IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 130 OF 2020

1. JACKSON STEPHANO @MAGESA .....1ST APPELLANT

2. PAULO ELIAS @KAMIA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from Judgment of the Resident Magistrates' Court of Musoma (Extended Jurisdiction) at Musoma

(Ngaile, RM Ext. J.)

dated the 3rd day of December 2019
in
Criminal Appeal No. 84 of 2019

.....

JUDGMENT OF THE COURT

30th May, & 9th June, 2022

KOROSSO, J.A.:

In the District Court of Musoma at Musoma, Stephano @Magesa and Paulo Elias @Kamia, the 1st and 2nd appellants together with Ngeleja Maingu @Ngeleja (who is not subject to this appeal) were arraigned and jointly charged on two counts. In the first count, Armed Robbery contrary to section 287A of the Penal Code Cap 16 R.E 2002, now R.E 2019 (the Penal Code) as amended by Act No. 11 of 2011. It was alleged that on 4/11/2018 at Songore area within Musoma District in Mara Region the two appellants together with Ngeleja Maingu did steal 30 pieces of tilapia fish

valued at Tshs 150,000/-, the property of John Manumbu @Muhoji and immediately before such stealing used a '*panga*" (bush knife) to threaten Jilabi Kusaga in order to take and retain the stolen items. In the second count, they were charged with Assault Causing Actual Bodily Harm contrary to section 241 of the Penal Code. The allegations were that the appellants and Ngeleja on 4/11/2018 at Kurumonyo area within Musoma District in Mara Region assaulted John Manumbu @Muhoji and caused him to suffer actual bodily harm.

The evidence of Jilabi Kusaga (PW2) was to the effect that he, Malembeko Kusaga (PW3) and one Bandeko were fishermen under the employment of John Manumbu Muhoji (PW1). On 4/11/2018 around 00.00 hours, PW2 together with his two colleagues took a canoe and went fishing in Lake Victoria. While fishing, at about 06.00hours they were attacked by the 1st and 2nd appellants, and another person who arrived in a canoe holding a bush knife and clubs and ordered PW2 and his colleagues to lie down. PW2, PW3, and their colleague complied, leading the assailants to take to their canoe their haul of tilapia about 30 Kilograms, and depart immediately thereafter sailing towards Kurumonyo village. The assailants' departure enabled PW2 to call PW1 informing him of the attack and mentioning the 1st, 2nd appellants, and Ngeleja as the attackers. PW2 also informed PW1 that the attackers' canoe was heading

towards Kurumonyo Village. PW2 also called the Village Chairman, Murungu Mrungu (PW4), and informed him about what had befallen them and where the assailants were heading. PW2, PW3, and their colleague decided to follow in the direction the assailants' canoe was sailing towards.

Having received the call from PW2, PW1 using his bicycle rushed to the Kurumunyo dock, and on arrival there he found the appellants and Ngeleja offloading the fish from their canoe. PW1 went to them and claimed the fish prompting the appellants and Ngeleja to kick and beat him with a club until he fell. The appellants and Ngeleja loaded the fish back in the canoe and departed. When PW2, PW3, and PW4 arrived at the Kurumunyo dock they found PW1 lying down injured and took him to the police station where the matter was reported. Subsequently, with a PF3 in hand, they took him to the hospital where he received medical treatment attended by Malisha John (PW5).

Both appellants distanced themselves from the offences charged testifying that on the alleged fateful day they were not in the area and were surprised when arrested and informed of the charges they faced. They alleged that the charges were framed in view of the prevailing grudge between the 2nd appellant and PW1. At the trial, upon hearing the cases for each side, the two appellants together with Ngeleja Maingu were

convicted on both counts. In the first count, each was sentenced to serve thirty years imprisonment and in the second count, to serve three years imprisonment. The sentences were ordered to run concurrently. Additionally, the trial court ordered that PW1 be paid Tshs. 150,000/= as compensation for the fish stolen and Tshs. 1,500,000/= for the bodily injuries sustained. Aggrieved by the decision, the appellants unsuccessfully appealed to the High Court, an appeal which was transferred for hearing before Ngaile RM with extended jurisdiction under section 45(2) of the Magistrates Court's Act, Cap 11 R.E. 2002, now 2019 (the MCA).

Still dissatisfied, both appellants have appealed to this Court by way of a joint memorandum of appeal with five grounds faulting the trial and first appellate courts, which essentially revolve around the following complaints: **One,** reliance on insufficient and implausible evidence in the identification of the appellants as the attackers; **two**, insufficiency of evidence and unreliability of prosecution witnesses (PW1, PW2, and PW3) to prove the charges against the appellants; and **three**, non-consideration of the appellant's defence and failure to inform appellants on their rights under section 240 (3) of the Criminal Procedure Act, Cap 20 R.E 2019 (CPA).

On the day the appeal came for hearing on 30/5/2022, the appellants appeared in person fending for themselves. Mr. Frank Nchanila and Mr. Isihaka Ibrahim learned State Attorneys represented the respondent Republic.

The 1st appellant commenced by adopting the five grounds found in his memorandum of appeal. He started his submissions seeking leave to present additional grounds of appeal, but later, upon reflection, he informed us that he was amplifying the adopted grounds of appeal, in essence, those we had condensed into three complaints.

When amplifying complaint number one, the 1st appellant faulted the lower courts for relying on the evidence related to identifying them as the assailants as per the charges facing them. He contended that the adduced evidence by the prosecution witnesses failed to meet the established legal yardsticks required for proper identification considering the conditions pertaining at the time of the commission of the alleged offence. He urged the Court to take cognizance of the fact that at 06.00 hours on the material day, it was still dark. The 1st appellant argued that the prosecution did not adduce any credible evidence to show what assisted the witnesses to identify the appellants in such unfavorable conditions. He thus implored us to find the complaint has merit. The 2nd

appellant supported the submissions by the 1st appellant that the evidence on their identification was weak and incredible.

Mr. Nchanila commenced his reply by outlining the respondent's stance, that the appeal was resisted. Confronting complaint number one, the learned State Attorney urged us not to consider the appellants' submissions because the prosecution adduced ample evidence to leave no doubt that it is the appellants who attacked PW2 and his colleagues in the Lake, took all the fish, and beat PW1 when he confronted them at Kurumonyo dock. He contended that the PW2's evidence on pages 15-17 of the record of appeal established that there was enough light at the time of the attack since it was at 6.00 am, at sunrise. The learned State Attorney contended that other evidence adding credence to prosecution evidence was the duration of time and proximity that the witnesses had to observe the assailants arguing that PW2 and PW3 testified that the robbing incident at the Lake in the canoe, took more than 10 minutes and while close to each other. For PW1 he had confronted the appellants to claim the fish they had stolen from PW2 and PW3.

According to the learned State Attorney, the fact that PW2 mentioned the appellants' names to PW1 and PW4 soon after the attack further adds weight to prosecution evidence that the appellants were properly identified. To cement his argument, Mr. Nchanila asserted that

the import of the evidence of recognition was amply discussed by this Court in the case of **Masamba Musiba @Musiba Masai Masamba Vs Republic**, Criminal Appeal No. 138 of 2019 (unreported) and urged the Court to be inspired by the holding therein on the import of evidence of recognition.

The learned State Attorney implored the Court to consider the fact that the prosecution managed to adduce evidence that addressed all the essential factors requisite to remove any doubt that the appellants were properly identified and the possibility of mistaken identity. He thus prayed that the complaint be dismissed.

Having heard the submissions and considered cited authorities from both sides on the complaint, and perused the record of appeal, clearly, the crux of the case against both appellants centers on whether the appellants were properly identified as the ones who committed the offence charged. The fact that evidence of identification is the weakest and most unreliable evidence, and courts should be very cautious when analyzing such evidence has been reiterated in various cases. In the celebrated case of **Waziri Amani Vs Republic** [1980] TLR 250, the Court underscored factors that must be considered when courts deliberate on identification evidence; **One**, the time the witness had the accused under observation. **Two**, the distance at which the witness had the

accused under observation. **Three**, if there was any light, then the source and intensity of such light; and **four**, whether the witness knew the accused prior to the incident. (See also, **Selemani Rashid @ Daha Vs Republic**, Criminal Appeal No. 190 of 2010, and **Chacha Mwita and 2 Others Vs Republic**, Criminal Appeal No. 302 of 2013 and **Philipo Rukaiza @ Kicheche Mbogo Vs Republic**, Criminal Appeal No. 25 of 1994 (All unreported)).

Additionally, we find it pertinent to also discuss the import of the evidence of recognition finding it relevant in this appeal having been relied upon by both the trial and first appellate courts in the conviction of the appellant. In the case of **Masamba Musiba @Musima Masai Masamba** (supra) which cited and followed the holding in **Athumani Hamis @Athumani Vs Republic**, Criminal Appeal No. 288 of 2009 (unreported), the Court held:

> "*Under the circumstances where the complaint recognized the appellant because of knowing him before and given the conditions which made the complainant to recognize the appellant, it is safe to say that there was no mistaken identity of the appellant.*"

Applying the above-cited requirements in the instant appeal, we agree with the learned State Attorney that conditions for identification of

the appellants were conducive leaving no possibility of mistaken identity, for the following reasons: **One**, it was early morning when the incident took place but the adduced evidence by PW2 and PW3 establishes that there was enough light. Besides, the appellants did not cross-examine the witnesses on the issue of adequacy of light at the time the incident took place. **Two**, the time and proximity the witnesses had the assailants under observation was sufficient to positively identify them, that is above ten minutes. They observed the assailants at close range, for PW2 and PW3 in the canoe and for PW1 at the dock where he exchanged words with them for about ten minutes according to his testimony.

Three, soon after the attack, PW2 informed PW1 and PW4 who the attackers were, so the naming of the culprits soon after strengthens the evidence of the identification of the appellants. It is a cardinal principle that the ability to mention the suspect at the earliest opportunity is of utmost importance as it gives more credence to the witness as stated in **Swalehe Kalonga and Another Vs Republic**, Criminal Appeal No. 45 of 2001 (unreported).

Four, as adduced by PW1, PW2 and PW3 the assailants were known to them prior to the incident and thus the appellants were recognized by the prosecution witnesses. As shown above, the conditions for identification were not unfavorable and the appellants were recognized by

the witnesses. Even for the sake of argument, we were to consider the argument that the attack against PW2 and PW3 was at the time when it was still dark, clearly by the time PW1 met them at Kurumonyo, the light was sufficient since it was 06.45 hours by then according to PW1.

Taking all the above-expounded factors into consideration, we agree with the first appellate findings after having cautioned itself on the danger of relying on evidence on visual identification, that under the circumstances; the fact that it was morning hours with enough light, the fact that the assailants were known to the witnesses prior to the incident, and the considerable time the witnesses observed the appellants, were essentially favorable conditions to allow proper identification and remove any possibility of mistaken identity. Thus, the first complaint lacks merit.

Having found the visual identification of the appellants to be impeccable we could have ended here and refrained to proceed to consider other complaints, but we find that in the interest of justice, it is pertinent to deliberate on the remaining complaints as far as they relate to the identification of the appellants or their defence.

Moving to the second complaint, the 1st appellant argued that the witnesses called by the prosecution to prove the charges against them were the complainant and his employees without any independent

evidence to corroborate their evidence even though there were villagers and village leaders available. He gave an example of the evidence alleging PW1 having been beaten when confronting the appellants at Kurumonyo and argued that without independent witnesses to corroborate his evidence, it remained unsubstantiated and essentially strengthened the defence argument that the adduced evidence was concocted by PW1 to appease his grudges against the 2nd appellant.

According to the 1st appellant, the failure of the prosecution to tender any exhibits to strengthen their case, such as the fish which it is alleged was stolen and/or a map of the area to establish where PW1 was found beaten as alleged further weakened the prosecution case. He thus implored us to find the complaint meritorious.

The 2nd appellant concurred with the 1st appellant's submission on this complaint, reiterating that the prosecution failed to prove their case since the evidence adduced was weak and unreliable and in essence without basis since it was framed.

On the other side, Mr. Nchanila urged the Court to find that the prosecution did prove the case to the standard required. He conceded to the fact that PW2 and PW3 were employees of PW1 but contended that when weighing the credence of the witnesses, the issue for consideration

is not how related or close the witnesses are, but whether the evidence adduced was credible. Additionally, he submitted that the number of witnesses to be called is determined depending on what the circumstance of the offence demands to be proved. He urged the Court to disregard the appellants' submission of there being no independent witness arguing that in proving a fact or case what is to be considered is not the number of witnesses called to prove a fact, referring us to the provisions of section 143 of the Evidence Act, Cap 6 R.E 2002, now 2019 (The Evidence Act). The learned State Attorney implored us to find that in the current case subject of this appeal, the circumstances demanded that those attacked, the owner of the fish who was injured upon his follow-up of attackers, testify in court to substantiate the charges against the appellants since the crucial issue was the identification of the assailants and the prosecution managed to call the most crucial witnesses and they proved their case.

In response to the appellants' claim on the prosecution side's failure to tender any exhibits, the learned State Attorney contended that it was in evidence that the attackers left with the stolen fish, meaning that nothing was recovered for it to be tendered at the trial. Regarding the absence of a sketch map of the area, he argued that the evidence of PW2, PW3, and PW1 established the scenes where the offences were committed

and PW4 also corroborated the evidence on finding an injured PW1 at the Kurumonyo dock. He also argued that they tendered a PF3 which was admitted as exhibit P1 to establish injuries sustained on PW1. According to Mr. Nchanila, the ingredients of the offence charged were proved and that is what was important and argued that the complaint lacked merit and the Court should find so.

We have carefully considered the submissions before us from both sides on this second complaint. In weighing on this complaint, it is worth noting that any competent witness in terms of section 127 of the Evidence Act is entitled to be believed, as held in the case of **Goodluck Kyando Vs Republic** [2006] TLR 363 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 a witness.*"

Similarly, it is pertinent to underscore that the determination of credibility and reliability of witnesses depends on assessment made by the presiding magistrate or Judge during the trial on the evidence presented in court. Apart from the demeanour of a witness, according to the case of **Shabani Daud vs Republic**, Criminal Appeal No. 28 of 2001 (unreported): -

> *"The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses ..."*

In the instant case, when weighing the reliability and credibility of prosecution witnesses both the trial and the first appellate court relied on the evidence of PW1, PW2 and PW3. The first appellate court stated that:

> *"From their testimony, the evidence tendered by PW1, PW2 and PW3 were (sic) coherent and very corroborative in proving the case against the appellants."*

On our part, we are inclined to share the observation above and the arguments by the learned State Attorney on this fact. The fact that PW2 and PW3 were employees of PW1 does not in itself detract from their credibility there being concurrent findings of their reliability by the lower courts. Additionally, we are of the view that the evidence by PW2 and PW3 on the assailants who had attacked them and taken the fish from them and headed to Kurumonyo was amply corroborated by PW1 who ambushed the assailants at the Kurumonyo dock and saw them with the allegedly stolen fish and upon querying them, was beaten and kicked. Indeed, that PW1 was beaten and injured was confirmed by Murungu

Mrungu (PW4), the Bukima village chairman, an independent witness, and Malisha John (PW5) the clinical officer who attended PW1 and tendered a PF3 admitted as exhibit P1, which showed that PW1 had swollen tissue injury on the chest and on the face, left thigh possibly occasioned by a blunt object. We also agree with the learned State Attorney that bearing in mind there is evidence that the appellants left with the stolen fish and the evidence by PW4 regarding finding PW1 at the Karumonyo dock was sufficient and no exhibit was required to strengthen the prosecution evidence against the appellant. Without doubt, taking the above factors into consideration, this complaint falls.

On complaint number three, the 1st appellant urged the Court to rectify this anomaly by the lower courts alleging they absconded their duty by failing to consider the defence and decide in the appellant's favour by allowing the appeal and consequently be set free to join his family. The 2nd appellant was in tandem with the 1st appellant's submission faulting the lower courts for not considering his defence of *alibi* that on the date and time the alleged offence was committed he was in the hospital and that the charges against him were framed. He implored us to allow the appeal and set him free.

The respondent's reply to this complaint advanced by the learned State Attorney prefaced by conceding that the record of appeal reveals

that the trial court in its judgment discussed the defence only in passing without analyzing it. Nevertheless, he contended that this anomaly was cured by the first appellate court which stepped into the shoes of the trial court and reanalyzed, considered the defence evidence and then rejected it, finding that the appellants were duly identified and that their defence failed to raise any doubts to the prosecution evidence. The learned State Attorney thus urged the Court to find this complaint devoid of merit and under the circumstances, to dismiss the appeal in its entirety.

In the circumstances, complaint number three should not take much of our time. It is the position of the law that generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In the case of **Leornard Mwanashoka Vs Republic**, Criminal Appeal No. 226 of 2014 (unreported), the Court underscored useful guidelines on what is to be considered in the evaluation of evidence, stating:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis."*

The above position was reiterated in the case of **Yusuph Amani Vs Republic**, Criminal Appeal No. 255 of 2014 (unreported), and the Court held:

> *"We are of considered view that the appellant's defence was disregarded in the evaluation stage which is crucial. Failure to evaluate or an improper evaluation of evidence inevitably leads to wrong and/or biased conclusions and inferences resulting into miscarriages of justice."*

The above being the position, upon a careful scrutiny of the record of appeal, whilst it is true that the trial court discussed the defence in passing, we find nothing to fault the first appellate court when considering the evidence. Indeed, the first appellate court summarized and analyzed the defence evidence (see pages 61-62) when determining the first ground of appeal before it. We reproduce the excerpt from the judgment of the first appellate court for ease of reference, it reads:

> *"I have gone through, the defence by the appellants. In their defence the appellants raised the defence of alibi that they were not at the scene of crime in the material day as they were at rest area at Musoma Township fishing and they were not at the scene of crime. As it has been provided in criminal cases that "those who allege must prove", the appellants in their defence did not*

prove the Trial Court that they did not commit the offence and were not at the scene of crime."

Further on, it held:

"Despite the fact that, the Court has discretion to accord weight of any kind to the defence of alibi, regarding the appeal at hand, the appellants did not give watertight evidence to satisfy the Court that they were not at the scene of crime in the fateful date and that is why the Trial Court disregarded their defence."

Therefore, without doubt the first appellate court did consider the defence of *alibi* presented at the trial and found it not plausible to weaken the prosecution evidence. Having scrutinized the evidence before the trial court found on record, and having found the appellants were properly identified, we share the views of the first appellate court that the defence of *alibi* presented by the appellants was unbelievable and did not detract from the strong evidence presented by the prosecution to prove their case.

Regarding the complaint on failure to inform the appellants on their rights under section 240(3) of the CPA, in view of the fact that the author of the PF3 was called to testify in the presence of the appellants who also had an opportunity to cross-examine him as seen on page 23 of the record

of appeal shows that non-compliance of section 240(3) of the CPA by the trial court did not prejudice the appellants and thus the anomaly is cured under section 388 of the CPA. We thus find complaint number three without merit.

In the upshot, we find that the appeal lacks merit, and it is hereby dismissed in its entirety.

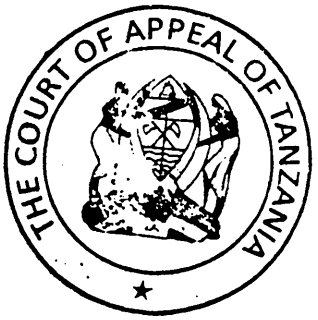
DATED at **MUSOMA** this 8th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 9th day of June, 2022 in the presence of the Appellants in person and Mr. Tawabu Yahaya Issa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL