IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 287 OF 2019

SHABANI HUSSEIN@MAKORA
ALISTIDES ANACRET@ RUTASHOBYA .....**APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Kilekamajenga, J.)

Dated 21st Day of May, 2019
in
Consolidated Criminal Appeals No. 73 and 74 of 2016

JUDGMENT OF THE COURT

7th & 16th December, 2020

MUGASHA, J.A.:

The appellants were charged before the Resident Magistrate's Court of Kagera at Bukoba with two counts for the offence of Armed Robbery contrary to section 287A of the Penal Code. It was alleged by the prosecution in the first count that, on 6/10/2015 during morning hours at Kashura area within the Municipality and District of Bukoba in Kagera

Region, the appellants did steal a Television flat screen 50 inches make Samsung Plasma Display Model P5-50P5H black in colour valued at TZS. 6,000,000/= and its remote control and a deck make ZEC valued at TZS. 150,000/= all in total valued at TZS. 6,170,000/= the properties belonging to Jamal s/o Karumuna and at the time of stealing they threatened to use violence against one Herieth d/o Paulo who was within the house at the time of stealing. In the second count at the same place, date and time, it was alleged that the appellants did steal a handbag valued TZS. 20,000/=, a mobile phone make Tecno valued at TZS. 75,000/=, a cloth (Kitenge) valued at 40,000/= and veil valued at 10,000/= the property of one Jamila d/o Jamal and at the time of stealing they threatened to use violence against on Herieth d/o Paulo who was within the house at the time of stealing.

The appellants denied the charges and in order to prove its case, the prosecution lined up six prosecution witnesses and tendered one physical exhibit Television make Samsung (Exhibit P1) and two documentary exhibits namely: a certificate of search and seizure (Exhibit P2) and the cautioned statements of the appellants (Exhibits P3 and P4).

The facts which led to the arraignment of the appellants were that; on 6th day of October 2015 at 11.00 am, the appellants together with another person armed with knives and iron bars, stormed into the house of the complainant one Jamal Kalumuna (PW2) and found therein, one Herieth Paulo (PW1), a house maid, who was washing utensils and babysitting the complainant's child of one and half years old. Upon being forced to surrender the keys of the complainant's room, she declined. Subsequently, the second appellant grabbed, broke the door of that room, took PW1 inside and forced her to give them money or else risk to be raped. Then, the assailants searched the house, took several items as listed in the charge sheet and disappeared leaving PW1 in the complainant's room. Thereafter, PW1 narrated the episode to a neighbour who notified the complainant and his wife on what had transpired at their residence and the matter was reported to the police station. PW2 opted not to sit back and as such, commenced his own investigation after being informed by a bodaboda rider who claimed to have seen the first appellant together with two other persons carrying the television set. The bodaboda rider volunteered to show the first appellant's place of work. PW2 relayed this information to the police who rushed at the first appellant's salon and found therein both appellants. A search was mounted in the first

appellant's house, where the stolen television was found and PW2 recounted to have identified it to be his property. The appellants were taken to the police and recorded the cautioned statements which was followed by their arraignment.

In their defence, the appellants denied the prosecution assertions. According to the 1st appellant he was at his office when his wife informed him that a certain client had brought at their residence a television set which had no electricity cables. That apart, he also told the trial court that the 2nd appellant, a driver at Geita Gold Mine was his client and they last met when he went to his office to repair a DVD deck. As for the 2nd appellant, he told the trial court that he was an employee of Geita Gold Mine and happened to be in Bukoba Municipality to take care of his sick mother. He denied to have taken the television set at the residence of the 1st appellant. He further recalled to have been arrested by seven police officers after refusing to give them TZS. 200,000/= and that he had left his identification card at the police investigation department.

Upon being satisfied that the prosecution had proved its case to the hilt, the trial court convicted the appellants and sentenced them to imprisonment of thirty years and 12 strokes of the cane for each appellant.

They unsuccessfully appealed to the High Court whereby their appeal was dismissed hence the present appeal. Each appellant filed a separate memorandum of appeal. The grounds of complaint in respect of the 1st appellant are as hereunder paraphrased:

1. That, the charge was wrongly substituted under section 235 (1) of the Criminal Procedure Act instead of section 234 of CPA.
2. That, the appellate judge did uphold conviction without considering the non-compliance of the requirements of section 192 (1) of the Criminal Procedure Act.
3. That, the requirements of section 312(1) and (2) of the Criminal Procedure Act were contravened.
4. That, the conviction was wrongly grounded and sustained on account of improper identification.

In respect of the second appellant the grounds of complaint hinge on the following paraphrased grounds:

1. That, the charge was incurably defective as it was wrongly substituted under provisions of section 235 (1) of the CPA.

2. That, the charge was further incurably defective because the contended stolen television model No. P5-50P5H was not correctly disclosed by the complainant.
3. That, the charge was vague and unmaintainable for not mentioning the name of the owner of the properties allegedly stolen in the count of Robbery.
4. That, the Hon. Judge erred both in law and fact by upholding the conviction against the appellant relying on involuntary confession taken beyond the prescribed time.
5. That, the said caution statement by the appellant was vitiated and contravened the requirements of section 50 and 51 of the CPA.
6. That, the Hon. Judge misdirected himself to concur and support the omission to comply with the provisions of sections 50 and 51 of CPA.
7. That, the Hon. Judge erred to hold that the nature of the matter concerned high public interest.
8. That, the Hon. Judge misdirected himself in concluding the matter to be of utmost public interest on account of the complicated nature of the investigation in question.
9. That, the failure to conduct the identification parade did not eliminate possibilities of mistaken identification of the appellant.

The second appellant raised one additional ground as follows:

1. That, the two courts below wrongly relied on the certificate of seizure (Exhibit P2) which was not read out after it was admitted in the evidence.

At the hearing, the appellants appeared in person, unrepresented whereas the respondent Republic had the services of Mr. Basilius Namkambe, learned Senior State Attorney. In the course of hearing the appeal, the first appellant abandoned the second ground of appeal and the second appellant abandoned the third and fourth grounds of appeal and we marked them so abandoned.

In their brief submission on the remaining grounds of complaint, the appellants fault the trial court and the first appellate court basically on two major fronts, namely: **One,** that the trial was marred with flaws as the trial magistrate wrongly invoked the provisions of section 235 of the CPA to amend the charge sheet; relying on irregularly admitted documentary exhibits to ground the conviction considering that, the cautioned statements of the appellants (Exhibits P3 and P4) were taken beyond the prescribed time and that those statements and the certificate of seizure (Exhibit 2) were not read out after being admitted in evidence.

Two, the conviction being grounded on the charge which was not proved beyond reasonable doubt considering that: the identification parade was not conducted to establish if the appellants were properly identified at the scene of crime and in addition, the complainant did not positively establish that the stolen television set belonged to him. In this regard, the appellants urged the Court to allow the appeal and set them at liberty.

On the other hand, Mr. Namkambe from the outset supported the appeal conceding to the procedural irregularities as pointed out by the appellants. In addition, he pointed out that while the appellants were charged with two counts of armed robbery, they were only convicted on one count. He argued this to be irregular and that the remedy would be to return the case file to the trial court for it to enter proper conviction on the second count. However, he urged the Court not to follow that course arguing that, on record the prosecution evidence is weak due to the following: **One,** the appellants were not properly identified at the scene of crime because according to PW1, the first appellant was a stranger and that he knew the fellows of the second appellant which does not fit in the criteria of identification by recognition. That apart, PW1 did not state the duration she had with the appellants under observation at the scene of

crime. To back up the propositions, Mr. Namkambe cited to us the case of **KASSIM SALUM VS REPUBLIC**, Criminal Appeal No. 186 of 2018 (unreported). Also Mr. Namkambe faulted the learned High Court Judge for sustaining the conviction of the appellants relying on the cautioned statements of the appellants which deserve to be expunged as they were not read out after being admitted in the evidence. **Two**, the prosecution account was marred with contradictions which cast a shadow of doubt on the complainant's positive identification of the stolen television set. On this, he argued that, while the charge sheet indicated a different model and serial number of the television set, PW2, PW3 and PW5 each had own version on the model and serial number of the television and such contradictory account raised doubt which ought to have been resolved in favour of the appellants by the two courts below.

Finally, in view of his earlier submission, the learned Senior State reiterated his earlier prayer that the case file should not be returned to the trial court for it to enter the conviction due to weak prosecution account. On the way forward, he urged the Court to invoke its revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act [CAP 141 RE. 2019 to

quash the conviction, set aside the sentence and set the appellants at liberty.

After a careful consideration of the submission of the parties and the record before us including the grounds of complaint, the issues for our consideration are whether the trial was flawed with procedural irregularities and if the charge was proved against the appellants as the required standard.

We shall begin with the procedural irregularity which was raised by the learned Senior State Attorney on the lacking conviction of the appellants in respect the second count whereas they were charged with two counts of armed robbery. We have gathered that, after being satisfied that the prosecution had proved its case against the appellants, the trial magistrate stated what is reflected at page 74 of the record of appeal as follows:

> *"This court convict both first and second accused guilty of an offence of armed robbery"*

Subsequently, the trial magistrate proceeded to record the appellants' mitigations, previous record of convictions, and passed the sentence. The sentence did not follow the conviction in respect of one count of armed

robbery as mandatorily required by section 235(1) of the CPA which provides:

> *"The court, having heard both the complainant and the accused person and their witnesses and the evidence,* ***shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge*** *under section 38 of the Penal Code".*
>
> [Emphasis supplied]

In the circumstances, the judgment of the trial court which lacked a conviction on one count of armed robbery missed one of the essential components of a judgment in terms of section 312 (2) of the CPA which provides:

> *"In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced".*

The reading together of sections 235 (1) and 312 (2) of the CPA clearly indicate that, the conviction must precede the sentence. In the case

of **JOHN S/O CHARLES VS. REPUBLIC**, Criminal Appeal No. 190 of 2011, the Court emphasized on the essence of compliance with the mandatory requirements of sections 235(1) and 312 (2) the Criminal Procedure Act, having said:

> *"It is clear that both the provisions of the CPA require that in the case of conviction, the conviction must be entered. It is not sufficient to find an accused guilty as charged; because the term guilty as charged is not in the statute; and the legislature may have a reason for not using that term, but instead, decided to use the word "Convict"."*

In view of the settled position of the law, the omission is a fatal irregularity which can be remedied by returning the case file to the trial court for it to enter conviction on the other count of armed robbery. Before determining as to whether a retrial is worthy or not, we proceed to determine other complaints relating to the procedural irregularities because they have a bearing in deciding as to whether or not a retrial is worthy.

On the complaint on failure to read out the exhibits P2, P3 and P4 after being admitted at the trial as raised by both appellants and conceded by the learned Senior State Attorney, it is glaring at page 22 of the record

of appeal that, the certificate of seizure (Exhibit P2) was tendered in the evidence by Inspector Mbaruku Msonga (PW5). Similarly, the cautioned statement of the first appellant (Exhibit P4) suffered same predicament as reflected at page 27 of the record after it was tendered in the evidence by G 3681 DC Emmanuel (PW6). It is crucial to note here that, the cautioned statement of the second appellant was not tendered at the trial as assumed by the parties. That apart, it is settled law that, whenever it is intended to introduce any document in evidence, it should be actually admitted before it can be read out. Failure to read out documentary exhibits is fatal as it denies an accused person opportunity of knowing or understanding the contents of the exhibit because each party to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed or made with a view to influencing the court's decision. See – **ROBINSON MWANJISI AND OTHERS VS REPUBLIC** [2003] T.L.R. 218, **NKOLOZI SAWA AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 574 of 2016, **JUMANNE MOHAMED AND TWO OTHERS VS REPUBLIC**, Criminal Appeal No. 534 of 2015, **MBAGA JULIUS VS REPUBLIC**, Criminal Appeal No. 131 of 2015 and **MARK KASIMIRI VS REPUBLIC**, Criminal Appeal No. 39 of 2017 and

KURUBONE BAGIRIGWA AND 3 OTHERS VS REPUBLIC, Criminal Appeal No. 132 of 2015. (all unreported).

We are thus satisfied that, though the appellants were present at the trial, they were convicted on the basis of the documentary evidence which they were not aware of and as such, exhibits P2 and P4 were wrongly acted upon to convict the appellants and we accordingly discard those exhibits from the record.

Next for determination is whether the appellants were positively identified at the scene of crime. Parties were at one that the visual identification fell short of meeting the laid down criteria. In the case of **WAZIRI AMANI VS REPUBLIC** [1980] TLR 250 the Court laid down several factors to be taken into account by a court in order to satisfy itself on whether evidence on visual identification is water-tight. Such factors include **one,** the time the witness had the accused under observation; the distance at which he observed him; **two,** the conditions in which such observation occurred; if it was day or night time; whether there was good or poor lighting at the scene; and **three,** whether the witness knew or had seen the accused before or not. See also - the case of **CHOKERA MWITA VS. REPUBLIC**, Criminal Appeal No. 17 of 2010 (unreported) whereby

confronted with a similar issue; the Court among other things emphasized that, the court should not act on evidence on visual identification unless all possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely water tight.

As to whether the PW1 knew or had seen the appellants before the incident or not, at page 14 of the record of appeal she recalled that the fateful day was her first encounter with the second appellant who tortured her. However, when cross-examined by the second appellant she replied as follows:

> *"...You entered inside the house, two of you. I know your fellow used to work nearby our home."*

When re-examined by the prosecutor she answered as follows:

> *"I was living at Bukoba Secondary School. I was residing nearby the office of the fellow and person who came with the 2nd accused inside the house."*

In the light of what PW1 recounted, the appellants were strangers to her and thus, following their arrest, this necessitated conducting the identification parade so as to enable PW1 to identify the appellants in order to establish that they are the same people she saw at the scene of crime.

Failure to conduct the identification parade poked holes in the prosecution case and in a nutshell, the purported identification fell short of eliminating possibilities of mistaken identification. In this regard, we are satisfied that the appellants were not properly identified at the scene of crime and it was unsafe for the two courts below to hold otherwise.

The other limb to be addressed touching on the prosecution account is whether the complainant did establish that he is the owner of the stolen television set. On this we begin with the charge sheet itself which is at page 9 of the record. It shows that the alleged stolen television set was a flat screen, 50 inches make Samsung Plasma Model P5-50PH black in colour. However, in his account at page 15 of the record, PW2 described the stolen television set as follows:

> *"I found my television Flat screen 50 inches with serial No. PWS/50P5N make Samsung Black in colour stolen."*

It is crystal clear that the description of the television set as availed by the complainant varied with the description in the charge sheet which was the basis of arraignment of the appellants and foundation of the trial. It is settled law that properties suspected to have been stolen should be

identified by the complainant who must avail the terms of description of the stolen item. This is crucial because in a criminal charge it is not enough to make a generalised description of the property. See – **DAVID CHACHA AND 8 OTHERS VS REPUBLIC,** Criminal Appeal No. 12 of 1997 (unreported).

Thus, in the present case, as earlier intimated, PW2 did not give the terms of description of the stolen television. In this regard, can it be safely vouched that, the prosecution account supported the charge? Our answer is in the negative. Although the difference or rather the variance was discussed at length in the judgment of the learned High Court Judge who attributed it to the handwriting problem of the trial magistrate, he concluded the same was not fatal as the appellants were not prejudiced, with respect, we disagree. Having gone through the original record the variation is glaringly vivid and as such, this was a clear doubt in the prosecution account which ought to have been resolved in favour of the appellants. In this regard, once again, we are satisfied that the prosecution case was not proved beyond reasonable doubt and it is probable that the complainant made a description of another television not subject of the charge.

In view of the deficient prosecution evidence, we do not find it worth to return the case file to the trial court to remedy the infraction on the missing conviction in respect of one count of armed robbery. We thus invoke our revisional jurisdiction under section 4 (2) of the AJA, quash the conviction, set aside the sentence and order the immediate release of the appellants unless otherwise lawfully held for another cause.

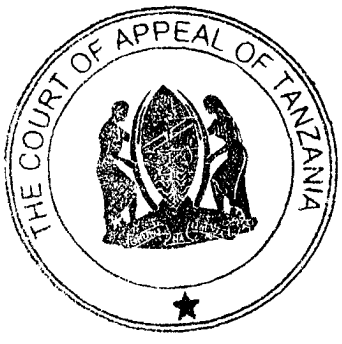
DATED at **BUKOBA** this 15th day of December, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 16th day of December, 2020 in the presence of the 1st and 2nd appellants in person and Mr. Juma Mahone, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL