IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: JUMA, CJ., MKUYE, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 4 OF 2020

ATHUMAN MUSA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated the 13th day of November, 2019
in
DC Criminal Appeal No. 38 of 2019

JUDGMENT OF THE COURT

29th June & 5th July, 2021

MKUYE, J.A.:

The appellant, Athuman Musa was charged and convicted of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 [now 2019] by the District Court of Kigoma at Kigoma and was sentenced to thirty (30) years imprisonment. Aggrieved, he appealed to the High Court but his appeal was dismissed.

At this juncture, we deem appropriate to narrate the facts, albeit briefly, leading to this appeal. They go thus:

On the material date, 2/4/2018 at about 20:00 hours the victim Jamila Sadiki (PW1) hired a motorcycle (commonly known as boda

boda) ridden by the appellant to take her to the market. According to PW1, on their way they were stopped for inspection at a police barrier where one of the police who was familiar to the appellant greeted him by calling his name "*Athuman hujambo*" and the appellant replied "*Afande Joel mko salama*" and the former also replied "*tuko salama*". After the inspection which took about ten (10) minutes, they proceeded with their journey. On arrival at the market, PW1 handed the appellant money to buy salt she needed. They spent about seven (7) minutes and electricity light illuminated from five shops. Then, the appellant came back with the salt and they began their trip back home. However, to her astonishment, when they reached at the junction, instead of heading to Kiganza area where the victim resided, the appellant took a different route heading towards Kigoma Town.

On reaching at a secluded area the appellant stopped, then four people emerged and started attacking PW1 with a knife while one of them telling her to say her last prayer. As she started to pray, they undressed her and took her mobile phone make TECNO L9+ valued at Tshs 350,000/= and cash amounting to Tshs. 40,000/=. They also cut her on her right arm with a knife and during the robbery the appellant

was heard telling the other thugs that they should finish her to do away with evidence.

Then, PW1 fell unconscious and on regaining consciousness she sought help from a passer-by and was taken to the police barrier where they had passed earlier on and narrated her ordeal to the policeman, one, Joel. Thereafter, she was directed to go to the Central Police Station where she was issued with a PF3 for treatment.

E.6217 CPL Joel (PW2) who was mentioned by PW1 was at the police barrier. On 2/4/2018, he inspected various motor vehicles and motorcycles among them being ridden by the appellant who had carried a certain woman. PW2 was familiar to the appellant as he used to pass at that barrier on several occasions. He identified him through the light from other vehicles which he stopped for inspection and his torch and that they spent about 10 minutes at the police barrier. Later, he saw that woman (the appellant's passenger) while bleeding and told him that she had been wounded by the appellant. He directed her to report to the Central Police Station for further action.

On 4/4/2018, the appellant was arrested. An identification parade in which PW4 also participated was conducted by Insp. Chacha (PW3) for the purpose of identifying the appellant. Thereafter, he was arraigned

before the court for an offence of armed robbery as alluded to earlier on.

In his defence, the appellant testified on how he was arrested on 5/4/2018 and taken to the Central Police Station. Later, together with his fellow motorist were taken to the CID room for interrogation. He also explained how he denied involvement and how he was involved in the identification parade in which a certain woman identified him.

After a full trial, the trial court discounted the identification parade evidence on account that it was conducted illegally as the identifying witness was present when the participants were exchanging clothes. All the same, the appellant was found guilty and convicted as hinted earlier on.

Still protesting his innocence, the appellant has appealed to this Court on four (4) grounds of appeal which can be extracted as follows:

1) That, the Hon. High Court Judge erred in law and fact in upholding the appellant's conviction while the trial court did not read the substance of the charge to the appellant after conducting the preliminary hearing and before receiving the prosecution evidence.

2) That, the Hon. High Court Judge erred in law and fact in

upholding the appellant's conviction and the stiff sentence of 30 years imprisonment by holding that the appellant was properly identified.

3) That, the Hon. High Judge erred in law and fact in upholding the appellant's conviction and sentence on flimsy evidence as the same left much to desired.

4) That, the Hon High Court Judge erred in law and fact in sustaining the appellant's conviction and stiff sentence without scrutinizing the appellant's defence thoroughly.

At the hearing of the appeal on 29/06/2021, the appellant appeared in person through a video link from Bangwe Central Prison in Kigoma, whereas the respondent Republic was represented by Mr. Adolf Maganda, learned Senior State Attorney assisted by Mr. Yamiko Mlekano, learned Senior State Attorney and Mr. Shaban Juma Masanja and Ms. Happiness Mayunga, both learned State Attorneys.

On being invited to elaborate his grounds of appeal the appellant preferred to let the respondent respond first and reserved his right to rejoin later, if need would arise.

For the respondent, it was Ms. Mayunga who took the floor and prefaced her submission by declaring their stance that they did not support the appeal.

Responding to the 1st ground of appeal that the charge sheet was not read over to the appellant before commencing to receive the evidence, she submitted that, this is a new ground having been not raised and determined by the 1st appellate court and, therefore, this Court has no jurisdiction to entertain it. While referring to the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 551 of 2015 (unreported), she implored the Court not to entertain it.

In relation to the 2nd ground of appeal that the appellant was not properly identified, the learned State Attorney submitted that, there was strong visual identification evidence which proved that the appellant was identified. She pointed out that, though the offence was committed at night, PW1 explained clearly how she identified the appellant. She said, PW1 explained that she was carried by the appellant suggesting that they had conversation. That, they took about ten (10) minutes at the police barrier where the appellant talked with PW2 while mentioning his name. She added that, at the market where they had gone to purchase some salt, there was electricity light from five shops which enabled her

to identify him and that they had spent about seven (7) minutes. To show that PW1 identified him she described him to be a person of black complexion and after the incident she mentioned him to the police at the police barrier. To support her argument that the appellant was properly identified, Ms. Mayunga referred us to the cases of **Chacha Jeremia Murimi and 3 Others v. Republic**, Criminal Appeal No. 557 of 2015 page 18 (unreported) and **Raymond Francis v. Republic** TLR 1994 104.

Besides that, Ms. Mayunga argued that, PW2 who knew the appellant prior to the incident identified him after he had stopped him for inspection through the light from the passing vehicles and the torch which he had.

The learned State Attorney went on submitting that, though the evidence shows that the appellant brought the victim to the thugs and he was heard asking them if they have finished "*mmemaliza?*" he cannot escape participation as in terms of section 22 (1) of the Penal Code as he is deemed to have committed the offence. In this regard, she implored the Court to find that the appeal is unmerited and dismiss it in its entirety.

In rejoinder, the appellant insisted that the charge was not read over to him before the witnesses started to testify.

It should be noted that, in the course of composing our judgment it transpired that both the appellant and the respondent did not submit on the 3rd and 4th grounds of appeal. We, thus, on 1/7/2021 summoned the parties in order to address us on the same.

Addressing the Court on the 3rd ground of appeal that the conviction and sentence was sustained based on the flimsy evidence which left much to be desired, Ms. Mayunga argued that there was strong evidence which incriminated the appellant as was argued in ground no. 2. On the seemingly complaint against the excessiveness of the sentence meted out to the appellant she argued that, it was the mandatory sentence under section 287A of the Penal Code.

As to ground no. 4 that the defence evidence was not considered, Mr. Masanja chipped in and conceded to it. However, he urged the Court to step into the 1st appellate court's shoes and evaluate his defence evidence against the prosecution evidence.

On this part, the appellant conceded to what was presented by the learned State Attorney that the defence evidence be considered.

We have considered the grounds of appeal and the arguments from either side and, we think, we are now in a position to determine the appeal.

We wish to begin with the 1st ground of appeal regarding failure to read over the charge before commencement of the trial. We agree with Ms. Mayunga that this ground is new as it was not raised or determined by 1st appellate court. The record of appeal bears it out that it was neither raised nor determined by it. Section 4(1) of the Appellate jurisdiction Act, Cap 141 RE 2019 vests the Court with jurisdiction to determine appeals from the High Court and subordinate courts with extended jurisdiction. This implies that, the Court cannot have jurisdiction to determine the matter which was not dealt with by the 1st appellate court.

This Court has in numerous occasions pronounced such stance that it cannot do so where the matter is not dealt with by the subordinate court for luck of jurisdiction – see **Julius Josephat v. Republic,** Criminal Appeal No. 03 of 2017 (unreported). Also, in the case of **Godfrey Wilson** (supra) when we were confronted with an akin situation, we held that:

".... After having looked at the record critically we find that as the learned State Attorney submitted grounds Nos 1,2,3,5,6,7 and 8 are new... We think that those grounds being new grounds for having not been raised and decided by the first appellate court we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts. Hence, we refrain ourselves from considering them."

See also **Karim Seif @ Slim v. Republic,** Criminal Appeal No. 161 of 2017; **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013; **Omary Saimon v. Republic,** Criminal Appeal No. 358 of 2016 and **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004 (all unreported).

On the basis of the above cited authorities, since the said ground of appeal was not raised at the High Court on first appeal, it cannot be entertained by this Court for lack of jurisdiction. Hence, for that reason we refrain from entertaining it.

We now move to the 2nd ground on the issue whether the appellant was properly identified. In the first place, we wish to restate

that this Court has in many occasions emphasized that the evidence of visual identification is the weakest kind of evidence and courts are advised not to base conviction on it unless all possibilities of mistaken identity are eliminated or it is absolutely watertight. - See **Waziri Amani v. Republic** TLR [1980]. Also, in the case of **Chacha Jeremia Murimi** (supra) which was cited by learned State Attorney, the Court expounded guiding principles or factors for consideration in visual identification evidence. The Court stated that:

> *".... The common factors are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of light if it was at night? Was the observer impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did*

the witness name or describe the accused to the next person he saw? Did that/those other persons(s) give evidence to confirm it? See ***Waziri Amani v. R,*** *TLR [1980] 250;* ***Raymond Francis v. R,*** *(1994) TLR 100;* ***Augustino Mihayo v.R*** *(1993) TLR 117;* ***Marwa Wangai and Another v.R,*** *Criminal Appeal No. 6 of 1995; and* ***Shamir s/o John v. R,*** *Criminal Appeal No. 166 of 2004, (both unreported)."*

In the case at hand, we agree with the learned State Attorney that the appellant was properly identified. We are satisfied that the appellant was identified by the witnesses because **one**, from the time PW1 hired the appellant's motorcycle she was carried by him as a passenger. **Two**, the appellant moved with PW1 from one place to another as there is nowhere in the record of appeal which shows that PW1 had changed the motorcycle. **Three**, at the police barrier, both appellant and PW1 removed their safety helmets and stayed for almost ten minutes before proceeding to the market. During that time PW1 was able to see the appellant through the light from passer–by vehicles from and to Mwandiga area. **Four**, when they reached at the market where they had gone to purchase salt, there was electricity light from five shops which

also enabled her to identify the appellant as at that time they had also removed their helmets and they stayed there for about seven minutes. **Five,** PW1 was able to mention him to the police at the police barrier immediately after the incident and she went there while wounded and bleeding. It is settled law that, the ability to mention the suspect at the earliest opportune time is every crucial as it proves reliability of the witness – see **Marwa Wangiti Mwita and Another v. Republic,** [2002] TLR 39; **Jaribu Aballah v. Republic,** [2003] TLR 271 cited in the case of **Makende Simon v. Republic,** Criminal Appeal No. 412 of 2019 (unreported).

Besides that, PW1's evidence was corroborated by that of PW2 who saw the appellant carrying PW1 as a passenger. PW2 knew the appellant even prior to the incident as he used to pass at the police barrier thus, they even exchanged greetings on the material day as people who were familiar to each other. Also, at the time when he saw the appellant at the police barrier there was light from moving vehicles and his torch which enabled him to properly identify the appellant.

Having considered the factors expounded in **Chacha Jeremia Murimi's** case (supra), we are satisfied that the appellant was properly

identified by PW1 and PW2 as there were no possibilities of mistaken identity. Hence, this ground is devoid of merit and we dismiss it.

We note that the appellant might have considered himself to have not been directly involved in attacking the victim as he seemed to direct his accomplices what they should do.

However, we are mindful of section 22 (1) of the Penal Code which deals with principal offenders. It provides as follows:

"(1) When the offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing, namely:

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counselling or procuring its commission."

In the case of **Director of Public Prosecutions v. ACP Abdallah Zombe and 8 Others**, Criminal Appeal No. 358 of 2013 (unreported), the Court had an opportunity to interpret the above quoted section and it held a view that all persons enumerated in that section are principal offenders and as such they can be jointly or separately charged and convicted.

The Court went on to state that:

> *"... it is clear that* ***the 2nd respondent was the architect so to speak of the whole incident by sending the four deceased persons to Pande Forest with a view to killing them and in actual fact they were eliminated.*** *In terms of section* ***22(1) (b) of the Code a person who enables another person to kill another person and that other person is actually killed, the person who facilitated the killing is guilty of unlawful***

causing death of the person *notwithstanding the absence of the actual perpetrator."* [Emphasis added]

In the instant case, the appellant is the one who took the victim to a secluded place where other four accomplices attacked her. At the scene of crime, the appellant was heard uttering words *"kamanda nimeshamfikisha"*. Then he said *mmemaiiza? Malizeni tufute ushahidi"*. Much as he might have not participated physically in attacking PW1, in terms of section 22(1) of the Penal Code, so long as he facilitated in bringing the victim to his accomplices who in actual fact attacked her, he is deemed to have participated in attacking her and hence he was liable to be charged and convicted.

Regarding the 3rd ground of appeal that the conviction and sentence were sustained on the basis of flimsy evidence, we think, it cannot stand in view of the strong identification evidence as we have endeavoured to explain when dealing with ground no. 2 above. In the circumstances, this ground fails.

In the 4th ground of appeal, the appellant's complaint is that the 1st appellate court did not scrutinize his defence. It is noteworthy that the appellant neither raised this issue at the 1st appellate court nor did

the said court dealt with it. However, we are mindful of the legal principle that the 1st appellate court has a duty to re-evaluate afresh the evidence on record and come to its conclusion – See **Siza Patrice v. Republic,** Criminal Appeal No. 19 of 2019 (unreported).

We have perused the record of appeal and noted that even the trial court did not consider the defence evidence in its decision. Likewise, going through the judgment by the 1st appellate court, there is nowhere that the court evaluated the evidence of the defence. Ordinary, in such a situation the 1st appellate court ought to have evaluated such evidence even if it was a weak evidence or it did not relate to the fact in issue.

In the case of **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported), when the Court was faced with an akin scenario, it enjoined to step into the shoes of the 1st appellate court to evaluate the defence evidence. The Court stated as follows:

> *"In our present case, the complaint that the appellant's defence was not considered by both courts below warrants our interference. We are therefore set to analyse the appellant's defence and weigh the same against that of the prosecution witnesses in relation to the matter at hand."*

On our part, we subscribe to the above cited case.

In this case, the defence evidence by the appellant was that he was arrested on 5/4/2018 and taken to the Central Police Station. He testified further that he was later taken together with his fellow motorist to the CID room for interrogation where he denied involvement in the commission of the crime. He also went on testifying on how he was involved in the identification parade in which a certain woman identified him.

We have considered the defence evidence against the prosecution evidence, but we are of the considered view that his evidence did not shake the prosecution evidence. This is so because, the appellant concentrated on narrating the circumstances leading to his arrest and the interrogation relating to the matter at hand instead of controverting the prosecution evidence. In this regard, it is our further considered view that even if the two courts below had considered it, they might have not come to a different conclusion.

Lastly, it would appear that the appellant is complaining against the excessiveness of the sentence of 30 years imprisonment. However, on our part, we go along Ms. Mayunga's submission that, that is the

minimum sentence as provided under section 287 A (1) of the Penal Code. There is no way that it can be reduced.

With the foregoing, we find the appeal devoid of merit and it is accordingly dismissed in its entirety.

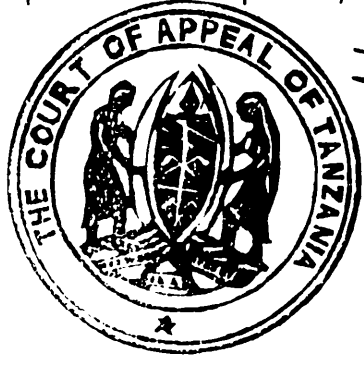
DATED at **KIGOMA** this 2nd day of July, 2021.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This judgment delivered this 5th day of July, 2021 in the presence of the Appellant in person through a video link from Bangwe Central Prison in Kigoma, and Ms. Happiness Mayunga, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.



E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL