IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 376 OF 2017

(Appeal from the judgement of the District Court of Temeke at Temeke, Criminal Case No. 477 OF 2016)

1. PAULO THOBIAS KOMBA.....APPELLANT

2. AMIRI HAMIS OMARY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

NGWEMBE, J

The Appellants before this court are Paulo Thobias Komba and Amiri Hamis Omary who were convicted for armed robbery contrary to section 287A of the Penal Code Cap 16 R.E. 2002, and sentenced to serve thirty (30) years imprisonment. In brief, facts of the case are summarized that, the appellants on 8th July, 2016 at Chang'ombe Unubi area within Temeke District in Dar es Salaam region did steal cash money TZS 5,500,000/= property of Nicolaus Tillya and immediately before stealing they used pistol in order to obtain the said money.

Upon being convicted and sentenced to serve 30 years' imprisonment, the appellants preferred this appeal by issuing notice of appeal filed on 24th October, 2017, equal to five (5) days from the date of conviction and sentence. The appellants, jointly lodged five (5) grievances against the decision of the trial court. The grievances may be summarized as follows:

1. The visual identification made by PW1 and PW2 lacked description of the appellants;
2. The identification parade conducted by police defaulted the procedure.
3. The caution statement was retracted by the appellants but was admitted as exhibit P111 contrary to legal procedures.
4. The prosecution evidence was not corroborated and the conviction was wrong.
5. The trial court erred to convict the appellants for the prosecution failed to prove the case beyond reasonable doubt.

Having summarized the appellants' grievances to this court, the parties on the hearing date, submitted; The two appellants being unrepresented, prayed this court to adopt their grounds of appeal and added further, that on the scene of crime, PW1 and PW2 failed to identify properly the appellants and their features. The identification parade was conducted on 27/7/2016. They submitted that the caution statement was retracted, but no inquiry took place. Finally, the appellants rested their case by praying to this court to find them innocent.

The Republic, was represented by Ms. Elen Masululi learned State Attorney, who vigorously, contested the appeal by countering every ground of appeal as follows:- On identification, the State Attorney argued that the visual identification of the appellants by both PW1 and PW2 was proper according to the legal procedures. The identification meted all legal requirements provided for by the Court of Appeal in the case of **Waziri Aman Vs. Republic (1980) TLR 250.** PW1 further testified that, robbery took place during a day light, where the appellants were well identified. The 2nd appellant was riding a motor cycle while the 1st appellant was holding pistol and was the one took the money to PW1. The same evidence was repeated by PW2. The distance between the appellants and PW1 and PW2 were about 4 meters which was so close to know who is who. PW2 tendered in court

both Police RB and bank statement indicating withdraw of TZS 5,500,000/= and admitted in court as exhibit P 1

On the Identification parade, the learned State Attorney, comprehensively submitted that the Police Force conducted two identification parade on 27th July, 2016, at noon. In both parade PW1 identified the appellants and the identification parade reports were tendered in court collectively marked exhibit P 2. PW3 was the one conducted both identification parades. On the issue of caution statement, the State Attorney submitted that, PW4 was the one arrested both appellants and took caution statement of the 2nd Appellant on the same date. The inquiry is only done when the statement is taken under duress contrary to the appellants' statements. PW5 proved that the 1st Appellant did not travel from Morogoro to Dar es Salaam on 8th July, 2016. The passenger register book did not include the name of Paulo Thobias Komba. The learned State Attorney rested her submission by inviting this court to dismiss the appeal for lack of merits.

This court intends to discuss one ground after another based on the facts on record, decided cases and the law applicable. On the issue of identification, the ingredients of visual identification are now settled after having series of court decisions. The Court of Appeal for Eastern Africa way back in 1942 in the case of ***Mohamed Alhui V. Rex*** **(1)** held that:

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

The holding of the court was adopted by the Court of Appeal of Tanzania in various decisions including the Case of ***Waziri Aman vs R (1980 TLR 250*** whereby the court reiterated authenticity of identification by asking the following fundamental questions:

- What kind of light was on at the scene of crime at the time;
- What was the intensity of that light;
- What was the distance between the source of light and where the witness was;

On the same vein, the Court of Appeal in the **Criminal Appeal No. 197 of 2008** (Unreported) at page 7 added two fundamental questions that:

- Whether the accused was known to the witness before the incident;
- Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like which may have interrupted the latter's concentration.

In order to convict an accused based on the identification at the scene of crime, all the above questions must be answered in affirmative. In this appeal, the incident occurred on a day light, on a public road along Chang'ombe area within Temeke district. The evidence of PW1 was to the effect that when were on road to chang'ombe area two persons on motor cycle approached them, one of them was holding a pistol who threatened them. Due to that fracas PW2 went out of their car with money trying to run away from robbers, but the 1st appellant followed him and managed to robe money, and together ran away with their motor cycle. The evidence of PW2 is a replica of PW1 who were the victims on that incidence.

In cross examination, PW1 did not know the appellants prior to the incident but identified them during police identification parade. Out of 12 persons he identified the two appellants.

It is an elementary knowledge of criminal law that where determination of the case depends essentially on identification, evidence on conditions favouring correct identification is of utmost importance **(Raymond Francis Vs R (1994) TLR 100).**

In this appeal, the incident took place during a day, it is clear that the question of light and its intensity do not arise. Proximity of two parties that is the victims and the appellants no doubt was so closer to each other, which enabled PW1 easily identify them. On strength of the above reasons, this court is satisfied that the appellants were properly identified.

On the identification parade, according to exhibit P11, the was conducted by Assistant Inspector Daniel of Police Station - Chang'ombe on 27th July, 2016. Both appellants were properly identified by PW1 and the appellants signed on the identification parade report. PW3 who conducted the parade testified in court that the two parade were conducted, and the appellants were properly identified by PW1.

With serious note, the process of identification parade is governed by Police General Oder's (PGO) No. 232 made by the Inspector General of Police under powers vested on him under section 7 (2) of the Police Force Auxiliary Services Act, Cap 322 R.E. 2002. The rules have to be followed during the exercise of identification parade. According to exhibit P11, twelve people were involved including the two accused. At the end both appellants signed the report authenticating that the parade has been conducted and have been identified by PW1.

The arresting police officer PW4 did not participate on the identification parade as rightly governed by PGO.

Since the one who conducted the identification parade was PW3, then the issue of PW4 defaulting the procedure of identification parade does not arise. Therefore, this

court find the two identification parades were conducted according to the laid down procedures and the appellants were properly identified.

On the caution statement, PW4 testified that he was the one who wrote the statement of the 2nd appellant and another police officer took the statement of the 1st appellant. It is on record that during interrogation the 2nd Appellant admitted that he is a motor cycle rider (Bodaboda) and he admitted to have been involved in the incidence of stealing PW1's money together with 1st appellant. On cross examination PW4 did not know when the identification parade was conducted, since he did not participate, but was sure on the date of when the appellants were arrested (11/7/2016) and the caution statement was taken on the same date when they were arrested at 16 hours. The caution statement has finger prints of the appellant in every page indicating that he agreed on the contents of the record. The 2nd Appellant objected the admission of caution statement, but upon response from the prosecution, he ended up withdrawing the objection and the statement was admitted by the trial court as exhibit P111.

In the circumstances, the court finds that sections 50, 51, and 57 of the Criminal Procedure Act, Cap 20 R.E. 2002, which governs taking of caution statements were followed when the caution statement of the 2nd appellant was taken and was properly admitted in court.

The last prosecution witness was PW5 who was an employee of ALSAED Transport LTD, who contradicted the only defence of 1st appellant. PW5 disputed the fact that the 1st Appellant on 8/7/2016 travelled from Morogoro to Dar es Salaam. However, exhibit P IV disproved that he never travelled with that bus on the alleged date. The defence of the 1st appellant was that on 8th July, 2016 he travelled from Morogor to Dar es Salaam by bus of Al Saed, which in turned was proved not true. (PW5).

The remaining key issue is, whether the prosecution proved the case to the standard required by law. The onus of proving the guilty of the accused beyond all reasonable doubt, solely lies to the prosecution. This in my mind means, to prove all the ingredients of the offence and eliminating any possible defence that is available to the charge.

In the case of ***Sunderje V.R (1971) HCD 316 and Tumbark Halbattthe V. R (1957)*** EA at page 355, the judges insisted that a prima facie case must be one on which, a reasonable court directing its mind on the law and evidence before it, could convict if no explanation is given by the defence.

Again in the case of ***Fanuel s/o Kiula v. R. (1967) HCD at 369,*** Chief Justice Georges set out a principle of proving criminal case that:

> ***"It is not necessary to accept the evidence of the accused in order to find him not guilty. All that an accused need to do is to raise a reasonable doubt as to his guilt".***

In another case ***Moshi d/o Rajab V. R (1967) HCD 384*** the magistrate's judgment contained "no reference whatever to the evidence given by the prosecution witnesses," but did state the magistrate's belief "beyond all doubt" that the defence was "a pack of lies." The High Court held inter alia that:

> ***"the magistrate 's refusal to accept a defence as truthful is not a proper basis for conviction; here, the magistrate's judgment did not give any indication that he was aware that the onus of proving the guilt of the accused is on the prosecution, or that he gave any consideration to the prosecution evidence"***

There are series of authoritative cases of this court and of the Court of Appeal that the duty of the prosecution is to prove the case beyond all reasonable doubt, that no other person than the accused who committed the offence.

On the strength of the available evidence as rightly analyzed above, increasingly, I have no doubt, the prosecution dutifully proved the case to the standard required by law. Ground 4 and 5 of the appellants' have no leg to stand.

Finally, I have sought guidance from the Court of Appeal in ***Criminal Appeal No. 267 of 2006 Mkaima Mabagala V. R,*** **(Unreported),** where the Court of Appeal discussed at length on the reasoned judgement of a court of law as follows: -

> ***"For a judgement of any court of Justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. Such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at".***

Using this legal benchmark, I respectfully and confidently say that the trial court did live up to this requirement. The judgement of the trial court analyzed the evidence of the prosecution logically and rightly arrived to the conclusion that the appellants were involved in the criminal act. This court arrives to the same conclusion. I am satisfied that the trial magistrate alluded to all features of the case against the appellants and the conviction and sentence of the appellants was according to law. In the circumstances, I am satisfied that there is no reason to decide otherwise than

what the trial court so decided. In conclusion, this appeal is dismissed and the conviction and sentence by the trial court is sustained.

Right to appeal to the Court of Appeal is explained.

Dated at Dar es Salaam this 27th day of June, 2018

P. J. Ngwembe, J.

27/06/2018

Delivered at Dar es Salaam in Chambers on this 27th day of June, 2018; in the presence of the appellant and Mr. Erick Shija State Attorney for the respondent.

P.J. Ngwembe, J

27/6/2018