IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J. A., KWARIKO, J.A, And SEHEL, J.A.)

CRIMINAL APPEAL NO. 135 OF 2019

MUSSA DAUDI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Luvanda, J.)

dated the 20th day of March, 2019
in
(DC) Criminal Appeal No. 123 of 2018

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JUDGMENT OF THE COURT

2nd & 15th June, 2021

SEHEL, J.A.:

The Resident Magistrate's Court of Kinondoni at Kinondoni (the trial court) convicted the appellant, Mussa Daudi, of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16, R.E. 2002 (the Penal Code). He was sentenced to serve thirty (30) years imprisonment. He unsuccessfully appealed to the High Court (the first appellate court). Hence, this second appeal.

Ahiya Lukumay (PW2), the victim of the armed robbery, narrated as to how the incident of armed robbery occurred on 18th day of June, 2007. He

stated that, on that particular day he returned home from his errands at around 20:45 hrs. Soon after he reached at the gate of his house, he heard a gunshot. Thus, he had to stop his car. Then and there, he saw a man holding a stone knocking at the window of his car and another man armed with a gun stood next to the man with a stone. Fearing for his life, he got out of his car and saw two other men who were standing behind the car. PW2 claimed that he identified the appellant by the aid of a sport light which was so bright such that the whole place was like a day time. The other factors which he said helped him to identify the appellant were that the bandits did not cover their faces and the appellant was about 3 metres from him and he was holding a gun, make SMG. The one who had the stone, took a wallet from his pocket. They also took his briefcase from his car that had cash money of TZS. 5,050,000.00 and USD 2,510.00 and gold ring valued at TZS. 250,000.00. They then disappeared.

Benson Mwakilasi (PW4), a security guard at a neighbour's house also said he saw four people that night, three people entered inside the house and one remained outside the gate. He said, he witnessed the bandits ordering PW2 to lie down. Having seen that, he took his panga and tried to help PW2

but as a gun was pointed to him, he ran away to hide. PW4 also claimed to have identified the appellant.

Shortly, police officers from Kimara police station arrived at the scene of the crime, among them was D. 7974 D/Ssgt. Innocent (PW1). PW1 inspected the scene of the crime and saw some blood trails from the gate. He tried to trace it up but aborted the exercise upon reaching a dense forest and as it was too dark. He recovered at the scene a spent cartridge (Exhibit P1) and a bullet (Exhibit P2). It suffices to mention here that neither PW2 nor PW4 gave a detailed description of their assailants to the police, that night.

The following day, Mwajuma Mlungila (PW3), a ten-cell leader of the area, found the appellant lying down nearby the forest with bleeding wound on his thigh. Upon interrogation, the appellant told her that he was shot and robbed his money by his friend, Iddi. PW3 called the police who arrived and took the appellant to the home of PW2. They found PW2 at home and identified the appellant as among the bandits who had invaded him and he was the one who pointed a gun at him.

The police then took the appellant to Kimara police station where he was questioned and admitted to have committed the offence. His cautioned statement was tendered without objection and admitted as Exhibit P3.

In his defence, the appellant said that he was a businessman based in Mbeya and on that fateful day he was in Dar es Salaam selling his rice at Kariakoo with the help of his friend, Iddi, the broker. He sold all of his merchandise and got TZS. 4,000,000.00. At the end of the day, they headed home. On their way, Iddi shot him on his thigh, robbed from him his money and mobile phone and run away. He cried for help and people gathered including PW3 who called the police. The police then took him to the house of PW2 and thus connected him with an incident of armed robbery which he said he did not commit it and knew nothing about it.

The trial court found credence on the visual identification of PW2 and PW4 on account that there was enough light illuminated from the sport light as testified by PW2 and that PW2 was few meters away from the appellant, that is about three meters apart. It also held that as the appellant did not hide his face the witnesses positively identified him. He was subsequently convicted and sentenced as stated herein. The first appellate court concurred with the trial court that the identification of the appellant at the scene was proper and water tight. It thus dismissed the appeal.

Still protesting for his innocence, the appellant filed this second appeal advancing four grounds of appeal, namely: -

"1. The learned first appellate Judge erred in law and fact by relying on incredible visual identification evidence of PW2 and PW4.

2. The learned first appellate Judge erred in law and fact by upholding the trial court's decision that the blood seen at the scene of crime oozed from the appellant's wound without forensic evidence.

3. The learned first appellate Judge erred in failing to realize discrepancies within PW1, PW2 and PW3's evidence in regard with the date the appellant was apprehended.

4. The learned first appellate Judge erred in both law and fact by holding the prosecution proved its case against the appellant beyond reasonable doubts as charged."

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent/Republic was represented by Ms. Faraja George, learned Senior State Attorney and she was assisted by Mr. Adolf Verandum, learned State Attorney.

The appellant adopted his memorandum of appeal and opted to hear from the respondent/Republic. However, he reserved his right to rejoin, if need would arise.

On her part, Ms. George supported the appeal on technical grounds and lack of sufficient evidence to prove the case against the appellant. The learned Senior State Attorney submitted that after she had gone through the record of appeal, she noted that there are procedural irregularities which rendered the trial court's proceedings a nullity. The first irregularity which she pointed out was in respect of the ruling on a case to answer. She argued that the ruling appearing at page 17 of the record of appeal demonstrates that the learned trial Magistrate was biased as he had formed a preconceived opinion that the case against the appellant was proved beyond reasonable doubt before hearing of the defence case.

The second irregularity, she submitted, was the failure by the learned trial Magistrate to address the appellant in terms of section 231 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA). She argued that from the record, after the closure of the prosecution case, the learned trial Magistrate was mandatorily required to inform the appellant concerning his rights and the manner in which he could have made his defence but that was not done.

She contended that the two irregularities are so fundamental, incurable and greatly prejudiced the appellant as he was denied a fair hearing. She

therefore urged us to invoke our revisional power under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) to nullify the proceedings from the date when the ruling of a case to answer was delivered, quash conviction and set aside the sentence imposed on the appellant.

On the way forward, she argued that according to the circumstances of the case, a re-trial would not be in the interest of justice. She reasoned that the evidence available was not sufficient to warrant a conviction against the appellant. She argued that the visual identification of PW2 and PW4 was weak hence the trial court ought not to have acted upon it. She explained that it was weak because none of the identifying witnesses gave a detailed description of their assailants to the police. They also failed to state the time taken to observe them and that the intensity of the light illuminated from the sport light claimed by PW2 is questionable because PW4 said nothing about it. She further argued that there is huge contradiction between the evidence of PW1, PW2 and PW4. She pointed out that while PW1 said that they traced the blood stains on the incident night, PW4 said that it was done on the next day. Another contradiction, she pointed out, is that while PW4 said that the appellant was interrogated at the forest, PW4 said it was at PW2's house. Further, she added, PW4 contradicted with the evidence of PW2 regarding the

attire which they claimed the appellant wore on that night. All these contradictions, Ms. George argued, create doubts and thus should be resolved in the appellant's favour.

She further argued that even after the appellant was arrested it was improper for PW1 to have taken the appellant to PW2's residence and expose to him before the trial of his case. Any prudent investigation police officer would have taken the appellant to the police station and thereafter conduct an identification parade but not to expose the appellant to the victim the way PW1 did.

She submitted that the trial court also based its conviction on the cautioned statement, Exhibit P3. However, she contended, after the cautioned statement was cleared for admission, it was not read out in court in order to enable the appellant know and appreciate the contents and substance of it. She therefore urged the Court to expunge it from the record of appeal.

On the other hand, the appellant being a layman had nothing useful to rejoin apart from asking the Court to set him free from the prison custody.

After having heard the submission of the learned Senior State Attorney, the issues for our consideration are the propriety or otherwise of the trial court on account of procedural flaws and whether a retrial should be ordered.

We propose to start with the procedural flaw regarding the ruling which the learned trial Magistrate delivered after the closure of the prosecution case. Ms. George argued that the learned trial Magistrate was biased in his ruling. To better appreciate her submission, we take a liberty to reproduce part of the extract of that ruling which reads: -

> *"In this case Prosecution side did bring four witnesses. Having seen the evidence adduced by the said witnesses, then I am satisfied that the* ***Prosecution side proved their case beyond reasonable doubt****. Hence, there is a prima facie case against the accused person."*

It is discernible from the bolded part that the learned trial Magistrate formed an opinion that the prosecution side proved its case before hearing the defence case. As a matter of law and in order to guarantee a fair trial, the trial court is enjoined to test the evidence of the prosecution against the accused person before making any firm opinion as to the proof of the case. The trial court has to hear both parties' evidence, evaluate the evidence as a

whole, ask itself as to whether anything said or which the accused person had introduced in his defence cast doubt on the prosecution case then and only then it can perfectly reach to a legally sound conclusion. The prosecution cannot be said to have proven its case beyond reasonable doubt unless the evidence given by or on behalf of the accused is put into the balance and weighted against that adduced by the prosecution. The fact that the learned trial Magistrate hurriedly ruled, at the stage of determining whether the appellant had a case to answer, that the prosecution proved its case beyond reasonable doubt was not only unfair to the appellant but also, showed his bias against the appellant. In essence, the learned trial Magistrate was not neutral as he made up his mind after hearing one side of the story, that is after hearing the prosecution case.

In **Alex John v. The Republic**, Criminal Appeal No. 32 of 2003 (unreported) we explained as to what is a fair hearing/trial. We thus said: -

> *"... fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end....a fair trial also envisages that the court or tribunal hearing the parties' case should be fair and impartial without it*

showing any degree of bias against any of the parties. So, a fair trial, first and foremost encompasses strict adherence to the rules of natural justice, whose breach would lead to the nullification of the proceedings."

It is in that respect, the Court in **Kabula d/o Luhende v. Republic,** Criminal Appeal No. 281 of 2014 (unreported) held that the trial Judge who made a remark in his ruling on a case to answer that the accused person committed the offence which she stood charged with, was biased and unfairly tried the accused person. It held: -

"...the learned trial judge openly exhibited bias against the appellant when he unequivocally ruled, at the stage of determining whether or not the appellant had a case to answer, that he considered that the appellant had murdered the deceased. We are also in full agreement with Mr. Mtaki on his submission that "nothing the appellant said or could have eventually said would have convinced otherwise the learned judge". The learned trial judge, in our respectful opinion, did not, therefore, approach the defence case with an open mind."

See also: **Frances Alex v. The Republic,** Criminal Appeal No. 185 of 2017 and **The Director of Public Prosecutions v. Chibango s/o**

Mazengo and Two Others, Criminal Appeal No. 109 of 2017 (both unreported).

We have shown herein that the learned trial Magistrate, formed a pre-determined opinion that the prosecution proved its case beyond reasonable doubt without subjecting the entire evidence into evaluation and before even hearing the defence case. We are therefore settled that the learned trial Magistrate openly showed bias by inclining to the prosecution case. On account of bias on part of the learned trial Magistrate, the entire proceedings of the trial court cannot be left to stand since, as there is nothing that the appellant could have said would have changed the pre-determined mind of the learned trial Magistrate (see **Kabula d/o Luhende v. The Republic** (supra)). In that respect, we agree with the learned Senior State Attorney that the appellant was denied his right to a fair hearing. We accordingly invoke section 4 (2) of AJA and declare the proceedings and judgments of two lower courts null and void.

We now turn to non-compliance with section 231 (1) of the CPA, we entirely agree with the learned Senior State Attorney that after the learned trial Magistrate had found that an accused person had a case to answer, he ought to have explained to the accused person the rights available to him in

making his defence and the manner in which he shall make his defence. That section stipulates: -

> *"231 (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made up against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of section 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right –*
>
> *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*
>
> *(b) to call witness in his defence,*
>
> *and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."*

It follows from the above provisions of the law that the learned trial Magistrate, after the closure of the prosecution and having ruled that the

accused person had a case to answer, ought to have notified the accused person that he had a right to defend himself either on oath or affirmation, or without oath or affirmation, or even to remain silent. The law also requires that the accused person to be informed that he has a right to call witnesses for his defence, if he so wishes.

Our perusal of the record of appeal bears out that it is not indicated that the appellant was informed of his rights. On 27th May, 2008, after the learned trial Magistrate ruled that the appellant had a case to answer, the case was adjourned to 26th June, 2008 whereupon the appellant was allowed to proceed with his defence case after taking an oath. Since the appellant had no legal counsel to represent him, we are satisfied that the omission prejudiced him. Such irregularity, occasioned to the unrepresented accused person, was fatal and vitiated the proceedings appearing after the ruling of a case to answer. However, considering the fact that we have found that the learned trial Magistrate was biased in his ruling of a case to answer, the entire trial court proceedings is vitiated by such bias. That is why, we have and by way of emphasis, invoked the provisions of section 4 (2) of AJA and declared the proceedings and the judgments of the two lower courts null and void.

Having declared, the next issue for consideration is whether or not a retrial should be ordered. Ms. George submitted that as there is no enough evidence to connect the appellant with the charged offence, a retrial of the case would serve no useful purpose. On this, we wish to restate the general principle for ordering a retrial as stated in **Fatehali Manji v. The Republic** [1966] 1 EA 343 that: -

> *"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to be blamed, it does not necessarily follow that a retrial shall be ordered;* ***each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*** [Emphasis added].

Having closely considered the circumstances of the present appeal, given the identification of the appellant by PW2 and PW4 was wanting as submitted by the learned Senior State Attorney and the fact that the appellant

has served a period of almost fourteen years imprisonment, the interest of justice is not in favour of a retrial.

In the end, as we have nullified the proceedings and judgments of the two lower courts, we proceed to quash the conviction and set aside sentence imposed upon the appellant. We order for immediate release of the appellant, **Mussa Daudi**, from prison unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 11th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered this 15th day of June, 2021 in the presence of the appellant in person and Ms. Grace Mwanga, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL