IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: MKUYE, J.A. GALEBA, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 241 OF 2018

MATATA WEKWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Maige, J.)

dated the 27th day of July, 2018

in

Criminal Appeal No. 55 of 2018

JUDGMENT OF THE COURT

29th April & 11th May, 2022

MKUYE, J.A.:

Before the District Court for Bunda District, the appellant, Matata Wekwe was charged with an offence of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2002, now R.E. 2019]. It was alleged that on 28th January, 2016 at Kihumbu Village within Bunda District in Mara Region the appellant did steal cash money Tshs. 1,700,000/= the property of one Webiro Keraba and immediately before such stealing used a machete to injure him in order to take or retain the said property. Upon a full trial, the appellant was convicted and sentenced to thirty (30) years imprisonment.

The brief facts leading to this appeal are as follows:

Webiro Kiraba (PW1) owned a shop business in the centre of Kihumbu Village. On the date of incident, he closed his business and proceeded to his home. On the way home, he met three people coming from the opposite direction and upon greeting them in their mother language "*Ohoite*" literally meaning "*good evening*" none of them answered back.

Suddenly, one among those persons retorted "*chini ya ulinzi*" simply translated "you are under arrest". PW1, who, at that time had a torch, illuminated it to that person and discovered it was the appellant. PW1 was further ordered to raise his hands up and switch off the torch. Upon realizing that he was in danger, he shouted for help.

However, the appellant and his accomplices did not spare him. They cut him with a machete on the neck and he fell to the ground. Then, PW1 gave up and handed to the bandits the money he had, who then proceeded to cut him several times on his left arm. Thereafter, Neema Kilaba (PW2) who heard the alarm arrived at the scene of crime and shone a torch whereby she saw the appellant attacking/cutting the victim (PW1). They flee away.

The people who responded at the scene of crime took PW1 to the police station where he was issued with a PF3 and rushed him to Bunda

DDH Hospital whereby Dr. Chacha Philip (PW3) who treated him, had to amputate the victim's fore arm.

The appellant was arrested on 7th November, 2016 while at Bariadi District in Simiyu Region, after Faustine Hamis (PW4) who heard about his involvement in the crime spotted him strolling in the streets at Bariadi. He alerted the police who eventually arrested him.

In convicting the appellant, the District Court relied on the evidence that the appellant was properly identified by PW1 and PW2 with the aid of the torch light which they each had and that the offence of armed robbery was proved beyond reasonable doubt.

His appeal to the High Court was unsuccessful as the High Court upheld the trial court's finding that the appellant was properly identified. In dismissing the appellant's appeal, the said court stated in relation to the identification among others that:

> *"... much as there was no evidence on intensity of the torch light, the identification of the appellant, in as far as it was based on combination of the elements of identification corroborating each other and eliminating the possibilities of mistaken identity, was properly done. With this strong evidence, and there being no probable evidence from the defence to create any reasonable doubt, the conviction of the appellant was sine qua non. For those reasons, I will agree with the learned State Attorney that, this appeal is devoid of*

any merit as the charge against the appellant was proved beyond reasonable doubt..."

Initially, the appellant on 15th April, 2019 lodged his self-crafted memorandum of appeal consisting four (4) grounds of appeal as follows:

1. *"The trial and first appellate courts grossly erred in law and facts in finding and holding that PW1 and PW2 sufficiently identified the appellant regardless PW1 and PW2 failure to offer any scintilla of description features of the assailant so uncogent and unreliable.*
2. *The trial and first appellate court erred in law and facts in being eye-catched by familiarity claims (undisputed) as the sole basis in convicting the appellant, and thus failed to analyse the whole identification evidence as opposed to the known yardsticks and elementary factors well provided for by the law and precedent.*
3. *The trial and first appellate court erred in law and facts by relying on the evidence of PW1, PW2, PW3 and PW4 regardless of their ill motives against the appellant after the witnesses set fire on the appellant's premises.*
4. *The trial and first appellate court should have had approached the prosecution evidence with great caution in so far as PW1, PW2, PW3 and PW4 were witnesses with an interest to serve (to evade criminal liability) as they participated in arson".*

At the hearing of the appeal, the appellant sought and was granted leave to file a supplementary memorandum of appeal which consists of six (6) grounds of appeal as follows:

1. *That, recognition of appellant by PW1 and PW2 was an afterthought as they did not mention him to persons who first arrived at the scene of crime.*
2. *No Police Officer came to testify in court to corroborate PW1's allegation that he had named the appellant to have committed the offence.*
3. *That, visual identification/recogration of appellant by PW1 and PW2 was highly doubtful and unreliable as it based on remote evidence.*
4. *The case was not investigated as the investigator would have shown the connection on how appellant was involved in the offence.*
5. *From the judgment of the 1st appellate court it is not clear whether the offence was committed by the appellant or another person.*
6. *The first appellate court judgment is uncertain as to whether it dismissed or allowed the appeal, thus it is NULL and VOID.*

When the appeal was called on for hearing, the appellant appeared in person and unrepresented whereas, the respondent Republic was represented by Messrs. Tawabu Yahya Issa and Donasian Joseph Chuwa, both learned State Attorneys.

When the appellant was given an opportunity to elaborate his grounds of appeal, he exercised his option to let the learned State Attorneys respond to the grounds of appeal first, while reserving his right to rejoin later, if need would arise.

Mr. Issa, in the first place intimated to the Court that out of four grounds of appeal in the substantive memorandum of appeal, grounds 3 and 4 were new which ought not to be considered by the Court. He added that even in the supplementary memorandum of appeal, grounds 2, 4 and 5 were new which cannot be entertained by this Court. He, thus, prayed that they should be disregarded by this Court. He made reliance of the case of **Sabas Kuziriwa v. Republic,** Criminal Appeal No. 40 of 2019 (unreported).

Responding to the grounds of appeal, Mr. Issa sought to begin with ground No. 6 of the supplementary memorandum of appeal to the effect that the first appellant's judgment was defective for being uncertain as to whether the appeal before it was dismissed or allowed and thus rendering it a nullity. Elaborating on the said ground of appeal, Mr. Issa took us to the end of the first appellate court's judgment appearing at page 86 of the record of appeal which reads:

> *"The appeal is therefore dismissed. The conviction is hereby set aside and sentence thereof quashed. The appellant shall thus remain in custody."*

He stated that, the excerpt is uncertain as to which exactly was the verdict by the 1st appellate court. In this regard he argued that, since this Court deals with decisions from the High Court, it should invoke

section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002, now R.E. 2019] (the AJA) and rectify it by removing the phrase "*The conviction is set aside and the sentence thereof quashed.*" To fortify his proposition, he referred us to the case of **Sabas Kuziriwa** (supra).

In relation to the remaining grounds of appeal in both the substantive and supplementary memoranda of appeals, the learned State Attorney argued that they all hinge on the issue of visual identification in which the appellant's complaint is that the prosecution witnesses did not describe special features of the appellant which enabled them to identify him. However, Mr. Issa responded that the appellant was sufficiently identified because PW1 knew him before the incident as they grew together and lived in the same village and, hence, the need for providing description did not arise. After all, he contended that, the fact that the appellant and the victim knew each other was admitted as an undisputed fact during the preliminary hearing of the case.

The learned State Attorney contended further that PW1 identified the appellant by his voice as being Wekwe and that there were other factors which facilitated the identification. One of such factors was that the appellant and the victim were at a minimum distance, as the appellant was able to cut the victim with a machete - See **Emmanuel**

Luka and 2 Others v. Republic, Criminal Appeal No. 325 of 2010 (unreported). Apart from that, he argued, the victim shone a torch light to him which helped him to see and they had a conversation when the appellant told him "*chini ya ulinzi*" and "*mikono juu*". In addition, Mr. Issa submitted that, PW2 identified the appellant while attacking PW1, when she shone a torch light to him. He rounded it up saying that the identification was that of recognition rather than visual identification.

Adding to what Mr. Issa submitted, Mr. Chuwa insisted that the appellant was properly identified as PW1 also mentioned him to people who responded to the alarm raised which made an assurance of the proper identification - (see **Emmanuel Kuziriwa's** case (supra). He added that, PW1 did not panic when the incident was taking place. In the end, he urged the Court to find that this ground has no merit and dismiss it and the entire appeal.

In rejoinder, the appellant insisted that PW1 and PW2 neither described nor mentioned the appellant to people who responded to the alarm; and that the evidence of PW1, PW2, PW3 and PW4 had to be looked with circumspection as they had an interest to serve having burnt his house.

In relation to ground No. 6, he conceded to the submission by the learned State Attorney that the 1st appellate's court decision was

confusing as it was not known as to whether the appeal was allowed or dismissed. He, therefore, argued that since the case was not proved beyond reasonable doubt, the Court should allow the appeal and set him free.

We have considered the grounds of appeal and the rival submissions from either side. Our starting point would be to deliberate on the issue of new grounds of appeal in which essentially, we agree with the learned State Attorney that grounds No. 3 and 4 of the substantive memorandum of appeal and grounds 2, 4 and 5 of the supplementary memorandum of appeal are new. According to section 4 (1) of the AJA, this Court has jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction (the first appellate court). In other words, we have no jurisdiction to entertain matters which were not first heard and decided by the first appellate court. This stance has been taken in numerous decisions of this Court. Just to mention a few, they include **Julius Josephat v. Republic**, Criminal Appeal No. 03 of 2017; **Alex Ndendya v. Republic**, Criminal Appeal No. 34 of 2017; **Omary Lamini @ Kapera v. Republic**, Criminal Appeal No. 91 of 2016, **Nasibu Ramadhani v. Republic**, Criminal Appeal No. 31 of 2017; **Kebaja Omary v. Republic**, Criminal Appeal No. 6 of 2017; **Godfrey**

Wilson v. Republic, Criminal Appeal No. 16 of 2018; and **John Madata v. Republic**, Criminal Appeal No. 453 of 2017 (all unreported).

For instance, in the case of **Julius Josephat** (supra), the Court stated as follows:

> *"... those grounds are new. As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction."*

Even in this case, based on the above cited authorities we refrain ourselves from considering and determining grounds No. 3 and 4 of the substantive memorandum of appeal and grounds No. 2, 4 and 5 of the supplementary memorandum of appeal since they were not raised and determined by the first appellate court.

With regard to the issue of identification which is the gist of the remaining grounds No. 1 and 2 of the substantive memorandum of appeal and grounds 1 and 3 of the supplementary memorandum of appeal, we entertain no doubt that the appellant was identified at the scene of crime. In the case of **Waziri Amani v. Republic**, [1980] TLR 250, the Court, when faced with a similar scenario stated as follows:

> *"... evidence of visual identification, as courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court*

should act on the evidence of visual identification unless all possibilities of mistaken identify are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight".

On top of that, in the case of **Kassim Salum v. Republic**, Criminal Appeal No. 186 of 2018 (unreported) while citing the case of **Scup John and Another v. Republic,** Criminal Appeal No. 197 of 2008, (unreported), we restated the factors to be considered in identification which are:

"1. How long the witness had the accused under observation.

2. What was the estimated distance.

3. If the offence was committed at night, which kind of light existed and what was its intensity.

4. Whether the accused was known to the witness before the incident.

5. Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the latter's concentration".

In this case, though the incident took place at night, there are factors which enabled unmistaken identity. The said factor's are: **One**, PW1 and PW2 knew the appellant even before the incident as they lived

in the same village together, and in particular, PW1 and the appellant grew up together. It is also noteworthy that, this fact was admitted by the appellant during Preliminary Hearing. In the circumstances, we agree with the learned State Attorney that, the need of providing description of appellant did not arise. **Two**, both PW1 and PW2 said that they saw him when each shone a torch light to him to the extent that the appellant told PW2 to switch it off. PW1 saw him when in conversation and PW2 saw him when he was cutting the victim. **Three**, PW1 explained that the distance between him and the appellant was about one foot when they conversed. But again, we take it to be probably the length of the machete which enabled the appellant to cut him on his neck and his fore hand which, eventually, had to be amputated. **Four,** the time taken in the commission of the offence may not be short reckoning from when PW1 greeted them but they did not respond, instead the appellant answered "*under arrest*" which was followed by "*hands up*". This could also have enabled him to identify the appellant. **Five**, his conduct after the incident of armed robbery. He remained at large until when apprehended away at Bariadi and he gave insufficient account on that. Thus, PW1 and PW2's evidence shows that they were credible and reliable witnesses worth believing - see

Goodluck Kyando v. Republic, [2006] TLR 36 in which it was stated that:

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness."*

Besides that, there is evidence on record that PW1 and PW2 named the appellant to people who responded to the alarm raised by PW1 as opposed to the appellant's claim that there was no such evidence. As was rightly submitted by Mr. Chuwa, naming the suspect at the earliest possible time is an assurance of reliability of the witness. This stance was also reiterated in numerous cases, among them being the case of **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39 where the Court emphasized that the ability to name the suspect at the earliest opportune moment is an all important assurance that the witness is reliable and that even the unexplained delay or complete failure to do so has to put the court to inquiry. See also **Karim Seif @ Slim v. Republic**; Criminal Appeal No. 161 of 2017 (unreported).

Even in this case, we are satisfied that PW1 and PW2 were reliable witnesses in the circumstances of this case. We don't find any reason to interfere or fault the assessment of the evidence of PW1 and PW2 during trial. This is so because the issue of credibility of witnesses is in

the domain of the trial court which is better placed to assess their credibility than the appellate court which just reads the transcript of the record – see **Ali Abdallah Rajabu v. Saada Abdallah Rajabu and Others** [1994] T.L.R. 132.

We have also considered the appellants' contention that PW1, PW2, PW3 and PW4 might have had an interest to save as they participated in setting his house ablaze, but, we think such contention is not backed up with any evidence. Thus, this ground is unmerited and we, therefore, dismiss it.

In relation to the 6th ground of appeal in the supplementary memorandum of appeal, we entirely agree with both the appellant and the learned State Attorney that the verdict in the High Court's decision is uncertain. Indeed, the High Court having disallowed the appeal and dismissed it, proceeded to set aside the conviction and quash the sentence. But again, at the end, the appellant was ordered to remain in custody. Much as the terms "setting aside the conviction" and "quashing the sentence" were misapplied, we are settled in our mind that, that was not proper and in effect it must have been misleading the appellant as he was not clear as to which was the verdict. We think, as was submitted by the learned State Attorney, the anomaly needs to be rectified.

Fortunately, this will not be the first time for the Court to rectify a scenario which is confusing. It did so, though under a different avenue, in the case of **Samwel Gitau Saitoti @ Saimoo @ Jose and 2 Others v. Republic**, Criminal Application No. 73/02 of 2002 (unreported) to which we subscribe.

In the said case, the applicants applied for review of this Court's decision which resulted into an order for a retrial of the case in which only the proceedings were declared a nullity without making any comment on the judgment and sentence thereof; and also ordering the 3rd applicant whose appeal was not heard and determined after having been withdrawn, to be tried as well in the said retrial.

The Court considered and discussed the application at length and at the end it stated as follows:

> "*We have considered the circumstances of this matter, and we have found that there was an error on the face of the record for the Court failing to nullify the proceedings and the judgment thereof, quash the conviction and set aside the sentences against the 1st and 2nd applicants. As to the 3rd applicant despite the fact that there was a clear violation of Rule 66 (1) (b) of the Rules for being included in the order for retrial while he was not heard on the matter that*

he was not a party, he was still prejudiced with an order of the Court which resulted from an error of the face on the record which occasioned miscarriage of justice to the applicant ..."

Consequently, the Court modified the decision of the Court which was affected by specifically nullifying the proceedings and judgment of the lower court, quashing the conviction and setting aside the sentences meted out against the 1st and 2nd appellants (1st and 2nd applicants) and it also removed the 3rd appellant (3rd applicant) by deleting the phrase "*and the one who withdrew his appeal*" which in effect joined him in the retrial together with the 1st and 2nd applicants whose decisions were nullified.

Being guided by the above cited case, we think, in this case what the High Court had in mind was to dismiss the appeal. On this, we are guided by the last sentence of the decision, though misplaced in which it was stated that "*the appellant shall thus remain in custody.*" We say so because, such phrase ordinarily could not have come after the conviction was quashed and the sentence set aside.

In this regard, based on the above cited authority, we agree with the learned State Attorney that the error must be rectified. Thus, in terms of section 4 (2) of the AJA, we hereby modify the judgment in (HC) Criminal Appeal No. 55 of 2018 by removing the phrase "*The*

conviction is hereby set aside and sentence thereof quashed. The appellant shall thus remain in custody" and thereby remain with the phrase that "*The appeal is therefore dismissed"* which we are satisfied that, that was the intention of the first appellate court.

In the end, looking at the totality of our discussion, we are satisfied that the appeal is devoid of merit and it is hereby dismissed in its entirety.

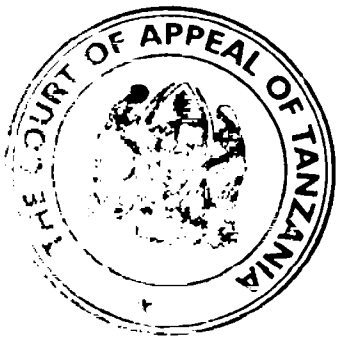
DATED at **MWANZA** this 10th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of May, 2022 in the presence of the Appellant in person and Mr. Emmanuel Luvinga, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL