IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

APPELLATE JURISDICTION

CRIMINAL APPEAL No: 146 of 2015

[Appeal from a decision of the District Court of Kilosa at Kilosa in Criminal Case No. 24 of 2014 before Hon. S.W. Mwalusamba RM]

DAMLA JOSEPH @ KARUBUJO . . . . . APPELLANT

VERSUS

REPUBLIC . . . . . RESPONDENT

Date of last order - 7/12/2015
Date of Judgment - 11/4/2016

JUDGMENT

Kitusi, J.:

DAMLA s/o JOSEPH @ KARUBUJO and two others were charged before Kilosa District Court with Armed Robbery contrary to section 287 A of the Penal Code [Cap 16 RE. 2002] as amended by Act No. 3/2011. The other two accused persons were found not guilty and acquitted while the present appellant Damla Joseph @ Karubujo was convicted and sentenced to thestatutory minimum term of thirty (30) years imprisonment.

The allegations placed at the appellant's door were that on 7/2/2014 at about 03:00 hours the appellant jointly with those two

who were acquitted, at Madudumizi Village within Kilosa District in Morogoro Region stole one Motorcycle Reg. No T 147 BZI make Sunlag, a number of mobile phones and shop items the total value of which is Tshs. 5,177,000/= the property of one Hassan Hamis. It was further alleged that immediately before and after such stealing they fired one bullet in the air with the view of obtaining those properties.

The evidence which led to the appellant's conviction was briefly to the following effect:

Hassan Hamisi (PW1) is a trader who runs a shop within his place of abode at Zombe Madudumizi Village in Kilosa District. On 7/2/2014 at around 3:00 hours when PW1 was in bed he was awakened by sounds of breakage into his house. One man brandishing a bush knife forced his way into PW1's bedroom and demanded money from him. Pw1's testimony at the trial was that he identified this man for three reasons. That he had seen the intruder at Kilosa Magomeni earlier on that day, and there was enough light from the three bulbs that were on.Lastly, the assailant stood just about three paces from him.

When Pw1 responded that he did not have money with him and that money was in the shop, the assailant commanded him to go fetch the money from the shop. As he was proceeding towards the shop, Pw1 saw two more bandits at the corridor of his house.

They were armed with bush knife and an iron bar respectively. However instead of playing into the bandits' hands he sprinted out of the house, but as fate would have it, he ran into the appellant who was armed with a gun. The appellant fired the gun in the air as Pw1 ran into the bush.

Pw1 said he identified the appellant because he lives in the same village with him and the two schooled together. In addition to these factors,Pw1 added that the encounter, between him and the appellant lasted five (5) minutes.

When Pw1 returned to his house later at about 6:00 a.m there was a group of people who had turned up to offer assistance. Pw1 saw at the scene, abandoned knives which the bandits had been carrying, and a huge log with which they had forced the door open. He also saw an item he associated with the gun and this item is referred to as a "magazine" After taking stock of the stolen shop items, Pw1 reported the incident to the village Executive officer then to the police. Police officers Mohamed (Pw5) and Oscar visited the scene of crime and collected the items that had been abandoned by the bandits including a "*used magazine*".

Detective Sgt Mohamed or Mudi (Pw5) was taken around the scene of the crime and shown where the motorcycle had been before being stolen. He prepared a sketch map of the scene of crime which the prosecution expressed an intention to tender in exhibit along

with the confessional cautioned statement of the appellant (First accused).The said appellant (First accused) did not object to the admissibility of his cautioned statement but the third accused objected alleging torture he suffered in the course of making it. The learned trial magistrate conducted an inquiry to satisfy himself of the voluntariness in making the statement. This point calls for a discussion at a later stage of this judgment, whether the court may entertain an objection to admission of a cautioned statement by a person other than the maker, on account of alleged torture to that other person. The statement was held admissible after the learned trial magistrate conducted an inquiry and got satisfied that it was obtained voluntarily.

Nothing was said about the sketch plan.

On 8/2/2014 Pw1 telephoned Pw5 to inform him that he (Pw1) had seen the first accused (appellant) at Magomeni area. Pw5 relayed this information to the OC – CID and itis his testimony that he is not the one who arrested the appellant.

Then there is the evidence of Hatibu Letema (Pw4) who doubles as a businessman and chairman of a Community PolicingGroup (Polisi Jamii) at Magomeni area, within Kilosa District. On 8/2/2014 Pw4 received a phone call from his assistant requesting him to join the group members at the place of abode of the appellant's aunt at a place called Madazini. When Pw4 got there

he found some group members and one Makwaya. The appellant was under restraint. Pw4 was informed that the appellant was being suspected of having taken part in an armed robbery incident and PW4 was supposed to witness a search of the house as it was suspected that the proceeds of the armed robbery were being hidden in it.The house was searched but nothing related to the armed robbery was found whereupon the appellant was interrogated in the presence of his aunt if he had another relative within that area. It was then known that the appellant had an uncle at Magomeni Sokoni. The group went to the house of appellant's uncle.

The house was searched in the presence of Hawa Ali (PW2) who is the Ten Cell leader of the area, Vumilia Athuman (PW3) who is the wife of the appellant's uncle and PW4 as already indicated. PW3's version is that shortly before the arrival of the group that had the appellant under arrest, one Khamis who was the second accused during the trial and a friend of the appellant's had gone to PW3's house to hide a bag in the appellant's room. PW3 was told by the said Khamis that the appellant had been arrested, therefore the Police would likely be arriving at that house for a search. The police arrived and searched the room which the appellant was occupying. They saw the bag in which there was a shotgun, one magazine a short trousers and a T shirt.

The appellant made a cautioned statement which was tendered in court in circumstances already referred to earlier and he implicated other accused persons while confessing to the offence charged.

In defence the appellant gave an account of how he was arrested while proceeding from his village called Zombo to Kilosa. The police interrogated him about his residence and that they wanted to search it. To the surprise of the appellant the police searched a house unknown to him at Magomeni area in which the gun was found. When cross examined on his relationship with the owners of that house, the appellant disowned them.The appellant said that the evidence of PW3 that the gun found in her house belonged to him is not supported by any proof. He further testified that PW1 was a stranger to him therefore his testimony that he identified him from a distance of seventy paces was questionable.

The trial court found the appellant guilty of the offence because he had been identified at the scene and secondly because the gun with a magazine that matched that which had been abandoned at the scene was found in his room.

The appellant has lodged this appeal on the following grounds; That the learned trial Magistrate erred in relying on the evidence of visual identification by PW1 who failed to name the suspect at the earliest opportunity.

1. That the evidence of PW1 on visual identification is contradicted by that of PW6 on whether or not the appellant was identified at the scene.

2. That the learned trial magistrate erred in admitting in evidence a gun without an opinion by an expert that it was really a gun and not something else.

3. That the learned trial magistrate erred in his failure to direct his mind to the intensity of the light that facilitated visual identification by PW1.

4. That the learned trial magistrate erred in not taking into account that in tendering the gun as exhibit the prosecution did not tender a certificate of seizure and the fact that no independent witness testified makes it possible that the gun had been planted by the prosecution.

5. That the learned trial magistrate erred in admitting his cautioned statement despite the fact that it had been obtained involuntarily.

During the hearing of this appeal the appellant appeared without any legal representation while Ms Paulina Fungameza, learned State Attorney stood for the respondent Republic. When the appellant chose to address the court after hearing the respondent's

submission, Ms Fungameza started by announcing that she supported the appellant's conviction and sentence and that she was going to argue grounds 1,2 and 4 together. I think her approach is justified because, as she correctly stated, these grounds relate to visual identification and failure by the victim to name the suspect at the earliest time.

The learned State Attorney submitted in relation to the three interrelated grounds that the conditions for identification as stipulated in the oft referred case of Waziri Amani V. Republic, (1980) TLR 250 were available in this case. She submitted tat PW1 knew the appellant before the incident because the two went to school together and live in the same village. Then there was enough light from solar energy and the two were separated by only three steps between them. She further submitted that the fact that the arrest of the appellant was a result of PW1's telephone call to PW4, impliedly shows that he had identified the culprit and named him to the police.

Regarding the third ground of appeal the learned State Attorney submitted that it is for the prosecution to choose which witnesses to call, depending on the relevancy of their testimony to the charge. She cited the case of **Sharif Juma Ally V. Republic,** Criminal Appeal No 14 of 2015 (High Court). Therefore, she concluded, that the omission to call the ballistic expert in this case

was not fatal because in armed robbery even threat of violence is sufficient to prove it.

As for the fifth ground the State Attorney submitted that the certificate of seizure was admitted in evidence without any objection and that the typed proceedings at pages 28 and 29 show that there was an independent witness. Regarding the appellant's complaint against the admissibility of the cautioned statement, which is ground number six, it is submitted that the appellant did not object to its admissibility at the trial, therefore he cannot be heard raising that objection on appeal.

On his part the appellant submitted briefly. Although he is a layman as he himself stated, his submissions were, in my view, focused. He submitted in relation to the victim's failure to name him by saying that he ought to have named him to the people who immediately turned up at the scene. As for the recovery of the gun he said he was led to the house which he had no connection with, and the gun was found. He submitted that he did not sign the search warrant. Lastly he submitted that he objected to the admissibility of the cautioned statement but it was nevertheless admitted in order to get him convicted.

I will start with the issue of visual identification and I will first restate the position of the law in that regard. Evidence of visual identification by a single witness at night is said to be of the

weakest type. It is so weak that even when the witness purports to recognize the culprit, the court is still required to approach such evidence with care. In the case of Nhembo Ndalu V. R, Criminal Appeal No 33 of 2005, CA Dodoma (Unreported) the Court of Appeal referring to its earlier decision in Dorika Kagusa V. R, Criminal Appeal No 174 of 2004 (unreported) said;

> ***"It is trite law that in a case depending for its determination essentially on identification be it of a single witness or more than one witness, such evidence must be watertight, even if it is evidence of recognition. And where such evidence is of a single witness made under unfavourable conditions, such evidence must, as a matter of practice only, require corroboration".***

In this case, if subjected to the known standards, can the evidence of identification by PW1 stand the test? According to the learned State Attorney, PW1 identified the appellant twice that is inside the house where there were solar lights and the distance separating them short, and later outside the house. With respect to the learned State Attorney, she did not appreciate the testimony of PW1 properly. PW1 saw somebody in his room and identified him to be the man he had earlier seen at the shopping centre earlier that

day and that he was holding a bush knife. PW1 bolted out of the house to escape, but unexpectedly ran into the man he identified as the appellant. Therefore the man who was in PW1's bedroom with a bush knife cannot be the same man whom PW1 ran into when he sprinted out. In the first place PW1 did not say so, but it is practically improbable that the appellant would have been in two places within a blink of an eye. Therefore the only time PW1 identified the appellant was during the brief encounter outside the house when the said appellant is said to have fired the gun. In my view the evidence of PW1 suffers from lack of details in the manner in which he identified the appellant. According to PW1himself he must have been running when he encountered the appellant outside and there is no way that he could have been looking forward to that encounter. The appellant allegedly fired in the air on seeing PW1, and the latter immediately made for the bush to save his skin. When then did PW1 pause to even take a glance at his assailant? There is nothing to suggest that anything more than a quick glance took place. It is my finding based on the foregoing analysis that PW1's evidence of identification is very unreliable and insufficient to base a conviction. I find merit in this ground of appeal and uphold it.

Let me connect the foregoing ground with the complaint that the victim did not name the culprit at the earliest possible time. According to the appellant he the complainant ought to have named him to the people who turned up at the scene to assist him. The

learned State Attorney responded by submitting that the arrest of the appellant was a result of the victim naming him to the police. The law is now established that failure to name a suspect at the earliest opportunity tends to suggest uncertainty on the part of the victim as to the identity of the culprit. In **JACKSON S/O THOMAS V.THE REPUBLIC CRIMINAL APPEAL NO 229, CA, TABORA REGISTRY**, (Unreported) the Court of Appeal quoted with approval a passage in the case of **MARWA WANGITI MARWA AND ANOTHER VS THE REPUBLIC [2002] TLR 39** to the following effect;

> ***"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent Court to inquiry."***

In this case if PW1's version that he was very familiar with the appellant because they attended the same school is true, then why didn't he name him to the people who were there to help him including PW4 the police who called at the scene immediately? The submission by the learned State Attorney that the victim informed the police by telephone does not address the point because he called PW4 on the next day. It is therefore my finding that this ground has merit and I accordingly uphold it.

I now turn to the complaint regarding prosecution's failure to call some of the witnesses. I am in total agreement with the learned State Attorney that the prosecution has the discretion to choose which witness to call. I am particularly guided by the principle in Speratus Theonist@ Alex V. R, Criminal Appeal No. 135 of 2003 quoted with approval by the Court of Appeal in Juma Magori @ Patrick and 4 others V. The Republic,Criminal Appeal No 328 of 2014, at Mwanza ((Unreported);

> ***"...the evidence has to be weighed and not counted."***

In this case however the complaint is that the ballistic expert was not called to the witness box to link the gun found at the appellant's place of aboard with the 'magazine' collected at the scene of crime. This link was, in my view, necessary because in convicting the appellant the learned resident Magistrate reasoned as follows;

> *" I hereby found (sic) third accused person not guilty with (sic) the offence, and acquit him forthwith, for the first accused person to be identified at the scene of crime by PW1, and the gun to be found in his room.* ***Which magazine match that used cover found at the scene***

of crime, *imply that he is the one who robbed the house of PW1 with the gun..."*

The question that is raised by the appellant's complaint seems to be whether the learned trial magistrate had before him expert evidence to conclude as he did. There is obviously no such evidence and it is glaringly clear that the prosecution had the duty to adduce such evidence. It is my conclusion, based on the above analysis, that this ground of appeal has merit and it is accordingly upheld.

To conclude, since the conviction of the appellant was based on the evidence of visual identification, which I have discounted for being insufficient, and the link between the gun and the magazine, which I have found missing, the said conviction was bad. I therefore allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. The appellant is to be set free unless his continued restraint is lawful for some other cause.

I.P. Kitusi

JUDGE

11/4/2016

Coram:	Hon. Magesa, DR.
For the Appellant:	Present
For the Respondent:	Mbwana, SA.
C.C.:	Eveline

Court:

The matter is coming for Judgment. Judgment delivered in the presence of the appellant in person. The Respondent is represented by Neema Mbwana, State Attorney.

C. Magesa

DEPUTY REGISTRAR

11/4/2016