IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA J.A., MWANGESI J.A., And SEHEL J.A.)

CRIMINAL APPEAL NO. 126 OF 2018

KIFARU JUMA KIFARU.....1ST APPELLANT

RAJABU SHOMARI JUMA.....2ND APPELLANT

DICKSON PHILIPO MDOE..... 3rd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Twaib J.)

Dated the 29th day of July, 2013
in
H/C Criminal Appeal No. 16 OF 2013

JUDGMENT OF THE COURT

5th & 22nd May, 2020

MWANGESI J.A.:

At the District court of Kinondoni at Kinondoni within the Region of Dar es Salaam, the appellants herein alongside Kaiza Stephano Mfugale and Ally Mussa Shemaka, stood charged with two counts of conspiracy to commit an offence contrary to section 384 and armed robbery contrary to section 287A both of the Penal Code Cap. 16 R.E. 2002 (**the Code).** The particulars of the offence for the first count were that, the appellants and their colleagues who are not in this appeal, hereinafter referred to as their

colleagues, on unknown date, time and place within the Municipality of Kinondoni in the Region of Dar es Salaam, they did jointly and together conspire to commit an offence termed armed robbery at Kinondoni shamba, in the house of one Leonard s/o Kijangwa.

The particulars of the offence for the second count were that, on the 25th day of November, 2009 at about 02:00 hours at Kinondoni Shamba area, within Kinondoni District in Dar es Salaam Region, the appellants and their colleagues, did steal cash TZS Four Million (4,000,000/=), one desk top computer make Dell, two marriage rings, one handbag with cosmetics, video deck make Panasonic and two mobile phones, the properties of Leonard s/o Kijangwa and immediately before or immediately after such stealing, did threaten by gun point Leonard s/o Kijangwa and his wife Pendo w/o Leonard, in order to obtain the stolen properties. Both counts were resisted by the appellants and their colleagues.

To establish the commission of the offences by the appellants and their colleagues, the prosecution paraded eight witnesses and tendered eight exhibits. On their part in defence, the appellants and their colleagues, relied on their own sworn and affirmed testimonies. At the end of the day, after the learned trial Resident Magistrate, had evaluated the evidence

presented before her from either side, held the appellants culpable to the offence of armed robbery, which featured as the second count, and convicted them of the same, while their colleagues, were acquitted and set at liberty. Nothing was said by the trial Resident Magistrate, in regard to the first count.

The appellants felt aggrieved by the decision of the trial court, and unsuccessfully challenged it in the High Court of Tanzania at Dar es Salaam. Still undaunted, they have come to the Court for a second attempt, premising their grievance on seven grounds of appeal, in a joint memorandum of appeal which was lodged on the 22nd November, 2018. On the 29th May, 2019, the appellants lodged a supplementary memorandum of appeal, consisting of other seven grounds.

When the appeal was called on for hearing before us, the appellants entered appearance in person as they were not legally represented whereas, the respondent was represented by Ms. Brenda Nicky Massawe, learned State Attorney. Upon the appellants being invited to take the floor and expound their grounds of appeal, they both implored the Court, to adopt their grounds of appeal as presented in the documents which they

lodged in Court, and invite the respondent to respond to, while reserving their right of rejoinder if need be.

In response to the grounds of appeal by the appellants, the learned State Attorney, started by pointing out grounds of appeal, which did not feature in the first appeal and therefore, featuring for the first time in this Court. These included the 4th ground in the memorandum of appeal, and grounds number 3,4 and 6 in the supplementary memorandum of appeal. Placing reliance on the holding in **Godfrey Wilson Vs Republic**, Criminal Appeal No. 168 of 2018 (unreported), she urged us to do away with them because, we lacked the requisite jurisdiction to entertain them.

As regards the other remaining grounds, both in the memorandum of appeal and the supplementary grounds, Ms. Massawe pegged her submission on the first ground in the memorandum of appeal, and the fifth ground in the supplementary memorandum of appeal, which are in respect of the evidence of visual identification of the appellants, which was based by the two lower courts, in founding them culpable to the charged offence. According to the learned State Attorney, the disposition of these two grounds, would in effect render the deliberation of the remaining other grounds of appeal, uncalled for.

The learned State Attorney, submitted to the effect that, regard being had to the fact that the commission of the offence of robbery in the instant appeal occurred during night, the visual identification alleged to have been made to them by PW2, who was the victim of the incident, ought to have been clarified. The mere contention that he identified them without giving any description as reflected on page 26 of the record of appeal, was not sufficient in the light of the holding in **Godfrey Yahe and Another Vs Republic,** Criminal Appeal No. 197 of 2010 wherein, a number of other decisions were referred, that for the evidence of visual identification to be acted upon by the Court, all possibilities of mistaken identity must be eliminated.

The situation of the second prosecution witness discussed above, according to the learned State Attorney, also faced the testimony of PW3, who happened to be the neighbor of PW2. The testimony of this witness before the trial court was that, he managed to identify the appellants at the material time through the window of his room, at a distance of about ten meters or so. He as well did not give any description of the bandits.

It was the further submission of the learned State Attorney, that even the arrest of the appellants by the police, was not based of any

description which was given to them by the witnesses, they were arrested through different circumstances.

Ms. Massawe, did also discuss on the issue of a pistol, which was found in possession of one Kaiza Stephano Mfugale, who featured as the fourth accused during trial, but is not in this appeal. The said pistol was tendered as exhibit P4 by E 3863 Detective Corporal Lucas. The said pistol and cartridge of the bullet which had been used at the scene of the incident, were also send to the Ballistic expert, for examination. The report of the Ballistic expert, which connected the pistol to the incident of armed robbery, was tendered under the provisions of section 34 B of the Tanzania Evidence Act, Cap. 6 R.E. 2002 (**the TEA**), and admitted in court as exhibit P8, for the reason that the Ballistic expert could not be traced.

It was however the argument of the learned State Attorney, that the tendering of the Ballistic report, was tainted with irregularities in that, one, the provisions of law applied to tender it, was improper because the same is applied in tendering documents only. Two, the one who tendered it that is, the prosecutor, was incompetent to tender it. Three, no prior notice was issued by the prosecution before the exhibit was tendered in court. Four,

after being admitted as exhibit, the said report was not read out to the appellants.

In view of the irregularities occasioned in tendering exhibit P8, Ms. Massawe asked the Court, to expunge it from the record. And once the report is expunged from the record, there is no connection between the pistol and the incident of armed robbery, which happened at the premises of PW2.

The learned State Attorney further wondered as to why the third appellant, was implicated to the charge under scrutiny because, the entire record of the trial court is silent about him. Unfortunately, even the first appellate Judge, did fail to note such an anomaly. And lastly, Ms. Massawe, submitted that, nothing was said about the first count neither by the trial court nor, the first appellate court.

On the basis of the anomalies which have been pointed out above, the learned State Attorney, implored us to find merit in the appeal by all appellants, and be pleased to quash their conviction of the charged offence, and set aside their sentences and ultimately, set all of them at liberty. The submission by the learned State Attorney, was cordially welcomed by all appellants, who had nothing to add.

In the light of the grounds of appeal by the appellants and the submission made by the learned State Attorney, the issue that stands for our determination, is whether the appeal by the appellants is founded.

To begin with, we are in agreement with what was submitted by Ms. Massawe, that the conviction of the appellants in this appeal, was founded on the evidence of visual identification from PW2 and PW3. Part of the testimony of PW2 in court during trial in *verbatim*, as reflected on page 26 of the record of appeal, was to the effect that: -

> *"I identified the person who opened the door as the lights were on. It was the 5th accused (now 3rd appellant). So I put my leg in the door (sic) in order to resist the opening. They had stones in small size, they started throwing them inside the house, I also took the stones and throw them back to them .... The 1st accused was the one with the pistol, and he shot at me ...."*

The witness proceeded to depose on page 27 of the record of appeal, by stating that: -

> *"They entered inside, one of them had a panga (2nd accused, now 2nd appellant), he cut me on my right arm."*

It is worthy being noted, that even though on page 17 of the record of appeal, the witness (PW2) told the trial court that, he knew all the accused persons before the robbery, there was no mention of any of them by him, anywhere in the record. The foregoing apart, there was no any attempt made by the witness, to describe any of them.

On his part, PW3, whose part of his testimony which we think is relevant to the determination of this appeal, is reflected on page 32 of the record of appeal, he stated thus: -

> *"...I wanted to open my door but suddenly I heard a bullet fired in the air. I was scared so I returned in my room and switched off the lights. After that the lights of outside were on. I decided to look through a window. I saw people breaking the entrance door as the grills were already broken. My window of my house and the door of my landlord is like 10 meters. I saw the persons who were breaking the door, the persons were 2nd accused had a panga, the 1st accused had a gun (pistol), the 4th accused person had an iron rod."*

Briefly, the above testimonies from PW2 and PW3, constituted the evidence of visual identification of the appellants, which was found by the

learned trial Resident Magistrate and upheld by the second appellate Court, that was cogent to ground conviction of the appellants to the offence of armed robbery. The question which we had to ask ourselves, is whether such evidence from the two witnesses, sufficiently established that the identification of the appellants was perfect and impeccable. In view of the position which has consistently been previously taken by the Court, in regard to the evidence of visual identification, our answer is in the negative.

It was the holding of this Court, in **Raymond Francis Vs Republic** [1994] TLR 100 that: -

> *"It is elementary that in a criminal case whose determination depends essentially on identification evidence, condition favouring a correct identification, is of utmost importance."*

The Court, had also an occasion to comment on the value of the evidence of visual identification, in the case of **Luzio Sichone and Another Vs Republic, Vs Republic,** Criminal Appeal No. 131 of 2010 (unreported), by stating that: -

> *"On the value of the visual identification evidence, the law is equally well settled. First of all, this type of evidence is of the weakest character and most*

unreliable, and should be acted upon cautiously only when, the Court is satisfied, that it is absolutely water tight and that, all possibilities of mistaken identity have been eliminated, even if it is evidence of recognition as it was the case here."

[See also: **Matola Kayuni and Two Others Vs Republic,** Consolidated Criminal Appeals No. 145,146 and 147 of 2011 and **Shija Masunga Bundala Vs Republic,** Criminal Appeal No. 251 of 2012 (both unreported).]

In line with the position which we took in the decisions outlined above, we are settled in our mind, that the visual identification alleged to have been made to the appellants, by PW2 and PW3, on the date when the incident of armed robbery occurred at the premises of PW2, was insufficient and could not form the basis for convicting them. As hinted above, there was no mention of the names of the appellants by the witnesses, nor was there given any description of them.

As regards the evidence of a pistol, which was tendered as exhibit P4 by PW6, the witness told the court that he was among the police Officers, who arrested the appellants, on the fateful night, and that the pistol was found in possession of the fourth accused, who was among

them but not in this appeal. Since they were together on the material night, undoubtedly they had a common evil mission, among which was the armed robbery at the premises of PW2. However, the evidential value of the exhibit, was wanting for the reason that the arrest of the said exhibit was made at a different place from where the offence was committed.

To connect exhibit P4, with the scene of crime, there was exhibit P8 that is, a report of the Ballistic expert, who examined a cartridge which was picked at the scene of the incident, after being fired during the commission of the offence. According to the report, it indicated that the cartridge was fired from the pistol (exhibit P4), implying that exhibit P4 was the weapon used by the appellants, to rob at the premises of PW2 on the fateful night. The said exhibit was however, of little assistance if any, because its tendering in court was flawed in that: -

One, it was tendered by the prosecutor and not a witness. It is a well settled procedure in Criminal proceedings that, an exhibit has to be tendered in court in evidence by a witness, who thereafter, is cross-examined by the accused or his representative. In the instant appeal, the exhibit was tendered by a public Prosecutor, who apart from being

incompetent, he did not know its detail and hence, could not be cross-examined on it by the appellants.

Two, the exhibit was improperly tendered under the provisions of section 34B of **the TEA,** which is normally applied in tendering statements of witnesses and not professional documents. The proper provisions that ought to have been applied, was section 34 (b) of **the TEA,** which reads that; -

> *"34.* ***Statement of persons who cannot be called as witnesses;***
> *Statements, written or oral, of relevant facts made by a person who is dead or unknown, or who cannot be found, or who cannot be summoned owing to his entitlement to diplomatic immunity, privilege or other similar reason, or who can be summoned but refuses voluntarily to appear before the court as a witness, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court to be unreasonable, are themselves admissible in the following cases–*
> *(a) n/a*

(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or ***the discharge of professional duty****, or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind, or of the date of a letter or other document usually dated, written or signed by him;*

Three, after the exhibit had been admitted in evidence, it was not read out to the appellants, to enable them to know what was contained therein. That procedure was improper because, they were convicted using evidence which was not known to them and thereby, condemning them unheard.

On the basis of the irregularities occasioned by the prosecution in tendering exhibit P8 as highlighted above, we join hands with the views which were expressed by the learned State Attorney, that the exhibit did not deserve to constitute part of the record in this appeal, and that, it has to be expunged as we accordingly do. And once the report of the Ballistic expert is expunged, the evidence of exhibit P4, even though it established

that on the material night, the appellants in being in possession of a pistol, had an evil mission, the same had no connection with the armed robbery under which they stood charged with, and convicted of.

There was yet another evidence of a panga which was tendered by PW6, as exhibit P5, allegedly found in the legs (sic) of the first accused (now first appellant) during his arrest, purporting to have been used by the second accused (now second appellant), to cut PW2, in the course of robbing at his premises. The same however, was as well of little assistance in establishing the case under scrutiny, because it was found at a different place from the scene of crime, and there was no evidence to establish that it was the very panga, which was indeed used to cut PW2.

In view of what we have endeavoured to highlight above, we find there is completely no evidence to implicate the third appellant to the charged offences of conspiracy to commit an offence, and armed robbery. One wonders as to why, he was convicted of the offence of armed robbery. And, it is even more surprising as well, as to why Kaiza Stephano Mfugale, who featured as the fourth accused during trial, who at least was arrested with a pistol (exhibit P4), was acquitted.

Be that as it might, the evidence which was relied upon by the prosecution to establish the commission of the offence of armed robbery against the first and second appellants, failed to meet the threshold set in criminal trials that is, establishing the gilt of the appellants, beyond reasonable doubt.

Before concluding, we would wish to make a comment on the concern which was raised by the learned Senior State Attorney, in regard to the judgment of the trial court. Indeed, the judgment of the trial court had some shortfalls. According to the charge sheet, the appellants were charged with two counts that is, one, conspiracy to commit an offence and two, armed robbery. Nevertheless, in the entire judgment of the trial Resident Magistrate, there was nothing which was said about the first count of conspiracy. Unfortunately, such anomaly was again not noted by the first appellate Court. That was yet another anomaly occasioned by the trial magistrate, as well as the first appellate Court.

All said and done, we find merit in the appeal of all appellants, which we hereby allow by quashing the concurrent findings of the two lower courts, set aside the sentence which was imposed to them, and order for

their immediate release from prison, unless they are otherwise lawfully held for some other cause.

Order accordingly.

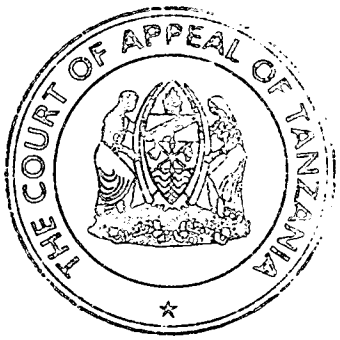
DATED at **DAR ES SALAAM** this 21st day of May, 2020.

S. A. LILA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of May, 2020 in the presence of the 1st, 2nd and 3rd appellants, in person and Ms. Mwanaamina Kombakono, learned Senior State Attorney for the Respondents/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL