IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 424 OF 2016

RASHID GEORGE @ MVUNGI ---------- 1st APPELLANT

RAMADHANI GEORGE ---------- 2nd APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Tanga)

(Aboud, J.)

dated the 2nd day of September, 2016

in

Criminal Appeal No. 50 of 2015

JUDGMENT OF THE COURT

18th & 25TH April, 2018

MWANGESI, J.A.:

The appellants herein were jointly arraigned at the district court of Tanga for the offence of armed robbery contrary to the provisions of section 287 'A' of the Penal Code Cap. 16 of the Revised Edition of 2002 as amended by Act No. 4 of 2004 (**the Penal Code**). It was the case for the prosecution that, on the 16th day of March, 2009 at about 11:00

hours at Raskazone area within the City, district and Region of Tanga, the duo did steal two mobile phones make Nokia valued at TZs 612,000/= and cash money amounting to TZs 1,000,000/-, all total valued at TZs 1,612,000/=the property of one Mark Treserden and that, immediately before the time of such stealing, did threaten the said Mark Treserden with a bush knife and pistol toy in order to obtain the said properties.

The charge was resisted by both accused/appellants and thereby, necessitating the prosecution to line up six witnesses to establish the guilt of both accused. On their part, the accused depended on their own sworn testimonies and had no witnesses to call. In the judgment that was handed down by the learned trial resident magistrate on the 9th day of February, 2012, both accused/appellants were held culpable to the charged offence and each was sentenced to the statutory minimum sentence of imprisonment for a term of thirty years.

Aggrieved by both the conviction and sentence, both appellants did lodge their grievances by way of an appeal to the High Court of Tanzania at Tanga, where they were not successful. Undaunted, the appellants

have come to this Court for a second appeal each lodging his own memorandum of appeal. While the first appellant's memorandum of appeal bears two grounds of appeal, the memorandum of appeal by the second appellant is comprised of six grounds.

The brief uncontroverted facts of the case as could be gleaned from the records of the trial court can be summarized that, Nekondo Ramadhani (PW1) was an employee of Mark Treserden (PW4) working as a house maid at where he was residing at Raskazone area within the City of Tanga. On the 16th day of March, 2009 during morning, while at her working place, she was invaded by two bandits who thereafter, held her in captivity in one of the rooms of her employer for some time. Meanwhile, the bandits proceeded to ransack the house of her employer for some valuables.

Later, Mark Treserden (PW4) who had been away to his office in town, returned back to his home and proceeded to his reading room upstairs, where he engaged in taking some tea without knowing that, there were some bandits therein. In the course of taking his tea, he was as well invaded by the two bandits, who entered the reading room

through the rear door and threatened him with a toy pistol and a bush knife to give them money. To salvage his life, he gave them TZs 1,000,000/=. And after having teased him for some time, they did disappear in thin air. The incident was thereafter reported to the Police Station and investigation was mounted by E 6958 Detective Constable Innocent, who testified during the trial as PW2.

In an identification parade that was conducted by Assistant Inspector Daniel Petro (PW5) on the 28th day of April, 2012 involving the appellants herein which was after the elapse of about 43 days from the commission of the offence, both of them were identified by PW4 to be those who invaded him on the 16th day of March, 2012. On her part, PW1 managed to identify the first appellant only. Such identification was however strenuously resisted by both appellants. The two lower courts believed the version from the prosecution witnesses and hence gave the concurrent decision which is being challenged in this appeal.

As earlier stated above, the attempt by the appellants to challenge the findings of the trial court did prove futile at the first appellate Court. The two grounds of appeal by the first appellant to this Court boil on the

question of identification that, he was not correctly identified by the prosecution witnesses as the one who committed the alleged offence of armed robbery. On the part of the second appellant, his challenge of the decisions of the two lower courts in the first ground is founded on the entire evaluation of the evidence that was relied upon by the courts to hold him culpable to the charged offence that, was not fair. Regarding the other remaining grounds of appeal, were of little assistance to his appeal if any, as will be demonstrated soon.

During the hearing of the appeal on the 19th day of April, 2018, the appellants entered appearance in person unrepresented and hence fended for themselves whereas, the respondent/Republic had the services of Ms Shose Naiman, learned State Attorney. Both appellants opted to let the State Attorney react to their grounds of appeal first, while reserving their right to rejoinder if need could demand.

The learned State Attorney on her part did from the outset support the appeal by the appellants. In amplifying her stance to the first ground of appeal preferred by the first appellant, the learned State Attorney argued that, in holding the appellants culpable to the charged offence of

armed robbery, the trial court and the first appellate Court based on the testimonies of PW1 and PW4 both of which claimed to have identified the appellants in the identification parade that was conducted by PW5. She doubted the identification alleged to have been made by PW1 for the reason that, there was no any attempt made by the witness to describe the features of the appellants before she identified them in the parade. The same was the position for PW4. Such failure by the witnesses according to the learned State Attorney, did cast doubt to their testimonies, which has to benefit the appellants. To cement the contention, Ms Shose referred us to the decision in the case of **John Paulo @ Shida and Another Vs the Republic,** Criminal Appeal No. 335 of 2009 (unreported).

As regards the second ground of appeal by the first appellant, the learned State Attorney challenged the identification parade that was conducted by PW5 that, it did not comply with the requirement stipulated under the provisions of section 60 of the Criminal Procedure Act, Cap 20 R.E 2002 (**the CPA)** as well as section 38 of the Police Force and Auxiliary Services Act, Cap 322 R.E 2002 in that, the appellants were

never informed of their rights before and after the conduct of the identification parade. In fortification of her argument, reliance was sought from the decision in the case of **Godfrey Richard Vs Republic**, Criminal Appeal No. 365 of 2008 (unreported).

Submitting on the grounds of appeal lodged by the second appellant, the learned State Attorney argued that all of them save the first ground of appeal only, were an afterthought in that, they were neither canvassed in the first appeal at the High Court nor during trial at the trial court. Relying on the decision in the case of **George Maili Kemboge Vs Republic,** Criminal Appeal No. 327 of 2013 (unreported), the learned State Attorney urged us to disregard those grounds of appeal.

In regard to the first ground of appeal by the second appellant, the learned State Attorney was in agreement with the appellant that, the evidence relied upon by the prosecution in establishing the case against the appellants was not cogent and hence, there was no justification to hold them culpable to the charged offence of armed robbery. To that end, we were urged to find merit in the appeal by the appellants by

quashing the concurrent findings of the two lower Courts, setting aside the sentence that was meted and setting both of them at liberty.

In their rejoinder, both appellants had nothing to submit on the obvious reasons that, the submissions made by the learned State Attorney was in their favour. They were therefore, in full agreement with the learned State Attorney. What stands for us to deliberate in the light of the foregoing submissions is whether or not the appeals by the appellants are meritorious.

We will commence with the grounds of appeal by the second appellant which we indicated earlier above that, they are of little assistance to the appellant. Before looking at those grounds, we deem pertinent to reproduce the two grounds of appeal that were jointly preferred by the appellants at the first appellate Court. They read thus:

1. *That, the trial magistrate erred in law and in fact by not being scrupulous enough to note that nowhere in the case tried did the prosecution eyewitnesses PW1 and PW4*

implicated (sic) the ex1act identity or detailed descriptions of the appellants before the parade was conducted.

2. *That, the learned trial magistrate erroneously admitted the evidence of identification parade which contravened instructions on how proper identification parade is to be conducted.*

The grounds of appeal by the second appellant to this Court in grounds number 2, 3, 4, 5 and 6 of which we have stated that are of little assistance to the appellant bear the following wording that is:

2. *That, the appellate Court erred in law and in fact by imprisoning the appellant without considering that he was a student of form two at Toledo secondary school. So the offence of armed robbery was not proved according to law.*

3. That the identification made by PW4 was improperly made for the appellant was not found in possession of the said property of Mark Treserden, either (sic) a said weapon pistol toy and a bush knife which was tendered in court as exhibits.

4. That both the trial court and appellate Court did not scrutinize the differing dates when the identification parade was conducted which were on 24/4/2009, 26/4/2009 and 28/4/2009 therefore, the said dates are clear on the matter of identification parade.

5. That, the trial court erred in law by convicting the appellants without defining on which section of the Penal Code was used to pass and pronounce the sentence upon the appellant.

6. That the list of persons who attended to the identification parade is in contradiction with the list specified in the statement written by Selemani Mbwambo after the parade had been conducted.

On looking at the two sets of grounds of appeal, it is evident as it has been pointed out by the learned State Attorney that, the grounds of appeal in the later appeal did not feature in the first appeal and therefore, were not canvassed at the same. The position of law where

the matters raised on appeal were not discussed in the lower courts, is well settled in our jurisprudence as stated by the Court in the case of **Ramadhani Mohamed Vs Republic,** Criminal Appeal No. 112 of 2006 (unreported) thus:

> *"We take it to be settled law, which we are not inclined to depart from, that this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

In yet another decision of the Court in the case of **Sadick Marwa Kisase Vs Republic,** Criminal Appeal No. 83 of 2012 (unreported), which was later cited in the case of **George Maili Kemboge Vs Republic** (supra) the above stance was reiterated by stating that:

> *"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appellate Court."*

In line with the clear position of law as indicated in the above holdings, without any further ado, we discard all grounds of appeal by

the second appellant save the first ground, in which the appellant is challenging the evaluation of the prosecution evidence that was made by the two lower courts, which will shortly be dealt with jointly with the first ground of appeal by the first appellant. For the moment, we look on the second ground of appeal by the first appellant, whereby the first appellant has challenged the credibility of the parade conducted by PW5.

The power for the conduct of an identification parade is provided by the provisions of section 60 of the Criminal Procedure Act, Cap. 20 R.E 2002 **(the CPA)**, which bears similar wording with the provisions of section 38 of the Police Force and Auxiliary Services Act, Cap 322 R.E 2002, which reads that:

> *"Any police officer in-charge of any Police Station or any police officer investigating an offence may hold an identification parade for the purpose of ascertaining whether a witness can identify a person suspected of the commission of any offence."*

The Rules for the conduct of an identification parade were set out in the case of **Rex Vs Mwango Manaa** [1936] EACA 29, which was cited in the unreported case of **Godfrey Richard Vs Republic,** (supra). Amongst them are Rules 1 and 2, which we deem are pertinent for the determination of the matter at hand. They read that:

1. *"The accused person is always informed that, he may have a solicitor or friend present when the parade takes place.*
2. *At the termination of the parade or during the parade, ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply."*

According to the testimony of Assistant Inspector Daniel Petro (PW) as reflected at page 50 of the record of appeal reads in part that:

"... At 09:00 hours I started to conduct parade and Corporal Abednego brought accused from lock up the identification parade area. The complainants who were

the identifiers were outside and I did not even know them at that time. I did also not manage to see the accused at that time. When accused arrived I informed them their rights to choose any place to stand and that, the identifier was there to identify her or his suspects. I also informed the identifier that she has to identify the person who robbed her... "

With the foregoing explanation by the witness, the question which crops up is whether or not, there was compliance with the two Rules named in **Mwango Manaa's case** (supra). Our answer is in the negative. Apart from the accused being told to choose the place where to stand in the parade, they were not told their right of having an advocate or friend, nor were they asked during or after the conclusion of the identification parade, if they were satisfied with the parade. There having been non-compliance with the Rules required in conducting identification parade, the subsequent question which we had to ask ourselves, is as to what was the effect of such failure.

The decision of the Court in the case of **Raymond Francis Vs Republic** [1994] TLR 100, gives the answer to the question posed above when it held that:

> *"In those circumstances, it appears to us that the identification parade was not carried out properly in terms of the applicable procedure as set out in the case of* ***Rex Vs Mwango Maana*** *[1936] EACA 29. As such it was of little value as evidence against the appellant."*

See also: **Francis Majaliwa Deus and Another Vs Republic,** Criminal Appeal No. 139 of 2005 and **Frank Thomas or Fred John Vs Republic**, Criminal Appeal No. 369 of 2013 (both unreported).

Since the conviction of the appellants by both lower courts was founded on the evidence of identification made to them by PW1 and PW4 in the identification parade which has been held to have not been properly conducted, it *ipso facto* implies that, such conviction was unjustifiable. This position therefore, sustains the first ground of appeal by both appellants that, the evaluation of the prosecution evidence by

the lower courts was not properly made. To that end, their appeals sail through and they are accordingly allowed. We hereby quash the concurrent findings of the two lower courts and set aside the sentence which was meted. In lieu thereof, we order that, both appellants be set at liberty unless they are otherwise lawfully held for some other grounds.

Order accordingly.

DATED at **TANGA** this 25TH day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL