IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 74 OF 2018

(Appeal from the judgment of the District Court of Mbarali at Rujewa,

Hon. Mkasela, A. M. RM in Criminal Case No. 84 of 2016)

SALUM S/O NGASA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date: 25/04/2019

Judgement date: 13/05/2019

MONGELLA, J.

In the District Court of Mbarali at Rujewa, Salum son of Ngasa @ Charles Wilson @ Uncle Mkomavu, the appellant herein, was charged with armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 as amended by Act No. 3 of 2011. It was alleged that on 26th March 2016 at

about 11:00hours at Machimbo Village within Mbarali District in Mbeya Region Salum Ngasa did steal cash money amounting to T.shs. 2,700,000/- and a motorcycle make Shinely with registration number T 583 BWD and chassis number LXYB 0380 186 valued at T.shs. 1,800,000/- making a total of T.shs. 4,500,000/- property of one Maulid son of Juma. It was also alleged that immediately after or immediately before the event Salum Ngasa did use a knife in order to obtain the stolen properties. Consequently, the trial court found him guilty and sentenced him to thirty years imprisonment and corporal punishment of twelve strokes. In addition, he was ordered to restore back to the victim the motorcycle and T.shs. 2,700,000/- he stole.

In arguing the appeal, Salum Ngasa represented himself while the respondent was represented by Ms. Xavier Makombe, learned State Attorney. The petition of appeal comprised a total of eight grounds, but I conveniently reduced them into six grounds and directed the parties to address the Court on those grounds. The grounds are:

1. *That the identification of the appellant by PW1 and PW2 was improper;*
2. *That Exhibits PE1 and PE2 were wrongly admitted;*

3. *That the caution statement was wrongly admitted;*
4. *That the evidence of PW3 and PW4 was wrongly admitted;*
5. *That the defence case was not considered by the trial court;*
6. *That the case was not proved beyond reasonable doubt.*

When invited by the Court to present his arguments, Salum Ngasa opted first to hear the presentation of the respondent and to reply thereon at the end. However, when invited to reply, he had nothing more to tell the Court, instead he urged the Court to adopt his grounds of appeal as part of his submission.

On the first ground, the appellant claims that there was a dispute on the identification of the appellant which was done by PW1 and PW2. That PW1 and PW2 failed to describe the appellant including the type of clothes he wore before being arrested. In support of this argument, he relied on the case of ***Augustine Kente v. Republic (1982) TLR 122***. Responding to this ground, Ms. Makombe argued that the ground has no base and ought to be dismissed. That PW1 at page 6 to 7 of the trial court proceedings has explained that he knew the appellant before the event. The two met in prison and since they knew each other prior to the event

there was no need of PW1 describing the appellant. Ms. Makombe cited the case of ***Jackson Kihili Luhinda & Musa Abdallah Madebe v. Republic, Criminal Appeal no. 139 of 2007*** and that of ***Raimond Francis v. Republic (1994) TLR 100***, and argued that in all these cases the Court ruled that the question of describing the accused is irrelevant where the victim and the accused know each other.

To my view, the issue of identification has been settled by the Court of Appeal of this land in a number of cases to the effect that where the victim and the accused know each other, the identification thereof becomes that of recognition and thus no description of the accused by the victim is mandatory. See ***Jumapili Msyete vs. Republic, Criminal Appeal no. 110 of 2014.*** However, still the court has to exercise caution to eliminate chances of mistaken identity. In ***Nebson Tete vs. The Republic, Criminal Appeal no. 419 of 2013***, the CAT at page 5 stated:

> *"The situation is different where the evidence of identification is by recognition, which has been held by courts to be more reliable than an identification of a stranger, but caution should as well be observed in that, when the witness is*

purporting to have recognized someone known from before, mistakes cannot be ruled out."

In the case at hand, the records of the trial court show that PW1, the victim and the appellant spent time together in prison and thus knew each other well. On the fateful date, the appellant asked PW1 to escort him to the prison for him to collect his belongings and they went using PW1's motorcycle. On the way when the appellant turned against PW1 and robbed him his motorcycle and T.shs. 2,700,000/-. Under such circumstances the possibility of mistaken identity is certainly ruled out. I therefore agree with the learned State Attorney that this ground lacks merits and thus I dismiss it.

On the second ground, the appellant claims that exhibit PE1, a knife and exhibit PE2, a motorcycle, were wrongly admitted by the trial court. In his petition he argues that the said exhibits were objected by him, but the court went ahead to admit them. Responding to this ground, Ms. Makombe argued that this ground has no base because at page 7 of the proceedings the appellant stated that he had no objection as to the exhibits being admitted.

I have gone through the proceedings of the trial court both typed and hand written and found that the appellant indeed never objected to exhibit PE1 being admitted. However, the records on the same page, that is, page 7, indicate that exhibit PE2 was admitted without PW1 praying to tender it in the first place. PW1 described the exhibit first before it was admitted. The appellant was also not accorded a chance to react on the exhibit before it was tendered and admitted in court. Having observed so, I am also of the view that exhibit PE2 was wrongly admitted and thus I expunge it from the records.

On ground three, the appellant claims that the caution statement was wrongly admitted. The appellant claimed that he objected to the caution statement, exhibit PE3, but the trial magistrate went ahead to admit it without conducting an inquiry as required under the law. He cited the case of ***Masanja Mazambi v. Republic (1991) TLR 200***, whereby the CAT ruled that a trial within a trial has to be conducted whenever an accused person objects to the tendering of any statement he has recorded. Responding to this ground, Ms. Makombe argued that the appellant never raised any objection to the tendering and admission of exhibit PE3. However, she observed that the procedure of admission of the exhibit was

not properly followed. That at page 11 of the typed proceedings of the trial court, it appears the statement was read over before being admitted as exhibit. She cited the case of ***Robinson Mwajisi & Three Others v. Republic (2003) TLR 218*** whereby the CAT stated:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted before it can be readout. Otherwise it is difficult for the court to be seen not to have been influenced by the same."*

She further argued that PW3 in the case at hand wrongly read the statement before the same was admitted, and thus it was difficult for the court not to be influenced by the said statements. She prayed for the Court to expunge the exhibit from the records. I need not say much on this ground. As pointed out by the learned State Attorney, it is very clear at page 11 of the typed trial court proceedings that the statement was read by PW3 without being cleared for admission. I thus expunge it from the court records.

On ground four, the appellant claims that the evidence of PW3 and PW4, both police officers, was wrongly admitted. He claims that the two had personal interest in the case and had planted this case against him. He

claimed to have informed the court of the same when the defence case opened. Responding to this ground, Ms. Makombe prayed for the court to dismiss the ground for lacking merits. She argued that PW3 and PW4 explained to the trial court what they did and there is nowhere in the records where it shows that the said witnesses had personal interest in the case. That if that was the case, the appellant ought to have cross examined the witnesses on the same. Bringing such an issue at this appellate stage makes it an afterthought. She further argued that the records of the trial court show that the appellant never mentioned this issue during his defence, but rather lamented on other police officers and not PW3 and PW4.

The records of the trial court do not indicate any kind of personal interest by the testifying police officers as claimed by the appellant. As rightly stated by the learned State Attorney the appellant in his defence complained about other police officers. He complained about one Athumani and one Dickson who arrested him on another offence and threatened to arrest him for another time. I find no merit in this ground and therefore dismiss it.

On ground five, the appellant claims that the trial court failed to adequately analyse the evidence and totally ignored the defence evidence thereby arriving at a wrong decision. Responding to this ground, Ms. Makombe referred the Court to page 8 of the trial court judgment where it is vivid that the trial court considered the evidence of the defence side. She further argued that the trial court after considering the said evidence saw it had no weight and that is why the court proceeded to convict and sentence the appellant on the offence charged. I agree with Ms. Makombe that the trial court analysed and considered the defence evidence before convicting the appellant. The same is reflected on page 7 to 8 of the trial court judgment. This ground is as well dismissed.

On ground six, the appellant claims that the case was not proved beyond reasonable doubt. Ms. Makombe responded to this ground by arguing that the evidence of PW1 who testified to have been threatened by a knife and robbed T.shs. 2,7000,000/- and a motorcycle by the appellant was enough to prove the case beyond reasonable doubt. She further argued that the evidence of PW4 who arrested the appellant and found him with the motorcycle corroborated that of PW1. Thus the trial

magistrate was right in convicting and sentencing the appellant to thirty years imprisonment.

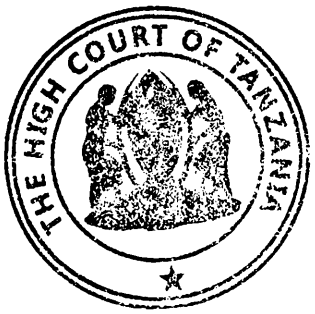
I have considered the evidence of PW1, the victim of the offence. PW1 in his testimony stated that the weapon used in the robbery was a knife with sharp edges on both sides and that the appellant stabbed him with that knife on his back. On cross examination PW1 stated that he did not get injured on his back. To my opinion I see the testimony of PW1 on being stabbed with a sharp edged knife by the appellant and not being injured thereof raises doubts of which should have been cleared by the prosecution during re-examination. Unfortunately it was not. Under normal circumstances one would wonder how could a person be stabbed by a sharp edged knife and not be injured even slightly at the same time. The trial court should have as well addressed this testimony, but it did not.

Having observed as above and having expunged exhibit PE2 and PE3 for being improperly admitted I see no tangible evidence presented by the prosecution to prove the offence of armed robbery beyond reasonable doubt. I therefore uphold this ground of appeal and quash the conviction and sentence of the trial court. I subsequently order for

the immediate release of the appellant from prison custody, unless held for some other lawful cause.

L. M. MONGELLA
JUDGE
13/05/2019

Dated at Mbeya this 13th day of May 2019



L. M. MONGELLA
JUDGE
13/05/2019

Court: Judgment delivered at Mbeya in Chambers on this 13th day of May 2019 in the presence of Ms. Bernadetha Thomas, State Attorney for the Respondent and the appellant appearing in person.

L. M. MONGELLA
JUDGE
13/05/2019