IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 139 OF 2015

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

SHADRACK KUHAHA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the Resident Magistrate Court of Dodoma at Dodoma)

(Rutatinisibwa PRM – Extended Jurisdiction)

dated the 19th day of December, 2012
in
Criminal Sessions Case No. 51 of 2011

JUDGMENT OF THE COURT

2nd & 5th June, 2015

MASSATI, J.A.:

The appellant was arraigned before the Court of Resident Magistrate of Dodoma (Rutatinisibwa, PRM (Extended Jurisdiction) on an information for attempted murder contrary to section 211 (a) of the Penal Code. He was convicted as charged and sentenced to 30 years imprisonment plus 12 strokes of the cane. He has now appealed to this Court against both conviction and sentence.

It was alleged before the trial court that, on or about the 30th August 2009, at Rudi village in Mpwapwa District, the appellant attempted to unlawfully cause the death of one LUCAS MBASHA by cutting him with an axe on his mouth the act which would have led to the latter's death. The appellant denied to have committed the offence.

What happened was this. The appellant was married to the victim's (PW1) daughter SAHAU MBASHA (PW2). The couple was having matrimonial problems. On 29th August 2009, PW2 went to inform PW1 that the appellant had beaten her again the previous night, and was now intent on filing a petition for divorce at Rudi Primary Court. PW1 decided to escort PW2 to the Primary Court where the petition was filed, and a summons to the appellant issued. The court also ordered PW2 to remain at her father's house pending determination of the case. The case was set for hearing on 11th September, 2009. PW1 and PW2 returned to PW1's home and PW2 went to sleep with her sister in the father's house while the victim slept outside at the verandah of his house with his grandchild.

Then, at around midnight, the victim suddenly heard some approaching footsteps. He was then suddenly cut with a very sharp object.

PW1 recognized the assailant to be the appellant. He cried out for help before he lost consciousness. Some neighbours gathered and found the victim bleeding heavily. He was rushed to Dodoma Regional Hospital and finally Muhimbili National Hospital. According to medical evidence, the victim suffered grievous harm in the jaws and nose. Eventually, the appellant was arrested and charged with the offence.

The appellant raised the defence of alibi. He told the trial Court that on the material night, he was at a camp, keeping watch on cattle belonging to one Chihimu, his maternal uncle, and that he knew nothing about the crime, but admitted that the victim was his father in law, and PW2 was his wife but did not know about the divorce proceedings.

It is on the basis of these facts that the appellant was convicted as charged.

In this Court, the appellant through his advocate, Mr. Godfrey Wasonga, has filed and argued three grounds of appeal, but basically they could be grouped into two major ones. **First,** that the prosecution evidence was too weak to sustain the appellant's conviction. **Second,** that

the sentence of 30 years imprisonment and 12 strokes of the cane was manifestly excessive. Mr. Wasonga argued them together.

With regard to the first major ground, the learned counsel fielded two arguments. Firstly, the evidence of visual identification of the appellant was not watertight, because the conditions were not favourable. This was, because it was dark and no witness could have seen the appellant properly. Secondly, the alleged axe and the alleged divorce proceedings were not produced in court as exhibits to corroborate the prosecution evidence.

On these grounds, he asked us to allow the appeal against conviction.

As to the sentence, the learned counsel submitted that the sentence of 30 years imprisonment was manifestly excessive, because the court did not take into account the period that the appellant had spent in prison. He went on to submit that the sentence of corporal punishment was not sanctioned by section 211 of the Penal Code. He thus prayed that if the Court sustains the conviction, at least, it should intervene by reducing the sentence.

The respondent/Republic was represented by Ms. Lina Magoma, learned State Attorney. She submitted that she supported the conviction, and sentence of 30 years imprisonment, but did not support the corporal punishment as it was illegal. Elaborating, Ms. Magoma, submitted that the appellant was sufficiently identified by PW1 (the victim) before he fell unconscious, and PW2, the appellant's wife. The evidence of identification was corroborated by PW3 GODFREY RAPHAEL MAGAWA, who was also the appellant's paternal uncle. She referred us to the decision of **MAGWISHA MZEE AND ANOTHER v. R** Criminal Appeal No. 465 and 467 of 2007 (Tabora) (unreported) on the position of the law on identification. On that account she prayed for the dismissal of the appeal against conviction.

When it came to the question of sentence, Ms. Magoma asked us to draw inspiration from our decision in **SHABANI YUSUFU MFUKO AND KUTOKA OMARY MFUKO v. R** Criminal Appeal No. 140 of 2012 (unreported) which recapitulated the principles on which this Court could interfere with sentencing discretion of trial courts. Applying those principles, the learned counsel argued that, considering that the maximum sentence for attempted murder was life imprisonment, and as the trial court considered all the mitigating and aggravating factors, the sentence of

30 years could not be said to be manifestly excessive. However, since the corporal punishment was not sanctioned by section 211 of the Penal Code, it was illegal, and could not be allowed to stand. To that extent, she urged us to allow the appeal against sentence, only as far as corporal punishment was concerned, but to dismiss the remainder of the appeal.

We think this appeal raises two issues for determination and decision. The first is, whether the appellant was properly identified as the perpetrator of the crime? The second is whether, if yes, whether this Court could interfere with the sentence?

With regard to the first issue we would first wish to restate certain principles relevant to the present case with regard to the law on visual identification which we may confidently state that they are now well settled. The position is this. **First,** such evidence is the weakest kind and most unreliable, and should be acted upon cautiously after the court is satisfied that the evidence is watertight, and all possibilities of mistaken identity are eliminated. **Second,** even if it is evidence of recognition that evidence must be watertight. In that regard, where the offence is committed at night, and the question of light is in issue, there must be

clear evidence as to the intensity of the said light and that bare assertions, would not do. (See **MAGWISHA MZEE AND ANOTHER v. R)** (supra). **Three,** in matters of identification conditions for identification alone, however ideal they may appear are no guarantee for untruthful evidence (See **JARIBU ABDALLAH v. R** Criminal Appeal No. 220 of 1994 (unreported). **Lastly,** it is not always impossible to identify assailants even at night and even where victims are terrorized and terrified. The evidence in every case where visual identification is what is relied on, must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. (See **PHILIP RUKAIRA v. R** Criminal Appeal No. 215 of 1994 (unreported).

We have subjected the evidence of visual identification of the appellant in this case. PW1, (the victim) identified the assailant before he lost consciousness with the aid of full moonlight. This was because, although it was at night, the assailant came so close to him and he was the person he knew, from before. When PW2 appeared, the assailant pursued her into the house where there was a pressure lamp. For a while they

struggled as he also wanted to cut her. PW2 was the appellant's wife. She couldn't have mistakenly identified him. Then PW3, who had a torch, and flashed it at him, witnessed the appellant walking away from the victim's homestead. He engaged him in a conversation but he did not respond. He was the appellant's paternal uncle. Then PW3 went to the scene of the assault , only to find the victim lying in a pool of blood and a blood stained axe beside him. Since the appellant was related to that family it was certainly strange to find him running away from such horrific scene. All the circumstances taken together point to the fact that it was the appellant, who was the assailant.

Before we conclude our discussion on this point, we wish to address on another point raised in the appellant's grounds of appeal. This relates to the non-production of the axe and the matrimonial proceedings as exhibits to corroborate the prosecution case.

It is true that the axe and the matrimonial proceedings were not produced as exhibits. The position of the law, is that, even if those articles were not produced in court that factor affects only the weight and not the admissibility of oral evidence regarding the existence of these articles.

Their non production does not obliterate the fact that under section 61 of the Evidence Act (Cap. 6 – R.E. 2002) all facts except the contents of a document may be proved by oral evidence.

It is also further the position of the law that, it is a rule of practice, not of law, that corroboration is required of the evidence of a single witness of identification of an accused made under unfavourable conditions, but the rule does not prevent a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling nothing but the truth. (See **HASSAN JUMA KANENYERA AND OTHERS v. R**) [1992] TLR, 102.

In the present case, the appellant's defence of alibi was defeated by the evidence of PW1, PW2, and PW3; who placed him at the scene of the crime at the time the offence was committed. He was thereby identified by PW1 (the victim) himself, and PW2.

So the appellant was identified by more than one witness. It is not therefore a case of a single witness of identification even though the conditions may have been unfavourable. As a matter of practice therefore,

there was no need of some other evidence to corroborate that of PW1 and PW2.

But if there was any need of such other evidence, it is constituted in the testimony of PW3, who saw him coming from the scene of crime, and the appellant's own conduct. According to PW1, after his discharge from Muhimbili, and when the appellant was out on bail, he went on and threatened to kill PW1, for which he earned for himself four months imprisonment. Those threats were evidence that the appellant was still harbouring some grievances against PW1 and provides the motive for him to have been the one who committed the atrocity on PW1.

We therefore find no merit in this complaint. We dismiss the appeal against conviction.

We now turn to the ground on sentence and would like to start with the obvious, the legality of corporal punishment.

The appellant was charged with attempted murder contrary to section 211 (a) of the Penal Code. There, the prescribed maximum sentence is life imprisonment. No other punishment is provided under that provision but such punishment may be imposed by a court under the

general provision on punishment in section 25 (c) of the Penal Code. However under section 3 of the Corporal Punishment Act (Cap. 17 R.E. 2002) – corporal punishment should not be awarded to an adult on conviction by any court unless the offence for which he is convicted is one of the offences mentioned in the Schedule to that Act. Attempted murder does not appear in any of the three parts of the Schedule to the Act. It is not therefore a scheduled offence for the purposes of the Corporal Punishment Act. We therefore agree with both learned counsel that the punishment of 12 strokes of the cane imposed by the trial court is illegal, and is hereby set aside.

We have also considered the submissions of the learned counsel on the sentence of 30 years imprisonment.

We have revisited the principles applicable before the Court interferes with the sentences imposed by trial courts, which, thankfully, were reminded to us by Ms. Magoma, in the case she cited of **SHABANI YUSUFU MFUKO AND ANOTHER v. R.** (supra).

While, Ms. Magoma has submitted that the trial court considered all the mitigating and aggravating factors, before imposing the sentence, Mr.

Wasonga submitted that the trial court did not take into account the 3 years or so that the appellant had spent in custody.

It is true that, in mitigation the appellant said that he had been in remand for about 3 years, and that he was a first offender. In the sentence, the trial court said:

"I have considered the mitigation."

But it went on

> *"I have in mind the nature of the offence. The accused went to kill his father in law, the innocent party. The accused deserves stiff sentence"*

We agree. In sentencing, the trial court is duty bound to take into consideration not only the mitigating, but also the aggravating circumstances in each case.

In this case, we are satisfied that the trial court, not only took into account the mitigating factors pleaded by the appellant but also the aggravating circumstances, in the nature of the offence. We cannot see any abuse of the trial court's discretion, and so cannot fault the trial court

there. The appeal against this part of the sentence is therefore devoid of substance. It is also dismissed.

Before we pen off, we desire to comment on the aspect of the manner in which the summing up was done in this case. Although, in the wording of section 298 (1) of the CPA, it is not mandatory for a trial court to sum up the case to the assessors before taking their opinions, it is in mandatory upon him/her to take their opinions before giving judgment as a necessary implication under section 265 of the CPA. So it is a matter of prudence and practice to do so except in the simplest of cases. (See **HATIBU GHANDHI AND OTHERS v. R.** (1996) TLR 12, **ANDREA s/o KULINGA AND OTHERS v. R** (1958) E.A. 684, **HAULE v. R** (2004) 2 EA 73.

But it is also a long established practice, that, where the trial court decides to sum up to the assessors, whether in the form of specific or general questions, they must also be asked to state their opinions on the case as a whole and on the general issue as to the guilt or innocence of the accused (See **WASHINGTON ODINDO v. R** (1954) 21 EACA 392, **SELEMANI s/o USSI v. R** (1963) 1 EA 442. Failure to do so largely

negatives the value of the assessors' opinions (See **ANDREA s/o KULINGA AND OTHERS v. R** (supra).

In the present case, after summarizing the prosecution and the defence cases, the learned Principal Resident Magistrate (Extended Jurisdiction) simply asked the assessors.

> "to assist (him) me in deciding whether or not the prosecution has proved their case beyond reasonable doubt. Or if the defence has succeeded to inject the doubt in the prosecution case?"

So, the trial court did not specifically ask the assessors to state their opinions as to the guilt or innocence of the accused person. Just as the summing up was vague so, were the opinions of the assessors, in the following way.

> "**1st assessor:** Mr. Phares Gamba
> We have heard the summing up to assessors. On my side let the law take its course.
> **2nd assessor:**
> We heard both sides. The accused had no witness to call. I side with the 1st assessor let the law take its course"

This was a result of improper summing up, the assessors opinions were as a result, of little value to the court. It is no wonder that the trial court did not refer to the said opinions in his judgment.

Having noted so, we are satisfied that although the procedure adopted by the trial court was irregular, the irregularity did not occasion a miscarriage of justice.

In the event, except for the appeal against corporal punishment which is allowed, and set aside, the appeal against conviction and sentence of 30 years imprisonment is dismissed.

It is so ordered.

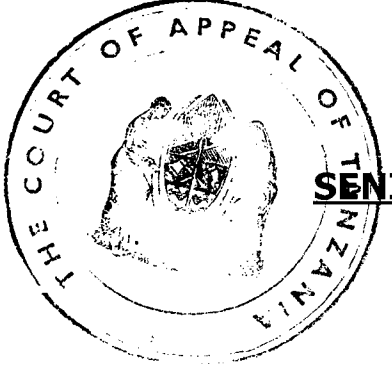
DATED at **DODOMA** this 4th day of June, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



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