IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 383 OF 2016

JAMILA MFAUME MAKANJILA @ MAMA WARDA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mtwara)

(Mzuna, J.)

dated the 1st day of September, 2016
in
Criminal Appeal No. 2 of 2015

JUDGMENT OF THE COURT

21st October, & 4th November, 2019

MMILLA, J.A.:

This is a second appeal by Jamila Mfaume Makanjila @ Mama Warda (the appellant), and is subsequent to the dismissal of her first appeal by the High Court of Tanzania, Mtwara Registry, in Criminal Appeal No. 90 of 2014 in which the decision of the District Court of Mtwara was upheld. Before the trial court, the appellant was charged with attempted armed robbery contrary to section 287B of

the Penal Code Cap. 16 of the Revised Edition, 2002. It was alleged that she attempted to rob one Ernest John Mlaponi of his motor cycle Registration No. T.659 CJQ make SANLG.

The complainant, Ernest John Mlaponi (PW1), was a resident of Mtwara Township who was carrying on the business of ferrying people around the town for hire using a motor cycle (m/c). He was ordinarily stationed at Bima area.

On 6.5.2014 at about 20:00 hours, he was at that area. Around that time, he was approached by the appellant who negotiated with him to be taken to Likonde Dispensary within Mtwara Township. On the way, the appellant changed the destination and instructed PW1 to take her to Mtepwezi area. PW1 obliged and began heading to Mtepwezi area as instructed. All through however, it was alleged, the appellant was busy communicating with certain unknown persons by phone, but PW1 kept on driving his m/c.

At a certain point, the m/c slid as a result of which it overturned and they fell down. Immediately thereafter, two persons

appeared at the scene and attacked the complainant. Instantaneously, he saw the appellant attempting to push away the m/c; he rushed to lock it, thereby frustrating the appellant's plan. It was then that he comprehended that the appellant and those two persons were a team. Luckily, PW1's colleagues who were trailing him from the moment he left Bima area rushed to the scene to assist him, following which the trio bandits ran away. The complainant took his m/c and they went to report the incident at a nearby police station.

Four days later, PW1 coincidentally saw the appellant at Mashujaa Bar within the vicinity of Mtwara Township. He arrested her and straight away sent her to Police Station. She was eventually charged with the offence of attempted armed robbery as it were.

The appellant had all through protested her innocence. She underscored that she did not commit the charged offence, adding that she was mistaken for someone else. She was nevertheless found guilty, convicted, and sentenced to a term of fifteen (15) years' imprisonment.

At the hearing of this appeal on 21.10.2019, Mr. Ali Kassian Mkali, learned advocate, entered appearance for the appellant who was also present in Court; whereas Mr. Joseph Mauggo, learned Senior State Attorney, appeared for and represented the respondent/Republic.

The memorandum of appeal filed by Mr. Ali Kassian Mkali on behalf of the appellant raised ten (10) grounds which he condensed into only two of them as follows: **one** that, both courts below improperly anchored the appellant's conviction on the evidence of visual identification, an identification which was done under unconducive conditions; and **two** that both courts below wrongly relied on the evidence constituted in the cautioned statement (exhibit P2) while in fact it was not read out in court after its admission.

Mr. Mkali's submission on the first ground touched on two scenes; firstly the place at which the appellant allegedly hired the complainant, and secondly at the place where the offence of attempted robbery allegedly occurred. He asserted that the

conditions at both places were unsatisfactory for correct identification.

In his bid to clarify his argument, Mr. Mkali maintained that there were three eye witnesses in this case; Ernest John Mlaponi (PW1) who was the complainant on the one hand, and Athumani Selemani (PW2) and Mussa Issa (PW3) on the other, who were the former's friends who trailed him at the time he left Bima area with the person who hired him. The learned advocate contended that those three witnesses said they had seen the appellant at Bima area at the time she was seated at Tigo Pesa Kiosk before she hired PW1 to send her to Likonde Dispensary, but they did not tell the distance from which they observed her. He also asserted that they did not tell the court the nature and source of light with the aid of which they identified her, nor its intensity. Further, apart from the fact that they did not tell if they had known her before or not, Mr. Mkali maintained as well that they did not even describe how she was clothed or her physical appearance. In view of that, he submitted, it cannot be accepted that those witnesses correctly identified the appellant at the place at which she allegedly hired the complainant.

Mr. Mkali submitted likewise that PW2 and PW3 did not identify the appellant at the scene of crime. Those two witnesses, he said, alleged that they saw the appellant attempting to rob PW1 of his m/c at a distance of 100 metres, and that they managed to see her with the aid of the light which was sourced from the headlamp of the m/c on which they were travelling, but they did not tell its intensity. He added that since the sketch map which was tendered in court as evidence (exhibit P1) showed that the road had corners, a fact which suggested that they were obstructed from clearly seeing very far in the direction they were heading; that again is evidence that the conditions at that second spot were not conducive for correct identification. On this point, he relied on the cases of **Oden Msongela & 5 Others v. D.P.P,** Criminal Appeal No. 417 of 2015 and **Masana Marwa v. Republic,** Criminal Appeal No. 229 of 2012. He pressed the Court to allow the first ground.

Coming to the second ground on validity or otherwise of the evidence in the form of the cautioned statement (exhibit P2), the emphasis of Mr. Mkali was on the fact that the said cautioned statement was not read in court after No. F. 7815 DC Mohamed

(PW5) had tendered it to enable the appellant to know its contents. Relying on the case of **Florence Atanas @ Baba Ali and Another v. Republic**, Criminal Appeal No. 438 of 2016, he submitted that because of that omission, that document was bad evidence and requested that it be expunged from the record. He invited us to likewise allow the second ground.

Mr. Mkali concluded that if the evidence of PW1, PW2 and PW3 on visual identification will be declared implausible, thus unreliable for reasons he has assigned; and also if the evidence constituted in the cautioned statement will be expunged; *ipso facto*, the remaining evidence is incapable of sustaining the appellant's conviction and sentence. In the circumstances, he urged the Court to allow the appeal, quash appellant's conviction, and set aside the sentence, resulting into her being released from jail.

On his part, Mr. Mauggo readily informed the Court that he was supporting the appeal on similar grounds advanced by his learned friend Mr. Mkali. He submitted that he was in agreement with Mr. Mkali that the evidence of visual identification was

insufficient as it did not meet the requirements of acceptability of such evidence. He similarly claimed that the source of light and its intensity at Bima area at which PW1, PW2 and PW3 said they saw the appellant seated at Tigo Pesa Kiosk before she hired PW1 was not explained, so also that they did not tell the distance from where they observed her to where she was seated.

As regards the validity or otherwise of the cautioned statement, Mr. Mauggo's answer was express that it did not form good evidence because it was not read out in court to afford the appellant chance to understand its contents. He supported the idea that it should be expunged.

Like Mr. Mkali, Mr. Mauggo concluded that if the evidence of visual identification and that which is contained in the cautioned statement will be found ineffectual, then there is no other evidence to sustain conviction and sentence. In the circumstances, he invited the Court to allow the appeal.

In view of the fact that Mr. Mauggo supported the appeal, Mr. Mkali did not make a rejoinder.

We have carefully considered the able submissions of counsel for the parties. Like they did, we will begin to discuss the first ground concerning validity or otherwise of the evidence of visual identification in this case, before turning to the ground concerning reliability or otherwise of the evidence constituted in the cautioned statement.

As was observed in **Waziri Amani v. Republic,** [1980] T.L.R. 250, in order to guarantee a correct identification of a suspect, a witness is required to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar. This exposition was re-emphasized in **Philipo Rukandiza @ Kichwechembogo v. Republic,** Criminal Appeal No. 215 of 1994 (unreported), in which it was stated that:-

> *"The evidence in every case where visual identification is what is relied on must be subjected to scrutiny, due regard being paid to all to the prevailing conditions to see if, in all the*

circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled."

See also the case of **Issa Mgara @ Shuka v. Republic,** Criminal Appeal No. 37 of 2005 in which it was highlighted that:-

"It is not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details on the source of light and its intensity."

In the present case both, Mr. Mkali and Mr. Mauggo have vigorously contended, and we agree with them, that PW1, PW2 and PW3 did not state the source of light and its intensity which enabled them to identify the appellant as they purported. They have similarly correctly contended that those three witnesses did not tell the distance from where they observed the appellant at the time she was at Tigo Pesa Kiosk at Bima area, also they did not describe her appearance or the way she was clad. The point on description of the accused person subject of identification was explicitly discussed in **Muhidini Mohamed Lila @ Emolo & 3 Others v. Republic**,

Criminal Appeal No. 443 of 2015 in which the Court cited with approval the case of **R. v. Mohamed Alui** [1942] EACA 72, cited in **Yohana Chibwingu v. Republic**, Criminal Appeal No. 117 of 2015 (unreported) where the East African Court of Appeal had stressed that:-

> *". . . that in every case in which there is a question as to identity of the accused, the fact of there having been given a description and the terms of that description are matters of highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by the person to whom the description was given."*

In order for their evidence of visual identification to have been reliable in the present case, PW1, PW2 and PW3 ought to have explicitly stated the source and the intensity of the light at the area at which they first saw and observed the appellant at the time she was allegedly seated at the Tigo Pesa Kiosk; the distance from where she was seated to where they observed her; if they had known her before that day or not; similarly the description of how

she was clad. Since those details were lacking, we agree with Mr. Mkali and Mr. Mauggo that those witnesses did not properly identify the appellant at the place where she purportedly hired PW1 to take her to Likonde Dispensary.

As earlier on pointed out, PW2 and PW3 told the trial court that they trailed PW1 from the time he left Bima area with the person who hired him up to the scene of crime. According to them, they saw the appellant struggling to rob PW1 of his m/c at a distance of 100 metres, and on seeing them coming; she and her colleagues ran away. Even though they said they managed to see her with the aid of the light sourced from the headlamp of the m/c they were riding, once again their claim of having identified her is doubtful because the sketch map (Exhibit P1) showed that the road at the scene of crime was not straight but had corners, a fact entailing that their evidence was wary, thus unreliable. This applied also to the evidence of PW1 who, because his focus was on the road where he and his customer were heading, he was not in a good position to mark appellant's face.

For reasons we have stated, we are convinced that the appellant was not correctly identified. As such, we find merit in first rephrased ground of appeal. We accordingly allow it.

We now turn to the second ground focusing on whether or not the evidence in the form of the cautioned statement was properly relied upon given that it was not read in court after its admission.

There is no controversy that at the time the cautioned statement was admitted as evidence during trial, it was not read in court as it ought to. The requirement to read any document on becoming part of the evidence in court has been emphasized in a number of cases, including those of **Florence Atanas @ Baba Ali and Another v. Republic** (supra) cited to us by Mr. Mkali. In that case, the Court relied on the previous case of **Jumanne Mohamed & 2 Others v. Republic,** Criminal Appeal No. 534 of 2015 (unreported) in which it was underscored that:-

> *"It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court. In **Thomas Pius** the documents under discussion were: Post Mortem Report, cautioned statement, extra judicial*

statement and sketch map. We relied on our previous unreported decision of ***Sumni Amma Aweda v. Republic,*** *Criminal Appeal No. 393 of 2013 to hold that the omission to read them out was a fatal irregularity as it deprived the parties to hear what they were all about."*

In the present case, there is no gainsaying that after its admission, the cautioned statement was not read out in court as it ought to. Certainly therefore, Mr. Mkali has a valid point, and we agree with him, that that piece of evidence became invalid and/or worthless and ought not to have been considered. We accordingly expunge it.

Having said that the evidence of visual identification was insufficient, also that the cautioned statement was worthless evidence, we agree with both Mr. Mkali and Mr. Mauggo that the remaining evidence was incapable of sustaining the appellant's conviction and sentence. As such, we are constrained to, and we hereby allow the appeal, quash her conviction and set aside the sentence. Consequently, we order her immediate release from

prison unless she may be continually held for some other lawful cause.

Order accordingly.

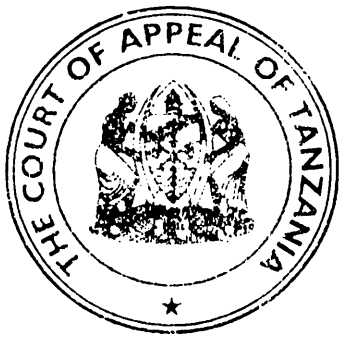
DATED at **MTWARA** this 1st day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2019 in the presence of Jamila Mfaume @ Mama Warda, Present in person unrepresented and Mr. Paul Kimweri, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL