sic) convicted the appellant based on incredible, uncollaborated (sic) interest serving identifying witness.

(2) That the honorable judge erred in both law and facts when he convicted the appellant based on a caution (sic) statement which is irrelevant to the charge and also uncollaborated (sic).

(3) That the honorable judge erred in both law and facts when he convicted the appellant based on exhibits that were not proved to have any connection to the crime (as per Section 110(1) (2) of the evidence Act,1967.

(4) That the honorable judge erred in both law and facts when he failed to consider the appellants ~~"ALIBI"~~

On the other hand the 2rd appellant had raised seven grounds. Some are common to those raised by the 1st appellant. The 2nd appellant raised the following; we reproduce them as under:-

1) That your lordship the High Court judge erred in law and fact when he rejected my defence of *alibi* that it does not go together with identification.

(2) That your lordships the appellate judge erred in law when he interfered with the findings of the trial magistrate on identification at the scene of crime whereas the trial (sic) evaluated the creditability (sic) of identifying witnesses and observed their demeanor.

3) That your lordships the appellate judge erred in law and fact on finding the prosecution witness who identified me to be credible whereas they did not have any credibility to sustain a conviction.

4) That your lordship the High Court judge erred in law and facts for (sic) accepting the identification evidence tendered by PW11 ~~one Christopher Bageni.~~

5) That your lordship the High Court judge erred when he convicted relying on the caution statement tendered by the prosecution.

6) That your lordship the High judge erred in law and fact when he considered the exhibits tendered by the Kenya police without considering their conduct of investigation was poor and they did not follow the provisions of Extradition

Act and Reciprocal Backing of warrant.

7. That your lordship the High Court erred in law when he did not consider the defence statement of DW3, DW 6 and DW7 to reach a fair decision.

In this appeal, the appellants fended for themselves; whereas the respondent/Republic was represented by Mr. Stanslaus Boniface. Mr. Boniface resisted the appeal contending that the conviction entered was sound in law. However, he conceded that some grounds raised in the memoranda of appeal had merit.

Briefly the prosecution case was to the following effect:-

On 15/11/2002 around 7.30 Am while employees of the CRDB Bank Azikiwe Branch were reporting for duty three bandits brandishing pistols and wearing clothes resembling uniforms of the said Bank stormed in through the same door the staff of the Bank used and ordered those inside to lie down and ordered that whoever was known as Boaz and Mwangomela to stand up. These two were the custodians of the keys to the strong room where money is kept. And those two each had a key different to his counterpart. It is not irrelevant to mention that a day prior to the robbery incident the Bank had received USD 1,000,000. There was no response from

those two. As there was no response the bandits roughed up Boniface Temu (PW8) believing he was Boaz and threatened to shoot him if he did not surrender the keys. The situation became tense. At long last Boaz and Mwangomela stood up. In accompany with the two bandits, they went to the strong room. They opened it. The bandits took money in different currencies equivalent to Tsh 3,147,974,054.24 and left. The incident was reported to police where the wheels of investigation were set in motion, hence the arrest of the appellants.

In the course of investigation the appellants were found with properties and money suspected to have connection with the robbery incident. Further, the Kenyan police took cautioned statements of the appellants where they are reported to have confessed to commit the offence. And lastly the Tanzanian police conducted an identification parade where the appellants, according to the evidence on record, were duly identified. The appellants raised a defence of alibi in that they never crossed the Kenya/Tanzania boarder on the alleged day; they were in Kenya.

In convicting the appellant, the High Court judge Kalegeya (as he then was) relied on three sets of evidence. One, the cautioned statements of the appellants they made to the Kenyan Police force. Two the properties found with the appellants. And lastly, the identification – visual and the parade. As the judge was satisfied that the appellants were the ones who committed the offence he rejected the appellants' defence of *alibi.*

The real issue in this case is whether there is enough evidence to ground conviction. We shall dispose this appeal by discussing the sets of evidence which the trial judge was satisfied to be strong to ground conviction. In so doing we are of the firm view that we will be discussing the grounds of appeal raised by the appellants. Then we shall discuss those not falling under the three sets mentioned supra. We start with the cautioned statements of the appellants.

The cautioned statement of the 1st and 2nd appellant (Exht P13 and P14 respectively) were taken by Kenyan Police officers. The question is whether those statements are admissible.

Mr, Boniface submitted that under Section 27 (1) of the Tanzania Evidence Act, Cap. 6 a confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person. But the police officer envisaged under the aforesaid section is not any one from any country. The police officer mentioned therein should be that from the United Republic of Tanzania. To buttress up his argument, he cited Police Force and Auxiliary Services Acts Cap. 322 which defines who is a Police officer and the Interpretation of Laws Act, Cap.1 where it defines what constitutes the United Republic of Tanzania. It is his contention that the cautioned statements taken by police officers from Kenya falls outside the ambit of Tanzania Evidence Act, Cap. 6 and therefore the same are not admissible.

Section 27 (1) of the Evidence Act, Cap. 6 provides:-

> 27 (1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.

The question for decision and determination is whether the police officer mentioned supra is only confined to police officers from the Police Force of the United Republic of Tanzania.

Section 2 defines, *inter alia* who is a police officer. It defines thus:

> "Police officer" means any member of the force of or above the rank of constable.

However, for the purposes of recording confession of an accused person, a police officer should be of or above the rank of a corporal (See Section 3 of the Evidence Act Cap. 6)

And the word force has being defined in the same section to mean:

> "Force" means the police force of the United Republic.

Lastly the term "United Republic" has been defined thus under the Interpretation of Laws, Cap. 1.

> "The United Republic means"

(a) for the period subsequent to 11th December, 1964 the United Republic of Tanzania

(b) for the period commencing on Union Day and expiring on 11th December, 1964, the United Republic of Tanganyika and Zanzibar.

We have carefully gone through the cited laws. We are of the settled view that the term police officer for the purpose of Section 27 (1) of the Tanzania Evidence Act, Cap 6 means a police officer from the Police force of the United Republic of Tanzania. It goes without saying that a police officer for the purpose of taking cautioned statement of an accused person from another country is not covered. It follows therefore that the cautioned statements of the appellants (**Exhts P13&P14**) which were taken by Kenyan police officers from Kenya Police Force are not admissible. We entirely agree with Mr. Boniface that the cautioned statements taken by Kenyan Police Officers ought not to have been admitted and acted upon by the Judge.

We now move to the properties, including huge sum of money deposited in the appellants' bank accounts. It is on record that the appellants were found to possess properties eg new motor vehicle, huge sum of money in their bank accounts etc. The prosecution side strongly believed that the properties were acquired from the money robbed from CRDB Bank Azikiwe Branch. The Judge did not say much as to whether the properties in question were acquired from the money stolen from the said Bank. He was of the view that that evidence corroborated the cautioned statements of the appellants. He didn't say more.

We have already discounted the cautioned statements. So, going by the finding of the Judge, the evidence of properties found with the appellants cannot stand alone as by its nature the aim of corroborative evidence is to confirm other evidence. Since the evidence upon which the corroborative evidence intended to confirm is wanting, naturally the latter cannot stand alone.

Even if, for argument sake, the properties acquired were a result of the robbery, we are hesitant on the available evidence on

record to say with certainty that the properties were acquired through robbery. Mr. Boniface like the first set of evidence didn't support conviction on the basis of this evidence. We are of the same views. This set of evidence is weak and cannot be relied upon.

We move to identification. Both appellants challenged the credibility of the prosecution witnesses who said they saw the appellants. They pointed out contradictions in the prosecution case. And as the incident did not last long, the witnesses were unable to identify the robbers, they contended.

Mr. Boniface on the other hand conceded that some witnesses who were at the scene of crime were not credible. He mentioned PW2, PW 5 and PW7. He said though the Judge said there were minor discrepancies, he was of the considered view that the discrepancies were not minor; they were material to the prosecution case. He gave some incidences. John Joseph Liso (PW2) for instance, in his evidence in chief, said he identified both appellants at the scene of crime and at the identification parade. But ASP Christopher Bageni (PW 10) said PW2 managed to identify the 1st

appellant but failed to identify the 2rd appellant. It is his opinion that the above mentioned witnesses were not credible. However, it is Mr. Boniface's submission that Boniface Temu (PW8) was a credible witness. He saw both appellants at the scene of crime and also managed to identify them at the identification parade. As to identification parade ASP Christopher Bageni (PW 10) confirmed this version that PW8 identified the appellants. It is the submission of Mr. Boniface that the appellants were the ones who robbed the Bank on the material day. In other words the evidence of this witness if believed to be true, the conviction entered against them was proper. He urged us to upheld both the conviction and sentence.

As regards to the evidence of PW8 upon which Mr. Boniface urged us to uphold conviction the Judge held, we quote:-

> *"among the witnesses, PW8 is the one who substantially had eye contacts with the 1st and 2nd accuseds (Appellants). He saw them enter as they by passed him and them made a u – turn before personally invading him. The two confronted him confusing him with Boas who had keys. They*

threatened to kill him if he did not surrender the keys. He pleaded with them with his hands raised. He was kicked on foot and ordered to lie down only after Boas had physically shaken the keys upon which they were satisfied that they had confronted a wrong person. He says the exercise took about 8 to 9 minutes. This witness testimony is so elaborate on his contact with the 1st and 2nd respondents that it leaves no spec of doubt in the identification."

The judge made that finding after he had applied the guidelines of identification as enunciated in **Waziri Amani VR (1980) TLR250** and satisfied himself that the conditions prevailed were favourable for the correct identification, hence the conviction and sentence. The appellants on the other hand challenged that finding pointing out *inter alia*, the attack was sudden and so PW8 was unable to identify the assailants. In any case they raised the defence of *alibi*.

We have carefully gone through the record. We wish first to point out that there is no particular number of witnesses required to

prove any fact in issue. This means that the court may convict an accused person on the version of a single witness if it believed him that what he had said is nothing than the truth. This is provided under Section 143 of the Evidence Act, cap. 6. The Section reads:

> 143. Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.

Second, we are alive to the fact that where the evidence of visual identification is relied upon, such evidence must be subjected to careful scrutiny due regard being paid to all the prevailing conditions to see if, in all the circumstances there was readily sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled.

Further, we are very much aware that it is not always impossible to identify assailants, even very violent ones, and even where the victims are terrorized and terrified (**see Criminal Appeal No. 215 of 1994 Philipo Rukaiza @ Kitwechembogo VR CAT (Mwanza Registry)** (unreported)

In the instant case, PW 8 told the trial court that he saw the appellants on the day the robbery took place. He said it was around 7.30 am. The evidence on record shows that PW 8 was mistaken to be Boaz, one of the custodians of the key to the strong room. He was ordered to surrender the keys; PW 8 was not Boaz and therefore he had no keys to surrender. He was roughed up and ordered to lie down. The act of roughing him up enabled him to come closer with the assailants.

When he was cross – examined by Mr. Maira, learned advocate for the appellants as to whether he was confused, he said he was not. This is what he said, we quote:-

> "I was not confused but I feared. I was shocked. I did not loose my mind... The Second accused also pulled me therefore this time, make identify the two suspects. I cannot know how many minutes took to accomplish robbery. The exercise did not exceed 8 or 9 minutes."

And when he was cross – examined by Mr. Mbamba learned counsel for the 3rd accused whether he really saw the assailants (Appellants) he said the following, we quote:-

> "I thought I was dying any time because they were three bandits holding pistols and pointing on me. I concentrated on their faces and clothes worn by the bandits, I told the police that I identified the bandits about their faces.

It is also the evidence of ASP Bageni (PW 10) that PW 8 identified the appellants during the identification parade.

We have considered the totality of the evidence of PW 8 and taking the facts that the incident did not take place in a flush, the assailants were at zero distance and the incident was committed during broad daylight, like the High Court Judge, we are satisfied that the conditions prevailing were favourable for the correct identification of the assailants. To put it differently the question of mistaken

identity does not arise. PW 8 was able to identify the assailants. We agree with Mr. Boniface that PW8 was a credible witness. And the assailants are no other than the appellants.

The appellants raised a defence of *alibi* that on the material day and hour they were in Kenya. They called witnesses and produced their passports to back up their defence of *alibi.*

It is a cardinal principle that the accused person does not have to establish that his *alibi* is reasonable true. All he has to do is to create doubt as to the strength of the case for the prosecution.

The question now is whether the defence of *alibi* creates any doubt in the prosecution case. First, we wish to point out that it is a well known fact that some people cross borders through unofficial entry points popularly known as "panya routes". Obviously, in so doing such entries will not be reflected in the passports of the persons who use those routes. In view of the strong prosecution case, it is likely than not that the appellants entered Tanzania through unofficial entry point. So, once the prosecution case is

accepted as nothing than the truth as in this case, then the defence of *alibi* as rightly pointed out by Mr. Boniface and the Judge does not hold. The defence of *alibi* does not shake the prosecution case at all. In this regard the evidence of Lina Nyokabi Ngatia (DW3), wife of the 2nd appellant who claimed her husband to have not travelled outside Kenya in October, 2002 which the 2nd appellant said the judge did not consider does not hold either.

As regards to the complaint of the 2nd appellant that the evidence of Boaz Mbupira (DW7) and Cleophas Mwangomela (DW6) to have not been considered by the Judge who testified to the effect that they did not identify the assailants, lacks merits as the judge considered their evidence. In actual fact he was wondering whether really the two were unable to do so taking into consideration the fact that the appellants did not disguise their faces and the time spent in the strong room with the appellants. It is not surprising the two were charged but acquitted. The Judge observed, we quote:

"The bandits who had not disguised their faces were at their disposed for a considerable time and easy

marking and subsequent identification. These are the witnesses however who dispute having identified any one! It is no wonder that the Republic proceeded against them and has fought tooth to nail against their acquittals."

We share the same sentiments.

Lastly is about failure to follow Extradiction Act and Reciprocal Backing of warrant. Firstly, the 2nd appellant did not elaborate or state the procedure to be followed. Secondly, the issue was neither raised during the trial nor in the High Court. The issue has been raised for the first time in this Court. That is not proper.

In **Gandy V Gaspar Air Charters (1956) 23 EACA 139** the then Court of Appeal for Eastern Africa stated thus:-

"As a matter of general principle, an appellate court cannot allow matters not taken or pleaded in the court below to be raised on appeal."

(See also **Melita Naikiminjal & Another V Sailevo Loibangati (1998) TLR 120)** So, this Court is precluded from entertaining the issue raised for the first time which was not raised and canvassed in the lower courts.

In result, we dismiss the appeal. It is so ordered.

DATED at DAR ES SALAAM this 22nd day of December, 2009.

JUSTICE OF APPEAL

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