IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A, MJASIRI, J. A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 210 OF 2015

1. BAKARI ABDALLAH MASUSI
2. MOHAMEDI BAKARI ABDALLAH } .....**APPELLANTS**
3. HAMISI MAJOWE RASHID @ SOKOINE

VERSUS

THE REPUBLIC.....**RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Kibela, J.)

dated 25th day of August, 2014

in

Criminal Appeal No. 49 of 2013

JUDGMENT OF THE COURT

8th & 12th October, 2015

MMILLA, J. A.:

Bakari Abdalla Masudi, Hamisi Majowe Rashidi @ Sokoine, Mohamed Bakari Abdalla Chamkono (the first, second and third appellants respectively), and Mohamed Said Kamkunde Papula who is not the subject of this appeal, were charged before the court of Resident Magistrate at Lindi in Lindi Region with the offence of armed robbery contrary to section

287A of the Penal Code Cap. 16 of the Revised Edition, 2002 as amended by Act No. 3 of 2011. After a full trial, they were found guilty, convicted and each sentenced to thirty (30) years imprisonment. Their appeal to the High Court was unsuccessful, save for Mohamed Said Kamkunde Papula in whose favour it was allowed. Undaunted, they filed this second appeal to this Court.

The background facts of the case were fully and clearly set out by both the trial court and the first appellate court, but we feel that it is indispensable to once again summarize them, albeit very briefly.

On 24.11.2011 at about 2: 00 hours, PW1 Abdallah Saidi Kibuti, his wife, and other members of the family were asleep at their home at Mchichili village in Ruangwa District in Lindi Region. Around that time, the front door of his house was broken and six bandits stormed in and proceeded to his bed room. It was alleged that while one of the bandits had a gun, others were armed with machetes and clubs. Those bandits ordered him to give them money, or else they would kill him. He succumbed to their threats, opened a drawer attached to his bed and gave them T.shs. 487,000/=. The bandits demanded more money but he told them that he had nothing left. Upon that, they ransacked the place and

took away several shop merchandise. PW1 said out of the six bandits he identified the appellants because there was strong light sourced from a "Chinese torch" in a form of a tube light, and that he had known them before because they were his village mates.

Meanwhile PW2 Zawia Said, the complainant's sister who had slept in another room at PW1's home said that on getting out of the room after she became aware that their house was invaded, she met two persons outside who instructed her to go back into the room. She obeyed. However, one of those persons followed her into the room and demanded money. Despite her initial protestation, she surrendered to him a small amount of money she had as well as her mobile phone. She said she identified the person who followed her into her room to be Mohamed Chamkono (the third appellant) who was a popular guy in their village. She said she managed to identify him with the aid of a "Chinese torch" which, according to her, had a very strong light.

PW1's mother was another family member who slept in that house on that day. She shouted for help, consequent to which PW3 Shaibu Ndogaji rushed to the scene. The latter unsuccessfully attempted to apprehend the bandits who managed to fade away with the loot. PW1 readily named his

attackers to PW3 to be Bakari Abdalla Masudi, Hamisi Majowe Rashidi @ Sokoine, and Mohamed Bakari Abdalla Chamkono.

PW3 rushed PW1 to Ruangwa Police Station where they reported the incident. Like he did to PW3, he readily named the bandits to the police, after which the former took him to hospital for treatment. Meanwhile, the police commenced investigation which fruited into the arrest of the appellants.

The first appellant was interrogated by PW6 and had his cautioned statement recorded by him. PW6 was the very witness who interrogated the second appellant who also allegedly offered his cautioned statement to him. The second appellant was also taken before PW4 Rajabu Saidi Machalilo, a justice of the peace before whom he offered an extra judicial statement. On the other hand, the third appellant was interrogated by PW7 F.1645 D/Cpl Walton. He was also alleged to have offered his cautioned statement to him. After those preliminaries, the appellants were subsequently charged with the offence of armed robbery as aforesaid.

The appellants' respective defences were very brief. To begin with, DW2 Hamisi Majowe Rashidi and DW3 Mohamed Bakari Abdalla @

Chamkono in common denied involvement in that crime, also that they did not know PW1 and PW2. Both of them retracted their cautioned statement. On the other hand, while admitting that PW1 was his village mate, DW1 Bakari Abdalla Masudi protested his innocence, asserting that on 24.11.2011 he was away in Dodoma. He similarly said he did not voluntarily offer any statement to the police

Before us, all the appellants appeared in person and fended for themselves, while Ms Mwahija Ahmed, learned Senior State Attorney and Abdulrahman Mohamed, learned State Attorney represented the respondent Republic.

The appellants filed separate memoranda of appeal. The first appellant's memorandum raised five (5) grounds, while those of the second and third appellants raised six (6) grounds each. Mr. Mohamed observed, and we agree with him, that those grounds resemble and are repetitive, therefore that they may conveniently be bridged into three main grounds; **one** that, they were not correctly identified at the scene of crime; **two** that, the extra-judicial statement in respect of the second appellant and the cautioned statements in respect of all of them were improperly received as evidence in court; and **three** that, the trial court's judgment

was illegal because that court delayed to deliver it. All the appellants elected for the Republic to submit first, undertaking to respond later on if need would arise.

Beginning with the first ground, Mr. Mohamed submitted that the evidence of identification came from PW1 and PW2, the victims of the alleged robbery. He underscored that PW1 identified the appellants out of the six robbers who stormed into his room with the aid of light sourced from a Chinese torch (tube light) which was fixed on the ceiling board. He was clear that PW1 observed the appellants for about thirty minutes, and that the light was very strong and enabled him see them clearly. He also submitted that PW1 readily named the appellants to PW3 upon his arrival at the scene because they were his village mates, so also that he readily named them to the police at the time the incident was reported to them.

Mr. Mohamed submitted also that PW2 was another eye witness who had the encounter of two of the offenders of whom she identified Mohamed Chamkono (the second appellant) who had followed her into the room after obeying their command to return therein. He said that PW2 identified the latter with the aid of light sourced from a Chinese torch, and that she was particular that the light was very strong, just like that of a

paraffin lamp, and that she observed the third appellant for about ten minutes, adding that he was a mason and a much known person in the village.

In his conclusion, Mr. Mohamed contended that the evidence of these two witnesses was correctly believed by the two courts below because they identified the appellants by names; also that because of that fact their description was unnecessary in the circumstances of the case. He relied on case of **Fadhili Gumbo @ Malota v. Republic** [2006] T.L.R. 50.

To begin with, we agree with Mr. Mohamed that the evidence of visual identification in this case came from PW1 and PW2. We are cautious though, that we need to re-state here that such kind of evidence is of the weakest character and most unreliable, and that courts should decline to act on such evidence unless all the possibilities of mistaken identity are eliminated, and the court is fully satisfied that it is absolutely watertight. It is also significant to emphasize that in weighing such evidence, the courts have to remain focused on whether or not the conditions at the scene of crime favoured correct identification - See the case of **Joseph Melkiory Shirima @ Temba v. Republic,** Criminal Appeal No. 261 of 2014 CAT (unreported). In that case the Court said that:-

". . . evidence of visual identification is of the weakest kind and most unreliable. As such, no court should act on such kind of evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that it is absolutely watertight.

It is also significant to emphasize that in weighing such evidence, the courts have to remain focused on whether or not the conditions at the scene of crime favoured correct identification as was expressed in ***Raymond Francis v. Republic*** *(supra) and* ***Rajabu s/o Issa Ngure v. Republic,*** *Criminal Appeal No. 164 of 2013, CAT (unreported)."*

Of course, we are also aware of the warning the Court has had occasions to make in cases where a witness may have known the suspect before, that mistakes may still be made – See the case of **Issa Ngara @ Shuka v. Republic,** Criminal Appeal No. 37 of 2005, CAT (unreported) where it was stressed that:-

"... even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source of light and its intensity is of paramount importance. This is because, as

occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."

Equally significant are the guidelines which the Court gave in **Waziri Amani v. Republic** [1980] T.L.R. 250. In that case, the Court stressed that before relying on evidence of visual identification, the trial courts should put into consideration the time the witness had the accused under observation, the distance at which the witness had the accused under observation, if there was any light, then the source and intensity of such light, and also whether the witness knew the accused before.

In the present case, the evidence of PW1 and PW2 met the requirements for perfect identification set out in **Waziri Amani v. Republic** (supra). There are three reasons for that proposition; **one** that, both witnesses said the light from the Chinese torches in their respective rooms was strong; **two** that, both of them were clear that the respective persons they identified were very well known to them because they were their village mates; and **three** that, those two witnesses had enough time in observing the appellants; PW1 observed them for about thirty (30) minutes and PW2 observed the second appellant for about ten (10)

minutes. In our firm view, the details given by PW1 and PW2 lessened the possibilities of mistaken identities. The fact that the light at the scene was said to have been strong, also that they kept them under observation for a long time, for sure afforded them sufficient opportunity to correctly identify them.

We also need to emphasize here that the fact that PW1 named the appellants at the earliest possible moment to PW3 who was the first person to arrive at the scene of crime, similarly that he readily named them to the police at the time the matter was reported to them, is again an assurance that they correctly identified the suspects. - See **Marwa Wangiti and Another v. Republic** [2002] T.L.R. 39 where it was stated at page 43 that:-

> *". . . The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent Court to inquiry . . ."*

On the basis of the above, we agree with Mr. Mohamed that the appellants were correctly identified by PW1 and PW2. We thus uphold the findings of both courts below on the point, hence we dismiss this ground.

The second complaint refers to improper and/or irregular admission in evidence by the trial court of the extra-judicial statement constituted in exhibit P1, and the cautioned statements which were marked exhibits P3, P5 and P7. While exhibit P1 was in respect of the second appellant recorded by PW4 Rajabu Saidi Machalilo, exhibit P3 was also in respect of the second appellant and was recorded by PW6 E.7795 D/Cpl Stephen. On the other hand, exhibit P5 was in respect of the first appellant, similarly recorded by PW6, while exhibit P7 was in respect of the third appellant and was recorded by PW7 F.1645 D/Cpl Walton.

We have carefully gone through the proceedings of the present case and we agree with the respective appellants and Mr. Mohamed that the documents indicated above were irregularly received as evidence by the trial court. The reason is that they were objected to by the appellants, but the court did not undertake to conduct inquiries before they were admitted. Surely, that was against the principle of law governing admissibility of such documents where they may have been objected to.

We wish to be guided by what this Court said in the case of **Twaha s/o Ali and 5 others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported). In that case, the Court stated that:-

> *"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 trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

Since the trial court in the present case did not conduct inquiries after the admissibility of those documents was objected to, we are of the considered opinion that such an omission was a serious one entitling us to expunge them from the record. For that reason, we find that this ground has merit and we allow it. Consequently, we expunge those statements from the record.

We now turn to the last complaint by the appellants that the judgment was illegal because the trial court delayed to deliver it. We think this was based on the provisions of section 311(1) of the Criminal

Procedure Act Cap.16 of the Revised Edition, 2002 (the CPA) as submitted by Mr. Mohamed, which requires the judgment in every trial in any criminal court to be pronounced in open court **either immediately** after the termination of the trial or **at some subsequent time of which notice shall be given** to the parties and their advocates.

Certainly, a delay such as this complained of here portrays an unhealthy situation which this Court must abhor – See the case **Amratlal Damodar Maltaser & Another T/A Zanzibar Silk Stores v. A.H. Jariwalla T/A Zanzibar Hotel** [1980] T.L.R. 31 in which a somehow similar situation was encountered.

In **Amratlal Damodar Maltaser** case (supra), although the plaint was filed in the Resident Magistrate's Court in May 1969, the proceedings did not come to an end until October, 1975, that is, over six years after the plaint was filed in Court. The Court observed that:-

> *"[We] cannot see any good ground on the face of the record of proceedings to justify this deplorable state of affairs. Indeed, what the record reveals is a complete lack of any concern for dispatch on the part of the court as well as counsel for the parties. Time and time*

again people have complained at the law's delay and to use Lord Denning's eloquent words: "counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time. Dickens ***tells how it exhausts finances, patience, courage, hope.****"* [Emphasis is provided].

Inspirationally, what is expressed above, by extension, applies to delays in doing or omitting to do some other matters connected to the case as a whole, including delays in delivery of judgments, the subject of complaint in the present case.

Notwithstanding what we have just expressed above however, we agree with Mr. Mohamed that section 311(1) of the CPA is an administrative provision intended to lay down the policy that judgments in any particular case must be delivered at the earliest possible opportune. The purpose is, of course, to see to it that the parties in any given case are informed of the outcome of their case without alarming delays. In our view therefore, a delay such as that which is being complained of here, does not go to the extent of making the particular judgment illegal. At most, such delay may, in very exceptional circumstances, attract administrative sanctions to the defaulting magistrate or judge. In the light of what we

have said, we are firm that it cannot be a ground for faulting the judgment as has been implored by the appellants. Thus, this ground too is devoid of merit and we dismiss it.

In a nut shell, having said the appellants were correctly identified by PW1 and PW2, we find that the appeal is devoid of merit and we dismiss it.

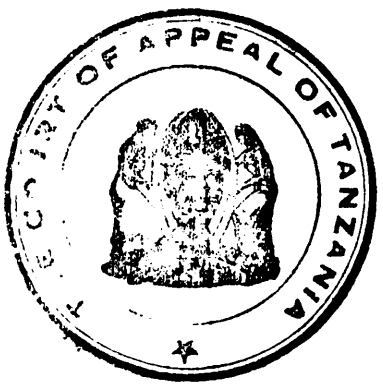
DATED at **MTWARA** this 12th day of October, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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



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