IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A., and KITUSI, J.A.)

CRIMINAL APPEAL NO. 188 OF 2018

1. EMMANUEL DENIS MOSHA
2. ELISHA SIMON MOLLEL
3. YASIN SWALEHE NANDA @ CHALII ..... **APPELLANTS**

VERSUS

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

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

(Mwenempazi, J.)

dated the 27th day of July, 2018
in
Criminal Appeal No. 221 of 2017

JUDGMENT OF THE COURT

25th August & 12th October, 2020

KITUSI, J.A.:

On 7/8/2015, Happiness Msumini (PW3) was on night duty as a receptionist at a Hotel known as Defrance, within the City of Dar es Salaam, and Ibrahim Mtumwa (PW2) was also on duty as a security man at that Hotel. It is alleged that at about 2:00 a.m. two things happened almost simultaneously, and that is according to the testimonies of PW2 and PW3.

At the reception desk, two people appeared and requested PW3 for rooms, but she told them the Hotel had been booked up. At the main entrance gate a motor vehicle described by PW2 as Alteza CXH, Silver in colour, pulled up and the driver remained in the car, explaining to PW2 that he was there to pick two colleagues of his who were in the Hotel trying to get rooms. PW2 ignored the man in the motor vehicle believing him to be just another customer.

However, immediately thereafter, PW2 saw two people emerge from the Hotel in a run and they jumped into the car, an act which made PW2 suspicious. He moved towards the Hotel with the view of finding out what had happened, but met PW3 midway and she was screaming that the two men had attacked her. According to PW3 when she told the two people that there were no vacant rooms and as she was recommending to them an alternative hotel, they ordered her to remain still and one of them pulled a gun and pointed it at her. She was ordered to lie down, which she obeyed, and she could see one of the bandits whom she described as short and white, go across the counter where she was, and by using keys he had snatched from her, opened the drawer containing money. He took a total of Tshs.470,000/= in cash and mobile phone recharge vouchers worth

Tshs.1,135,000/=. Then the bandits left. PW3 rose and got out of the hotel screaming.

PW3 said she informed her employer about the robbery, the matter was reported to police and eventually three people namely, Emmanuel Denis Mosha, Elisha Simon Mollel and Yasin Swalehe Nanda @ Chalii, the first, second and third appellants respectively, were arrested and charged with armed robbery under section 287A of the Penal Code, [Cap 16 R.E 2002] hereafter the Code. It was alleged that they stole cash Tshs. 470,000 and pre-paid airtime vouchers of Airtel, Tigo and Vodacom, valued at Tshs.1,135,000/= the property of Defrance Hotel, and that in the course of committing the robbery they threatened PW3 with a gun. They were convicted by the trial court and sentenced to 30 years imprisonment each, and their appeal to the High Court was unsuccessful. Hence this appeal.

The evidence for the prosecution was that PW3 identified the two people who invaded her at the reception and these, she said, were the second accused (second appellant) and the third accused (third appellant). Even when cross- examined by the two appellants she maintained that she identified them by the aid of a big electricity bulb which was illuminating

the reception and she could tell that it is the second appellant who pulled the gun on her. There was also the evidence of PW2 who testified that he identified the driver of the motor vehicle which facilitated the escape of the bandits. He picked the third appellant as being the said driver.

A month later on 9/9/2015, PW2 and PW3 identified the bandits in two identification parades that were conducted under the superintendence of Insp. Ezekiel Kyobo (PW4). In the first parade consisting of 12 participants, it was intended that two suspects be identified, and PW3 identified the first accused (first appellant) and the second accused (second appellant). In the second parade that involved 9 participants, from which one suspect was to be picked, the third appellant was identified by PW2. Despite objections from the appellants, the two identification parade forms were collectively admitted as Exhibit P1, and the efficacy of the parades still forms a basis of considerable dispute in this appeal.

The other piece of evidence that was relied upon by the prosecution is the confession allegedly made by the second appellant during interrogations conducted by CPL Amir (PW6). After a trial within a trial, the trial court was satisfied that the statement was admissible and it proceeded to admit it as exhibit P2. Both during the trial and before us,

the issue of whether the statement was recorded in compliance with the law, especially regarding time, features prominently.

In defence, the appellants denied being involved in any robbery and gave accounts of how, being strangers to one another, they were joined in this case after being randomly arrested on diverse dates. They tried to puncture holes in the evidence of visual identification, identification parades and cautioned statement. Despite that, the two courts below accepted the prosecution's side of the story and found no reasonable doubt introduced by the defence. They were convicted and sentenced as alluded to earlier.

This appeal raises a total of six grounds; five grounds in the main joint memorandum of appeal and one ground in the supplementary memorandum of appeal, which the appellants also lodged jointly.

At the hearing, the appellants fully participated from Ukonga Central Prison through video conferencing facility owned by the Judiciary, while the respondent Republic was represented by Mr. Credo Rugaju, learned Senior State Attorney and Ms. Brenda Massawe, learned State Attorney. The

appellants chose to let the State Attorneys break the ice and retained the right to rejoin, which we must admit, they did quite vigorously.

In resisting the appeal, Ms. Massawe argued grounds 1 and 2 separately, then grounds 3, 4, 5 jointly and lastly ground 6 which was also argued separately. We endorsed that scheme because the gist of the complaints may be grouped in those categories, although in our deliberations we shall deal with ground six first, it being a less substantive ground of appeal.

In ground 6 of appeal, the trial court is faulted for not complying with the provisions of section 210 (3) of the Criminal Procedure Act, [Cap 20 R.E 2002] (the CPA), in recording the evidence of PW4 and DW2. Ms. Massawe started by pointing out that the ground is new in that it was not raised at the High Court, but noting that it is raising a point of law, she proceeded to argue it all the same. While conceding that the trial court did not comply with the provisions of section 210 (3) of the CPA in recording the testimonies of PW4 and DW2, the learned State Attorney maintained that the noncompliance did not prejudice the appellants. She argued that PW4 did not complain, neither did DW2 allege that what is on record is not

what he stated when testifying. The learned State Attorney prayed that we dismiss this ground and consider the procedural error cured under section 388 of the CPA. She also referred us to cases including that of **Flano Alphonce Masalu @ Singu & 4 Others v. Republic,** Criminal Appeal No. 366 of 2018 (unreported).

Obviously, section 210 (3) of the CPA was not complied with by the trial magistrate, and the infraction escaped the eye of the learned High Court Judge who sat on first appeal. However, all that the said provision requires of a magistrate is for him or her to read over the substance of the testimony to the witness in order to authenticate it. Much as this provision is a quality assurance section when it comes to evidence recording, and much as adherence to that provision should be keenly emphasized, we agree with the learned State Attorney that in the absence of proof that the omission prejudiced the appellants, the noncompliance is inconsequential. With respect, we also agree with her that nowhere has the second appellant, who is DW2, suggested that the record is a misrepresentation of what he stated in court at the trial. We also need to make a reminder here, that court proceedings are too sacred to be disbelieved easily, and we have had occasions to say this in many a case, such as in **Flano Alphonce**

Masalu @ Kingu (supra) which the learned State Attorney cited to us and others. In **Alex Ndendya v. Republic,** Criminal Appeal No. 207 of 2018 (unreported) where we stated at page 12:

> *"It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record".*

Other cases on that point were cited in the case of **Alex Ndendya** (supra) and they are; **Halfan Sudi v. Abieza Chichili** [1998] T.L.R 527 and the earlier case of **Shabir F. A. Jessa v. Rajkumar Deogra,** Civil Reference No. 12 of 1994 (unreported). This ground of appeal therefore, though partly conceded to, is dismissed for being inconsequential.

After dealing with that procedural ground of appeal, we now go back to the substantive grounds of appeal in the chronology as suggested by the learned State Attorney, beginning with the first ground. The first ground of appeal seeks to fault the High Court Judge for accepting the evidence of PW2 and PW3 on visual identification of the appellants and that of the

identification parades which violated P.G.O No 232 Rules 1, 2K, 2H, 2N, 2G, 2P and 2S.

Ms. Massawe had a two-sided argument in respect of the first ground of appeal. First, she submitted that convictions of the appellants were not solely based on the evidence of identification parades. She pointed out that there was evidence of PW3 that she identified the first and second appellants although she mistakenly picked the third appellant during the parade. She referred us to the case of **Mercelina Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 (unreported) to make a point that we should ignore discrepancies on small details. She went on to submit that there is evidence of PW2 that he stayed with the driver of the runaway motor vehicle for a long time which gave him the opportunity to identify the third appellant. Thus, in effect the learned State Attorney submitted that there was evidence of visual identification in addition to that of identification parades.

Secondly, she addressed the alleged noncompliance with the Police General Orders (P.G.O) No. 232. She drew our attention to various parts of the testimony of PW4 and submitted how he established that the said

requirements as obtained in the P.G.O 232 were met. She referred us to PW4's testimony stating that he lined up people of the same height and colour, which was in compliance with regulation 2K. She went on to submit that it is PW4, not the arresting officer as alleged by the appellants, who beckoned the witnesses to the parade ground in compliance with regulation 2H. She concluded by submitting that regulation 2N regarding the number of participants in the parade was complied with, and so was regulation 2S which requires the police officer who conducts it to complete a form after the parade.

In rejoinder the appellants attacked the learned State Attorney's submissions on the first ground of appeal. The first appellant submitted that the conclusion by the learned High Court Judge at page 183 of the record of appeal that PW3 identified him is not consistent with the evidence of PW2 and PW3 who did not state any where that they identified him. He then pointed out faults in the identification parades including the fact that PW3 said the participants in those parades did not look alike, a different account from that of PW4 who said they were alike. Again, PW3 said she was positioned where she could see in advance the suspects being led to the parade ground which, he submitted, compromised the parade's

credibility. Then, he referred to yet another contradiction between PW3 and PW4 on whether PW3 identified the first and second appellants as stated by PW4 at page 37 or she identified no one as she herself (PW3) stated at page 30 of the record of appeal.

The second appellant wondered why would PW3 identify him as the person who attacked her in the hotel while PW2 who was manning the gate did not see him enter. Then he made submissions more or less like the first appellant's in relation to the contradictions in the evidence of PW3 and PW4 regarding the parade.

The third appellant made some distinct submissions showing weaknesses in the evidence of visual identification. He pointed out that at page 23 of the record of appeal, PW2 stated that he identified him at the gate, yet at page 30 PW3 said she also identified him as one of the two bandits at the reception desk. He then raised a rhetoric that, if it was PW3 who informed PW2 that there had been robbery inside the hotel, what reason did PW2 have to commit the driver to memory when he said he took him to be just another customer of the hotel? In addition, it was the third appellant's submission that neither PW2 or PW3 on the one hand, nor

the hotel owner who wrote Exhibit D1 on the other, did give to the Police the description of the bandits. This last part of the third appellant's submission has a bearing on how the appellants were arrested, and it shall be determined later by referring to the evidence of PW1. At the moment we shall skip our determination of the first ground of appeal until later, as we are going to deal with ground 2 of appeal next.

Ground 2 of appeal criticizes the trial court as well as the High Court for relying on the cautioned statement of the second appellant (Exhibit P 2) which was recorded in violation of the law. Ms. Massawe began by conceding that the cautioned statement (Exhibit P2) was recorded outside the basic hours stipulated under the law because the maker was arrested on 28/8/2015, yet the statement was recorded on 31/8/2015. The learned State counsel, however, sought to rationalize the delay by citing complications in arresting the suspects. She impressed on us that in similar circumstances in the case of **DPP v. James Msumule @ Jembe and 4 Others,** Criminal Appeal No. 397 of 2018 (unreported), we condoned the delay.

It is the second appellant who allegedly made the disputed cautioned statement and it is him who submitted about it in rejoinder. He submitted that if the police had difficult in getting the statement recorded within time, they should have applied for extension of time according to law, but they did not. He also criticized the trial court for admitting the statement during the trial within trial even before the ruling which, he submitted, was not consistent with the law as found in the case of **Seleman Abdallah v. Republic**, Criminal Appeal No. 384 of 2008 (unreported). Even then, he submitted, the statement did not give the description of the bandits, so it could not have enabled the police to arrest the other suspects.

At this juncture we shall, as earlier promised, make reference to the evidence of PW1 on how and when he effected the arrest of the appellants. According to PW1, the police were looking for a group of serial robbers who were stalking hotels in the city, using a motor vehicle known as Alterza. On 28/8/2015 when PW1 and other police officers were on routine patrol, they saw a vehicle that answered the description of the one they had been tipped about. They ordered the vehicle to stop and it turned out that it was the third appellant who was driving it. He was arrested and interrogated. The second appellant was arrested on the same date at

around 8.00 pm after the third appellant named him as one of the members of the group of wanted villains. The second appellant's statement was recorded on 31/8/2015, about three days later.

So, the question that immediately comes to mind is, what sort of complication hindered the taking of the second appellant's statement when he was already under arrest as early as 8.00 pm on 28/8/2015? The explanation in this case is clearly lame. This case is quite distinguishable from the case of **DPP v. James Msumule @ Jembe** (supra) because in the present case all the named suspects were within the city of Dar es Salaam, unlike in that case where the suspects were scattered in different villages. In another previous decision we condoned the delay because some of the suspects were arrested in jurisdictions other than the one where the alleged offence had been committed. It was in the case of **Andius George Songoloka and 2 Others v. The DPP**, Criminal Appeal No. 373 of 2017 (unreported). From our discussion on the issue raised in the second ground of appeal, we are constrained to emphasize the statutory requirement to record cautioned statements within 4 hours of the arrest of suspects, and we decline the invitation to consider the circumstances of this case as falling under exception to that rule. Without

ado, we conclude that the cautioned statement violated the provisions of section 50 (1) of the CPA so we shall disregard it. The second ground of appeal has merit and we allow it for the reasons shown.

It is now time for us to pronounce ourselves on ground 1 of appeal. The question is whether PW2 and PW3 identified the appellants, and if so, whether they described them so as to link their evidence of visual identification to the arrest of the suspects and to the parade of identification that followed. For, as we stated in **Gwisu Nkonoli & 3 Others v. Republic**, Criminal Appeal No.359 of 2014 (unreported), a parade of identification must be preceded by a description of the culprits. In **Ahmad Hassan Marwa v. Republic,** Criminal Appeal No. 264 of 2005 (unreported), cited in **Flano Alphonce Masalu @ Singu** (supra) we said in part:

> *"...an identification parade is itself not substantive evidence, but only admitted for collateral purposes".*

Now as we have said, the two cornerstone questions are; whether PW2 and PW3 identified the culprits and subsequently gave description of those culprits before they took part in the identification parades. We wish to start with PW2 and PW3 by taking a close look at their testimonies. In

doing so we shall keep in mind that the time was odd, and the incident lasted for a short time.

In her testimony in chief, PW3 stated initially that the third appellant was one of the two bandits who showed up at the reception desk where she was. The same third appellant however, was identified by PW2 as the person who was sitting on the driving seat of the 'Alterza' which he parked outside the gate. This, in our view, is a grave inconsistence that cannot just be wished away, because it touches on the issue of visual identification which is the root of the matter. It discredits PW2 and PW3, the key witnesses for the prosecution on the issue of visual identification because the third appellant could not have been simultaneously at the reception desk inside the hotel, and yet sitting in the car that he had parked outside the gate.

We have also considered the reality of what may have taken place at the reception desk at that odd hour. If there were no rooms vacant, we somehow wonder why did PW3 keep all the lights on as to illuminate the area at 2.00 am. As PW3 did not describe the intensity of the light at the reception, we think at best she may only have seen silhouettes of her

attackers and that explains her inability to give their descriptions. Such evidence could not be relied upon to find a conviction. As regards PW2, his testimony is equally of no value. He did not explain how he identified the driver of the runaway vehicle in view of the fact that that man remained in the car during his brief conversation with him. Similarly, this explains PW2's inability to give a description of the driver when the police took charge of the matter. The only thing that seems to have been described to PW1 was the vehicle and that hangs the prosecution case on a very thin thread. The vehicle had not been described by registration number or any other special mark.

In our jurisdiction it is settled law that in determining the issue of visual identification, it is the duty of courts to consider factors enabling positive identification and eliminate possibilities of mistaken identity. This is about the most frequently decided point, so cases on it are abound. See for instance, **Ally Manono v. Republic**, Criminal Appeal No. 242 of 2007, **Juma Machemba v. Republic**, Criminal Appeal No. 102 of 2015 and **Nhembo Ndalu v. Republic**, Criminal Appeal No. 33 of 2005 (all unreported). In this case however, the key witnesses have neither testified on factors for positive identification nor convinced us that possibilities of

mistaken identity were eliminated. We have no hesitation in finding the evidence of visual identification to have been inadequate.

Ordinarily we would have stopped there because, as we have stated a while ago, once the evidence of visual identification is found to be wanting, the parade of identification cannot come in to cure the deficiency. However, for completeness, we shall address the points raised in this respect. Ms. Massawe maintained that the parade was conducted in compliance with the dictates of the law, but she did not clear two major doubts raised by the appellants. The first is the fact that PW3 stated in her testimony that the people who were lined up in the parade did not resemble. The second is that PW3 was positioned where she could see the culprits ahead of the parade. Without going further, we are satisfied that these two faults are sufficient to discredit the parade of identification which, for no apparent reason, was conducted one month after the appellant had been arrested. We find the parade to have been of no evidential value.

Thus, we find merit in the first ground of appeal too.

Generally, grounds 3, 4, and 5 to which we now turn, challenge the decision of the two courts below for concluding that the prosecution had proved the case against the appellant beyond reasonable doubt while it had not. In this regard, the appellants submitted that the case for the prosecution was fraught with contradictions. For instance, PW2 and PW3 contradicted one another as to whether the third appellant was one of the bandits at the reception desk or he was outside as the driver. Then PW3 and PW4 contradicted one another on the way the parade of identification was conducted. We have considered these submissions in line with the evidence on record and it dawns on us that these contradictions are indeed there and have not been resolved.

Earlier in this judgment we stated that the case for the prosecution was based on the evidence of visual identification and that of the parade, as well as the cautioned statement. Now having concluded, because of the unresolved contradictions, that the evidence of visual identification was inadequate which rendered the parade of identification hollow, and also having concluded that the cautioned statement was recorded outside the statutory time of 4 hours, there remains no evidence that would have

supported the prosecution case. We consequently find merit in the complaint raised in grounds 3, 4 and 5.

Accordingly, this appeal has merit and it is allowed. The convictions entered against the appellants are quashed and the sentences imposed set aside. The appellants shall be released from prison immediately unless they are held for some other lawful cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 9th day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of October, 2020 in presence of the Appellants via Video link and Chesensi Gavyole, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL