

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CRIMINAL APPEAL NO. 286 OF 2017

CHARLES NANATI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mwandambo, J.)

dated the 28th day of March, 2017

in

HC. Criminal Appeal No. 219 of 2016

JUDGMENT OF THE COURT

24th February, & 6th March, 2020

LEVIRA, J.A.:

The appellant, Charles Nanati was arraigned before the District Court of Morogoro facing two counts of armed robbery c/s 287A of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). He was tried, convicted of both counts and sentenced to serve thirty years imprisonment in each count. The sentences were ordered to run concurrently. Aggrieved, he unsuccessfully appealed to the High Court, hence the current second

appeal. The appellant faults the conviction and sentences basically on the following complaints: **One**, that he was not properly identified at the scene of crime and during identification parade as alleged by PW1, PW2 and PW3. **Two**, PW2 and PW6 gave a contradictory account on when the appellant was apprehended. **Three**, PW4 obtained the cautioned statement of the appellant (Exhibit P1) contrary to the mandatory provisions of the law. **Four**, the charge of armed robbery was not proved against the appellant beyond reasonable doubt.

Before addressing the appellant's complaints we think it is apposite to briefly state the evidence upon which the appellant's conviction was based and eventually sustained by the High Court.

It was alleged by the prosecution that, on the 9th day of June 2014 at or near Diguzi village within the District of Morogoro in Morogoro Region, the appellant stole sum of Tshs. 5,000,000/= from one, Mudie Kilumali. Also immediately before such stealing threatened the said Mudie Kilumali with firearm in order to obtain the said stolen properties. It was further alleged that on the same day, place and time he again stole sum of Tshs. 2,360,000/= from one Ngandi Diwanji Almas; and also, immediately before

such stealing threatened the said Ngandi Diwaji Almasi with firearm in order to obtain the said stolen properties.

The first victim, Mudie Kilumali (PW1) testified, on the fateful day while alone going for cattle auction at Diguzi, in the middle of the way was confronted by the appellant who ordered him to stop his motorcycle. Subsequently, the appellant who was not a stranger appeared in front of him and ordered him to stop his motorcycle which he was riding. The appellant threatened him and demanded to be given money. Being terrified, initially, PW1 gave him Tshs. 2,000,000/= but the appellant demanded more, so he gave him Tshs. 3,000,000/=. While the appellant was collecting that money, a motorcyclist came to the scene of crime. The appellant pointed a gun at him and ordered the said motorcyclist which he obeyed to leave the motorcycle and go away. Within no time, Ngandi Almas (PW2) and Emmanuel Shabala (PW3) arrived at the scene. Having seen them, appellant pointed them with a gun, ordered them to stop and give him money; they as well obeyed to the order. After collecting the money the appellant left the scene of crime. PW1 and his fellows reported the incident to the police. On 12/10/2014 PW1 received information that

the bandit was apprehended and kept at Chalinze police station. PW1 and his fellow victims went to Chalinze police station where he was able to identify the appellant during the identification parade.

PW2, a pastoralist and cattle businessman testified to the effect that he knew the appellant as a fellow pastoralist and they used to live together at Luhindo-Dakawa in Mvomero District. According to PW2 on 9/6/2014 around 06:30 hours he was with his uncle Emmanuel (PW3) going to the cattle auction at Diguzi area. On the way they saw Mudie Kilumali (PW1) standing beside a motorcycle. Believing that there was an accident, PW2 rushed towards the scene, but upon arriving there Charles Nanati (the appellant) threatened them with a gun, ordered them to give him money otherwise he would kill them. PW2 took Tshs. 2,000,000/= from his pocket and dropped it down. He as well took another Tshs. 360,000/= and did the same. The appellant demanded money from PW3 but he had nothing. Thereafter, the appellant ordered them to depart from that area. It was PW2's further evidence that he identified the appellant because it was already morning so there was light, he knew the appellant before the incident and the appellant's face was not covered. PW2 testified that

having been ordered by the appellant to depart from the scene, they reported the incident to a policeman called Nyoni (PW5- PF 18327 A/Inspector Nyoni). It was also the testimony of PW2 that, on 7/10/2014 while at Chalinze auction together with Amos they were invaded by the appellant, but this time PW2 managed to escape and reported to the police who eventually managed to apprehend the appellant.

In his testimonial account, PW3 who is also a cattle keeper and businessman stated that he knew the appellant as they used to live together at Wami Sokoine village at Mvomero District before the appellant shifted to another village. He stated that he knew even the names of appellant's relatives. Basically, PW3's account is similar to that of PW2 concerning how the incident occurred until when the appellant was arrested.

PW5 confirmed that on the material day he received a phone call from PW2 informing him that, while PW2 and PW3 were going to the cattle auction at Diguzi they were robbed by Charles Nanati who was armed. PW5 and his fellow policemen went to the scene of crime and met PW2 who narrated to them what happened. However, they tried to search for

the appellant in vain. He also testified on how they received the information about the arrest of the appellant at Chalinze. PW5 and his fellow policeman (No. F 8750 D/C Paulo John- PW4) went to Chalinze Police station where A/Inspector Adam conducted the identification parade.

In his testimony, PW4 stated how he was ordered by PW5 go to the police station to meet PW1 and PW2, the victims of robbery which occurred on 9/6/2014. He went, met them and they told him that they knew the appellant by face and his name is Charles Nanati. The said victims told him that the appellant threatened them with a gun and forced them to give him money. Being scared, they gave the appellant about Tshs. 7,000,000/=.

On 7/10/2014, PW4 received information from Chalinze police station that the appellant was arrested. On 12/10/2014 PW4 accompanied PW5 to Chalinze where they went for identification parade and interrogation of the appellant. Upon arriving there, PW4 recorded the appellant's cautioned statement which was eventually admitted as exhibit P1 during trial.

The identification parade was conducted by PW6, A/Inspector Adam Mwakambane whose testimony was to the effect that, the appellant was identified by both victims (PW1 and PW2) in that parade. At the trial, PW6

tendered the Identification Parade Register and the same was admitted as exhibit P2.

In his defence DW1, Charles Nanati stated that on 6/10/2014 he went to visit his brother at Mwidu Bwawani who needed his assistance to trace his lost cows. On the following day he was arrested at Chalinze where he had gone to purchase provisions including cattle medicine and domestic items. The policemen forced him to show them a gun but he denied to have one and was kept in custody till 12/10/2014 when police officers Mr. Nyoni and Paulo came and ordered his release. The appellant claimed to have been taken in the torture room and asked the whereabouts of the gun used to commit crimes but he insisted not to have one. Having been tortured, the policeman Paulo came and informed him he wanted to record his statement concerning the offence committed on 9/6/2014. In response, he contended to have, on the fateful day, traveled to Singida and went back to Morogoro on 13/6/2014 and was received by Mr. Mashaka Dufae (DW2) who carried him on his motorcycle from Dakawa to his home. He as well tendered a bus ticket but the same was not admitted as exhibit following the prosecution's objection which was sustained. DW1 also

confirmed that he knew PW1, PW2 and Pw3 for a long time. The evidence of DW1, the appellant, was echoed by DW2 who stated that he knew the appellant as his neighbor and that, on 8/6/2014 he carried him on his motorcycle up to Dakawa bus stand when the appellant was going to Singida and on his return on 13/6/2014 from the bus stand to Luhindo.

With that evidence the trial court was satisfied that, the prosecution case was proved beyond reasonable doubt and the appellant was convicted and sentenced accordingly. The first appellate court sustained the appellant's conviction and the sentence.

At the hearing of this appeal the appellant appeared in person unrepresented, whereas the respondent Republic had the services of Ms. Debora Mcharo assisted by Ms. Imelda Mushi both learned State Attorneys. The appellant being a lay person prayed to adopt what is contained in his memorandum of appeal and the Court to consider it and set him free.

In reply, Ms. Mcharo commenced her submission by supporting the appeal. Regarding the appellant's complaints that he was not identified at the scene of crime, Ms. Mcharo faulted the credibility of the evidence of PW1, PW2 and PW3 who stated that, they identified the appellant and yet

they had to participate in the identification parade where they were required to identify the appellant. It was her argument that, if truly those witnesses identified the appellant at the scene of crime, then the identification parade was not necessary. However, she said, the trial court did not consider the evidence on identification parade but the High Court did at page 91 of the record. She thus urged us to discount the evidence on the identification parade.

Ms. Mcharo added that, the visual identification evidence of PW1 and PW2 was not proper as they failed to mention the appellant to the police at the earliest possible opportunity. She attacked the evidence of PW5 saying that it was hearsay evidence which could not be relied upon by the trial and first appellate courts. She thus urged us to find merits on this ground of complaint.

Regarding complaint on contradictory prosecution account, Ms. Mcharo conceded arguing that it cannot be ascertained as to when the appellant was arrested because while PW2 stated that he facilitated arrest of the appellant on 7th day of October 2014, PW6 said the appellant was arrested on 5th day of October 2014.

Another contradiction according to Ms. Mcharo is in respect of the evidence of PW5 and PW4. It was her argument that PW5 stated that he received a phone call from PW2 who informed him about the incident and having received that information, he was accompanied by other police officers to the scene of crime where he found PW2 and other people. To the contrary, PW4 stated that he was called by PW5 who had informed him about the occurrence of the crime and ordered him to go to the police station to meet the victims. Upon arriving at the police he met PW1 and PW2 (the victims), then they went to the scene of crime. Ms. Mcharo argued that these contradictions cast doubt on the prosecution evidence.

Submitting on the appellant's complaint about the cautioned statement, Ms. Mcharo stated, it was obtained in contravention of the provisions of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA). She therefore concluded that, the charge against the appellant was not proved beyond reasonable doubt and therefore she urged us to allow the appeal.

In rejoinder the appellant stated that he had a conflict with PW1 and PW3 and the case was cooked against him. Thus, he prayed that his appeal be allowed.

Now starting with the complaint regarding identification of the appellant, the main issue for our determination is whether the appellant was properly identified. We are mindful of the settled principle that, the evidence of visual identification is of the weakest kind and thus, before it is taken as a basis of conviction, it must be watertight. The Court in **Waziri Amani v. R.** [1980] TLR 250 held that:

"(i) Evidence of visual identification is of the weakest kind and most unreliable;

(ii) No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

To ensure that the evidence is watertight, a number of factors have to be taken into consideration by the court, including, the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, whether it was day or night- time, whether there was good or poor lighting

at the scene; and further whether the witness knew or had seen the accused before.

In the instant case, PW1 had testified to the effect that he knew the appellant even before the incident and cross examined by the appellant he said: *"...I know you even before the incident. I don't hate you..."* Also when PW1 was re-examined by the prosecutor he maintained that: *"...I know the accused person and his relatives. The accused is my fellow pastoralist; I didn't have any conflict with the accused..."*

Also PW2 who recalled to have identified the appellant as he knew him even before the incident stated as follows:

"...the accused is my fellow pastoralist and we used to live together at Luhindo-Dakawa in Mvomero District I identified the accused person because it was morning already and I know the accused. On the material date of incident the accused wore a black coat, black soak on his head but on his face nothing covered him, dust color trouser. We rode our motor cycles and run away. On the way we stopped and be surprised that Charles (accused) has decided to robe us."

In his evidence PW3 stated that: *"...I know the accused person. We used to live together at Wami Sokoine village at Mvomero District before the accused to migrate to another village. I know even the names of the accused's relatives."*

The crucial issue for determination is whether the appellant was recognized at the scene of crime by PW1, PW2 and PW3.

The Court in **Nicholous James Urio v. Republic**, Criminal Appeal No.244 of 2010, quoted with approval the decision of the Court of Appeal of Kenya in the case of **Kenga Chea Thoya v. Republic**, Criminal Appeal No. 375 of 2006 (unreported) where it was stated that:-

"On our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by witness Pw1 who knew him. This was clearly a case of recognition rather than identification and it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than that identification of a stranger."

In the current appeal, it is quite clear from the record that the appellant was not a stranger to PW1, PW2 and PW3 as he was known to them prior to the fateful incident. Thus, we subscribe to the above decision that the evidence of those witnesses was more of recognition and thus more reliable. Therefore, without prejudice as correctly said by Ms. Mcharo, it is our considered opinion that there was no need of conducting the identification parade. In the case of **Doriki Kagusa v. Republic**, Criminal Appeal No.174 of 2004 (unreported), the Court inter alia stated that:

“The identification parade was absolutely unnecessary where the identifying witnesses or witness knew the suspect before the incident, it is superfluous and waste of resources to conduct such a parade. We have asked ourselves this question; the identification parade is held to achieve what purpose when the suspect is well known to the identifying witnesses? Our answer has already been indirectly given above. It is unnecessary and a waste of time.”

In view of the above observation, since the suspect was known by the identifying witnesses we are settled that the evidence of identification

parade in the current case was unnecessary. Therefore, we hereby discount it. As a result, we remain with the evidence of identification by recognition of the appellant by PW1, PW2 and PW3. The evidence on record shows that the circumstances were conducive to the positive recognition of the appellant. This is due to the following reasons: **One**, the appellant was known to PW1, PW2 and PW3 as their village mate, hence not a stranger to them. **Two**, the appellant had not covered his face, hence clearly seen by PW1, PW2 and PW3 without any obstruction. **Three**, the incident occurred in the morning time, hence conducive to have clearly seen the appellant. **Four**, the distance between the appellant and victims was proximate. **Five**, the time spent by the appellant with PW1, PW2 and PW3 was sufficient to facilitate recognition.

Therefore having given due consideration to the conditions at the scene of crime, it suffices to say that, the identification evidence was watertight and there was no possibility of mistaken identity.

However, we take note that the appellant without issuing notice raised a defence of *alibi* trying to convince the trial court that on the material date he was in Singida and not in Morogoro as alleged by the

prosecution. His raised defense of *alibi* was, in our view, properly dealt with by courts below. In **Hamisi Bakari Lambani v. Republic**, Criminal Appeal No.108 of 2012 (unreported) the Court stated that:

"The law requires a person who intends to rely on the defense of alibi to give notice of that intention before the hearing of the case (section 194(4) of the Criminal Procedure Act, Cap 20). If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the alibi at any time before the prosecution closes its case, short of that the court may on its own discretion accord no weight to that defense."

In the case at hand, despite the appellant's noncompliance with the provisions of section 194(4) and (5) of the CPA, the trial court considered his defence and rightly in our settled view, came to a conclusion not to accord any weight to it. Having thoroughly gone through the record, we are satisfied that on the whole, the credible account of PW1, PW2 and PW3 militates against the appellant's *alibi* in the wake of proof of having been

seen and identified at the scene of crime. The first complaint on identification is therefore baseless.

Reverting to the complaint about contradictions, our task is to determine whether or not the complained of contradictions existed and if yes, if they went to the root of the matter? The appellant's complaint in this regard was strongly supported by Ms. Mcharo who contended existence of contradictions from the evidence of PW2 and PW6 regarding the date of the appellant's apprehension. She pointed out that while PW2 testified to the effect that it was on 7th day of October 2014 when they managed to arrest the appellant at Chalinze and took him to Chalinze police station, PW6 had testified to the effect that on 5th day of October 2014 the appellant was arrested for the offence of armed robbery and sent to Chalinze Police Station.

Admittedly, there is a difference between PW2 and PW6 testimonies on the date of arrest of the appellant. We are satisfied that this is a minor discrepancy which does not affect the root of the case. We say so because

there is no dispute that the appellant was arrested for the charged offence of armed robbery as was stated by both, PW2 and PW6. Also, the fact that the appellant was arrested for the charged offence was undisputed.

Another contradiction which was pointed out is whether the victims were at the police in terms of PW4 or at the scene of crime as per PW5's testimony. With respect, we need to state once that, whether the victims remained at the scene of crime or went to the police station immediately after the incident does not impeach the evidence that they had reported the incident to the police. Besides, there is no dispute that PW1 and PW2 were robbed by a person whom they knew before and they had reported to the police. We do not agree with Ms. Mcharo's line of argument as we find that the said contradiction is minor and it did not go to the root of the matter. In this regard we reiterate what we said in **Dickson Elia Nsamba Shapatwa and Another v. Republic**, Criminal Appeal No.92 of 2007 (unreported), where it was stated that:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for the court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide

whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter.”

Additionally, the Court went further quoting from the book, Sarkar in the Law of Evidence, 16th Edition, 2007 where it is stated at page 48 as follows:

“Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party’s case, material discrepancies do.”

The same position was maintained by the Court in the case of **Mohamed Said Matula v. Republic** [1995] TLR-3. In line with the above observations, it is our firm view that the purported contradictions in the evidence of PW2 and PW6; and that of PW4 and PW5 are minor and neither impeached their credible evidence nor cause injustice on the part of the appellant. Therefore, this ground is unmerited.

On the question of cautioned statement, the appellant has complained that, the same was tendered by PW4 as Exhibit P1 in contravention of the provisions of the CPA. This ground need not detain us as it is apparent on record that Exhibit P1, the appellant's cautioned statement was recorded beyond the prescribed time of four hours from the time of arrest. As per court's records, the appellant was arrested on 7th day of October 2014 but his statement was recorded on 12th day of October 2014 without any justification as to the delay by the prosecution. This contravened the mandatory provisions of sections 50 and 51 of the CPA. Failure to comply with the above cited provision of the law leads the cautioned statement taken out of time to be expunged from the records.

The Court in **Sia Mgusi @ Wambura and Two others v. Republic**, Criminal Appeal No.125 of 2015 (unreported) stated that:

"...time and again this Court has emphasized the necessity of complying with the provisions of section 50 and 51 of the Criminal Procedure Act and has reached to a conclusion that non compliance with the provisions of the law has the effect of expunging the cautioned statement recorded out of the prescribed time..."

The same stance was maintained by the Court in the case of **Junta Joseph Komba and three others v. Republic**, Criminal appeal No.95 of 2006 and **Lamunda Mahushi v. Republic**, Criminal Appeal No.239 of 2011 (both unreported).

In the instant case, the trial court failed to direct itself properly on the necessity of the compliance with the mandatory requirements under sections 50 and 51 of the CPA. Therefore, the appellant's cautioned statement admitted as Exhibit P1 is hereby expunged from the record.

In the last complaint, we shall consider whether or not the prosecution proved its case against the appellant beyond reasonable doubt.

It is well settled law that in criminal charges, the burden of proof lies on the prosecution. In the case at hand the credible evidence adduced by PW1, PW2 and PW3 sufficiently proved that on the material date they were robbed by the appellant. We thus disagree with the learned State Attorney who submitted that the charge of armed robbery against the appellant was not proved beyond reasonable doubt.

All said and done, we uphold the decisions of the courts bellow and hereby dismiss this appeal in its entirety.

DATED at **DAR ES SALAAM** this 4th day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of March, 2020 in the presence of Appellant in person and Ms. Anunciata Leopold, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL