IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 398 OF 2019

OMARY ATHUMANI @ MAGARI .....1ST APPELLANT

MOHAMED NASSORO KIZEE @ NG'ONYO.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(De-mello, J.)

Dated 12th day of September, 2019
in
Criminal Appeal No. 23 of 2019

JUDGMENT OF THE COURT

5th & 23rd July, 2021.

MAIGE, J.A.

At the District court of Kibaha, the appellants and another person who was acquitted, were charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 [R.E. 2019]. The two appellants were convicted and sentenced to thirty (30) years imprisonment each. Their appeal to the High Court was unsuccessful, hence the instant appeal.

It was alleged that, on 21.02.2013 at 23.00 hours, along the road between Athena Secondary School and Juhudi Primary School within Kibaha District in Coast Region, the appellants together with the person who was acquitted, did jointly and together, steal one motor cycle make FECON with Registration No. T 571 BJW worth TZS 1,300,000.00, the property of Samwel Kisanga. Further that, immediately before and after so stealing, the appellants threatened PW1 with a machete in order to obtain and retain the said property.

The conviction of the appellants was essentially based on the visual identification evidence of Samwel Kisanga (PW1), the victim of the crime. He testified that, on the material date and time, as he was riding a motor cycle on the road towards his home village in Visiga, Madafu, he was attacked by a gang of five bandits from his front side who blocked the road with a log. As a result, PW1 testified further, the motor cycle overturned and he fell down. It is his evidence that, in the course of defending himself, one of the bandits cut him with a machete on his hand. PW1 testified that, he managed to recognize the appellants through the aid of a motor cycle lamp as they were his village

mates. To rescue himself from the danger, PW1 ran away and the bandits chased him until he was near to his residence. He reported the incident to the ten-cell leader, Kawanda Abdallah Kiwanda, (PW2) who in turn reported it to the chairperson, Ally Rashid Matimbwa (PW3).

PW1's narration is confirmed by PW2 who told the trial court that, upon PW1 reporting the incident to him and disclosing the appellants as the assailants, he reported the matter to PW3 and there was an attempt to find out the bandits without success. It was further supported by PW3 who added that, on the next day, the matter was reported to the police station and subsequently, they were informed by the chairperson of Mbwawa that, some people suspected to have been involved in the crime, had been arrested by "afandejitu" at the said village.

PW1 went on testifying that, a moment later, the motor cycle was arrested by police at Yombo Bagamoyo while in the process of being sold and it was handed back to him. To establish his title on the motorcycle, PW1 produced the purchase agreement which was admitted in evidence as exhibit P1. On

cross examination, he unveiled that, he did not produce the motorcycle into evidence because it had already been sold.

The prosecution evidence on the discovery and arrest of the stolen motor cycle was based on the statement of Juma Pembe (exhibit P2) which was admitted in lieu of oral evidence. It was tendered by WP 3899 D/CPL HAWA (PW4), the police officer who investigated into the crime and recorded the statement.

In their defence, the appellants denied commission of the offence, their presence at the scene of the crime on the material date and being arrested on the same day. While the first appellant claimed to have been arrested by "afandejitu" on 25th February 2013, the second appellant claimed to have been arrested on 26th February 2013.

In his judgment, the trial magistrate believed the visual identification evidence of PW1 as correct and watertight. He assigned four reasons. **First**, through motor cycle light, it was probable for PW1 to identify the appellants. **Second** PW1 and the appellants were irrefutably residing in the same village. **Third,** the fact that PW1 was attacked by one of the bandits with a machete is an indication of the proximity between him and the suspects.

Fourth, in accordance with the testimony of PW2 and PW3, the victim disclosed the identities of the appellant at the earliest possible time. In his conclusion therefore, he held that, the case against the appellants had been proved beyond reasonable doubt. On appraisal of the evidence, the first appellate court absolutely subscribed to the trial court's findings and thus the instant appeal.

Initially, the appellants lodged a memorandum of appeal containing two grounds. It was followed by a supplementary memorandum of appeal consisting of eight grounds and thus making a total of ten grounds. The ten grounds can conveniently be summarized into two main complaints. **First**, the judgment of the trial court was flawed with procedural irregularities. **Second**, the appellants were not properly identified.

At the hearing, the appellants appeared in persons and were not represented. The Respondent/ Republic was represented by Mr. Medalakini Emmanuel, learned State Attorney. Prior to the hearing date, the appellants lodged a written submission on which they placed reliance to support their appeal. It was seriously rebutted by the oral submissions of the learned State Attorney.

Having remarked as such, we shall hereinafter consider the merit or otherwise of the appeal, of course, without going beyond the notorious cardinal principle of law that, as a second appellate court, we can only depart from the concurrent factual findings of the lower courts if we are fully satisfied that, there has been misapprehension of evidence, violation of some principles of law or miscarriage of justice. See for instance, **The Director of Public Prosecution vs. Jaffar Mfaume Kawawa,** [1981] TLR 149.

The first complaint revolves around procedural irregularities. It has two elements. In the first element, the trial court is faulted for admitting and placing reliance on the sale agreement in exhibit P-1 without the substance thereof being read over and explained to the appellants. In response, the learned State Attorney shared the same position with the appellants and advised the Court to expunge the exhibit from the record. With respect, we agree with him. The requirement under the respective provision is not a matter of procedural technicalities. It is one of the essential elements of fair hearing in criminal justice. As held in the case of **Robison Mwanjisi And Others vs. Republic,**

[2003] TLR 2018, the equity behind the requirement, is to make the accused aware of the nature of the accusation against him so as to be able to make a meaningful defense. Non observance of the requirement inevitably renders the document improperly admitted with the legal consequence of the same being expunged from the record. Guided by the above principle, we hereby expunge exhibit P1 from the record.

The second element of the irregularity pertains to the admissibility of exhibit P2. This is a statement by Juma Pembe which was admitted in lieu of oral evidence. It was the appellants' submissions that, as no prior inquiry was made, the statement was improperly received in evidence and ought to be expunged from the record. For the Republic, it was submitted that, the complaint has been misplaced as the duty to make an inquiry arises after the accused has lodged a notice of objection within 10 days from the date when he was informed of the intention to use the statement as evidence.

The relevancy and admissibility of a written witness statement in lieu of oral evidence in criminal cases is regulated by

section 34B (1) and (2) of the Evidence Act, Cap. 6, R.E., 2019 which provides as follows:-

> *"34B-(1) In any criminal proceedings where direct or oral evidence of relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of oral evidence.*
>
> *(2) A written statement may only be admissible under this section-*
>
> *(a) Where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;*
>
> *(b) If the statement is, or purports to be, signed by the person who made it.*

(c) If it contains a declaration by the person making it to the effect that it is true to the best of his own knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true.

(d) If, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties.

(e) If none of the parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;

(f) If, the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by a person who read it to the effect that it was so read."

The above provisions, in our reading, is one of the exceptions to the general rule as to inadmissibility of hearsay evidence. It allows a statement relevant to the fact in issue made and signed by a person who cannot be called as a witness to be used in evidence. For such evidence to be admissible and reliable, it must meet the following conditions. **First,** the maker of the statement must have been prevented from appearing in court by the reason of death, mental or bodily incapacity or being outside the country. **Second**, the statement has to be accompanied with a declaration that the same is true according to the knowledge and belief of the maker and that, the maker must have been made aware of the legal effect of the statement being false. **Third**, a copy of the statement should have been served on the adverse party ten days before the date it is intended to be tendered into evidence and that; there should be no notice of objection from the adverse party. **Fourth,** if the maker of the statement is illiterate, there must be a written declaration that the same was read and explained to him.

In accordance with the record, the statement in question was admitted into evidence on 29th September 2018. It was

produced by PW4 who claimed to have recorded it. For the first time, the Court was informed of the intention of the Republic to use such a statement as evidence on 11th day of September 2018, when the prosecution made the following oral application:-

> *"PP:- Your honour the matter is for hearing. No witness however I have an application of which it's in accordance to section 34B of TEA Cap 6 R.E. 2002, whereas we give a notice that the expected witness JUMA MAPEMBA from Bagamoyo is reported to be very sick hence he cannot attend to court. Here is a report from the village chairperson for simba village of Bagamoyo. I pray to file it as a proof. Hence as to the effect 34 B (2) of TEA I do hereby ask for the ten days' notice to this so that to produce the statement of folio b."*

The trial magistrate, made the following order and thereafter placed the matter for hearing on 21.09.2018:-

"Court:- *application granted."*

From the above statement, it cannot, in our view, be said that, the appellants or each of them were served with a copy of

the statement sought to be produced. To the contrary, the record suggests that, the prosecution sought to file a report from the village chairperson to the effect that the maker of the statement was sick. The record is silent if the said report was admitted into evidence. Yet, it is implicit in the above submission that, the prosecution prayed for ten days' notice to produce the statement. No doubt, the above submission was based on an incorrect apprehension of the requirements under section 34B (2) (d) and (e) of the Evidence Act. As we said above, the respective provision is complied with when a copy of the statement is served on the accused 10 days before the date when the same is produced in evidence. The service requirement seeks to afford the accused person adequate time to know the substance of the evidence intended to be used against him so that she or he can make a meaningful defense including objection as to the admission of the statement where necessary.

In the circumstances therefore, it was quite wrong for the trial court to admit and rely on the statement in exhibit P2 which was admitted in violation of the mandatory provisions of section 34B of the Evidence Act. We agree with the appellants that, the

omission to supply them with a copy of the statement within the statutory period, denied them a fair hearing which occasioned failure of justice. As a result, exhibit P2 is expunged from the record.

Having expunged exhibits P1 and P2 from the record, we shall consider the second complaint basing solely on the oral accounts of PW1, PW2, PW3 and PW4.

The appellants' submission on the second complaint is that, the visual identification testimony of PW1 was neither free from mistaken identity nor water tight. The reason being that, despite the offence being committed during night, no sufficient account was given as regards the intensity of the light, the proximity between the victim and the suspects and the duration of time spent by the victim to observe the appellants. They further criticized the evidence for want of description of their identities on the basis of which he identified them. Besides, they criticized the prosecution for failure to call the police officer who arrested them despite being a material witness in that regard. Basing on the decision in **Azizi Abdallah vs. The Republic,** (1992) TLR, 71,

the appellants have invited the Court to draw an adverse inference against the prosecution for such a failure.

Responding on this complaint, Mr. Medalakini, learned State Attorney, submitted, with all forces that, the appellants were correctly identified. In his view, as the suspects were not strangers to PW1 before the commission of the offence, evidence of description of their identities was immaterial. The counsel does not agree with the appellants on the alleged silence of the testimony of PW1 on the intensity of the motor cycle light. Our attention was drawn to the testimony of PW1 on cross examination suggesting that, he identified the first appellant as the person who assaulted him with a machete. On the failure to call the arresting officer, it was his submission that, the same was inconsequential as the evidence of PW2 and PW3 was sufficient to address the issue of arrest of the appellants.

As said above, the conviction of the appellants was essentially based on eyewitness identification and/ or recognition evidence of PW1. It is trite law that, such type of evidence is of the weakest character and most unreliable. It can only be acted upon, if it is water tight and if all possibilities of mistaken identity

and/ or fabrication are eliminated. There are many pronouncements supporting this proposition. See for instance, **Philimon Jumanne Agala @ J4 vs. The Republic,** Criminal Appeal No. 187 of 2015 (unreported), where it was held that:-

> *"Eyewitnesses' visual identification evidence though relevant and admissible, should be acted upon cautiously after the court has first satisfied itself that such evidence is watertight and all possibilities of mistaken identity or fabrication have been eliminated."*

A similar position was stated in **Waziri Aman vs. R,** (1980) T.L.R. 250, **Lukanguji Magashi vs. The Republic,** Criminal Appeal No. 119 of 2007, **Shamir S/O John vs. The Republic,** Criminal Appeal No. 166 of 2004 and **Gallous Faustine Stanslaus vs. The Republic,** Criminal Appeal No. 2 of 2009 (all unreported).

Evidence is said to be water tight, in view of the authority in **Nhembo Ndaru vs. The Republic,** Criminal Appeal No. 33 of 2005 when it is:-

"relevant to the fact or facts in issues, admissible, credible, plausible, cogent and convincing as to leave no room for reasonable doubt".

In the instant case, the offence is alleged to have been committed during night. The appellants were not stranger to PW1 as they were residents of the same village. The evidence is thus that of recognition. Therefore, for such evidence to be relied upon, it should not only be watertight and free from mistaken identity but free from any possibility of fabrication as well. The question to be addressed therefore, is whether the testimony of PW-1 on the recognition of the appellants was credible, plausible, cogent and convincing enough as to leave no room for reasonable doubt.

PW1 claimed to have identified the appellants by aid of motor cycle light. That, after he had fallen down following the overturning of his motorcycle, he became so closer to the bandits as to recognize them. Though, it is his claim that, one of the bandits did cut him with a machete, it is surprising that, throughout his testimony in chief, PW1 could not afford to

mention who between the two did that. It was not until when he was cross examined by the first appellant that, he mentioned him to be the one who did so. Considering the materiality of the evidence to the fact in issue, it was highly improbable for PW1 to forget such an account in his testimony in chief. In addition, the offence in question was irrefutably committed during night. The oral account of PW1 is such that, he was able to recognize the appellants by light of motor cycle lamp. He did not give any explanation as to the intensity of the light as the principle in **Waziri Amani** case *(supra)* requires. Equally so, for duration of time within which PW1 had observed the appellants without interruption.

PW1's ability to identify the appellants was justified on account that, he was residing in the same village with them. Ordinarily, the prosecution evidence would have given an insight if there was any attempt to trace the appellants at their residences in the village at the earliest possible time. That was not the case. In his evidence, PW1 aside from claiming that, the first appellant was arrested on the third day at his home residence, he does not say whether there was any attempt on the material date or the

next day, to trace the appellants or any of them at their residences.

Admittedly, the testimony of PW2 suggests that, after missing the appellants at the scene of the crime on the material date, an attempt was made to trace them at their residential homes but in no avail. The story is nonetheless materially contradictory with that of PW3 who told the trial court that, after missing the bandits at the scene of the crime, they went to Mlandizi and Mbwawa to find them out. The question is, if at all PW1 informed PW2 and PW3 that the appellants were the residents of Visiga, why did they take all troubles to trace them at Mlandizi and Mbwawa?.

There is yet another evidential material discrepancy on this issue. While PW1 claims to have only recognized the two appellants, quite surprisingly, the story he narrated to PW3 disclosed three persons. In his own words appearing at page 23 of the record, PW3 recounted as follows:-

> *"The 1st accused was arrested at his place at Visiga. PW1 mentioned the robbers who are IDDI KIZEE, RAMADHANI NYAMBI and Omary were arrested but others escaped."*

More to the point, the prosecution evidence indicates that, through their identities disclosed by PW1, the appellants were both arrested on the third day. The testimony of PW1, PW2 and PW3 does not directly speak of the arrest of the second appellant. It only speaks of the arrest of the first appellant. Unlike the expression in the testimony of PW2 and PW3 that, the first appellant was arrested by a policeman called "afandejitu", the claim by PW1 is that, the first appellant was arrested by "sungusungu". On the arrest of the second appellant, the testimony of PW3 was as follows:-

> *"Later on we got information from the chairperson of Mbwawa that they saw the people whom were suspected to be criminals as they were drinking beer since morning. They were arrested."*

Though, it may be reasonably inferred from the above piece of evidence that, the second appellant was among the suspects who were arrested at Mbwawa village, whether he was the resident of the said village and on what basis was he arrested, are questions which cannot find answers from the prosecution

evidence. Conceivably, an account from the police officer who arrested the appellants could have addressed the uncertainty. Alas, he was not called as a witness and no reason for the omission has been assigned. We agree with the appellants that, the trial court ought to have drawn an adverse inference against this omission. This is in line with the principle in **Azizi Abdallah vs. R** (1991) TLR 71.

In our view, the discrepancies and gaps on visual identication by PW1 discussed herein above, raise a reasonable doubt which should have been resolved in favour of the appellants. It seems to us that, the trial magistrate misdirected himself on the principle in **Waziri Amani** case in so far as he relied on the visual identification evidence of PW1 without warning himself if it was free from mistaken identity. Apparently, the first appellate court fell into the same track.

In the final result and for the foregoing reasons, therefore, the appeal succeeds to the extent as afore stated. The case against the appellants was not proved beyond reasonable doubt. As a result, we quash their convictions and set aside the sentences

thereof. We further order for their immediate release from prison unless otherwise held for other lawful causes.

DATED at **DAR ES SALAAM** this 19th day of July, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This judgment delivered this 23rd day of July, 2021 in the presence of the appellants in person through video link from Ukonga prison and Mr. Yusufu Aboud, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL