IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KWARIKO, J.A., SEHEL, J.A. And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 419 OF 2020

MFAUME S/O DAUDI MPOTO.....FIRST APPELLANT
ANTHONY S/O BANGA @ SAID.....SECOND APPELLANT
GODFREY S/O AUGUSTINO @ DAMIANO .....THIRD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Masara, J.)

dated the 18th August, 2020

in

DC Criminal Appeal No. 32 of 2019

JUDGMENT OF THE COURT

15th & 31st August, 2023.

KHAMIS, J.A.:

The three appellants, Mfaume Daudi Mpoto, Anthony Banga @ Said and Godfrey Augustino @ Damiano and two others were jointly charged in the District Court of Babati with armed robbery contrary to section 287A of the Penal Code as amended by Section 10A of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2011 and gang rape contrary to sections 130(1) and 131A(1)(2) of the Penal Code, Cap 16 R.E 2002; [Now R.E 2022].

Whereas the other two accused persons were acquitted, the appellants were convicted on both counts and sentenced to thirty (30) years imprisonment for each count which were ordered to run concurrently. Their first appeal against conviction and sentence was dismissed by the High Court hence this appeal.

The first two courts found that on the 6th day of June 2016, armed robbers broke into the house of and stole from Ibrahim Rajabu at Magugu area, Babati District, Manyara Region. The list of stolen items comprised of cash money TZS. 240,000.00, one small radio valued at TZS. 15,000.00, one mobile phone make TECNO valued at TZS. 30,000.00, one t-shirt valued at TZS. 10,000.00, one pair of shorts *"bukta"* valued at TZS. 5,000.00 and dozens of sofa cloths valued at Tshs. 12,000.00 which in total were valued at TZS. 320,000.00.

The lower courts also established that in the course of armed robbery, the assailants jointly and together did unlawfully have a carnal knowledge of the wife of Ibrahim Rajabu, whose name is withheld but shall be referred to as DGR, victim or PW2 for purposes of this Judgment.

A total of seven witnesses were paraded to establish the prosecution case and four defence witnesses testified under oath.

According to PW1 Pastor Ibrahim Rajabu, he was asleep during night hours of 6th June, 2016 when three robbers carrying a gun and bush knives broke into the house and proceeded to his bedroom. Whereas PW1 was laid down and his hands tied with ropes, his wife was tied with bedsheets. Thereafter, PW 1 and his wife were led to a trench outside the house where two other robbers each carrying a bush knife demanded TZS. 10,000,000.00. On disclosing that he only kept TZS. 240,000.00, the couple was taken back to the house and forced to part with that sum.

PW1 further testified that after collecting the money, robbers forced him to lie down as three of them raped his wife in succession. With the aid of solar light, he identified them, in that: *"one was somehow long and little white and another was tall and black."* After raping, the robbers threatened to kill PW1 and the victim if they attempted to make any adverse move. With that in mind, the couple stayed calm in the bedroom whose door was locked from outside until the next morning when they called a granddaughter who slept in another room to open for them.

After the bedroom door was opened, PW1 went to the hamlet chairman where he reported the incident and subsequently informed the

Police. His wife was issued with PF3 and then hospitalized at Magugu Health Centre where she was medically attended.

Later on, PW1 accompanied policemen to the scene of crime where, in the course of inspection, he discovered that his NOKIA mobile phone, a pair of shorts *"bukta"*, small radio, yellow t-shirt and sofa set cloths were missing. Equally, nowhere to be found was his luggage containing valuable documents including certificates of title to landed properties.

On 11th June, 2016, PW1 was summoned at Babati Police Station and shown a pair of shorts which he identified as his stolen *"bukta"*. Two days later, on 13th June, 2016, at about 10.00 hours, PW1, his wife (PW2) and granddaughter went to the police station and participated in the identification parade that singled out the appellants.

PW2 DGR, a forty five (45) years old woman, stated that at about midnight on the fateful day, a door to her bedroom was smashed and three armed men stormed in; one had a gun and two carried bush knives. She narrated the ordeal in the same line as PW1, her husband, with whom she shared a bedroom. She also participated in the identification parade at the police station and pinpointed the appellants as the culprits. Nonetheless, she gave no features of the perpetrators.

PW3 No. F 334 DC Tibe, a policeman at Magugu Police Station, told the trial court that upon being assigned to investigate the offences of armed robbery and rape, he visited the scene of crime. At the scene, he found a door to the house was broken and items therein scattered all over the place. On 7th June, 2016, Mfaume Daudi Mpoto, the first appellant, was arrested for another offence but while in custody, confessed to a fellow inmate on participating in Pastor Rajabu's incident.

Following that, the first appellant was interrogated and confessed to take part in the incident. He escorted policemen to a trench used to hide firearm but for unexplained reasons, the same was not found. Afterwards, he was taken to Babati Police Station where an identification parade organized by Assistant Inspector William was conducted. According to him, PW1 was able to spot the first appellant because he wore his stolen shorts.

PW3 said in the course of interrogation, the first appellant named other culprits who were accordingly arrested. PW4 Amos Simon Sadan, the hamlet chairman, said the incident was reported to him by PW1 around 6:00 hours on 6th June 2016. He accompanied PW1 to the scene and found PW2 in bad shape. He organized a motorcycle which carried PW1 from the scene to the police station and then to the hospital.

Thereafter, he escorted PW1 and policemen for inspection of the scene of crime.

PW5 Hamza Musa, a daladala driver, participated in the identification parade at Babati Police Station. He was one of the men who stood in line for identification and then recorded a statement. PW6 Assistant Inspector William, the investigation officer in charge at Magugu Police Station, organized the identification parade at Babati Police Station on 13th June, 2016 at about 14:15 hours. According to him, 14 men were lined up whereupon the appellants were singled out by PW1 and PW2. Two Identification Parade Forms No. 186 were filled in and accordingly admitted as exhibits P3, collectively.

PW7 Yohana Naasi, a medical doctor at Magugu Health Centre, testified that PW2 DGR, visited his medical facility on 6th June 2016 during morning hours and complained of a bodily assault and rape. Upon examination, he found bruises around her vagina and inside the cervix. He also carried high vaginal swab and established presence of active male sperms. The doctor opined that the victim was penetrated but no sexually transmitted disease was detected.

The appellants who testified as DW1, DW2 and DW3 respectively, estranged themselves from the allegations and maintained innocence while claiming that the charges against them were fabricated.

Worthy of note is that the High Court outlined three issues for determination: whether the appellants were properly identified by PW1 and PW2, whether exhibits P1, P2 and P3 were properly admitted and whether the prosecution proved its case beyond reasonable doubts.

Resolving the first issue, the first appellate Judge observed that despite lack of descriptions of the assailants' features immediately after the incident and a fact that pre-incident, both witnesses were not familiar with the appellants, he was upbeat that PW1 and PW2 visually identified the assailants at the scene of crime. On the identification parade, he found that it was properly conducted and the appellants were properly pinpointed.

On the second issue, despite of the omission to read contents of the Identification Parade Registers (exhibits P3 collectively) after they were cleared for admission, the learned Judge spared them from expunging on the ground that they were supplemented by the evidence of PW6 which enabled the appellants to cross-examine on their contents hence not prejudiced.

Exhibits P1 and P2 were a pair of shorts "*bukta*" and cautioned statement allegedly recorded by the first appellant, respectively. The learned Judge found that omission to tender the record of search, seizure certificate and chain of custody forms, rendered admission of exhibit P1 irregular hence expunged it from the record.

The learned Judge struck out the first appellant's cautioned statement on the ground that it was recorded beyond the statutory period, its maker was not afforded legal rights, and the trial court omitted to conduct an inquiry before its admission.

On the last issue, the learned Judge was of the view that inconsistencies in the evidence of PW1, PW2, PW5 and PW6 were not grave and did not affect credibility of PW1 and PW2 in identifying the appellants. In winding up, he found the prosecution case was proved beyond reasonable doubts.

The seven grounds put forward by the appellants in the memorandum of appeal and one ground in the supplementary memorandum of appeal, making a total of eight grounds, can be summarized as follows:

i) That, the courts below erred in law and in fact in convicting the appellants for the offences charged disregarding that

while in custody from 7th June, 2016 to 2nd November, 2016 when they were charged were subjected to torture contrary to the constitution and the law.

ii) That, the first appellate court erred in law and in fact in not finding that the identification parade was unlawful and irregular for offending rules 2(c), (d), (n), (o), (q) and (r) of the Police General Orders (PGO) No. 232 as the appellants were not asked if were satisfied with the conduct of the identification parade.

iii) That, the courts below erred in law and in fact in convicting the appellants based on the evidence of PW1 and PW2 who failed to describe the assailants immediately after the incident and did not describe intensity of the light at the scene of crime.

iv) That, the courts below erred in law and in fact in convicting the appellants in disregard of the inconsistencies in respect of exhibit P3 (PF3) which did not reconcile with testimonies of PW2, PW3, PW4 and PW7.

v) That, the evidence available is weak and insufficient to prove the charge against the appellants beyond reasonable doubt.

vi) That, the courts below erred in law and in fact for failure to deal with the first appellant (Mfaume Daudi Mpoto) in accordance with section 131A (3) of the Penal Code as he was less than 18 years at the time of the incident.

vii) That, the courts below erred in law and facts by convicting and sentencing the appellants without considering their defence.

viii) That, the lower courts erred in law and in fact in not finding that section 32(1) of the Criminal Procedure Act, Cap 20 R.E 2022 (the CPA) was contravened as the charge show the offence was committed on 6th June, 2016, the appellants were arrested between 7th and 8th June, 2016 but arraigned on 2nd November, 2016.

When the appeal was set for hearing, the appellants were unrepresented, and thus fending for themselves. The respondent, Republic, enjoyed legal services of Mses. Alice Mtenga, Donata Kazungu, Grace Madikenya and Amina Kiango, all learned State Attorneys.

The hearing proceeded viva voce with the third appellant, Godfrey Augustiano @ Damiano, on behalf of the other appellants, adopting the grounds of appeal. He also laid out, in strenuous details, the numerous

flaws that made the lower courts' findings a violation of the appellants' rights. For the reasons to be revealed later, we have chosen to address the first, second, third and eighth grounds of appeal which can be conveniently clustered to three grounds.

On the first and eighth grounds of appeal combined, the appellants contended that immediately after their arrest, they were subjected to torture and an arbitrary procedure such that they were kept in custody for almost five months prior to their production before a magistrate.

Expounding, the third appellant asserted that the appellants' trial and conviction were carried in violation of their rights to fair trial. He alleged that the appellants' right to be heard by an open and impartial court which is guaranteed under the Constitution, was seriously curtailed owing to their irregular incarceration from date of arrest, 7th June, 2016 to date of arraignment, 2nd November, 2016.

He contended that the appellants' rights to a fair trial; to have the criminal proceedings begin and conclude without unreasonable delay cannot be suspended owing to the datum that they were suspects or accused persons. He implored this Court to find that the process of the court must be used properly, honestly, in good faith, timely and not

abused and the unexplained delay in charging the appellants rendered their trial to be a nullity. He beseeched this Court to quash the lower courts' proceedings without fear or favour in compensation for their deprived right to a fair trial.

On the second ground of appeal, the third appellant contended that an alleged identification of the appellants by PW1 and PW2 during a parade conducted at the police station was irregular and unlawful for offending PGO No. 232. Detailing, he asserted that PW1 and PW2 failed to describe features of the suspects prior to the arrest.

In cementing his assertion, the third appellant argued that the prosecution's failure to produce witness statements recorded immediately after the incident, suggested that there was no prior description of the suspects given by PW1 and PW2.

Furthermore, the third appellant implored us to expunge the identification parade registers (exhibits P3 collectively) on the ground that they were not read out after being cleared for admission. He submitted that contrary to the High Court's findings, the omission to read the exhibits was fatal and prejudicial as held in two cases of this Court, to wit: **DPP v. Festo Emmanuel Msongaleli & Another**,

Criminal Appeal No. 62 of 2017 and **Omar Hussein @ Ludanga v. Republic**, Criminal Appeal No. 547 of 2017 (both unreported).

Regarding the third ground, the third appellant faulted the lower courts for relying on testimonies of PW1 and PW2 in convicting the appellants. He asserted that the incident took place at dark hours of the night and conditions for proper identification at the scene of crime were not favourable for the assailants' identification. He argued that failure of the prosecution witnesses to describe the assailants prior to the arrest was a justification for the assertion.

Addressing the Court on behalf of the respondent's legal team, Ms. Kazungu admitted some of the allegations and supported the appeal, particularly regarding identification of the appellants as reflected in second and third grounds above. She admitted there was no explanation on how the appellants were identified after the incident.

On a further note, Ms. Kazungu contended that PW1 and PW2 as complainants and victims, were key prosecution witnesses but did not explain intensity of the solar light allegedly present in their bedroom at the time of the incident.

The learned State Attorney invited us to observe that the evidence backing PW1 and PW2's description of the assailants was conspicuously

missing and that, PW6 as organizer of the identification parade, failed to supply details on how the individuals involved in the parade were chosen. On this, she referred us to the Court's decision in the case of **Hamis Ally & 3 Others v. Republic**, Criminal Application No. 596/2015 (unreported).

Over and above, Ms. Kazungu submitted that the identification parade was the only evidence sanctioning the appellants' conviction such that the deficiencies shown weakened the prosecution case.

The learned State Attorney also readily conceded that it took about five months for the appellants to be indicted as reflected in the first and eighth grounds of appeal above. In her view, the delay to charge the appellants casts doubts in the prosecution case.

We have dispassionately heard the parties' arguments generally and on each ground of appeal. Upon consideration of the merits or otherwise of the said grounds, and particularly the basis upon which the appellants were convicted, we are of the view that determination of this appeal basically centers on the first, second, third and eighth grounds of appeal as alluded herein above.

These grounds, from our point of view, raise issues on whether the appellants were fairly tried and whether they were properly

identified by PW1 and PW2 as to entitle the lower courts to hold that the prosecution case was proved beyond reasonable doubts.

On account of its importance and for convenience purpose, we have chosen to begin with the first issue; whether the appellants were fairly tried. Trial in criminal jurisprudence means a judicial examination or determination of the issues before the court to arrive at a finding whether the accused is guilty or not.

Despite there being no one comprehensive or exhaustive definition of fair trial, the concept remains to be the heart of criminal jurisprudence. It is recognized nationally and internationally and traces its origin to the 1215 Magna Carta, which gave all human beings the right to a fair trial by jury. The Universal Declaration of Human Rights (UDHR) under Article 10 and the International Covenant on Civil and Political Rights (ICCPR) in Article 14 recognizes the concept of fair trial even at the global level.

A right to fair trial is expressed in Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) which provides that when the rights and duties of any person are being determined by the court or any other agency, that person shall be

entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

The Constitution under Article 13(6), (b), (c), (d) and (e) further guarantees equality before the law for suspects and accused of criminal offences. As gleaned from that article, this right to a fair trial does not focus on a single issue but rather consists of a complex set of rules and practices. The rules applicable to the administration of justice are wide and as a minimum, refer to, *inter alia*: presumption of innocence, the right to be heard by a competent, independent and impartial court or tribunal; the right to be heard within a reasonable time, the right to counsel in respect of capital offenses, the right to interpretation, the right to know nature of the accusation, the right to examine witnesses, the right of juvenile offenders, no punishment without law, the right to appeal and the right to due process.

The due process may be interpreted as the rules administered through courts of law in accordance with established and sanctioned legal principles and procedures, and with safeguards for the protection of individual rights.

It is widely accepted that the rights of an accused begin from the time of his arrest. The Constitution under Article 15(2)(a) provides that

no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom except under circumstances prescribed by law and in accordance with the procedures.

Section 23 of the CPA which is corollary to Article 15(2) of the Constitution, enacts that the person arrested should be informed of the ground of arrest. After the legal arrest of a person, his rights are protected through the period for which he may be held in custody. For the custody to be legal, except for capital offenses, a person may not be held for more than twenty-four hours unless it is not practicable to bring him before an appropriate court (See section 32 of the CPA).

A cautious reading of section 32(1), (2) and (3) of the CPA makes it clear that the officer in charge of the police station to which a suspect is brought, can direct for a remand only when there are grounds to believe that the accusation or charge is well founded and it appears that the investigation cannot be completed within the period of twenty - four hours as specified in that section.

In this regard, the importance of expeditious charging and trial cannot be gainsaid. A delay of justice is often equal to no justice at all. This is especially important for a person who is about to be charged with

a criminal offence. Justice dictates that he should not remain in custody longer than is necessary before being brought to court.

In the present case, there was an unexplained delay to arraign the appellants after their arrest. PW3 on examination by the public prosecutor, testified that the appellants were arrested on 7th June, 2016. His testimony was corroborated by DW1 the first appellant, and DW2 the second appellant. DW3 the third appellant, went on record that he was arrested at about 15:15 hours on 5th August, 2016.

The charge appearing at page 1 of the record of appeal, shows that the appellants were arraigned on 2nd day of November, 2016, about five months from date of their arrests. In our view, this incomprehensible delay was in violation of section 32 of the CPA and prejudicial to the appellants.

In **David Mushi v. Abdallah Msham Kitwanga**, Civil Appeal No. 286 of 2016 (unreported) at page 18, this Court held that where a judicial decision is reached in violation of the right to a fair hearing, such decision is rendered a nullity and cannot be left to stand.

In our view, determination of the aforestated ground would have been satisfactory to extinguish the matter. Nonetheless, we find it inevitable to scrutinize the second and third grounds of appeal having

considered repercussions of the second issue before us; whether the appellants were properly identified by PW1 and PW2 to entitle the lower courts conclude that the prosecution case was proved beyond reasonable doubts.

Parties addressed us on the trial court's failure to read exhibits P3 collectively after their admission. This omission was noticed by the learned High Court Judge who disregarded it as reflected in page 166 of the record of appeal, thus:

> *"I have carefully perused the record of the trial court, I agree with the appellants' contention that having admitted exhibit P3, its contents were not read in court..."*

At page 167 of the said record of appeal, the learned Judge commented on the out-turn of an omission to read exhibit P3, thus:

> *"The question is whether in this case the appellants were prejudiced for failure to read Exhibit P3. ...There is no doubt that the appellants, through the description and explanations made by PW6 were able to understand the contents of Exhibit P3."*

This issue should not hold us. In a plethora of authorities, we expressed our stance on the procedure to be resorted to in the course of

admission of documentary exhibits. In **Iddi Abdallah @ Adam v. Republic,** Criminal Appeal No. 202 of 2014 (unreported), we stated that:

> *"In our present case, we have expunged exhibit PE. 2-the appellant's cautioned statement for two reasons; one that the trial court did not hold a trial within trial to determine its admissibility; and two that it was not read over to him after it was admitted as already discussed above..."*

As earlier on stated, exhibits P3 collectively, are the identification parade registers. A similar document was challenged in **Omary Hussein @ Ludanga & Hashimu Abdallah @ Simba v. Republic**, Criminal Appeal No. 547 of 2017 (unreported), wherefore we held that:

> *"In this case, as the identification parade register was not read over after being admitted before the court, we find it was prejudicial to the appellant as he could not have been in a position to understand its contents. As was stated by Ms. Mmassy, this was a fatal omission which cannot be cured under section 388 of the CPA. In the circumstances, we expunge it from the record of appeal."*

Contrary to the lower courts' posture, we are convinced that the omission to read exhibits P3 collectively after being cleared for

admission was a fatal irregularity which could not be set to rights by either testimony of PW6 or section 388 of the CPA. We therefore expunge exhibits P3 from the record hence find the identification parade invalid. Consequently, we remain with the visual identification evidence of PW1 and PW2.

In spite of that, the evidence of visual identification is equally unsustainable. The appellants and the defendant's team of learned State Attorneys, speaking through Ms. Kazungu, faulted the lower courts for finding the appellants were not properly identified. We board their wagon. Our scrutiny of the record reveals that, there was no legal base upon which to pinpoint the appellants herein as the assailants.

It is trite law that evidence of visual identification should be approached comprehensibly. Meticulous should be employed where the conditions for favourable identification are poor. In **Waziri Amani v. Republic** [1980] T.L.R. 250, this Court pointed out that the evidence of visual identification is one of the weakest kind and most unreliable. Further, the Court warned that:

> *"....no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully*

satisfied that the evidence before it is absolutely watertight...."

Further, it is now accepted that there is a distinction between identification and recognition of a suspect. Recognition of an assailant is more assuring as it is based on personal knowledge of the assailant prior to the incident whereas identification refers to an act of distinguishing a stranger in some form or another (**Anjononi and Others v. Republic** [1980] KLR). In both situations, courts are bound to examine such evidence with great care.

In **Omary Hussein @ Ludanga** (supra) this Court held that it is a settled principle of law that before one can identify a suspect in the identification parade, he must give description of such person prior to identifying him.

In the present case, the appellants were strangers to PW1 and PW2. Records show that none of these witnesses gave detailed description of the suspects before the appellants were arrested and or the witnesses were engaged in the identification parade.

We are also of the view that the generalized statement by PW1 regarding identity of two suspects falls short of the legal threshold. The witness stated that: "*one was somehow long and little white and*

another was tall and black." This allegation contradicts our established position that such description of a suspect should be specific and not generalized. In **Cosmas Chalamila v. Republic**, Criminal Appeal No. 6 of 2010 (https://tanzlii.org/akn/tz/judgment/tzca/2015/196/eng@2015-08-12), we expressed ourselves, that:

> *"....it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such suspect to a person whom he first reports the matter to him/her before such a person is arrested. The description should be on the attire worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect."*

Having regard to the circumstances of this case and particularly the shortcomings discussed above, we are of the opinion that there was no proper identification of the suspects by PW1 and PW2 and thus, the lower courts misapplied the evidence on record in entering conviction against the appellants. Consequently, the second and third grounds have merit.

Having resolved the four grounds in the affirmative, we find no pressing need to determine the remaining grounds of appeal. In the

event, and for the reasons given, we allow the appeal and quash the appellants' convictions and set aside the sentences meted out. Finally, we order that the appellants be released from prison forthwith unless they are otherwise lawfully held.

It is so ordered.

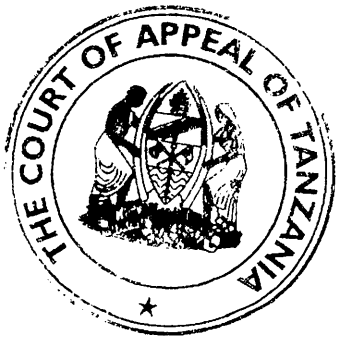
DATED at **ARUSHA** this 30th day of August, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The judgment delivered this 31st day of August, 2023 in the presence of the appellants in person and Neema Mbwana, 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