IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KIMARO,J.A., MMILLA,J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO.261 OF 2007

PROCHES JAMES MAITE@KIKAANGWA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the judgment of the High Court of Tanzania at Moshi)

(Jundu,J.)

dated 23rd March, 2007
in
Criminal Appeal No.161 of 2004

.....

JUDGMENT OF THE COURT

16th & 23rd May 2016

KIMARO,J.A.

The appellant and one Joseph Melkior Shirima @ Temba were jointly charged in the District Court of Rombo in Kilimanjaro with the offence of robbery with violence contrary to section 285 and 286 of the Penal Code [CAP 16 R.E. 2002]. The charge sheet alleged that the appellant and his co-accused stole from Dismas Kavishe an assortment of items valued at

T shillings 140,000/=. Immediately and after the theft they threatened the victim of crime with a "*panga*" for purposes of retaining the stolen items.

The trial court was satisfied by the evidence that was led by the prosecution and convicted the appellant and his co accused as charged. They both appealed unsuccessfully to the High Court. Joseph Melkior Shirima @ Temba successfully appealed to this Court in Criminal Appeal No.261 of 2014.

Briefly the evidence that led to the conviction of the appellant in the trial court was that of his identification and a caution statement he made to the police. Explaining in the trial court on how the offence was committed, Joyce Dismas Kavishe, (PW1) the wife of Dismas Didas(PW4) testified that on the night of 2nd November 2003 herself and her husband were sleeping in their house. The couple lived at Msinga village in Usseri. At around 9.00 p.m. she heard a bang at the main door. When she woke up she saw armed persons; among them being the appellant who was armed with a "*panga*". The appellant had a torch. She said she could identify the appellant because there was light from a hurricane lump which was on. The couple had a small child then. PW4 corroborated the evidence of PW1 on the identification of the appellant.

The testimony of the two witnesses was that to enable the appellant and the culprits who were in his company to commit the offence, the appellant beat PW4 with a "*panga*" and the couple was ordered to sleep on the ground and they were covered with a blanket. They were threatened not to raise any alarm or else they would be killed. They complied. That enabled the appellant and his co accused to ransack the house and leave with ten cushions, one radio, four foam mattresses, and two bed sheets. When the couple woke up after being satisfied that the situation was calm, they noted that the above items were stolen.

The matter was then reported to the police. No. C 9706 D/Sgt Benjamin (PW2) conducted the investigation of the case. His testimony was that PW1 mentioned the appellant as being one of the persons who committed the offence. He was their neighbor. On 11th January 2004, PW2 arrested the appellant at the house of Joseph Malkior Shirima @ Temba. D9845 Detective Corporal Christopher (PW3) recorded a cautioned statement of the appellant which was admitted in court as exhibit P2. The appellant was said to have admitted the commission of the offence. At the trial the appellant retracted the statement but it was admitted in evidence

without any inquiry being conducted. It was also read in court before its admission.

The appellant admitted in his defence that the complainant is his neighbor. He denied the commission of the offence. Regarding the caution statement that PW3 recorded the appellant retracted it.

With this evidence the trial court was satisfied that the prosecution case was proved beyond reasonable doubt. The appellant was then convicted and sentenced to imprisonment for a term of fifteen years. His appeal in the High Court as said before was not successful. He has now come to the Court with five grounds of appeal faulting the decision of the High Court.

In the first ground the appellant says he was convicted on insufficient evidence by the prosecution. The second and fifth grounds fault the caution statement for being wrongly admitted because of illegalities on the taking and admission of the statement itself. The third is a complaint concerning the credibility of the prosecution witnesses. In the fourth ground the appellant laments that the evidence of his identification was not water tight.

When the appeal was called on for the hearing, the appellant appeared in person and fended himself. The respondent /Republic was represented by Mr. Innocent Eliawony Njau, learned Senior State Attorney.

The appellant adopted his grounds of appeal. He had no addition grounds of appeal. However, he informed the Court that the co-accused who was jointly charged with him in the trial court was acquitted in an appeal he filed in the Court. He prayed that his grounds of appeal be considered favourably and his appeal be allowed.

Responding to the grounds of appeal, the learned Senior State Attorney did not support the appeal. He supported the conviction and sentence. On ground four of appeal which talks about the identification of the appellant, the learned Senior State Attorney said the evidence of PW1 and PW4 who were the identifying witnesses, at the scene of crime sufficiently identified the appellant because of the hurricane lump which was on when the appellant entered into the house. He went further to say that the appellant was a neighbour to the prosecution witnesses, he was known to them before and he was also mentioned to the police station when the matter was reported there. He cited the case of **Ally Fumito V Director**

of Public Prosecution Criminal, Appeal No. 298 of 2008 (Unreported) to support his argument. He said this evidence was not impeached by the appellant during cross examination. The appellant also complained that the witnesses did not give any description nor the type of clothes he wore. On this aspect the learned State Attorney opined that because the appellant was a known person, a neighbor, there was no need for the identifying witnesses to give all those details.

Regarding grounds two and five of the appeal in which the complaint was on the caution statement and its admissibility in evidence, the learned Senior State Attorney admitted that the grounds have merit. He said the caution statement was recorded outside the prescribed period by the law and it was read in court before it was admitted. He said that contravened sections 50 and 51 of the Criminal Procedure Act, [Cap 20 R.E.2002]. He insisted that even if this evidence is expunged from the record, the evidence on identification would sustain the conviction of the appellant. He relied on the case of **Roland Thomas Mwangamba V Republic,** Criminal Appeal No. 308 of 2007 (unreported). He said the procedure of admission of documentary evidence is that the document had to be admitted in court

before it was read over to the accused person. He prayed that the caution statement be expunged from the record.

On the complaint by the appellant that the prosecution witnesses were not credible, the learned State Attorney said the ground has no merit because the record does not show that the appellant impeached the credibility of the witnesses. He cited the case of **Darusi Gidahosi V Republic** Criminal Appeal No. 298 of 2008 (unreported) and said that the assessment of the credibility of the witnesses is the duty of the trial court which has the opportunity of seeing them testifying. He said the trial magistrate made an assessment of the witnesses and was satisfied that they were credible witnesses.

The appellant had nothing to say in rejoinder. He insisted that the prosecution case was not proved beyond reasonable doubt and that he was entitled to an acquittal.

In as far as our position is concerned; we are of a respectful opinion that the appeal has merit. We are aware that this is a second appeal where the Court rarely interferes with the findings of the lower courts unless satisfied that there was misapprehension of the nature and quality of

evidence which resulted into a miscarriage of justice. See the case of **Salum Mhando V R,** [1993] T.L.R. 170. With respect to the learned judge on first appeal, in this case we do not think that there was a proper evaluation of the evidence.

Starting with the ground of identification, we do not agree that the evidence of identification that was given by the PW1 and PW4 sufficiently identified the appellant at the scene of crime. In the case of **Morris Jacob v R,** Criminal Appeal No. 220 of 2012 CAT (unreported) the Court held that evidence of visual identification is of the weakest kind and most unreliable. As such no court should rely on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that it was absolutely watertight. All that PW1 and PW4 said in their testimonies was that the appellant was identified as being among the culprits who were at the scene of crime on the date of the commission of the offence. Their testimonies are that it was a hurricane lump which assisted them to see the appellant as he was a known person before and a neighbor. However the intensity of the light was not disclosed.

While there is no hard and fast rule to be relied upon for a correct identification, the Court has developed a number of principles to guide the trial courts. **Kasim Said & Two others V Republic,** Criminal Appeal No. 208 of 2013 is among such authorities. In the case of **Magwisha Mzee and Another V R,** Criminal Appeals 465 and 466 of 2007 (unreported), the Court said the prosecution evidence must establish beyond reasonable doubt that the light relied upon by the witnesses was reasonably bright to enable the identifying witnesses to see and identify the accused person. Statement such as there was hurricane lump and torch light as the witnesses said in this case is not sufficient. The witnesses should have explained the intensity of the light from the named sources.

The witnesses also said they recognized the appellant because he was their neighbor but they did not go further to describe him. A description of the appellant was important. See **R V M. B. Allui** (1942) EACA 72. Equally important for the identifying witnesses, was to give the distance the appellant was from them, the size of the house which was invaded for purposes of ascertaining illumination of the room from the source of light the witnesses mentioned. This was necessary because the witnesses said they were threatened to be killed and ordered to sleep on the ground and

they were covered by a blanket. This Court has repeatedly said that even in recognition cases mistakes can be made. In the case of **Issa Mgare @ Shuka V Republic,** Criminal Appeal No. 37 of 2005 Criminal Appeal (unreported) the Court cautioned 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."*

Another important aspect arising from the evidence of identification is the time the appellant was arrested. The charge sheet, the testimonies of both PW1 and PW4 show that the offence was committed on 2nd November, 2003 and the appellant was mentioned as the one who committed the offence. But according to PW2, the appellant was arrested on 11th January 2004. Why should there be a big interval between the commission of the offence and the arrest of the appellant if he was a neighbor of the two identifying witnesses and his name was mentioned to the police at the time of reporting the crime? In the case of **Aziz Athumani**

@ **Buyogera v Republic,** Criminal Appeal No. 222 of 1994 (unreported), the Court held that an unexplained delay in arresting a suspect casts doubt on the credibility of the identifying witness. See also the case of **Galous Faustine Stanslaus V Republic,** Criminal Appeal No. 2 of 2009 (unreported). From the above analysis we fault the learned judge on first appeal for holding that there was sufficient evidence of the identification of the appellant. In our considered view, as we have endeavored to show, there were doubts in the identification of the appellant. For this reason, we disagree with the learned Senior State Attorney on this ground. This ground of appeal has merit.

Regarding the caution statement, that it was illegally obtained, that is ground two of the appeal, and its admissibility that it was read over before its admission, that is ground five of the appeal, the learned Senior State Attorney conceded that the grounds have merit. PW2 said he arrested the appellant on 11th January 2004. On the other hand, PW3 said he recorded the statement of the appellant on 15th January 2004 that was on the fourth day after his arrest. Section 50 of the Criminal Procedure Act [CAP 20 R.E. 2002] states that the period for interviewing a suspect after his arrest is four hours. An extension can be sought in section 51. In this case despite there

being evidence of PW3 that the caution statement was recorded outside the allowed period, there is no evidence showing that PW3 was granted extension to record the caution statement of the appellant after the period allowed by section 50 of the CPA had elapsed. The caution statement was unlawfully recorded. See the cases of **Roland Thomas @ Mwangambe** (supra) referred to by the learned Senior State Attorney. This evidence ought not to have been introduced in evidence. The learned judge on first appeal erred for not expunging it from the record.

The complaint by the appellant on its admission is also valid. In the case of **Robinson Mwanjisi and three others V Republic,** Criminal Appeal No. 154 of 2015 (unreported) the Court held that:

> *"Whenever it is intended to introduce any document in advance, it should first be cleared for admission, and be actually admitted before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial."*

We said the caution statement was not supposed to be admitted in evidence for failure to meet the requirement of the law. But even if that requirement had been met, a condition precedent to its admission was to

find out whether it was taken voluntarily. The caution statement was read over before it was admitted in court. That also flouted the procedure. For further exposition on observance of the procedure see the case of **Wahii Abdallah Kibutwa and 2 others v Republic,** Criminal Appeal No.181 of 2006 (unreported). With those irregularities in the recording and admission of the caution statement exhibit P2, we expunge it from the record.

The last ground of appeal by the appellant was that the prosecution witnesses were not credible. As the learned Senior State Attorney supported the conviction and the sentence his submission was that the credibility of the witnesses was not impeached and the assessment of the credibility of the witnesses was exclusive realm of a trial court. We agree with the learned Senior State Attorney that it is the position of the law. The case of **Darusi Gidahosi** (supra) confirms this principle of the law. However we have shown where the weakness in the identifying witnesses lay. We have also made our finding on the matter. Since the evidence was not sufficient, we have no alternative but to allow the appeal, quash the conviction and set aside the sentence. The appellant has to be released from prison unless he is held there for other lawful reason.

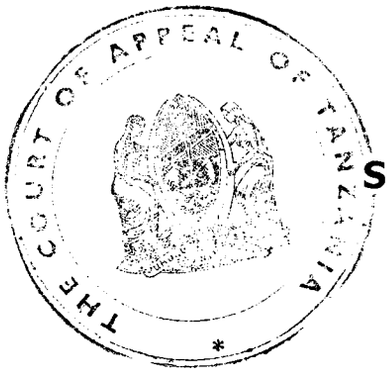
DATED at ARUSHA this 19th day of May 2016

N. P. KIMARO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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



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