IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 86 OF 2018

HASSAN KHATIB ALI ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from Judgment and Decree of the High Court of Zanzibar at Vuga)

(Mwampashi, J.)

dated the 28th day of November, 2017
in
Criminal Appeal No. 25 of 2017

JUDGMENT OF THE COURT

10th & 13th December, 2019

MWARIJA, J.A.:

The appellant was charged in the Regional Magistrate's Court of Zanzibar at Vuga with the offence of robbery contrary to sections 285 and 286 (2) of the Penal Act No. 6 of 2004. It was alleged that on 2/11/2015 at 7:30. p.m. at Fuoni Meli tano, the appellant stole from one Seif Khamis Juma, one mobile phone make Samsung Galaxy 3, valued at Tzs 300,000.00 and before such stealing, he threatened the said person with a machete. The appellant denied the charge and the case proceeded to

a full trial whereby, on the part of the prosecution, it called four witnesses to testify whereas on his part, his was the only witness for his defence.

The background facts of the case are not complicated. They can be briefly stated as follows: On 2/11/2015 at 07:30 p.m. while in a commuter bus (Daladala) at Meli tano area, while the bus had stopped, the said Seif Khamis Juma (PW2) was robbed of his mobile phone by a person who, after having embarked in the bus, produced and brandished a machete at PW2. Shortly after that act, the culprit ran away. PW1's attempt to chase and apprehend him proved futile. As he was being pursued, the culprit threatened PW2 with a machete and thus managed to take to his heels and vanished away. Later on, after about five days, the appellant was arrested by No. F 4567 Cpl. Suleiman (PW1) following information by PW2 to the police that he had seen the appellant, the person who according to him, was the one who robbed him (PW2) his mobile phone on the material date of the incident. The appellant was consequently arrested and charged as shown above.

In his evidence, PW2 averred that he identified the appellant at the scene of the incident because there was sufficient light from a nearby mosque and more so, because the appellant was not a stranger to him. It

was PW2's evidence further that he had known the appellant before by the nickname of "Gogo". In support of PW2's evidence, Hamad Abdalla (PW3) testified before the trial court that he witnessed the incident as he was also a passenger in the daladala in which the offence was committed. Like PW2, PW3 testified that he witnessed the appellant stealing PW2's mobile phone and also when the appellant threatening PW2 with a machete as he attempted to apprehend him.

The other witnesses, PW1 No. F 4567 Cpl. Suleiman and PW4 No. F 2931 D/Cpl. Abdalla, testified on the events which took place after the offence. PW4 said that PW2 reported the incident at the police station and named the culprit as "Gogo". On his part, PW1's evidence essentially concerns his involvement in the arrest of the appellant.

In his defence evidence, the appellant denied the charge. He testified that on a date which he did not remember, he was arrested by the patrol police who sent him to police station where he was later charged with the offence in this case. He denied having committed any offence at Meli tano area on the date of the incident.

Having considered the evidence of the prosecution and the defence, the learned Regional Magistrate found that the charge against the

appellant was proved beyond reasonable doubt. Relying on the evidence of PW2 and PW3, the trial Magistrate found that the appellant was properly identified at the scene of crime. He was of the view that there were favourable conditions for identification because there was sufficient light from the mosque which was near the area where the offence was committed. The learned Regional Magistrate observed that the appellant's defence was too weak, presumably meaning that it did not raise any reasonable doubt in the prosecution evidence. The appellant was consequently convicted and sentenced to seven years imprisonment.

Aggrieved by conviction and sentence, the appellant unsuccessfully appealed to the High Court. The High Court (Mwampashi, J.) upheld the decision of the Regional Magistrate's Court. Like the learned Regional Magistrate, the leaned Judge was satisfied that the appellant was properly identified at the scene of crime.

In his memorandum of appeal, the appellant has basically raised six grounds as follows:-

> *"1. That the Hon. Judge grossly erred in law in his judgment for, after quashing the sentence and set aside the conviction imposed on the appellant*

by the Regional Court, he did not write an order to release the appellant from the prison.

2. *That the High Court erred in law for failing to inform the appellant that he has the right to appeal where by this affects justice and its merits.*
3. *That the Trial Court and High Court erred in law and in proceeding for entertaining a case in which the appellant was undefended notwithstanding the fact that the offence charged is serious and carries a long term prison sentence. See case of* ***Khaslm Hamis Manywele v. Republic,*** *Criminal Appeal No. 39/1990 (unreported) High Court of Tanzania at Dodoma.*
4. *That the two courts below erred in law for failing to inform the poor indigent appellant his right to engage a counsel by his own expenses.*
5. *That the two courts below erred in law and fact for failing to find that the totality [of the] evidence adduced by the prosecution side did not establish*

that a crime has been committed or that the appellant is the one who committed it.

6. *That the trial court erred in law and facts for failing to call a key witness (driver and conductor) of the said bus to testify that the alleged crime was committed inside their bus on the material date."*

At the hearing of the appeal, the appellant appeared in person unrepresented while the respondent, Director of Public Prosecutions was represented by Ms. Sabra M. Khamis, learned Principal State Attorney who was being assisted by Mr. Hamis O. Abdalla, learned Senior State Attorney and Mr. Ayoub N. Shariff, learned State Attorney.

When he was called upon to argue his appeal, the appellant opted to hear first, the respondent's reply to the grounds of appeal and intimated that he would make a rejoinder if the need to do so would arise.

Ms. Khamis was quick to inform the Court that the respondent was in support of the appellant's conviction and the meted out sentence.

We wish to state at the outset that the first ground of appeal is based on a typing error made on the typed copy of the judgment. The word

"cannot" was skipped in the sentence reading *"... for that reason the conviction and sentence imposed on the appellant 'cannot' be quashed and set aside."* That ground of appeal is therefore misconceived.

On the 2nd ground of appeal, the learned Principal State Attorney argued that, although it is true that the appellant was not informed by the High Court that he had the right of appeal, that omission did not prejudice him as he has filed his appeal before the Court. In any case, Ms. Khamis argued that there is no legal requirement of informing a party to the appeal in the High Court, that he has a right of appeal.

On the 3rd and 4th grounds of appeal, the learned Principal State Attorney submitted that, from the nature of the offence with which the appellant was charged, it is not only a bailable offence but one which did not attract a capital punishment. In the circumstances, she said, the appellant was not entitled to be provided legal service at the Government's expenses. Ms. Khamis added that the appellant was not at all denied his right of having an advocate at his own expenses. Relying on the cases of **Moses Mhagama Laurent v. The Government of Zanzibar,** Criminal Appeal No. 17 of 2002 (unreported) and **Pascal Kitigwa v. Republic,** [1994] TLR 65, the learned Principal State Attorney submitted that free

legal services are only provided to accused persons who are facing charges which attract capital punishment.

With regard to grounds 6 and 7 in which the appellant challenges the finding of both the Regional Magistrate's Court and the High Court that he was identified at the scene of crime, Ms. Khamis supported the finding of the two lower courts. She agreed with the findings that there was sufficient light from a nearby mosque and the light from inside the daladala in which the offence was committed. When probed by the Court however, the learned Principal State Attorney argued that, whereas the distance between the mosque and the daladala was not disclosed, the source and intensity of the light from both the mosque and from inside the daladala was also not disclosed.

On the contention that the prosecution did not call an important witness, it was argued for the respondent that, since under s. 134 of the Evidence Act, 2017, there is no particular number of witnesses required to prove a case, it was proper for the prosecution to call the witnesses whose evidence was material to the case. She stressed that the selected witnesses adduced sufficient evidence which has proved the case against the appellant beyond reasonable doubt.

In rejoinder, the appellant opposed the learned Principal State Attorney's reply submission. He denied the contention that he was known by the nickname of 'Gogo' and the evidence of PW2 and PW3, that they identified him at the scene of crime.

We have duly considered the submissions made by both, the learned Principal State Attorney and the appellant in this appeal. In determining the appeal, we wish to consider first, the issue of identification which in our view, is crucial because it was the identification evidence of PW2 and PW3 which was the basis of the appellant's conviction. As pointed out above, in upholding the decision of the Regional Magistrate's Court, the learned first appellate Judge agreed that the appellant was properly identified at the scene of crime by PW2 and PW3. Like the trial Magistrate the learned Judge was of the view that, although the offence took place at night under difficult conditions for identification, there was sufficient light from a nearby mosque and from inside the daladala in which the offence was committed. The learned Judge acted also on the evidence adduced by PW2 and PW3 that the appellant was known to them before the date of the incident.

As a starting point, in determining whether or not there was a proper direction by the two lower courts on the visual identification evidence tendered by PW2 and PW3, we find it instructive to reproduce a passage from the case of **Waziri Amani v. Republic,** [1980] TLR 250 where the Court stated as follows:-

> *"The first point we wish to make is an elementary one and this is that evidence of identification, as courts in East Africa and England have warned in a number of cases, is of 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."*

The Court went on to state as follows on the factors which must be established so as to eliminate the possibility of mistaken identity of a suspect:-

> *"We would for example, expect to find on record questions such as the following posed and resolved by him: the time the witnesses 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 lightning at the scene; and further whether the witnesses knew or had seen the accused before or not. These matters are but a few of the matters which the trial judge should direct his mind before coming to a definite conclusion on the issue of identity."

In the case at hand, Ms. Khamis conceded in her submission that the intensity of the light in the daladala and from the mosque near the place where the offence took place, was not disclosed. It is worth to note also that the distance from the mosque to the daladala was not disclosed. Furthermore, none of the two witnesses PW2 and PW3 explained on how the appellant became familiar to them and for how long. None of them also testified that they mentioned the appellant to the police or any other person after the incident. The evidence of PW1 that PW2 mentioned the appellant to him remains therefore, to be a hearsay. In such circumstances, it is hard to say with certainty, that there was sufficient light which enabled proper identification of the appellant. In the cases of

Kulwa Mwakajape & 2 Others v. Republic, Criminal Appeal No. 35 of 2005 and **Issa s/o Mgara @ Shuka v. Republic,** Criminal Appeal No. 37 of 2005 (both unreported) relied upon by the first appellate Judge, the Court underscored the principle that even where the identifying witness had a prior knowledge of the suspect, as a pre-condition for acting on the evidence of identification, it must be established that there were fbavourable conditions for such identification. So, although PW2 and PW3 stated in their evidence that they had known the appellant before, in the circumstances pointed out above, their evidence leaves much to be desired and with such uncertainty, the possibility of mistaken identity of the appellant was not eliminated.

On the basis of the foregoing, we find with respect, that had the first appellate Judge subjected the identification evidence of PW2 and PW3 to the above stated test, he would have found that such evidence failed to prove that the appellant was properly identified at the scene of crime. Such evidence was not watertight and could not therefore, found the appellant's conviction.

Since the finding on the 5th ground of appeal suffices to dispose of the appeal, we find no pressing need to consider the other grounds of

appeal. In the event, we hereby allow the appeal. The conviction of the appellant which was upheld by the High Court is hereby quashed and the sentence imposed on him is set aside. He shall be set free unless he is otherwise held for any other lawful cause.

DATED at **ZANZIBAR** this 13th day of December, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 13th day of December, 2019 in the presence of Hassan Khatib Ali, counsel for the Appellant and Mr. Khamis Othman Abdalla, Senior State Attorney for the respondent is hereby certified as a true copy of the original.

A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL