IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 281 OF 2012

YOHANA PAULO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)

(Mwaikugile, J.)

dated the 24th day of October, 2012
in
Criminal Appeal No. 135 of 2011
.....

JUDGMENT OF THE COURT

8th & 17th May, 2019

KITUSI, J.A.:

It seems the appellant YOHANA PAULO was charged with and convicted of Armed Robbery contrary to section 287A of the Penal Code, Cap 16, before the District Court of Kibaha, at Kibaha. He was given the minimum custodial sentence of 30 years which he had been serving since 5th July, 2011 to date. We are given to believe that the appellant unsuccessfully appealed to the High Court, so he is before us to quench his thirst for justice on second appeal.

We are using uncertain terms as regards the appellant's prosecution at the District court as well as his first appeal to the High Court, by design, because of what we shall make clear shortly.

At the hearing of this appeal, the appellant appeared and argued it in person without the benefit of legal services, whereas Ms. Jenipher Massue and Ms. Christine Joas, both Senior State Attorneys, represented the Republic, the respondent. Right from the outset we drew the attention of Ms. Massue, the lead Attorney, to a disturbing feature of this matter, which is that, some important documents were found to be missing from the record. The missing documents include the charge sheet, ruling of a case to answer, Notice of Appeal to the High Court, and Proceedings of the High Court. We invited the learned Senior State Attorney to address us on whether, in view of the incomplete record that had been placed before us, we could proceed with the hearing.

Ms. Massue agreed with us that the documents which we said are missing were indeed missing and went on to point out that the Deputy Registrar of the High Court, Dar es Salaam District Registry, under whose superintendence the record was prepared, has taken an affidavit stating that efforts to reconstruct the record by tracing the missing documents have proved unsuccessful. The learned Senior State

Attorney submitted that such efforts of reconstruction of the record are in line with the principle in the decision of the Court in **Robert Madololyo V. Republic**, Criminal Appeal No. 486 of 2015 (unreported).

However, the learned Attorney pressed for the matter to proceed for hearing for two reasons. First, she submitted that we should invoke Rule 4 (2) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to hold that the interests of justice in this case require that we should proceed with hearing. In this regard she underlined the fact that the appellant has been in prison for over 8 years. The second reason is that the information contained in the proceedings, judgment of the District Court as well as in the Memorandum of Appeal to the High Court and to this Court, is enough to go by.

The appellant, a lay person, did not have much to say but agreed with the learned Senior State Attorney. Responding to our questions the appellant said he did not have any of the missing documents because in prison grounds of appeal are prepared for inmates by prison officers.

We have given this scenario the consideration it deserves, and we are certain in our mind that Ms. Massue has made a case for us to continue with the hearing.

We are aware that availability of a complete record of appeal to the parties is an aspect of fair hearing, a constitutional right under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended. We are fully persuaded and associate ourselves with the holding of the Supreme Court of Uganda in the case of **Omiat V. Uganda** [2003] 1 E.A 226 (SCU). That Court held, inter alia:-

> *"An appellant is entitled to have at his or her disposal, the entire record of proceedings under which his or her conviction is founded. Only on this basis is the Appellant availed all opportunities to challenge every step and aspect leading to his or her conviction and sentence."* [Emphasis added].

In addition we are satisfied that there is nothing like a satisfactory solution to the embarrassing issue of loss of record. The best barometer is always the scales of justice in the matter, as suggested by Ms Massue

and as held in some decisions on the point. In the case of **Hamisi Shabani @ Hamis (Ustadhi) V. Republic**, Criminal Appeal No. 259 of 2010 (unreported), we cited with approval a Kenyan decision of the Court of Appeal in **Mulewa and Another V. Republic** (2002) 2 E.A 488 – 492.

The following paragraph was reproduced:-

> *"The Courts must in this matter try to hold the scales of justice evenly between the parties and whilst not wholly satisfactory solution can be expected for such an unsatisfactory state of affairs the course followed by the judge was* ***on balance, the fairest and most just and is the only solution which offers an opportunity on the merits of the case."***

We therefore concluded without hesitation, that the fairest course in this case was to proceed with the hearing as submitted by Ms. Massue, because to hold otherwise would cause a grievous injustice to the appellant. We accordingly invoked the provisions of Rule 4(2)(b) of the Rules and proceeded with the hearing.

Back to the substance of the case, it was alleged that on 31st January, 2010 at about 1:00 hours the appellant, jointly with one Charles Zakaria Nyang'anyi, stole the following items from one Evan Mwilingwa; one bicycle make Avon valued at Tshs. 100,000/=, a mobile phone make Nokia valued at Tshs. 40,000/=, a bicycle pump valued at Tshs. 6,000/=, one pair of trousers valued at Tshs. 10,000/=, an axe valued at Tshs. 5,000/= and Tshs. 140,000/= in cash, all total valued at Tshs. 280,000/= the property of Evan Mwilingwa. It was further alleged that immediately before the said stealing the accused persons used actual violence to Ivan (the victim) by using a bush knife with the view of obtaining the properties.

The evidence relied upon by the prosecution was that of Evan Mwilingwa (PW1) who stated that on the material night while sleeping in his house, he heard people walking about outside, then they called out his name. Assuming that they were members of Sungusungu vigilant group, he got out but only to be assaulted by them. They then gained entry into his house and forced him back into the house from where they stole his money (Tshs. 140,000/=), a mobile phone and a bicycle. PW1 estimated the number of his assailants as being around 9 to 10,

out of which he identified two of them, one Abdul Mpei who was not charged; and Charles Zakaria Nyang'anyi, the 2nd accused.

PW1 testified that he could identify these two people by aid of moonlight and the torch which those assailants were holding. He said that as a result of the assaults in the hands of the assailants he was hospitalized for 5 days. When he was discharged from the hospital he was summoned to go to Visiga (we assume it to be a police station) where he identified his stolen items, an axe, a machete, a pair of trousers and a pump.

PW1's wife, Rebeca Zakayo (PW2), supported the former's version in every aspect including the identity of the bandits.

Another thread of evidence was that of Rajabu Kambi (PW3), a Commander of Sungusungu at Visiga who led a search party, on 30/1/2010 upon receiving information that there had been a breaking into and stealing from the house of one Mr. Lupembe. In the course of the search on 31/1/2010 at 6:00 a.m. they stumbled onto the appellant at Msufini area, semi consciously drunk, with a 'panga', bicycle pump, a pair of trousers and axe lying by his side. PW3 enlisted the assistance of the police from Visiga who took the appellant away for interrogations.

Later in the day PW3 was informed that a group of bandits had attacked one Ivan at Matuga area and stole from him on the eve of 31/1/2010.

PW3's testimony was supported by that of Ally Mohamed (PW4) a member of the search party which PW3 had been leading.

The case for the prosecution was that the axe, machete, trousers and pump that PW1 identified at Visiga Police Station are the same as those that the appellant was found in possession of.

In defence, the appellant denied to have stolen from anyone and also stated that he was not found in possession of the items alleged to have been stolen from PW1. He demonstrated the insufficiency of the prosecution evidence of visual identification by pointing out that neither PW1 nor PW2 testified to have identified him.

The appellant's defence did not cast doubts in the mind of the learned trial magistrate who concluded as thus about him: -

> *"Concerning the 1st accused Yohana Paulo, he was found with the PW3 and PW4 right handled (sic) with the stolen properties. This leaves the court with no doubt that he was at the scene area and he did commit an offence as charged."*

That was how the appellant's fate was sealed and he has been in prison since, serving thirty (30) years.

The appellant's appeal to the High Court was, as already stated, unsuccessful and since we do not have the copy of the judgment of that first appellate court, we are denied access to its rationale. We have however already resolved that we shall determine this appeal, one way or the other.

The appellant's appeal to us is predicated upon three grounds; although in earnest, they boil down to one, as Ms. Massue rightly submitted. The three grounds are; **One**, the stolen items Exhibits P1, P2, P3 and P4 were not described by PW1. **Two**, the first appellate court erred in believing the prosecution's uncorroborated evidence. **Three**, the prosecution did not prove the case beyond reasonable doubt.

Ms. Massue declared that the respondent Republic was in support of the appeal and she proposed to argue it on only one ground, that is that, the case against the appellant was not proved to the required standard. As we have intimated earlier, we think that is an all-

embracing ground of appeal sufficient to dispose of the matter before us.

Submitting, Ms Massue, referred to the evidence of PW1 and PW2 to bring home the fact that they did not identify the appellant at the scene of the alleged robbery. She further submitted that the conviction of the appellant proceeded on the evidence of PW3 and PW4 who testified that they found him in possession of items which were subsequently identified by PW1 as his stolen properties. However, the learned Senior State Attorney faulted the value of this evidence on a number of reasons. First, she submitted that the principle of chain of custody was not observed. Referring to the proceedings, Ms. Massue submitted that the alleged stolen properties were tendered in evidence by PW3 (page 18) when PW1 was not in court and he only came later when he was recalled to identify them (page 21). She criticized the prosecution for the fact that PW1 neither established ownership of the stolen items nor gave their description prior to identifying them in court. She submitted in addition, that some of the items which the appellant was allegedly found in possession of, were not mentioned in the charge, and she gave an example of the 'panga'.

In the circumstances, the learned Senior State Attorney prayed that the conviction be quashed and the sentence be set aside. On his part the appellant did no more than agree with the position taken by the respondent Republic.

It now remains for us to deliberate on the issues involved, not intricate, in our view. To begin with, we are aware that as a second appellate court it is not, but under exceptional circumstances, in our domain to re-evaluate evidence. This is a household principle since the case of **DPP V. Jaffari Mfaume Kawawa** [1981] TLR 148, followed by many subsequent decisions forming a large family, that only when there are misdirections or nondirections, does a second appellate court get justified to look into the evidence of the case to make its own findings. We are of the view that in this case there are misdirections and nondirections in the decision of the District Court that should have been resolved by the High Court, so we see this as justifying our intervention.

When we subject the evidence of PW3 and PW4 to evaluation, we do not see how these witnesses could competently tender Exhibits P1, P2,P3 and P4. Competence of a witness to tender an exhibit must be tested along the set of guidelines which we reaffirmed in **DPP V. Mirzai Pirbakhsh@Hadji and Three Others,** Criminal Appeal No. 493 of

2016, cited in **Hamis Said Adam V. Republic**, Criminal Appeal No. 529 of 2016 (both unreported). The following paragraph reproduced in the latter case is relevant:-

> *"A person who at one point in time possesses anything, a subject matter of trial, as we said in* ***Kristina case****, is not only a competent witness to testify but could also tender the same... The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly. So, a possessor or custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."*

In this case PW3 and PW4 had absolutely no knowledge of the exhibits as even the fact of the alleged robbery came to be known by them much later in the day. Neither did they possess the exhibits for a while because according to their own testimonies they called to the scene a police officer one Ayoub who on arrival took charge of the matter.

So, Ms. Massue has a point we think, in submitting that the rule as to chain of custody, laid down in the case of **Paulo Maduka & 4 Others V. Republic**, Criminal Appeal No. 110 of 2007 (unreported)was not observed. It was the said police officer who seized the exhibits and took them to Visiga Police station along with the appellant, but thereafter the flow of events gets marred such that we do not see the link between the testimonies of PW3 and PW4 on the one hand, and that of PW1 the alleged owner of the items, on the other.

Comes the evidence of PW1. It may not have been easy or even necessary for PW1 to prove ownership of exhibits P1, P2, P3 and P4. We think what was important was for him to prove that he was in possession of those items before the same were stolen, and this would have been achieved by giving description of those items. There is, however, no evidence from a police officer or even PW1 himself that he provided some description of the stolen items before the same had been recovered. We take this to be a curious omission that renders PW1's evidence less plausible. We have, in many cases, held that a victim of theft must have given a description of his stolen items for him to claim later that the recovered items are those which were stolen from him.

One such case is, **Mustafa Darajani V. Republic**, Criminal Appeal No. 242 of 2008 (unreported).

It is a bit unfortunate, and we are saying this with genuine respect, that all this escaped the eye of the first appellate court. We have no doubt that the case against the appellant was not proved to the standard required in criminal cases, because in the end there is no evidence that would ground the conviction. On that basis, we uphold the ground of appeal as argued by Ms. Massue. In consequence, we allow the appeal by quashing the conviction and setting aside the sentence. The appellant's liberty should be immediately restored if he is not being held for some other lawful cause.

DATED at **DAR ES SALAAM** this 14th day of May, 2019

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL