IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MKUYE, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 298 OF 2017

1. HUSSEIN SAID SAID @ BABA KARIM @ WHITE
2. JAILAN RASHID NGALIEMBE @ FISAD ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Kitusi, J.)

dated the 11th day of December, 2015
in
Criminal Appeal Case No. 110 of 2015
.....

JUDGMENT OF THE COURT

20th February & 12th March, 2020

MMILLA, J.A.:

The appellants; Hussein Said Said @ Baba Karim @ White and Jailani Rashid Ngaliembe @ Fisadi (herein to be referred to as the first and second appellants respectively), were originally jointly charged before the District Court of Kinondoni in the Region of Dar es Salaam with two counts along with twelve other persons. The first count charged them of conspiracy to commit an offence contrary to section 384 of the Penal Code Cap. 16 of

Cap. 16 of the Revised Edition, 2002; while the second count charged them with the offence of armed robbery contrary to section 287A of the same Act, as amended by Act No. 4 of 2004. The appellants and four other persons were convicted of both offences and sentenced to thirty (30) years' imprisonment in respect of the offence of armed robbery, but no sentence was pronounced against them on the first count of conspiracy. The rest of their co-accused before that court were acquitted of all the charges. The appellants unsuccessfully appealed to the High Court, Dar es Salaam Registry, hence this second appeal to the Court.

The facts of the case were briefly that, on 10.7.2010 around 20:00 hours, an armed group of bandits invaded the house of Humphrey Mrwande (PW2) at Mbezi Beach. After placing him and his wife under their control, they ransacked the bedroom from which they took money in cash including Tzs. 490,000/=, US $ 6000, his wife's ornaments, two television sets, one radio, clothes and shoes. They also searched his motor vehicle which was on its parking lot in anticipation that he had kept some money therein; but they did not find anything. After they were done, the bandits fled. It was then that PW2 reported the incident at Bahari Beach Police Station for their action.

WP.5324 D/Cpl. Josephine (PW1) from Osterbay Police Station was one of the police officers who were hugely involved in making follow ups of this case soon after she was instructed as such on 16.10.2010. Then, they had arrested one Jumanne Adiadi Omary @ Ras @ Jaa (he was the first accused before the trial court). Upon interrogation, the said Jumanne Adiadi Omary admitted involvement in the commission of the robbery at Mbezi Beach and named one Salum Ally Mhina @ White wa Moro @ Sikitu (second accused before the trial court) as having been one of his companions. He led the police to where that person was, and they arrested him. While he allegedly admitted involvement, the latter named four other accomplices; Hussein Said Said @ Baba Karim @ White (first appellant), Fredrick @ Mkongwe, Jailani Rashid Ngaliembe @ Fisadi (second appellant) and Pango Dotto Juma.

The first appellant was arrested on 26.10.2010 at Kongowe Mzinga, Mbagala area. He was interrogated and allegedly admitted involvement in the charged crime, also that he had a gun which was used in the commission of that crime. He led the police to where it was hidden and they recovered it. He helped the police in the arrest of Fredrick @ Mkongwe.

Meanwhile, the second appellant was arrested on 27.7.2010 at Kunduchi /Tegeta area cross roads. He was interrogated by No. D.7847 D/Cpl. Beatus (PW5) who recorded his cautioned statement. He allegedly admitted involvement in the said incident of 10.10.2010 at Mbezi Beach area. The second appellant's cautioned statement was received and marked exhibit P2.

After the arrests of the suspects in this connection, a series of identification parades were organized and held at various police stations in the City, including Osterbay and Sitakishari which were held on 31.7.2010 at different hours in which the first and second appellants were allegedly identified by PW2.

The scene of crime was inspected by a team of policemen under the supervision of ASP Shila Emmanuel Daniel (PW8). PW2 and his wife Jane Mrwande informed them that the bandits opened fire before they looted their properties. In the course of inspection at the scene, PW8 and his team found and picked two empty cartridges of ammunition which were subsequently sent to the Forensic Bureau, along with a shot gun which was said to have been recovered from the first appellant.

The first appellant was interrogated by No. D. 8487 D/Sgt. Fadhili (PW13). According to this witness, the first appellant admitted involvement in the commission of that crime, also that he was in possession of a shot gun which was at his home at Mbagala Kongowe. He led him and his team, including PW1 and an officer from Tanzania Peoples Defence Force to his home at which he showed them, in the presence of his ten cell leader one Mohamed Kigalangala, where he had hidden it. They dug that place, and allegedly unearthed a shot gun – Pump Action (exhibit P14). PW13 had prepared an emergency search order which was likewise, tendered as exhibit P15.

As earlier on hinted, the shot gun constituted in exhibit P14 and the two empties of ammunition were sent to the Forensic Bureau for scientific examination. The said shot gun and the two empties of ammunition were examined by Insp. Raphael Maira (PW15), a Forensic Bureau expert. PW15 said he was satisfied that the two empties of ammunition were fired from the shot gun with serial No. 249523 which was submitted to the Bureau for examination.

There was also the evidence of No. D.7312 D/Sgt. Jumanne (PW16) who testified that he interrogated the first appellant and recorded his

cautioned statement. He said he admitted involvement in the commission of the charged robbery. That statement was admitted as exhibit P21 after overruling the objection he had raised.

The appellants' defences were relatively short. To begin with, Hussein Said Said (DW6/the first appellant), testified that he was arrested on 25.7.2010 at Mtoni Mtongani Bus Stand. He informed that his arrest was in connection with matters of drugs. They searched his person and found him with US $ 900, 1500 meticais and Tzs, 300,000/=. They sent him to Chang'ombe Police Station, after which he was transferred to Osterbay Police Station. He contended that they persuaded him to confess, but he refused. Later on however, they forced him to sign a statement they had come with, which he denied in court to have not been voluntarily made. He likewise said he never led the police to his home, also that his house was never searched. He maintained that it was not true that they recovered a gun from his residence. He further complained that the prosecution evidence against him was loaded with serious contradictions.

On the other hand, Jailani Rashid Galiembe (DW7/the second appellant) testified that he was arrested on 27.72010 at Tegeta Bus Stand and was taken to Sitakishari Police Station. He alleged to have been

informed that his arrest was "in relation to a sexual affair with a woman called Anna." He was extensively interrogated, but he denied commission of any offence. DW7 said that he came to be informed later on that he was involved in the robbery incident which occurred at Mbezi Beach on 6.8.2010, which he denied and continued to protest his innocence. He denied having made any statement at police, but that he only recorded his particulars.

On the date of hearing of this appeal, both appellants appeared in person, unrepresented. On the other hand, the respondent/Republic was represented by Ms Janethereza Kitally, assisted by Mr. Credo Rugaju, learned Senior State Attorneys.

The appellants filed separate memoranda of appeal, and each of them filed supplementary grounds. The first appellant's substantive memorandum of appeal raised five (5) grounds, while the supplementary one raised seven (7) of them. As regards the second appellant, the substantive memorandum of appeal raised four (4) grounds, while the supplementary one raised four (4) grounds.

At the commencement of hearing of the appeal, Ms Kitally hurried to inform the Court that they were supporting the appeal. She observed

however, and we readily shared her observation, that the grounds of appeal of both appellants could in each case be abridged into only two of them as follows:-

First Appellant:

(1) That, exhibits P10 and P14 were improperly regarded as good evidence in the case against the first appellant.

(2) That, the prosecution did not prove the case against the first appellant beyond reasonable doubt.

Second Appellant:

(1) That, exhibit P4 was wrongly relied upon as evidence.

(2) That, the second appellant was not correctly identified at both; the scene of crime and at the identification parade.

The appellants chose to make their submissions first, and the first chance was accorded to the first appellant. He submitted that PW8 had testified that his team of policemen picked two empties of ammunition (exhibit P10) at the scene of crime at Mbezi Beach, and that they were sent to the Forensic Bureau whereof they were examined by PW15. However, he contended, PW8 did not explain how he kept them to avoid

corruption, therefore that the empty ammunitions' chain of custody was abrogated and ought not to have been accepted as good evidence. He argued that if his argument will be upheld, it means the link between exhibits P10 and P14 will be broken, thus entitling the Court to hold that the case against him was not proved beyond reasonable doubt. He pressed the Court to allow his appeal.

On his part, the second appellant contended that after it was received as evidence, the cautioned statement (exhibit P4) attributed to him was not read out before the trial court, a fact which denied him opportunity to know its contents. In that regard, he said, that document was invalid evidence.

The second appellant submitted similarly that he was not identified by PW2 at the scene of crime, also that he lied when he said he identified him at the identification parade which was allegedly conducted at Sitakishari on 31.7.2010 because he did not participate in that parade. He requested the Court to allow his appeal.

As earlier on pointed out, Ms Kitally said they are supporting the appeal. Submitting on the first appellant's first ground, the learned Senior State Attorney argued that PW8 and his team were the persons who picked

two empties of ammunition (exhibit P10) at the scene of crime, however that witness (PW8) did not tell the trial court how he kept exhibit P10, so also how it was sent to the Forensic Bureau at which those empties of ammunition were examined by PW15, together with the shot gun – Pump Action (exhibit P14). Ms Kitally submitted likewise that PW15 said exhibit P10 was sent to him by one Cpl. Adelius, however that person was not called to testify, hence that there was no explanation where Cpl. Adelius got those empties, and how he conveyed them to PW15. Equally suspicious was the fact that there was no evidence to explain how exhibit P10 was returned to PW8 who tendered it in court. Relying on **Paul Maduka and 4 Others v. Republic**, Criminal Appeal No. 110 of 2007, CAT (unreported), Ms Kitally submitted that since the chain of custody of exhibit P10 was broken, the evidence constituted in that exhibit was worthless, therefore its linkage to exhibit P14, a gun which was alleged to have been recovered from the first appellant, was similarly shaky. If that piece of evidence is discounted, she argued, there would be no other evidence to link the first appellant with the charged crime.

On our part, we readily agree with Ms Kitally's concern that the evidence of PW8 had a lot of snags. In the first place, he did not tell the

trial court how he kept exhibit P10 after picking it at the scene of crime. He similarly did not tell the trial court how it was sent to the Forensic Bureau at which that exhibit was examined by PW15. Also, PW15 said he was handed that exhibit by Cpl. Adelius, but that person was not summoned to give evidence. He was the one who could have explained where he got those empties of ammunition. Furthermore, there was no evidence to tell how exhibit P10 returned to PW8 who tendered it in court. This unexplained situation created a lot of doubts, leading to the assumption that exhibit P10 could have been tempered with. As we observed in **Paul Maduka and 4 Others** (supra), where the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence is not observed or is broken; it cannot be guaranteed that the said evidence relates to the alleged crime. Given the explained pit-falls of exhibit P10 in the present case, we agree with Ms Kitally that because of that fact, exhibit P10 was not valid evidence. Accordingly, we allow this ground and expunge that piece of evidence (exhibit P10) from the record. In effect therefore, its link to exhibit P14 crumbles.

The first appellant's second ground of appeal challenges that the prosecution did not prove the case against him beyond reasonable doubt.

We carefully considered the remaining evidence in order to find out if in the absence of the link of exhibit P10 to exhibit P14, the remaining evidence is capable of sustaining the first appellant's conviction and sentence; we have found none. This is particularly so because, the evidence of visual identification at the scene of crime as well as the evidence of identification parade was rejected by the first appellate court. Thus, the second ground too has merit and we allow it.

For reasons we have given, the first appellant's appeal has merit and we allow it.

We now come to consider the second appellant's fate. As earlier on pointed out, there are essentially two grounds to be considered in that regard, the first one of which alleges that exhibit P4 was wrongly relied upon as evidence.

The second appellant's complaint in this regard is that after it was admitted as an exhibit, the cautioned statement (exhibit P4) he allegedly

offered to the police was not read out to him. He contended that such omission denied him the chance to know the contents of that document.

On her part, Ms Kitally supported the second appellant's claim that indeed, the cautioned statement was not read in court after its admission. She submitted that failure to read that statement in court denied the second appellant the opportunity to understand its contents. She referred us to the case of **Semeni Mgonela Chiwanza v. Republic**, Criminal Appeal No. 49 of 2019, CAT (unreported). On the basis of that, Ms Kitally said it was invalid evidence and asked the Court to expunge that piece of evidence from the record.

Ms Kitally submitted similarly that if that evidence is expunged from the record, the only remaining evidence against the second appellant will focus on whether or not he was identified, which is the concern of his second ground of appeal. It alleges that evidence of identification was insufficient to sustain conviction and sentence against him.

According to Ms Kitally, PW2 was the only witness who purported to have identified the second appellant at the scene of crime; and also at an identification parade which was organized on 31.7.2010 at Sitakishari Police Station, Dar es Salaam. She stated that the evidence of PW2 was

improperly relied upon because he did not explain how he identified the second appellant at the scene of crime. His casual statement that he saw him at his home on the night of 10.10.2010 without explaining how he managed to identify him and the role he played in that group raises doubts. On this, Ms Kitally referred us to the case of **Chacha Jeremiah Murimi and 3 Others v. Republic,** Criminal Appeal No. 515 of 2015.

Concerning identification parade evidence, Ms Kitally submitted that it was similarly wanting because PW2 merely said that he identified the 7th accused (the second appellant), but did not explain the position he was standing. Even, Ms Kitally added, PW2's casual claim was not supported by the Identification Register evidence. On that basis, she maintained that this evidence too was unreliable. She prayed that we allow this ground too; and consequently allow the second appellant's appeal.

We will start with the first ground which alleges that exhibit P4 was not read in court to afford the second appellant chance to understand the contents of that document.

The second appellant's cautioned statement was recorded by PW5, and indeed he was the witness who tendered that document in court as reflected at page 113 of the Record of Appeal. Upon its admission

however, that document was not read out to him. No doubt, that was improper.

As we had the occasion to state in the case of **Misango Santiel v. Republic,** Criminal Appeal No. 250 of 2007 which was followed in **Robert P. Mayunga & Another v. Republic,** Criminal Appeal No. 514 of 2016 (both unreported), where such document may not have been read out to the accused, it ceases to be valid evidence and cannot be relied upon. We stated in the latter case of **Robert P. Mayunga & Another** (supra) that:-

> *"Failure to read out to the appellant a document admitted as exhibit denies the appellant the right to know the information contained in the document and therefore puts him in the dark not only on what to cross examine but also how to effectively align or arrange his defence. The denial, therefore, abrogates the appellant's right to a fair trial . . . ."*

See also the case of **Semeni Mgonela Chiwanza** (supra) and **Jumanne Mohamed & 2 Others v. Republic**, Criminal Appeal No. 534 of 2015 (unreported).

In the circumstances of the present case, because the cautioned statement was not read out in court to the second appellant, that was a

grave irregularity which vitiated reliance on that document. Consequently, this ground succeeds; that piece of evidence is hereby expunged from the record.

The only other evidence which remains is that of identification. It is in two limbs; visual and identification parade evidence. The burning issue is whether, that kind of evidence was capable of sustaining the second appellant's conviction and sentence. We will begin with the limb torching on the evidence of visual identification.

PW2's evidence on how he identified the second appellant at the scene of crime is reflected at pages 70 and 71. He generalized that a group of bandits stormed into his house and they included the first, second, third, fourth, fifth, sixth, seventh (the appellant), eighth and twelfth accused persons. Apart from his claim that all of them were armed, PW2 did not explain the kind of light with the aid of which he managed to identify them, or described how the second appellant was clad, or state the distance at which he observed and identified him; and/or if he had seen him before that day or not. Similarly, he did not tell the kind of weapon the second appellant was carrying, or the special role he played among the group members in the course of execution of the said robbery. The generalization

he made that he identified them, just like that, was extremely deficient, making his evidence unreliable.

The Court has often cautioned the danger of relying on evidence of visual identification because of the notorious fact that it is of the weakest kind of evidence, hence the emphasis that such evidence should only be acted upon after being fully satisfied that all possibilities of mistaken identity are eliminated and it is absolutely water-tight - See **Waziri Amani v. Republic** [1980] T.L.R. 50. The rationale for the caution was succinctly expressed in **Philipo Rukandiza @ Kichwechembogo v. Republic,** Criminal Appeal No. 215 of 1994 (unreported) in which it was stated that:-

> *"The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled.* ***There could be a mistake in identification notwithstanding the honest belief of a truthful identifying witness.****"* [The emphasis is ours].

In the circumstances of the present case, we agree with Ms Kitally that the evidence of PW2 cannot be said passed the "water tight evidence" test for which, as we said in **Festo Mawata v. Republic,** Criminal Appeal No. 299 of 2007 (unreported), it means:-

> ". . . *such evidence whose truthfulness cannot be reasonably disputed, doubted or questioned. . . .*"

On the basis of the weaknesses we have pointed out, we hold that PW2's evidence of visual identification in respect of the second appellant was wanting, and therefore unreliable.

It was also contended by the second appellant that PW2 did not identify him at the identification parade which was held on 31.7.2010 at Sitakishari Police Station. On this point too, he has been supported by Ms Kitally. We hurry to say that we agree with them.

Identification Parades are governed by the Police General Orders (the PGO) No. 232 made by the Inspector General of Police under section 7 (2) of the Police Auxiliary Service Act, Cap. 322 of the Revised Edition, 2002. One of the requirements under para 232 of the PGO is that in any such identification parade, the officer – in charge must keep an Identification Parade Register to reflect the record or entries of the parade, that is, those involved in the parade, the suspects who were targeted for identification,

the identifying witness/s and other such crucial information. Thus, the Identification Parade Register forms a formidable part of the evidence in that regard – See the case of **Rex v. Mwango s/o Manana** (1939) 3 E.A.C.A. 29.

We scanned the Record of Appeal to find out if the second appellant was ever involved in any of the identification parades in which PW2 was the identifying witness, including that which was purported to have been held on 31.7.2010 at Sitakishari Police Station, but in vain. None of the documents which were tendered in a form of Identification Parade Register showed his involvement. To be particular, the Identification Parade Register for the parade which was held at Sitakishari on 31.7,2010 at 14.50 hrs appears at page 354 of the Record of Appeal. The suspects who were lined-up for that purpose were Juma Said (fifth accused) and Hussein Said (sixth accused/first appellant). The second appellant was not listed. Since there is nothing else to show the second appellant's involvement in that parade, it is clear that the sweeping statement of PW2 that he identified him is baseless. In the circumstances, we agree with both, Ms Kitally and the second appellant that this ground has merit and we allow it.

That said and done, we allow the appeals of both appellants; quash their convictions and set aside the sentences which were imposed against them. We consequently order their immediate release from prison unless they are continually held for some other lawful cause.

Order accordingly.

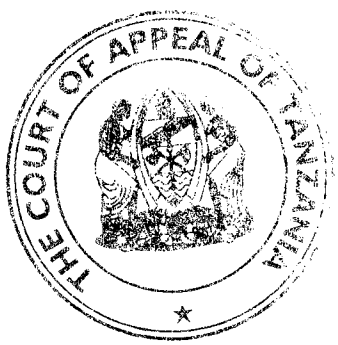
DATED at **DAR ES SALAAM** this 9th day of March, 2020

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The judgment delivered this 12th day of March, 2020 in the presence of Appellants appeared in person and Mr. Benson Mwaitenda, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL