

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 335 OF 2015

ALEX LEMALI APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the conviction and sentence /acquittal of the

High Court of Tanzania at Arusha)

(Massengi, J.)

Dated 23rd day of July, 2012

In

Criminal Appeal No. 75 of 2011

REASONS FOR JUDGMENT

30th Sept. & 5th October, 2015

KILEO, J.A.

On 30th September 2015 we allowed the appeal by Alex Lemali, quashed his conviction and set aside the sentence that had been imposed upon him. We ordered his immediate release from prison as far as the matter before us was concerned. We reserved our reasons for the decision which we now give.

This appeal originates from the decision of the District Court of Arusha at Arusha in Criminal Case No. 34 of 2011 in which the appellant was convicted of armed robbery contrary to section 287A of the Penal

Code. The conviction earned him a thirty year prison term. Being aggrieved he unsuccessfully appealed to the High Court. Still aggrieved he has come to this Court.

The appellant's main complaints which are contained in his lengthy memorandum of appeal comprising of grounds and submission centre on sufficiency of identification and credibility of witnesses. These are really the main issues in this case.

The facts of the case as they were exposed at the trial are simple. PW1 who owns a supermarket at Ngarenaro area gave evidence at the trial that on 17/01/2011 at 3p.m. she was invaded by two people one of whom was the appellant. At the time of the invasion she was with her aide who testified as PW2. Five days later, at around 8.30 while exercising she claimed to have seen the appellant at a bar. She alerted the police and the appellant was arrested. An identification parade was conducted at which PW1 and PW2 claimed to have picked out the appellant as the culprit of the robbery. The appellant denied involvement in the robbery and claimed that he was arrested while he was at his home in Sakina. He figured out that he might have been arrested in connection to some conflict with a policeman over some woman. In the course of his defence he challenged the identification parade on the ground that it was not properly conducted.

At the hearing of the appeal the appellant appeared in person. When prompted by the Court to address it he did not have much to say leaving it to the respondent to submit first. Mr. Fortunatus Muhalila learned State Attorney represented the respondent Republic. He was assisted by Ms. Gaudencia Joseph learned State Attorney. Mr. Muhalila did not resist the appeal. He was of the opinion that the case for the prosecution which essentially centred on visual identification (after the cautioned statement had been discounted by the High Court) was not sustainable as the identification was flawed. He submitted, and we agree with him, that it was inconceivable that the complainant (PW1), some five days after the incident, at 8.30 pm while exercising would have been able to recognize the appellant whom she claimed was at a bar. There was no explanation on how she was able to identify him. She did not say whether she was exercising in the bar where the appellant was said to be or was walking by the bar. Her evidence to us appeared to be sort of bizarre.

The court was not told how the complainant's aide who was not in the company of the complainant while she was exercising, was able to identify the appellant at the identification parade.

There is also nothing on record to show that the complainant ever gave a description of the invaders to the police or anyone for that

matter. Furthermore, there is nothing on record apart from the appellant's own explanation in his defence on how he came to be arrested and subjected to an identification parade where PW1 and PW2 allegedly picked him out. We are of the considered view that an explanation regarding the circumstances leading to the appellant's arrest was necessary as a vital link to the complainant's testimony. This was not all. The contradictions which were apparent in the testimonies of the prosecution witnesses made their testimonies highly suspect. PW1 for example testified to the effect that the identification parade comprised of persons of different sizes while PW4, Assistant Inspector Happiness who conducted the parade said that the parade consisted of persons of same stature.

The parade itself was not conducted in accordance with the Rules that are laid down under Police General Order (PGO) 232. PW4 stated that she explained to the appellant his rights, but she did not say what those rights were that she explained to him. This Court in **Francis Majaliwa Deus & Others**, Criminal Appeal no. 139 of 2005 which was referred to by Mr. Muhalila reproduced part of the PGO 232 which we also find it pertinent to reproduce here for the sake of clarity to those who are involved in the administration of justice. The PGO 232 reads in part as hereunder:

"INVESTIGATION –IDENTIFIATION PARADES

2. *Identification parades shall be conducted as far as possible in accordance with the following rules'*
- (c) *At a reasonable time prior to the parade, the officer-in-charge of the case will inform the suspect that he will be put up for identification. Any objections raised by the suspects will be noted and communicated by the officer-in-charge of the case to the officer conducting the parade before it is held.*
- (d) *If the suspect desires the attendance of a solicitor or friend, arrangements must be made for him to attend the parade if he wishes to do so. The person so attending will be required to remain in the background, observing only and saying nothing.*
- (n) *There should be eight or more persons on the parade for one suspect; ten or more for two suspects. If there are more than two suspects, more than one parade will normally be held, with different personnel being used to form each parade.*
- (o) *When the officer conducting the parade has arrived and has taken charge of the proceedings, the suspect will be brought on to the parade. The officer conducting the parade will explain the purpose of the parade and will ask the suspect if he has any objection to any person participating in the parade. Any objection raised by the suspect will be noted in the Identification parade Register and immediate steps taken to replace those*

persons to whom the suspect objects. The suspect will then be invited to stand where he pleases in the line. The position he selects will be noted in the register.

- (q) The first witness will be called to the parade by the officer conducting it, who will explain the purpose of the parade in the hearing of those on the parade and invite him or her to point out by touching any persons he or she identifies. Under no circumstances shall the witness be touched or led during his or her examination of the parade.*
- (r) If the witness requires any person on the parade to walk talk see him with his hat on or off, this may be done but the whole parade must be asked to do likewise.*

The officer conducting the parade will note carefully in his identification parade Register any identification or degree of identification made and any material circumstances connected therewith including any wrong identification, and any remark or objection made by the suspect. He shall ask the witness who makes the identification; "In what connection do you identify this person?" and shall similarly record precise details of the witness's reply. No other questions are permissible.

- (v) Subsequent witnesses will be brought into the parade an handled in accordance with the same procedure set out in sub-paragraphs (q)- (t) above.*

(w) The officer conducting the parade will finally check his entries in the identification parade Register and will sign in the space provided. The original copy will remain in the Register and the duplicate removed and filed in the case file."

Going through the evidence of PW4 it is obvious that the rules mentioned above were not complied with. The identification parade was therefore of no consequence.

On credibility of witnesses we hasten to point out that a trial court is the one which is best placed to assess the credibility of witnesses. All things being equal, this Court being a second appellate court would normally be very cautious before interfering with the concurrent findings of fact of the two lower courts. However, where there is a clear misdirection and misapprehension of the evidence an appellate court may interfere with the findings of fact by the trial court. - See **Salum Muhando v. R** [1993] TLR 170 where it was held:

"Where there are misdirections and non-directions on the evidence, a court of second appeal is entitled to look at the relevant evidence and make its own findings of fact."

In the present case we are satisfied that both courts below misapprehended the nature and quality of the evidence and particularly failed to address themselves to the material contradictions that were

came to an erroneous conclusion.

It is in the light of the above considerations that we allowed the appeal, quashed the conviction, set aside the sentence and ordered the immediate release from prison of the appellant unless he was held for some lawful cause.

Dated at Arusha this 1st day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL