IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 407 OF 2016

1. HERODE S/O LUCAS
2. MUSSA S/O IDD ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Decision of the High Court of Tanzania at Mbeya)
(Lyamuya, SRM Ext. Juris.)

dated the 24th day of September, 2013
in
Ext. Juris. Criminal Appeal No. 17 of 2013

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JUDGMENT OF THE COURT

20th & 28th August, 2019

NDIKA, J.A.:

This is a second appeal by Herode s/o Lucas and Mussa s/o Idd, the first and second appellants respectively, who were before the Resident Magistrate's Court of Mbeya at Mbeya charged with and convicted of armed robbery contrary to section 287A of the Penal Code, Cap. 16 RE 2002. They were each sentenced to thirty years' imprisonment with twelve strokes. Their first appeal, filed in the High Court of Tanzania at Mbeya but transferred and heard by A.M. Lyamuya, Esq. Senior Resident Magistrate (Extended Jurisdiction), bore no fruit, hence this appeal.

The prosecution alleged at the trial that the appellants on 13th September, 2011 at Uyole area within the City of Mbeya, jointly and together, stole TZS. 650,000.00, two NOKIA phones valued at TZS. 394,000.00 and one SONY radio valued at TZS. 150,000.00 from one WP. 3020 D/Cpl. Flora and at or immediately before or immediately after such stealing used iron rods to obtain or retain the aforementioned properties or prevent or overcome resistance to their being stolen or retained.

The appellants having denied the accusation against them, a full trial took place. In all, four witnesses testified for the prosecution, their evidence being supported by five documentary exhibits – a medical examination report (PF.3), two cautioned statements and two extra-judicial statements. On the other hand, each appellant gave evidence but called no witness.

Briefly, the prosecution case was as follows: on 13th September, 2011 at or about 21:30 hours WP No. 3020 D/Cpl. Flora (PW2), a police officer stationed at the Regional Crimes Office, Mbeya was at her stall in Uyole, Mbeya where she used to sell drinks. At the time the place was dark as there was power outage and she was readying herself to close business for the day. All of a sudden, the place was raided by three robbers armed with iron rods and a machete. Apart from demanding money and phones, the robbers attacked

PW2 and whoever they found at the scene. In the process, one Hans Kyando (PW1), a cook at the stall, was knocked unconscious. While the raid was still raging on power was restored and so the lights came on again illuminating the scene. At that point, PW2 identified the appellants as two of the robbers but that was the first time she was seeing them. According to her, the robbers spent close to three hours at the scene before they made away with TZS. 650,000.00 in cash, two phones worth TZS. 394,000.00, a SONY radio valued at TZS. 150,000.00 and a box of alcoholic drink called Konyagi, all being her property. Around 01:00 hours, she had a neighbour call the police who then came to the scene. PW1 and PW2 were subsequently taken to hospital for treatment. A medical examination report – PF.3 on PW2 was admitted as Exhibit P.1.

No. E.382 D/Cpl. Simon (PW3), a police officer, adduced that he interrogated the appellants on 17th September, 2011 after they were arrested. He said in the course of the interviews with them, each confessed to the charged offence, naming one Paul Chengula as their partner in crime. He tendered at the trial two cautioned statements, one for each appellant. These were collectively admitted in evidence as Exhibits P.2 despite the appellants' protestations that they were extracted from them through torture. Rather

ominously, the learned trial Resident Magistrate conducted no inquiry to determine the voluntariness, and hence, the admissibility of those statements.

Jacob Ndila (PW4), employed as a Primary Court Magistrate, was a Justice of the Peace who recorded extrajudicial statements, one for each appellant – Exhibits P.3. He said that apart from confessing to being involved in the robbery at PW2's stall, the appellants confessed to have killed a certain person in the aftermath of the robbery incident.

In his sworn evidence, the first appellant denied the allegations against him and raised an alibi of some sort. He lamented that the charge against him was trumped up by three certain police officers who he met at Mwanjelwa Bus Stand on 13th September, 2011 at noon. They asked for money from him and threatened to fix him if he declined. Having refused to do so, he was apprehended right away. He also bewailed that he was tortured while he was at the police station and that he was subsequently taken to a Justice of the Peace before whom he was forced to admit killing a person.

The second respondent gave an affirmed testimony. His line of defence mirrored that of the first appellant as he, too, raised an alibi and alleged that he was also framed by three police officers whose names he did not mention who came to his place of business at Makunguru area on 14th September, 2011

and accused him of having grilled and vended meat of a stolen goat. The police subsequently arrested and beat him up before they took him to a Justice of the Peace where he was coerced to give an incriminating extrajudicial statement.

The trial court believed the evidence of PW2 who was the only witness to allege to have seen and identified the robbers at the scene. It found that the conditions at the scene were favourable for a positive identification as the place was lit by electricity and that PW2 talked to the robbers and observed them from close proximity for a considerable period of time. The court also acted on the cautioned and extrajudicial statements by which the appellants confessed to the offence.

As hinted earlier, the appellant's first appeal was barren of fruit. In its judgment, the court upheld the conviction on the grounds that: first, the appellants were positively identified at the scene by PW2; and secondly, that the retracted cautioned and extrajudicial statements corroborated PW2's evidence. However, the court sustained the complaint that the PF.3 (Exhibit P.1) was admitted in evidence without compliance with section 240 (3) of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA). It is of note, however, that the said document was not relied upon in convicting the appellants.

In this Court the appellants have lodged two separate Memoranda of Appeal raising a total of nineteen grounds of appeal. It is our view that the said grounds can be conveniently condensed into the following points of complaint: **first**, that visual identification evidence given by PW2 was not watertight. **Secondly**, that the cautioned statements were wrongly admitted in evidence and that they should not have been relied upon. **Thirdly**, that the extrajudicial statements were obtained illegally and should not have been relied upon. **Fourthly**, PF.3 (Exhibit P.1) was wrongly admitted in evidence. **Fifthly**, that the defence evidence was ignored. **Finally**, that there was no proof of the charge against the appellants beyond reasonable doubt.

At the hearing before us, the appellants were self-represented. They adopted their grounds of appeal and urged us to allow their appeal.

Ms. Zena James, learned State Attorney, who was assisted by Mr. Ofmedy Mtenga, also learned State Attorney, supported the appeal when she replied on behalf of the respondent. She submitted, at first, that PW2's visual identification evidence was weak. She reasoned that while initially the scene of the crime was dark due to a blackout there was no evidence on the intensity of lights after the power was restored. Further, even though PW2 allegedly saw the robbers that fateful evening for the first time no identification parade

was conducted to corroborate her claim relegating her identification to mere dock identification. She went on to argue that PW2 might have reported the incident to a neighbour who then called the police but there was no detail given on whether she actually reported the matter to the police and if so, whether she named and described the suspects. She added that there was no evidence on how and when the appellants were arrested making it impossible to link the evidence of identification with the arrests.

Coming to the impugned cautioned statements, Ms. James conceded that the said statements were wrongly admitted, as shown at pages 17 and 18 of the record of appeal, without their voluntariness having been inquired into by the trial court after the appellants had objected to their admissibility. Citing the case of **Paulo Maduka & Four Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported), she urged us to expunge the said statements.

The learned State Attorney made a further concession as regards the extrajudicial statements. She criticized the trial court for accepting these statements on two grounds: first, that the statements were admitted after PW4 had read them out at the trial before their admissibility could be ascertained. Secondly, that the statements concerned the offence of murder which the

appellants were accused to have committed and that it was unconnected with the instant case. She thus urged us to discount these statements.

Ms. James also acknowledged the complaint that the appellants' respective defences were not considered. She argued that the courts below did not evaluate and consider the appellants' alibis as well as the complaints that the charges were trumped up by the police.

In the end, the learned State Attorney concluded that the charge against the appellants was not proven beyond doubt. Following the otherwise incriminating cautioned and extrajudicial statements being discounted, there was no other evidence that would have linked them to the charged offence in the absence cogent visual identification that would have placed them at the scene of the crime at the material time. Accordingly, we were urged to allow the appeal and acquit the appellants of the offence.

In view of the ostensibly promising standpoint taken by the learned State Attorney, the appellants declined the opportunity to rejoin.

We should state at the onset of our determination that this being a second appeal, the Court will rarely interfere with the concurrent findings of fact made by the courts below. The exceptions to the rule are when the findings are perverse or demonstrably wrong: see, for example, **Director of**

Public Prosecutions v. Jaffari Mfaume Kawawa [1981] TLR 149 and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). We shall be guided by this rule in our determination of the appeal.

We begin our determination of the appeal by addressing the first complaint, which raises the issue whether the appellants were positively identified at the scene. On this issue, we think it is pertinent that we refer to the guidelines on visual identification as stated in our seminal decision in **Waziri Amani v. Republic** [1980] TLR 250, the Court cautioned, at pp. 251 – 252, that:

> *"... 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 added]

Then, the Court stated, at p. 252, that:

> *"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 added]

Applying the above guidelines to the instant case, we are, without any hesitation, of the view that the evidence of PW2, who was the sole identifying witness, was abysmally weak. As correctly observed by Ms. James, the incident occurred at night and that PW2 said nothing on the intensity of light at the scene after the electricity was restored that allegedly enabled her to see and identify the robbers. It is also significant that the robbers were complete strangers to PW2, that she did not describe their physique or attire nor did she

say whether she named those she saw at the scene of the crime to the police as the suspects as soon as the police arrived at the scene. The prosecution case is further weakened by the absence of any evidence on how the appellants were arrested and if the arrests were a result of any report made by PW2 to the police. We also agree with the learned State Attorney that since PW2 claimed to have seen the appellants at the scene for the first time an identification parade had to be conducted if at all she had given to the police a detailed description of the suspects. Had the parade been conducted it would have served as corroboration of the dock identification of the appellants in terms of section 166 of the Evidence Act, Cap. 6 RE 2002. In the circumstances, PW2's dock identification of the appellants without any corroboration by identification parade evidence was worthless – see **Mussa Elias & Three Others v. Republic**, Criminal Appeal No. 172 of 1993; **Thaday Rajabu @ Kokomiti v. Republic**, Criminal Appeal No. 58 of 2013; and **Said Lubinza & Four Others v. Republic**, Criminal Appeal Nos. 24, 25, 26, 27 and 28 of 2012 (all unreported). In the premises, we find merit in the complaint under consideration, which we allow.

Next, we deal with the admissibility of the cautioned statements. We recall Ms. James conceded that the two statements were wrongly admitted without their voluntariness having been inquired into by the trial court after

the appellants had objected to their admissibility. We hasten to say that we agree with her. At first, it is, indeed, on the record of appeal at pages 17 and 18 that after the police investigator (PW3) tendered the statements in evidence, both appellants objected, saying in unison that they were extracted from them through torture. It is disconcerting that instead of inquiring into the voluntariness, and hence, the admissibility of the statements, the learned trial Resident Magistrate overruled the objections and admitted the statements collectively as Exhibits P.2. That course was plainly erroneous. We are perturbed that this error slipped the attention of the first appellate court, which brushed aside the appellants' complaint rather casually and proceeded to act on the impugned confessions.

It is settled that a confession or a statement will be presumed to have been voluntarily made until an objection to it is made by the defence on the ground that it is not so or it was not made at all – see **Paulo Maduka** (supra) citing **Twaha Ali & Five Others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported). In **Twaha Ali** (supra), the Court particularly stated that an inquiry into voluntariness of a statement must done when an objection is made by the defence:

> *"If that objection 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 (or a trial with a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence ....***"[Emphasis added]

Admission in evidence of a confessional statement that was objected without conducting an inquiry into its voluntariness is an incurable irregularity rendering the statement liable to be expunged from the record – **Paulo Maduka** (supra), **Twaha Ali** (supra) and **Frank Michael @ Msangi v. Republic**, Criminal Appeal No. 323 of 2013 (unreported). In the premises, we hold that the two statements were wrongly adduced into evidence and we, accordingly, expunge them from the record of the evidence.

We now turn to the ground faulting the trial court for admitting and relying upon the extrajudicial statements were obtained illegally and should not have been relied upon. On this complaint, Ms. James brought our attention to pages 22 to 23 as well as pages 53 to 57 of the record of appeal. Having examined those parts of the record, we go along with Ms. James that, indeed, the two statements were read out by PW4 before their admissibility was cleared and that they were recorded in respect of an investigation into an

incident of murder which the appellants were accused to have committed. We find merit in the complaint and proceed to discount the two extrajudicial statements.

The grievance that F.3 (Exhibit P.1) was wrongly admitted in evidence need not detain us. We note that a similar complaint had been raised to the attention of the first appellate court. That the said document was tendered by PW2 and admitted without the appellants being informed of the right under section 240 (3) of the CPA to have the medical expert who made the report appear at the trial for cross-examination. The appellate court, acting on the authority of **Alfeo Valentino v. Republic**, Criminal Appeal No. 92 of 2006 (unreported), rightly sustained that ground and held that the medical report was wrongly admitted without compliance with section 240 (3) of the CPA. The relevant part of the holding, at page 75 of the record of appeal, reads thus:

> *"... non-compliance with the mandatory provisions of section 240 (3) of the Criminal Procedure Act, as in this case, results in the medical report being discounted or expunged.* ***I hereby expunge the PF.3 from the record of the case. Nevertheless, the trial court did not rely on it in arriving at conviction.***"
> [Emphasis added]

Given that the medical report complained of was no longer on the record and that it was not relied upon to found conviction against the appellants, we were perplexed that the same ground was rehashed. We would, therefore, dismiss the complaint under discussion for being unmerited.

Moving to the grievance that the appellants' respective defences of alibi and the contention that the charges against them were trumped up by the police were not considered, we are aware that Ms. James acknowledged that fault. Having read thoroughly the trial court's nine-page judgment, we agree with her as we found that apart from a short summary of the appellants' evidence in their defence that the learned trial Resident Magistrate narrated in his judgment at pages 34 and 35 of the record, that evidence was not evaluated; it was simply ignored. This approach was both injudicious and unjudicial, to say the least. It has been admonished by the Court on numerous occasions including **Charles Samson v. Republic**, Criminal Appeal No. 29 of 1990 (unreported). In that case, the Court held that failure by a trial court to fully consider an accused's defence of alibi is serious error. In **Alfeo Valentino** (supra), the Court stated more broadly that:

> *"... failure by a trial court to fully consider a defence of alibi, and we may add without fear of being contradicted, the defence as a whole, is a serious error.*

> ***We are settled in our mind, therefore, that the trial court fatally erred in not considering the entire defence before finding the appellant guilty.***"[Emphasis added]

We are yet again perturbed that although the ground under consideration was also raised in the first appeal, it was dealt with perfunctorily. At page 76 of the record, the learned appellate Senior Resident Magistrate (Ext. Juris) acknowledged the issue but he held as follows:

> *"In another ground of attack, the appellants are saying that their defences were not considered. This ground is baseless. As it can be appreciated in (sic) the trial magistrate evaluated the defence evidence before arriving at conclusion."*

Certainly, the learned appellate Senior Resident Magistrate (Ext. Juris) was not correct in his finding. As rightly submitted by Ms. James, the learned trial Resident Magistrate wrongly ignored the defences and that was a serious error vitiating the appellants' respective convictions. We thus find merit in the complaint at hand.

Finally, we deal with the general criticism that the charge against the appellants was not proven beyond peradventure. In view of our findings that PW2's visual identification evidence was not watertight and that the cautioned

and extrajudicial statements were wrongly admitted and hence we expunged them from the record, there remains no other evidence that would have linked the appellants to the charged offence. Accordingly, we find the complaint here is meritorious.

All said and done, we allow the appeal in its entirety. We quash and set aside the appellants' respective convictions and sentences. The appellants, Herode s/o Lucas and Mussa s/o Idd, are to be released forthwith from prison unless they are held for other lawful causes.

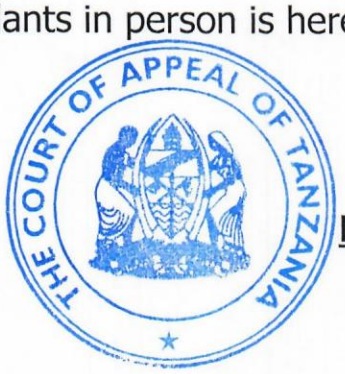
DATED at **MBEYA** this 28th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 28th day of August, 2019 in the presence of Mr. Shindai Michael, learned State Attorney for the respondent Republic and the appellants in person is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL