IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 193 OF 2018

JUMA ALLY MUSTAPHA.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Arufani, J.)

dated 25th day of June, 2018
in
Criminal Appeal No. 363 of 2017

JUDGMENT OF THE COURT

14th & 24th September, 2020

MUGASHA, J.A.:

The appellant and another person were charged with two counts of armed robbery and grievous harm contrary to sections 287A and 225 of the Penal Code Cap 16 RE. 2002, respectively. The prosecution alleged that, on 27/3/2016 at Yombo Kilakala area, Temeke District within Dar-es-salaam Region, the appellant and another person did steal cash TZS. 45,000/= and one mobile phone make Tecno from Said Ally Linyakavu (PW1) who was also struck on the neck, cut and injured by the assailants. After a full trial, the other person was acquitted whereas the appellant was convicted on both counts and sentenced to imprisonment to a term of

thirty years in respect of the first count and seven years for the second count. The sentences were ordered to run concurrently.

In order to appreciate, what led to the apprehension, arraignment and conviction of the appellant, it is crucial to briefly state the background as follows: From a total of five witnesses, the prosecution case was to the effect that, on the fateful day, Said Ally Linyakavu the complainant who testified as PW1, while at Tupendane bar he was attacked by a group of seven bandits armed with bush knives and knives. According to him, during the incident which took about five minutes, he was ordered but refused to surrender his belongings which made one of the bandits to cut him on the face. Other bandits vanished after taking away his mobile phone and cash money. It was PW1's account that, enabled by electricity tube lights he managed to identify the appellant from amongst the bandits. He also claimed to have mentioned the appellant while narrating what befell him to his father Ally Said (PW2). Then, PW2 accompanied by PW1 and one of his sons went at the residence of the appellant's parents and while there it was alleged that the appellant and others resurfaced and attacked PW1 and PW2 with a bush knife. The incident was reported to the police and the victims (PW1 and PW2) were issued with a PF3 and they proceeded to the

hospital for medical treatment. According to the investigator, E.6053 D/CPL Peter (PW3), apart from testifying that PW1 was attacked by bandits while on his way home from the place of work, he also told the trial court that the appellant who had run away after the fateful incident was arrested on 25/11/2016 in connection with another robbery incident and on the following day, PW1 went to the Police complaining to have been attacked by the appellant. According to the testimonial account of E 6227 DSGT Focus (PW4), in the cautioned statement, the appellant admitted to have committed the offence. However, pursuant to an inquiry conducted by the trial court, the cautioned statement was rejected on account that it was not properly recorded.

In his defence, the appellant denied the charge. He told the trial court that on the fateful day he was at his parents' residence watching news. While there, some visitors including the victims surfaced and were attended by one of his brothers and later joined by his parents. About a half an hour later, upon hearing voices coming from the veranda of the house, the appellant went outside only to find his brother and PW1 fighting. He intervened to stop the fight and PW1 obliged but because he was drunk hurled abusive words to the appellant's mother. Then PW1 and

his father PW2 departed. On the following day, the appellant travelled to Tunduma where he stayed for a week and returned to Dar-es-salaam. Two days later, he went back to Nakonde, Zambia and stayed there for ten days. On 26/11/2016 he was arrested and taken to Chang'ombe Police Station. Upon interrogation and on 27 /11/2016 he made a cautioned statement against his will subsequent to which he was formally arraigned before the trial court. However, the police officer to whom the fateful incident was reported, was not fielded as a prosecution witness.

Believing the prosecution account to be true, as earlier stated, the trial court convicted the appellant and another person as charged. In the first appeal, the other person was acquitted whereas the appellant was not successful because his conviction was sustained. Still aggrieved by the decision of the High Court the appellant filed a second appeal to this Court on the following five grounds of complaint:

1. *That the first appellate court erred in holding to in-credible and un-procedural visual identification of PW1 against the appellant at the locus in quo and before he was arraigned in Court as expounded by PW3.*

2. *That the learned appellate court erred in failing to realize that no police officer to whom the offence was first reported was called to testify in court.*
3. *That the first appellate court erred in failing to realize that no evidence was raised to suggest the appellant's manhunt immediately after the occurrence of the offence considering he was known before hand by the victims and reside on the same locality.*
4. *That the learned first appellate court erred in failing to appraise objectively the prosecution evidence before holding on it as basis for the appellant's conviction.*
5. *That the first appellate court erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt.*

On 11th March, 2020 the appellant lodged a supplementary Memorandum of appeal consisting of two grounds;

1. *That the first appellate court erred in law and fact by sustaining the appellant's conviction on armed robbery relying on defective charge.*

    (a). it did not disclose the actual time to which the alleged offence was committed.

b). it did not disclose the descriptions of and value of the coins and bank notes to which the sum of the alleged stolen cash money were composed.

(c). it did not disclose peculiar marks of the alleged stolen mobile phone since tecno has different makes.

(d). the first appellate court acquitted the appellant in the second count that the prosecution failed to prove grievous harm and that PW1 (the victim) did not manage to prove beyond reasonable doubt that he was injured in the said event hence the actual violence alleged to be used to the victim by the appellant also was not proved as both offences alleged to be committed on the same transaction.

2. *That the first appellate court erred in law and fact by sustaining the appellant's conviction on un-procedural conducted trial as the trial court;*

(a). disregarded the over detention of the appellant under police custody contrary to the mandatory provision of section 32 of the Criminal Procedure Act

(b). failed to furnish with the victim's statement instead of the complainant statement in regard with the mandatory provisions of section 9(3) of the Criminal Procedure Act

(c). recorded trial witness evidence with improper compliance of the provision of section 210(3) of the Criminal Procedure Act for not recording any comment which the witness made concerning his evidence.

(d). Failed to explain the substance of the charge to the appellant in the ruling of prima facie case before defense contrary to the mandatory provision of section 231 (1) of the Criminal Procedure Act.

At the hearing, vide a virtual link facility with Ukonga prison, where the appellant is serving jail term the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Janeth Magoho and Ms. Ellen Masululi, both learned State Attorneys.

Apart from the appellant adopting his written submissions, he also urged the Court to consider the grounds of grievance and allow the appeal. In the written submissions, he argued that the prosecution case was not proved beyond reasonable doubt on account of the following: **One,** on the

fateful day he was at his parents' residence and not at Tupendane Bar where the complainant was attacked by a group of armed bandits. **Two,** he was not identified at the scene of crime considering that, PW1 did not state the intensity of the light at the scene of crime. **Three,** the issue of stealing was raised as an afterthought because PW1 never disclosed it to PW2. **Four,** the police officer to whom the incident was reported was a material witness and he was not paraded as a witness which did cast a heavy doubt on the prosecution case and as such, the courts below ought to have drawn an inference adverse to the prosecution. **Finally**, on the basis of his arguments, the appellant urged the Court to allow his appeal and set him free.

On the other hand, the learned State Attorney did not support the appeal. In the light of the record before us and the grounds of complaint raised by the appellant, we prompted the learned Ms. Magoho when responding to the complaint that the charge was not proved to the hilt also to address the Court if the said trial court's conclusion was arrived at after considering the entire evidence availed by the appellant at the trial.

Apart from Ms. Magoho conceding that the two courts below did not consider the appellant's evidence, it was her submission that the infraction

is minor and curable under section 388 (1) of the Criminal Procedure Act [CAP 20 RE.2002]. In this regard, she urged the Court to remit the case file to the trial court for it to consider the appellant's defence which is available in the record of the trial proceedings. The learned State Attorney did not cite to us any case law to support her propositions. Besides, challenging remitting the case file to the trial court, the appellant urged the Court to allow his appeal.

Having carefully considered the rivalling submissions and the fifth ground of appeal, the issue for our determination is whether the appellant's defence was considered and if the answer is in the affirmative, the related consequences. We begin with what took place before the trial court. At page 50 of the record of appeal as earlier stated, the appellant's defence was to the effect that on the fateful day he was not at the scene of crime but at his parent's residence and had intervened to resolve a dispute between PW1 and his brother who was accused of having a love affair with PW1's wife. After analyzing the prosecution evidence and that of another accused person who was acquitted, the trial magistrate concluded what is reflected at page 73 of the record as follows:

" After the above analysis of the fact and evidence given by both prosecution and defence side this Honourable court finds that the prosecution side was able to prove their case, more so discharged their burden of proof by providing credible enough evidence and building their case...."

The aforesaid excerpt is not in agreement with the reality because the defence availed by the appellant as aforesaid was not at all considered by the trial magistrate which is irregular. The proper approach was for the trial magistrate to deal with the entire prosecution and defence evidence and after analyzing such evidence, the Magistrate should have then reached the conclusion. Before the first appellate court, apart from having observed the infraction, the High Court fell in the trial court's trap having concluded at page 102 of the record as follows:

"Since the trial court was in a better position to determine credibility of the witnesses testified in relation to the above stated argument, the court has failed to see any justifiable reason to make it to differ with the finding of the trial after ***seeing through the trial court did not say anything in relation to the said defence of the appellant but the court has found the same to be an afterthought and has not managed to raise any reasonable doubt to the prosecution evidence."***

[Emphasis supplied]

In the case of **HAMISI RAJABU DIBAGULA VS REPUBLIC** [2004] TLR 181, the Court was confronted with a situation whereby the trial magistrate did not consider one of the two issues he framed and the one considered was dealt with perfunctorily. Besides, the judgment was attacked to lack reasoning justifying the final conclusion. Thus, in determining as to whether or not the trial magistrate's judgment sufficiently met the dictates of section 312 of the CPA which prescribes the contents of a judgment, the Court observed as follows:

> *"... A judgment must convey some indication the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored..."*

In the present matter, we found the course taken by the High Court not proper because as the first appellate court it was obliged to re-evaluate the entire evidence including that of the appellant and arrive at its own conclusions. In the case of **HUSSEIN IDDI AND ANOTHER VS REPUBLIC** [1986] TLR 166 the Court was faced with a similar scenario whereby the first appellant together with another person were convicted of murder.

The trial court dealt with the prosecution evidence implicating the first appellant and reached the conclusion without considering the defence evidence. The Court stated that:

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

[See also **SADICK KITIME VS REPUBLIC**, Criminal Appeal No. 483 of 2016, **JOSE MWALONGO VS REPUBLIC**, Criminal Appeal No. 217 of 2018 and **JEREMIAH JOHN AND 4 OTHERS VS REPUBLIC** (all unreported). In the latter case, the Court was confronted with a complaint on failure to adequately consider the appellants' defence of alibi. The Court made the following observation:

> *"The common ground to the effect that the appellants were not given a full hearing, in that their defence was not considered at all, and where it was, not adequately, affords us a good starting point of our discussion. We are of this view because our Constitution, in Article 13 (6) (a), compels all courts to give accused persons a fair or full hearing when determining their rights. It is now settled law that this duty is not discharged when the court does not consider either at all or adequately, the defence case."*

On the consequences of such infraction, failure to consider the defence case is fatal and usually leads to a conviction being quashed. See - **MOSES MAYANJA @ MSOKE VS REPUBLIC, CRIMINAL** Appeal No. 56 of 2009, **MALONDA BADI & OTHERS VS REPUBLIC,** Criminal Appeal No. 69 of 1993 (both unreported) **OKOTH OKALE V UGANDA** [1965] E.A 555, and **LOCKHART – SMITH V. R** [1965] E.A 211 (TZ) among others.

Likewise, in the case under scrutiny, it is evident that the trial magistrate, in his judgment did not consider the appellant's evidence which in our strong considered view did introduce a reasonable doubt against the prosecution case which entitled the appellant to an acquittal. We say so on account of the uncontroverted appellant's account that on the fateful day he was neither present at Tupendane Bar where the appellant was attacked by the bandits nor did he attack PW1 while at his parents' residence. In this regard, since the appellant was deprived of having his entire defence considered in the judgment of the trial court, he was denied a fair and full hearing when determining his rights and this is a fatal omission which is incurable. In the circumstances, the conviction imposed cannot be allowed to stand. We accordingly quash the conviction and set aside the sentence.

On the way forward, we decline the learned State Attorney's invitation to remit the case file to the trial court for consideration of the appellant's evidence. That apart and without prejudice, we have also noted that the prosecution evidence is weak on the following fronts: **One,** besides bare assertions of PW1 and PW2, no proof was availed if the two were attacked and injured during the alleged robbery incident. **Two,** considering that it is common knowledge that electric bulbs and fluorescent tube give out varying light with varying intensities definitely, the respective light cannot be compared. Thus, PW1's failure to state the intensity of the light at the scene of crime fell short of eliminating possibilities of mistaken identification on account of the overriding need to give in sufficient details on the intensity of the light and the size of the area illuminated- See: **ISSA MGARA @SHUKA VS REPUBLIC,** Criminal Appeal No. 37 of 2005, **SAID CHALLY SCANIA VS REPUBLIC,** Criminal Appeal No. 69 of 2005 and **KURUBONE BAGIRIGWA AND THREE OTHERS VS REPUBLIC,** Criminal Appeal No. 132 of 2015 (all unreported). **Three,** the unexplained delayed arrest of the appellant effected more than seven months after the fateful incident leaves a lot to be desired considering that he was not a stranger to the identifying witnesses. This gives impetus to our refusal to return the case file to the trial court to rectify the infraction as it would serve no useful

purpose on account of the stated weak prosecution account to ground the conviction of the appellant.

In view of the aforesaid, we find the fifth ground of appeal merited and it is sufficient to dispose of the appeal and as such, we shall not belabour on other grounds raised by the appellant. All said and done, we allow the appeal and order the immediate release of the appellant unless if he is held for another lawful cause.

DATED at **DAR ES SALAAM** this 22nd day of September, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of September, 2020 in the presence of the appellant in person and Ms. Ester Chale learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL