IN THE HIGH CORUT OF TANZANIA

AT DODOMA

(DC) CRIMINAL APPEAL NO. 104 OF 2011 C/F 37 OF 2012

(APPELLATE JURISDICTION)

(Original Criminal Case No. 122 of 2010 of Dodoma District Court at Dodoma)

1. MANENO MSAFIRI
2. CATHBERT MNG'ONG'O ..... **APPELLANTS**
3. AMOS MATHAYO

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

13/3/2013 & 10/4/2013

KWARIKO,J.

The facts of this case which brought about this appeal reveal that one AZIZI GEMBE PW1 was a credit officer with a financial entity known as BRAC which had its offices at Chamwino area within Dodoma Municipality during the material time on 13/3/2010. Whilst in there at about 8.00 am three armed thugs invaded the office and waylaid PW1 and forced him to take them to the Manager's office after they robbed him Shs. 4,000/=. Before PW1 was forced to lead

to the Manager's office one JOEL MSAMBILI PW3 a watchman was taken along. At the Manager's office the thugs ordered PW1 to open table drawers and they ordered them to lie down while they escaped and on the way robbed another officer MARY ELITUMAINI. The incident took about ten minutes.

PW1 was emphatic that during the robbery he marked the description of the thugs who had no masks and that the one who had bald head carried a Machete, one had a knife and one who had rasta hair carried a gun. The incident was reported to police and descriptions of the thugs were given and they were accordingly arrested various dates. On 3/4/2010 PW1 was called to police where on an identification parade that was conducted by Inspector CHAUSIKU MASASI, PW7 the appellants herein were identified. PW1 said that the 1st appellant herein was the bald headed, the 2nd appellant carried the knife and the 3rd appellant was the rastaman who had the gun.

After the arrest of the appellants by No. F. 7341 DC THOMAS, PW2 among others, their interrogation was done and they are said to have admitted the allegations and their caution statements were written.

After all these formalities have been completed the appellants and one ALLY MOHAMED then 4th accused were taken to court

where jointly and together faced three counts of **Armed Robbery c/s 285 and 287A of the Penal Code Cap. 16 of the Laws R. E. 2002 as amended by Act No. 4 of 2004.** The appellants herein and ALLY MOHAMED denied the charge and during the trial a sketch plan map of the scene of crime, the 2nd appellant's caution statement, the 1st appellant's caution statement, the 3rd appellant's caution statement, Identification parade Register and the 4th accused's caution statement were admitted in court as exhibits P1,P2,P3,P4 and P5 respectively.

Before the close of the prosecution case the appellant herein was recorded to have escaped from custody hence the case proceeded in his absence. During his defence the 2nd appellant said was arrested on 25/3/2010 together with his colleagues who were found playing cards. That his colleagues bribed the police and were released. He was beaten to confess and was treated in hospital on 29/3/2010.

On his part the 3rd appellant said was arrested on27/3/2010 in Dar es Salaam, was beaten and brought to Dodoma where on 29/3/2010 was taken to hospital for treatment. That they were both broad cast on TBC Television on 01/4/2010 before identification parade was conducted on 03/4/2010 hence the same was not legal.

In its judgment the trial court acquitted then 4th accused person. Whereas in convicting the appellants herein the court found that they were sufficiently identified by PW1 who had ample time to mark their descriptions during the robbery and the identification at the parade which was legally and properly conducted. The trial court thus did not act on the appellants' confession statements to convict the appellants since there was other direct evidence hence did not decide on the voluntariness of the same there being objections in respect of the same.

Therefore, the appellants were convicted on the 1st count and acquitted on the 2nd and 3rd counts since the complainants therein MARY ELITUMAINI and IDPHONCE MASUDI, victims of the robbery did not turn up to testify. Hence the appellants were sentenced to thirty (30) years imprisonment with twelve (12) strokes of the cane each. That was on 16/5/2011.

The 1st appellant who was convicted and sentenced in absentia was arrested and brought to the trial court on 13/7/2012. The 1st appellant was given opportunity of being heard on his reasons for absence and whether had probable defence on merits. The court found that the 1st appellant presented no sufficient reasons for his absence hence was not heard on probable defence on merit. He thus was ordered to serve his sentence from the date of apprehension.

The appellants were aggrieved by the trial court's decision hence filed this consolidated appeal whereas the 1st appellant has his grounds of appeal and the 2nd and 3rd appellants have separate grounds of appeal. Though, the grounds of complaints in the two memoranda of appeal are the same save for only one ground in respect of the 1st appellant. In both memoranda of appeal about seven grounds of Appeal have been raised but only five grounds of complaints have been clear, they are as follows:

1. *That, the trial court erred in law and in fact to convict the appellants on insufficient evidence of identification.*

2. *That, the trial court erred in law and fact to convict the appellants basing on the evidence of co-accused.*

3. *That, the trial court erred in law and in fact to act on the complainants' uncorroborated evidence.*

4. *That, the trial court erred in law and in fact to act on illegal caution caution statements.*

5. *That, the trial court erred in law and in fact to convict the 1st appellant in absentia without following legal procedure hence denying him his constitutional right of being heard.*

When the appeal was called for hearing, the appellants adopted their grounds of appeal and waited to hear the respondent's stance. Mr. Sarara learned State Attorney appeared

on behalf of the respondent Republic and in his submission did not make the appellants' life easy since he opposed their appeal.

Responding to the first ground of appeal Mr. Sarara submitted that the evidence in respect of the appellants' identification was sufficient. He said that PW1 had enough time to mark the thugs' appearance that is why he described them in detail and was not in fear since he even managed to describe the attire of the thugs and the incident took place in a day light about 8.00 am. And that the evidence of PW3 was not considered as complained by the appellants.

As for the complaint that the appellants were broadcast on the Television before identification parade was conducted Mr. Sarara said the same had not been proved by the appellants. That, the identification parade was procedurally conducted and according to PW7 there were four rastamen on the line as opposed to a complaint that there was only one of them. Mr. Sarara referred this court to the cases of **MWANGO MANAA [1936] 3 EACA 29** which was quoted with approval in the case of **S. MUSOKE VR [1958] EA 715 and K. MARANGE VR [1983] TLR 158** in respect of the issue of identification parade. That, the requirements for identification parade enunciated in the cited cases had been complied in the instant case.

As for this first appellate court which has duty to revisit the evidence at the trial, it has found that although PW1 said had

enough time to mark the, thugs which led him to identify them in an identification parade, his alleged identification in the considered view of this court creates doubt. This is so because PW1 said he was in the said office together with PW3 and both had been hambushed and waylaid by the thugs but PW3 said did not mark anybody and was not called to the identification parade for that purpose. The trial court was not told that PW3 was less intelligent to mark descriptions of the thugs in order to point out them later. And the alleged IDPHONCE MASUDI who is said to have been in the company of PW1 and identified the thugs at the parade was not called to testify to corroborate and give credence to PW1's evidence.

Further, this court has considered the appellants' complaint that the appellants were broadcast on Television on 01/4/2010 before identification parade was conducted on 03/4/2010. It is my considered opinion that this complaint rings a truth in it since it has not been controverted by the prosecution. The appellants first complained about this issue when PW4 testified and no any substantial explanation was given by this witness apart from denial that she did not display the appellants on the Television for this case. This reply meant that the appellants were displayed on Television and PW7 did not say it was for which case. The court therefore agrees with the appellants that in the absence of any other evidence on the contrary they were broadcast on Television in respect of this case. If that is the case then there was possibility that the witnesses saw the appellants before the identification parade.

The court is fortified in its finding by the absence of PW7's evidence to show what were the appellants' comments after the identification parade. PW4 ought to have noted what the appellants said after the parade exercise was completed. This is one of the requirements of a valid identification parade as enumerated in the cited case of **MWANGO MANAA VR** [supra]. In that case about thirteen (13) Instructions for Identification Parade had been listed. The said requirement was said thus;

> *"At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply".*

Therefore, had PW7 complied with their requirement the appellants would have said something in respect of them being broadcast on the Television before that day.

Also, the witnesses that stood in the line together with the appellants during the identification parade ought to have testified to give credence to the whole exercise to prove that there were no any complaints from the appellants. This is so because PW4 did not say if she had informed the appellants of their right to have their Advocates, family members or friends present during the exercise (see **MWANGO MANAA VR** [supra].

Therefore, the identification parade was not conducted in accordance with legal procedure as the trial court held and it follows that the identification of the appellants had not been proved. The first ground is thus resolved in the positive.

In the second ground of appeal the court agrees with Mr. Sarara learned State Attorney that the same is baseless because the trial court did not regard the evidence of co-accused when it convicted the appellants. In fact the appellants' confession statements though admitted in court but the same were not used against the appellants. This ground is thus rejected.

As for the third ground of complaint that there ought to have been corroborative evidence from independent witnesses the court is of the opinion that it is not every case that an independent witness is wanting. In this case the complainants did not say they had raised alarms during the robbery to attract attention of other people and thus there is no possibility that any other people apart from the office members were aware of the incident. Since the matter was reported to the Police who came to testify, I am satisfied that, that was enough. This complaint is thus dismissed.

The fourth ground of complaint relates to the appellants' caution statements. This court agrees with the learned State Attorney that the confession statements were not used against the appellants when the trial court convicted them. Though, I agree with the appellants that the court erred in law when it admitted these statements in evidence while they had been objected by the appellants. The trial court ought to have inquired the admissibility of these statements after the appellants had objected the same. This was not done and it was illegal that they were received in evidence. The appellants' caution statements were thus not good evidence and they are hereby scrapped from the evidence. This ground of complaint thus succeeds in that extent as shown.

Lastly, the 1st appellant complains that he was convicted without being afforded opportunity of being heard. That, the trial court did not explain which provision was used in that respect between **sections 226 and 227 of the Criminal Procedure Act Cap. 20 R.E. 2002 [The Act]**. Also, the trial court did not make effort to secure his attendance before he was convicted in absentia. Mr. Sarara learned State Attorney contended that the court did not err to convict the 1st appellant interms of section 226 and 227 of the Act. And since he had escaped form lawful custody he should not be heard to complain.

This court is of the opinion that although the trial court did not rule out to indicate why it proceeded in the absence of the 1st appellant after he was reported had escaped from lawful custody, but I do not think that the 1st appellant was ever prejudiced. This is so because it was on 24/2/2011 that the 1st appellant was reported absent and the case was adjourned to 25/3/2011 when the last prosecution witness testified in his absence. It is my considered view that the court waited the 1st appellant for a sufficient time taking into account that there were co-accused languishing in remand custody and it could not be ascertained when the 1st appellant would have been arrested. Therefore, it is not true that the trial court hurriedly convicted the 1st appellant in absentia.

And whether the 1st appellant was given opportunity of being heard in relation of his absence and if he had probable defence on merit; The trial court did find that the 1st appellant had not advanced sufficient reason for his absence hence did not afford him opportunity to present his defence. The court noted that the said procedure was done interms of section 226(2) & (3) of the Act. That was the legally required procedure and no any law had been contravened. Section 227 of the Act was not applicable in this case as it relates to the accused who absents himself after the close of prosecution case **[See FWEDA MWANAJOMA & ANOTHER VR, Criminal Appeal No. 174 of 2008, Court of Appeal of Tanzania at Dodoma** [unreported]. I therefore reject this complaint for being baseless.

Consequently, I find that the prosecution case at the trial was not proved to the standard required in law. I therefore allow the appellants' appeal, quash the conviction and set aside the sentence.

The appellants are ordered to be released from custody unless otherwise lawfully held. Order accordingly.

(M. A. KWARIKO)

JUDGE

10/4/2013

Date :10/4/2013

Coram : Hon. M. A. KWARIKO, J

1ST Appellant – Absent

2nd Appellant – Present

3rd Appellant – Present

For Respondent – Mr. Wambali State Attorney

C/C: Ms. Komba

Mr. Wambali :

The matter is for judgment. We are ready and the 1st Appellant is absent as he is reported to be in Morogoro where he has another case.

Court :

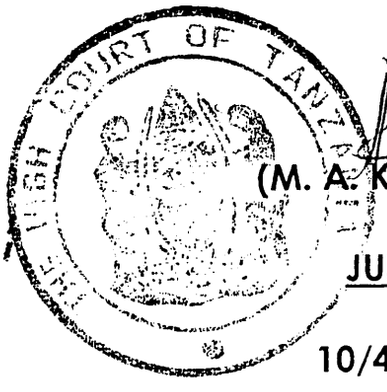
Judgment delivered in court in the presence of the 2nd and 3rd Appellants and Mr. Wambali learned State Attorney for the Respondent, Republic. Ms. Komba court clerk present.

(M. A. KWARIKO)

JUDGE

10/4/2013

Court: Right of Appeal fully explained.



(M. A. KWARIKO)

JUDGE

10/4/2013