IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 379 OF 2015

ROBERT JAMES @ MSABI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mgonya, J.)

Dated the 20th day of May, 2015

In

DC Criminal Appeal No. 164 of 2014

JUDGMENT OF THE COURT

13th & 22nd April, 2016

MUSSA, J.A.:

In the District Court of Kahama, the appellant was arraigned and convicted for armed robbery, contrary to section 287A of the Penal Code, Chapter 16 of the Revised Laws. Upon conviction, he was sentenced to thirty (30) years imprisonment. His appeal to the High Court was dismissed in its entirety (Mgonya, J.), hence this second appeal. The

factual setting giving rise to the arrest, arraignment and the ultimate conviction of the appellant may be recapitulated briefly:-

The prosecution sought to establish that on the 9th July, 2013, at Petro Africa filling station, within Kahama District, the appellant did steal a sum of Shs. 130,000/= in cash, and two Nokia cellular phones and that immediately before and after such stealing, he threatened a certain Emmanuel Samson (PW2) by the use of a short gun, club and a piece of iron bar in order to obtain or retain the stolen properties. The appellant denied the accusation, whereupon the prosecution lined up five witnesses, two documentary exhibits and several physical exhibits comprised of a short gun, ten bullets and two Nokia mobile phones.

Throughout the trial, it was common ground that, at the material time, the appellant was employed as a security guard by a company known as S.S. Limited and assigned to the referred filling station. It was equally undisputed that on the fateful day, the appellant actually reported for duty at the filing station. The prosecution evidence was to the effect that, also present there, were three pump attendants, namely, Halima Said, aged 19 (PW1), Shamrat Basher, aged 20 (PW3) and the already referred Emmanuel Samson (PW2). It was further alleged that at a certain moment

in time, PW1 and PW3 retired for a brief spell of a nap at a kiosk, ahead of their post-mid-night shift. The way it appears, the kiosk is located within the precincts of the filling station. The other attendant (PW2), who was seated on a bench, remained thereabouts but, soon after, he noticed that the appellant had conspicuously disappeared from the premises. Within a moment, at around 2:00 a.m., or so, the appellant suddenly emerged at the premises in the company of another person who was masked.

The appellant was holding a gun and a club in his hands, whereas his collegue held a machete. According to PW2, the electric lights were on at the time of their arrival. The appellant and his colleague physically attacked PW2 by the use of the club and machete and, within a while, PW2 lost consciousness. The witness tendered a PF3, presumably, to fortify the claim of being assaulted by the robbers which was admitted and marked P3. It should, however, he observed that the document was admitted against a protest by the appellant who objected to its tendering.

In the meantime, PW1 and PW3 who had been awakened by the fracas, took the courage of coming out of the kiosk to see what was going on. As they came out, the young ladies immediately recognized the appellant who was in the company of the masked colleague. The security

lights had been switched off but the lights from the filling pumps were on and assisted them to recognize the appellant. Upon seeing PW1 and PW3, the appellant and his colleague ordered the two girls to kneel down. The appellant and his company then dispossessed PW1 of her mobile phone and took a sum of shs. 130,000/= from the filling station's shelf. Having accomplished their awful mission, the twosome bolted away.

On the morrow of the fateful incident, the appellant did not report for duty just as he did not hand over the short gun and the ten bullets which were entrusted to him by his employer for security purposes. His boss, namely, Joseph Bachuta (PW4), who is the Director of SS Limited, made an effort to trace him on that day to no avail, but the short gun was found abandoned at an undisclosed location. According to PW4, a little later on that same day, the appellant made a phone call to some of his co-guards requesting them to plead with him so that he (PW4), forgives the appellant. PW4 pretended to be heedful so as to facilitate the arrest of the appellant who, apparently, fell into trap and was arrested at the Company's Camp on the 11th July, 2013. Upon arrest, the appellant was found in possession of ten short gun bullets and a Nokia mobile phone which he subsequently surrendered to the police.

At Kahama Police Station, the appellant was interviewed by Defective Sergeant No. C9895, namely, Laurent (PW5), who recorded his cautioned statement. In the statement, the appellant is said to have confessed involvement in the alleged robbery. Nonetheless, as and when PW5 sought to tender the statement during the trial, the appellant protested in the following words:-

> " ***Accused***: *I object the statement because I was not taken to a justice of peace (sic). He did not accord me all my rights.*"

The protest was, however, overruled and the cautioned statement was adduced into evidence and marked exhibit P4. This detail concludes the prosecution version as unveiled by its witnesses during the trial.

In reply, the appellant gave sworn evidence. To begin with, he did not quite refute the allegation of being at the filling station on the fateful day. His account was to the effect that he reported for duty, at the filling station, around 10:00 p.m., or so. Moments later, he was suddenly invaded by three persons who dispossessed him of the short gun as well as 16 bullets. The intruders abducted him to Kagongwa area where they

abandoned him and, as to what transpired next, it is perhaps best if we let him pick the tale in his own words:-

> *"I started to contact people who were close to my boss so that they seek leniency from my boss as I was afraid because my boss was threatening to sue me should I become negligent in watching. I talked to my boss through his younger brother and he told me to wait for his arrival so that we go to report at police station. He arrived on 11/7/2013 and took me to Kahama police for the purposes of reporting but instead he reported me as the robber. I was charged with this case my boss told PW5 to ensure that I get into troubles (sic)."*

The appellant concluded his testimony by deploring the evidence of the prosecution witnesses as sheer fabrication and completely disowned the cautioned statement.

But, before we depart from our recital of the appellant's defence, we think it is of significance to observe that, from the very outset of his

testimony, the appellant introduced himself as a seventeen (17) year old. He repeated the claim whilst under cross-examination and upon being questioned by the Court. And yet, both courts below adopted a passive stance in relation to the appellant's claim which, obviously, will be the subject of our remarks at a later stage of this judgment.

For the moment, it is pertinent to observe that, on the whole of the evidence, the concurrent finding of facts by the two courts below were that the eye witnesses to the episode, namely, PW1 PW2 and PW3 told a credible and coherent tale. More particularly, the first appellate Court held the view that the evidence of visual identification of the appellant was buttressed by the fact that he was well known to the witnesses. Again, both Courts below additionally relied on the cautioned statement to, respectively, register and uphold the conviction. The appellant's defence was considered but, both Courts rejected it in the light of the credible prosecution version.

As hinted upon, the appellant is aggrieved upon a memorandum of appeal which is comprised of five grounds of appeal. The same may conveniently be rephrased and crystallized as follows:-

1. **That first appellate Court non-directed itself on the appellant's defence to the effect that he was also the victim of the robbery.**

2. **That the first appellate Court failed to appreciate that robbery was not constituted inasmuch as not a single bullet was fired from the short gun.**

3. **That the cautioned statement was wrongly adduced for failure of the trial Court to conduct a trial within trial in the wake of the appellant's objection.**

4. **That the evidence of visual identification was not watertight, the more so as PW1 and PW3 claimed that they were asleep.**

At the hearing before us, the appellant was fending for himself unrepresented, whereas Mr. Miraji Kajiru, learned State Attorney, stood for the respondent Republic. The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage, after the submission of the learned State Attorney.

For his part, Mr. Kajiru initially supported the appeal on account of insufficient evidence of identification but, upon realizing that this was a case of recognition, as distinct from mere visual identification, he made a turn about and fully supported the conviction and sentence. The learned

State Attorney refuted the appellant's claim that his defence was not considered. Both Courts below, he said, reflected on the appellant's defence but rejected it in the face of a credible case for the prosecution. As regards the contention that robbery was not constituted, Mr. Kajiru submitted that the evidence was to the effect that PW2 was assailed by a machete and a club and, as such, robbery was sufficiently constituted. The learned State Attorney further submitted that the evidence of recognition of the appellant was supplemented by the fact that he was previously well known to PW1, PW2 and Pw3. Nonetheless, Mr. Kajiru conceded that, in the wake of the appellants objection, the trial Court ought to have held an enquiry and inasmuch as the same was not held, the cautioned statement was wrongly adduced into evidence and should be expunged from the record. He was, however, quick to add that, even without the cautioned statement, the appellant was sufficiently implicated by the remaining evidence.

In reply, the appellant reiterated the points of grievance raised in the memorandum of appeal and, more particularly, he insistently contended that the evidence of visual identification was not watertight. The appellant sought to impress that the identifying witnesses did not elaborate on the

intensity of the light which enabled them to identify him. He also suggested that the account given by PW1 and PW3 was unreliable in the light of their concession that they were asleep. The appellant added a detail to the effect that the PF3 was wrongly adduced into evidence, on account that the medical officer who authored it was not called to testimony.

We have given due consideration to the competing rival arguments from either side. In determining this contested appeal we shall abide by the cherished principle that, on a second appeal, the Court will not lightly interfere with the concurrent findings of the lower courts unless it is evident that the findings were based upon an oversight of some material factor or that the same were arrived at upon the application of a wrong principle of law (see **DPP vs Jaffar Mfaume Kawawa** [1981] TLR 149.

Having stated the guiding principle we propose to first address the appellants' complaint with respect to the cautioned statement. If we may express at once, the appellant has a valid complaint. As ready intimated, the appellant objected to the tendering of the statement and, incidentally, in the objection, he complained that the interviewer did not accord him his rights. The complaint, surely, had a bearing on the

voluntariness of the statement and, accordingly, the trial court was enjoined to resolve whether or not the statement was voluntary. In the unreported Criminal Appeal No. 78 of 2004 - **Twaha Ali and Others vs The Republic**, the Court observed as follows:-

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

In the matter under our consideration, the requirement was not complied with and, in the result, we are left with no option than to expunge the cautioned statement from the record of the evidence. We will go further and just as well expunge the PF3 which was adduced into evidence without according the appellant an opportunity to express whether or not he wished the medical officer who authored it to be

summoned. That was contrary to the mandatory provisions of Section 240 (3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws.

We will next address the complaint that inasmuch as no bullet was fired during the episode, robbery was not constituted. The grievance is, in the first place, a fallacy, much as it is not quite the law that for robbery to be constituted a culprit in possession of a gun must release a gun shot. In a given situation, it will suffice if the culprit, say, threateningly wields the gun towards the victim. But, in the matter at hand, there was evidence that PW2 was physically assailed by, at least, machete which suffices to constitute robbery. The appellants grievance, we so find, is without a semblance of merit.

We now address the complaint about insufficiency of the evidence of visual identification. As hinted upon, we should reiterate that the prosecution evidence related to the recognition of the appellant as distinguished from his more visual identification. Of recent, the Court of Appeal of Kenya held that evidence of recognition of an assailant was more satisfactory, assuring and reliable than identification of a stranger because such evidence depended upon the person knowledge of the assailant (see **Mohamed v. Republic**, [2006], E.A. 209 CAK). But we are, nonetheless,

keenly alive to the caution expressed in the unreported Criminal Appeal No. 35 of 2005 – **Issa Mngara @ shuka vs The Republic**, where this Court stated:-

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

When all is said on the subject of recognition, we do not entertain a flicker of doubt that PW2, for one, had ample opportunity to recognize the appellant the more so as, at the time the culprits arrived, the security electric lights were on. For another, upon recuperation from their sleep, PW1 and PW3 also had an opportunity to recognize the appellant. According to PW3, although the security light had, by then, been switched off, the light from the filling pumps were on and sufficiently lit the premises to enable them recognize the appellant. It is noteworthy, in this regard, that the appellant insistently claimed that PW1 and PW3 could not have recognized him as they were asleep. With respect, the evidence was to the effect that the two witnesses were awakened by the fracas involving PW2 and the culprits and, more particularly, PW1 was physically confronted

by the culprits who dispossessed her of a mobile phone. To this end, we are fully satisfied that the appellant was amply recognized at the scene by PW1 PW2 and PW3. His conviction was well deserved and unassailable. We will, in the result, dismiss the appeal against the conviction.

As regards the sentence, we should express at once that upon the appellant's consistent claim that he was seventeen years of age, the trial Court should have taken a breather to call such material evidence as would have enabled it to ascertain the claim before passing sentence. To the extent that the claim was not ascertained, we cannot say with certainty that the custodial sentence was legal in the face of section 119 (1) of the Law of the Child Act No. 21 of 2009 (the Act). Incidentally, the referred provision imperatively bars a custodial sentence as against a child who is defined by section 4 (1) of the Act to be a person under the age of eighteen (18). Given the apparent illegality of the sentence, the fitting approach, in our view, will be to invoke our revisional Jurisdiction and set aside the sentence under the provisions of section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws. Having regard to the fact that the appellant has been in prison custody ever since the 6th June, 2014, we refrain from prescribing any substituted punishment and instead,

we order his immediate release forthwith unless he is otherwise lawfully held. Order accordingly.

DATED at TABORA this 21st day of April, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL