IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., MKUYE, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 466 OF 2017

STANY LOIDI .....APPELLANT

VERSUS

D.P.P .....RESPONDENT

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

(Mutaki SRM, Ext. J.)

Dated on 18th day of July, 2017
in
Criminal Appeal No. 87 of 2016

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JUDGMENT OF THE COURT

1st & 3rd April, 2020.

MKUYE, J.A.:

Stany Loidi, the appellant, was arraigned before the District Court of Chunya at Chunya for the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16, R.E 2002. It was alleged that the appellant, on the 3rd day of April, 2016 at Mwaoga village within Chunya District in the Region of Mbeya, did steal 5.6 grams of gold valued at Tshs. 2,200,000/= and cash money Tshs.1,804,000/=, the property of one, Ambwene Simon and immediately before or after stealing threatened the victim by using a gun in order to obtain and retain the said property.

After having denied the charge, the case went on full trial whereupon he was found guilty, convicted with the offence he stood charged and sentenced to thirty (30) years imprisonment.

Being aggrieved by that decision, he appealed before the High Court but his appeal was dismissed. Still protesting his innocence, he has brought a second appeal before this Court.

The facts leading to this appeal can be stated as follows:

The victim, Ambwene Simon (PW2) was a resident of Mwaoga Makongolosi village. He conducted a petty business of selling food to miners in that area. He also used to keep gold pellets. His business was conducted at a kiosk/ shop at a place which was separate from his home.

On the 3rd day of April, 2016 at about 22:00hrs PW2 left the shop and went home to have dinner. While eating at his home he was invaded by bandits and one of them pointed a gun at his mouth. Suddenly, the bandits ordered him together with his family members to lie down lest they would kill him. They put off the electricity light and tied them with ropes. Meanwhile, those bandits demanded to be given money but he informed them that he kept it at his shop. At about 1:00hrs, they

released PW2 and proceeded to the shop with two bandits, one holding a gun and the other holding a steel bar.

On arrival at the shop, the bandits allegedly stole Tshs.2,200,000/= in cash and gold worth Tshs.396,000/=. Then, those bandits together with PW2 went back to his home whereupon they left at 01:15hrs after having counted the money they had stolen.

PW2 reported the matter to village Chairman, Shabani Kidiga Mahida (PW3) who later informed the police. Thereafter, the appellant was arrested in connection with the offence of armed robbery. The prosecution presented four (4) witnesses and produced two (2) documentary evidence to prove its case. In his defence, the appellant, testified on his own behalf as there was no other witness who was called to testify.

The appellant, in his memorandum of appeal, raised ten (10) grounds of appeal which can be paraphrased as follows: **One,** the trial court relied on the extra judicial statement which was not corroborated by any caution statement of the appellant. **Two,** the trial court relied on the evidence of PW1 (justice of peace) without taking into account that he did not introduce himself to the appellant as a justice of peace; and that the trial within trial was not conducted after the appellant had

objected the tendering of the extra judicial statement (Exh P1). **Three,** the appellant was not properly identified as PW2 failed to give a description of the appellant while he had stated that the electricity had been put off; **four,** the intensity of light which enabled PW2 to identify the appellant was not explained; **five,** the money alleged to be stolen Tshs.1,804,000/= and 5.6 grams of gold were not tendered in court as exhibits; **six,** the trial court relied on PW3's evidence which was a hearsay evidence having been told by PW2; **seven,** the identification parade was not properly conducted as PW2 saw the appellant before; **eight,** the other participants in the identification parade were not called to testify in court to corroborate the evidence of PW4 that the appellant was identified by PW2; **nine,** the trial court convicted the appellant on the weakness of the appellant's defence; and **ten,** the prosecution failed to prove the case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented; whereas for the respondent/Director of Public Prosecutions, Ms. Rhoda A. Ngole, learned Senior State Attorney assisted by Ms. Xaveria Makombe, learned State Attorney entered appearance.

When the appellant was given the floor to elaborate on his appeal, he sought to adopt his grounds of appeal and opted to let the State

Attorneys respond first; and he reserved his right to rejoin later if need would arise.

On her part, Ms. Ngole declared their stance that they were supporting the appeal. She opted to respond to the appeal on the basis of three main grounds which are, visual identification, identification parade and extra judicial statement. Nevertheless, at the end, she added another ground relating to the variance between the charge sheet and the evidence.

In relation to the visual identification, Ms Ngole argued that, though PW2 explained in details the sequence of events from when the bandits invaded their house and pointed the gun at his mouth to the time when they stole Tshs.2,200,000/= and gold valued at Tshs.396,000/= from his kiosk/shop and returned back home, he did not explain the kind and the intensity of light which enabled him to identify the appellant. She added that the appellant did not also describe the appellant or specify whom between the two bandits who took him to the shop he was able to identify. She said, generally, the appellant failed to explain whether or not there were favourable conditions for proper identification of the appellant. In support of her argument she cited the

case of **Chacha Mwita and 2 Others v Republic**, Criminal Appeal No.302 of 2013 (unreported).

Ms. Ngole went on to submit that even the evidence of PW3, to whom the offence was reported by PW2, that he was told by him that there was sufficient light contradicted with PW2's evidence who did not explain the kind of light and its intensity in his testimony. She was of the view that having regard that there were no favourable conditions for proper identification, the visual identification in this case was not watertight.

As regards the identification parade, the learned Senior State Attorney argued that, though it was said that PW2 identified the appellant in the identification parade as the one who held the iron bar, he had not given prior explanation on how he identified him. Upon being reminded by the Court whether a person who did not identify the suspect at the scene of crime could identify him in the identification parade, she readily contended that it was impossible.

In relation to the extra judicial statement, she contended that, it was admitted contrary to the law for being read over in court before being cleared. While relying on the case of **Robison Mwanjisi and Another v. Republic**, TLR [2003] 220, she argued that reading of an

exhibit before being admitted was a fatal irregularity with the effect of being discounted. She, thus, prayed to the Court to expunge it.

Regarding the issue of variance between the charge sheet with the evidence, the learned Senior State Attorney submitted that, though in the charge sheet it is indicated that the stolen properties were gold gram 5.6 valued at Tshs. 2,200,000/= and cash Tshs. 1,804,000/=, PW2 in his testimony said the robbers had stolen Tshs. 2,200,000/= in cash and gold valued at Tshs. 396,000/=. She also added that, even the trial magistrate amending the charge in the judgment without being requested to do so was wrong. In this regard, she argued that the prosecution failed to prove her case beyond reasonable doubt. Lastly, on the basis of those grounds, she urged us to allow the appeal, quash the conviction, set aside the sentence and order for the immediate release of the appellant from custody.

In rejoinder, the appellant concurred with the learned Senior State Attorney's submission and prayed to the Court to set him free.

We have dispassionately considered the uncontested submission by the learned Senior State Attorney. Regarding visual identification evidence, it is true that both the two courts below relied on it in convicting the appellant. The two courts were convinced that there was

light and that PW2 and the bandits spent a long time at the time the offence was committed.

On how PW2 identified the appellant, we find it apt to reproduce what he testified in court at page 17 as hereunder:-

> *"...while I was eating I saw a gun at my month. I was ordered not to move. I was ordered to lie. We were tied up, they put off electric light, the youths told me they would kill me unless I produce and give them money. Also gold others were searching in various parts in the house. I told them that I keep money and gold in the kiosk...*
>
> *At about 1:00 Am they released me, the one with the gun was behind and another with steel bar ahead on the journey to the shop. I showed them where I keep the money; one of them was close to me. I could see him, his face was not covered. They took the money, Tshs. 2,200,000/= and gold which was kept in a tin of Tshs. 396,000/= value. The gun was put down. They escorted me to my residence. They counted the money at my home, they left the place about 1:15 Am..."*

We have reproduced the above excerpt at length so as to understand the gist of evidence given by PW2 evidence in relation to identification. What is notable is that though the witness explained in

detail the sequence of events, he did not explain the type of light nor its intensity; he did not give a description of the appellant; and he did not explain the conditions whether or not were favourable for proper identification. In the case of **Chacha Mwita and 2 Others** *(supra)* when the Court was confronted with a scenario like in this case cited with approval the case of **Waziri Amani v. Republic**, [1980] TLR 250 which laid down factors to be taken into account when considering visual identification evidence as follows:-

> *"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."*

Also in the case of of **Frank Christopher @ Malya v. Republic**, Criminal Appeal No. 182 of 217 (unreported), the Court emphasized the requirement of giving description of the accused especially if the accused is a stranger to the victim. In that case the Court quoted with approval the principles which were stated by the erstwhile East African

Court of Appeal in the case of **Mohamed Allui v Rex**, [1942] 9 EACA 72, and stated as follows:

> ***"In every case in which there is a question as to the identity of the accused, that fact of there having been given a description and the terms of that description are matters of the highest importance of which evidence ought always to be given*** *first of all, of course, by the person who gave the description and purports to identify the accused, and then* ***by the person or persons to whom the description was given".*** *(Emphasis added).*

Yet, in the case of **Mwita and 2 Others** (*supra*) where identification was done under unfavourable conditions, the Court stated as follows:

> *"There is no gainsaying that where a witness is testifying about identifying another person in unfavourable circumstances as in this case, he must give clear evidence which leaves no doubt that the identification is correct and reliable and must mention all aids to unmistaken identification like the source of light and its intensity etc. See* ***Said Chelly Scania v.R,*** *Criminal Appeal No.69 of 2005; and* ***Abdi Julius @ Mollel Nyangusi and***

Another v.R, *Criminal Appeal No.107 of 2009 (unreported).*

In this case, much as the 1st appellate court had found that the appellant was positively identified due to sufficient electric lighting and that PW2 had spent a long time (almost 3 – 4hrs) with the bandits, we find that that was not sufficient. We say so because, based on the above cited authorities, PW2 did not explain the type of light and its intensity; he did not give a description of the appellant whom he did not know even before the incident; and he did not explain the conditions whether or not were favourable for proper identification. At most what can be gathered from PW2's evidence is that the conditions that prevailed were not favouvarable having regard to that the fact that the gun was pointed at his mouth, the light was switched off and that they were tied with ropes. This means that the place was dark and that they were under fear. Under such situation PW2 could not be in a position to continue watching the attackers.

Moreover, PW2 said that when he was taken to the shop by two invaders, he watched the bandit who was close to him. Unfortunately he did not explain the prevailing conditions which enabled him to identify mthe bandit. He did not also explain if there was light and its intensity on

their way to the shop and inside the shop itself. In addition, regarding the persons who took him to the shop, there was no explanation given if the appellant was the one holding the gun or the steel bar and how he identified him as one was in front of him and the other at his back.

Given the circumstances that prevailed at that particular time, we are settled in our mind that the conditions were not favourable to enable PW2 identify the appellant properly. We, therefore, agree with the learned Senior State Attorney that the visual identification evidence was not watertight and that the appellant was not identified to be the person who robbed the PW6.

In relation to the issue of identification parade we agree with the learned Senior State Attorney that since PW2 failed to identify the appellant at the scene of crime there cannot be evidence that he identified him in the identification parade. This is so because the evidence of the witness who failed to identify the appellant at the scene of crime but alleges to have identified him at the identification parade is not in any way of assistance in establishing a conclusive identification of the appellant (See **Michael Godwin and Another v Republic,** Criminal Appeal No 66 of 2002 (unreported)). Perhaps, it is noteworthy at this juncture to restate that the purpose of an identification parade is

to enable a witness identify his/her assailant whom he/she has not seen or known before the incident and it is conducted during investigation to ascertain whether the witness can identify such suspect of the crime. (See **Joel Watson @ Ras v Republic**, Criminal Appeal No.143 of 2010 (unreported).

In this case, as we have already ruled out that the visual identification was not watertight, the identification through identification parade cannot offer a conclusive identification.

We now turn to the issue of the improper admission of the extra judicial statement. Ms. Ngole's contention is that it was not properly admitted as it was read out before its admission in court. For better appreciation of what transpired in Court we found it appropriate to reproduce in portion what PW1 stated in the trial court as follows:

> *"I can recognize the statement I do the same, it bears my handwriting and signatures.* ***I pray the same to be tendered as an exhibit after I read it."***
>
> *Accused: I do not recall on it. I don't know how to read and write.*
>
> *Court: Admitted as Exhibit "P1".*
>
> [Emphasis added].

From the above quoted portion of the proceedings, it is evident that the extra judicial statement of the appellant was read out in court before it was admitted in evidence. However, we think that it was not proper to read out a document before it is admitted in evidence. This Court was confronted with akin situation in the case of **Robison Mwanjisi and another** (*supra*) where the 1st appellate court, admitted the statements made to the police during investigation though they had been rejected by the subordinate court, in the absence of the appellants, and it observed as follows:

> ***"It is noted that the statements were read out before the Trial Court although they were subsequently rejected,*** *a practice unfortunately common in trials before Subordinate Courts.* ***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. Reading out documents before they are admitted in evidence is wrong and prejudicial.*** *If the document is ultimately excluded, as happened in this case, it is difficult for the Court to be seen not to have been influenced by the same."*

[Emphasis added]

On our part, we agree with Ms. Ngole that the extra judicial statement was not properly admitted. Even the fact that it was admitted

despite the appellant's denial to know it, we think, it prejudiced the appellant. In a situation where the appellant denied to know the statement, prudence dictates that an inquiry should have been conducted to clear the dust or ascertain if the appellant made it or not. (See **Manje Yohana v Republic,** Criminal Appeal No. 147 of 2016 (unreported). Hence, given that the alleged extra judicial statement was wrongly admitted in evidence, we hereby expunge it.

Regarding the discrepancy in the properties alleged to have been stolen indicated in the charge sheet and the evidence adduced by PW2, we equally agree. Having revisited the record of appeal we have come across the fact that while in the charge sheet the appellant was alleged to steal 5.6 gram of gold valued at Tshs.2,200,000/= and cash Tshs.1,804,000/= the property of Ambwene Simon, PW2 (**Ambwene Simon**) told th e court that the bandits who took him to his shop stole cash Tsh.2,200,000/= and gold valued at Tsh.396,000/=. In such a situation, as was rightly argued by Ms Ngole, the proper course of action was for the prosecution to seek leave of the court to amend it. That was not done. Neither was it the duty of the trial magistrate to amend it in the judgment as he did in this case. At any rate, we think, the discrepancy vitiated the standard of proof required in criminal cases.

In the case of **Masota Jumanne v Republic**, Criminal Appeal No.137 of 2016 (unreported), when the Court was faced with a similar situation it stated as follows:

> *"In a nutshell the prosecution evidence was riddled with contradictions on what was actually stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge."*

(See also **Vumi Liapenda Mushi v Republic**, Criminal Appeal No. 327 of 2016 (unreported).

In our case at hand, after having considered the variance in the charge sheet and the evidence adduced by PW2 who was the victim of the offence, we find that such discrepancies were not minor as they went to the root of the matter. They rendered the entire case not to be proved to the required standard.

In view of the foregoing, we agree with the learned State Attorney that the case was not proved beyond reasonable doubt. We, therefore, allow the appeal, quash the conviction, set aside the sentence meted out

against the appellant and order for his immediate release from custody unless held for other lawful reason(s).

Order accordingly.

DATED at **MBEYA** this 3rd day of April, 2020

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of April, 2020 in the presence of the appellant in person and Ms. Sara Anesius learned State Attorney for the Respondent is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL