IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 132 OF 2015

KURUBONE BAGIRIGWA & 3 OTHERS………….....……………APPELLANTS

VERSUS

THE REPUBLIC…………………………………………………….RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

Dated 11th Day of March, 2015
in
Criminal Appeals No. 129 and 130 of 2013 and 9 and 119 of 2014

JUDGMENT OF THE COURT

26th 28th October, 2016

MUGASHA, J.A.:

The appellants were charged with two counts of armed robbery contrary to section 287(A) and the third count of destroying evidence contrary to section 109 of the Penal Code.

It was alleged in the first two counts that, on 25/11/2012 at 02.00hrs all four appellants (KURUBONE S/O BAGIRIGWA, BAKARI S/O IBRAHIMU, DANIEL S/O NGARAMA @ YOHANA and JOHN S/O NHADULA) accompanied by another person (YUSUPH S/O

NASSORO) at Buseresere village within Chato District in the region of Geita, did steal properties of ALEX s/o NZILUHILE @ MSASI and DANIEL s/o MARABA and immediately before such stealing they threatened them with "domestic weapons" in order to obtain the said properties.

In respect of the third count, the appellants and the said YUSUPH S/O NASSORO, on the same date, time and place after stealing a motor cycle, willfully did remove its plate No. T.641 BED and numbered it with Reg. T.386 AUU with intent to prevent it from being used in evidence.

The prosecution paraded seven witnesses and four documentary exhibits namely: a motor vehicle registration card (exhibit P1), a Vehicle Inspection Report (exhibit P2) and the cautioned statements of the 2nd and 3rd appellants, (exhibits P4 and P5 respectively.

A brief account underlying the conviction of the appellants is briefly as follows: On 25/11/2012 at 08.00hrs, armed bandits broke into the house of PW1 ALEX NZILUHILE and his wife COSTANCIA CHARLES (PW2). The bandits assaulted them and made away with an assortment of items namely, cash money one Nokia mobile phone and a motor cycle make SUNLG with registration number T 641 BED – T 386 AUU the properties of PW1 and PW2, COSTANCIA CHARLES. PW1 claims to

have identified the appellants at the scene of crime and reported the matter to the Police and PW2 recalled to have identified the appellants as they knew them as residents of Buseresere. PW7 also testified that, on the same date and time the armed bandits stormed into his house and took away an assortment of items including, 8 grams of gold, one Nokia mobile phone and cash money all with a total value of Tshs 660,000/=. PW2 also claimed to have identified the appellants because of the solar light and he knew them as residents of Buseresere. PW4 F.1851 D.SGT MAJANI recalled to have received names of the appellants from PW1. He claims to have arrested the appellants following the confession statement of the 3rd

appellant who mentioned the 1st and 4th appellants, and they managed to

recover the stolen motor cycle with its number changed in possession of the 5th accused who is not among the appellants.

All the four appellants were convicted on the count of armed robbery. However, the trial magistrate did not specify if he had convicted them on two counts of armed robbery. They were each sentenced to imprisonment to a term of 30 years. The 5th accused was convicted on the third count and given a sentence of conditional discharge for one year under section 38(1) of the Penal Code.

The appellants unsuccessfully appealed to the High Court where the appeal was dismissed. Although the first appellate court initially made a finding that the appellants were not properly identified at the scene of crime, later she changed her stance and found that the appellants were identified at the scene of crime and that the 2nd appellant's confession facilitated the recovery of the stolen motor cycle.

Aggrieved, the appellants have preferred this appeal to the Court. Each appellant filed his own Memorandum of Appeal with almost identical grounds. Upon perusal of the Memoranda, we have found out that their complaints hinge on three main grounds, namely: -

"(1). That, the appellants were not properly identified at the scene of crime.

(2). That, the cautioned statements were wrongly acted upon to convict the appellants.

(3). That, they were not found in possession of the stolen properties."

At the hearing, the appellants appeared in person. Ms. Martha Mwadenya, learned Senior State Attorney, represented the respondent Republic.

The appellants opted to initially hear the submission of the learned Senior State Attorney. Ms. Mwadenya initially opposed the appeal. However, on probing by the Court, she conceded and supported the

appeal on grounds that, One, the evidence of visual identification of the appellants is weak because PW1 did not state the nature of the light present at the scene which aided him to properly identify the appellants while the remaining identifying witnesses (PW2 and PW7) apart from stating that there was solar light they fell short of stating its intensity. Two, the available documentary evidence is not sufficient to prove if the stolen and found motor cycle belonged to the complainant. Three, as the cautioned statements were not read out after being admitted into the evidence, such evidence was wrongly acted upon to convict the appellants.

The Court then suo motu raised another point, whether the appellants were convicted for the charge to which they had pleaded as required by law. the learned Senior State Attorney conceded by submitting that the substituted charge was never read over to the appellants after the 6th accused was added, which was irregular. Since this is a point of law the lay appellants had nothing useful to add.

When the accused appear in court section 228(1) of the Criminal Procedure Act, requires:

> “the substance of the charge shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge.”

Section 228 of the Criminal Procedure Act, imposes a mandatory requirement for a plea to be taken before proceeding with the hearing of the case. Failure to comply with that fundamental requirement of the law makes the proceedings illegal and renders the trial a nullity. (See NAOCHE OLE REBILE v. REPUBLIC (1993) TLR and ATHUMANI MKWELA AND 2 OTHERS VS REPUBLIC, Criminal Appeal No. 173
of 2010 (unreported).

However, under section 234 of the Criminal Procedure Act, it is permissible to amend the charge. Whenever the charge is amended, in terms of section 234 (2) (a) of the Criminal Procedure Act, the court is duty bound to take new pleas on the amended charge. It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do so renders a trial a nullity. (See THUWAY AKONNAY VS. REPUBLIC (1987) TLR 92).

> In AKBARALI DAMJI VS. REPUBLIC (2) TLR 137 the Court categorically stated that, the arraignment of an accused is not complete until he has pleaded. Where no plea is taken the trial is a nullity. The omission is not curable.

In the matter under scrutiny, the record shows that the appellants were arraigned and their pleas taken on 28/11/2012. On 3/12/2012, the charge

was substituted to add the 6th accused person. The charge was read over to him alone and he was required to plead. The appellants were not required to plead to the new charge. This was irregular because in the light of section 234 (2) (a) of the Criminal Procedure Act and the THUWAY AKONNAY's case, once a charge is amended or altered, the new altered charge must be read over to the accused person or persons, who must be required to plead thereto, failure which renders the trial a nullity.

In the premises, it would be proper for the Court to invoke revisional powers under section 4(2) of the Appellate Jurisdiction Act (CAP. 14 R.E. 2002), to nullify all the proceedings in the courts below and order a retrial. However, a retrial will not be ordered for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. A retrial should be made where interests of justice so require. (See FATEHALI MANJI VS. THE REPUBLIC (1966) EA, 341).

We have now to consider if there is sufficient evidence to warrant ordering a retrial.

As the alleged robbery incident occurred at 02.00hrs midnight and since some witnesses recounted that there was solar power, it is imperative to determine if the appellants were properly identified at the scene of crime.

In CHOKERA MWITA VS. REPUBLIC, Criminal Appeal No. 17 of 2010 (unreported) the Court was confronted with a similar issue; the Court held:

> "In so far as the latern lamp is concerned, neither PW1 nor PW3 spoke of the intensity of its light, thus leaving unattended the issue of likelihood of mistaken identity."

The Court further held:

> "In short, the law on visual identification is well settled. Before relying on it the Court should not act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely water tight…"

In ISSA S/O MGARA @ SHUKA VS REPUBLIC, Criminal Appeal No. 37 of 2005 (unreported), the Court said that it is not sufficient for the witnesses to make bare assertions that "there was light". The Court held:

> "It is our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in sufficient details on the intensity of the light and the size of the area illuminated."

This requirement was underscored by the Court in SAID CHALLY SCANIA VS REPUBLIC, Criminal Appeal No. 69 of 2005 (unreported).

In the present matter PW1, PW2 and PW7 were all at the scene of the crime. However, PW1 who claims to have identified the appellants, his evidence did not state he nature of light which aided him in the proper identification of the appellants. PW2 and PW7, who all stated that there was solar light, fell short of stating the intensity of such light.

In the light of what the Court said CHOKERA MWITA VS. REPUBLIC (supra) and ISSA S/O MGARA @ SHUKA VS REPUBLIC

(supra) in the case at hand, since the intensity of solar light was not

explained, the possibilities of mistaken identity were not eliminated. It was not enough for the witnesses to merely say that, they knew the appellants who are residents of Buserere, without stating as to how they managed to identify the appellants at the scene of the crime. This is because it is trite law, even in recognition cases, mistaken identity is possible. (See ISSA S/O MGARA @ SHUKA VS REPUBLIC (supra).

In a nutshell, the evidence of PW1, PW2 and PW7 on visual identification of the appellants does not rule out the possibilities of mistaken identity which is unsafe to base a conviction.

The appellants' complaint on the improper reliance of the cautioned statements of Daniel Ngarawa (3rd appellant) and Bakari Ibrahim (2nd appellant), is well founded. This was irregular as conceded by the learned Senior State Attorney.

It is settled law that whenever a confession statement is intended to be introduced in evidence, it must be initially cleared for admission and then actually admitted before it can be read out. (See WALII ABDALLAH KIBUTWA AND TWO OTHERS VS REPUBLIC, Criminal Appeal No. 181 of 2006 (unreported). In LACK s/o KILINGANI VS. REPUBLIC, Criminal Appeal No. 405 of 2015 (unreported), the Court categorically held that failure to read the contents of the cautioned statements of accused persons after being admitted is fatal. This is because although the record shows that, the statements were admitted without objection, both the maker and their co-accuseds had inherent right to know the contents of those statements if they were to effectively cross examine on them. We have to emphasise this because the right to adversarial proceedings which is one of the elements of fair hearing within Article 13 (6) (a) of our Constitution means that each party to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed or made with a view to influencing the court's decision.

At pages 14 and 20 of the record, the cautioned statements of the 2nd and 3rdappellants were improperly admitted as exhibits P4 and P5 into the evidence. However, they were not read out to the appellants.

As the cautioned statements were improperly admitted into the evidence before the court they were wrongly acted upon by both the trial and first appellate courts to convict the appellants. We accordingly, discard them from the record.

As to whether the doctrine of recent possession was properly invoked to establish that the appellants were found with the stolen motor cycle, in JOSEPH MKUMBWA AND ANOTHER VS. REPUBLIC, Criminal Appeal No. 94 of 2007 (unreported) which was followed by the case of ALEX JOSEPH KASHARANKORO VS. REPUBLIC, Criminal Appeal No. 156 of 2013 the Court was of a considered view that:

> "For the doctrine of recent possession to apply as a basis of conviction it must be positively proved that, First, that the property was found in possession of the suspect. Second, that the property is positively the property of the complainant. Third, that it was recently stolen from the complainant and lastly, that the stolen thing in the possession of the accused constitutes the subject of the charge against the accused. It must be the one that was stolen or obtained during the commission of the offence charged".

In the present case, PW1 who claimed to be the owner to the stolen motor cycle did not mention any peculiar mark which made him to identify that the stolen and found motor cycle belonged to him. Instead, he tendered the Registration Card which bears the name of the owner to be one GORDIAN RICHARD MGEMA and which identified it by CHASSIS NUMBER LBRSPJB 527901521 and the make is SUNLG motor cycle. PW1 further produced the sale agreement (exhibit P2) which not only failed to mention the CHASSIS NUMBER or engine number but also indicates that PW1 purchased the motor cycle from one ERNEST MGEMA. The inspection report (exhibit P3) which was prepared, after the recovery of the motor cycle, does not state the CHASSIS NUMBER or engine number of the motor cycle which was recovered and concludes that it had forged plate number.

Apart from the Chassis Number not being stated in the sale agreement and even the charge sheet, the previous owner is not the one stated in the Registration Card which cast doubt as to who was the previous owner and actually sold the motor cycle to PW1. Besides, ERNEST MGEMA was not called as a witness to clear the doubt.

With the said shortfalls and in the absence of any peculiar marks on the stolen motor cycle and the distinct engine or CHASSIS NUMBERS

which were not in the sale agreement, the motor cycle inspection report and the charge sheet, the prosecution miserably failed to prove if the recovered motor cycle found in possession of the appellants belonged to PW1 and was one of the properties robbed. These discrepancies are grave and the doctrine of recent possession was wrongly invoked to convict the appellants.

In view of the deficient prosecution evidence, we do not find it worthy to order a retrial. Having invoked our revisional powers we quash the convictions and set aside the sentences and order the immediate release of the appellants from the prison unless they are otherwise lawfully held.

DATED at MWANZA this 28th day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL