IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CONSOLIDATED CRIMINAL APPEALS NO. 192 OF 2015 & 397 OF 2016

1. **YOHANA KULWA @ MWIGULU**
2. **NG'WANA SELELI @ MASELE**
3. **NGASA JOHN** ..... **APPELLANTS**
4. **MASHAKA JACKSON**

VERSUS

THE REPUBLIC ..... **RESPONDENT**
(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Kaduri, J.)

Dated the 17th day of February, 2011
in
Criminal Appeals No. 125, 179, 180 and 181 of 2007

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JUDGMENT OF THE COURT

4th September, & 19th November, 2018

MWAMBEGELE, J.A.:

Before the District Court of Shinyanga sitting at Shinyanga, the four appellants – Yohana Kulwa @ Mwigulu, Ng'wana Seleli @ Masele, Ngasa John and Mashaka Jackson - were arraigned for armed robbery. After a fully-fledged trial, they were found guilty as charged and each of them was awarded the mandatory minimum sentence of thirty years in prison. There

was another person going by the name of Mulyambelele Masanja who was the fifth accused person charged on the second count for receiving stolen property and convicted as well and sentenced to two years in jail. He did not appeal. The appellants' first appeal to the High Court proved futile hence this second appeal. They have raised a total of twenty-nine grounds of complaint which have the same substance and can be condensed in the following four grounds:

1. The 1st appellate court wrongly upheld the conviction by the trial court relying on the evidence of visual identification of PW1 and PW2 which was not watertight;

2. The 1st appellate court wrongly upheld the conviction by the trial court relying on the cautioned and extra-judicial statements whose voluntariness was challenged;

3. The, 1st appellate court wrongly upheld the conviction by the trial court relying on the evidence of the doctrine of recent possession which was not treated according to law.

4. The 1st appellate court wrongly relied on the evidence of PF3 which was admitted in evidence without compliance with the law.

At the hearing of the appeal before us on 04.09.2018, the four appellants appeared in person, unrepresented. The respondent Republic appeared through Mr. Iddi Mgeni, learned State Attorney.

Before delving into the determination of the appeal, we find it pertinent to narrate, albeit briefly, its factual background. It goes thus: Yasin Shem (PW3); an Indian National, was, at the material time, a resident of Balewa Street in Shinyanga Region. He traded in gemstones. He used to buy gemstones from small holders at his office which ostensibly is within his residence. On 30.10.2007 at about 11:00 hours, he was visited by four people who masqueraded as persons seeking to sell gemstones. That scenario was quite common to him, for, he used to receive at his office sellers of gemstones in groups. Before the unexpected visitors produced the gemstones they pretended to have, one of them raised a *panga* ready to hack him. No sooner had one of them raised a panga, than another one held tight his neck, fell him down and the rest

descended on him demanding money in the process. He was hacked on his right arm and sustained wounds on both palms. He had no money to give them. He was raising an alarm in the process of attack. At the end of the day, the robbers made away with two cell phones make Nokia, a wrist watch and a diamond weighing scale. They left behind PW3 tied to a chair with a rope.

Passers-by and neighbours responded to PW3's distress call. Among them were Kulwa Charles @ Bala (PW1) and Oscar Charles (PW2) who worked in the same street. While on their way to the *locus in quo*, PW1 and PW2, allegedly, saw the appellants running away from there. They allegedly identified them because they used to work together at Balewa Street loading and unloading shipment on and off big trucks. They went to the scene of crime and found PW3 in blood. Upon their information to the police, the first appellant was arrested two hours after the robbery. The rest of the appellants were arrested on the following day.

All the appellants pleaded the defence of alibi.

At the hearing of the appeal, all the appellants adopted their respective grounds of appeal. Having so done, they all deferred their elaboration to a later stage after they heard the response of the respondent Republic, if need would arise.

Responding, Mr. Mgeni supported all the grounds of appeal save for one on identification. On the grounds that the learned counsel supported, respecting reception of the PF3 in evidence, the learned state attorney stated that it was put in evidence contrary to the provisions of section 240 (3) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (hereinafter referred to as the CPA). It was his view that the PF3 must be expunged from the record.

Regarding the ground respecting admission in evidence the cautioned and extrajudicial statements, the learned State Attorney conceded that they were wrongly received in evidence given that the appellants complained that the same were involuntarily made. In the circumstances, he submitted, the trial court ought to have conducted an inquiry to investigate if they were voluntarily made and therefore their admissibility in

evidence. He was also of the view that the statements must be expunged from the record.

On the doctrine of recent possession, the learned State Attorney was of the view that it was wrongly applied. He argued that the victim (PW3) tendered the exhibits without stating how they came into his possession. He submitted that the chain of custody was at stake.

Regarding the evidence of visual identification, the learned State Attorney was of the view that the same was sufficient to prove the case against the appellants beyond reasonable doubt. He argued that PW1 and PW2 knew the appellants before the incident as they worked together at Balewa Street. He added that the incident occurred in broad daylight and that they were not far from the scene of crime. He added that the appellants never cross-examined PW1 and PW2 regarding identification. The learned State Attorney referred us to the cases of **Waziri Amani v. Republic** [1980] TLR 250 and **Hassan Juma Kanenyera v. Republic** [1992] TLR 100 to bolster his argument to the effect that the identification of the appellants was absolutely watertight.

For their part, the appellants dissociated themselves with the charges levelled against them claiming that they did not know PW1 and PW2. They claimed that the circumstances obtaining at the *locus in quo* were not such that any assailant could easily be identified. They claimed that PW1 and PW2 were arrested first in connection with the offence before being turned into prosecution witnesses. They thus prayed that the Court analyses their grounds of appeal and set them free.

We have considered the arguments by the learned State Attorney on the grounds he conceded. We agree with him on his concession. We shall herein bellow state briefly on why we think the learned State Attorney is justified to support those grounds of grievance.

Regarding the admission of PF3 into evidence, we simply wish to state that it is now settled law that noncompliance of the provisions of section 240 (3) of the CPA is fatal and makes a PF3 admitted in blatant disregard of the section liable to be expunged – see: **Alfeo Valentino v. Republic**, Criminal Appeal No. 92 of 2006, **Mwita Matiku @ Mahee Wilson & anor v. Republic**, Criminal Appeal No. 235 of 2013, **Arabi Abdu Hassan v. Republic**, Criminal Appeal No 187 of 2005, **Ahmad**

Mangwalanya v. Republic, Criminal Appeal No. 105 of 2010, **Prosper Mnjoera Kisa v. Republic**, Criminal Appeal No 73 of 2003 and **Meston Mtulinga v. Republic**, Criminal Appeal No 426 of 2006 (all unreported), to mention but a few. In all these cases, the Court uninterruptedly held that a trial court must advise an accused person of his right to call the doctor and his answer must be on record. This was not done in the instant case. It signifies that the PF3, which was admitted in evidence as Exh. P1, was wrongly admitted in evidence. As rightly submitted by the learned State Attorney, it ought to have been expunged by the first appellate court. As that was not done by the first appellate court, we expunge it now.

Next for consideration is the reception in evidence of the cautioned and extra-judicial statements. It is in evidence that the first appellant's cautioned and extra-judicial statements were admitted in evidence as Exh. P4 and Exh. P10, respectively. The record of appeal also bears it true that the first appellant objected to both cautioned and extra-judicial statements being tendered and admitted in evidence on the ground that he was tortured before making them. The same is the case with the other appellants who also challenged the voluntariness of their cautioned statements. In such an eventuality, the trial court ought to have

conducted an inquiry to investigate their admissibility in evidence. That this is the law founded upon prudence we held in a number of our decisions – see: **Robinson Mwanjisi and three others v. Republic** [2003] TLR 218 and **Twaha Ali & 5 Others v. Republic**, Criminal Appeal No. 78 of 2004 and **Juma Bushiri v. Republic**, Criminal Appeal No. 485 of 2007 (both unreported). In all the cases we held that it is improper to admit a disputed confession in evidence without first conducting an inquiry or a trial within trial to verify its voluntariness. In **Twaha Ali & 5 Others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported), for instance, we categorically held:

> *"... if the objection [to tendering a cautioned statement] is made after the trial court has informed the accused of his right to say something in connection with the alleged confession,* ***the trial court must stop everything and proceed to conduct an inquiry ... into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence ...***"
>
> [Emphasis added].

In the case at hand, the appellants having objected to the tendering of the cautioned and extra-judicial statements, the trial court ought to have stopped everything and proceeded to conduct an inquiry. For the avoidance of doubt, whether to conduct an inquiry or a trial within trial is a matter of nomenclature; it refers to one and the same thing but in different courts. It is an inquiry in the courts subordinate to the High Court (except for the primary court) and a trial within trial in the High Court.

Regarding the evidence on visual identification which the learned State Attorney was of the strong view that it was sufficient to mount a conviction against the appellants, we find it appropriate to first revisit the law on it.

The oft-cited case of **Waziri Amani**; the case referred to by the learned State Attorney, is a landmark case in our jurisdiction on visual identification. The case set out guidelines on visual identification which the courts in this jurisdiction have uninterruptedly followed. Regarding this kind of evidence, the Court gave the word of caution at pp. 251 – 252:

> *"...evidence of visual identification, as Courts in East Africa and England have warned in a number*

of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.***" [Emphasis supplied].

Then, the Court went on at p. 252:

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and***

further whether the witness knew or had seen the accused before or not. *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."* [Emphasis supplied].

The above excerpts from **Waziri Amani** lay down the principles in respect of visual identification during the night, in broad daylight and visual identification by recognition. In the instant case, the offence was committed in broad daylight and the visual identifiers knew the appellants before.

The issue of identification of the appellants has taxed our minds greatly in this appeal. Much as we are aware that the evidence of visual identification in the present case is one of recognition and that this kind of evidence, as we held in **Samwel Dickson & Another v. Republic**, Criminal Appeal No. 322 of 2014 (unreported), citing with approval the decision of the Court of Appeal of Kenya of **Anjonane v. Republic** [1998] KLR 60, is more reliable than identification of a stranger, we have failed to see it as proving the guilt of the appellants without reasonable doubt. Having closely revisited the law and juxtaposed it with the facts of the

present case, we have found it difficult to go along with the learned State Attorney. The testimony of the identifiers was such that it leaves some doubts as to whether the appellants were identified with certainty. We say so because PW1 and PW3 were not descriptive on the circumstances obtaining at the *locus in quo* and its precincts which facilitated their identification by recognition. PW1, for instance, is recorded as saying:

> *"...approaching there I saw two men running away from that house of the mhindi. At first ran the two and were later followed by the other two. I managed to identify them all (ie. four of them). It was Yohana, Ngassa, Mashaka and Ng'wana. I know them by their first names. The four I have named are here in court that is the first to fourth accused. (Pointed in court). I managed to identify them easily as I used to work with them for a long time."*

Likewise, on the relevant part, PW2 is recorded as saying:

> *"...we heard a cry for help and on the alert we/I saw people running from that house. They were about four (4) people. These were Yohana, Ngasa, Ngw'ana & Mashaka. After we made the*

follow ups in that house where the cry for help was, we found the mhindi wounded and was bleeding. These (4) people ran in different directions. Yohana ran towards to the old primary court and the rest to the market place ..."

The foregoing excerpts are the relevant parts of the testimonies of the identifiers. We have found three shortcomings in them. First, the identifiers did not state the distance between them and the persons being identified. Second, they did not even describe the attire of the appellants at the moment they were being identified. Third, time spent to identify them was not described and fourth, as they testified that there were other people going towards the scene of crime, they did not testify how they could identify the appellants in that state of affairs. These are very relevant ingredients to satisfy watertight visual identification as appearing in the two excerpts above.

We find these shortcomings marring the prosecution case with doubts that must be resolved in favour of the appellants as our criminal law practice dictates. For the avoidance of doubt, we will not make any determination on the doctrine of recent possession as it was in respect of the fifth accused person at the trial who did not appeal. In sum, we find

the evidence of visual identification by recognition falls short of the threshold set out in **Waziri Amani** (supra).

In the upshot we find that the case against the appellants was not proved to the hilt. The consolidated appeal is meritorious and we allow it. We consequently order that the appellants - Yohana Kulwa @ Mwigulu, Ng'wana Seleli @ Masele, Ngasa John and Mashaka Jackson - be released from prison custody unless otherwise held for some other lawful cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 17th day of September, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

H.S. MUSHI
DEPUTY REGISTRAR
COURT OF APPEAL