IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 670 OF 2020

HUSSEIN KAUSAR RAJAN ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Dar es Salaam with Extended Jurisdiction at Kitusu, Dar es Salaam)

(Kisongo, SRM EXT. JUR.)

Dated the 3rd day of November, 2020
in
Criminal Appeal No. 126 of 2019

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JUDGMENT OF THE COURT

6th July & 22nd September, 2022

WAMBALI, JA.:

The appellant, Hussein Kausar Rajan and Hassan Shua Hassan (not party to this appeal) were charged, convicted and sentenced to imprisonment for thirty years each by the District Court of Ilala at Samora Avenue Dar es Salaam (the trial court) after they were found guilty of the offence 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. 2022).

The particulars of the charge alleged that on 22nd June, 2017 at Mshihiri area within Ilala District in Dar es Salaam Region, the appellant and Hassan Shua Hassan stole cash money: USD 3000.00; TZS. 4,000,000.00; gold ornaments valued TZS. 10,000,000; one mobile phone, make iphone 6; hand bag which had cash money TZS. 40,000.00; Driving Licence Class D No. 4001245431; NSSF Card, Voter Identity Card; DTB Bank Card; and two watches, make Rado and Casio valued USD 150.00 the property of Abdul Rahman Ally Mohamed and immediately before such stealing they did threaten the said person with a knife in order to obtain and retain the said properties.

The appellant and Hassan Shua Hassan pleaded not guilty, hence a full trial was conducted. The prosecution case essentially depended on six witnesses namely; Abdulrahman Ally Mohamed (PW1), Mehrum Abdulrahman (PW2), Inspector Mussa Hassan Mazwazwa (PW3), E.8924 D/CPL Athuman (PW4), E. 2454 D/C Daniel (PW5) and Asst. Inspector Kwai (PW6). In addition, six exhibits consisting of two identification parade registers PF 186 dated 19/8/2017; 3 pieces of ropes made of sisal and 2 pieces of plaster; a flash make data fast Kingston; a letter dated 28/8/2017 with Ref. No. CD/CID/3.1/VOL.XVVI/12, the album or book containing photographs of the accused from the CCTV Camera and from the studio and

Forensic Bureau Report dated 14/3/2018 which were admitted as exhibits P1, P2, P3, P4, P5 and P6 respectively. It was strongly asserted by the prosecution that the appellant and Hassan Shua Hassan were properly identified at the crime scene on the fateful date by PW1 and PW2 and that the evidence of those eye witnesses was fully supported by the CCTV footage showing those bandits robbing the victims. It was thus the prosecution stand that the appellant and Hassan Shua Hassan were guilty of the offence they were charged with.

On the defense side, the appellant and another defended themselves as they neither summoned witnesses nor tendered any exhibit to support their case. In short, the appellant stated that on 22nd June, 2017 in the morning he was at Kariakoo where he fought with a girl, namely Sabrina and as a result he was arrested by the police.

As it were, at the climax of the trial, after the trial court considered the evidence of the parties for both sides, it formed an opinion that the case for the prosecution left no doubt that the appellant and Hassan Shua Hassan were guilty as charged. Ultimately, they were convicted and sentenced as intimated above. It is noted that for the purpose of this judgment and for

the reason to be apparent shortly, we do not deem it appropriate to recite the detailed background of the case and the evidence of the parties.

The decision of the trial court was not the end of the road, as the appellant and Hassan Shua Hassan appealed against it contesting both convictions and sentences to the High Court through Criminal Appeal No. 240 of 2019. The respective appeal was transferred to the Resident Magistrate Court of Dar es Salaam at Kisutu where it was heard by Kisongo, Senior Resident Magistrate (SRM) with Extended Jurisdiction as Criminal Appeal No. 126 of 2019, the subject of the present appeal.

It is noteworthy that the appellant's appeal was dismissed in its entirety by the first appellate court, while that of Hassan Shua Hassan was allowed leading to his acquittal. The first appellate court's judgment seriously aggrieved the appellant, hence this second appeal which has attracted ten grounds of appeal contained in the memorandum of appeal. Nonetheless, before we commenced the hearing, it was agreed that the determination of the appeal revolves around one general ground of appeal, namely:

> *"That the first appellate court erred in law and fact in upholding the conviction of the appellant while the*

prosecution case was not proved beyond reasonable doubts."

The appellant entered appearance in person, unrepresented at the hearing. Basically, when he was granted permission to submit in support of the sole ground of appeal, he simply adopted it and urged the Court to consider his complaint and allow the appeal. Thereafter, he opted to let the respondent Republic's counsel to respond to the ground of appeal, while he retained the right to rejoin if necessary.

On the adversary side, Ms. Ester Kyara and Ms. Beata Kitau, learned Senior State Attorneys and Ms. Silvia Mitanti, learned State Attorney, entered appearance for the respondent Republic. It is noted that at the very outset, Ms. Kyara who addressed the Court, out rightly supported the appellant's appeal.

Submitting in support of the ground of appeal, Ms. Kyara readily conceded that the prosecution case was not proved beyond reasonable doubt. In her submission, this is because; firstly, a thorough perusal of the evidence on record leaves no doubt that there is variance between the particulars in the charge and the evidence on record adduced by the prosecution. She argued that though the particulars in the charge sheet listed several properties of PW1 and PW2 alleged to have been stolen by the

bandits on the date of the incident, that is, 22nd June, 2017, namely; gold ornaments valued TZS. 10,000,000.00, Rado and Casio watches, mobile phone, make iPhone 6 and wallet, on the contrary, there is no evidence at all from the said witnesses on record to support the allegation in the charge.

She submitted further that PW2's evidence with regard to some of the alleged stolen properties was contradictory because while during examination in chief she mentioned gold ornaments without stating the value as among the stolen items, during cross –examination she stated that it was silver ornaments valued TZS. 10,000,000.00 which were stolen by the bandits. Moreover, she submitted that whereas PW2 testified in chief that she did not know the amount of money stolen from her and her husband by the bandits, during cross examination she stated that her wallet which was stolen had TZS. 40,000.00. On the other hand, she argued, the evidence of PW1 was that the value of the gold ornaments taken from his wife were valued TZS. 4,000,0000,00 which was contrary to the type of the stolen item and the value stated by PW2 as intimated above.

More importantly, the learned Senior State Attorney submitted that there is apparent variance between the charge and the prosecution evidence because some of the properties mentioned by PW1 and PW2 in their

testimonies to have been stolen by the bandits on the material day, namely; PW2's framed picture, wallet, silver ornaments, gold chains and rings were not listed in the particulars of the charge which was read over and explained over to the appellant and another.

In the circumstances, Ms. Kyara submitted that the apparent variance between the particulars in the charge sheet and evidence of the eye witnesses (PW1 and PW2) to the incident and the contradiction between them dented the prosecution case as the charge is deemed not to have been proved to the required standard. Unfortunately, she submitted, the anomaly cannot be cured because the said charge was not amended in accordance with section 234 (1) of the Criminal Procedure Act [Cap 20 R.E. 2022] (The CPA) to make it consistent with the evidence on record. To support her submission, she made reference to the decision of the Court in **Michael Gabriel v. The Republic,** Criminal Appeal No. 240 of 2017 in which further reference was made to **Noel Gurth A.K.A. Bainth and Another v. The Republic,** Criminal Appeal No. 339 of 2013 (both unreported).

Secondly, Ms. Kyara submitted that the prosecution case was not proved to the required standard because the alleged identification of the appellant at the crime scene was not watertight. She explained that both

PW1 and PW2 did not describe the appearance and physique of the assailant when they reported the incident to the police (PW4 and PW5) on arrival at the crime scene. This was so because, she stated, PW1 only described one of the assailant as an Indian boy, while PW2 simply stated that she saw a person of an Asian origin who she sought was a friend of her son. Unfortunately to, she added, even during cross-examination the witnesses failed to show that they categorically told the police concerning the appearance of one of the assailant they saw at the scene as they emphasized that he was an Indian boy.

Ms. Kyara submitted further that though the identification parade was conducted by PW3 and PW1 and PW2 purportedly identified the appellant, that piece of evidence cannot be wholly relied upon to support the evidence of those eye witnesses. Her argument was premised on the fact that PW1 and PW2 had not initially fully described the appearance of the said assailant to the police which would have enabled them to properly identify him at the identification parade. In her view, the value of identification parade evidence was weak for failure of the eye witnesses (PW1 and PW2) to describe the appearance of the appellant to PW4 and PW5 who they met for the first time after the incident. To bolster her contention, she cited our decision in

Richard Otieno @ Gullo v. The Republic, Criminal Appeal No. 367 of 2018 (unreported).

On the other hand, Ms Kyara argued that the evidence of PW1 and PW2 regarding identification of the appellant cannot be corroborated by the evidence of PW4 who visited the crime scene, interrogated the victims and reviewed the contents of the images of the CCTV footage concerning the incident and that of PW5 who downloaded the CCTV footage into the flash (exhibit P3) because their evidence and the authenticity of the said data is highly unreliable. She submitted that her stance is based on the following reasons: One, there is no assurance that the photographs contained in the flash (exhibit P3) which was sent to PW6 at the Forensic Bureau Department for verification were those from the CCTV footage downloaded by PW5. In her view, considering the evidence on record in respect of the entire process, there is likelihood that the CCTV footage contents downloaded by PW5 into the flash was compromised before the said flash was sent to PW6. Two, PW5 did not state how he collected, stored and transmitted the said data from the CCTV footage into the flash because the witness simply stated that he downloaded the data at the crime scene and gave it to the police officer in charge. She submitted further that a careful scrutiny of the evidence of PW5 on record leads to the conclusion that the data in the flash might have

been tempered with and thus its evidence could not be fully relied on to ground the appellant's conviction. Three, the collection, storage and transmission of the evidence from CCTV footage did not comply with the requirement of the law under section 18 (2) (a), (b), (c) and (d) of the Electronic Transaction Act [Cap. 306 R. E. 2022].

In the circumstances, Ms. Kyara concluded that the variance between the charge and the evidence on record, lack of watertight evidence with regard to the identification of the appellant at the crime scene by PW1 and PW2 and noncompliance with the law on collection, storage and transmission of the data greatly weakened the prosecution case and left the charge not proved beyond reasonable doubt. She thus prayed that the appeal be allowed, conviction quashed and the sentence of the appellant be set aside leading to his acquittal.

In rejoinder, the appellant joined hands with the respondent Republic's counsel to urge the Court to allow the appeal on account that the first appellate court wrongly upheld the trial court' findings that the prosecution case was proved beyond reasonable doubt.

On our part, having heard the parties' submissions, we entirely agree that according to the evidence on record, the prosecution case was not

proved beyond reasonable doubt. There is no doubt that despite the apparent clear indication that there is variance between the particulars in the charge and the prosecution evidence on record amid the defence of the appellant, the allegation against the appellant remains unproved. It is unfortunate that in the course of the trial the charge was not amended as required by section 234(1) of the CPA to make it consistent with the evidence on record. At this juncture, we are compelled to reemphasized what we stated in **Leonard Raphael and Another v. The Republic,** Criminal appeal No. 4 of 1992 (unreported) that:

> *"Prosecutors and those who preside over criminal trials are reminded that when, as in this case, in the course of trial the evidence is at variance with the charge and discloses an offence not laid in the charge, they should invoke the provisions of section 234 of the CPA 1985 and have the charge amended in order to bring it in line with the evidence."*

In this regard, the failure of the trial court to invoke the said provisions amid the apparent variance in the evidence of PW1 and PW2 and the charge sheet with regard to the nature and type of the stolen items and their requisite values left the charge unproved because the particulars were not brought in line with the evidence on record. Faced with an akin situation, in

Issa Mwijaku @ White v. The Republic, Criminal Appeal No. 175 of 2018 (unreported) the Court stated as follows:

> *"We note that items mentioned by PW1 to be among those stolen like ignition switches of Tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of the case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard."*

In the appeal at hand, there is no dispute, as correctly stated by Ms. Kyara in her arguments in support of the appeal, that the variance is not only on lack of indication in the charge sheet of the properties mentioned by PW1 and PW2 but also that some of the properties mentioned therein were not confirmed by the respective witnesses to be among the properties stolen by the alleged assailants at the crime scene on the fateful date.

We equally agree with her that besides the variance, it is apparent, according to the evidence on record, that the alleged identification of the appellant by PW1 and PW2 was not watertight. Basically, those witnesses failed to describe sufficiently to PW4 and PW5, the policemen, who visited the crime scene, the appearance of the assailants they saw on that particular day. The general description by the witnesses that one of the bandits was

an Indian boy of Asian origin could not have enabled the police to successfully trace the suspect and thereby enable PW1 and PW2 to identify him at the identification parade being the one they saw at the crime scene on the fateful date. In the circumstances, we also agree with Ms. Kyara that though PW1 and PW2 claimed to have identified the appellant at the identification parade, that evidence cannot be relied upon to ground the appellant's conviction because they had not sufficiently managed to describe his appearance to the police before the identification parade was conducted by PW3. More importantly, the said identification parade was not conducted immediately after the incident as it took about two months. Thus, there was no assurance that PW1 and PW2 positively identified the appellant at the identification parade who they had simply told the police that they saw an Indian boy without sufficient description. To this end, we wish to reiterate what was stated by the defunct Court of Appeal for Eastern Africa in **R.V. Mohamed bin Ally** (1947) 9 EACA 72 that:

> *"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given, first of ail, of course by the person or persons who gave the description and*

purport to identify the accused, and then by the person or persons to whom the description was given."

In the appeal at hand, though the incident occurred during the day, there was no categorical description of the appearance of the appellant to the police (PW4 and PW5) by PW1 and PW2 who they purportedly claimed to have identified at the crime scene.

Furthermore, we are satisfied that the evidence of PW4 and PW5 cannot be relied upon to convict the appellant. This is because apart from the apparent contradictions in their evidence concerning the incident, the authenticity with regard to how the photographs of the appellant and Hassan Shua Hassan from the CCTV footage was downloaded into the flash, stored and later transmitted to PW6 for verification of the contents of the data was highly unreliable as the law was not complied with. Basically, a thorough scrutiny of the evidence of PW4 and PW5 on record on the manner under which the contents of the data in the flash (exhibits P3) were downloaded from the CCTV footage, stored and communicated to the verifying authority demonstrates without doubt that the requirement of the law was not followed. For avoidance of doubt, section 18 (2) (a), (b), (c) and (d) of Cap. 306 provides as follows:

"18 (2) In determining admissibility and evidential weight of a data message, the following shall be considered –

(a) The readability of the manner in which the data message was generated, stored or communicated;

(b) The reliability of the manner in which the integrity of the data message was maintained;

(c) The manner in which its originator was identified; and

(d) Any other factors that may be relevant in assessing the evidence."

We entirely agree with the learned Senior State Attorney that the authenticity of said evidence is questionable and cannot be relied upon to ground the conviction of the appellant as it offended the provisions of section 18 (2) (a), (b) and (c) of Cap. 306. The said evidence cannot therefore corroborate the evidence of PW1 and PW2 with regard to the identification of the appellant at the crime scene because the evidence of PW4 and PW5 that the appellant's photographs found in exhibit P3 are those generated and downloaded from the CCTV footage on the material day are highly doubtful.

Considering the foregoing deficiencies in the prosecution case, and having regard to the defence of the appellant, we have no hesitation to agree

with Ms. Kyara that the prosecution case was not proved beyond reasonable doubt. It is no wonder that at the very outset, she out rightly supported the appellant's appeal against the decision of the first appellate court which confirmed the findings of the trial court.

In the event, we allow the sole ground of appeal. Consequently, we quash the conviction and set aside the sentence imposed on the appellant by the trial court and confirmed by the first appellate court. Ultimately, we order the immediate release of the appellant, unless held for other lawful causes.

DATED at **DAR ES SALAAM** this 16th day of September, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of September, 2022 in the presence of Appellant via Video, and in the presence of Ms. Ester Kyala, Principal State Attorney for the Respondent is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL