IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 150 0F 2007

KESSY MBWARI... .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mlay, J.)

Dated 5th day of March, 2007
in
Criminal Appeal No. 2 of 2005

JUDGMENT OF THE COURT

6th & 14th July, 2015

MBAROUK, J.A.:

In the District Court of Morogoro at Morogoro, the appellant with three others were charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code read together with the Written Laws Miscellaneous Amendments Act No. 10 of 1990 and Act No. 27 of 1991. The appellant and another not subject to this appeal were found

guilty. The appellant was convicted and sentenced to thirty (30) years imprisonment and was ordered to pay compensation of Tshs. 1,953,000/=. Aggrieved by that decision, the appellant filed his appeal before the High Court of Tanzania at Dar es Salaam where his appeal was dismissed in its entirety. Dissatisfied, he has now preferred this second appeal.

In this appeal, the appellant appeared in person, unrepresented, whereas, the respondent/Republic was represented by Ms. Janethreza Kittaly and Honorina Munishi, learned Senior State Attorneys.

The appellant filed a memorandum of appeal containing six grounds of appeal, but in essence they boil down to three major grounds namely:-

1. *That, identification was not watertight.*
2. *That, the cautioned statement (Exh.P3) tendered by PW3 was wrongly admitted as*

the trial court failed to conduct an inquiry after it was retracted.

3. That, the case was not proved beyond reasonable doubt.

Before we discuss the grounds of appeal, we think it is helpful to briefly state the facts of the case as found at the trial court. At the trial court, the complainant Said Mgagala (PW1) testified that on 20-10-2000, he reported at his work place PEPSI COLA Company at Morogoro where he worked as Sales Officer and assigned to work at Kilombero route. He had two vehicles, one carried 431 soda crates and the second 235 soda crates. At around 7:00 p.m. after having completed selling those crates, on his way back to Morogoro he had Tshs. 1,953,000/= being the proceeds of sale of the day. At a certain point when he approached the National Park, the breaks of the vehicle jammed leading him to reduce the speed and that led PW1 to arrive late at Morogoro at about 10:45 p.m. Having arrived late, PW1 was unable to report to his

work place, hence he went direct to his house. When he knocked the door of his house, he was shocked when his young brother was about to open the door, a person suddenly short a bullet at his stomach. That led the bandits to take the money away. PW1 said, at the scene of crime, the person who shot him was with two other people. With the help of tube light PW1 testified to have identified the appellant and another person who is not in this appeal called Iddi s/o Muhidini Nassor. PW1 further testified that, after being shot, he raised an alarm, hence the bandits escaped. Thereafter, he was hospitalized for about two months.

On the other hand Abdallah Salum Mgagala (PW2) testified that on the day when PW1 was shot, he was sleeping at his house and suddenly heard a gunshot outside the house. When he went outside, he saw PW1 lying near the door bleeding at his stomach, head and hands, while his intestine was outside the stomach. PW2

said, he was told by PW1 that he was attached by more than five people who robbed him the Pepsi sale proceeds of the day. He further told him that he identified only two out five people and named the appellant and another person called Iddi Muhidin not in this appeal.

At the trial court, the appellant did not give his defence after he indicated to appeal against the ruling which found him to have a case to answer. Hence the trial court proceeded to hear the defence of the other accused person and invoked section 226 of the Criminal Procedure Act.

At the hearing of the appeal, the appellant opted to allow the learned Senior State Attorney to respond to his grounds of appeal first and prayed to give his reply thereafter.

On her part, Ms. Janethreza from the outset indicated to support the appeal. She submitted that, taking into account

that the incident occurred abruptly within no time at night and PW1 was seriously injured, she urged us to find that the appellant was not properly identified at the scene of crime as PW1 was shocked. In support of his contention, she cited to us the decisions of this Court in the case of **Abraham Daniel v. The Republic**, Criminal Appeal No. 6 of 2007 (unreported) and **Raymond Francis v. R.** (1994) TLR 100.

The learned Senior State Attorney further added that, the record shows that when the cautioned statement of Iddi s/o Muhidini Nassoro the (3rd Accused) (Exhibit P3) was tendered at the trial court, the said 3rd accused objected for it to be tendered, but the procedure of conducting an inquiry was not followed by the trial magistrate.

Ms. Janethreza further submitted that, as far as the 3rd accused objected the said cautioned statement (Exhibit P3)

to be tendered, the trial magistrate ought to have conducted an inquiry, but the same was not conducted. She added that, in the said Exhibit P3, the appellant was implicated as part of those who committed the alleged offence and both the trial court and the first appellate court used that cautioned statement in convicting the appellant. However, she said, taking into account the anomaly of not conducting an inquiry, she urged us to expunge the said Exhibit P.3 in the record, and if the same is expunged there will be no other evidence on record to establish that the case against the appellant was proved beyond reasonable doubt.

For that reason, the learned Senior State Attorney prayed for the appeal to be allowed.

On our part, we fully agree with the learned Senior State Attorney that this appeal is with merit. We rely on

the same reasons given by Ms. Janethreza in support of the appellant's appeal.

Firstly, as the record shows, the act of invasion made by the bandits to PW1 occurred abruptly at the scene of crime at night time. PW1 was shot at his stomach leading his intestine to come out of the stomach. Even if PW1 testified to have identified the appellant at the scene of crime by the help of a tube light but taking into account the circumstances of being shot leading to his intestines to come out of his stomach, we agree with the learned Senior State Attorney that PW1 was in a state of shock. Also, as the record has shown, there were several bandits at the scene of crime on that night, hence we are of the opinion that under those circumstances, PW1 could not have been able in such a state of shock to have a clear focus on the identity of the appellant. Apart from that, PW1 failed to disclose the intensity and size of the tube lights which

enabled him to identity the appellant among a group of people who ambushed him.

This Court has repeatedly held that, in a case where the decision relies on the evidence of visual identification of an accused person, such evidence has to be absolutely watertight. For instance, see a well celebrated case of **Waziri Amani v. Republic** (1980) TLR 250 where this Court held as follows:

> ***"Evidence of visual identification is of the weakest kind and most unreliable; and that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely watertight."***
>
> *(Emphasis added).*

Also see **Raymond Francis** (supra).

It is now settled, that in avoiding mistaken identity of an accused person, all conditions and circumstances favoring correct identification have to be considered. We are increasingly of the view that, the circumstances at the scene of crime in this case raised more questions which remain unanswered in eliminating the possibilities of mistaken identity on the part of the appellant.

In addition to that, as the record has shown, the trial court and the first appellate Court relied upon the contents of the cautioned statements (Exhibits P.3) of the appellant's co-accused to convict the appellant. However, when the same was tendered, it was objected by the 3rd accused, and no inquiry was conducted. We are of the opinion that such on anomaly is fatal and incurable rendering Exhibit P.3 to be expunged from the record. This Court in the case of **Twaha Ally and five others v The**

Republic, Criminal Appeal No. 78 of 2004 (unreported) stated as follows:

> *"The omission to inform the accused of his right to say something and/or a trial within trial in case there is objection raised, result in a fundamental and incurable irregularity."*

Cumulatively, we find that the shortcomings stated herein above raise doubt as to whether the prosecution has proved their case beyond reasonable doubt. This is for that, **firstly**, due to the circumstance, which occurred at the scene of crime we found that the appellant was not sufficiently identified at the scene of crime. **Secondly**, no inquiry was conducted when an objection was raised after the cautioned statement of the appellant's co-accused was tendered that has led us to expunge it from the record. In the said cautioned statement the appellant was implicated as among those who committed the offence, and if the same is expunged there will be no other evidence to

support the prosecution's case to prove the case beyond reasonable doubt.

In the event, we quash the appellant's conviction and set aside the sentence imposed on him. In the result, we order the appellant to be released from the prison forthwith, unless he is held for some other lawful cause.

DATED at **DAR ES SALAAM** this 9th day of July, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL