THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 113 OF 2019

(Originating from Criminal Case No. 579/2001 Appeal from decision of the Court of Resident Magistrate's of Mbeya)

EMMANUEL S/O ANDREW @ KANENGO..... .... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of the last order: *20/03/2020*
Date of Judgment: *06/05/2020*

NDUNGURU, J.

In the Resident Magistrate's Court of Mbeya at Mbeya, the appellant and six others were charged with the offence of Armed Robbery contrary to Section 285 and 286 of the Penal Code Vol. 1 of the Laws as amended by Act No. 10/1989. The offence was committed way back in 2001. The background to this case is as follows; The appellant in the company of six others were alleged to have broken into a bar called Yetu Bar and Guest House in Nzovwe area within Mbeya District at Mbeya Region, and did steal Tshs. 71,000/= property of PW4, threatened PW3 and PW4 with a machete and shot one bullet in air in

order to obtain and retain the said property. PW3 who was a watchman testified that on the fateful day, the appellants ambushed them at midnight armed with an iron bar and a gun, biting him, entering to various guests' rooms taking away their money. PW4 testified that she was able to identify the appellant since she followed her in a toilet with a torch and demanded to be given all the money she had. PW5 in his testimony at the trial court said that he knows the appellant since he is his neighbor at Nzovwe. He narrated on how the appellant left him unconscious after biting.

In his defense the appellant and the other co accused denied breaking into the bar. The appellant claimed to have been forced by the police to admit the offence that he did not commit. He narrated on how he was tortured by the police hence he had no other option that to confess the offence at the police. At the end of a full trial, the appellant and the first accused were convicted as charged and were sentenced to serve custodia sentence of thirty years imprisonment each. The other five accused were acquitted by the trial court with the reason that the case is not made against them.

Being aggrieved by the conviction and sentence metered at the trial court, the appellant knocked the doors of this court armed with

eighty (8) grounds. On the hearing date Ms. Zena James the State Attorney, appeared for the respondent while the appellant appeared himself unrepresented. He prayed for the court to allow the state attorney to start to address and letter he would rejoin.

In turn the learned state attorney Ms. Zena apart from venturing to argue into those grounds raised, she consented that the caution statement was wrong admitted, praying for the same to be expunged and she further consented that the trial Magistrate did not consider the defense evidence in his judgment.

In resorting to the 1st and 2nd grounds raised, the learned State Attorney submitted that the appellant was properly identified at the scene based on the electricity light; the time the witness was under observation, and the distance between the appellant and witness. She referred to the court page 17 - 18 of the proceedings. The learned State Attorney added that PW3 had three minutes to observe the appellant with the aid of electric light, his face was not covered and they even exchanged words.

The learned State Attorney further referred to the court at page 14 - 19 of the trial court typed proceedings stating that the evidence of PW3 was corroborated by the testimony of PW4. She also cited the case

of **Nelson Tete vs. Republic**, Criminal Appeal No. 419 of 2019 where the court provides five most important criteria to be considered with regard to the identification of an accused. The learned state attorney admitted that the evidence of PW5 has met the above criterion save for the intensity of light. She went on further to state that the witness knew the accused before the incidence as they lived together at Nzovwe area.

In urging further to first and the second ground, the learned state attorney submitted that PW4 informed the court that she was under observation for a long time and is the appellant who took her out from the toilet and forced her to surrender all the money and to go to other guest rooms. For her, this is the clear evidence that the appellant was identified at the crime scene and during the identification parade. She added that the appellant did not cross examine the witnesses on the issue of identification.

In dealing with the 3rd and the 5th ground, the learned state attorney submitted that the appellant conviction was based on the evidence of PW3 which was corroborated with the testimony of PW3, PW4 and PW5 and that of PW8 praying for the court to disregard this ground of appeal for lack of merit.

With regard to the fourth ground, the learned State Attorney submitted that there was no need for trial within a trial since the appellant never objected his cautioned statement but conceded that the recording of the same did not follow the requisite procedure. The learned state attorney prayed for the same be expunged. The learned State Attorney also when dealing with ground number six that the defense evidence was not considered by the trial court, but prays for the court to revaluate and re-analyze the evidence afresh so as to reach into a conclusion. She referred the court the case of **Adamson Mwaitembo vs. Republic**, Criminal Appeal No. 28 of 2015. It was contention that this court being the first appellate court has the power to retreat the evidence afresh and reach into just conclusion.

In dealing with the seventh and the eighth grounds, the learned State Attorney submitted that the prosecution proved the case against the appellant. She added that the evidence adduced at the trial court proved that the appellant and his fellow invaded the premises of PW5 while armed with panga, iron bars and a gun taking away 71,000/= leaving PW5 injured. She concluded by urging the court to dismiss the appeal for being meritless, the conviction and the sentence be upheld.

On his part, the appellant insisted that his grounds of appeal have merits and prayed for the court to consider them, allow the appeal and set him free at liberty. The issue to be determined after hearing the appellant and the learned State Attorney for the Respondent is whether the appeal has merit or otherwise.

Firstly, I do not entertain any doubt and as correctly submitted by the learned state attorney with regard to ground number 1 and 2 that the intensity of light was not proved. It was the observation of the trial Magistrate that the appellant was identified by eye witnesses, the victim (PW5), PW3 and PW4 at the scene of crime. The records at the trial court shows that, PW4 informed the trial court to have seen the appellant holding a torch in the company of his colleague approaching to the toilet where she was hiding. She explained on how the appellant ordered him to surrender all the money from the counter in the total of 47,500/= which was hidden in a small tin. PW4 at the trial court testified that he managed to identify the appellant through electricity light. The trial Magistrate relied on the evidence of PW3, PW4, PW5 and PW6 who testified to have seen the appellant. The trial court also relied on the testimony of PW3 who is the watchman who knew the appellant before the fateful incidence. PW6 narrated to the court that he heard a fire gun

during that night and also heard a person shouting against the appellant on why he was killing him. The trial court also counted the evidence of PW7 who recorded the appellant caution statement testifying that the appellant had confessed the crime. However, since there is no objection and basing on the prayer made by the learned State Attorney the caution statement will therefore be expunged.

Regarding the visual identification of the appellant at the scene of a crime, it was the evidence of PW3 and PW4 that the appellant and his colleague invaded them at about 01:45 hours at Yetu Bar and Guest House. PW4 testified that she managed to identify the appellant as there was electric light. The same version was given by PW3 who testified the same adding that he knew the appellant before the incident. However, none of the witnesses managed to explain the intensity of such light. Even if we have to believe that PW3 and PW4 were aided by the electric light to see the appellant, still that evidence is not water tight as the intensity of the light was not stated.

The learned State Attorney submitted that the intensity of light was not explained. In the case of **Waziri Aman vs. Republic [1980] L.R.T 250**, the court expounded certain factors to be taken into account

by a court in order to satisfy it on whether or not such evidence is water tight. The court insisted on the following to be observed.

> *"The time the witness had the accused under observation; the distance at which he observed him, the conditions in which such observation occurred, if it was day or night time;* ***whether there was good or poor light at the scene,*** *whether the witness knew or had seen the accused before or not." [emphasis added]*

From the evidence on the trial court's record, PW3 stated that he knew the appellant before the incident. This fact alone could not be sufficient in establishing that he has identified the appellant on the material day and time. The court of Appeal in **Geophrey Isidory Nyasio vs. Republic**, Criminal Appeal No. 270 of 2017 Court of Appeal of Tanzania at Dar es Salaam at page 13 of the typed judgment while confronted with the same matter, stated that knowing a person and identifying him at the scene of a crime where all possibilities of mistaken identity are not eliminated are quite different things. The court went on to state that knowing a suspect before the incident is an added advantage in identification more so after elimination of all possibilities of mistaken identity.

It has observed by plethora's of authorities that it is now a settled principle that in visual identification, the evidence must be watertight.

The court of Appeal in **Scapu John and another vs. Republic**, Criminal Appeal No. 197 of 2008 quoted with approval the case of **Paschal Christopher and 6 others vs. Republic**, Criminal Appeal No. 106 of 2006 (both unreported) it was observed that:

> *"in a case involving evidence of visual identification,* ***no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight....." [emphasis added]***

After having considered the whole evidence on record in particular that of PW3 and PW4, I am of the settled mind that the visual identification evidence adduced by the prosecution witness was frail and cannot be acted upon. It cannot be safely concluded that Pw3 and PW4 who failed to even mention the intensity of light at the scene of a crime were able to identify the appellant on the material date. PW4 even went on to mention that the appellant followed her in the toilet with a torch light. PW4 failed to adduce at the trial court why the appellant was carrying a torch if at all there was electricity light.

To get more emphasis I find it prudent to find shield in the case of **Mengi Paulo Samweli Luhana & Another vs. Republic**, Criminal Appeal No. 222 of 2006 (unreported) where it was observed that:

".....eye witness testimony ...can ... be devastating when false identification is made due to honest confusion or outright lying."

That evidence from PW3 and PW4, whose credibility is not beyond criticism, leaves the court with no lurking uncertainties in my mind that it is patently deficient in cogency. Therefore, it was not proved that the appellant has been perfectly identified by the prosecution witness as a robber.

Upon going through ground number 6 of the appeal and having re-visited the judgment of the trial court, it is true that the trial court did not consider the defense evidence in his judgment. The learned State Attorney during her submission has admitted that the appellant's submission was not considered. However, the learned State Attorney formed a different camp by asking the court to re-evaluate and analyses the whole evidence as the first appellate court.

Basing on the decision from the trial court, it seems to me that the trial Magistrate dealt with the prosecution evidence on its own, and arrived at the conclusion that it was true and credible and as a result, he did not at all throw his eyes at the defense evidence. The trial Magistrate should have dealt with the prosecution evidence and the defense evidence and after analysis of such evidence should reach into a

proper verdict. The appellant was deprived of having his defense properly considered by the trial Magistrate. In the circumstances I think it is unsafe to the let the conviction of the accused stand. The court of appeal in **Hussein Idd and Another vs. Republic [1985] TZCA 5 (1 July 1985) 1986 TLR 166 TZCA was being confronted with the same situation.**

The trial Magistrate believed that the evidence of PW3. PW4 and PW5 to be reliable adding that the evidence of PW6 implicates the appellant. There is no doubt the trial Magistrate was more focused on prosecution evidence leaving away the defense evidence.

There is plethora of pronouncements by the court that non consideration of the defense evidence is fatal and it vitiates the conviction. Some of the celebrated cases are in the case of **Moses Mayanja @ Msoke vs. Republic**, Criminal Appeal No. 56 of 2009, **Yustin Adam Mkamla vs. Republic**, Criminal Appeal No. 206 of 2011 and **Simon Aron vs. Republic,** Criminal Appeal No. 583 of 2015 (all unreported).

Non - consideration of the defense case is also violation of the right to be heard which is safeguarded in the Constitution of the United

Republic of Tanzania, 1977. Article 13 (6) (a) thereof provides in the official version literally translated, the sub-article in English reads:

> *(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*
> *(a) 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.*

Ms. Zena, the learned State Attorney urged this court to enter into the shoes of the trial court to consider the evidence along with the prosecution evidence and make my own findings. The learned state attorney submitted that it will be proper if the court will consider the evidence of both parties afresh and reach into just decision. I am alive of the law that being the first appellate, I am permitted to re-evaluate and re-analyses the evidence and treat the evidence as a fresh and reach into just conclusion. However, upon perusal of the trial court records, I think this move will not bear fruits at all. This is because the prosecution evidence is wanting in cogency.

I have considered this case whose evidence has several shortcomings as it has clearly been shown above. I am therefore settled since the appellant was not clearly identified as stated above then retreating evidence a fresh on the side of the prosecution evidence in this appeal will be nothing rather than a restarting an engine that has no gas on it.

The duty of the first appellate court is not only to summarize but also to objectively evaluate the gist and the value of the defense evidence, and weight it against the prosecution case. I will therefore detain myself in analyzing the defence evidence to see on whether it has weigh to be accorded. The appellant in his defence has clearly insisted that he was forced to admit the offence that he did not commit. Had the trial magistrate considered this defense, he could not take into consideration the accused confession as the basis of his conviction. Since the caution statement has been expunged, there is no any other credible evidence left to prove the case beyond reasonable doubt that the appellant has committed the offence. As it was stated in **Hussein Idd and Another vs. Republic** (supra) that failure to consider the defense case was so serious a misdirection that a conviction would not be safe. The same stance was also taken in the case of **Adamson**

Mwaitembo vs. Republic, Criminal Appeal No. 28 of 2015, Court of Appeal of Tanzania at Mbeya and in the case of **Daniel Severine and two others vs. The Republic**, Criminal Appeal No. 431 of 2018, Court of Appeal of Tanzania at Bukoba.

It is for the foregoing reasons I find that the lower court failed to consider the defense case. Basing on prosecution evidence alone was a serious misdirection that rendered the conviction entered unsafe and untenable. As I find merit in the 1st and the 6th ground of appeal, I allow the appeal, quash the conviction entered and set aside the sentence of 30 years, As a result, I order the release of the appellant from custody unless his continued confinement is in relation to any other lawful cause.

It is so ordered.

D. B. NDUNGURU
JUDGE
06/05/2020

Date: 06/05/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Republic: Mr. Kihaka – State Attorney

B/C: M. Mihayo

Mr. Kihaka – State Attorney:

The appeal is for judgment today, we are ready.

Appellant:

I am ready.

Court: Judgment delivered in the presence of Mr. Kihaka State Attorney for the respondent/Republic and the appellant.

D. B. NDUNGURU
JUDGE
06/05/2020

Right of Appeal explained.