IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 216 OF 2011

JUMA HAMIS KABIBI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza

(Sumari, J.)

dated the 30th day of April, 2009

in

Criminal Appeal No. 113 of 2006

.....

JUDGMENT OF THE COURT

28th Nov. & 11th Dec. 2013

MUSSA, J.A.:

In the District Court of Nyamagana, the appellant and another were arraigned for Armed robbery. During the trial, the appellant stood as first accused, whereas his co – accused, namely Baziri John was indicted as second accused. At the conclusion of the trial, the second accused was found not guilty and acquitted, but the appellant was convicted and sentenced to thirty (30) years imprisonment. His appeal to the High Court was dismissed in its entirety (Sumari, J.), hence this second appeal.

In his memorandum of appeal, the appellant has enlisted seven points of grievance. Ahead of a consideration of his points of contention,

we deem it instructive to explore the factual setting giving rise to the arrest, arraignment and subsequent conviction of the appellant.

To begin with, from a total of five witnesses, the case for the prosecution was to the effect that on the 22nd October, 2002 at Bugando Mission, within Mwanza District, the appellant in the company of two others, stole a sum of shs. 40,000/= from the person of Rosemary Juma (PW3). Evidence was to the effect that, around 7:30 p.m., on the fateful day, Rosemary was strolling from her working place towards home. As she walked past an area called Makaburini, she was suddenly rounded up by three bandits and, upon being threatened with a dagger (sime), Rosemary was eventually dispossessed of the sum of shs. 40,000. Having accomplished their mission, the three thugs ran clear of the scene. From the ordeal. Rosemary recollected that one of the bandits was wearing a white cap. Whilst still at the scene of the robbery, she was hinted by a bystander that the robbers might have gone to a certain Eliza's Bar. Rosemary proceeded straight there and, indeed, she, allegedly, located the appellant who was drinking beer at Eliza's Bar. According to her, the appellant is the very person who was clad with a white cap at the time of the robbery. By then, he was without the cap and, going by Rosemarys' account, at the Bar, he was in the company of several persons who ran away upon exclaiming the word: "*Limesanuka.*" Somehow, the lady succeeded in grabbing the appellant and, as she held him tightly she was shouting:-

Mwizi, Mwizi, Mwizi wangu huyu hapa.

Elias Helandogo (PW1), who was running a steak barbecue within the vicinity, came to her assistance and joined the lady in the physical

apprehension of the appellant. Soon after, the apprehended man drew out a dagger from his trousers pocket and, seeing the weapon, Elias and Rosemary gave up and let go of him. Aside from Rosemary and Elias, another witness, namely, Chacha Robert (PW2) also testified on what happened at Eliza's Bar. Only, he did not mention the detail about Rosemary and Elias grabbing and holding the appellant. All he said was that upon being implicated by Rosemary, there was an attempt to arrest the appellant, but the latter resisted by drawing out the dagger. Next, the appellant ran away and, as told by all the three witnesses, he "*disappeared into the darkness.*" Unlike Rosemary and Elias who did not advance claims of prior knowledge of the appellant, Chacha claimed that he knew him thoroughly well, as a resident of the locality and, as he put it, he also knew him as a thief. Ironically though, upon the alleged implication and the subsequent disappearance of the appellant, Chacha did not report the occurrence to the police or local authorities. He did nothing till four days later, on the 26th October 2002, when he, again, spotted the appellant drinking *Pombe* at a club. This time, Chacha, in the company of five others, managed to arrest appellant after soliciting the assistance of the chairperson of the locality.

Upon arrest, the appellant was initially interviewed by the investigation officer, No. E 1242 – Detective Constable Sangai (PW4). Before him, he purportedly orally confessed involvement in the robbery and also implicated two others, namely, Nyamanche and Wabogo. But, it was another officer, No. D. 2402 – detective Corporal Boniface (PW5), who recorded the appellant's alleged confessional statement that was adduced into evidence (exhibit P1) in the wake of a so – called trial

within trial. As it turned out, the mini trial was exclusively comprised of the evidence of two prosecution witnesses, following which the cautioned statement was adduced without recourse to evidence from the defence. Thereafter, the prosecution drape was drawn closed.

In reply, the appellant commenced his version by informing the trial court that he operates for gain by sewing and selling clothes at Miti Mirefu. On the 27th October, 2002 he was at his usual place of business when, suddenly, three vigilantes who were in the company of Rosemary, confronted and apprehended him. Thereafter, the appellant was taken to a police station where he was enquired about Rosemary and then subjected to untold beatings. Eventually, he was forced into signing the cautioned statement following a death threat. On the 29th October, 2002 the appellant was formally arraigned for the offence giving rise to this appeal. In short, he completely disassociated himself from the prosecution accusation. Finally, in an impromptu rejoinder, the appellant claimed that Rosemary was, actually, his ex – girlfriend and that she fabricated the accusation on him as a way of revenge following her estrangement.

As already intimated, on the whole of the evidence, the trial court was fully impressed by the entire version told by the prosecution witnesses, hence the conviction and sentence. Again, as we hinted above, the verdict of the trial court was upheld on the first appeal. As it were, both courts below found that the evidence of identification sufficiently implicated the appellant. In addition, the lower courts took into consideration the confessional statements, allegedly, made by the

appellant to the two police officers. At the hearing before us, the appellant fully adopted his memorandum of appeal, without more. The respondent Republic had the services of Mr. Yamiko Mlekano, learned State Attorney, who resisted the appeal. With seven points of grievance, the appellant's memorandum of appeal is considerably lengthy but, in our view, the same may, conveniently, be condensed into two substantive grounds, namely:-

(1) *That the lower courts erred in their reliance on the confessional statements which were improperly adduced into evidence.*

(2) *That there was insufficient evidence of identification of the appellant.*

Dealing with the first point of grievance, it should be recalled that the trial within – trial was conducted in a rather unprecedented manner, in that the appellant was not accorded a hearing ahead of the admittance of exhibit PW1. When we drew the attention of Mr. Mlekano to this anomaly, he readily conceded that the cautioned statement was improperly adduced into evidence. On the premises, the learned State Attorney urged that the statement should be expunged from the record of the evidence. Mr. Mlekano did not press for more, much as, the cautioned statement was, just as well, belatedly recorded and, additionally, the recording officer did not indicate the time when the interview ended. In the same vein, we are constrained to fault the trial court for accessing and relying upon the oral confession which was, purportedly, administered from the appellant by Constable Sangai (PW4). At the rank of Constable,

Sangai was, undoubtedly, not empowered by the law, as it then stood, to administer a confession.

As we now address the appellant's second point of grievance, we are fully alive that, on a second appeal, we are only supposed to deal with questions of law and, as such, we are not expected to interfere with the findings of fact by the two courts below. However, it is now settled that a second appellate court would definitely interfere where there is a clear misapprehension of the evidence or, as the case may be, where the courts below demonstrably acted under a wrong principle of law or practice. As we shall shortly demonstrate, we are of the respectful view that owing from a cursory approach, both courts below completely misapprehended the nature, quality and status of the evidence pertaining to the identification of the appellant.

That said, it is instructive to observe that, from the record of the evidence, Rosemary (PW3) was the only witness who advanced claims of having identified the appellant at the scene of the alleged crime. The other witnesses, that is, Elias (PW1) and Chacha (PW2), were actually brought to the foreground by Rosemary after she implicated the appellant to them. Thus, to that end, the identification of the appellant at the alleged scene of the crime was, exclusively and entirely, upon the evidence of Rosemary. On this issue, Mr. Mlekano commenced his submission by attempting to paint a rosy picture on the conditions under which the identification was made, that is, by asserting that the visibility at the scene was good. The learned State Attorney was set upon advancing a theory, which apparently won the

sympathy of the first appellate court, to the effect that, at this locality, sunset comes about late during the month of October. It was a theory which Mr. Mlekano insistently urged us to take judicial notice. Nonetheless, viewed from the witnesses' account that the appellant actually "*disappeared in the darkness*" as they attempted to arrest him, the theory is pure conjecture that cannot find purchase.

In any event, it is beyond question that Rosemary, who claimed that the appellant was a complete stranger, was not accorded an opportunity to identify the latter in an identification parade. To say the least, her implication of the appellant was nothing more than a dock identification. In this regard, we reiterate what we stated in the unreported Criminal Appeal No. 172 of 1993 – **Mussa Elias and Two Others v. Republic**:-

> " *... dock identification of an accused person who is a stranger, has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at all.*"

Thus, unlike the two courts below, we are of the settled view that, in the absence of the parade, Rosemarys' identification of the appellant was most unreliable and of little or no value at all. Surprisingly, Mr. Mlekano hesitated long before conceding to this obvious eventuality. Even as he grudgingly gave up, the learned State Attorney insisted on supporting the conviction on account of what he perceived as an unbecoming conduct of the appellant in the immediate aftermath of the

occurrence. Mr. Mlekano also sought to capitalize on the appellant's alleged implausible testimony, during the trial. On the first front, the learned State Attorney had reference to an allegation that the appellant exclaimed the word "*limesanuka,*" in the face of Rosemary's accusation. To Mr. Mlekano, the exclamation was self-incriminatory. With respect, without having to explore the import of the word, upon a closer scrutiny of the evidence, Rosemary did not quite specifically tie the appellant on the exclamation. To be sure, this is what she told the trial court:-

> *"I found them drinking beer. At that time the 1st accused was already put off his cap. When they saw me they ran away and they said "limesanuka."*

From the foregoing extract, one cannot assert, with certainty, that it was the appellant who made that exclamation. On the second front, learned State Attorney viciously attacked the appellant for not giving a true account in his defence. Again, it is quite apparent that the learned first appellate Judge shared this sentiment when she deplored the appellant for alleging, in the memorandum of appeal, that Rosemary was not known to him:-

> *"Appellant testified that PW3 was his girl friend. Perhaps appellant has forgotten that in his defence he told the Court that he told the police that Rose Juma was his girl friend and he insisted this to the court when XXD but in the above ground he is contemplating that he does not know PW3. This shows clearly how the appellant is incredible person. He is like a chameleon, I must say. If he has managed to change version before a court of law to*

that extent, I find not strange to hear him complaining that he was beaten and forced to sign Exh. P1. All these factors if considered are enough to establish that the appellant was correctly identified as one who robbed PW3."

In the context, quite obviously, the Judge erroneously concentrated her attention, not on a affirmative prosecution case, but, rather, on exhibiting the falsity of the appellant's account which, unfortunately, turned out to be a factor in establishing the latters' guilt. With respect, a criminal accusation ultimately stands or falls on the strength of the prosecution case. Where the prosecution case is itself weak, it cannot be salvaged from the tatters of the defence. It is quite plain that, false statements made by an accused person, if at all, do not have substantive inculpatory effect and cannot be used as a make weight to support an otherwise weak prosecution case. The fact that an accused person had not given a true account only becomes relevant, to lend assurance, in a situation where there already is sufficient prosecution material. (See **Pyaralal Malaram Bassan** v R [1960] EA 854). That was, certainly, not the case here.

When all is said and done, this appeal succeeds and, accordingly, the conviction and sentence are, respectively, quashed and set aside. The appellant is to be released forthwith unless if he is held in prison custody for some other lawful cause.

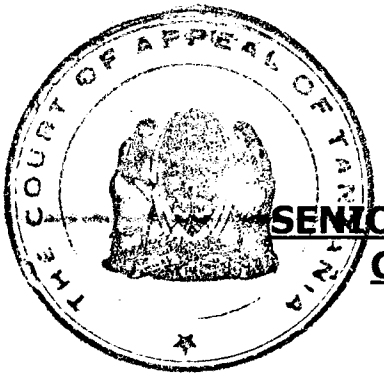
DATED at MWANZA this10th day of December, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



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