IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUSSA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 475 OF 2015

JAMES RYOBA WAING'ARI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matupa, J.)

dated the 6th day of October, 2015
in
HC Criminal Appeal No. 33 of 2015

JUDGMENT OF THE COURT

29th Nov. & 12th Dec. 2018

NDIKA, J.A.:

The appellant, James Ryoba Waing'ari, together with another person named Alphonce Saba @ Mtura, were before the District Court of Tarime District at Tarime charged with the offence of malicious damage to property contrary to section 326 of the Penal Code, Cap. 16 RE 2002 on four counts. Briefly, it was alleged by the prosecution that the appellant and his co-accused, jointly and together, on 6th October, 2012 at about 07:00 hours, did wilfully and unlawfully destroy maize and or blue gum trees growing on four distinct farms of various sizes owned separately by

Laurent Nyablangeti, Mrimi Masaite @ Mrimi, John Wangubo and John Johannes. Both the appellant and his co-accused denied the charges.

In order to prove the charges, the prosecution produced eight witnesses whose evidence was amplified by five documentary exhibits. The appellant and his co-accused gave sworn testimonies and called three witnesses. In its judgment, the trial court acquitted the appellant and his co-accused of the offence on the third count but convicted them on the first, second and fourth counts and sentenced each of them to four years' imprisonment on each count. Apparently, the court did not state whether the said sentences were to run concurrently or not. But, in addition to the aforesaid sentences, the court ordered the appellant and his co-accused to pay compensation to PW1 Laurent Nyablangeti, PW4 John Johannes and PW5 Mrimi Masaite whose properties were destroyed. Again, it is apparent on the record that the court did not specify the quantum of compensation it had ordered.

Resenting the trial court's decision, the appellant unsuccessfully appealed to the High Court against the conviction and sentence. Still protesting his innocence, the appellant has lodged in this Court this second appeal.

Briefly stated, the prosecution case was that on 6th October, 2012 at 07:00 hours, PW2 Samuel Marwa was at Nyansisine, Ng'ereng'ere Village in Tarime where the complainants in the case had their respective farms. He was supervising a number of casual labourers that were weeding the farms owned by PW1 and PW4, both of which were under his care. Suddenly, a group of about twenty people armed with machetes, bows, arrows and clubs invaded the farms, chased away the labourers and started slashing the maize crop and or blue gum trees grown on the farms. Over a short period, the intruders increased to about five hundred people and all of them set upon all adjoining farms including a maize farm owned by PW5.

Responding to PW2's call for aid, both PW1 and PW4 reported the matter to Sirari Police Station. Then, ten police officers that included PW8 F.4434 D/Constable Solomon rushed to the *locus in quo* along with PW1 and PW4 but they could not immediately subdue the intruders who were still busy chopping off trees and maize on the farms. An additional contingent of police officers was subsequently deployed at the scene from Tarime. Finally, the police teargassed the invaders and drove them away. PW1 pointed an accusing finger at the appellant as one of the raiders that he saw and identified at the scene. PW2, too, mentioned to the police to

have identified the appellant as one of the culprits and that he was actually the ringleader of the original group of twenty raiders.

The tale given by PW3 Makabo Mangera, one of the casual labourers that were weeding the farms, largely dovetailed with that of PW2. He also named the appellant as one of the raiders that he saw and identified at the scene on the fateful day. PW5's evidence, too, placed the appellant and his co-accused in the group of raiders that destroyed the farms.

After the invasion was quelled, the affected farms were inspected and assessed. It was established that farms owned by PW1, PW4 and PW5 had been destroyed. In this respect, PW6 Selina Samson Kajina and PW7 Sara Damian Kumdyanko, both Agricultural Field Officers, tendered between them four valuation reports on the farms (Exhibits P.1 – P.4) indicating the extent of the damage in monetary terms.

Both the appellant and his co-accused denied involvement in the invasion. Raising an *alibi*, the appellant particularly claimed to have been in Mwanza at the material time attending to his mother who was hospitalized at the Sekou Toure Hospital. He tendered in evidence several documents to support his *alibi*: a letter dated 7th August, 2012 issued by the Chairman of Gwikongore (Exhibit D.1) indicating that the appellant was expected to

travel to Mwanza; a hospital discharge certificate for his mother (Exhibit D.2) indicating that she was admitted at the hospital from 8th August, 2012 through 12th October, 2012; a burial permit dated 4th March, 2013 (Exhibit D.3) for his deceased mother who passed away on 2nd March, 2013; and two bus tickets (Exhibits D.4), one for his passage to Mwanza on 8th August, 2012 and the other for his return home on 12th October, 2012. His wife, DW3 Helena James, supported his *alibi*, saying that the appellant never returned home until 12th October, 2012 after he left on 8th August, 2012.

In its judgment, the trial court found that the appellant was conclusively identified at the crime scene and that on the authority of **Venant Mapunda and Another v. Republic**, Criminal Appeal No. 16 of 2002 (unreported) that his *alibi* gave way to the positive evidence of identification on the reason that the defences of identification and *alibi* were mutually exclusive.

The appellant's appeal to the High Court mainly challenged the trial court's finding that he was positively identified at the crime scene as well as its rejection of his *alibi*. In its determination, the court (Matupa, J.) observed that:

"On his defence of alibi it is trite law that what the appellant had to do was to bore a hole of doubt on the case for the prosecution. In the present case, therefore, all that the court was supposed to do was to weigh all the evidence including the alibi and see if there is a doubt in the prosecution case. I understand that the court was supposed to weigh the prosecution case together with the evidence and see if it was consistent with the claim that the appellant was at the scene of the crime. That was carefully done by the court."

The court went on to uphold the trial court's finding that the appellant was conclusively identified at the crime scene and that on the authority of **Venant Mapunda** (supra) his *alibi* gave way to the positive evidence of identification. It added that, the two-months' duration of the timelines of the *alibi* did not foreclose the possibility that the appellant might have travelled back to his home and visited the crime scene for a few hours. In the premises, the court dismissed the appeal.

The appellant has filed a Memorandum of Appeal containing three grounds of complaint as follows: **one**, that the first appellate court erroneously rejected the appellant's defence of *alibi* while it was sufficient to secure an acquittal; **two**, that the first appellate court erroneously relied

upon the evidence of identification of the appellant at the *locus in quo* by the prosecution witnesses who were under horrifying circumstances; and **finally**, that the first appellate court erred in law for failing to hold that the prosecution case was not proven beyond all reasonable doubt.

At the hearing of the appeal before us the appellant appeared in person, unrepresented. Having adopted his grounds of appeal, he deferred his address to a later stage, if need be, after hearing the submissions of the respondent Republic.

For the respondent, Ms. Mwamini Fyeregete, learned State Attorney, keenly opposed the appeal. On the first ground of complaint, she supported the first appellate court's rejection of the appellant's *alibi*. She submitted that, like the trial court, the first appellate court duly considered the *alibi* but in the end it was satisfied that the appellant was conclusively identified at the crime scene as one of raiders in the first group of twenty people. She thus urged us to hold that the *alibi* was rightly disbelieved.

Moving to the second ground that the first appellate court erroneously relied upon the evidence of identification of the appellant at the crime scene by the prosecution witnesses who were under horrifying circumstances, Ms. Fyeregete contended that the circumstances at the

scene were favourable for an unmistaken identification of the culprits. She submitted that the appellant was certainly identified by PW1, PW2 and PW3; that the evidence of these witnesses was consistent that they saw and identified appellant at the scene; that they knew him before invasion; that the incident occurred in daytime; that they gave a description of his attire; and that they immediately mentioned him to the police as one of the culprits.

As regards the final ground of appeal, the learned State Attorney submitted that the claim that the charge against the appellant was not sufficiently proven was hollow. She impressed upon us that the evidence that the appellant was seen and identified at the crime scene as one of the intruders was sufficient to found conviction against him.

At the end of Ms. Fyeregete's address, we probed her on why it took the police a long time to arrest the appellant if at all he was spotted at the crime scene as one of the invaders and his name promptly mentioned to the police. The learned State Attorney admitted that the appellant was apprehended by the police on 26th March, 2013, which was more than five months after the awful events of 6th October, 2012. Nonetheless, referring to the evidence of the police investigator (PW8) at page 45 of the record,

she contended that the identified suspects including the appellant escaped arrest as they fled the scene on the fateful day.

Rejoining, the appellant insisted that his *alibi* was sufficiently established on his testimony and that of DW3 as well as the documentary proof that he produced at the trial. He added that since he was at the Sekou Toure hospital in Mwanza on the fateful day he was obviously not at the crime scene. The evidence of identification was, therefore, without a shred of truth. Finally, he contended that the charges against him were not proven.

We have dispassionately considered the submissions of the parties on the grounds of appeal. In determining the appeal, we propose to address the first and second grounds of appeal conjointly as they are entwined.

This appeal, as rightly observed by the first appellate court, revolves around the identification of the appellant at the crime scene and his *alibi*. Both courts below, as indicated earlier, were concurrent that the appellant was conclusively identified at the crime scene and that on the authority of **Venant Mapunda** (supra) his *alibi* gave way to the positive evidence of identification. As indicated earlier, this is a second appeal. Being so, the Court is cautious in interfering with findings of fact by the lower courts.

The Court may only interfere where there are misdirections or non-directions on the evidence – **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1980] TLR 149.

With respect, we think that the unexplained delay in the arrest of the appellant alluded to earlier casts doubt on the prosecution evidence that he was identified at the crime scene and named to the police as a suspect. As we shall demonstrate shortly, this aspect denotes a serious lapse in the prosecution case and, sadly, it was not addressed by the lower courts.

It was claimed by PW1, PW2, PW3 and PW5 that, having seen and identified the appellant at the crime scene, they named him along with other suspects to the police. As happened, none of the suspects was arrested at the scene allegedly because, according to the only police officer that testified at the trial (PW8), they fled the place. Oddly, although PW8 adduced how he subsequently attempted to trace the appellant's co-accused, he said nothing about the appellant. The entire prosecution case is, therefore, silent on how and when the appellant was arrested. Actually, it was the appellant himself who adduced in his defence that he was arrested by the police on 26th March, 2013 at a public meeting in Sirari which he attended innocently without any fear of an impending arrest.

There was no explanation given in the prosecution evidence as to why it took more than five months to arrest the appellant if indeed the police were in the hunt for him. Nor was there any evidence linking the appellant's arrest with the leads the police received from the witnesses who allegedly identified him at the crime scene and named him to the police. We think that the prosecution evidence should have, at least, shown that the police were informed of the appellant being a suspect and that they took steps to arrest him, even if they had no success initially.

In **Maswed Seleman v. Republic**, Criminal Appeal No. 189 of 2007 (unreported), the Court dealt with a similar case of unexplained delay by the prosecution in arresting an accused person. It held that:

> *"In this case, the delay in arresting the appellant casts doubts on the credibility of PW1 and PW2, as submitted by Ms. Makala. And further, the possibility that PW1 and PW2 did not mention the appellant to PW3 cannot be ruled out either.*
>
> *To us, it is obvious this aspect of unexplained delay in arresting the appellant was not addressed by both courts below. In our opinion, had it been brought to the attention of the learned appellate*

Judge, she would have arrived at a different conclusion."

Then, the Court went on to hold that:

"On the foregoing, it cannot be said that the evidence of visual identification, in the circumstances of this case, is watertight and meets the standards set out in the case of WAZIRI AMANI vs. R. [1980] 250."

We are of the opinion that the absence of the link between the identification evidence and the arrest of the appellant shakes the credibility and reliability of the identifying witnesses – PW1, PW2, PW3 and PW5. It only lends credence to the appellant's *alibi* that he was all along in Mwanza attending to his debilitated mother at hospital, thereby poking holes into the prosecution case on the whole. The possibility that the said witnesses did not actually see the appellant at the crime scene or mention him to the police cannot be ruled out. Moreover, it is significant, in our considered view, that the learned appellate Judge too doubted the credibility of the identification evidence when he observed in his judgment that:

"In dealing with the identification, one has to appreciate the overtones in the description of the numbers. Almost every witness came with the same

estimation of the number of invaders; who [were] twenty people in the first group and five hundred in the second, with the exact estimation by every witness. This brings us to a doubt as to the level of common mathematical intelligence possessed by these witnesses which would by far outwit even very scholarly persons. I am afraid that the authorship of this number could as well be one centred, the rest were just parroting."

In the light of the foregoing discussion, we think that if the learned appellate Judge had directed his attention to the disquieting and inexplicable delay in apprehending the appellant, he would have arrived at a different conclusion. Accordingly, we hold that the evidence of identification against the appellant was not up to scratch and that it gave way to the appellant's *alibi*. We, therefore, find merit in the first and second grounds of appeal.

Needless to say, the foregoing determination inevitably leads us to uphold the third ground of grievance that the first appellate court erred in law for failing to hold that the prosecution case was not proven beyond all reasonable doubt.

In the light of the foregoing analysis, we allow the appeal. In consequence, we quash the appellant's convictions on the three counts and set aside the sentences imposed on him as well as the order for payment of compensation to the complainants. We thus order that he be released from custody unless he is held for some other lawful cause.

DATED at **MWANZA** this 11th day of December 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL