IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 197 OF 2018

1. BAKARI JUMANNE @ CHIGALAWE
2. SALUM ABUU @ TALL MIXER
3. JUMA LEONARD @ CHITETE
4. MODESTUS BEDA @ DOGOMOSOSI ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Phillip, J.)

dated the 4th day of July, 2018
in
HC Criminal Appeal No. 283 of 2016

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JUDGMENT OF THE COURT

16th Sept, & 2nd Oct, 2020

NDIKA, J.A.:

The appellants and another person not a party to this appeal (George Patrick @ Mawei) stood trial before the District Court of Ilala at Samora Avenue on a charge of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 Vol. 1 of the Laws ("the Penal Code"), as amended by Act No. 27 of 1991 and Act No. 12 of 1998. They were all convicted as charged and each of them was sentenced to thirty years' imprisonment.

Their first appeal to the High Court of Tanzania at Dar es Salaam against conviction and sentence was unsuccessful, hence this second appeal.

It is essential to provide at the beginning the salient facts of the case. Briefly, it was alleged at the trial that the appellants and the said George Patrick, on 25th August, 2000 at 19:30 hours at Jangwani Darajani along Morogoro Road within the District of Ilala in Dar es Salaam Region, stole TZS. 80,000.00 in cash, several personal possessions and a *Phoenix* bicycle from one Constantine Masali and immediately before such stealing they used a machete to hack the said Constantine Masali on his head in order to obtain the said property.

Based on the testimonial accounts of nine prosecution witnesses woven together, the prosecution's narrative was as follows: on 25th August, 2000 around 19:30 hours, PW7 Constantine Masali, a retired Inspector of Police, was suddenly accosted by five machete-wielding thugs at a bridge at Jangwani area along Morogoro Road as he was riding home on his *Phoenix* bicycle. They fell him to the ground, hacked him on his head with a machete and finally relieved him of TZS. 80,000.00 in cash, the bicycle, a *Rado* watch, a voter's registration card and other personal possessions before they fled the scene leaving their victim semi-conscious.

At the trial, PW7 named the appellants as well as the said George Patrick as the gangsters who robbed him. He was firm that he saw and identified them with the aid of light emitted from security lights at the nearby Kajima Road Construction Camp as well as light from motor vehicles passing by at that time. He added, when cross-examined, that the crime scene was also illuminated by moonlight. It is noteworthy that PW7 did not suggest in his testimony that the appellants were familiar to him before the fateful incident.

Of the nine prosecution witnesses, seven were police officers who dealt with the various aspects of the case. Acting on a tip from an informer, No. C.615 D/Cpl. Sizya (PW5) and No. E.8670 D/Constable Deogratius (PW3) arrested George Patrick at Jangwani Bar two days after the incident. According to these witnesses, they found George Patrick wearing a *Rado* watch believed to have been stolen from PW7 and that upon being queried he admitted to have taken part in the armed robbery and mentioned the appellants as his partners in the crime. This led to the subsequent arrests of the appellants.

There was further evidence from No. C.8335 D/Sgt Yassin (PW1), No. C.3299 D/Cpl Theonest (PW2), No. E.3797 D/Sgt Hatibu (PW4), No.

D.3784 D/Cpl Mkwelu (PW6) and No. D.4734 D/Cpl Modest (PW9) that the appellants and the said George Patrick separately recorded their cautioned statements by which they confessed to the armed robbery. These were admitted in evidence as Exhibits P.1 to P.5 despite the protestations against their admissibility.

When put to their defence, the appellants and their co-accused denied flat out the accusation against them. Each of them also raised a defence of *alibi*.

Apart from finding that the appellants and their co-accused were positively identified by PW7 at the scene, the trial court acted on the cautioned statements which it found sufficiently incriminating. It considered the appellants' defences but it was unimpressed.

On the first appeal, the High Court found merit, rightly so in our view, in the appellants' complaint that the cautioned statements were irregularly admitted at the trial as they were read out by the respective witnesses before having been cleared for admission as directed by this Court in **Robinson Mwanjisi & Others v. Republic** [2003] TLR 218. On account of that infraction, the learned first appellate Judge expunged the statements from the record.

We also feel compelled to observe that the said statements were as well liable to be discounted on the ground that they were admitted at the trial without any inquiry being conducted into their voluntariness following being repudiated or retracted at the time they were tendered. The approach taken by the trial District Magistrate brushing aside the protestations against the admissibility of the statements without any inquiry flies in the face of the settled jurisprudence that such an inquiry is peremptory. That anomaly rendered the statements concerned inadmissible, hence liable to be expunged from the record – see, for example, **Sabas Bazil Marandu @ Myahudi & Ignas Elias Mushi v. Republic**, Criminal Appeal No. 229 of 2013; and **Frank Michael @ Msangi v. Republic**, Criminal Appeal No. 323 of 2013 (both unreported).

Having expunged the confessional statements, the learned first appellate Judge quite correctly took the view that the tenability of the appellants' conviction turned solely on the reliability of the evidence of visual identification. After re-appraising the evidence on record, she upheld the trial court's finding that the appellants were positively identified at the scene by PW7 and that the failure by the police to conduct an identification parade after the appellants had been arrested was inconsequential. As

hinted earlier, the learned appellate Judge sustained the respective conviction and sentence against the appellants.

The appellants now challenge the above outcome on five grounds as follows: **one**, that the charge was incurably defective; **two**, that visual identification evidence was weak and unreliable; **three**, that the testimony of the victim (PW7) was irregular and unreliable because he was not reminded of his oath before being cross-examined by the defence; **four**, that the witness testimonies were recorded contrary to the dictates of section 210 (3) of the Criminal Procedure Act, Cap. 20 RE 2002 ("the CPA"); and **five**, that the prosecution case was not established beyond reasonable doubt.

Before this Court the appellants appeared in person via a virtual link to prosecute their appeal. The respondent Republic, on the other hand, had the joint services of Ms. Janethreza Kitaly, learned Senior State Attorney, and Ms. Neema Mbwana, learned State Attorney.

When invited to address the Court on the appeal, the appellants adopted their grounds of appeal and urged us to allow the appeal without more.

On the part of the respondent, Ms. Kitaly argued in support of the appeal, submitting that the appeal turned on the second and fifth grounds of complaint whose thrust was the issue whether the appellants were positively identified at the scene as the thugs who attacked and robbed PW7.

Ms. Kitaly posited that the visual identification evidence as averred by PW1 was weak and unreliable. She elaborated that while the incident occurred at night around 19:30 hours, PW7 did not give a full account as to how he was able to identify the assailants. Apart from nothing being mentioned on the distance between the crime scene and the alleged source of light at the Kajima Road Construction Camp, the intensity of the light was not addressed. She also urged us to take into account that since PW7 was severely attacked, he must have been too horrified and weak to identify his assailants. In support of her submission, she cited the recent case of **Omary Idd Mbezi v. Republic**, Criminal Appeal No. 224 of 2017 (unreported) wherein the Court referred to its earlier decision in **Waziri Amani v. Republic** [1980] TLR 250 as regards the criteria for determining the propriety and reliability of visual identification.

Moreover, the learned Senior State Attorney contended that an identification parade should have been conducted to support PW7's testimony since he did not say that he knew the appellants prior to the incident. Again, referring to **Omary Idd Mbezi** (*supra*), she submitted that the failure to conduct such a parade rendered PW7's identification of the appellants mere dock identification, which was worthless. In the premises, she concluded that the charged offence was not proved against the appellants.

Following the apparently promising stance taken by the learned Senior State Attorney, the appellants understandably elected to make no rejoinder.

Having scrutinized the record of appeal and taken account of the submissions of the parties, we agree with Ms. Kitaly that the appeal turns on the second and fifth grounds of complaint positing the issue whether the appellants were positively identified at the scene as the thugs who attacked and robbed PW7.

In determining the above issue, we are cognizant that this being a second appeal, we are, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE 2019, mandated to deal with matters of law only but not

matters of fact. However, on the authority of the decision of the Court in the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a host of decisions that followed, the Court can intervene where the courts below misapprehended the evidence, where there were misdirections or non-directions on the evidence or where there was a miscarriage of justice or a violation of some principle of law or practice.

Ahead of dealing with the cogency and reliability of the evidence of visual identification, we wish to remark that we as well duly considered the complaints in the first, third and fourth grounds of appeal but found them bereft of merit as we shall demonstrate hereinbelow, albeit briefly.

Beginning with the contention in the first ground that the charge was incurably defective, we examined the charge at page 1 of the record of appeal and became satisfied that it was proper both in form and content. Apart from the charged offence of armed robbery being rightly laid under the provisions of sections 285 and 285 of the Penal Code as they were at the material time, the particulars of the offence sufficiently disclosed the accusation that the appellants and their co-accused stole from PW7 the

particularized items and that immediately before such stealing they hacked PW7 on his head with a machete so as to obtain the stolen properties.

Similarly, there is clearly no merit in the contention in the third ground of appeal that PW7's testimony in cross-examination was irregularly recorded without oath. We accept Ms. Kitaly's submission that the record at page 54 shows that PW7 took oath on 9th August, 2001 before he adduced his evidence in chief. We further note from the same record that the trial was adjourned to 24th August, 2001 when he came back to the trial court for cross-examination. Certainly, at the time PW7 was still under the oath he took previously, meaning that there was no need for him to retake the oath. Viewed this way, the appellants' contention that PW7 was cross-examined without oath is plainly misconceived.

As hinted earlier, the fourth ground of appeal alleges an impropriety in the manner the trial District Magistrate recorded witness testimonies. We are cognizant that section 210 (3) of the CPA enacts the procedure for handling a witness' testimony after it is recorded. It states that:

> *"The magistrate shall inform each witness that he is entitled to have his evidence read over to him*

and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

The above provision enjoins the presiding magistrate to avail every witness an opportunity to have his evidence read over to him after it is recorded and then note down whatever comments the witness makes after his testimony is read over. This procedure is intended to ensure that every testimony is properly recorded and that it guarantees against distortion, perversion and suppression of evidence – see **the Director of Public Prosecutions v. Hans Aingaya Macha**, Criminal Appeal No. 449 of 2016 (unreported).

It is indeed true that the trial record shows that the trial District Magistrate did not indicate any compliance with the requirement under section 210 (3) of the CPA after recording the testimony of each witness. So, it is true that the aforesaid provision was violated. The issue, then, is what is the effect of this violation? In **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 (unreported), where we confronted the same irregularity, we emphasized that in every procedural

irregularity the crucial question is whether it has occasioned a miscarriage of justice. We, then, reasoned that:

> *"In **Richard Mebolokini v. Republic** [2000] TLR 90, Rutakangwa, J. (as he then was) was faced with a similar complaint. The learned judge observed that when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal. We respectfully agree with that observation. **But in the present case the authenticity of the record is not in issue, at least, the appellant has not so complained. In the circumstances of this case, we think that non-compliance with section 210 (3) of the CPA is curable under section 388 of the CPA.**"* [Emphasis added]

See also **Athuman Hassan v. Republic**, Criminal Appeal No. 84 of 2013; **Elia Wami v. Republic**, Criminal Appeal No. 30 of 2008; **Omari Mussa Juma v. Republic**, Criminal Appeal No. 73 of 2015; and **Flano Masalu @ Singu and Four Others v. Republic**, Criminal Appeal No. 366 of 2018 (all unreported).

As we are satisfied that the authenticity of the trial record is not in question in the instant appeal, we hold that the omission complained of

occasioned no miscarriage of justice to the appellants. We thus dismiss the ground of appeal at hand for want of merit.

We now revert to the main question – the cogency and reliability of the evidence of visual identification. To resolve this issue, we wish to refer to the guidelines on visual identification as stated in our seminal decision in **Waziri Amani** (*supra*). In that case, we cautioned, at pages 251 – 252, that:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the 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.****"*[Emphasis added]

Then, the Court acknowledged that although there were no clear-cut rules laid down as to the manner a trial court should determine the question of disputed identity, a proper resolution of such a question would entail showing on the record a careful and considered analysis of all the

surrounding circumstances of the crime being tried. The Court stated further, at p. 252, that:

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

It is common cause in the instant matter that the attack on PW7 was carried out at night, around 19:30 hours. PW7 claimed that the second and third appellants attacked him first and then the first and fourth appellants together with the said George Patrick entered the fray from a nearby valley. While the first appellant hacked him with a machete, the second appellant grabbed his pair of shoes and the third appellant relieved

him of his money. He was also explicit that the fourth appellant snatched his *Rado* watch. As hinted earlier, PW7 was firm that he saw and identified the appellants because the crime scene was illuminated by light from the nearby Kajima Road Construction Camp as well as light from passing motor vehicles in addition to moonlight.

The above tale, in our considered view, is plainly lacking in cogency. To begin with, we agree with Ms. Kitaly's submission that PW7 did not mention the distance between the crime scene and the source of light at the construction camp, meaning that it was not clear how intense the light was at the scene. There might have been some moonlight but again its intensity was not disclosed. The headlights of the passing vehicles might have lit up the scene but it occurs to us that this source of light was no more than fleeting and unreliable. In this context, there was no assurance that the scene was well lit for the witness to observe and identify his attackers.

The question whether PW1 knew his assailants before the incident or not was obviously an important consideration but it was not fully appreciated by the courts below. We think on the evidence on record, it was clear that PW7 was waylaid and attacked by strangers who left him

for dead at the scene. If this witness truly identified the appellants as his attackers, we expected that he would have given to the police their descriptions in terms of their attire or physique but no such evidence was led at the trial.

The above gap is further compounded by the failure by the police to conduct an identification parade which, as rightly argued by Ms. Kitaly, rendered PW7's identification of the appellants no more than worthless dock identification – see, for example, **Thadey Rajabu @ Kokomiti v. Republic**, Criminal Appeal No. 58 of 2013 (unreported). There is no doubt that the learned appellate Judge's finding to the contrary as shown at page 222 of the record of appeal that the aforesaid omission *"cannot water down the weight of the evidence of PW7 so far as the issue of visual identification of the appellants at the scene of the crime is concerned"* is a clear misapprehension of the law. In this sense, we find it instructive to recall what we stated in **Mussa Elias and Three Others v. Republic**, Criminal Appeal No. 172 of 1993 (unreported):

> *"... dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade of which the witness successfully identified the*

accused before the witness was called to give evidence at the trial."

In view of the misapprehension of the evidence and the law as aforesaid, we find merit in the second ground of appeal. We are, therefore, enjoined to interfere with the concurrent findings of the courts below on the issue of visual identification. We think that the evidence on record was not watertight for a firm and positive identification of the appellants as the perpetrators of the armed robbery. In the premises, we also find merit in the fifth ground of appeal that the prosecution case was not proved beyond reasonable doubt.

Before we take leave of the matter, we wish to state that we heard this appeal on 16th September, 2020 sitting as a usual panel of three justices of appeal including the late Mmilla, J.A. who was the presiding Chairperson. After the hearing, we immediately held a conference, again presided over by him, where we reached a complete consensus on the reasoning and the outcome of the appeal. Sadly, Mmilla, J.A. passed away on 24th September, 2020 before the composition and signing of this judgment. We recall that the Court once faced an unhappy occurrence like this in **Ahamad Chali v. Republic** [2006] TLR 13 but at the time the

rules of the Court were silent on the matter. Thankfully, this scenario is presently governed by Rule 39 (11) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), as amended by the Tanzania Court of Appeal (Amendment) Rules, 2019, G.N. No. 344 of 2019, which states as follows:

> *"(11) Where one of the members of the Court dies, ceases to hold office or is unable to perform the functions of his office by reason of infirmity of the mind or body, the remaining members, if-*
>
> *(a)* ***after considering the facts of the appeal or matter before them have concurring opinion, shall deliver the judgment****; and*
>
> *(b) they do not concur, the matter shall be referred to the Chief Justice for constituting another panel to conduct a fresh hearing."*
> [Emphasis added]

This judgment is, therefore, made pursuant to Rule 39 (11) (a) of the Rules as it expresses our concurring opinion as surviving members of the panel.

The upshot of the matter is that for the reasons we have stated the appeal has merit. Accordingly, we allow the appeal, quash the convictions

and set aside the sentences against the appellants. The appellants are to be released from prison unless they are held for other lawful causes.

DATED at **DAR ES SALAAM** this 29th day of September, 2020.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of October 2020, in the presence of the 1st Appellant in person linked via video conference at Songea, 2nd appellant at Ukonga, 3rd and 4th appellants at Isanga Dodoma and Mr. Adolf Kissima State Attorney for the Respondent is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL