IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KWARIKO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO 11 OF 2018

BETWEEN

IBRAHIM ALLY MWADAU ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal form the decision of the High Court at Dar es salaam)

(Mlay, J.)

Criminal Appeal No 143 of 2002

Dated 27th October, 2006

.....

JUDGMENT OF THE COURT

14th & 23rd July, 2020

LILA, J.A.:

The appellant, Ibrahim Ally Mwadau @ Kiswabi @ Kocha, together with five other accused persons who were acquitted by the District Court of Ilala (the trial court) were arraigned on a charge comprised of two offences. In the first count all of them were charged with attempt armed robbery contrary to section 287 of the Penal Code Cap. 16 of the Revised Edition 002. It was alleged that on 23/9/1998 at about 15:45 hours along Jamhuri/ Zanaki Street within Ilala District, Dar es Salaam they attempted to steal money from Taya

Bajaria and immediately before such attempt they threatened to shoot Taya Bajaria with a pistol in order to obtain the money.

In the second count, only the appellant was charged with armed robbery contrary to section 285 and 286 of the Penal Code Cap 16. The particulars of offence were that on the same date and place at 15:45 hours he did steal a motor vehicle make Nissan Sunny with Registration No RAC 85 valued at TZS 3,500,000.00 the property of Tanzania Railway Corporation (T.R.C) and that immediately before such stealing he did use actual violence to one Juma Matanda, the driver of the said car, by pointing to him a pistol in order to obtain the said car.

After a full trial the trial court was satisfied that the offence of attempted robbery was not proved as against all accused persons. It thereby acquitted them all. As for the offence of armed robbery, it found it to have been proved as against the appellant. He was accordingly convicted and sentenced to serve thirty years imprisonment.

Aggrieved, the appellant protested his innocence before the High Court. As the bad luck would have it, he was unsuccessful. Undaunted, he preferred the present appeal to the Court.

The prosecution assembled a total of 7 witnesses to prove the charge. After the closure of the prosecution case the trial court was satisfied that save for the appellant on the second count, a prima facie case against the rest of the accused persons was not established hence they were acquitted.

The pertinent facts of the case which led to the appellant's conviction with the offence of armed robbery are straight forward. On the material date and at/about 2:45 pm, Iddi Matanda (PW1), a driver working with the T.R.C, was driving a Nissan Sunny Saloon car from the office and on arriving at around Jamhuri/Zanaki Street he heard people screaming for thief. No sooner had he done anything, than he found himself at a gun point. He was forcefully removed out of the car by a person who then took over the steering. However, before he could move the car, a group of people surrounded the car. One of those people who was an officer from National Service (JKT) managed to snatch the gun from that person. A Police Officer No E.7029 PC Hamisi (PW4) who happened to be at the scene arrested that person and took him to the Police Post. That person turned out to be the appellant.

The appellant, the only defence witness, denied involvement in the commission of the alleged offence. Despite his concession that on the fateful day and time he was at the scene, he claimed that he was running after a thief

who had snatched his wallet at a certain shop where he had gone to buy some items. As to what preceded the event, the appellant explained that when he went back to collect the properties he had bought, the one who was receiving those properties he had bought screamed 'thief, thief' something that attracted a group of people who started beating him. He said he was then arrested and thereafter taken to a police station. It is from that set of evidence the trial court convicted the appellant with armed robbery.

As we have indicated above, the appellant was aggrieved. He unsuccessfully appealed to the High Court. Still protesting his blamelessness the appellant appealed to the Court advancing the following points of grievance:-

> "(1). That, the 1st appellate judge erred in law and fact by relying on the charge sheet of which the year of its amendment is unknown.
>
> (2). That, the 1st appellate judge erred for sustaining on the incredible evidence of visual identification against the appellant as transpire by PW1, PW2 and PW3 since

the circumstances prevailed at the fracas of scene were miserably unfavourable.

(3). That, the 1st appellate judge erred in law and fact by holding and considering on the dock identification against the appellant without bearing in mind that the prosecution had totally failed to conduct an identification parade in order to clear any speck of doubt.

(4). That, the 1st appellate judge grossly erred for sustaining on the evidence of a co-accused confession transpired by the 3rd accused person against the appellant without being corroborate, however such statement was recorded beyond the prescribed period of time.

(5). That, the 1st appellate Judge miserably erred for relying on exhibit P3 which was illegally tendered and admitted in evidence in that notwithstanding that it was objected by the learned counsel of the 1st accused during the trial of the case, no trial within trial was

conducted in order to ascertain whether it was obtained voluntarily.

(6). That, the 1st appellate judge erred in law and fact for improperly supporting the testimony of PW1 and PW2 as good evidence while the same was very suspiciously and contradicted itself as regards to who exactly was with PW1 at the *locus in qou* during the fateful day."

The appellant, later on, lodged a supplementary memorandum of appeal comprised of one ground of appeal as hereunder:-

"1. That, the learned 1st appellate judge erred in law by sustaining the appellant's conviction and sentence based on incurably defective charge at material time there was no provision in the Penal Code creating the offence known as armed robbery."

At the hearing of the appeal, the appellant's appearance was facilitated through a video link from prison whereas the respondent Republic had the services of Ms. Jenipher Mark Massue, learned Senior State Attorney, who was assisted by Ms. Chesensi Awene Gavyole, learned State Attorney.

The appellant, after adopting his grounds of appeal, left it for the respondent Republic to respond to them so that he could later on make a rejoinder.

In her response to the grounds of appeal, Ms. Massue, initially, resisted the appeal. She contended that the prosecution evidence proved the charge against the appellant beyond reasonable doubt.

Ms Masue, opted to begin her submissions with the sole ground of appeal raised in the supplementary memorandum of appeal and ground one (1) of the memorandum of appeal jointly which touch on the validity of the charge. She conceded that at the material time the offence termed as "armed robbery" did not exist. She, however, quickly pointed out that the law then distinguished the offence of robbery committed by an accused who is armed with any dangerous or offensive weapon or instrument and the one who is not so armed by providing different sentences, the former being severely punished. She referred us to the provisions of the then sections 285 and 286 of the Penal Code. She argued that a formal distinction and hence establishment of the offence of armed robbery was brought about by an amendment to the Penal Code by Act No 4 of 2004 whereby section 287A was introduced. Since the particulars of the offence and the evidence led by the prosecution clearly showed that the appellant used a pistol in the commission of the offence, she

was of the view that the appellant was not prejudiced by the word "armed robbery" used in the charge instead of "robbery with violence". In addition, she argued that it was not clear as to which amendment the appellant was contemplating and complaining about in his ground one (1) of appeal. She accordingly implored us to dismiss those two grounds of appeal.

This ground of complaint need not detain us so much. We entirely agree with the learned Senior State Attorney that the defect on the charge is curable under section 388(1) of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA). It is true that at the material time (23/9/1998) the offence termed "armed robbery" was not in existence. However, the provisions of sections 285 and 286 of the Penal Code gave a clear distinction between robbery with violence committed with the use of a weapon and the one committed without it by stipulating different sentences. We would let the respective provisions tell it all.

Section 285 which provides for the definition of robbery states:-

> *'Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome*

resistance to its being stolen or retained is guilty of robbery'

Section 286 of the penal Code provides the punishment for robbery, as follows:-

> *"Any person who commits robbery is liable to imprisonment for twenty years and if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with any other person or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses personal violence to any person, he is liable to imprisonment for life, with or without corporal punishment."*

It is plainly clear that the two provisions herein above do not provide for an offence termed "armed robbery". That is to say, in 1998 when the appellant was charged the offence termed so did not exist. As rightly argued by the learned Senior State Attorney, the offence termed armed robbery was introduced by Act No 4 of 2004 which amended the Penal Code and introduced section 287A. However, even before the amendment, the law recognized it by way of the sentence imposed. So, the mere writing "armed robbery", the appellant was not thereby prejudiced because both the particulars of the offence and the evidence on record sufficiently informed the appellant the

accusation leveled against him to be that he committed the offence of robbery with violence but he employed a weapon, a pistol. The particulars of the offence stated that:-

> *"**PARTICULARS OF OFFENCE**: IBRAHIM ALLY MWADAU @ KISWABI @ KOCHA is charged that on 25th day of September, 1998 at about 15.45 hours along Jamhuri/Zanaki Street within Ilaia District in Dar es Salaam Region, did steal a motor vehicle make Nissan Sunny with Reg. No. RAC 85, valued at Tshs 3,500,000/= the property of Tanzania Railway Corporation and immediately before such stealing did use actual violence to one JUMA MATANDA, the driver of the said car by pointing him a pistol in order to obtain the said car."*

Clear as they are, the particulars of the offence coupled with the testimonies of PW1 and PW4, we hasten to state that nothing was left unclear to the appellant on the nature and substance of the charge leveled against him. The defect is therefore curable under section 388(1) of the CPA [See **Jamali Ally @ Salum vs Republic**, Criminal Appeal No. 52 of 2017 (unreported)]. The two grounds of appeal lack merits and are hereby dismissed.

Ms. Massue argued grounds 2 and 3 together. The complaint centered on insufficiency of the identification of the appellant and failure to conduct identification parade. She discounted them as being baseless on account of the fact that the offence was committed during a broad daylight and the appellant was arrested at the scene of crime hence the question of identification of the appellant does not arise.

We, again, entirely agree with the learned Senior State Attorney that, given the fact that the offence was committed during a broad daylight and the appellant was allegedly arrested at the scene of crime, the issue of identification does not arise. The Court has on a number of times held that where an accused is arrested at the scene of crime his assertion that he was not sufficiently identified should be rejected. [See **Bahati Robert Vs. Republic** (supra) and **Joseph Safari Massay Vs. Republic,** Criminal Appeal No. 125 of 2012 (unreported)]. In the latter case, the case of **Abdalla Bakari Vs. Republic,** Criminal Appeal NO. 268 of 2011 (unreported) was cited in which the appellant was overpowered and arrested at the scene of crime and his assertion on appeal that he was not sufficiently identified was rejected. The Court has also always considered the evidence of finding somebody red handed committing an offence to be conclusive. For instance in the case of **Abdallah Ramadhani**

Vs.Republic, Criminal Appeal No.141 of 2013 (unreported), the Court stated as follows:

> *"When he responded to the call and went to the scene of crime, he found the appellant in "flagrante delicto" raping the complainant. The evidence to prove the offence of rape was therefore more than sufficient":*

Applying the same principle, this ground of appeal is baseless and is hereby dismissed

Grounds 4 and 5 of appeal did not pose any difficulty to the learned Senior State Attorney because without mincing words, she conceded that the 3rd accused's cautioned statement which incriminated the appellant was improperly introduced into evidence on account of not being read out after it was admitted as exhibit. She, on that account, invited the Court to expunge it from the record of proceedings. We, indeed, agree with the learned Senior State Attorney that the 3rd accused's cautioned statement (exhibit P3) was not read out after it was cleared for admission. That omission was fatal as it denied the appellant the right to understand the nature and substance of facts contained in it so as to enable him align his defence properly (See **Robinson Mwanjisi and Others vs Republic** [2003] TLR 218). We accordingly accept

the invitation and hereby expunge exhibit P3 from the record of proceedings. The two grounds of appeal are allowed.

We now turn to consider the last ground of appeal, ground 6. Initially, the learned Senior State Attorney resisted this ground of complaint pointing out that PW1, PW2 and PW4 were eye witnesses to the incident, they were reliable and credible. She insisted that the contradictions if any were minor and did not go to the root of the case. She argued that PW1 and PW2 were together in the car on the fateful date and they told the trial court that the appellant invaded that car, pointed a pistol to PW1 and that he was disarmed by a certain National Service Officer before he was arrested by PW4. However, when we brought to her attention the evidence by the said eyewitnesses on how the incident occurred, she retreated and conceded that their evidence contradicted on certain material aspects hence they were not reliable. She went further to point out the contradictions to be; First, regarding who were in the car, the learned Senior State Attorney argued that while PW1 said he was with a certain lady called Bamwenda, PW2 who claimed to have been the one who was with PW1 introduced herself as being Mary Benedictor. Second, in respect of how the appellant invaded that car, PW1 said Bamwenda had sat at the front left hand side of the car while PW4 said the lady in the car sat at the back seat. Third, she argued that there were different versions given by the witnesses

regarding how the appellant was arrested. She said while PW1 told the trial court that the appellant pointed a pistol to him, pulled him down and entered the car, PW4 told the trial court that the driver (PW1) was forced to drive the car while the appellant was in the car seated at the other seat. These versions by the witnesses compelled the learned Senior State Attorney to realize that there were material contradictions going to the root of the case and she changed her position and supported the appeal.

The general view of the Court is that minor contradictions, inconsistencies and discrepancies by any particular witness or among witnesses do not corrode the credibility of a party's case while material contradictions and discrepancies do [See **Dickson Elia Nsamba Shapwata & Another vs Republic**, Criminal Appeal No. 92 of 2007 (unreported)]. Having seriously examined the prosecution evidence on record, we are inclined to agree with the learned Senior State Attorney that the contradictions cited in the present case were material and go to the root of the case. In the first place it does not occur to us how PW2 (Mary Benedicto) gave evidence tending to show that she was the one who was with PW1 in the car at the material time whereas the latter had categorically stated that he was with one Bamwenda, his fellow work-mate. There was no evidence suggesting or from which it could be inferred that Mary Benedicto and Bamwenda were one and the same person.

Even when cross-examined by Mr. Magafu, learned defence counsel, PW1 maintained not knowing one Mary Benedicto. This alone creates doubt whether or not PW2 was not a planted witness. More seriously, the evidence giving details on how the offence was committed leaves much to be desired. PW1 and PW4 who were said to be eye witnesses gave different versions over the same incident. For clarity, we let the record speak for itself.

PW1 told the trial court that:-

> *"... On arriving at round about of Jamhuri Zanaki around DTV I heared a voice of thief from Jamhuri Street. Suddenly I saw the person at the door of my car who pointed to me a pistol and forced me come outside my car. While on the said car I lied down. That person opened my car and removed me by force outside the car and entered inside the car. While he was about to run a group of people came and surrounded the car. One Police Officer of JKT managed to take the pistol from that man. He was removed outside the car and started to beat him..."*

On his part, PW4 is recorded to have stated that:-

> *"On arriving at DTV I saw one person holding a bag running while people were crying from behind "mwizi mwizi" thief thief. That man was coming from science and technology towards Zanaki at the*

roundabout. I saw that man forcing to enter in one car Hyundai RAC 85. I saw him with a weapon (pistol). The car stopped to wait the chance of crossing roundabout. He entered inside the car and forced the driver to drive the car, driver did not accept to drive the car. One Police Officer of JKT grabbed the weapon from the culprit, by then I had arrived on the other side of the car. We forced accused outside the car with the help of other Police Officers. Accused was taken to Police Post Kisutu."

When he was cross-examined by Mr. Magafu, he stated that:-

"Many people came for help. Driver was forced to drive the car while culprit was seated at the other seat front driver (right) culprit (left) both were inside the car."

It is definite, from the above excerpts, that the evidence by the two witnesses was shrouded with material inconsistencies. While PW1 said he was forcefully removed from the car by the culprit and the culprit entered into it, PW4 stated that the culprit entered into the car while PW1 was inside and forced him (PW1) to drive the car. Furthermore, according to PW, the appellant was arrested while on the driver's seat and when he attempted to run away as opposed to PW4 who said that the appellant was arrested while in the other

seat other than the driver's seat. Such evidence by PW1 and PW4 who were key witnesses to the incident had a lot of bearing with the commission of the offence hence the inconsistency cannot be taken lightly. We therefore have no hesitation to state that the inconsistencies were material and went to the root of the prosecution case. The Court has pronounced itself in various decisions that the credibility of witnesses is gauged not only by the witness's self-contradictions but also by the inconsistencies in the witnesses' evidence. For instance, in the case of **Oscar Nzelani vs Republic**, Criminal Appeal No. 48 of 2013 (unreported), the Court stated that:-

> *"It is trite law that in assessing a witness's credibility, his or her evidence must be looked at in its entirety, to look for inconsistencies, contradictions and/or implausibility; or if it is entirely consistent with the rest of the evidence on record: See, for instance,* ***Shabani Daudi v. Republic,*** *[CAT] Criminal Appeal No. 28 of 2000 (unreported) and* ***Soda Busiga,*** *(supra)."*

Given the inconsistencies in the evidence by PW1 and PW4 on how the alleged robbery incident occurred, we are firm that the credibility of the prosecution case was thereby corroded. PW1 and PW4 cannot therefore be considered to have been credible and reliable. It was therefore unsafe to rely

on their testimonies, as did the trial court and sustained by the first appellate court, to found the appellant's conviction.

In the event, we allow the appeal, quash the appellant's conviction and set aside the sentence meted on him. Unless held for another lawful cause, we order his immediate release from prison.

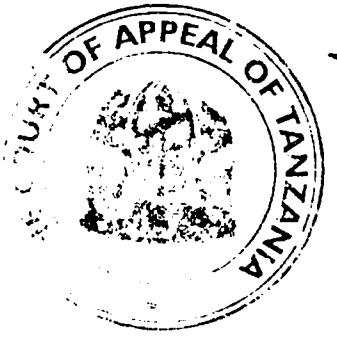
DATED at **DAR ES SALAAM** this 21st day of July, 2020

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of July 2020, in the Presence of the Applicant in person-linked via video conference and Ms. Miss Anjelina Nchalla Senior State Attorney for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL