IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 368 OF 2018

AMBROS ELIAS .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mandia, J.)

Dated the 11th day of February, 2008
In
HC. Criminal Appeal No. 124 of 2007

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JUDGMENT OF THE COURT

15th March &15th April, 2021

LILA, JA:

This appeal arises from the decision of the District Court of Kilosa, sitting at Kilosa, where the appellant together with one Salapion Sabastian were arraigned of the offence of armed robbery, contrary to sections 285 and 286 of the Penal Code, Chapter 16 of the Revised Edition, 2002. The appellant was convicted as charged whilst Salapion Sabastian was acquitted. Upon conviction, the appellant was sentenced to a term of thirty (30) years imprisonment.

It was the prosecution's allegation that on 7/03/2002 at about 01:00hrs at Msolwa village within Kilosa District in Morogoro Region the appellant and the one who was acquitted did steal TZS 401,000.00 the property of one Isaya Madenge and immediately before such stealing they fired two bullets on air and wounded Ester D/o Matei and Nuru D/o Mlowe by cutting them with "panga" in order to retain the said money.

The factual setting giving rise to the arraignment, trial and ultimate conviction of the appellant is as follows. On the material night of 7/3/2002 at Msolwa Village, a gang of four persons fired bullets and broke into the house of Isaya Madenge (PW1) in which Ester Mathew (PW5) and Nuru Issaya (PW6) were sleeping. At that time PW1 was not at his home as he was in Morogoro. The bandits were armed. The room was lit by a lamp. Speaking of the identity of the assailants, PW5 claimed to have been able, with the aid of lamp light, to see the appellant as being one of those thugs and the one who did beat her with a bush knife on the head following her failure to heed to the demand for money. Ultimately, the bandits made away with TZS 400,000.00. Soon thereafter, PW1 arrived with his car and upon noting the light from the car the bandits disappeared into the bush. Also speaking of the identity of the bandits PW1 claimed, with the help of

the light from the car, to have been able to see and identify both the appellant and another person as they were running away. A call for help reached Francis Albert (PW2) and Mathew Madenge (PW3) who turned up to the scene of crime only to find the bandits had already disappeared. Amisa Pamoni (PW8) told the trial court that in the afternoon of the incident day, the appellant took food (rice) at his kiosk. On the following day Salapion Sabastian (then 1st accused) was arrested by the villagers and taken to police station by CPL Ahmed (PW4). An identification parade was conducted on 12/3/2002 by Insp. Simba (PW9) whereat PW5 identified the appellant (then 2nd accused) out of the ten persons who formed the parade as being one of the bandits who invaded and robbed money in PW1's house. In her testimonial account, PW5, apart from telling the trial court that managed to identify and pick the appellant out of ten men who constituted the identification parade, further claimed that she knew him prior to the incident as he attended school in the same village.

Salapion Sabastian (then 1st accused) totally denied involvement in the commission of the offence and claimed that he left Dar es Salaam on 8/3/2002 to Nyalande Village to buy raw maize and while thereat he was arrested and taken to police. The appellant (then 2nd accused), similarly

distanced himself from the accusation and claimed that he left Dar es Salaam to Ulaya Village sometimes in March to collect maize from one Hatibu. That, while on the way he met seven people who arrested him and took him to the Ward Secretary where he was beaten and later sent to Kilosa Police Station. After a full trial, the trial court was satisfied that the appellant was properly identified. He was consequently convicted and sentenced as aforesaid.

Aggrieved by the trial court decision, the appellant preferred an appeal to the High Court. His major complaint was that the evidence of identification was insufficient to found a conviction. In his written submission, the appellant complained that the factors enunciated in the case of **Waziri Amani vs R** [1980] TLR 250, **Eliya and Others vs R** [1972] HCD 101 and **Chande Said vs R** [1973] LRT were not met. He also complained that the identification parade was not properly conducted and the defence evidence was not properly evaluated.

The High Court ((Mandia, J.) concurred with the trial court finding on visual identification evidence that it was impeccable and that the identification parade evidence provided a surplus evidence. On the issue of

visual identification, the learned judge was of the view that there was light from a lamp in the rooms the bandits entered and that the witnesses were not confused. In its evaluation of the circumstances under which the offence was committed, the learned judge went further stating that a person who could direct where the money was, cannot be said to have been confused by the situation, but was keen enough to identify a person. It was, at the end, convinced that the identification evidence was faultless and held that the conviction was well grounded. Consequently, it dismissed the appeal.

Undaunted, the appellant presently seeks to impugn the decision of the first appellate court in a memorandum of appeal comprising six points of grievance which substantially fault the first appellate judge for sustaining his conviction and sentence based on unreliable visual identification evidence of PW5 and PW6 which was doubtful for lacking description of the appellant, intensity of light, distance at which he was observed at the scene; the identification parade conducted by PW9 contravened the PGO 232 as there was the prosecution evidence that the appellant was known to PW5 and PW6 prior to the date of incident; the charge sheet was at

variance with the evidence by PW5 and PW6 and that the prosecution case was not proved at the standard required.

At the hearing of the appeal before us, the appellant appeared in person, unrepresented and was linked to the Court through video facilities from Ukonga Central Prison. The respondent Republic had the services of Mr. Medalakini Emanuel and Ms. Sabina Ndunguru, learned State Attorneys.

The appellant had nothing to say in elaborating his grounds of complaints after he had adopted them and in rejoinder. He simply urged the Court to allow his appeal.

On his part, Mr. Emmanuel, who supported the appeal, commenced his submission by contending that grounds 2 and 4 of appeal are new grounds because they were not raised and determined by the first appellate court. Being not legal issues, he pressed us to disregard them in terms of section 6(7) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the AJA).

We need not detain ourselves on this issue, for, we have perused the grounds of appeal taken to the fore by the appellant before the High Court and compared with those before us and we are satisfied that the two

grounds are new. Unlike points of law which, in terms of section 6(7) of the AJA, may be raised and entertained by the Court at any stage of the proceedings, the two complained grounds are factual which, in terms of section 4(1) of the AJA, the Court lacks jurisdiction to entertain them. That stance was taken in **Galus Kitaya vs Republic**, Criminal Appeal No. 196 of 2015 in which the Court cited the case of **Nurdin Mussa Wailu vs Republic**, Criminal Appeal No. 164 of 2004 (both unreported). In that case the Court stated that: -

> *"...usually the Court will look into matters which came in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."*

(See also **Hassan Bundala @ Swaga vs Republic**, Criminal Appeal No. 386 of 2015 cited in the case of **George Claude Kasanda vs The Director of Public Prosecutions**, Criminal Appeal No.376 of 2017 (both unreported).

That said, we shall not therefore consider grounds 2 and 4 of appeal.

In his submission in respect of the appellant's complaint concerning his being identified as one of the persons who robbed in the house of PW1, Mr. Emanuel contended that the incident occurred at night hence it was not enough for PW1, PW5 and PW6 to simply say that they identified the appellant using the lamp light that was lit in the room without giving details of its intensity, how long the incident took and the distance at which they observed the appellant. It was his view that the evidence of visual identification was not watertight. To fortify his contention, he referred us to the case of **Masumbuko Charles @ Kema vs Republic**, Criminal Appeal No. 466 of 2015 (unreported).

Linked to the issue of identification is the conduct of the identification parade which the appellant complained that it was improperly conducted hence wrongly relied on to ground his conviction. In his submission, the learned State Attorney readily agreed with the appellant that the identification parade was conducted in total violation of the law. He pointed out the deficiencies in its conduct as being that the participants were characteristically dissimilar and the appellant was not allowed to exercise his right to change position during the conduct of the parade. That aside, the learned State Attorney pressed us to expunge the identification parade

form (exhibit P1) from the record of proceeding on account of it being admitted in evidence without the appellant being accorded an opportunity to comment and also having not been read out in court after it was cleared for admission. He, however, quickly brought to the attention of the Court that the High Court relied on evidence of visual identification to sustain conviction whereas the identification parade evidence was taken as surplus evidence only.

We, indeed, entirely subscribe to the view taken by the learned State Attorney. We shall begin with the identification parade. It is noteworthy that save for PW5, no other witness claimed to have previously known the appellant. And, according to the record and particularly the testimony by PW9 and herself (PW5), she was the only identifying witness at the identification parade. The law on identification parade is fairly settled that it is by itself not substantive evidence. It is usually only admitted for collateral purposes, mostly, to corroborate dock identification of an accused by a witness (See **Moses Deo vs R** [1987] TLR. 134). And for it to have any value, it must be conducted in full compliance with the applicable procedure as set out in **Rex vs Mwango s/o Manana** (1939) 3 EACA 29 (or GPO 232). Otherwise, a breach of any of the rules governing the

conduct of the parade is enough to render the parade of little value against an accused person (See **Raymond Francis vs R** [1994] TLR 100).

In the case under our scrutiny, we are not told of what kind of persons formed the parade and their appearances. The learned state Attorney contended that the participants were dissimilar. This piece of evidence is not borne out by the record. Instead, the record clearly shows that both PW9 who conducted the parade and PW5 who claimed to identify the appellant in that parade were completely silent on this crucial aspect. We are therefore not certain that persons answering the same description formed the parade and for that reason we have no hesitation to hold that the conduct of the parade did not accord to the rules. Of particular relevance for our purposes is paragraph 2 (k) of Police General Order No. 232 which reads:-

> *"(k). Persons selected to make up the parade should be of similar age, height, general appearance and class of life. Their clothing should be in general way similar"*

On this account therefore, there is merit in the complaint that the parade was not properly conducted hence rendering it valueless.

The above notwithstanding, the identification parade form (Exhibit P1) was unprocedurally admitted as exhibit. The record vividly shows at page 23 that the appellant was not accorded his right to comment on whether or not he had any objection before it could be received by the trial court and admitted as exhibit. That irregularity is fatal and incurable with the effect that it should be disregarded (See **Robison Mwanjisi v. Republic**, [2003] TLR 218).

Besides the above, yet the evidence on identification parade could not be relied on to convict the appellant for an obvious reason that the conduct of identification parade was superfluous for two main reasons. **One**; The identifying witness (PW5) was familiar with the suspect (appellant). That position was reiterated in the case of **Mbaruku Deogratias vs Republic**, Criminal appeal No. 279 of 2019 (unreported) where the Court stated that: -

> *"According to PW1, the appellant was an acquaintance with whom she had sex before the one the subject of this case. Whether that is true or not, the law is clear that identification parades serve no meaningful purpose when the witness alleges that he or she is familiar with the suspect.*

We have decided so in many cases including ***Karim Seif @ Slim v. Republic,*** *Criminal Appeal No. 161 of 2017 (unreported)."*

(See also **Doriki Kagusa v. Republic,** Criminal Appeal No. 174 of 2004, and **Charles Nanati v. Republic** Criminal Appeal No 286 of 2017 (both unreported).

Two; PW5 did not avail the description of the suspect to those who she immediately met or to the police. It is, even evident that the appellant's arrest was not a result of the description she gave to the police. It is trite law that to afford credence in the identifying witness, a witness who claims to have known the bandit prior to the incident, must name the bandit to those whom he immediately came by after the incident. That requirement was pronounced by the Court in the case of **Yohana Chibwingu vs Republic**, Criminal Appeal No. 117 of 2015 (unreported) in which the case of **R v Mohamed** [1942] EACA 72 was cited. **In Yohana Chibwingu's** case, the Court stated that: -

"That in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of

highest importance of which evidence ought to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by the person to whom the description was given."

Three; PW5 did not avail the description of the suspect to the police before she was produced at the identification parade so as to identify the suspect. The aforesaid stance was cemented in the case of **Muhidini Mohamed Lila @ Emolo and Three Others vs Republic**, Criminal Appeal No. 443 of 2015 where the Court categorically stated that: -

"since therefore, in the case at hand, the requirement of giving the description of the suspects prior to the identification parade was not complied with, there is no gainsaying that the evidence obtained from the parade is unworthy of credit."

Viewed from the above perspective, we therefore find that the identification parade was uncalled for and served no useful legal purpose. It should have been accorded no weight at all. We accordingly discount such evidence.

In the absence of identification parade evidence, the issue of concern now is whether the evidence on visual identification squarely places the appellant at the scene of crime. In a case depending entirely on visual identification evidence it is settled law that it is of the weakest character and the courts should not act on such evidence unless satisfied that all possibilities of mistaken identity are eliminated and the evidence is absolutely watertight (See – **Waziri Amani Vs Republic** [1980] TLR 250. It is also a settled principle of law that where the ability to see and identify is with the aid of a certain source of light, the source and the intensity of such light must be clearly described. That has been the stance of the Court on a number of decisions. To mention just a few, they include: **Issa Mgara @ Shuka Vs. Republic,** Criminal Appeal No. 37 of 2008; and **Omar Iddi Mbezi and 3 Others Vs. Republic,** Criminal Appeal No. 227 of 2007 (both unreported). In, for instance, **Issa Mgara's** case *(supra)* the Court stated that: -

> *"It is **not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient detaiis on the source of iight and its intensity."***
> *[Emphasis added].*

In this case, both PW5 and PW6 claimed that they were able to identify the appellant through the light illuminated from a lamp. They did not indicate not only the distance at which they had the appellant under their observation and time taken but also the intensity of light.

We also wish to add that, all the circumstances considered, it is evident that there was fear and havoc at the scene of crime. Both PW5 and PW6 were clear that upon gaining entry, the bandits started cutting them with bush knives they had carried. It does not occur to us that under such circumstances, they could have time to concentrate on observing any of the assailants. Such a condition dispels the possibility of unmistaken identity due to confusion. On this, this Court lucidly held in **Mengi Paulo Samwel Luhana & Another v. R.,** Criminal Appeal No. 222 of 2006 (unreported) that: -

> *" eye witness testimony can be devastating when false identification is made due to honest confusion or outright lying."*
> *[Emphasis is ours].*

The appellant's last complaint is directed to the variance between the charge and evidence regarding the amount stolen. In the charge it was

alleged that the amount stolen during the robbery incident was TZS 401,000.00 while in their testimonies PW5 and PW6 stated that the amount stolen was TZS 400,000.00. More so, during preliminary hearing the prosecution clearly stated that the amount stolen was TZS 401,000.00. Without any hesitation, the learned State Attorney conceded to the anomaly.

On our part, we agree with learned State Attorney. Confronted with an akin situation in the case of **Masota Jumanne v. Republic**, Criminal Appeal No. 137 of 2016 (unreported), the Court cited the case of **Edward Luambano V. R,** Criminal Appeal No. 190 Of 2018 (unreported), and stated that: -

> *"In a nut shell 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 **Japhet Anael v. Republic**, Criminal Appeal No. 78 of

2017).

In the same case of **Edward Luambano V. R** (supra), the Court stated that: -

> *"it is notable that the particulars of offence in the charge sheet were at variance with the evidence from PW1 as regards the amount/the value of the property stolen. In other words, the evidence led by the prosecution did not support the allegation contained in the charge sheet. And, the effect of the variation between the charge and evidence in proof of such case is that the offence was not proved."*

The only remedy available to the prosecution was to amend the charge under section 234 of the Criminal Procedure, Cap. 20 of the Revised Edition, 2002. That was not done. Like in the above authorities, we hold that the amount stolen was not proved. Stealing, being among the crucial ingredients of the offence of robbery to be proved, failure to prove it adversely affected the prosecution case.

For the above reasons, we are satisfied that the evidence of PW2, PW3, PW5 and PW6 on identification of the appellant was wanting. The identification of the appellant at the scene of crime fell short from being

water tight. There was also no proof that the alleged money was stolen. His conviction was against the weight of the evidence. It cannot be sustained.

All said and done, we allow this appeal in its entirety. The conviction of the appellant is hereby quashed and set aside as well as the imposed sentence of thirty years imprisonment. The appellant is to be released forthwith from prison, unless otherwise lawfully held.

DATED at **DAR ES SALAAM** this 14th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered on this 15th day of April, 2021, in the presence of appellant, in person linked via video conference from Ukonga Prison and Ms. Debora Mushi, learned state Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL