IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 158 OF 2007

SHIJA MASAWE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlay, J.)

Dated the 6th day of September, 2006
In
HC. Criminal Appeal No. 117 of 2005

JUDGMENT OF THE COURT

29th February & 9th March, 2016

MASSATI, J.A.:

The appellant was arraigned before the Resident Magistrate's Court of Dar es Salaam at Kisutu on 28/11/2002, and charged with the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code. He pleaded not guilty.

After hearing seven (7) prosecution witnesses, and the Appellant's own testimony, the trial court found:

"the accused guilty of the offence"

and convicted him of the offence "as charged". The trial magistrate did not refer or specify for which provision of the law, the conviction was entered.

The Appellant appealed to the High Court, where Mlay, J. dismissed the appeal in its entirety. So he has now come to this Court to challenge the findings of the lower courts.

The Appellant filed four grounds of appeal, as follows:

MEMORANDUM OF APPEAL

"1. *That, your lordship both trial magistrate and learned appellate Judge Grossly erred in law and fact by finding that PW2, PW3, PW4 and PW5 positively identified the appellant at the LUCUSIN QUO.*

2. *That, trial magistrate and learned appellate Judge Grossly erred in Law and fact by holding to unprocedural identification parade conducted by PW7. against the appellant where PW2, PW3, PW4 and PW5 did identify him as they all*

confirm to know him from before contrary to Rules and regulations of P.G.O No. 232 Rule (2N).

3. *That, both the trial magistrate and learned appellate erred in law and of act by convicting the appellant in case whose proof was below the required stand and all the witnesses allege to know him from before and reside in the some vicinity but no investigatory evidence was led as to how he was apprehended in connection with the crime.*

4. *That, the learned appellate Judge attend in law and fact by embracing the trial court Judgment which lacked factual or legal points of determination in accordance with mandatory provision of criminal procedure Act Cap. 20 R.E. 2002."*

At the hearing of the appeal, the Appellant appeared in person, adopted his memorandum of appeal, and opted to let the Respondent begin to address the Court, reserving his right of reply.

The respondent/Republic which was represented by Mr. Aloyce Mbunito, learned Senior State Attorney, did not support the conviction. Instead, he supported the appeal.

Mr. Mbunito submitted that the Appellant's grounds of appeal raise two substantive issues with which he agreed. The first issue relates to the evidence of the appellant's identification at the scene of crime. Relying on the decisions of this Court including **WAZIRI AMANI v R**, (1980) TLR 250, and **GODFREY RICHARD v R**, Criminal Appeal No. 365 of 2008 (Dodoma) (unreported) the learned counsel said that the evidence of visual identification by PW1, PW3, PW4 and PW5 left a lot to be desired. It was not watertight enough to support a conviction. On the identification parade, the learned Senior State Attorney submitted that, since there was evidence that the identifying witnesses were known to the appellant, the parade was uncalled for, and in any case, valueless as corroboration since the primary evidence of identification itself was discrepant, thus incapable of being corroborated.

The learned counsel went on to submit on what he framed as the second issue which relates to the contents of the trial court's judgment.

In his view, the judgment lacked analysis on the points for determination and also incomplete consideration of the defence case. He said that this violated section 312 of the Criminal Procedure Act (Cap. 20 R.E. 2002). He also said that even the section with which the appellant was convicted was not shown. He went further and argued that even the judgment of the first appellate court suffered from the same defects. In conclusion, Mr. Mbunito prayed that should the Court agree with his observations, it should not send back the case file to the trial court for retrial because there was no sufficient evidence on record to support the move, and therefore such order would only work injustice on the part of the appellant. In short, he asked us to allow the appeal.

Given the chance to make a reply, the Appellant entirely agreed with the Respondent and had nothing useful to add. He left the rest to the Court.

We shall begin with the Appellant's fourth ground of appeal in which the trial Court's judgment is criticised for lacking "factual or legal points of determination in accordance with mandatory provision of the Criminal Procedure Act...."

By that we understand the Appellant to be referring to noncompliance with section 312(1) of the CPA, as Mr. Mbunito, has expressly done, with whom the Appellant agreed.

Section 312 of the CPA provides:

> *"(1). Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the Court, and shall contain the point or points for determination, the decision thereon, and the reasons for the decisions and shall be dated and signed by such presiding officer as of the date on which it is pronounced in open Court.*
>
> *(2). In the case of conviction the judgment shall specify the offence of which, and the section of the*

Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."

The gist of the Appellant's complaint is that the trial court's judgment did not contain factual and legal points for determination. In judicial parlance the words:

"shall contain the point or points for determination the decision thereon and the reasons for the decision"

have been taken to mean "evaluation" or "analysis" of the evidence on record and the law. Although the terms **"evaluation"** and **"analysis"** are used interchangeably they mean slightly different things. **"Evaluation"** means:

"a systematic determination of a subject's merit, worth and significance using criteria governed by a set of standards".

but **"analysis"** means:

"... the process of breaking a complex topic or substance into smaller parts in order to gain a better understanding of it."

(WIKIPEDIA)

What this means in judicial proceedings is that in writing a judgment the judge or magistrate will not only have to summarise and analyse the body of the evidence and the law, but also to evaluate in order to determine its worth, credibility or believability and significance by using the legal standards of admissibility, burden and standards of proof and weight of such evidence, for both the prosecution and the defence in criminal cases, and the parties in civil cases. This is what is referred to as critical analysis (See **AMIRI AND MOHAMED v R**), (1994) TLR 138.

The position was succinctly put by this Court in **LEONARD MWANASHOKA v R**, Criminal Appeal No. 226 of 2014 (unreported) in the following words:

> *"It is one thing to summarise the evidence for both sides separately and another to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain... Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not*

to consider the evidence at all in the evaluation or analysis."

So in our considered view, what section 312 (1) of the CPA requires, in ordinary language, is both an **analysis** and **evaluation** of all the relevant evidence or material necessary to resolve the issue that call for determination in a criminal case.

In the present case, the four page judgment of the trial Court is not more than a summary of the testimonial evidence of each of the prosecution witnesses, and the accused's defence. From there the Court concludes:

"The prosecution has discharged their duty of proof beyond doubt as identification of the accused in respect of all criminal acts he committed at the scene are water tight, to the extent that the defence of the accused has been watered down."

The judgment is patently wanting in a proper analysis of the main issue in the case namely that of visual identification – It lacks an evaluation on the law setting guidelines on the evidence of identification and identification parades. It lacks on analysis and evaluation of the

worth of each of the prosecution witnesses' testimonies. But most importantly it lacks an analysis and evaluation of the appellant's defence. So, we entirely agree with the Appellant and Mr. Mbunito, that the trial Court's judgment is defective in substance, and this was a serious misdirection (See **AMIRI MOHAMED v R** (1994) TLR 138, **SEIF SALUM v R**, Criminal Appeal No. 150 of 2008 (unreported), **HUSSEIN IDD AND ANOTHER v R** (1986) TLR 283.

But the most disturbing feature in this aspect is the way the trial court treated the Appellant's defence. Led by his counsel, Mr. Koga, the Appellant, raised five defences:

> *(i). the numbers of the rifle, which was one of the stolen items listed in the charge sheet were not disclosed.*
>
> *(ii) the "panga" was not produced as an exhibit.*
>
> *(iii). that PW1 failed to identify him although he is well known to her before.*
>
> *(iv). that all the witnesses were related.*
>
> *(v). That PW1 bore a grudge with him because he refused to work for her*

because she was quarrelsome and would not easily pay salaries.

But in the judgment although the court acknowledged only some of the defences (i.e. relating to the Rifle, witnesses, being relations) it did not refer at all to others, such as the one on the possibility of there being a grudge between the appellant and PW1. Apart from referring to them only in passing, there was no critical analysis and evaluation of the appellant's defences at all. For instance there was no evaluation on why and how did PW1 fail to identify the Appellant because of threats of a "panga", but the same panga could not scare off, PW3, PW4 and PW5. This lack of analysis in our view, dealt a serious blow to the prosecution case.

Failure to consider a defence case is fatal and may vitiate a conviction. This principle has been followed by this Court for a long time. To mention just a few recent decisions:

1. ***ELIAS STEVEN v R*** *(1982) TLR 313.*
2. ***HUSSEIN IDDI AND ANOTHER v R*** *(1986) TLR 166.*

3. ***LUHEMEJA BUSWELU v R,*** *Criminal Appeal No. 164 of 2012 (unreported).*
4. ***VENANCE NKUBA & ANOTHER v R,*** *Criminal Appeal No. 425 of 2013 (unreported).*
5. ***LEONARD MWANASHOKA v R,*** *Criminal Appeal No. 226 of 2014 (unreported).*

Unfortunately the first appellate court did not notice these serious irregularities. The result is that both the trial court and the High Court proceedings and judgments are vitiated. The next question is what is the way forward?

Under ordinary circumstances, we would have ordered a retrial. But as a matter of principle a retrial should not be ordered if it would not be in the interests of justice to do so. (See **FATEHALI MANJI v R** (1966) EA 343.

In the present case as Mr. Mbunito has submitted, the prosecution evidence on the identification of the Appellant was so discrepant that to order a retrial would be to enable the prosecution to

fill up gaps in its evidence at the first trial. This would most likely cause injustice to the Appellant.

So, for all the above reasons we allow the appeal. We quash the proceedings and judgments of the lower courts and set aside the sentence. We order that he be released from custody immediately unless he is held there for some other lawful cause.

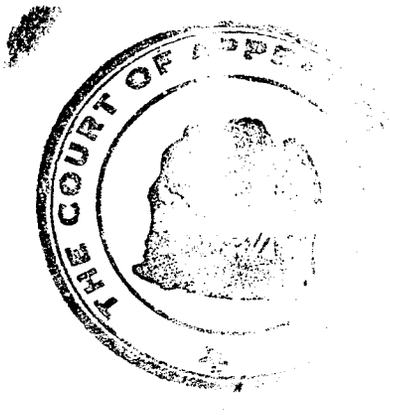
DATED at **DAR ES SALAAM** this 3rd day of March, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL