IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MZIRAY, J.A., NDIKA, J.A.)

CRIMINAL APPEAL NO. 396 OF 2015

SHABANI KIIZA @ AMBULANCE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bongole, J.)

dated the 25th day of May, 2015
in
Criminal Appeal No. 163 of 2014

JUDGMENT OF THE COURT

3rd May & 1st June, 2017

MUSSA, J.A.:

In the Resident Magistrate's Court of Dar es Salaam, at Kisutu, the appellant was arraigned as follows: -

"***STATEMENT OF OFFENCE***

ARMED ROBBERY: *Contrary to section 287A of the penal code [Cap. 16 R.E. 2002]*

PARTICULARS OF OFFENCE

SHABAN KIIZA @ AMBULANCE, on 26th day of September, 2011 at Ubungo Bandari Kavu area,

within Kinondoni District in Dar es Salaam Region, did steal a motorcycle make ***FECON*** *with Registration No. T. 273 BUL valued at Tshs. one million (Tshs. 1,000,000/=) the property of* ***RAMADHANI RAJABU*** *and immediately before such stealing did use actual violence by stabbing him with a knife in order to obtain the said motor cycle."*

The appellant denied the charge, whereupon the prosecution deployed seven witnesses, three documentary exhibits, as well as the allegedly stolen motor cycle. In reply, the appellant featured himself as the sole defence witness and rested his case. At the conclusion of the trial, the appellant was found guilty as charged, convicted and sentenced to a term of thirty (30) years imprisonment. His appeal to the High Court was dismissed in its entirety (Bongole, J.), hence the present second appeal which is founded upon six (6) points of grievance. Nonetheless, before we reflect on the memorandum of appeal, it is necessary to recapitulate, albeit briefly, the factual setting giving rise to the arrest, arraignment and the ultimate conviction of the appellant.

From the totality of the prosecution version, it is undisputed that, at the material times, a certain Abdulrahman Juma (PW3) owned a motor cycle Registration No. T. 273 BUL which he purchased on the 5th September, 2011 at a price of Shs. 1,500,000/=. Evidence was to the effect that PW3 entrusted the motor cycle to one Festo Charles (PW2) for use in the business of commuting persons, popularly known as *"boda boda"* transport. The latter was, actually, a *boda boda* driver and he and his colleagues used to park at Vingunguti Machinjioni area, within Dar es Salaam City. Ramadhani Rajab (PW1) and Daudi Christopher (PW6) were amongst the *boda boda* drivers who used to park at the joint.

On the 26th September 2011, around 8:00 p.m. or so, PW1 was approached by a customer who requested to be driven to Mabibo area. The way it appears, PW1 had no motor cycle at that particular moment and so he requested and was given by PW2 the referred motor cycle to ferry the customer. It is, perhaps, pertinent to interject the remark that in his testimonial account, PW1 advanced a claim that there was enough light at the scene and that, through it, he identified the customer to be the appellant herein.

To resume PW1's telling, as they drove towards the desired destination, the appellant requested PW1 to stop midway, so as to pick a colleague of his (appellant's). To this, PW1 obliged and, indeed, an undisclosed second passenger embarked on the motorbike and joined them in the journey. A little later, as they rode past Bandari Kavu near Mabibo area, the appellant commanded PW1 to reduce speed which he did but, almost immediately, his passengers tied him with a rope. Soon after, the undisclosed passenger took command of the motor cycle and rode it away. Next, the appellant stabbed PW1 severally on his back, ribs and shoulder. Apparently, PW1 lapsed into unconsciousness till when he was later picked and helped by an anonymous Samaritan who took him to the Muhimbili Medical Centre where he was hospitalized.

From there, it is Philipo Paulo Jeremia (PW5) who picks the tale. At the material times, the witness was a casual labourer at a godown which is, incidentally, located at Bandari Kavu. On the fateful day, around 9:00 p.m. or so, PW1 along with Saidi, Musa and Ezekiel were unloading luggage from a motor vehicle and transferring the same into the godown. Then, all of a sudden, a man fell from the godown enclosure and landed at the spot where they were working. When asked to account

for the strange occurrence, the man informed PW5 and his colleagues that he had just been involved in a motor cycle robbery and that he managed to climb and jump over the godown wall to flee from an angry mob which was on his heels. PW5 and his colleagues informed the police of the occurrence and, within a while, the police arrived at the godown, whereupon the man was securely apprehended. As it turned out, the man in flight was none other than the appellant herein.

A good deal later, on the 28th September, 2011 a certain detective Sergeant Juma Salum (PW7) interviewed and recorded a cautioned statement from the appellant in which the latter was said to have confessed involvement in the robbery episode which he also, allegedly, linked with the Bandari Kavu godown incident. During the trial, the appellant resisted the admissibility of the cautioned statement but following an enquiry akin to a trial within trial, the statement was held admissible and adduced into evidence (exhibit P4).

It is perhaps also pertinent to note that in the course of trial, the prosecution, through PW2, additionally adduced into evidence the motorbike which was allegedly stolen from PW1 (exhibit P1). But, quite unfortunately, the witness did not disclose as to how he became seized

of the motorbike, the more so as, in accordance with the other evidence on record, the same was actually dispossessed from PW1 and driven off by the appellant's unnamed colleague. Speaking of exhibit P1, in fact there was a complete dearth of evidence with respect to what transpired after the motorbike was seized from PW1 and driven away at Bandari Kavu. Be what may have been the happening, with this detail, so much for the prosecution version which was unfolded before the trial court.

In his affirmed defence, the appellant was fairly brief in his complete disassociation from the prosecution accusation. According to him, on the 24th September, 2011 he and two others were arrested whilst playing billiards and taken to Urafiki Police Station. The other suspects were later released but he was put in custody till on the 26th September, 2011 when he was arraigned for an offence which he did not disclose. Thus, he further contended that he could not have been at the scene on that day which was also the day when he was arraigned in court. Having raised the defence of *alibi*, the appellant rested his case.

As hinted upon, on the whole of the evidence, the trial learned Principal Resident Magistrate was fully impressed by the version which was unfolded by the prosecution witnesses. She, for instance, accepted

the cautioned statement as truthful and found the same to be sufficiently corroborated by the testimonies of PW1, PW4 and PW5. Accordingly, as already intimated, the appellant was found guilty, convicted and sentenced to the extent as indicated above. Again, we have similarly indicated the extent to which the first appellate court found no cause to vary the verdict of the trial court.

Before us, the appellant seeks to impugn the decision of the first appellate court upon six (6) points of grievance, namely: -

> "1. *THAT, your Lordship the learned first appellant (sic) judge grossly erred in law and fact sustaining conviction and sentence meted out to the appellant based on a charge which did not disclose the right full owner of the property so robbed.*
>
> 2. *THAT, the first appellant (sic) judge erred in law and fact by up-holding to un-credible, un-reliable and un-procedural visual identification of PW.1 against the appellant before and during occurrence of the crime as he mention the intensity*

of light while being re-examined by the prosecutor which renders his stance an afterthought.

3. *THAT, the learned first appellate judge erred in law and fact by not critically assessing contradictory and conflicting evidence of PW4 and PW7 during main case and inquiry as to where he was while the appellant was recording the alleged statement and when the same was obtained from him respectively.*

4. *THAT, the learned first appellate judge grossly erred in law and fact by considering caution statement Exh. P4 tendered by PW.7 against the appellant as it was obtained contrary to mandatory provisions criminal procedure Act Cap. 20 RE. 2000, neither were its contents read over by its author to its alleged maker in compliance with requirement of the trial court.*

5. *THAT, the learned first appellate judge erred in law and fact by convicting the appellant in a case where the police*

officer(s) who its alleged re-arrested the appellant were not summoned to testify on material facts to clear any doubt.

6. *THAT, the learned first appellate judge grossly erred in law and fact by sustaining conviction on to the appellant in a case where the prosecution failed to prove his guilt beyond any shadow of doubt as charged."*

At the hearing, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Ms. Rachel Magambo, learned Senior State Attorney. The appellant fully adopted the memorandum of appeal but he preferred to elaborate on it, if need be, at a later stage, after the Republic has given its submissions. As it were, the learned Senior State Attorney fully supported the appeal for a variety of reasons.

For a start and, quite aside from the grounds of appeal, Ms. Magambo contended that the charge sheet to which the appellant stood arraigned was fatally flawed for two main reasons. First, she charged, Ramadhan Rajabu (PW1) was erroneously named therein as owner of

the stolen motorbike instead of Abdulrahman Juma (PW3). It is noteworthy that the appellant has raised a similar concern in his first ground of appeal.

Second, the learned Senior State Attorney contended that the addition of the words *"...did use actual violence..."* in the particulars of the offence was a superfluity which derogates from the provisions of section 132 of the Criminal Procedure Act, Chapter 20 of the Revised Laws (CPA). In sum, the learned Senior State Attorney submitted that the alleged flaws on the charge sheet would, alone, vitiate the conviction.

As regards the identification of the appellant, Ms. Magambo discounted the evidence of visual identification by PW1 and PW6 as insufficient, the more so as both witnesses did not disclose the source as well as the intensity of light which enabled them to identify the appellant. In view of the insufficient evidence of identification, the learned Senior State Attorney advised that the conviction of the appellant cannot be sustained.

Coming to the cautioned statement, Ms. Magambo contended that the same was improperly adduced into evidence, given the fact that it

was belatedly recorded beyond the basic period available for interviewing a suspect as prescribed by sections 50 and 51 of the CPA. That being the situation, the learned Senior State Attorney suggested that the statement should be expunged from the record of the evidence. To wind up her submission, Ms. Magambo advised us to allow the appeal, quash the conviction and set the appellant at liberty. Incidentally, having heard the learned Senior State Attorney, the appellant fully supported her without more.

Addressing the issues of contention, we think the alleged flaws on the charge sheet, if at all they are, need not unnecessarily detain us. To begin with, the erroneous mention of PW1, in the particulars of the offence, as an owner of the property is, indeed, unfortunate but; given the fact that there was clear evidence of ownership from PW3, the misnomer is, to say the least, inconsequential and did not, in any way, prejudice the appellant.

As regards the expression *"...did use actual violence..."* which also appears in the particulars of the offence, we are, with respect, far from being persuaded that the same offends the provisions of section 132 of the CPA. On the contrary, we do think that the expression elaborates

further the nature of the offence charged which is, exactly what is required by the provision.

Next is the issue of the identity of the motorbike robber. In this regard, there are two separate strands of evidence implicating the appellant. First, are claims advanced by PW1 and PW6 to the effect that they identified the appellant and; second, is the evidence pertaining to the Bandari Kavu godown episode. As regards the identification claims by PW1 and PW6, both Ms. Magambo and the appellant, in his second ground of appeal, have discounted the testimonies of these witnesses for being insufficient on the issue of visual identification. We propose to first address this strand of evidence and, with respect, we think both Ms. Magambo and the appellant had a valid concern.

Our long settled jurisprudence is to the effect that the evidence of visual identification under unfavourable conditions, such as at night, is of the weakest kind and unreliable. Such evidence should be approached with utmost circumspection. No court should act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight (see the unreported Criminal Appeal No. 152 of 2011 – **Felician Joseph Vs. The Republic**).

In the situation at hand, the incident occurred at night and, thus, one would have expected, as, indeed, it was in the best interests of the prosecution, to bring evidence that would have, *inter alia*, disclosed the time PW1 and PW6 had the appellant under observation; the distance at which they observed him; the source of light and its intensity and; a detail as to whether the witnesses knew or had seen the appellant previously (see the guidelines laid down in the case of **Waziri Amani Vs The Republic** [1980] TLR 250).

Unfortunately, in this matter, the foregoing guidelines were hardly met. More particularly, the identifying witnesses did not disclose whether or not they observed the appellant from a good vantage point and the length of time they had him under observation; they did not, as well, elaborate on the nature, location and intensity of the available light, just as neither of them claimed knowing the appellant previously. All these factors are telling against the sufficiency of the evidence of visual identification by PW1 and PW6.

Furthermore, it is beyond question that PW1 and PW6 who, apparently, had not known the appellant previously, were not accorded

an opportunity to identify him in an identification parade. To say the least, their implication of him was nothing more than a dock identification. In this regard, we need do no more than reiterate what we said in the unreported Criminal Appeal No. 172 of 1993 – **Musa Elias and Two others Vs The Republic**: -

> *"...it is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial."*

Thus, to conclude from the foregoing, we are constrained to find that, in the absence of an identification parade, the visual identification claims by PW1 and PW6 are of little value, if at all.

Coming to the cautioned statement, both the learned Senior State Attorney and the appellant have similarly discounted it, rightly in our view, for being recorded belatedly. From the available evidence, it cannot be doubted that the appellant was arrested sometime after 9.00 p.m. on the 26th September, 2011 in the wake of his miraculous

descending from the godown wall. Equally undisputed, is the fact that his cautioned statement was recorded by PW7 on the 28th September, 2011 between 2.00 and 3.00 p.m. which turns out to be close to two days after his arrest. The relevant provisions pertaining to the time available for interviewing suspects are contained in sections 50 and 51 of the CPA. Section 50(1) stipulates as follows: -

> *"For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is –*
>
> *(a) Subject to paragraph (b), the basic period available for interviewing the person, that is to say,* ***the period of four hours commencing at the time when he was taken under restraint*** *in respect of the offence;*
>
> *(b) If the basic period available for interviewing the person is extended under section 51, the basic period as so extended." [Emphasis supplied].*

The foregoing extracted section is supplemented by section 51(1) which makes provision for extensions thus:-

> *"Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may –*
>
> *(a) Extend the interview for period not exceeding eight hours and inform the person concerned accordingly; or*
>
> *(b) Either before the expiration of the original period, or that of the extended period, make application to a magistrate for a further extension of that period."*

In the instant case, we are of the settled view that the cautioned statement which was recorded outside the prescribed time without extension was improperly adduced into evidence and, for that reason, the same should be expunged from the record. Similar views have been

expressed upon numerous decisions of this Court in, for instance, Criminal Appeal No. 40 of 1999 – **Tumaini Molel @ John Walker and Others Vs The Republic**; Criminal Appeal No. 95 of 2005 – **Janta Joseph Komba and Three others Vs The Republic**; Criminal Appeal No. 9 of 2007 – **Michael Mathias Vs The Republic**; Criminal Appeal No. 101 of 2008 – **Iddi Muhidin @ Kibatamo Vs The Republic**; and Criminal Appeal No. 205 of 2010 – **Salum Said Kanduru Vs The Republic** (All unreported).

Having expunged the cautioned statement from the record of the evidence, all what remains is the Bandari Kavu godown detail. It should be recalled that the evidence respecting the Bandari Kavu episode was to the effect that around 9.00 p.m. the appellant suddenly descended from the godown wall and, upon being questioned, he confessed that he had just been involved in a motorbike robbery and that he jumped over the wall to flee from an angry mob which was pursuing him. For sure, the appellant was up to no good but, a question still looms: Which robbery incident was the appellant involved in? It would have, perhaps, made the difference if the cautioned statement had survived but, without it, there is absolutely no nexus between the Vingunguti occurrence and

the Bandari Kavu episode. As we have already intimated, there is a complete dearth of evidence with respect to what transpired at Bandari Kavu after the motorbike was seized from PW1 and driven off.

To this end and, in sum, we do not think that the prosecution sufficiently discharged its burden of proving the case beyond all reasonable doubt. We, accordingly, allow this appeal, quash the conviction and set aside the sentence. The appellant should be released from prison custody forthwith unless if he is otherwise lawfully detained. It is so ordered.

DATED at **DAR ES SALAAM** this 18th day of May, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL