IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: OTHMAN, C.J., JUMA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO 323 of 2015

FIKIRI JOSEPH PANTALEO @ USTADHI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Munisi, J.)

dated the 16th day of April, 2012
in
HC. Criminal Appeal No. 48 of 2010

JUDGMENT OF THE COURT

29th August, & 13th September, 2016

JUMA, J.A.:

The appellant, FIKIRI JOSEPH PANTALEO @ USTADHI, was charged and tried before the Resident Magistrates' Court of Dar es Salaam at Kisutu with four counts of armed robbery (c/s 287A of the Penal Code), conspiracy to commit an offence of armed robbery (c/s 384 of the Penal Code), unlawful possession of firearms i.e. a pistol (c/s

4 (1) and 34 of the Arms and Ammunition Act No. 2 of 1991) and unlawful possession of ammunition (c/s 4 (1) and 34 of the Arms and Ammunition Act No. 2 of 1991). At the conclusion of the trial, W.E. Lema-PRM, found the appellant guilty on one count of armed robbery. Paraphrased, the particulars of the offence of armed robbery, for which the appellant alone was convicted and sentenced to serve thirty years (30) in prison, alleged that he together with another Benson s/o Lutakinjwa who was acquitted, not only stole Vodacom, Tigo and Zain airtime vouchers valued at Tshs. 2,710,000/-, but also Tshs. 580,000/- in cash, the properties of Henry s/o Ngililea. It was further alleged that they fired pistol shots into the air in order to threaten and obtain the stolen properties.

The appellant's first appeal to the High Court at Dar es Salaam against his conviction and sentence was dismissed by Munisi, J. Still aggrieved, the appellant has now come to this Court on second appeal citing a total of seven grounds of complaints. In his **first** ground, the appellant faults the first appellate Judge for relying on the evidence claiming that he was found in recent possession of the vehicle (Reg.

No. T510 APE) which was used in the commission of the crime and which the trial court admitted as exhibit P3. This first ground is closely linked to the appellant's third, fifth and sixth grounds of appeal. In the third ground he complains that this exhibit P3 was neither brought before the trial court nor was it shown to PW1.

The appellant's **second** ground faults the first appellate court for failing to take into account the contradiction between what the eye witness' Henry Nelile (PW1) testified in court, and his own first statement recorded by the police which was admitted as Exhibit D1. In his recorded statement PW1 did not identify the motor vehicle used in the commission of the offence. This second ground of appeal is also expounded in some portion of the fourth ground where the appellant complains that the total value of stolen property PW1 testified on differs from what this witness mentioned in his recorded statement (exhibit D1).

In the **fourth** ground the appellant faults the first appellate Judge for relying on the way PW1 identified him whilst in the dock without any prior identification parade.

A total of three prosecution witnesses testified against the appellant. It was around 18:00 p.m. in the evening when Henry Nelile (PW1) asked his shop attendant at Mbagala Machinjioni to close the business for the night as he walked to the nearby shop to purchase rice to take home. Before he left for the neighbouring shop, he parked his motorcycle outside and tucked at the steering wheel a wrapper containing mobile phone vouchers. Suddenly noises of gunshots rang into the air. Having been a policeman before, PW1 recognized the unmistakable sound of gunfire. He saw a person rushing to a white vehicle, Corolla T510 APE which was parked next to his shop. Soon thereafter this vehicle sped towards Maji Matitu area. In his evidence, PW1 claimed that he somehow managed to identify the appellant who was at the steering wheel of the escaping vehicle.

The evidence on the way the appellant was arrested came from SP Geresi Moruto (PW2). Around 18:05 police received radio-call messages alerting them about the armed robbery at PW1's shop. The police who included PW2 rushed to the scene of armed robbery. From there the police made follow-ups which led them from Charambe. The

escaping vehicle was stuck at Kizinga area and bandits were still pleading with the locals to pull them from the mud when the police arrived. On seeing the police all the bandits escaped except for the appellant who was arrested at the scene.

In his defence (DW1) the appellant testified that it was around 9:30 p.m. on 12/2/2009 he had parked the taxi cab at the Mbagala Taxi bay waiting for customers. The complainant (PW1) asked for a ride to a place known as Equator Grill where he called for a lady. When the lady arrived, the passenger who had hired him asked to be taken to "Luxury Pub". DW1 was not satisfied with the taxi fare of Tshs. 5,000/= which this passenger offered him at Luxury Pub. As a way of forcing his erstwhile passenger to pay sufficient taxi fare, DW1 snatched his mobile phone. That is when the passenger slapped DW1 and fished out an ID which identified him as a police officer. According to DW1, that is how he was arrested and taken to the police station.

At the hearing of the appeal, learned Senior State Attorney Ms. Helen Moshi together with Ms. Zawadi Mdegela learned State Attorney, represented the respondent Republic. The appellant, who fended for

himself, preferred to let the learned State Attorneys to first respond to his grounds of appeal.

From the very outset of her submissions, Ms Mdegela, learned State Attorney, expressed the Republic's support of the appeal albeit on different grounds from those advanced by the appellant. The learned State Attorney focused her submissions on three areas. **First,** she took exception at the way the only eye-witness (PW1) who when testifying mentioned a white saloon car with Reg. No. T510 APE (exhibit P3), but failed to identify that same vehicle in court. The learned State Attorney referred us to page 12 of the record where PW1 testified how, as his shop assistant was closing the shop, he walked to a nearby shop to purchase rice leaving a wrapper containing mobile phone vouchers tucked at the steering wheels of his motorcycle:

> *"...Suddenly I had a bullet. I noted it because I was a police officer. Then I saw the guys rushing in the motor vehicle white in colour Corolla T510 APE. The motor vehicle rushed to Maji Matitu. I managed to identify the one who was on the steering of the motor vehicle because he was looking at others."*

Ms Mdegela submitted that by failing to formally identify the vehicle in court, the two courts below should not be taken to have established that the vehicle which PW1 saw driving away towards Maji Matitu, is the same vehicle the appellant was driving when he was arrested by the police when it stuck up in a muddy road.

Secondly, she submitted although the only eye-witness claimed that he identified the appellant in the escaping vehicle, no Identification Parade was arranged at Mbagala Police Station to enable this witness to formally identify the appellant. This, the learned State Attorney submitted, left unresolved doubt whether the complainant unmistakably identified the appellant at the scene of crime.

In the **third** area of her submission, Ms. Mdegela does not think the prosecution proved to the required standard, the essential elements of stealing and use of firearm in armed robbery under Section 287A of the Penal Code. In so far as proof of stealing is concerned, the learned State Attorney referred us to the evidence of PW1 stating how this witness claimed to have seen people rushing into a white saloon car, but failed to specify if he also saw the occupants of the car actually

stealing the wrapper containing his vouchers. She added that the failure to call the shop attendant to testify, denied the prosecution with evidence which would have supported the element of stealing. Ms. Mdegela also gave her reasons why she thought that the use of firearm in the armed robbery cannot be said to have been proved. She referred us to the evidence of PW2 who claimed to have recovered a pistol with No. 3387987 and a magazine with four bullets (admitted as exhibit P1). The learned State Attorney submitted that there was no attempt to forensically link the recovered firearm with shells left behind at PW1's shop.

All said, the learned State Attorney urged us to allow the appeal and set the appellant free.

In response, the appellant supported the position taken by the learned State Attorney and prayed to be given back his freedom.

On our part, we agree with Ms. Mdegela that the circumstances surrounding the event of the alleged armed robbery, required the trial and first appellate courts to address the questions of visual identification and that of proof of stealing, which the two courts below

did not address at all. The learned trial Principal Resident Magistrate skipped the question of identification and assumed the vehicle the appellant was arrested with while trying to pull the vehicle from the mud, was the vehicle PW1 identified at the scene of crime:

> *"...Considering the above provisions, and evidence on record, it suffices to say that 1st accused did commit the alleged offence of armed robbery. He has the common intention with guys who emerged from the motor vehicle, picked complainant's property and shot in the air to scare people. There is no explanation as to why did he use that motor vehicle for that purpose. It has been admitted that he is the one who was driving that motor vehicle, as he was given by the 2nd accused. The defence which accused gave has nothing to challenge the prosecution case, but rather to exonerate him from this offence. The evidence against the 1st accused in relation to the 2nd count is watertight to the extent that this court is satisfied that the prosecution has prove[d] this count beyond reasonable doubt. I therefore find that 1st accused guilty of the offence charged and I convict him..."*

Likewise, Munisi, J. on first appeal, did not regard the two questions of identification and proof of stealing to be crucial, when she stated that:

> *"....There is no doubt in my mind that this appeal stands or falls on one main issue, i.e. whether the appellant was arrested driving a motor vehicle Corolla make Reg. No. T510 APE used in the commission of an offence shortly before its arrest. In other words whether the conviction entered against the appellant is sound in law in view of the doctrine of recent possession which in relation to the present case its applicability relates to the car used in the commission of crime and not the stolen item...*

Beginning with the first issue of identification, the position of this Court is well established that trial courts, and by extension courts sitting on first appeals must take great caution before relying on the evidence of visual identification when conditions for positive identification are difficult: **see— Waziri Amani v. R.** [1980] T.L.R. 250. Visual identification evidence was in **Yustin Adam Mkamla vs. R.,** Criminal Appeal No. 206 of 2011 (unreported) described to be the

weakest kind and most unreliable evidence, requiring great care before being acted upon.

It seems to us that categories of conditions which can be regarded to be difficult for positive identification depend on individual circumstances of the cases concerned. The categories of difficult circumstances for positive identification are certainly not limited to darkness or night times only. Even in broad daylight particular conditions may still be described to be difficult for positive identification to require courts to exercise great caution. We think the circumstances under which the complainant (PW1) in the instant appeal purported to have identified the appellant fell under the categories of difficult circumstances for positive identification where great caution was needed. For example, it is not clear if the complainant (PW1) was still inside that neighbouring shop purchasing his rice when the first shots rang out. With the bandits still firing shots, it is also not clear how far PW1 was from the vehicle, for him to be in a position to identify the appellant and also to read the registration plate number of the speeding vehicle.

Because the two courts below did not regard identification evidence to be an important issue to address their judicial minds to, no attempt was similarly made to address such precautionary factors as the distance separating the complainant from the other suspects rushing into the vehicle and the number plate of the vehicle. We think, it was not sufficient for PW1 to state, as he did on page 13 of the record of appeal, that: — *"I managed to identify the one who was on the steering of the motor vehicle because he was looking at others."*

Next, we agree with Ms. Mdegela the learned State Attorney over her doubts whether the element of stealing in the offence of armed robbery was proved at all. For purposes of instant appeal the main elements constituting offence of armed robbery section 287A are **first,** stealing. The **second** element is either using firearm to threaten in order to facilitate the stealing. In the particulars of the offence of armed robbery alleged that air time vouchers and Tshs. 580,000/= in cash was stolen during the armed robbery.

In his evidence, the complainant testified that he left the wrappers containing his vouchers tucked in his motorcycle handle, but

said nothing about the cash. Again, the complainant did not shed any evidence to prove the aspect of taking of the wrapper to constitute the stealing. He merely stated: *"Then I saw the guys rushing in the motor vehicle white in colour corolla T510 APE. The motor vehicle was parked just next to my shop."*

It is an established principle of law that courts sitting on second appeal, should refrain from interfering with concurrent finding of facts by trial and first appellate courts, unless there are factors like misapprehension of evidence causing injustice: see **Gwandu Faustine and Daniel Wema Vs. R.,** Criminal Appeal No. 174 Of 2005 and **Bahati Robert vs. R.,** Criminal Appeal No. 146 Of 2013 (both unreported). Because the two courts below failed to consider the evidence of visual identification under difficult circumstances and on proof of stealing, we find it appropriate to interfere with the concurrent finding of the two courts below.

We shall in event allow this appeal. The conviction for armed robbery is hereby quashed and the resulting sentence is set aside. The

appellant shall be released forthwith from prison unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 5th day of September, 2016.

M.C. OTHMAN
CHIEF JUSTICE

I.H. JUMA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL