IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LUANDA, J.A., MMILLA, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 10 OF 2016

1. PETER PINUS
2. ROBERT REUBEN .... APPELLANTS
3. ALEX MWAKYUSA
4. PAUL JOSEPH

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Mwambegele, J.)

dated the 28th day of August, 2014
in
DC. Criminal Appeal No. 10 of 2015

....

JUDGMENT OF THE COURT

14th & 20th February, 2018

NDIKA, J.A.:

In the District Court of Sumbawanga at Sumbawanga the appellants herein were jointly charged with armed robbery, on three counts, contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2002]. In addition to the aforesaid counts, the second appellant faced the charge of being found in possession of property suspected to have been stolen contrary to section 312 (1) of Cap. 16 (supra). They were all convicted of armed robbery and each of them was

sentenced to a term of thirty years' imprisonment. It is apparent that the trial court did not indicate on which count was the conviction entered. Nor did the court make any verdict in respect of the fourth count against the second appellant. Be that as it may, the appellant's first joint appeal against conviction and sentence was unsuccessful, hence this appeal.

The facts of the case are briefly as follows: on 23rd October 2011 at 4.00 a.m., a guesthouse known as Watosha Guest House located at Jangwani, Sumbawanga was broken into by a group of bandits armed with clubs and machetes. Within a short period, they robbed PW1 Mshirika s/o Simtengu (the Guest House Manager), PW2 Mosses Kaudasya (a Security Guard at the guesthouse) and PW3 Brown Mwanalinze money in cash and various items including cellular phones. In addition, six plastic chairs inscribed with the name "WATOSHA GUEST HOUSE" were stolen. Although PW1 adduced that the guesthouse was well illuminated by electric lights at the time of the robbery, at the trial none of the three witnesses gave any detail on the identities of the robbers.

A police patrol responded to the attack and visited the scene of the crime a while later. On tracing the bandits, the police found the

appellants just two hours after the robbery at a house at Bangwe. They were in a room known to be occupied by the second appellant. In the presence of PW6 F.2864 D/Sgt. Alfred and PW4 Raymond Shauri (local Hamlet Chairman), the room was searched. A certain amount of money in cash was recovered along with a number of items including six plastic chairs marked "WATOSHA GUEST HOUSE." The first appellant made a cautioned statement to PW5 E.3080 D/Cpl. Rashid in which he allegedly confessed to the robbery (Exhibit P.3). PW7 Inspector Thomas told the trial court that the appellants were identified at an identification parade that he conducted as shown by the Identification Parade Register (Exhibit P.4).

In defence, all the appellants denied liability. They refuted being at the scene of the crime at the material time.

In convicting the appellants of armed robbery, the trial court accepted the prosecution evidence as credible. In addition, it invoked the doctrine of recent possession against the appellants in view of the evidence that certain items like the marked plastic chairs stolen at the scene of the crime were recovered from the appellants about two hours after the incident.

On appeal, the learned appellate Judge sustained the appellants' convictions on his finding that the doctrine of recent possession was rightly applied against the appellants. Nonetheless, the learned Judge, having followed the guidance in **Waziri Amani v The Republic**, [1980] TLR 250, found that the evidence of visual identification of the appellants at the scene of the crime by PW1, PW2 and PW3 was unreliable on the ground that conditions at the scene did not favour a correct identification.

The appellants have each lodged a separate memorandum of appeal containing six grounds of complaint. Their grievances are common and can be conveniently condensed into the following four grounds: **one**, that the evidence of identification was inadequate; **two**, that the identification parade was wrongly conducted; **three**, that all pieces of documentary evidence tendered at the trial (i.e., Exhibits P.1, P.2, P.3 and P.4) were wrongly admitted; and **four**, that their defence evidence was ignored at the trial.

At the hearing before us, the appellants appeared in person, unpresented. Mr. Francis Rogers, learned State Attorney, appeared for the respondent Republic.

At first, the Court, *suo motu*, asked the parties to address it on the legality of the appellants' trial in view of the apparent omission by the trial Resident Magistrate to have witnesses sworn or affirmed before giving evidence.

Responding, Mr. Rogers readily acknowledged that all seven prosecution witnesses were not sworn or affirmed before they gave evidence. While noting that the appellants had also indicated that in terms of their rights under section 231 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition of 2002, they would give their respective defence evidence on oath (page 20 of the record of appeal), no oath was administered on them prior to testifying. It was his view that this omission was a serious infraction of the mandatory provisions of section 198 of Cap. 20 (supra). He thus submitted that all the evidence on the record was of no value and that the trial was inevitably a nullity. In the circumstances, he prayed that the Court, acting on its powers under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] nullify the proceedings and decisions of the trial court and the first appellate court and that the appellants' convictions be quashed and sentences against them set aside.

On the way forward, Mr. Rogers urged that the appellants be retried on three grounds: first, none of the parties are to blame for the omission to administer oath or affirmation on the witness; secondly, there was strong proof against the appellants particularly the "evidence" that they were all found in possession of some of the items that had been stolen at the scene of the crime; and thirdly, the appellants were convicted and sentenced about five years ago and that they been incarcerated for a relatively short period of seven years since their arrest in 2011.

The appellants, on their part, acknowledged the omission alluded to. Still, they prayed in common that they be released contending that there were not blameworthy for the vitiation of the trial.

As submitted by the parties, it is evident that all seven prosecution witnesses as well as the appellants gave evidence without having been sworn or affirmed and that the said anomaly was a palpable contravention of section 198 (1) of Cap. 20 (supra), which stipulates:

"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."

With the exception of the evidence given without oath or affirmation by a child of tender years or an accused person who opts out of giving sworn or affirmed defence testimony under section 231 (1) or section 293 of Cap. 20 (supra), any evidence given without oath or affirmation is of no evidential value: see, for example, **Mwita Sigore @ Ogora v The Republic**, Criminal Appeal No. 54 of 2008; **Mwami Ngura v. The Republic**, Criminal Appeal No. 63 of 2014; **Emmanuel Charles @ Leonard v. The Republic**, Criminal Appeal No. 369 of 2015 and **Laurent Msabila v. The Republic**, Criminal Appeal No. 109 of 2016 (all unreported). It is, therefore, our firm view that the totality of the evidence on the trial record is worthless and that this procedural infraction renders the entirety of the trial a nullity. We note that this irregularity skipped the attention of the first appellate court.

In considering whether an order for retrial in this matter would be justified or not, we made reference to the celebrated decision in

Fatehali Manji v Republic [1966] 1 EA 343, in which the erstwhile East African Court of Appeal enunciated, at page 344, the principles for determining such an issue:

> *"in general a retrial will be ordered only when the original trial* ***was illegal or defective****; it will not be ordered where the conviction is set aside because of insufficiency of evidence or* ***for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial****; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."*
> [Emphasis added]

We recall that Mr. Rogers pressed for a retrial on the grounds that none of the parties was blameworthy for the vitiation of the trial; that the evidence of possession of recently stolen property was

overwhelming against the appellants; and that the appellants have so far been incarcerated for a relatively short duration since their arrest in 2011. On the other hand, the appellants took a different view, urging the Court to release them.

We are cognizant that the trial was rendered defective due to a mistake or omission committed by the trial court, but in most cases that in itself is not a ground for ordering a retrial. Of course, each case should be considered on its own facts and circumstances.

Nonetheless, having scrutinized the "prosecution evidence" on the record, we find it deeply troubling and deficient. First and foremost, the "evidence" of PW1, PW2 and PW3 on the identification was extremely weak. While all these witnesses adduced that the bandits were complete strangers at the scene of the crime none of them described the conditions that aided the identification of the robbers. None of them pointed out the physical features or attire of the robbers. In the circumstances, it is unsurprising that the first appellate Court found that the "evidence" on the record was insufficient for a positive identification in view of the criteria in **Waziri Amani** (supra). Secondly, we think that the lower courts appear to have erroneously invoked the doctrine of recent

possession to found conviction against the appellants. We say so as we note that the said courts relied on the "evidence" of PW4 (the Hamlet Chairman) and PW6 (the arresting police officer) to hold that the appellants were found in possession of the items stolen at Watosha Guest House (including the marked plastic chairs). It is noteworthy that apart from the fact that the said items were improperly admitted in evidence without the appellants having been asked if they had any objection to the admission of those items, none of PW1, PW2 and PW3, who were presumably conversant with the stolen items, was asked to identify the allegedly recovered items at the trial. The Hamlet Chairman (PW4), who tendered the items collectively as Exhibits P.2 on the reason that he witnessed their recovery from the appellants' house could not have distinctively and positively identified the said items as the property robbed from Watosha Guest House. The fact that the plastic chairs tendered in evidence were marked with the name "WATOSHA GUEST HOUSE" was, in itself, not enough. On this basis, we think that a retrial will give an unfair advantage to the prosecution to fill up the gaps in its evidence at the first trial.

For reasons we have given above, notwithstanding that the appellants have served only seven years of their respective terms, we are of settled mind that it is not in the interests of justice that a retrial be ordered.

In the final analysis, we exercise our revisional powers under section 4 (2) of Cap. 141 (supra) by nullifying all the proceedings and decisions of the lower courts. Accordingly, we quash and set aside the appellants' convictions and sentences. We order that the appellants be released forthwith unless they are otherwise lawfully held.

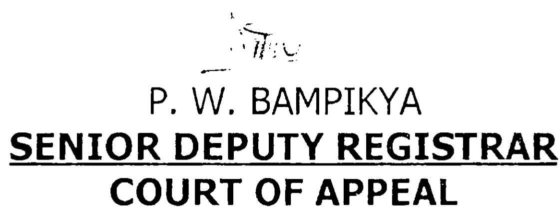
DATED at **MBEYA** this 19th day of February, 2018

B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
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