IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And LEVIRA, J.A.,)

CRIMINAL APPEAL NO. 270 OF 2017

GEOPHREY ISIDORY NYASIO ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bongole, J.)

dated 23rd day of August, 2013
in

HC Criminal Appeal No. 15 of 2013

JUDGMENT OF THE COURT

14th & 27th February, 2020

LEVIRA, J.A.:

This is a second appeal originating from the Resident Magistrate Court of Kinondoni at Kinondoni whereby, the appellant Geofrey Isidory Nyasio and two others who are not party to this appeal (Isidory Nyasio and Annah John Kasoli) were charged with two counts. The first count was receiving stolen property c/s 311(1) of the Penal Code Cap 16 RE 2002. This was against Isidory Nyasio (first accused). The other count was

Armed Robbery c/s 287A of the Penal Code and it was against Annah John Kasoli (second accused) and Geofrey Isidory Nyasio (third accused), the appellant herein. At the end of the trial, Isidori Nyasio and Annah John Kasoli were acquitted. The appellant was convicted of the offence of Armed Robbery and sentenced to serve thirty (30) years imprisonment. Dissatisfied, he unsuccessfully appealed to the High Court and hence the current appeal.

In brief, the prosecution evidence was as follows: On 27/7/2009 about 21:00 hours Abdulahi Salum (PW6) was sitting at his veranda and saw Geofrey (the appellant) walking along the wall. Shortly thereafter, he saw a car make Corolla coming and it parked near him. He managed to see people who were inside. It was his further evidence that Geofrey went to the driver's side and removed the driver (PW2, Mussa Abisai) from the car. The said driver tried to get back to the car but Geofrey threatened him by firing in the air. As PW6 was worried, so he got inside the house and the car was moved off while the driver was crying for help. PW6 got out of the house, accompanied the driver to report the incident at the police station

at Magomeni. Thereafter, they went to the scene of crime with the policemen. PW6 informed the policemen that he knew Geofrey.

PW2 testified that on the material day he was hired by a lady and a man to take them to Magomeni quarters. While there he saw the 3rd accused (appellant) coming to his side, took the car switch and pointed a pistol to him. He forced him out of the car, fired a gunshot and drove off the car. On 8/11/2009 PW2 got information about the stolen car and with the aid of police, they recovered the same at Korogwe while being driven by Salehe Rajab (PW7), a taxi driver. No. F8230, PC. Selemani (PW8) a policeman working at Korogwe was involved in seizing the said stolen car.

In his evidence PW7 stated that he was employed by Isidory Nyasio (the 1st accused) as a taxi driver. According to the information he had from Isidory Nyasio, the said car with Registration Number T 267 ASX was bought by his son. The said Isidory Nyasio was arrested on 9/11/2009 for being found with stolen property and sent to Magomeni police station. On 12/11/2009 he was interrogated and admitted to have received the said stolen car from his son, Godfrey (the appellant). His cautioned statement was admitted as exhibit P3 during trial.

According to Hawa Maji (PW1) the allegedly robbed car, make Corolla with Registration Number T 281 AXY found in Korogwe was her property which she bought in December, 2008. According to her, on the material date the said car was being driven by her driver (PW2).

On 3/3/2010 the second accused was arrested at Magomeni quarters and having been interrogated, she confessed to have been involved in the robbery incident with Geofrey Isidory Nyasio and their friend Isack whereby, the robbed car was sent to Korogwe to Isidory Nyasio.

According to D/SGT Abdallah (PW11), Godfrey was arrested on 28/3/2010 and having been interrogated he confessed to have committed the crime in company of the second accused (Annah) and that, the car in question was sent to Korogwe to his father (Isdory Nyasio). He confessed further that, Number T 267 ASX was the number of his car he legally owned, make Honda Civic so he had transferred the plate number.

Confirmation of the Registration Number of the stolen car was made by Teddy Igira from Ukonga, Tanzania Revenue Authority (TRA) – Registration office (PW10). In her evidence PW10 stated that, according to the TRA Report, Number. T.281 AXY was the registration number of Toyota

Corolla Saloon owned by Hawa Juma Maji (PW1) and Azania Bank Ltd, while Number T. 267 ASX was Honda of Wagon Civic owned by Geofrey Nyasio Isidory (the appellant). She tendered the said Report which was admitted as exhibit P6. The appellant and the two others (Annah and his father) were charged at the Resident Magistrate's Court of Kinondoni as introduced above. In his defence, the appellant made a general denial of the charge which was laid against him. He said, he was arrested for dealing in drugs and was interrogated in that respect.

In grounding conviction of the appellant, the trial Magistrate relied on three factors; visual identification, confession of the third accused and circumstantial evidence.

It was the observation of the trial Magistrate that the appellant was identified by the eye witness, the victim (PW2) at the scene of crime. That PW2 informed the trial court to have seen the appellant coming in front of the car as the car lights were on. Apart from that, the trial magistrate relied on the evidence of PW6 who knew the appellant before the fateful incident, saw the appellant moving towards PW2, threatened him with the gun and threw him out of the car. He fired in the air and left with the said

car. According to the trial magistrate, the identification of the appellant by PW6 was watertight and reliable.

Another evidence relied upon by the trial magistrate was the cautioned statement of the appellant (Exhibit P2) believed to contain nothing but the truth.

Regarding circumstantial evidence, the trial magistrate relied on the evidence of PW7, PW8 and PW9 which in essence based on how the stolen car was recovered.

Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court (Bongole, J.). In upholding the appellant's conviction and the sentence, unlike the trial magistrate, the first appellate Judge relied on the cautioned statement of the first accused person (Exhibit P3). Amplifying on it, he said, the appellant's father cautioned statement is categorical that it was the appellant who had sent to him the motor vehicle. He thus found the appeal with no merit and dismissed it.

Still aggrieved, the appellant has preferred this second appeal against the decision of the High Court. In the memorandum of appeal, he has

raised six grounds which are paraphrased here under: One, that the visual identification by PW6 was weak. Two, the trial magistrate and first appellate judge failed to evaluate the evidence. Third, that exhibits were improperly admitted during trial. Fourth, that circumstantial evidence relied upon by the trial court was not watertight. Fifth, that the prosecution failed to establish apprehension of the appellant in connection with the offence he was charged with. Sixth, that the prosecution failed to prove the case against the appellant beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms. Jenipher Mark Massue, learned Senior State Attorney assisted by Ms. Yasinta Peter, learned State Attorney. The appellant adopted the grounds of appeal and opted to first hear the submission of the learned State Attorneys as he reserved his right to make a rejoinder.

Although initially Ms. Peter did not support the appeal, Ms. Massue rose and changed the stand after a brief dialogue between them. It was her submission that during trial the charge sheet was substituted twice. However, the second substituted charge was not read over to the accused

persons. This failure, she said, contravened the law and as a result, the conviction of the appellant was not proper likewise the appeal before the High Court and the current appeal.

Regarding the evidence on record she submitted that, identification of the appellant by PW6 at the scene of crime was proper as he knew the appellant before the incident. In addition, she said, the source of light at the scene of crime which aided the visual identification of the appellant was the car light as per evidence of PW2.

On the admission of exhibits during trial, Ms. Massue submitted that exhibit P3 (cautioned statement of the first accused) and exhibit P6 (the Tanzania Revenue Authority (TRA) Report) were not read over after their admission. In addition, she said, exhibit P3 was recorded out of prescribed time by the law and this is a fatal procedural irregularity. Therefore, she prayed for those exhibits to be expunged from the record. Finally, she submitted that, the charge against the appellant was not proved beyond reasonable doubt.

In a very brief rejoinder, the appellant stated that he did not commit the alleged offence. Therefore, he prayed to be set free.

Having considered the submission of the learned Senior State Attorney and the record, we shall deal with two main issues. One, whether the trial was feasible and two, whether the evidence on record was sufficient to ground the conviction of the appellant.

In addressing the first issue we wish to start with the charges presented before the trial court. As introduced above, the charge was substituted twice whereas, the first charge sheet had only one accused (Isidory Nyasio). The said charge sheet was substituted on 19/3/2010 and the new one had two accused persons, (Isidory Nyasio and Annah John Kasoli). On 8/04/2010 there was another substitution which indicated three accused persons, Isidory Nyasio, Annah John Kasoli and Geofrey Isidory Nyasio.

It is noted from the record that, on 8/4/2010 when the charge sheet was substituted, the same was read over and explained to an unspecified accused person who purportedly pleaded not guilty to the charge. The record is silent as to who was that accused among the three indicated in the charge sheet. For ease of reference, we find it appropriate to reproduce the relevant part of the proceedings hereunder:-

"08/04/2010

Coram: Hon. Kihawa – RM

PP: Insp. Sisiwaya

CC: Uyaga

Accused: Present

PP: For substitution of charge sheet

Court: Prayer granted.

Sgd: Kihawa – RM

08/04/2010

Court: CROEA who is asked to plead there to;

Accused: "It is not true"

Court: Entered as plea of not quilt

Sgd: Kihawa – RM

08/04/2010

Order: 1. Mention on 14/4/2010

2. ARIC & AFRIC

Sgd: Kihawa – RM

08/04/2010"

Section 228 (1) of the Criminal Procedure Act Cap 20 RE 2002 (CPA) requires the trial court to read out to the accused person the substance of the charge, and to require him to state whether he admits or denies the charge as it provides:

> *"The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."*

As stated earlier, in the current case although the charge was substituted twice it is not known as to who among the three accused persons was required to plead to it. We agree with Ms. Massue that the mandatory provisions of section 228(1) of the CPA were not complied with. This defect is fatal and it renders the subsequent proceedings in the trial and first appellate courts a nullity as the Court stated in **Thuway Akonaay v. R** [1987] TLR 92, that:

> *"It is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity."*

Therefore, it is our settled position that the trial was a nullity in the absence of the appellant's plea to the substituted charge.

In the circumstances, ordinarily we would have ordered a retrial. However, having revisited the evidence on record, we find that it is not in the interest of justice to do so because a retrial will not serve any useful purpose. To appreciate our observation, we wish to consider the second issue as to whether the evidence on record was sufficient to ground the conviction of the appellant.

Regarding visual identification of the appellant at the scene of crime, it was the evidence of PW6 that the incident took place at around 21:00 hours but he did not state whether or not there was light which enabled him to identify the appellant. We note that Ms. Massue in her submission associated the light stated by PW2 at page 31 of the record with the evidence of PW6. We entertain no doubt that this is a misconception. In his evidence, PW2 was referring the light at the Magomeni quarters which enabled him to identify the accused persons on 2/3/2010 and not on the material day. Even if we have to believe that PW2 was aided by the car lights to see the appellant while parking the car at the scene, still that evidence is not watertight as the intensity of the light was not stated. In the case of **Waziri Amani v. Republic** [1980] L.R.T. 250,

the Court expounded certain factors to be taken into account by a court in order to satisfy it on whether or not such evidence is watertight. They include the following:-

> *"The time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred,* ***if it was day or night time; whether there was good or poor lighting at the scene;*** *whether the witness knew or had seen the accused before or not."*
> [Emphasis added].

We also take note that PW6 stated in his evidence that he knew the appellant even before the incident. This fact alone could not suffice in establishing that he identified him on the material day and time. Knowing a person and identifying him at the scene of crime where all possibilities of mistaken identity are not eliminated are quite different things. It is our considered view that, knowing a suspect before the incident is an added advantage in identification more so after elimination of all the possibilities of mistaken identity.

It is settled principle that in visual identification, the evidence must be watertight. The Court in **Scapu John and Another v. Republic**, Criminal Appeal No. 197 of 2008 quoted with approval the case of **Paschal Christopher and 6 Others v. Republic,** Criminal Appeal No. 106 of 2006 (both unreported) where it was stated that:

> *"In a case involving evidence of visual identification, no court should act on such evidence* ***unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight*** *...." [Emphasis added].*

Having considered the whole evidence on record and in particular that of PW6, we are settled in our minds that the visual identification evidence adduced by the prosecution witnesses was weak. Therefore, it cannot safely be concluded that PW6 who failed even to mention the source and intensity of light at the scene of crime identified the appellant on the material date. It is more wanting as the appellant who was allegedly identified, continued to visit the scene of crime after the incident as per the evidence of PW2 but was arrested after five months.

Another evidence relied upon by the prosecution during trial was documentary evidence. At this juncture we need to consider whether or not the documentary evidence was properly obtained and admitted during the trial. In the second, third and fourth grounds of appeal, the appellant complained that exhibits P3 (cautioned statement of Isidory Nyasio) and exhibit P6 (the TRA Report) were not properly admitted as exhibits during trial.

According to the record, the cautioned statement of the third accused (exhibit P3) was recorded three days after his arrest. This is contrary to the law which requires such statement to be recorded within four hours from the time when the accused is taken under restraint. Section 50(1) of the CPA which provides:

> *"For the of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) Subject to paragraph (b) the basic period available for interviewing the person, that is to say,* ***the period of four hours commencing at the time when he was taken under restraint in respect of the offence."*** [Emphasis added].

We also note that even after admitting the said exhibit, the same was not read out to the accused persons and this was the trend even when the TRA report (Exhibit P6) was admitted. As a matter of procedure, when documentary evidence is admitted after being cleared, its contents must be read out with the sole purpose of informing the accused person its nature and substance. In **Jumanne Mohamed and 2 Others v. Republic,** Criminal Appeal No. 534 of 2015 (unreported) the Court was dealing with the similar issue had this to say:

> *".... Failure to read a document after it is admitted as exhibit is fatal. A well established practice is that* ***after any document is cleared for admission and is actually admitted as an exhibit, it should be read out to the accused person to enable him understand the nature and substance of the facts contained in it.*** *The interest of justice and fair trial demands that be done."* [Emphasis added].

Being guided by the above principle, we find that it was necessary for exhibits P3 and P6 to be read out to the appellant for him to understand their nature and substance. Since this was not done, the same

could not be relied upon to ground the appellant's conviction. Consequently, we expunge both exhibits P3 and P6 from the record.

In the final analysis, we observe that exhibit P3 to a large extent incriminated the appellant as the one who gave Isidory Nyasio the stolen car. Likewise exhibit P6 aimed at proving registration and details of the stolen car which in effect could connect the appellant with the car found in possession of his father, one Isidory Nyasio. Now that both exhibits (P3 & P6) have been expunged from the record there is no sufficient evidence to connect the appellant to the offence of Armed Robbery.

It is our settled view that, the evidence on record regarding how the stolen car was discovered does not directly link the appellant with the offence of Armed Robbery. More so, as we take into consideration that he was not properly identified at the scene of crime. In the circumstances we hold that the evidence on record was insufficient to ground the conviction of the appellant.

Following the identified anomaly that the charge was not read out to the appellant and the deficiency in evidence, we allow this appeal. In exercise of our revisional powers as provided under section 4(2) of the

Appellate Jurisdiction Act, Cap 141 R.E. 2002 we quash the proceedings of both lower courts and set aside the appellant's conviction and sentence. We order immediate release of the appellant from prison unless he is lawfully held.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th day of February, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 27th day of February, 2020 in the presence of Appellant in person and Ms. Debora Mcharo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL