IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 472 OF 2015

JOHN MARWA @ KERAGI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, Mwanza Registry)

(Ebrahim, J.)

dated the 7th day of October, 2015
in
Criminal Appeal No. 103 of 2014
.....

JUDGMENT OF THE COURT

2nd & 11th July, 2018

MWANGESI, J.A.:

The appellant herein is currently in prison serving a sentence of imprisonment for thirty years, which was imposed to him by the district court of Musoma sitting at Musoma, on the 7th day of October, 2013, in Criminal Case No. 270 of 2012. At the same he was charged with and convicted of the offence of armed robbery contrary to the provisions of section 287A of the Penal Code Cap 16 as amended by Act No. 4 of 2004. The particulars of the offence were to the effect that, on the 3rd day of February, 2008 at Mwisenge – Mtakuja area within Musoma district in the

Region of Mara, he did steal cash money TZs 3,200,000/=, US Dollars 800, Dubai Dirham 300 and three Nokia phones valued at TZs 400,000/=, all the properties of one Emanuel s/o Magige @ Chacha, and immediately before or after such stealing, did use a panga, an axe and iron bar to cut and beat him in order to obtain or retain the said properties.

In order to establish the commission of the offence by the appellant, the prosecution called five witnesses and tendered three exhibits. On his part, in resisting the charge against him, the appellant relied on his own sworn evidence which was supplemented by the testimony of one Assistant Inspector Gosbert Christian and tendered four exhibits. As already hinted above, the trial ended in his disfavour whereby, he was convicted and sentenced to serve the statutory term of imprisonment of thirty years. Additionally, the trial magistrate ordered the appellant to be canned twenty - four strokes of the cane as well as compensating the victim of robbery after completion of the jail sentence, the value of the robbed properties. His attempt to challenge the finding of the trial magistrate and the sentence meted in the High Court of Tanzania Mwanza Registry, proved futile and hence, this second appeal.

The background of the case giving rise to the impugned decision as could be discerned from the record in the case file, can briefly be stated that, on the 3rd day of February, 2008 at about 21: 45 Hours, one Night w/o Emanuel Magige (PW1), was at her home inside her bedroom. She then heard the arrival of her husband Mr. Emanuel Magige, through the sound of an arriving motor vehicle. The gate of the house was opened by the night watchman and the motor vehicle entered into the compound of their house. In no time however, PW1 heard an alarm being raised by her husband to the effect that, they had been invaded by bandits including the appellant, which was followed by a gunshot. Mr. Emanuel Magige hurriedly entered inside their bedroom and closed the door.

Nonetheless, the door to their bedroom was forcefully broken in, and many bandits in the company of the appellant stormed inside. Therein, they demanded for money and some other valuables from the couple. As there was no positive response, the appellant who was holding a panga in his hand, cut Mr. Emanuel Magige with the said panga on several parts of his body. On her part, PW1 was as well assaulted with a club by the colleagues of the appellant. And in the course of the raid, PW1 handed to the bandits TZs 200,000/=. The bandits did also manage to rob cash TZs

100,000/= and 800 US Dollars which had been inside the wallet of Emanuel Magige, as well as three mobile phones which were inside the bedroom. At all that particular time, an alarm was being raised by the victims and their children.

After some time, neighbours responded to the alarm, only to find that the bandits had already disappeared in thin air. Mr. Emauel Magige, who had seriously been injured by the bandits and his wife (PW1), were taken by the neighbours to the Regional Government Hospital through the Central Police Station of Musoma, where the incident was reported and a PF3 issued to the victim (Emanuel Magige), to go and get treated the wounds which he had sustained from the incident. On their part, the policemen proceeded with their investigation that culminated to the arrest of the appellant after the elapse of about three months or so, and charging him with the offence of armed robbery.

During the trial of the appellant, it was testified by PW1 that, she managed to identify the appellant as being among the bandits who invaded her and her husband in their bedroom on the material night, because there was ample light. Additionally, there was evidence from a cautioned statement of the appellant that was tendered as exhibit P1 wherein, the

appellant is alleged to have confessed before Inspector Abdallah Ally Mohamed (PW4) that, he participated in committing the offence of armed robbery on the material night. On his part in defence, the appellant strongly resisted involvement in the commission of the alleged offence because at the material time, he was not in Musoma town which after all, was not his place of residence.

As earlier stated above, the trial magistrate believed the version contained in the evidence from the prosecution witnesses, and convicted the appellant to the charged offence, a finding which was upheld by the first appellate Court and hence, this second appeal to the Court.

In his appeal to the Court, the appellant has raised about seven grounds which however, can conveniently be condensed to four complaints namely, **firstly,** that the evidence of his alleged cautioned statement was improperly used to found him liable; **secondly,** that there was an unexplained delay by the prosecution to arraign him before the court; **thirdly**, that the evidence of visual identification relied upon in convicting him was not cogent; **and fourthly,** that as a whole, the prosecution failed to establish the offence against him to the standard required by law.

During the hearing of the appeal, the appellant entered appearance in person unrepresented and therefore, fended for himself whereas, the respondent/Republic had the services of learned Senior State Attorney Ms Ajuaye Bilishanga, who was assisted by Ms Sabina Chogogwe also learned State Attorney. At the outset Ms Bilishanga declared her interest by stating that, she was supporting the appeal. In arguing the grounds of appeal raised by the appellant, she grouped them in the same way we have put above.

Starting with the second complaint of the appellant, the learned Senior State Attorney submitted that, the incident of armed robbery in the instant matter, occurred on the 3rd day of February, 2008 as per the charge sheet. The appellant on the other hand was arrested in respect of the said offence on the 15th May, 2008. It is further on record that, the appellant was arraigned before the court for the offence of armed robbery on the 3rd day of December, 2012. However, Ms Bilishanga went on to submit, the record is silent as regards to where the appellant was, from when he was arrested, to when he was taken before the court, that is to say, a period of about four years and six months or so. The absence of a clear explanation to that situation, casts serious doubts in the way the appellant was

prosecuted and convicted. In the view of the learned Senior State Attorney, such doubts have to be resolved in favour of the appellant.

As regards the third complaint which is to the effect that, the evidence of visual identification was not cogent, the learned Senior State Attorney submitted to the effect that, this evidence came from the testimony of PW1, who claimed to have identified the appellant at the scene of crime on the date of the incident. She however casted doubt to such averment by the witness for the reason that, while at one instance in her testimony, she claimed to have identified the appellant on the material night, in another instance in the same testimony, there was change of stand, when she stated that, she identified the appellant at the identification parade. Such contention by the witness was doubtful because according to the available record in the case file, there was no identification parade conducted at any point in time. Furthermore, the witness never attempted to give any description of the appellant. In that regard, the learned Senior State Attorney concluded her submission in this aspect, by urging us to resolve the cloud of doubts in the evidence of PW1 in favour of the appellant.

With regard to the first complaint which relates to the cautioned statement of the appellant, Ms Bilishanga stated that even though the same was not objected when it was being tendered in evidence, the procedure in admitting it was flouted in that, after being admitted was not read to the appellant. That being the case, it was improperly used to found conviction of the appellant because its content was not made known to him.

The learned Senior State Attorney concluded her submission by arguing that, the cumulative effect of all the anomalies which have been pointed out above, is supportive to the last ground of complaint by the appellant that, the case against him was not sufficiently established and hence, his conviction to the charged offence of armed robbery was unjustifiable. She urged us to find merit in the appeal, and be pleased to quash the findings of the two lower courts and set aside the sentence meted down, the resultant of which, is to set the appellant at liberty.

On the obvious reasons that, the submission which was made by the learned Senior State Attorney was in his favour, there was no substantial argument from the appellant in rejoinder. He only implored the Court to set him at liberty because he was being detained for no founded grounds.

The issue which stands for our deliberation and adjudication in the light of what has been submitted above is whether or not, the appeal by the appellant is founded. In answering the issue, we propose to begin our deliberation with the second complaint of the appellant which is in respect of the unexplained delay. Much as the records in the case file disclose, there were two types of delays occasioned in this case. The first delay was from when the offence was committed to when the appellant was arrested, while the second delay was from when the appellant was arrested, to when he was arraigned before the court.

Beginning with the first type of delay, while the offence was committed on the 3rd February, 2008, the appellant was arrested on the 15th May, 2008, which was after the elapse of about three months or so (102 days). The records are however silent as to why there was such a delay in arresting the appellant, regard being to the testimony of PW1 to the effect that, she identified the appellant on the date of the incident. Commenting on such type of delay in **Ibrahim Shaban and Another Vs. Republic,** Criminal Appeal No. 110 of 2002, which was followed in **Maswed Selemani Vs. Republic**, Criminal Appeal No. 189 of 2007 (both unreported), the Court stated that:

"It is our opinion that, the slackness in arresting the appellants was not due to inefficiency, but to lack of information as to who they were to arrest."

In line with the foregoing, we are tempted to think that, even in the instant appeal, the appellant was not arrested earlier because there was no information to the effect that, he had participated in committing the charged offence of armed robbery. Be that as it may, such situation in our view discredits the contention by PW1 that, she correctly identified the appellant on the date of the incident, which is the gist of the subsequent complaint of the appellant. It only suffices for the moment to say that, there was no explanation which was given by the prosecution regarding the delay.

The second type of delay which we find to be more alarming, is the failure by the prosecution to arraign the appellant before the court within reasonable time. While the record indicates that the appellant was arrested by police on the 15th day of May, 2008, he was arraigned before the court on the 7th June, 2012 that is, after the elapse of more than four years. As it was argued by the learned Senior State Attorney, the prosecution was legally obligated to give explanation as to why there was such delay, and

where the appellant had been kept for the whole of that period. The failure by the prosecution to perform such duty raises serious doubts regarding the rights of the appellant and his being prosecuted. It is our finding that, the complaint of the appellant in that regard is founded and merited.

The third complaint of the appellant is pegged on the evidence of visual identification, which was relied upon by the trial court to found him culpable to the charged offence. We are quite alive to the position of law that, this being a second appellate Court, has to sparingly interfere with the concurrent findings of facts of the two lower courts. See: **Dr. Pandya Vs. Republic** [1957] EA 336, **Daniel Nguru Vs Republic,** Criminal Appeal No. 178 of 2004 (unreported). However, upon going through the evidence of visual identification that was used in holding the appellant culpable in this appeal, we think this is a proper matter in which the intervention of this Court is called for.

The evidence of visual identification in this appeal came from PW1. Principally, there was no dispute to the fact that, the incident of armed robbery occurred during night at about 21: 45 Hours or so. In her testimony, PW1 claimed to have managed to identify the appellant with the aid of light, which was inside the bedroom where they were met by the

bandits. She however, failed to name the source of light as well as its intensity. When the witness was cross-examined by the appellant as to whether she really identified him on the fateful night, her answer as reflected at page 11 of the record of appeal was to the effect that:

> *"I am telling the court the truth, I know you well as I saw you at the scene of crime and identified you very well--- you were among the bandits who invaded us on that night. I saw you well and identified you personally as you were armed with a panga. And I saw you at the identification parade and identified you twice."*

While discussing the question of visual identification after it had been raised in the first appeal at the High Court, the view of the learned Judge as reflected at page 67 of the record of appeal, was to the effect that *in ipsissima verba*:

> *"As correctly pointed out by Mr. Luvinga, it is evident that PW1 did not immediately identify the appellant by name. However, she identified him twice at the identification parade. Mr. Luvinga is contesting that, the fact that PW4 said that, he arrested the appellant from the information of PW1, is doubtful considering that, the*

appellant was arrested almost three months later. I find that argument to lack merit. Much as I agree that, PW1 did not positively identify the appellant on the first day and it is even possible that she did not know his name, but that alone cannot be basis of denying the fact that her information led to the apprehension of the appellant. Besides, it was the basis of conducting identification parade. The appellant is challenging that the identification parade conducted was wrong and fair (sic). I have gone through the entire evidence admitted in court as exhibit D2, I could not fault it. The appellant is surely challenging to save his skin."

On our part, after having also gone through the entire evidence in the record, we were unable to trace any iota of evidence to establish that, there was any point in time when an identification parade was conducted by the police to enable PW1 identify her robbers of the fateful night. In that regard, with due respect, we think that the finding of the learned first appellate Judge to the effect that, the appellant was identified twice by PW1 at the identification parade, was not borne out of the evidence on record.

In our finding, apart from the witness (PW1) failing to elaborate the nature of light which aided her to identify the appellant, the veracity of her testimony was also clouded with doubts in averring that, she identified the appellant at the identification parade which was not conducted. In that regard, we are persuaded to join hands with the learned Senior State Attorney in doubting the visual identification alleged to have been made to the appellant by PW1. We believe such fact did also contribute to the unexplained delay by the prosecution in arresting the appellant as it was held in **Ibrahim Shabani and Another Vs. Republic** (supra).

The law is settled in regard to evidence of visual identification as it was stated in **Michael Godwin and Another Vs. the Republic,** Criminal Appeal No. 66 of 2002 (unreported), where the Court reiterated the cardinal principle as set out in **R Vs. Eria Sebwato** (1960) and adopted in **Waziri Amani Vs. the Republic** [1980] TLR 250 that:

> *"The cardinal principle pertaining to evidence of visual identification is that, it is the weakest and most unreliable, and courts should only act on it when satisfied that, possibilities of mistaken identity are eliminated."*

See also: **Raymond Francis Vs Republic** [1994] TLR 100, **Moris Jacob @ Shuka Vs. Republic,** Criminal Appeal No. 220 of 2012 (unreported).

The question which we had to ask ourselves is whether or not, the evidence received from the testimony of PW1 in the instant case, passed the test enunciated above. In our considered view, the failure by the witness to elaborate on the nature of the light that aided her in identifying the appellant, as well her alleged identification of the appellant at the identification parade which was not conducted, has left her testimony open to doubtfulness and as such, it could not safely be relied upon to found conviction to the appellant. We hold that the two lower courts, misdirected themselves in acting on such evidence. The complaint of the appellant in that regard is found to be merited.

The evidence contained in the cautioned statement of the appellant which was tendered in evidence by Inspector Abdallah Mohamed (PW4) as exhibit P1, constitutes the first complaint of the appellant. Even though in his grounds of appeal the appellant complained that, his alleged cautioned statement was involuntarily obtained from him and that, he repudiated its being tendered in evidence, such contention is controverted by the record at page 19, where his testimony is recorded to the effect that:

"PW4 --- this is the accused cautioned statement dated the 14/5/2008. I pray for the court to admit them in court as exhibit on our part of the prosecution.

Accused: Your honour, I have no objection at all on my part for cautioned stament dated the 14/5/2008 to be admitted in court as prosecution exhibit."

Court: The accused cautioned statement dated the 14/5/2008 is admitted as exhibit and marked p1."

With the foregoing position, the appellant cannot be heard to complain that, he repudiated the admission of his cautioned statement. Nevertheless, such position notwithstanding, the pertinent question for our deliberation is whether or not, the content of the said cautioned statement was evidence worthy being relied upon by the trial court to hold the appellant culpable to the charged offence of armed robbery. The basis of this question is two limbed. The first limb relates to the way the statement was recorded, whereas the second limb, relates to the way it was tendered in court.

As regards the first limb, it was argued by the learned State Attorney during the hearing of the appeal at the High Court that, the cautioned statement of the appellant was recorded in violation of the appellant's right in that, the recording was witnessed by one Nyamhanga Chacha (PW2), who was called by the recording Police Officer (PW4) to witness the recording, without the consent of the appellant. Unfortunately, it was not addressed to by the learned first appellate Judge in her judgment. We think that it ought to have been deliberated, and a finding made because, it was a legal right of the appellant to have a relative or an advocate of his own choice, witness the recording of his cautioned statement by PW4. In that regard, the rights of the appellant as enshrined under the provisions of section 54 (1) of the Criminal Procedure Act, Cap 20 R.E 2002, was flouted.

But of more importance, which constitutes the second limb, is the fact that, the alleged cautioned statement (exhibit P1), was not read to the appellant after being admitted in evidence. The implication of such omission is that, the content of the cautioned statement which was used to determine the fate of the appellant's rights, was not made known to the appellant so as to give him the chance of either challenging it or otherwise. In our view, such omission was tantamount to condemning the appellant

unheard. The law is well settled that, where a person has been denied the right to be heard, the proceedings leading to the determination of any of his rights becomes nullity. See: **Abas Sherally and Another Vs. Republic,** Criminal appeal No. 32 of 2002, **Ndamashule Ndoshi Vs Republic,** Criminal Appeal No. 120 of 2005 and **Dishoni Sherally and Another Vs. Republic**, Criminal Appeal No. 122 of 2009 (all unreported).

In **Dishoni Sherally's** case for instance, the Court stated in part that:-

> *"... the right to be heard when one's rights are being determined by any authority leave alone a court of justice, is both elementary and fundamental. Its flagrant violation will of necessity lead to nullification of the decision in breach of it..."*

On the basis of the anomaly occasioned on the said cautioned statement of the appellant therefore, its evidence had to be expunged from the record. And once that is done, there remains the evidence of visual identification from PW1, of which, as already demonstrated above was tainted with serious shortfalls. In the event, we find the appeal by appellant to be merited and we allow it. The decision of the two lower courts is hereby quashed and the sentence imposed to the appellant plus

the ancillary orders of corporal punishment and compensation are set aside. It is ordered that the appellant be set at liberty forthwith, unless he is otherwise legally detained for some other grounds.

Order accordingly.

DATED at **MWANZA** this 9th day of July, 2018

B. M. MMILLA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL