IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 443 OF 2015

1. MUHIDINI MOHAMED LILA @ EMOLO
2. EDWARD JOSEPH CHUMILA @ KIDEVU ..... **APPELLANTS**
3. HUSSEIN JUMA LUNGOLE @ MOX
4. MUSTAPH ABDUL

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)
(Teemba, J.)

dated 15th day of June, 2015
in
Criminal Appeal No. 39 & 40 of 2014

JUDGMENT OF THE COURT

3rd May & 31st July, 2018

MWARIJA, J.A.:

The appellants were arraigned in the Resident Magistrate's Court of Dar es Salaam, at Kisutu on two counts under the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). In the first count, they were charged with the offence of conspiracy to commit an offence contrary to section 384 whereas in the second count, they were charged with the offence of armed robbery contrary to section 287 A both of the Penal Code. It was alleged that on or about 17/2/2012, the appellants conspired and later on the

same date committed the offence of armed robbery at Kimara area within Kinondoni District in Dar es Salaam region. According to the charge, they stole from Mr. and Mrs Invocavits Swai, various properties total valued at Tshs. 15,750,000/= and that at the time of such stealing, the appellants used a gun to threaten and bush knives to assault Joyce Humphley Swai and her husband Invocavit Swai in order to obtain and retain the stolen properties. When the charge was read over to them, the appellants denied the two counts.

Having heard the evidence of nine prosecution witnesses and the appellants' defence, the trial court found that there was no evidence proving the offence of conspiracy as a cognate offence. They were therefore, found not guilty and were thus acquitted of that count.

As for the 2nd count, the trial court found that the prosecution evidence had proved the offence against the appellants beyond reasonable doubt. They were consequently convicted and sentenced to 30 years imprisonment. Aggrieved by the decision of the trial court, they appealed to the High Court. Their appeal was unsuccessful hence this second appeal.

The background facts leading to the appellants' arraignment and conviction can be briefly stated as follows: On 17/2/2012 in the night at about 01.00 a.m., a group of bandits invaded the house of Invocavit Humphrey Swai (PW2) situated at Kimara area near Mavurunza Primary School. At that time, PW2, his wife Joyce Humphrey (PW1) and some of their children were asleep. One of the children, David Humphrey (PW3) had however, not gone to sleep. He was still watching a TV programme (a football match).

As he was doing so, he heard voices outside the house. When he looked out, he noticed that there was a group of people. He suspected them to be bandits because, according to his evidence, one of them carried a gun and another one had a panga (a machete). He ran into his parents' bedroom (the bedroom) and informed them about those people.

On that information, PW1 raised an alarm to alert the neighbours in an attempt to prevent those bandits from executing their intention. Notwithstanding the alarm, the bandits broke the main door, entered into the house and proceded to the bedroom where PW2 was raising alarm. Using the flat part of the machete, one of the bandits hit PW1. They also pulled out PW2 and PW3 from beneath the bed where they had hidden

themselves and violently demanded money and valuable properties from the victims (PW1, PW2 and PW3). In the process, one of the bandits injured PW2 by cutting him with a machete on his forehead while also threatening him with a knife. The others embarked on searching and collecting valuable properties in the house including, 3 golden chains, 2 golden rings, 3 cameras and a laptop computer.

Shortly after the incident, some neighbours arrived and took PW1 and PW2 to hospital for treatment after each one of them had obtained a P.F. 3 from the police. The incident was also reported to the police.

Later on 10/3/2012, a police officer, D/SSgt Abdallah (PW4) received information that one of the persons suspected to have participated in the commission of the offence was at Kariakoo area in a hotel known as Tropical. With assistance of other police officers from Msimbazi Police Station, PW4 went to that hotel and arrested the 3rd appellant. According to PW4, when he interrogated the 3rd appellant, he admitted that he participated in the commission of the offence and in addition, he named the rest of the appellants as the persons that collaborated with him. On that information, the 1st, 2nd and 4th appellants were later arrested.

It was the prosecution's evidence further that, after their arrest, the appellants were interrogated and their statements were recorded. According to PW7, No. E 4128 D/SSgt Gaston, he interrogated the 3rd appellant on 11/3/2012 and the 2nd and 4th appellants on 16/3/2012 and 17/3/2012 respectively. He testified that the said appellants admitted the offence and thus recorded their cautioned statements. The Statements which were allegedly made by the 1st, 2nd, and 4th appellants were admitted in evidence as Exhibits P1, P2 and P3 respectively. On his part, PW8, No D.7628 Cpl Musimba testified that on 17/3/2012, he interrogated the 1st appellant who, according to this witness, also admitted the offence and thus recorded a cautioned statement of that appellant. The statement was admitted in evidence as Exhibit P.4.

In their evidence, PW1, PW2 and PW3 testified that they identified the appellants at the scene of crime. According to PW1 she saw more than six bandits who entered into the bedroom but out of them, she later identified four persons (the appellants) at the identification parade. It was her evidence that she identified them at the scene of crime by aid of electricity light as, upon entering the bedroom, the bandits switched on the lights. Describing the source of light, she said that it was from 100 watts

bulb, adding that the person who attacked her with a machete was the 1st appellant. PW2's evidence was also to the effect that he identified a total of five persons by aid of electricity light switched on by the bandits after they had entered into the bedroom. It was his evidence further that, the person who injured him with a machete was the 3rd appellant. In cross-examination, PW2 said that he was able to identify the five persons because the bedroom was brightly lit by tube light.

As pointed out above, the incident was reported to the police on the material night. In his evidence, PW7, the police officer who investigated the case, stated that PW1 and PW3 indicated to him that they would be able to identify their assailants if the suspects of the offence were to be arrested. Thus, after the arrest of the appellants, identification parade (the identification parade) was conducted in two phases under supervision of Inspector Vernon (PW9). According to the evidence of this witness, PW1 identified the 1st and 2nd appellants in the 1st parade while PW3 identified the 3rd and 4th appellants in the 2nd parade. PW9 tendered the identification parade register and the same was admitted in evidence as exhibit P.5.

As stated above, all the appellants denied both counts. In their defence, they narrated on how they came to be arrested and later arraigned in court on the two counts. The 1st appellant (DW1) testified that he was arrested on 17/2/2012 at his home on allegation of having in his possession, 10 litres of illicit liquor (gongo). He went on to state that on the aftermath of his arrest, he was interrogated on 19/3/2012. Thereafter, he was given a paper to sign and was later paraded in the identification parade.

As for the 2nd appellant (DW2), it was his evidence that on 14/3/2012 at about 4.00 p.m. while he was negotiating with prospective buyers of the motorcycle which he was selling, some people suspected that the motorcycle was a stolen property. He was arrested and taken to police station together with the motorcycle. At the police station, he was forced to sign a document. According to his evidence, the motorcycle was not stolen. He tendered its registration card (Exh D2) to show that it belonged to his uncle, one Fadhili.

With regard to the 3rd appellant (DW3), he stated in his evidence that on 9/2/2012 he was arrested at Manzese Mazizini. He was taken to Magomeni Police Station where he was kept in the lock-up for a month. On

27/2/2012 he was required to sign some papers. He denied the allegation by the prosecution that he led PW4 to the 2nd appellant's home and the contention that he was identified at the identification parade.

As for the 4th appellant, (DW4) it was his defence that the charge against him was a result of grudges which existed between him and one Hamisi. In his evidence, DW4 said that, it all started from his relationship with a woman who was the wife of the said Hamisi, the relationship which ended up in cohabiting with the said woman. The 4th appellant went on to state in his evidence that, as a result, he was accused by Hamisi of having stolen a motorcycle. He challenged the evidence of the prosecution witnesses contending that the same is contradictory. He also denied the contention that he confessed to the offence stating that he did not know how to read and write.

As stated above, the trial court found that the prosecution had sufficiently proved the 2nd count against the appellants. It particularly relied on the evidence of PW1 and PW3 to the effect that they properly identified the appellants at the scene of crime and later, at the identification parade.

In upholding the finding of the trial court, the learned 1st appellate judge was of the view that there was sufficient light which enabled the witnesses to properly identify the bandits who were later pointed out at the identification parade. The High Court relied also on the statements which were admitted by the trial court to be cautioned statements of the appellants.

Against that decision, the appellants have preferred this appeal raising 14 grounds in the joint memorandum of appeal. The grounds of appeal can however be consolidated into 5 as follows:

1. *That the learned High Court judge erred in law and facts in upholding the appellants' conviction which was based on insufficient evidence of identification.*
2. *That the learned High Court judge erred in law and facts in upholding the decision of the trial court which was erroneous for having been based on the evidence of cautioned statements which were retracted/repudiated by the appellants.*
3. *That the learned High Court judge erred in law and facts for failing to find that the evidence of*

identification parade was invalid because the conduct of the parade was irregular.

4. *That the learned High Court judge erred in law and facts for failing to find that the trial court wrongly acted on the evidence of PW4, PW5 and PW6 while the prosecution did not call as a witness, the person who informed PW4 that the appellants are the persons who committed the offence.*

5. *That the learned High Court judge erred in law and in facts for failing to find that the trial court wrongly disregarded the appellants' defence while their evidence raised reasonable doubt against the prosecution's case.*

At the hearing of the appeal, the appellants appeared in person, unrepresented while the respondent Republic was represented by Ms Honorina Munishi, learned Senior State Attorney. When they were called upon to argue their appeal, the appellants opted to hear first, the respondent's reply to the grounds of appeal and that they would thereafter make a rejoinder if the need to do so would arise.

At the outset, the learned Senior State Attorney informed the Court that the respondent was supporting the appeal. On the 1st paraphrased

ground of appeal, she submitted that the evidence of identification was not watertight. She argued that, since the offence took place in the night hence under difficult conditions, the identification evidence must be watertight. According to her submission, the finding that there was sufficient light which enabled PW1 and PW3 to make proper identification is erroneous because the two witnesses gave contradictory versions as regards the source of the light. She pointed out that whereas PW1's evidence is to the effect that the source of light was 100 watts bulb, PW3 testified that the light was from a tube light. In the circumstances, the learned Senior State Attorney argued, there is doubt as regards existence or the intensity of the light which aided the witnesses to make identification.

Ms Munishi went on to argue that the doubt on the intensity of the light is fortified by the fact that the witnesses gave different evidence on the number of the bandits who entered in the bedroom. The number was stated by PW2 to be five whereas PW3 who, according to his evidence was under or behind the bed, seven bandits entered into the bedroom. Relying on the case of **Raymond Francis v. R** [1984] TLR 100, the learned Senior

State Attorney submitted that these contradictions rendered the identification evidence unreliable.

With regard to the 2nd paraphrased ground of appeal, that the evidence of the cautioned statements was invalid, Ms Munishi agreed with the appellants that the evidence was improperly acted upon to convict them. She argued that, although according to the charge, the offence was committed at Kimara Matangini, the cautioned statements show that the offence which the appellants allegedly confessed to have committed, took place at Kimara Mavurunza. The learned Senior State Attorney submitted therefore, that since the statements do not relate to the offence charged, the same were improperly relied upon to found the appellants' conviction. She conceded however, that despite that variance, the evidence refers to the same victims of the crime and the stolen properties. In the circumstances, we hasten to state that, the misdescription of the scene of crime as Mavurunza instead of Matangini, is in our view, a minor irregularity which is curable under S. 388 of the Criminal Procedure Act [Cap. 20 R.E. 2002]. In fact, according to the evidence of PW1, the house in question is situated near Mavurunza Primary School.

As stated above, in supporting the appeal, the learned Senior State Attorney based her submission firstly on the identification evidence and secondly, the evidence of cautioned statements, although she narrowed it down to the variance between the charge and the evidence contained in the cautioned statements. Having considered her submission, however, we respectfully agree with her, firstly, that the identification evidence was not watertight. With respect, we find that the lower courts erred in finding that the evidence of PW1 and PW3, that they properly identified the appellants at the scene of crime and later at the identification parade, was credible. We are increasingly of that view because, both the learned trial resident magistrate and the learned 1st appellate judge failed to consider the glaring contradiction in the evidence of the two witnesses as regards the source of the light which aided the witness to identify the bandits.

As submitted by Ms Munishi, whereas PW1 stated that the source of the light was 100 watts bulb, PW3 said that the light was from a tube light. We agree with the learned Senior State Attorney that such a contradiction from the family members, who resided in the same house, raised a reasonable doubt on the existence of light and whether the intensity of

that light, if any, was sufficient to aid identification at the material time of commission of the offence.

But even if the irregularity would have been minor, in our considered view, the procedure which was adopted at the identification parade raises doubt on the identification evidence. From the evidence of PW9, after the identification parade had been arranged, PW1 and PW3 were in turn, called to identify the suspects. There is nothing in the prosecution evidence showing that these witnesses had, prior to the identification parade, given to the police or any other person, the description of the persons who were to be identified. The only evidence which is available on record is that of PW7 who stated that, PW1 and PW3 told him that they would be able to identify the bandits if they were to be apprehended.

It is trite law that, for the evidence of an identifying witness to be credible, such witness must have given the description of the suspect before he made identification at the identification parade. In the case of **R. v Mohamed** [1942] EACA 72 cited in the case of **Yohana Chibwingu v The Republic,** Criminal Appeal No. 117 of 2015 (unreported) the erstwhile East African Court of Appeal underscored this requirement in the following words:

> *"that in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by person to whom the description was given."*

Since therefore, in the case at hand, the requirement of giving the description of the suspects prior to the identification parade was not complied with, there is no gainsaying that the evidence obtained from the parade is unworthy of credit.

With regard to the confession evidence, the appellants have challenged it contending *inter alia* that, the lower courts wrongly acted on the cautioned statements which were retracted and /or repudiated by the appellants. It is not in dispute that both at the trial and in their defence, the appellants denied the cautioned statements contending that they did not make them. They therefore retracted the statements. It is trite principle that confession evidence which has been retracted or repudiated cannot be acted upon to found conviction unless the same is corroborated

by independent evidence. In **Ali Salehe Msutu v Republic** [1980] TLR 1, the Court stated as follows:

> *"a repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted."*

See also the case of **Shihobe Seni & Another v. Republic** [1992] TLR 330.

In her judgment, the learned High Court judge observed that the confession evidence was corroborated. She stated as follows in her judgment at pages 175-176 of the record:

> *"Even though these statements were retracted by the appellants in court still there was/is evidence made orally by prosecution witnesses to corroborate the cautioned statements. This evidence is found in the testimonies of PW1, PW2 and PW3 as victims and also from the arresting officer."*

We have found above that the evidence of PW1 and PW3 is unworthy of credit. On the other hand, the evidence of PW2 did not touch on the identification or confession by the appellants. The evidence of PW1 and

PW3 which is itself deficient or incredible cannot therefore, give credence to the evidence which required corroboration. Similarly, the evidence of the police officers who arrested the appellants (PW4 and PW5) which is to the effect that the appellants made oral confession that they committed the offence cannot, as well be used to corroborate the retracted confession. This is because the appellants denied that they ever made any oral confessions. In the same vein therefore, that evidence required corroboration and the evidence which itself requires corroboration cannot corroborate the retracted or repudiated confession. See the case of **Morris Agunda & 2 Others v. Republic** [2003] TLR 449. In that case the Court stated as follows:

> *"Evidence which itself required corroboration could not corroborate the retracted or repudiated confession of the co-appellant."*

The findings above suffice to dispose of the appeal. The need for considering the other grounds of appeal raised by the appellants does not therefore arise.

On the basis of the above stated reasons, we find merit in the appeal and hereby allow it. In the event, the appellants' convictions are quashed

and sentences set aside. We order their release from prison forthwith unless they are otherwise lawfully held.

DATED at DAR ES SALAAM this 29th day of May, 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