IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 12 OF 2022

(Originating from Criminal Case No. 66 of 2020 in the District Court of Kigamboni at Kigamboni)

TWALIB KHAMIS DIHENGA @ SENGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 21/09/2022

Date of Judgment: 26/09/2022

Kamana, J:

The Appellant, **Twalib Khamis Dihenga @Senga**, was charged before the District Court of Kigamboni with two counts of armed robbery contrary to section 287A of the Penal Code, Cap.16. Upon examination of the

evidence adduced before it, the trial court found the Appellant guilty of both counts. In view of that, the trial court convicted and sentenced him to serve thirty years imprisonment for each count whereby the sentences were termed to run concurrently.

The particulars of the offence in respect of the first count were that on 27th March, 2020 at Lingato area within Kigamboni District in Dar es Salaam Region, the Appellant did steal army combat uniforms, two sets of television, two phones, watch, radio home theatre and Tshs. 950,000 in cash, the properties of one Hamisi Ally Stambuli. It was averred that immediately before and after such stealing, the Appellant threatened Hamis Ally Stambuli with a bush knife with a view to obtaining and retaining the said properties.

With regard to the second account, the particulars of the offence were to the effect that on the above mentioned date, the Appellant did steal a phone, two pairs of gold earrings and a ring, both properties of one Sabrina Mosha. It was alleged that immediately before and after the

stealing, the Appellant threatened Sabrina Mosha with a bush knife for purposes of obtaining and retaining such properties.

At the trial, the Prosecution fielded five witnesses in the names of Hamisi Ally Stambuli (PW1), Sabrina Mosha (PW2), E7870 D/CPL Audiphace (PW3), F7217 D/CPL Khaleed (PW4) and F8639 PC Khamis (PW5). On the part of the Appellant, he did not have any witness other than himself.

Aggrieved, the Appellant has knocked the doors of this Court to seek justice by way of an appeal. The Petition of Appeal contained nine grounds of appeal. However, for the purpose of this Judgment I will not reproduce those grounds herein. Suffice to state that the Appellant was of the view that in convicting him, the trial Court:

1. Relied on incredible and unreliable visual recognition.
2. Failed to properly analyze the evidence adduced by the Prosecution.
3. Relied on a cautioned statement that was recorded beyond the time limit. and

4. Failed to make a proper analysis of the evidence on record and disregarded his evidence.

At this juncture, it is worthy to provide facts that led to this appeal, albeit, briefly. The whole episode took place on 27th March, 2020 around 2.00 am at the place known as Lingato within Kigamboni District in Dar es Salaam Region. It was alleged by the Prosecution that whilst the PW1 Hamisi Ally Stambuli and PW2 Sabrina Mosha were sound asleep and babysitting their infant respectively, the latter felt presence of people lurking outside their house. Being alerted, PW2 peeped through the window and in that course, she saw approximately seven people of whom she managed to identify their neighbour who is now the Appellant. It was further alleged by the Prosecution that PW2 woke up his husband PW1 Hamisi Ally Stambuli who also keeked through the window and saw the Appellant in the company of other people armed with machetes.

It was further alleged by the Prosecution that in the course of peeping through the window, PW1 saw one of the Appellant's fellows knocked the door with a brick. Following that event, PW1 decided to rush to the living room whereby he met with more than five young men in the corridor. It is contended by the Prosecution that PW1 was ordered by the intruders to

stay still while the latters ransacked his bedroom and the children's bedroom. Meanwhile, PW2 was screaming for help before being ordered to enter under the bed with his husband PW1 who also was attacked on his back by the intruders. From there, the looters stole the properties and vanished in a thin air.

At the hearing of this Appeal, the Appellant appeared in person whilst the Respondent had the services of Ms. Dhamiri Masinde, the learned State Attorney. Being a lay person and without legal representation, the Appellant opted for the State Attorney to submit first though he requested this Court to consider the decision of the Court of Appeal in the case of **Watende Sultan Mwingo and others v. Republic**, Criminal Appeal No.233 of 2012.

In her short submission, Ms. Masinde supported the Appeal. She contended that there is a likelihood that the arrest of the Appellant had nothing to do with an offence which the Appellant was charged with. She referred the Court to the proceedings of the trial Court in which PW1 who

was the complainant in the first count testified that he has no knowledge as to when the Appellant was arrested. When probed by the Court as to whether that is a ground sufficient enough to support the appeal, Ms. Masinde was of the firm view in respect of her position though she could not support her stance with any statutory or case law.

Further, it was the contention of the Respondent that the trial Court failed to consider the evidence adduced by the Appellant. Ms. Masinde argued that the trial Court only summarized the evidence of both parties without evaluating the same. In her view, failure to evaluate the evidence especially of the accused person amounts to a miscarriage of justice. Regarding other grounds of appeal, the learned State Attorney opted not to address them.

When asked the way forward with regard to the appeal taking into consideration her arguments, the learned State Attorney submitted that through this appeal, the conviction of the Appellant and sentence should be quashed and set aside. She, further, prayed for the release of the Appellant unless otherwise lawfully held.

On his part, the Appellant in realization that the Respondent is in support of his appeal, he had no many words to say other than supporting what the latter has submitted. He requested the court to set him free.

I entirely agree with the learned State Attorney with regard to failure of the trial Court to evaluate the evidence adduced by the Appellant before it as such failure vitiates the trial process. Upon perusal of the record, it is clear in my mind that the trial Court failed to consider and evaluate the evidence of the Appellant. In a twelve page Judgment, the trial Court did neither reproduce nor evaluate the evidence of the Appellant.

In view of that, the question for determination now is the legal impact of the failure of the trial Court to consider and evaluate the evidence advanced by the Appellant. It is a settled law in this country that consideration and evaluation of the accused's evidence are of paramount importance in reaching a fair trial. In the case of **Yusuph Amani v. Republic**, Criminal Appeal No. 255 of 2014 (Unreported), the Court of Appeal pronounced itself on the importance of considering and evaluating evidence by stating the following:

> `*It is the position of the law that, generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In that regard, failure to consider defence evidence is fatal and usually vitiates the conviction.'*

That being the position, I am of the view that the trial against the Appellant was not fair as his evidence was not evaluated. This is essentially a denial of a right to be heard.

Mindful of the fact that the first appellate court has powers to reconsider and reevaluate the evidence which was not considered and evaluated in the court of first instance, I am now directing myself towards reconsidering and reevaluating the adduced evidence in the trial Court. However, in the course of doing that, I will try to narrow the scope of my analysis within the precincts of the grounds of appeal as stated herein.

It is worthy to state at this point that in so doing I will reconsider and reevaluate evidence advanced by both parties. In doing so, I am guided by the interests of justice for both parties. Before embarking on that journey, may I invite the Court of Appeal in the case of **Watende Sultan and**

Others (Supra). In that case, the Court of Appeal had the opportunity to deal with a judgment of the trial Court which was short of essential ingredients of a judgment as per section 312(1) of the Criminal Procedure Act, Cap.20. In that case, the Court quoted with approval its decision in the case of **Shabani Amiri v. Republic**, Criminal Appeal No. 18 of 2007 (Unreported) where it was observed as follows:

> *'...We think that the decision of the trial court speaks for itself. There is nothing in it to show that the learned trial Honorary Magistrate assessed the evidence at all. This appeal presents us with one of those very rare cases in which this Court, on a second appeal, has to step into the shoes of the High Court and make a proper evaluation of the entire evidence in order to satisfy itself on whether or not the conviction of the appellant was justified or right. That is permissible was clearly spelt out in the case of* ***D.R Pandya V. R [1957]*** *E.A. 336 (Court of Appeal). It was held therein that on a first appeal the evidence must be treated as a whole to a fresh and exhaustive scrutiny and that*

failure to do is an error of law which can be remedied on a second appeal. That has been the stance of the law since then.'

Now, being armed with the powers to reevaluate the evidence as recorded by the trial Court, it is imperative to direct myself to determine whether the trial Court warned itself in applying the evidence of visual identification. In its judgment, the trial Court observed the following and I quote:

'PW1 and PW2 mentioned accused person to be one among the robbers, they said that they peeped through the window and saw him, he was their neighbour who often passed near by(sic) their house and that they were just separated by the road. The witnesses have been staying in the neighbourhood since 2018, it is a reasonable time to get to know him.

They also said that there were not less than eight electricity bulbs installed surrounding the house and that the robbers stood where there was a big Tronic

Bulb which made the area to have enough light to enable them to identify the accused person, given the fact that the witnesses were in the dark room and there was light outside where the robbers stood.

PW1 and PW2 also said that the distance between them and where the accused person was about three to four meters. They were not far apart from each other. Given that scenario, there is no doubt that the witnesses managed to identify the accused person.' (Emphasis added).

In view of the above observation of the trial Court, I am of the position that the trial Court did not warn itself when convicting the Appellant on the basis of the visual identification. This is due to the following reasons:

(a) Records of the trial Court are silent with regard to the time within which PW1 and PW2 managed to peep through the window to the extent of identifying the Appellant in the midst of other persons armed with machetes. What is on the record is the time within which the intruders conducted their mission inside the their

house. It is worthy to note here that the witnesses are in agreement that the Appellant did not enter into their house hence the time spent by the bandits within their house is immaterial so far as the Appellant is concerned. Under normal circumstances, peeping of the PW1 and PW2 could not take enough time to enable them to identify the Appellant in such circumstances of impending armed robbery;

(b) Records of the trial Court shows that PW1 shortly after the incident reported the matter to his neighbours. However, it is not shown in the record that he or PW2 intimated to their neighbours that one of the suspects is their neighbour (the Appellant).

Much as I agree with the facts that there was enough light to enable PW1 and PW2 to recognize a person; the distance between them and the intruders was about three to four meters; and the Appellant was very known to them, I am not convinced that there was visual identification in the eyes of the law. In this regard, I premise my position on the fact that PW1 and PW2 did not at any time during the trial state the time they spent to observe the Appellant and his alleged fellows. Time spent in observing the accused person in a night time regardless of distance, light and

acquaintanceship is essential to warrant a proper visual identification. There are so many instances in a normal life where persons fail to identify their acquaintances even in a broad day light.

The Court of Appeal has. in its innumerous decisions, accentuated the importance of time spent in observing the accused to warrant visual identification. In the celebrated case of **Waziri Amani v. Republic** [1980] T.L.R. 250, the Court of Appeal laid down cardinal elements to be proved before the evidence of visual identification to be banked on in convicting an accused. Among those elements is the time the witness had the accused under observation.

Further, in their evidence, PW1 and PW2 did not mention to any person they encounter immediately after the incident that the Appellant was amongst the robbers. It is trite law in relation to visual identification that a witness should be able to mention the accused person he has identified to any person he firstly encounters and relates the incident.

According to the records, PW1 testified that after the bandits ran away, he followed them but his efforts proved futile. He then decided to go to the Appellant's house where he found it locked. Upon returning to his house,

PW1 contended that he found his neighbours and they tried to go after the bandits in vain. From that testimony, it is crystal clear that PW1 did not mention the name of the Appellant to his neighbours, being the first persons, he met and related the incident.

The Court of Appeal has an apt time to give a thought on the importance of a witness to name a suspect at an earliest possible time. In the case of **Marwa Wangiti and Another v. Republic** [2002] T.L.R 39, the Court of Appeal observed as follows:

> *'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 unexplained delay or complete failure to do so should put a prudent Court to inquiry.'*

At this juncture. I am inclined to hold that visual identification was in this case not proved beyond reasonable doubt in the absence of the evidence as to the time spent by the witnesses in observing the Appellant and failure of witnesses, particularly PW1 to name the Appellant as a culprit at the earliest possible opportunity. In view of that, the doctrine of common

intention against the Appellant was wrongly applied as there was no proof of his participation in the commission of the alleged offence.

Continuing with the reevaluation of the evidence adduced in the trial Court, the records of the trial Court shows that the evidence of **PW5** was to the effect that he arrested the Appellant at his home on the ground that he was wanted for armed robbery. According to this witness, he arrested the Appellant on account of incident which was reported on 27th March, 2020 which took place at Lingato. The arrest was effected on 17th May, 2020.

In my view, the evidence of PW5 has entirely failed to link the Appellant and the offence he was charged with. This is due to the fact that the evidence did not disclose whether the Appellant was arrested in relation to the armed robbery which was alleged to have been committed against PW1 and PW2. The mere fact that his arrest was in relation to a reported incident that took place at Lingato on 27th March, 2020 does not convince my mind to link the Appellant with the incident that took place against PW1 and PW2 in the absence of the linkage between the Appellant and the offence which is alleged to have been committed against PW1 and PW2.

In this regard, I agree with the learned State Attorney that there is a likelihood that the Appellant was arrested for another offence other than the one he was charged with. In the records, there is no any hint that PW1 or PW2 mentioned the name of the Appellant when they reported the matter at the Police Station. In view of that, I hold that the evidence of PW5 has nothing to do with the Appellant so far as the PW1 and PW2's complaints are concerned.

To substantiate this position, it is of utmost importance to discuss the evidence of the Appellant during the trial. Briefly, it is the defence case that the Appellant was arrested on 20th April, 2020 at New Palace Bar in Mikwambe, Kigamboni, Dar es Salaam. The facts that led to his arrest, according to him, relate to the brawl that ensued between himself and other two persons. The source of that brawl is an attempt of those two men to snatch a girl he had a company with while taking a booze. Following that fight, it is alleged by the Applicant, police came and arrested him for causing chaos. He was taken to Kibada Police Station where the two men told police officers to lock him up. From his accounts, the Appellant was not set free until he was arraigned in the trial Court for the offence of armed robbery.

This kind of an evidence may insinuate that the Appellant was framed in the case in which he was convicted as it was contended also by the learned State Attorney. In a situation like this, evidence in relation to the arrest of the Appellant was supposed to be watertight as to the time, dates and to which complainant(s) the offence leading to an arrest relates to. The evidence in relation to the arrest as provided by PW5 is weak as it fails to establish the link between the Appellant and the alleged armed robbery committed against PW1 and PW2. In such circumstances, the Appellant should have a benefit of doubt.

In relation to a cautioned statement, during the trial, the Appellant contended that his statement was taken after being subjected to torture. In view of that assertion, the trial Court conducted an inquiry and after such inquiry it was satisfied that the Appellant confessed to have committed the offence without being tortured. In reaching that decision, the trial Court relied on the evidence of PW3 and PW4. For the purpose of determining this Appeal, I will not discuss whether the trial Court was wrong or right in admitting the cautioned statement despite the Appellant's objection.

However, upon perusing the records and the Memorandum of the Appeal, it has come to my knowledge that the recording of the cautioned statement was conducted beyond the prescribed time. According to section 50 (1) (a) of the Criminal Procedure Act, Cap. 20, a period available for interviewing persons is four hours or other extended period as per section 51. From the records, the purported cautioned statement was taken from 9.00 AM to 10.00 AM. Same records establishes that the Appellant was apprehended at 3.00 AM. This means that his statement was recorded five hours after the arrest without cause be furnished in the records.

The Court of Appeal in the case of J**amali Msombe and Nicholaus Bilali @Myovela v. Republic**, Criminal Appeal No.28 of 2020 (Unreported) quoted its position with regard to the applicability of section 50(1) of the CPA in the case of **Ramadhani Mashaka v. Republic**, Criminal Appeal No. 311 of 2015 (unreported) as follows:

> *"It is now settled that a cautioned statement recorded outside the prescribed time under section 50 (1) (a) and (b) renders it to be incompetent and liable to be expunged."*

Borrowing a leaf from the Court of Appeal, I expunge the cautioned statement.

In the light of the foregoing, I find the case of the Prosecution against the Appellant was not proved beyond reasonable doubt. Accordingly, this Appeal his hereby allowed in its entirety. I consequently quash the conviction of the Appellant and set aside the prison sentence meted out by the trial Court. The Appellant is to be released forthwith from the prison unless he is otherwise lawfully held. It is so ordered. Right of appeal explained.

KS KAMANA

JUDGE

26/09/2022

Court: Judgment delivered in the presence of both parties.