IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 517 OF 2017

BALIGOLA S/O LUPEPO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, at Tabora)

(Mallaba, J.)

dated the 28th day of August, 2017
in
DC. Criminal Appeal No. 56 of 2017

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JUDGMENT OF THE COURT

22nd & 29th October, 2021

LILA, J.A.:

The appellant, **BALIGOLA S/O LUPEPO**, was charged with four counts of armed robbery contrary to section 287A of the Penal Code Cap. 16 R.E. 2002, as amended by Act No. 3 of 2011 [now R.E. 2019] (the Penal Code). It was alleged that he robbed four different persons at the same time, date and place using the same gun to threaten them so as to obtain or retain the things stolen. That is to say in the same transaction, he committed four robbery offences to four different persons hence charged in the same charge but different counts. That was on 24/1/2014 at or about 08:00hrs at Ussoke Mlimani Village within

Urambo District in Tabora Region and, to be specific, the offence was committed within Ussoke Secondary School compound. In the **1st count**, he was accused of robbing TZS. 1,100,000.00 the Property of Ussoke Secondary School from one Andrew S/o Richard @ Mlolwa, a bursar in that school; in the **2nd count,** he robbed one mobile phone type SQ DUOS valued at TZS. 240,000.00 from one Anord S/O Thomas @ Mbulwa; in the **3rd count**, he robbed one mobile phone type Nokia 1200 valued at TZS. 45,000.00 from one Edina d/o Martin and; in the **4th count**, he robbed one mobile phone type Techno valued at TZS. 30,000.00 from one Richard s/o Mdaki.

To prove its case, the prosecution paraded five witnesses and tendered one physical exhibit, that is three shells of ammunitions (exhibit PI) and one documentary exhibit that is a sketch map (exhibit PII).

Brief background evidence leading up to this second appeal is straight forward. On the material day Andrew Richard Mlolwa (PW1) was in his office with a certain person who had supplied the school with food grains and who had turned up to be paid his money, TZS 750,000.00. As he was escorting him after paying that amount of money, he saw another person with a joining instruction form hence thinking that he was a parent of one of the school pupils, he returned to his office letting

the one he was escorting to go. At the office, instead of producing the form, that man who wore a t-shirt written Tanzania produced a pistol with which he forced to be given money by PW1. Immediately, another person joined that man and PW1 gave them TZS. 1,100,000.00 which were part of the school fees paid by students. The attempt to get money from the safe was unsuccessful as PW1 had no keys hence could not open it. The two persons forced PW1 to go with them to the head Master's office and on the way they met one Richard Mdaki (PWIII), a school driver, who had conversation over the mobile phone he had. The two men turned against PWIII and PW1 seized the opportunity to run away shouting for help. On his part, PWIII told the trial court that on the material date, he met two men one with T-shit written Tanzania carrying a gun while going to the bursar who ordered him to lay down and they robbed him his mobile phone make Tecno valued at TZS. 30,000.00. then they rose him up and led him to the bursar's office where he was locked in. While therein he heard gun shots but did not see what happened outside.

Edna Martin (PWII), an evangelist in that school, told the trial court that when proceeding from the dining hall to the staff room, she met a person with a T-shirt written Tanzania who ordered her to lay down and was robbed a mobile phone make Nokia 1200.

It is noteworthy that save for PWIII, the two other witnesses never knew the appellant prior to the incident and they identified him in court by stating that he was the one who wore a t-shirt written Tanzania at his chest. On his part, PWIII claimed that he identified that person with a gun and a t-shirt written Tanzania as being a person he was shown at Itebulanda village prior to the robbery incident by his relative one Hassan Mpata when he visited him at Itebulanda village. That he was shown the appellant who was at "Kijiweni" and was told that his name is Baligola.

A Police Officer No. F. 9073 D/C Rahim (PW5) led a team of policemen to the crime scene including D/C Augustino and the Incharge one Magai where they recovered three shells of a gun (exhibit PII) and drew a sketch map (exhibit PII) and he was told by PWIII that he identified one of the robbers as being the appellant who was a person he was shown by his relative at Itebulanda village prior to the incident. Acting on a police message from Urambo, the appellant was arrested at Manzese Club in Tabora by one Hardson Steven Ntibalizi (PW4), a police officer who was accompanied by other policemen.

On the other side, the appellant opted to remain silent hence did not render any defence. After being informed all his rights under section 131(1) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (now 2019)

(the CPA) just five (5) days past during which he indicated that he would give his defence evidence under oath and had no witness to call, he elected, on the day set for hearing his defence, not to render his defence by categorically stating that, we hereunder quote:-

"Accused: I can't give my defence."

The trial court proceeded to compose the judgment, found him guilty in all counts, convicted and sentenced him to serve thirty (30) years imprisonment in each count and it further ordered that the sentences shall run concurrently.

In its judgment, the learned trial magistrate was satisfied that the offences of robbery were committed at around 9:00hrs, hence during day time and the properties listed in the charge were robbed. Addressing himself on the crucial issue whether the appellant was involved, he reproduced the evidence by PWI and PWII on how they identified the appellant by the t-shirt written Tanzania and that the robbers did not put on masks and, in respect of PW3 (sometimes referred to as PWIII), he said:-

> *"PW3 established that, Baligola is the one who ordered him to lie down, then he robbed his cellular phone make Tecno valued Tshs. 30,000/= then he pulled him till in the PW1 office, and locked him therein, therefore he saw him very clear as he had no mask on his face."*

The appellant was principally convicted on the basis of identification evidence by PW1, PW2 and PW3.

That decision aggrieved the appellant and lodged an appeal to the High Court. Substantially, he advanced four (4) grounds of appeal. He faulted the trial court for **first**; relying on the testimonies of PW1, PW2 and PW3 who he claimed were not credible to convict him, **second**; evidence on visual identification was not watertight. Under this complaint, he complained that no detailed description of the suspect was given to the police by PW3 who claimed that he knew the suspect before the incident and that it was necessary to conduct identification parade so as to clear the doubts if PW1 and PW2 positively identified the appellant as he was new to them. He cited the case of **Joseph Shagembe vs R** [1982] TLR 147, **Bushiri Amiri vs R** [1992] TLR 65, **Marwa Wangiti Mwita and Another vs Republic**, Criminal Appeal No. 6 of 1995 and **Kalol Bijanda vs Republic**, Criminal Appeal No. 3 of 1990 (both unreported) to support his contentions. **Third**; section 231 of the CPA was not complied with and, **four**; that the charge was not proved against him as required by law.

After revisiting all the evidence and law, the first appellate judge could not help to fully concur with the trial court hence uphold the

convictions and sentences of the appellant. Basically, he was also convinced that the appellant was positively identified. After properly directing himself to the guidelines set out by this Court in the case of **Waziri Amani v. R.** [1980] TLR 250 on visual identification, he was equally satisfied that PW1, PW2 and particularly PW3 had seen and impeccably identified the appellant as being one amongst the robbers who featured at the scene of crime. On whether it was necessary to conduct an identification parade for PW1 and PW2 whom the appellant was a stranger so as to enable them ascertain whether the person they saw at the scene of crime was the appellant, the learned judge, after appraising himself with the legal position pronounced by the Court in the case of **Jandika Mwakarija and Another vs Republic**, Criminal Appeal No. 175 of 1991 (unreported), held that failure to do so did not render the evidence of visual identification worthless. He was resolutely convinced that since the offence was committed during the day time and the three witnesses gave detailed description of the suspects, the identification of the appellant could not be faulted for failure to name him at the earliest opportunity. The appeal was therefore unsuccessful.

Still believing that he was wrongly convicted and pushed by his conscience that he is innocent, the appellant preferred this second

appeal to this Court. He raised seven grounds; **one,** that the two courts below erred in law and in fact for convicting him basing on the weakness of the defence evidence; **two,** that the preliminary hearing was irregularly conducted; **three,** that the first appellate court erred in law and fact in sustaining the appellants conviction on the basis of weak and unreliable visual identification evidence given by PW3 who told the court that he was shown the appellant before the incident took place; **Four,** that the first appellate court erred in law and fact in sustaining the appellant's conviction on suspicious evidence given by the prosecution witness; **five,** that hearing of the case commenced without being reminded the charge; **six,** that charge was amended after all the prosecution witnesses had already testified but he was not accorded the right to elect whether or not the prosecution witnesses should be recalled and; **seven,** that the charge was not proved beyond all reasonable doubt.

In this Court, the appellant appeared in person and was not defended. He urged the Court to determine his appeal based on the grounds outlined in the memorandum of appeal he had earlier on 4/4/2018 lodged which he adopted in full and left it for the respondent Republic to respond to them.

On the other hand, Mr. Tito Ambangile Mwakalinga, learned State Attorney, represented the respondent/Republic. He, on the onset, blatantly stated that he was resisting the appeal.

Mr. Mwakalinga offered response in the manner the grounds of appeal were arranged in the memorandum of appeal. He reserved his response in respect of ground one (1) to a later stage and he first directed his arsenals against the complaint in ground two (2) of appeal that the two courts below wrongly convicted him on the weakness of his defence. Mr. Mwakalinga insisted that the record bears out clearly that the appellant did not defend himself hence that contention is unfounded.

Indeed, we agree with the learned State Attorney that the appellant's complaint is not supported by the record as at page 21 and 22 of the record, the appellant at his free will refused to enter defence although he had indicated his wish to defend himself under oath the previous day. A reading of section 231(1)(b) of the CPA makes it plain that an accused person has a discretion to exercise any of the rights conferred to him under section 231(1)(a) of the CPA which includes entering his defence or not and whether or not on oath or affirmation. Much as he freely opted not to enter defence, as rightly argued by the

learned State Attorney, he cannot be heard now complaining that he was not accorded that right. Although he tended to advance an argument that he was compelled to take that course because the charge was amended without being accorded the right to recall the witnesses, that allegation is hard to be accepted for the record does not indicate that he raised that allegation as a cause of his refusal to enter defence. That contention is therefore nothing but an afterthought.

Responding in respect of ground three (3) of appeal, Mr. Mwakalinga was of the view that the requirements under section 192 of the CPA were fully complied with for, as the record vividly shows, the appellant was reminded the charge, facts supplied to him were read aloud in court and the appellant indicated the facts he was not disputing which were duly recorded. Following that, he argued, the purpose of conducting a preliminary hearing was thereby achieved by sorting out undisputed facts to which both sides and the trial magistrate signed. He accordingly urged the Court to dismiss that ground of appeal.

With respect, Mr. Mwakalinga's arguments are a true reflection of what transpired on the day the preliminary hearing was conducted. The record speaks it all. We need not be detained herein but agree with the

learned State Attorney and hereby proceed to dismiss this ground of complaint.

The learned state Attorney strongly resisted the appellant's complaint in ground four (4) of appeal which touched on the identification evidence of the appellant. He impressed upon the Court to hold that the appellant was positively identified at the crime scene by PW1, PW2 and PW3 who were able to describe the appellant's attire that he did wear a t-shirt with a writing Tanzania on his chest, the time taken as being about 15 minutes, he was close to them when he robbed them money and mobile phones and also that the incident occurred during the day time, specifically at 09.00hrs hence in broad day light. Submitting specifically on PW3's evidence, he was emphatic that he knew the appellant before the incident as he was showed him at "Kijiweni" at Itebulanda village when he visited his relative and was told of his name as being Baligola. We shall address this issue which stems to be crucial in this appeal at length at a later stage of this judgment.

The appellant's complaint in ground five (5) of appeal did not find merit in Mr. Mwakalinga's mental faculty as he discounted it arguing that the findings of guilt of the appellant by both courts below was founded on cogent evidence not suspicion. He submitted that the three witnesses

led evidence which sufficiently established the appellant's guilt by narrating how they identified him as being amongst the three robbers who robbed them. He again, urged this appeal ground be dismissed. We reserve the discussion on this ground to a later stage when we shall address the appellant's complaint on the issue of identification in ground four (4) of appeal.

Before we engage in the consideration of the remaining grounds of appeal faulting the learned trial magistrate and the learned judge on some procedural infractions allegedly committed, as our starting point, we find it apposite that we make it clear by pronouncing a legal principle that will guide us in the exercise that the test to be applied to determine whether or not the defect is curable in such circumstances is whether the omission worked serious prejudice on the part of the appellant. The rule has always been that where a substantial miscarriage of justice has not flown from the defect, the provisions of s. 388 of the CPA can be brought into play and the conviction be sustained.

We begin with ground six (6) of appeal. The appellant complained that he was not reminded the charge before trial commenced. Mr Mwakalinga readily conceded that when trial by witnesses being called to testify in court began on 18/3/2014, the record is silent whether or

not the appellant was reminded the charge. He was, however, quick to argue that such an omission did not work injustice to the appellant as the preliminary hearing was conducted on 17/3/2014 when the appellant was reminded the charge and hearing began on 18/3/2014. He urged the Court to agree with him that the appellant could not be taken to have, within such a short span of time, forgotten the contents of the charge.

Much as we appreciate that in terms of section 228 of the CPA, trial is expected to commence immediately after an accused person has denied the charge which therefore presupposes that he would still be aware of the charge and that in the event trial begins sometimes later, the tenets of fair trial demands that the appellant be reminded the charge, yet in the peculiar circumstances of this case, that omission did not prejudice the appellant. As rightly contended by the learned State Attorney, it was hardly a day that had passed after the appellant was reminded the charge. We hasten to find that the contents of the charge were still fresh in the appellant's mind when trial ensued the next day. The truth of it is reflected in the manner the appellant cross-examined the witnesses across the trial and the line of defence he took. Since the test is the extent of prejudice occasioned on the appellant, in view of

what we have endeavored to show above, we find nothing suggestive of that. Accordingly, this complaint is unmerited and is dismissed.

Although Mr. Mwakalinga conceded to the complaint in ground seven (7) of appeal that the charge was amended after all the prosecution witnesses had given evidence and no right to recall the witnesses was accorded to the appellant, he was not ready to agree with the appellant that, in the circumstances of this case, the defect was fatal because the amendment was not substantial and did not affect or touch on the evidence. In effect, he argued, it was only the Act amending the provisions of section 186 of the Penal Code which was amended to read No. 3 of 2011 instead of Act No. 4 of 2004. It was his view, therefore, that the infraction did not prejudice the appellant therefore curable under section 388 the CPA. He urged the Court to dismiss this ground of appeal.

It is, indeed, apparent that the prosecution amended the charge on 14/5/2014 and as is the established practice, under section 228(1) of the CPA, it was read out to the appellant to enable him understand the nature of the accusation he was facing and he maintained his plea of not guilty. As gleaned from the record, the former charge made reference to Act No. 4 of 2004 as the amending section and the

substituted charge was intended to only alter the amending Act to read Act No. 3 of 2011. The appellant's complaint is that he was not accorded the right to elect to recall the prosecution witnesses after the amendment of the charge. We think, crucial here is the extent of the amendment. In the present case, the amendment was only to the above extent otherwise the substance of the charge and the evidence in support of it remained to be the same that is why even the prosecution did not find it necessary to recall the witnesses. We are accordingly inclined to agree with the learned State Attorney that the kind of amendment effected to the charge did not cause substantial alteration to the charge and there was therefore no injustice caused to the appellant by the omission to afford him the complained right. That aside, we are alive to the settled law that recall of witnesses being a judicial discretion is allowed up to the time when the prosecution or the defence closes its case so as to meet questions that could not reasonably have been anticipated (See **Frank Kachile v. R.** [1972] HCD no. 218). That means, even the appellant, if he found it necessary would have urged the trial court a certain witness of the prosecution be recalled for him to put up questions on matters he thought crucial to his case. Given the fact that he did not exercise that right which was open to him too, we have no hesitation to hold that no injustice was

occasioned and the appellant did not make any suggestion. This complaint fails too.

We now turn to consider ground four (4) of appeal. It is noteworthy that common to the appellant's grievances before the High Court and before us is that the identification evidence was not watertight. A glance on the record of appeal reveals that the issue of visual identification occupied an important place in both courts below. The main issue in this appeal is therefore whether the two courts below properly found that the appellant was sufficiently and positively identified.

As will be appreciated, both courts below were of the concurrent finding that the appellant was sufficiently identified. They particularly found, as a fact, that the evidence of PW1, PW2 and particularly PW3 was strong, credible and reliable. As a general rule, this being a second appeal, this Court would not, readily interfere with such concurrent findings of fact except where there are serious misdirections, non-directions or misapprehensions on the evidence leading to miscarriage of justice. A plethora of this Court's decisions, inclusive **Musa Mwaikunda v. Republic** [2006] T. L. R. 387, **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T. L. R. 2297 and **Rashid Ramadhani**

Hamisi Mwenda v. Republic, Criminal Appeal No. 116 of 2008 (unreported) propounded that legal stance.

In the instant case, the prosecution case mainly depended on the evidence of five witnesses. Of all, PW1, PW2 and PW3 were the witnesses who claimed to have identified the appellant at the scene of crime. We shall endeavour to examine into the evidence of these three witnessed more seriously.

We, at first, wish to begin by restating the settled principle of law that visual identification evidence is of the weakest kind which must be absolutely watertight to justify a conviction. Cognisant of that, the Court propounded factors to be taken into consideration in the case of **Waziri Amani v. Republic** [1980] L.R.T. 250, in order for the court to satisfy itself on whether or not such evidence meets the threshold of being watertight. These are that:-

> *"The time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, if it was day or night time; whether there was good or poor lighting at the scene; whether the witness knew or had seen the accused before or not."*

We shall, alive of the above stance of the law, start with the consideration of the identification evidence by PW1 and PW2. It is an undisputed fact that in this case the suspects of the robbery incident were strangers to both PW1 and PW2. In such situations, the Court has consistently insisted the need for identification parade being conducted so as to enable a witness identify the assailant whom he had not seen or known before the incident (see **Abdul Farijala and Another vs Republic**, Criminal Appeal No. 99 of 2008 and **John Paulo @ Shida and Another vs Republic**, Criminal Appeal No. 335 of 2009 (both unreported). Propounding on the significance of an identification parade where the identifying witness is a stranger to the suspect/accused, this Court, in the case of **Musa Elias and Two Others v. R.,** Criminal Appeal No. 172 of 1993, (unreported) stated that:-

> *"Furthermore, PW3's dock identification of the 3rd appellant is valueless. It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial".*

In essence, where a witness identifies an accused who is a stranger to him in a properly conducted identification parade as being one of those who participated in the commission of the offence, it lends credence or assurance that the person he saw was actually the accused. We pronounced so in **ABDUL FARIJALAH AND ANOTHER V. REPUBLIC,** Criminal Appeal No. 99 of 2008 (unreported) cited in **HAMISI ALLY AND THREE OTHERS VS. R,** Criminal Appeal No. 596 of 2015 (Unreported) in these unambiguous words:

> *".... It is trite law that the test in an identification parade is to enable a witness to identify a person or persons whom she or he had not known or seen before the incident.... An identification parade held soon after the incident in which a witness positively identifies an accused lends assurance to the court of that witness's dock identification of that person."*

The record is clear, in the present case, that PW1 and PW2 were strangers to the appellant. They purported to identify the appellant through the attire he wore, that is t-shirt written Tanzania at his chest and blue jeans. No identification parade was held. The record is silent if the appellant wore the same clothes when PW1 and PW2 testified. In the absence of such evidence, it cannot, with certainty, be held that the

appellant was the very person who invaded and robbed them. In the circumstances, an identification parade was necessary. Failure to conduct it rendered the purported identification of the appellant by PW1 and PW2 undeniably dock identification which has, on the authority above, no evidential value.

We now turn to consider the identification evidence by PW3. It will be recalled that this was the witness who seemed to be unequivocal in his assertion that he saw and identified the appellant whom he knew before hand as he had an occasion to be shown him at Itebulanda village. On this, he is recorded to have said:-

> *"I remember him, I recognize the person is the one in the court dock. The accused I had seen him two times. At 1st time I saw him at Itebulanda village and second time I saw him at Ussoke Secondary. I went Itebulanda for general visit of one Hassan Mpata who is my relative. The accused was sat at "Kijiweni", people who know him showed me, "that person is the one named Baligola"..."*

The question we asked ourselves is whether, on that evidence, both the trial and the first appellate court would be justified to believe PW3 as a witness of truth that he knew the appellant before the incident, hence not a stranger to him. We are alive to a caution

expressed by the Court in dealing with a witness evidence of identification in the case of **Jaribu Abdalla v. Republic**, Criminal Appeal No.220 of 1994, CAT, (unreported) that:-

> *"In matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."*

In that same case, the Court proceeded to say that:-

> *"Eye witness testimony can be a very powerful tool in determining a person's guilt or innocence. But it can be devastating when false witness identification is made due to honest confusion or outright lying."*

Our own objective examination of PW3's above evidence, has led us to a conclusion that it is wanting in cogency. His assertion is not only strange but also inconsistent with a truthful witness. It is loud and clear that the time, whether it was day or night time, during which he was shown the person said to be Baligola is not told and he was not forthcoming as to why he was shown the appellant alone out of those persons said to be at "Kijiweni" which suggests that there were many other persons. In the absence of such explanation, that assertion leaves

many questions unanswered. So, his evidence was suspect and both courts ought to have treated his testimony with a lot of caution. It cannot therefore be safely held that PW3 knew the appellant beforehand. That deficiency renders him unreliable and his assertion that he knew the appellant before the incident stands to be untruthful. Consequently, his remaining identification evidence, like that of PW1 and PW2, is that of dock identification which is, in the eyes of the law, valueless.

Consequently, there were clear misdirections on the law obtaining to visual identification and misapprehensions of the nature and substance of prosecution evidence leading to miscarriage of justice which entitles the Court to interfere with the concurrent findings of fact by both courts below that the appellant was positively identified at the crime scene. Had both courts below properly directed their minds, they would have not arrived at that conclusion.

In the absence of evidence placing the appellant at the crime scene, the impeccable conclusion we are inclined to arrive at is that the charge was not proved against the appellant and the appellant's conviction was not justified and grounded on a proper and objective analysis of the prosecution evidence as rightly complained by the appellant in grounds one (1) and five (5) of appeal above.

Accordingly, we allow the appellant's appeal, quash his convictions and set aside the sentences with an ultimate result that he should, as we hereby order, be released from prison forthwith if not held therein for another lawful cause.

DATED at **TABORA** this 28th day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of October, 2021 in the presence of the Appellant in person and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL