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. 177 OF 2018

1. PAUL THOMAS KOMBA
2. AMIRY HAMIS OMARY .....**APPELLANTS**

VERSUS

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

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

(Ngwembe, J.)

dated the 27th day of June, 2018
in
Criminal Appeal No. 376 of 2017

JUDGMENT OF THE COURT

17th August & 21st October, 2020

MKUYE, J.A.:

The appellants Paul Thomas Komba and Amiry Hamis Omary (the 1st and 2nd Appellants) were charged and convicted with the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 R.E 2002 by the District Court of Temeke at Temeke and were each sentenced to 30 years imprisonment.

They unsuccessfully appealed to the High Court of Tanzania at Dar es Salaam, hence this second appeal.

The brief facts leading to this appeal are that, the victim Nicholaus Tilya (PW2) was a businessman conducting his activities at Temeke Sokota within Temeke District. On the material day, while accompanied by his relative Sali Athanas Tilya (PW1) went to NBC Bank branch at the National Stadium area and withdrew from the bank Tshs. 5,500,000/= to facilitate his business errands. On their way back heading home, upon arrival at the gate while waiting for the gate to be opened for them, a motorcycle approached them and two persons alighted one brandishing a pistol and demanded that they hand over the money. PW2 who had custody of the money got out of the car carrying the envelop containing the money and started running. Unfortunately, he tripped and fell down and the bandit who was running after him managed to pick up the envelop with money and they boarded the motorcycle and left.

The incident was reported to the police and PW2 who had sustained injuries at the shoulder after having fallen down was issued with the PF3 for treatment. It is not borne in evidence how the appellants were arrested but an identification parade was conducted and the appellants were allegedly identified at the parade by both PW1 and PW2 as the thugs who

robbed them. The appellants also recorded their cautioned statements and only the cautioned statement of the 2nd appellant was tendered and admitted in evidence as Exh. P3. The prosecution presented five witnesses to prove the case and the defence had two witnesses, the appellants themselves. Upon a full trial, the trial court convicted the appellants and sentenced them; and their appeals to the High Court were unsuccessful as alluded to earlier on.

The appellants have fronted five grounds of appeal in the substantive Memorandum of Appeal and seven grounds in the Supplementary Memorandum of Appeal which can conveniently be paraphrased as follows:

1) *The 1st appellate court sustained the appellants' conviction based on the defective charge.*

2) *The 1st appellate court sustained conviction on the basis of incredible visual identification by PW1 and PW2.*

3) *The 1st appellate court relied on unprocedural identification parade conducted in contravention of the rules of PGO No. 232 and conducted out of the prescribed time.*

4) *The 1st appellate court erred in relying on the retracted and repudiated cautioned statement (Ex. P3) of the 2nd appellant as it was obtained un procedurally.*

5) *The 1st appellate court disregarded the appellants illegal arrest and detained in police custody beyond the prescribed period.*

6) *The 1st appellate court sustained the appellants' conviction while they were not furnished with the complainants' statement as required by section 9 (3) of the CPA, Cap. 20 RE 2002.*

7) *The 1st appellate court sustained the conviction in disregard of the unshaken defence of alibi raised in compliance with section 194 (4) of CPA; (Cap. 20).*

8) *The 1st appellate court sustained the conviction relying on the evidence recorded in reported speech.*

9) *The 1st appellate court sustained the conviction relying on the PF3 admitted in contravention of section 240 (3) of CPA.*

10) *The 1st appellate court grossly erred in holding that the prosecution proved the case beyond reasonable doubt.*

When the appeal was called on for hearing on 17th August, 2020, the appellants appeared in person, unrepresented while linked through video conference from Ukonga Central Prison; and the respondent Republic had

the services of Mr. Gabriel Kamugisha and Mr. Erick Shija both learned State Attorneys.

The appellants in the first place sought to adopt their substantive and supplementary memoranda of appeal and in addition the 2nd appellant sought to adopt the written submission to form part of their submission. Then, they preferred for the learned State Attorney to respond to their grounds first and reserved their right to rejoin later, if need would arise.

It is noteworthy that on 17th August, 2020 when the matter was called on for hearing, Mr. Kamugisha readily conceded to the 1st ground of appeal on the defective charge and urged us to allow the appeal on that ground alone. However, on reflection, the Court recalled the parties on 21st August, 2020 so as to address it on the other grounds of appeal. Hence, our decision will base on the submissions made on the two dates on the basis of the grounds of appeal which we have found it appropriate to cluster into the following issues: defective charge, visual identification and identification parade, cautioned statement and defence of *alibi.*

In response to the complaint relating to the defective charge, Mr. Kamugisha readily conceded to it. He argued that the charge was defective

for failure to disclose in the particulars of offence to whom the pistol was directed when the offence was committed. He said, this contravened the provisions of section 132 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) and that the anomaly prejudiced the appellants as they did not understand well the charge to enable them prepare their defence. While relying on the case of **Juma Maganga v. Republic**, Criminal Appeal No. 427 of 2016 (unreported), he argued that the defect was fatal and incurable under section 388 of the CPA.

With regard to the appellants' complaint on visual identification and identification parade evidence, Mr. Kamugisha argued that the visual identification evidence was not watertight as PW1 said he identified the appellants by face without first having given description of their physical appearance. Neither did PW2 do so. The case of **Joasiala Nicholous Marwa & 2 Others v. Republic,** Criminal Appeal No. 384 of 2008 (unreported) was cited to us in support of his argument. As to the second limb of identification, he contended that the identification parade did not comply with PGO No. 232 because according to PW3, the 1st and 2nd

appellants who did not have similar physical features were placed in the same parade.

With regard to the complaint that the 2nd appellant's cautioned statement was obtained un-procedurally, the learned State Attorney similarly conceded to it. He argued that the same was admitted in evidence though it was objected to its being tendered on the ground that it purports to show that it was recorded on 11/7/2016 while he (2nd appellant) was arrested on 13/7/2016. While relying on the case of **Seleman Abdallah v. Republic,** Criminal Appeal No. 384 of 2008 (unreported), he argued, the trial court ought to stop the proceedings and conduct an inquiry to ascertain whether it was really made including its voluntariness. On that account, he prayed for its expungement.

As regards the issue of failure to consider the 1st appellants' defence of *alibi*, Mr. Kamugisha submitted that there was no notice issued by the 1st appellant that he will rely on the defence of *alibi*.

On the complaint that the case was not proved beyond reasonable doubt, the learned State Attorney equally conceded to it arguing that the identification evidence was not watertight. He added that, if the 2nd

appellant's cautioned statement which was admitted un-procedurally is expunged, the remaining evidence cannot sustain the conviction.

In the end, he implored the Court to find that the prosecution failed to prove the case beyond reasonable doubt and allow the appeal with the immediate release of the appellants from custody.

On their part, the appellants welcomed the learned State Attorney's submission and urged the Court to consider it and set them free.

Having summarized the arguments from both sides, we think, now we are in a position to deliberate on them. We propose to begin with the issue concerning the defective charge.

The appellants were charged with an offence of armed robbery contrary to section 287A of the Penal Code. In the charge of armed robbery under the said section it is a requirement to mention the threat or violence as it is an essential element and to show in the particulars of offence the person to whom that threat is directed. (See **Kashima Mnadi v. Republic,** Criminal Appeal No. 78 of 2011 (unreported). We think at

this juncture it is instructive to reproduce the particulars of the offence as hereunder:-

> ***"PARTICULARS OF OFFENCE.***
> *Paulo Thobias Komba and Amiry Hamis Omary on 8th day of July, 2016 at Chang'ombe Unubini area within Temeke District in Dar es Salaam Region did steal cash money 5,500,000/= Tshs the property of Nicolous Tilya and immediately before such stealing they use (sic) pistol in order to obtain the said property."*

As it is, we think, the above excerpt does not indicate sufficiently the nature of the offence as required by section 132 of the CPA which requires the charge to contain among others such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. In particular, though the particulars show that a pistol was used, they do not disclose to whom the threat was directed during the commission of the offence and more so when the complainants were two.

This Court has in times without number held that where the person to whom the threat is directed is not disclosed, the charge would be rendered fatally defective and cannot be cured by section 388 of the CPA.

In the case of **Juma Maganga** (supra) the Court emphasized that the charge which lacked essential ingredients of the offence of robbery, was incurably defective and could not be salvaged under section 388 of the CPA. Even in this case, since there was no disclosure as to whom the threat was directed in the particulars of the offence, we find that the charge was incurably defective and, indeed, it prejudiced the appellants. We, thus, find merit in this ground of appeal.

Ordinarily, we think, this ground alone could have sufficed to dispose of the entire appeal. However, having regard to the nature of the matter, we feel compelled to go a step further and deal with the issues of visual identification and identification parade, cautioned statement and defence of *alibi* which we had identified earlier on.

As to the issue of visual identification, it is now settled that the evidence of visual identification is the weakest kind and most unreliable and that courts should not act on it unless all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence which is before it is absolutely watertight (See **Waziri Amani v. Republic**, (1980) TLR 250.

It is also noteworthy that among other factors, according to the prevailing circumstances, to be considered in the issues of identity of the accused is the description and the terms of the description given, by the person who gives description or purports to identify the accused and then by the person to whom the description was given. (See **Republic v. Allui,** (1942) EACA 52).

In this case, PW1 and PW2 were the identifying witnesses. PW1 stated in evidence at page 14 of the record of appeal that on arriving at PW2's residence they were attacked by persons on a motorcycle who alighted and approached them while wielding a gun and demanded to be given money. He further stated that PW2 managed to get out of the car with the money and took to his heels. Unfortunately, he fell down, and the invaders took the money away. PW2 said, he saw the motorcycle which came and stopped behind them and the passenger alighted while carrying a pistol, silver in colour, and then he (PW2) took the money and started running but unfortunately, he fell down and the money was taken by the robber. As he got injured, they reported the matter at Chang'ombe Police Station and went to Temeke Hospital for treatment. What we ask ourselves

is whether PW1 and PW2 were able to identify the appellants to be their assailants.

Upon our examination of the record of appeal we have been unable to glean how PW1 and PW2 identified the appellants. Apart from contradicting themselves on the weapon the assailants carried, they did not give description of the appellants and how they were able to identify them. They did not describe the appellants in terms of their physique or even their attire. Neither of the two witnesses stated the duration of the incident and for how long they kept them under observation. Looking at the two witnesses' testimonies it shows that it was a sudden invasion which must have caused a shock which might have affected even their attention. Apart from that, PW2 fell down, and there is no explanation whether he still continued to observe the appellants while on the ground. This crucial information was expected to have been given to the police when they reported the incident and given a PF3 for medical treatment or when they came back from the hospital which could have been testified by PW4 as well. Given the circumstances of this case, we even wonder as to what led the police to arrest them. In this regard, we agree with the learned State

Attorney that the visual identification was not watertight in the circumstances.

But again, the visual identification is also vitiated by the identification parade. This is so because, as was rightly argued by Mr. Kamugisha, the same was conducted in contravention of PGO No. 232 as it was not fully complied with. Not only that, but also PW1 and PW2 did not describe their assailants before identifying them in the identification parade. As it is, a person who did not identify the assailant at the scene of crime cannot allege to have identified him at the identification parade. The value of description of the suspect before the witness identifies him in the identification parade was reiterated in the case of **Flano Alfonce Masalu @ Singu v. Republic**, Criminal Appeal No. 366 of 2018 (unreported), where the Court cited with approval the case **Emilian Aidan Fungo @ Alex and Another v. Republic,** Criminal Appeal No. 278 of 2008 (unreported) in which it was stated as follows:

> *"It is the law that for any identification parade to be of any value, the identifying witness(es) must have earlier given a detailed description of the suspect before being taken to the identification parade."*

Thus, in this case, lack of description of the assailants before the identification parade was conducted, vitiates the evidence of that parade.

Another complaint regarding the contravention of PGO 232, is that the two suspects (the appellants) were placed on one parade consisting 12 people. The appellants objected to the tendering of the Identification Register alleging that their body structures were different from other participants in the parade. In his evidence, Ass. Insp. Daniel (PW3) also admitted that the 1st appellant's body structure was different from the 2nd appellant.

Unfortunately, the trial magistrate admitted in evidence such Identification Register without any reason being assigned. This was contrary to paragraph 2 (n) to PGO No. 232 which requires more than one parade to be conducted in case there are more than one suspect to be identified. If such procedure is not followed, the evidence on identification parade is of no evidential value and is bound to be discarded. (See **Said Lubinza and Others v. Republic,** Consolidated Criminal Appeal Nos. 24, 25, 26 27 and 28 of 2012 (unreported)). Even in this case, in the absence

of a valid identification parade, such evidence has to be discarded as we hereby do.

We now turn to the issue that the cautioned statement was admitted un-procedurally. This complaint has merit. The record of appeal bears it that the trial court admitted the cautioned statement without giving any reason though it was objected from being tendered on account that it purported to show that it was made even before the 2nd appellant's arrest. We think, after the 2nd appellant had objected to the tendering of the said cautioned statement, the trial court ought to have given a ruling on it showing whether it was recorded before his arrest or not. Unfortunately, that was not done.

On top of that, the said cautioned statement was not read over after having been admitted in evidence to enable the 2nd appellant understand its gist. In the case of **Robinson Mwanjisi v. Republic,** [2003] TLR 218, the Court clearly explained that:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out."*

In the instant case, as already hinted above, as the cautioned statement was not read over to the 2nd appellant, it is obvious that such failure might have prejudiced him for not knowing the content of the cautioned statement. This was a fatal irregularity which was not curable. See **Robinson Mwanjisi** (supra); and **Ramadhani Mboya Mahimbo v. Republic,** Criminal Appeal No. 325 of 2017 (unreported). Consequently, such omission to read over the cautioned statement to the appellants rendered the said cautioned statement to have no evidential value and hence, we accordingly expunge it from the evidence.

In relation to the issue of *alibi,* we think it should not detain us much. This is because it is cardinal principle for a prior notice to rely on such defence to be given as per section 194 (4) of the CPA; or if the accused fails to give such notice at the early stage then he will be required to give the prosecution the particulars of *alibi* at any time before the prosecution closes its case as per section 194 (5) of the CPA. If the accused raises the said defence against the dictates of section 194 (4) and (5) of the CPA, then the court is entitled to accord no weight to such evidence.

In this case, though the learned State Attorney argued that no notice was issued by the 1st appellant for him to rely on the defence of *alibi,* we have failed to find support on such stance. On the contrary, the 1st appellant had indicated his reliance on such defence and he indeed testified that he had travelled to Mororgoro. Working on the said notice, the prosecution through PW5 who was an employee of Al Saedy High Class Bus countered that the 1st appellant never travelled with their bus on the alleged date (Page 70 of the record of appeal).

Unfortunately, the trial court just summarized the 1st appellant's defence that he had travelled to Morogoro and that such evidence was countered by PW5 but it did not consider or make any finding on it. It is our considered view that, even if the 1st appellant relied on it without first issuing the notice, the trial court ought to decide on that by not according any weight on it. In the case of **Alfeo Valentino v. Republic**, Criminal Appeal No. 92 of 2006 (unreported) when the Court faced a similar situation it stated as follows:

> *"Failure by the trial court to fully consider a defence of alibi and we may add without fear of being contradicted, the defence as a whole is a serious*

error. We are settled in our mind, therefore, that the trial court fatally erred in not considering the entire defence before finding the appellant guilty."

We, on our part, subscribe to the above cited authority. We, therefore, agree with the appellant that it was wrong for the courts below to disregard the defence of *alibi* raised by the 1st appellant in compliance with section 194(4) of the CPA. This was a serious error which, indeed, vitiated the 1st appellant's conviction.

Lastly, we turn to the issue that the charge was not proved beyond reasonable doubt. And again, we think, this issue should not detain us. As we have found that the visual identification evidence by PW1 and PW2 was not watertight; that, the evidence of the identification parade was vitiated because the same was not properly conducted; that the 2nd appellant's cautioned statement was not property admitted, and hence, expunged; and that the defence of *alibi* by the 1st appellant was not considered, we do not see any other evidence that would sustain the conviction. We, agree with the learned State Attorney that the offence was not proved beyond reasonable doubt. Hence, we find merit in the appellants' appeal.

With the foregoing, we allow the appeal, quash the appellants' convictions; and set aside their sentences. Thereafter, we order their immediate release from custody unless otherwise held for other lawful reasons.

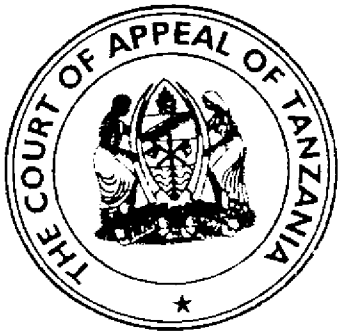
DATED at **DAR ES SALAAM** this 16th day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 21st day of October, 2020 in the presence of the Appellants in person and Mr. Benson Mwaitenda, 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