IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 532 OF 2017

TIZO MAKAZI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Shinyanga)

(Kibella, J.)

Dated the 23rd day of June, 2017
in
Criminal Appeal No. 113 of 2016

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JUDGMENT OF THE COURT

13th & 27th August, 2021

WAMBALI, J.A.:

The appellant, Tizo Makazi, was arraigned before the District Court of Maswa (the trial court) upon the charge of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 [now R.E. 2019]. It was the case for the prosecution as per the particulars of the offence that on 9th August, 2015 at Uzunguni Street within Maswa District in Simiyu Region, the appellant did steal cash money TZS. 3,400,000.00 the property of one Maguryati Charles @ David Mgasa and before and after such stealing did fire bullets in order to obtain that sum of money.

As the appellant pleaded not guilty to the charge, the prosecution summoned the following witnesses to support its case, namely; Maguryati Charles (PW1) Fedelis Segumba (PW2), Mnyasa Green (PW3), A/INSP. Johansen Mkera (PW4), E.306 D/CPL. Jonas (PW5), Dr. Mayani Yona (PW6) and Masoud Mikidadi (PW7). In addition, the prosecution tendered the Report of the Government Chemist, Identification Parade Register, 11 bullet cartridges, TZS. 1,000,000.00 and the cautioned statement of the appellant which were admitted as exhibits P1, P2, P3, P4 and P5 respectively.

Briefly, the substance of the prosecution evidence was that the case against the appellant was proved beyond reasonable doubt by the fact that: he was identified by the victim (PW1) during the incident and during the identification parade; he confessed in his cautioned statement (exhibit P5) to have committed the offence and that when he was arrested, he was found wearing blue trousers and black shoes which were stained with blood. It was thus the prosecution evidence that the analysis of the Government Chemist done in the blood stained trousers and shoes revealed that the appellant took part in the alleged robbery and injured PW1.

On his part, the appellant put up a spirited defence and contended that he was not identified at the scene of crime and that the identification parade was illegaliy conducted. He also denied to have confessed before the police officer (PW5) and that the alleged result on his connection to the commission of the offence contained in the report of the Government Chemist was unfounded. The appellant also contended that the charges were planted on him as he was arrested after he refused to surrender TZS. 1,100,000.00 to the police.

Noteworthy, at the end of the trial, the trial court discounted the prosecution evidence regarding the identification by PW1, the identification parade and the cautioned statement. However, the trial court believed the report of the Government Chemist (exhibit P1) which contained the results of the analysis of the blood samples of the appellant and the victim (PW1). According to the evidence in the record of appeal the said report revealed that the DNA found in the appellant's blood-stained trousers and shoes was of the victim. The report further revealed that the trousers and shoes were of the appellant and the DNA of the victim was found in the said blood-stained trousers and shoes.

The trial court also found that the evidence of PW3, the mini bus (hiace) driver who witnessed the appellant being arrested by the police

wearing blood-stained trousers and shoes corroborated the report of the Government Chemist as an independent witness.

Consequently, the appellant was convicted of the offence charged and sentenced to thirty years imprisonment. It was further ordered that TZS. 1,000,000.00 (exhibit P4) which was found in possession of the appellant to be given to the victim after the expiry of the appeal period.

The appellant's desire to contest the trial court's conviction and sentence was not fulfilled as his appeal to the High Court was dismissed in its entirety, hence the instant appeal. The displeasure of the appellant with the decision of the High Court is expressed in the memorandum of appeal comprising eight (8) grounds of appeal. However, before the hearing commenced, it was unreservedly agreed that the appellant's complaints in the grounds of appeal can be conveniently resolved based on the first ground which is whether the prosecution proved the case against the appellant beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, with no legal representation. In support of the appeal, he fully adopted the grounds of appeal and did not wish to expound further but urged us to allow the appeal.

On the other side, the respondent Republic was duly represented by Mr. Nestory Mwenda and Ms. Caroline Mushi, both learned State Attorneys.

At the very outset, Ms. Mushi expressed on behalf of the respondent Republic her support to the appellant's appeal on the contention that the prosecution case was not proved beyond reasonable doubt.

Submitting in support of the appeal, Ms. Mushi argued that there is no doubt that in grounding the conviction of the appellant, the trial court relied on the evidence of PW2 and the report of the Government Chemist (exhibit P1) together with the evidence of PW3.

However, she argued that the procedure of tendering and admitting exhibit P1 was flauted because; firstly, it was tendered before PW2 explained his qualification in the respective field and laying a foundation of how the analysis was conducted to reach the results.

Secondly, exhibit P1 was tendered by the prosecutor and not PW2 who was specifically summoned to testify and tender it. Thirdly, exhibit P1 was not read over and its contents explained to the appellant after it was admitted in evidence at the trial. To this end, she argued that the

consequence of this irregularity is to expunge it from the record of the proceedings.

On the other hand, Ms. Mushi submitted that the other glaring irregularity which tainted the prosecution case was that the chain of custody of the allegedly seized blood-stained shoes and trousers of the appellant and the blood samples of the victim (PW1) and the appellant was not clearly documented on how they were taken by the police and sent to the Government Chemist for analysis. Besides, she argued, there is no evidence in the record showing how they were returned to the police as required by law. Particularly, she submitted that the first problem is expressed by the fact that with the exception of TZS. 1,000,000.00, PW5 did not show clearly how the trousers and shoes were collected from the appellant and sent to the Government Chemist Laboratory at Mwanza. She emphasized that no witness testified on this issue. The only evidence, she argued, is that of PW2 who testified that he received the blood-stained trousers, shoes and the blood samples of the appellant and the victim (PW1) from Mwanza together with a letter. She did not however specify the date and the author. From that end; in her view, the lapse seriously dented the prosecution case as far as the handling of the said items was concerned.

In her further submission she argued that the problem of poor handling and lack of paper trail documentation of the said items is compounded by the fact that apart from the report (exhibit P1), the respective items were not tendered in court during the trial to justify the allegation that they were really seized and taken from the appellant and PW1. Besides, she submitted, it was not stated at the trial if the blood samples taken from the appellant and the blood-stained shoes and trousers were destroyed after the analysis by the Government Chemist which resulted into the report (exhibit P1). To support her submission with regard to the importance of documenting the chain of custody in handling the exhibits, she referred the Court to the decision in **Esther Amani v. The Republic,** Criminal Appeal No. 242 of 2016 and **Peter Mabara v. The Republic,** Criminal Appeal No. 242 of 2016 (both unreported).

In the circumstances, Ms. Mushi submitted that if exhibit P1 is expunged, the remaining evidence in the record is that of PW2 and PW3. However, she argued that in the circumstances of this case the evidence of PW2 cannot be relied upon to ground conviction of the appellant. This is because, she submitted, despite being an expert witness he did not explain sufficiently on how the analysis was

conducted before he came to the conclusion that the appellant's and PW1's samples of blood and the blood-stained shoes and trousers connected the appellant to the commission of the offence against PW1. More importantly, she submitted that the evidence of PW1 on identification was disbelieved by the trial court and confirmed by the first appellate court. In her further submission, she argued that the evidence of PW3 which was also relied upon by the trial court to corroborate the prosecution case that the appellant was arrested wearing blood-stained trousers and shoes cannot salvage the insufficient evidence of the prosecution.

In the end, she implored us to allow the appeal, quash conviction and set aside the sentence imposed on the appellant and order his release from custody.

In rejoinder, the appellant fully supported Ms. Mushi submission and urged us to allow the appeal and order his release from prison custody.

Having heard the submission of the parties, the issue for our determination at this juncture is whether the prosecution proved the case against the appellant beyond reasonable doubt.

In the first place, we entirely agree with Ms. Mushi that exhibit P1 was wrongly tendered, admitted and relied in evidence by the trial court and confirmed by the first appellate court as it was tendered by the prosecutor. It is settled position that a prosecutor is not competent to tender exhibits because he cannot be both a prosecutor and a witness at the same time. For this stance, see for instance the decision of the Court in **Thomas Ernest Msungu @ Nyoka Mkenya v. The Republic,** Criminal Appeal No. 78 of 2012 (unreported), where it was held that: -

> *"a prosecutor cannot assume the role of a prosecutor and witness at the same time. With respect that was wrong because in the process the prosecutor was not the sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98(1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined."*

This being the case, we expunge exhibit P1 from the record of proceedings.

Secondly, we similarly agree with Ms. Mushi that in view of the factual setting with regard to the evidence of PW2, his testimony cannot be of assistance to ground the conviction of the appellant. We have

noted from the record that despite being an expert, his evidence did not show sufficiently how he made the analysis and arrived to the conclusion that the samples of blood and blood-stained shoes and trousers taken from the appellant and PW1 connected him with the commission of the offence of armed robbery.

We have however no doubt that as an expert, his evidence can be considered by the Court along with other evidence in the record. Indeed, as stated by the Court in **Makame Junedi Mwinyi v. Serikali ya Mapinduzi Zanzibar (SMZ) [2000] TLR 455: -**

> *"The position of the law is that an expert evidence is admissible in cases where specialized knowledge is required."*

Nonetheless, as we have intimated above, the trial court must consider the expert evidence in line with the available evidence in the record. It is therefore not open to consider solely the expert evidence in isolation of the other evidence in the record. It is appropriate, we think, at this point to reiterate what we stated in **Bashiru Rashid Omar v. Director of Public Prosecutions**, Criminal Appeal No. 309 of 2017, (unreported) with regard to the expert evidence: -

> *"Indeed, opinion of the expert evidence is premised on a general rule that there are certain matters which cannot be perceived by the senses. Their existence or non-existence is ascertained by inferences drawn by persons specifically trained in the particular field with which the subject is connected. Nevertheless,* ***the opinions of experts are not ordinarily conclusive and therefore not binding upon the judge.*** *In this regard,* ***the reasons for the opinion evidence must be carefully scrutinised and examined and considered by the trial court along with all other relevant evidence in the record.*** *The trial court therefore cannot surrender its opinion to that of an expert in disregard of the other relevant evidence for both sides of the case. The trial judge is therefore entitled to scrutinize the expert evidence and come to his own conclusion on the facts of the case.* [Emphasis supplied]

Moreover, it is also a position that for an expert to be believed by the court, he must furnish it with the necessary scientific criteria for testing the accuracy of his conclusion so as to enable the Court to form its own independent judgment by the application of these criteria to the facts proven in the evidence (see **Davie v. Edinburgh Magistrates,**

[1953] SC 43, **Daubert v. Marrel Dow Pharmaceutical Inc.** 509 US 579 (1993) and **United States of America v. Roy Van WYK**, US District Court for the District of New Jersey, Cr. 99 -2717 (2000) referred in **The Republic v. Kerstin Cameron** [2003] TLR 88 at page 128.

Indeed, as stated by the Supreme Court of India in **Malay Kumar Mukherjee & 2 Others**, AIR 2010 SCC 1007.

> *"The scientific opinion evidence, if intelligible, convincing and tested becomes a factor for consideration along with other evidence of the case. The credibility of such witness depends on the reasons stated in support of his conclusions and the data and material which form the basis of his conclusions."*

To that end, we hasten to add that an expert has to go beyond making mere assertions if he is to be taken serious as convincing and effective.

Applying the above expounded position with regard to the expert witness in the instant appeal, we are settled that in view of the factual setting of PW2's oral account during the trial, we are of the considered opinion that his evidence cannot solely be relied upon to reach the conclusion that the appellant committed the offence he stood charged.

His evidence has to be considered along with other evidence in the record. In the circumstances, we agree with Ms. Mushi that his evidence cannot be relied upon to ground the conviction of the appellant.

On the other hand, having expunged exhibit P1 and accorded the evidence of PW2 less weight, we are of the settled opinion that it is not necessary to consider other irregularities which were raised by Ms. Mushi with regard to the propriety of the tendering and admission of evidence. Similarly, we do not find it important to discuss the chain of custody and handling of the blood samples of the appellant and PW1 and the blood-stained shoes and trousers of the appellant as they are connected to the report contained in exhibit P1 which we have expunged from the record of proceedings.

In the circumstances, the remaining crucial evidence in the record is that of PW3 which we also hold that it cannot ground conviction as it is not supported by any other evidence of the prosecution. In short, PW3 evidence that the appellant was arrested wearing shoes and trouser stained by blood which could have been linked to the injuries sustained by PW1 whose evidence was discounted by the trial court and confirmed by the first appellate court, cannot stand on its own corroborate the evidence of PW2.

From the foregoing deliberation, we are compelled to interfere with the concurrent findings of facts of both the trial and first appellate courts and hold that the prosecution did not prove the case against the appellant beyond reasonable doubt. Ultimately, we hold that the conviction and the subsequent sentence of the appellant is not justified.

Consequently, we allow the appeal, quash conviction and set aside the sentence. In the result, we order the immediate release of the appellant unless otherwise held lawfully.

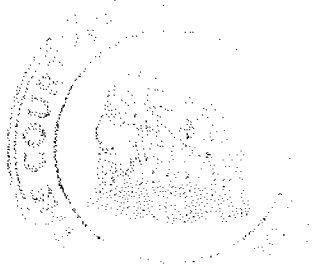
DATED at **SHINYANGA** this 26th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 27th day of August, 2021 in the presence of appellant in person and Mr. Jukael Reuben Jairo assisted by Wampumbulya Shani, learned State Attorneys for the respondent/Republic is hereby certified the true copy original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL