IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE,J.A. And KWARIKO, J.A.,)

CRIMINAL APPEAL NO. 99/01 OF 2014

1. OMARI SAID @ MAMI
2. BAVEN HAMISI } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kaduri, J)

dated 21st day of August, 2013
in
(DC) Criminal Appeal No. 114 of 2012

JUDGMENT OF THE COURT

16th March & 28th May, 2020

KWARIKO, J.A.:

Omari Said @ Mami and Baven Hamisi, the appellants, were convicted by the District Court of Morogoro of the offence of armed robbery contrary to section 287A of the Penal Code [CAP 16 R.E 2002]. They were sentenced to a statutory punishment of thirty years in prison. Their appeal before the High Court of Tanzania at Dar es Salaam was dismissed. Dissatisfied, they have come to this Court on a second appeal.

In their joint memorandum of appeal which they filed on 30/9/2019, the appellants raised seven grounds which we have conveniently paraphrased as follows:

1. *That, the charge was defective;*
2. *That, the trial court did not comply with the provision of section 210 (3) of the Criminal Procedure Act [CAP 20 R.E. 2002];*
3. *That, the trial court erred to shift the burden of proof to the second appellant because he elected to remain silent during his defence;*
4. *That, the appellants were convicted on unjustified and uncorroborated prosecution evidence;*
5. *That, the first appellate court failed to objectively appraise the credibility of the prosecution witnesses;*
6. *That, the cautioned statement (exhibit P5) was improperly admitted in evidence; and*
7. *That, PW1 did not identify the appellant in court.*

When the appeal was called on for hearing, the appellants were granted leave and they added the following three grounds of appeal:

1. *That PW1's evidence of identification was not sufficient;*

2. *The stolen property was not properly identified by the owner; and*
3. *The owner of the stolen properly did not testify to prove its ownership.*

We find it apposite at this point to narrate, albeit briefly, the background facts which led to the appellants' conviction. One Devotha A. Nkungu (PW2) owned a motorcycle with Reg. No. T 927 BAY. She entrusted it to Baltazar Kileo (PW1) to do a motorcycle hire business commonly known as "bodaboda". On 23/10/2010 at 22:00 hours when PW1 was at work within Morogoro Municipality, he was hired by a person who was identified to be the first appellant to take him to Railways quarters area. He allegedly identified him by his clothes and a mark on his nose. He accepted the offer, and carried him to the agreed destination. Along the way at Kaloleni School, the first appellant gave some sign by whistling. Following that sign, two men emerged from the school fence following them. PW1 sensed danger and quickly turned the motorcycle around. However, when doing that, he fell down and the two men came, one of them being the second appellant who had a machete which he used to threaten him hence he failed to raise an alarm. The thugs made away

with a mobile phone valued at TZS 100,000.00 and cash TZS 52,000.00 together with the motorcycle.

The incident was reported to the Police Station. On 26/10/2010 at about 00:15 hours a police officer No. F 3248 Mjarubi (PW4) while he was at the Police Station, received information from a good Samaritan that a motorcycle thief was arrested at Nunge Darajani area. Together with his fellow policemen, they went to the scene and found the second appellant being under restraint. They arrested and took him to the Police Station.

Upon being interrogated at the police, the second appellant allegedly confessed to have participated in the robbery incident. He mentioned the first appellant and others as his accomplices. Based on this information, the second appellant led the police to the fifth accused's residence, where the alleged stolen motorcycle was retrieved. It had no registration number. It was evidenced that the said motorcycle came into the possession of the fifth accused as security for a loan taken by the second appellant. The agreement was reduced into writing (exhibit D1).

In their defence, the appellants flatly distanced themselves from the robbery allegations.

At the end of the trial, the appellants were convicted and sentenced as shown earlier.

When the appeal was called on for hearing, the appellants appeared in person fending for themselves while the respondent Republic was represented by Ms. Anunciata Leopold, learned Senior State Attorney.

Before the hearing commenced, the appellants asked that the Panel be reconstituted. They ascribed their prayer to the fact that two members of the Panel were members of the Panel in Criminal Appeal No. 99 of 2014 and Criminal Application No. 25 of 2016 in which they lost. The appellants contended that they did not have confidence in the two members before whom they did not have the chance of succeeding in their previous appeal and application. They thought that if the two members were allowed to be part of the Panel, this appeal would not succeed. Ms. Leopold on her part argued that the ground advanced for the recusal was not sufficient and she termed it as a delaying tactic.

The issue we were confronted with, at that stage, was whether the appellants had advanced sufficient grounds justifying reconstitution of the Panel. We refused the prayer and promised to give reasons in this judgment which we now give. The prayer to have the Panel reconstituted

did not attract us because we had the view that the reasons advanced by the appellants were trivial. We did not think that reconstituting the Panel on shear apprehension of fear that the appellants would lose the appeal would be in the interest of justice. If anything, recusal on trivial grounds would be tantamount to abdication of our calling. Our view gets support from the Court's decision in **Registered Trustees of Social Action Trust Fund and Another v. Happy Sausages Ltd and Others** [2004] T.L.R 264 where it was, held *inter alia,* that: -

> *"It would be an abdication of judicial function and an encouragement of spurious applications for a judicial officer to adopt the approach that he/she should disqualify himself/herself whenever requested to do so on application of one of the parties on the grounds of possible appearance of bias."*

Having rejected the appellants' prayer, we invited the appellants to argue their appeal. In so doing, they adopted their grounds of appeal and preferred for the learned State Attorney to respond to their grounds of complaints first and reserved their right to rejoin if need would arise. Ms. Leopold first supported the appeal and argued the grounds of appeal as follows.

As regards the first ground of appeal, Ms. Leopold conceded that the charge did not mention a person to whom the threats were directed during the robbery. According to her, the omission rendered the charge defective hence vitiating the proceedings. She thus urged us to nullify the proceedings of the trial court and its resultant appeal before the High Court. In support of her position, Ms. Leopold cited the case of **Shija Masunga Bundala v. R,** Criminal Appeal No. 251 of 2012 (unreported). However, she refrained from pressing for a retrial of the appellants for the reason that the evidence on record is not sufficient to ground conviction against them.

Although Ms. Leopold agreed that the trial court did not comply with section 210 (3) of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA) which is the appellants' complaint in the second ground of appeal, she argued that the omission did not prejudice the appellants.

In relation to the third ground of appeal, the learned counsel argued that the prosecution evidence was considered generally thus the trial court did not shift the burden of proof onto the second appellant.

As regards the fourth and fifth grounds of appeal, the respondent's counsel conceded that the High Court did not assess the credibility of PW1

since he did not prove the identification of the appellants. That, he did not explain the source of light at the scene which enabled him to identify the first appellant. To support her position, the learned counsel relied on the case of **Raymond Francis v. R** [1994] T.L.R 100. She added that because PW1 did not know his assailants before, an identification parade ought to have been conducted in accordance with the procedure as stated in **Tano John v. R,** Criminal Appeal No. 372 of 2014 (unreported).

Ms. Leopold submitted in relation to the sixth ground of appeal that exhibit P5, the first appellant's cautioned statement, was not properly received in evidence because the witness who tendered it is not the one who authored it.

Arguing the second ground in the additional grounds of appeal, the learned Senior State Attorney conceded that the stolen property was not properly identified by the owner, PW2. This is because the property which was allegedly found in possession of the appellants was not similar to the one which was tendered in court by PW2. For the foregoing arguments, Ms. Leopold urged us to allow the appellants' appeal.

Following the respondent's concession to the appeal, the appellants had nothing substantial to add in their rejoinder.

We have considered the grounds of appeal and the submissions of the parties. We are required to decide whether the appeal has merit. In respect of the first ground of appeal, we agree with both parties that the charge did not indicate at whom were the threats directed during the robbery. Ms. Leopold argued that this omission prejudiced the appellants as they could not properly marshal their defence. We are not prepared to go along with Ms. Leopold. The overriding objective now enshrined under section 3A and 3B of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018 calls upon the Court to avoid unnecessary technicalities and decide cases on consideration of substantial justice.

We have asked ourselves if this principle can be applied in the instant case. It is our considered view that the omission is not fatal as it is curable under section 388 (1) of the CPA. This is so because PW1 who was the victim of the offence testified before the trial court and explained how he was threatened by the thugs. Now, since PW1 testified before the appellants gave their defence, we are satisfied that they were aware as to whom the alleged threats were directed and therefore, when they gave their respective defences they had sufficient knowledge of the charge against them. They were thus not prejudiced anyhow. In its recent

decisions, the Court has applied the overriding objective, one of them being **Jamali Ally @ Salum v. R,** Criminal Appeal No. 52 of 2017 (unreported). In that case, the appellant was charged with the offence of rape under sections 130 and 131 (1) (e) of the Penal Code. The appellant complained that section 131 (1) (e) is non-existent making the charge defective. The Court decided that: -

> *"In the instant appeal before us, the particulars of the offence were very clear and, in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, and the name of the victim and her age."*

Having found that the particulars of the offence gave the appellant sufficient information about the charge against him, the Court held that the omission was not fatal to the charge. In the circumstances, this ground of appeal has no merit.

In relation to the fourth and fifth grounds of appeal, we are in agreement with both parties that, since the incident occurred during night

hours, PW1 ought to have mentioned the source of light which helped him to identify the first appellant as among his assailants because he was not known to him before. In the oft-cited case of **Waziri Amani v. R** [1980] T.L.R 250, the Court laid down some crucial conditions which should be met before the evidence of visual identification made under difficult conditions is relied upon to convict. One of such conditions is the proof of the type and/or intensity of light which helped the witness to make identification. Thus, since in the instant case PW1 did not mention the source of light which aided him to identify his assailants, it cannot be said that he positively identified the first appellant as one of the thugs who robbed him. It follows therefore that, since PW1 did not know the first appellant before, an identification parade was necessary. It was not done in this case. We get support in this view from the case of **Tano John v. R,** Criminal Appeal No. 372 of 2014 (unreported), cited to us by Ms. Leopold in which the Court stated thus: -

> *"The normal practice in instances where a culprit is not previously known to a victim is to hold an identification parade where the suspect gets apprehended. The holding of identification parades to have suspects identified is intended to ensure that the identification of a suspect by a witness*

takes place in circumstances where the recollection of the identifying witness is tested objectively under safeguards by placing the suspect in a line made up of a like looking suspects."

In the sixth ground of appeal, it is not disputed that the first appellant's cautioned statement (exhibit P5) was not tendered by the witness who recorded it. It was the prosecuting attorney who tendered the statement which is contrary to the law. Faced with a situation like the present, the Court said in the case of **Silvery Adriano v. R,** Criminal Appeal No. 121 of 2015 (unreported), thus: -

"...the exhibit was tendered by the prosecuting attorney from the bar, at the end of the trial, which was illegal because he was not a witness and could not be cross-examined."

(See also the case of **Frank Massawe v. R,** Criminal Appeal No. 302 0f 2012 (unreported).

There is yet another ailment which goes with the admission of the cautioned statement; it was read over before admission. This was unprocedural and, we think, it prejudiced the appellants. There is plethora of authorities where the Court has held that exhibits should first be cleared

for admission before they are admitted and read over in court. One of such decisions is the case of **Robinson Mwanjisi and Three Others v. R** [2003] T.L.R. 218 whereby three stages were outlined before documents are received in evidence, it was said thus: -

> *"...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.****"*(Emphasis added).

Now, since exhibit P5 was improperly admitted in evidence, it lacks evidential value and we hereby expunge it from the record. This ground is therefore meritorious.

The second ground in the additional grounds of appeal relates to identification of the stolen property by the purported owner. In this case PW3 testified that the motorcycle which was allegedly mortgaged by the appellants to the then fifth accused person Nazir Shariff, had no registration number. PW2 who purported to be the owner of the stolen property, said the motorcycle's registration number was T 923 BAY. It was not said when the plate bearing the said number was recovered. If that is the case, the identity of the stolen property was not proved and therefore

it cannot be reliably said that it belonged to PW2 and the appellants were responsible for the theft. There is a plethora of authorities in this part of the law, some of them are: **Hassan Said v. R,** Criminal Appeal No. 264 of 2015 and **Lomayan Kivuyo @ Babuu v. R,** Criminal Appeal No. 531 of 2016 (both unreported). In **Lomayan Kivuyo @ Babuu** for instance the owner did not identify the stolen property, the Court held thus: -

> *"We also agree with submissions of both parties that exhibit P2, the alleged stolen phone was not specifically identified by the complainant. PW1 did not give distinguishing marks of the phone to prove that it belonged to her."*

It follows therefore that, with the discardment of exhibit P5 and failure to identify the stolen property by PW2 as well as lack of watertight evidence as regards identification of the appellants, there was no basis for implicating the appellants with the offence charged. As the foregoing grounds of appeal are sufficient to dispose of the appeal, we find no need to deliberate on the remaining grounds.

Consequently, we are settled in our mind that the prosecution did not prove the case against the appellants beyond reasonable doubt. We find the appeal meritorious and hereby allow it, quash the conviction and set

aside the sentence meted out to the appellants. We finally order their release from prison unless they are continually lawfully held.

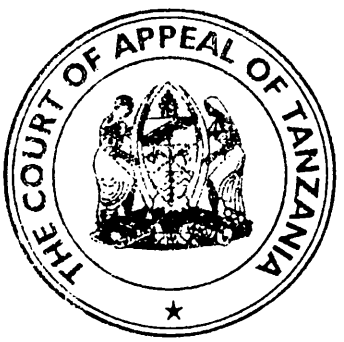
DATED at **DAR ES SALAAM** this 17th day of April, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 28th day of May, 2020 in the presence of the 1st and 2nd appellants, and Mr. Faraja George, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL