IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 538 OF 2015

MACHEMBA S/O PAULO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Kaduri, J.)

dated 6th day of July, 2008
in
Criminal Appeal No. 126 of 2007

JUDGMENT OF THE COURT

1st & 6th November, 2019

MUGASHA, J.A.:

The appellants and eleven other persons were jointly and together charged with armed robbery contrary to sections 285 and 286 of the Penal Code Cap 16 RE: 2002 in the District Court of Kahama. After a full trial, nine of them were acquitted and the appellant and two others were convicted and sentenced to thirty (30) years imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court of Tanzania, Tabora Registry where his appeal was dismissed. Further aggrieved, the appellant has lodged this second appeal.

The background giving rise to this appeal is briefly as follows: On 6/10/2006, a group of armed bandits invaded the premises of Kahama Gold Mine Company Limited (KGML) which they had accessed after cutting a wire fencing the said premises. As they targeted to steal a washing machine, having pulled it outside, they were pursued by the security guards of KGML including Shega Matolobe (PW1). Following the encounter, the bandits initially, vanished into the bushes leaving behind the washing machine. They later resurfaced with vigour armed with using bush knives, attempted to attack PWI who in retaliation fired several gun shots to scare them and in the course, Hashim Kassim who was among the bandits was shot on the stomach and later succumbed to death. According to the recollection by PW1, he did not identify any of the robbers at the scene of crime because all of them were strangers. PW1 and Pugwa Nyekeji (PW3) both told the trial court that, it is the deceased, who mentioned the appellant to be among the culprits at the robbery incident. However, Andrew Malebo (PW2) had a different account because apart from testifying to have been present at the robbery scene but said nothing about the deceased having mentioned the appellant's presence at the scene of crime. PW3 recalled that while hiding within the vicinity, aided by

electricity on the fence he managed to see and identify the appellant at the scene of crime. However, his account is silent on the manner in which he identified the appellant. The Police Officers involved in the investigation of the fateful incident namely: C9895 DC Laurent Msukuma D3761 DC Abraham and WP 2311 DC Mary PW4, PW5 and PW6 respectively, recounted to the effect that, the cautioned statement of the deceased was recorded and tendered at the trial as exhibit P7.

The appellant denied each and every detail of the prosecution account. He claimed to have been arrested on 11/10/2006 at 01.00 while with his girlfriend at Nyahanga area Kahama District, remanded and arraigned in court on 18/10/2016. Besides, he contended that following his arrest, the identification parade was not conducted.

Before the High Court, the appellant's conviction was sustained on the grounds reflected in its judgment at page 77 to 78 of the record:

> " ... *I agree with the submission of the learned State Attorney that when there is enough light to enable the accused to be identified, an identification parade is not necessary.... The evidence in a form of cautioned statement by the deceased Hamisi s/o*

Kassim who mentioned the appellant as among the thieves is corroborated by the evidence of PW3 who saw and identified the appellant as among the three thieves who were pulling the washing machine."

Basically, the High Court sustained the conviction of the appellant having concluded that, on the basis of the evidence on visual identification as corroborated by PW3 who claimed to have identified the appellant at the scene of crime.

In this appeal the appellant was unrepresented. He initially filed a Memorandum of Appeal containing four (4) grounds of complaint and later filed a Supplementary Memorandum of Appeal with six (6) grounds of grievance. We think all grounds of grievance boil down to two main grounds namely:

1. That, the learned judge erred in holding that the appellant was properly identified at the scene of crime while no detail of identification had been given.

2. That, the learned judge erred in relying on the statement of the deceased to convict the appellant.

The appellant opted to initially hear the submission of the learned Senior State Attorney but reserved the right to make a reply if need arises.

Mr. DeusDedit Rwegira, learned Senior State Attorney for the respondent Republic, in his brief but focused submission supported the appeal. He argued that, the appellant was not properly identified at the scene of crime which was confirmed by PW1 whose account indicates that, the appellant and other robbers were all strangers to him. He added that, in such a terrifying situation which obtained at the scene of crime in the robbery committed at night time involving a big group of bandits, the conditions were not favourable to eliminate the possibilities of mistaken identification.

Furthermore, the learned State Attorney faulted the reliance by the courts below on the cautioned statement of Hamisi Kassim (Exhibit P7) which was acted upon by the trial court to convict the appellants arguing the same to have been tendered in contravention of the provisions of section 34 B (1) and (2) of the Evidence Act [Cap 6 RE.2002] (the Evidence Act). On this, he pointed out that, since a prior notice of ten days was not given to the appellant and considering that the deceased being a suspect with an interest to serve in the matter, his statement was probably made

under duress. He thus urged the Court to expunge Exhibit P7 following which there is no other evidence to prove the charge against the appellant. Consequently, he urged us to allow the appeal and set the appellant at liberty. The appellant had nothing useful to add in rejoinder.

This being a second appeal, it is trite law that the Court should rarely interfere with the concurrent findings of lower courts on the facts unless it is shown that there has been a misapprehension of the evidence; a miscarriage of justice or violation of a principle of law or procedure. (**See - DPP VS JAFFAR MFAUME KAWAWA** (1981) TLR. 149, **ISAYA MOHAMED ISACK VS REPUBLIC,** Criminal Appeal No. 38 of 2008 and **SEIF MOHAMED E.L ABADAN VS REPUBLIC,** Criminal Appeal No. 320 of 2009 (both unreported).

As earlier pointed out, the courts below believed PW3's account that he had identified the appellant at the scene of crime. The question at stake is whether the appellant was properly identified. A proper identification of an accused person is crucial in proving a criminal charge in order to ensure that any possibility of mistaken identification is eliminated. In this regard, the Court has established principles in considering favourable conditions for

identifying the accused. See – **AMANI WAZIRI VS REPUBLIC**, [1980] TLR 250.

In **ISSA S/O MGARA @ SHUKA VS REPUBLIC**, Criminal Appeal No. 37 of 2005 (unreported), the Court said that it is not sufficient for the witnesses to make bare assertions that "there was light". The Court held:

> *"It is our settled minds;* ***we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime.*** *It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube.* ***Hence the overriding need to give in sufficient details on the intensity of the light and the size of the area illuminated."***

This requirement was underscored by the Court in **SAID CHALLY SCANIA VS REPUBLIC**, Criminal Appeal No. 69 of 2005 (unreported).

It is common knowledge that details of the identification of the accused are required particularly where an accused is a stranger to the identifying witness. In the case at hand, PW1's account at page 10 of the record reflects the following:

> *" ... I don't recognize any of the accused among all 13 accused person..... Among the 13 accused person I do not know even one of them, the one I shot died sometime after the event, when we interrogated him he mentioned about 3 names of co-accused to be Pompi,* ***Machemba*** *and Majuto. All the accused person mentioned I don't know them."*

As for PW2, neither did he testify to have identified the appellant nor heard the deceased Hamisi Kassim mentioning the appellant's name. PW3 claimed to have been aided by electricity light on the fence and saw and identified the 4th ,9th and 12th accused persons on the fateful day.

The appellant was the 9th accused at the trial. Apart from the appellant being a stranger to PW3, he claimed to have identified him among the crowd but fell short of stating how he managed to identify the

appellant as he did not explain the intensity and the size of the area illuminated by such light. That apart, if at all according to PW1 and PW3 the deceased mentioned the appellant to have been at the scene of crime, this contradicts PW2's account who despite being at the scene of crime, he never heard the deceased mentioning the appellant's name. This contradiction did cast a serious doubt on the prosecution case and it ought to have been resolved in favour of the appellant.

Moreover, we found PW3's account on the identification of the appellant to be highly suspect. We say so because apart from PW3 not stating the intensity of the electricity light from the fence and the size of the area illuminated as earlier pointed out, he still had to rely on the list mentioned by the deceased whose reliability is questionable as it is contradicted by PW2's account who did not hear the appellant mentioning the appellant to have been at the robbery scene. In a nutshell, in the contradictory prosecution account, the possibilities of mistaken identification of the appellant were not eliminated and as such, it was unsafe to act upon such evidence to convict the appellant. With such state of the prosecution account, we agree with the learned State Attorney that the appellant was not properly identified at the scene of crime.

Pertaining to the trial court's reliance and acting upon the cautioned statement of the late Hamis Kassim to convict the appellant, this was faulted by the learned Senior State Attorney who argued that, the respective statement was tendered into the evidence contrary to the requirements of section 34 (B) (2) of the Evidence Act (supra) as amended by Miscellaneous Written Laws Amendment Act No. 6 of 2012 which stipulates as follows:

"A written statement may only be admissible under this section–

(a) where its maker is not called as a witness, ***if he is dead*** *or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any iaw he cannot attend;*

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) ***if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behaif of the party proposing to tender it, on each of the other parties to the proceedings;***

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence: Provided that the court shall determine the relevance of any objection.

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it

and it is accompanied by a declaration by the person who read it to the effect that it was so read."

[Emphasis supplied]

In the light of the stated position of the law, it is not in dispute that Hamis Kassim is dead and that before his death it was alleged that he made a statement implicating among others, the appellant with the charged offence. What is contested is the reliance on such statement which was acted upon by the trial court to convict the appellant. As earlier stated, Mr. Rwegira's concession was on the irregular manner in which the statement was introduced and tendered in the evidence and adverse consequences on its reliance by the trial court to convict the appellant.

It is clear that, the conditions stated under the provisions of section 34 B (2) (a) to (e) of the Evidence Act must be cumulatively complied with prior to tendering of a statement of a person who is dead or cannot be found. Also, this entails giving the respective copy of the statement to the adverse party who within ten days may lodge an objection against it and the trial court shall determine the relevance of the objection. In the case at hand, since the appellant was not served with a copy of the impugned statement, he was not placed in a position to lodge an objection against

such statement as prescribed. Thus, the infraction was irregular and it occasioned a failure of justice as the statement was wrongly acted upon to convict the appellant. In this regard, we hereby expunge the cautioned statement of Hamis Kassim (Exhibit P7) from the record. Having discounted Exhibit P7, in the absence of any other evidence that the appellant was properly identified at the scene of crime, there is entirely no other prosecution account to link the appellant with the robbery incident at KGML. In the circumstances, it was incumbent on the first appellate court to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny in order to arrive at its own rational conclusions of fact on what actually transpired at the trial court. Unfortunately this was not done and in our considered view, the conviction of the appellant as upheld by the High Court suffered a clear misapprehension of the evidence which occasioned a miscarriage of justice and a violation of the principle of law warranting the interference of the Court. See- **HAMISI MOHAMED VS REPUBLIC** (supra) and **JAFARI MFAUME KAWAWA VS REPUBLIC** (supra).

In view of what we have endeavoured to discuss, we find the appeal to be merited and it is hereby allowed. We order the immediate release of the appellant unless he is otherwise held for another lawful cause.

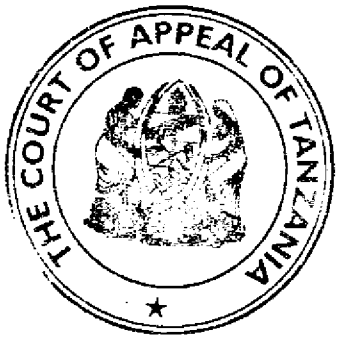
DATED at **TABORA** this 5th day of November, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of November, 2019 in the presence of Mr. Tumaini Pius, learned State Attorney for the respondent/Republic and Appellant appeared in person, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL