IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 76 OF 2018

SAMSON CHACHA @ MWITA PIUS @ KIPEPEO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, District Registry at Mwanza)

(De-Mello, J.)

dated the 28th day of February, 2018
in
Criminal Appeal No. 199 of 2017

JUDGMENT OF THE COURT

8th & 12th July, 2022

KEREFU, J.A.:

This appeal stems from the decision of the Resident Magistrate Court of Mara where the appellant, Samson Chacha @ Mwita Pius @ Kipepeo and another person, who is not a party to this appeal, were jointly charged with two counts of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2002], (the Penal Code).

In the first count, it was alleged that on 28th January, 2016 at CN Street within Bunda District in Mara Region, they stole TZS 4,217,500.00 the property of Alex Nyasatu Iganja and immediately before and after stealing they used a gun to threaten Elizabeth Masagi in order to obtain and retain the said property.

On the second count, it was alleged that on the same date and place, they stole TZS 2,500,000.00, one mobile phone make Nokia worthy TZS 60,000.00 and airtel till containing TZS 198,000.00 all making a total of TZS 2,758,000.00 the properties of Mirembe Stephen and immediately before and after stealing they used a gun to threaten him in order to obtain and retain the stolen properties.

The appellant and his co-accused denied the charge and as a result the case proceeded to a full trial. During the trial, the prosecution relied on the evidence of ten (10) witnesses, seven (7) documentary exhibits and three (3) physical exhibits. The appellant and his co-accused relied on their own evidence as they did not summon any witness. At the conclusion of the trial, the learned trial Magistrate was satisfied that the case against them was proved to the required standard. As a result, they were each convicted as charged and sentenced to thirty (30) years' imprisonment term.

The brief facts of the case giving rise to this appeal as obtained from the record states that: On 28th January, 2016 at around 19:45 hours at the CN Street within Bunda District in Mara Region, the appellant and his co-accused invaded two shops belonging to Alex Nyasatu Iganja and Mirembe Stephen (PW7) respectively. It was the evidence of Juma Lucas (PW4) who was working at Alex Nyasatu

Iganja's shop that, on that fateful date, while doing his daily reconciliation, he suddenly heard a gunshot and when he tried to go out to see what was happening, he encountered the robbers who ordered him to go back inside the shop and demanded for money. PW4 said that, at a gunpoint, he gave them TZS 4,217,500.00. He managed to identify them by aid of a tube light which was illuminating inside and outside the shop. That, the one who entered inside the shop was black with beards and a bald head, while the other one, who was outside armed with an axe, was brown and tall. Having accomplished their mission, the robbers left the scene of crime.

In her testimony, Elizabeth Masagi (PW5) who was PW4's co-worker in that shop, supported the narration made by PW4 and she added that, the walls of the shop were made-up with woods and glasses and thus it made easy to see inside and outside the shop. PW4 and PW5, both testified that they saw the robbers for the first time at that robbery incident.

On his part, Mirembe Stephen (PW7), the owner of the second shop, testified that, on the fateful date at around 19:30 hours while in his shop, he was also invaded by a robber who was armed with an axe and demanded for money. He gave him TZS 2,500,000.00, two mobile

phones one valued at TZS 198,000.00. PW7 said that, he managed to identify one of the robbers through the aid of electricity tube light which was bright enough, although he also stated that he saw the said robber for the first time at that shop and the incident took about five minutes.

The incident was reported to the police where the police mounted an investigation. It was the testimony of ASP Daud Mathew (PW6) that, on 12th February, 2016 while at Bunda he received a phone call from the OC/CID Sirari that some criminals were arrested on their way to Kenya. PW6 together with a team of other police officers went to Sirari and arrested the appellant and his co-accused. Upon being interrogated, they admitted to have been involved in the Bunda robbery incidents and the appellant's co-accused informed PW6 that he owned a firearm which was hidden at Majengo Street in Bunda. PW6 and his team went to Bunda, searched the appellant's co-accused's house and seized the firearm make AK 47, one magazine and one ammunition. A certificate of seizure to that effect was admitted in evidence as exhibit P4 and the said items were collectively admitted in evidence as exhibit P5.

On 21st February, 2016 Inspector Maige (PW3) conducted an identification parade where the appellant and his co-accused were identified by PW4, PW5 and PW7. The Identification Parade Register

was admitted in evidence as exhibit P3. Thereafter, the appellant and the co-accused were interrogated by D.6020 D/Sgt Charles (PW1) and H.3442 D/C Ludamila (PW2) respectively, and recorded their cautioned statements. The said statements were admitted in evidence as exhibits P1 and P2 respectively. Then, on 21st February, 2016, D.6298 D/Sgt Radiel (PW8) recorded the appellant's additional statement which was also admitted in evidence as exhibit P6.

In his defence, the appellant, who testified as DW2, apart from admitting that he was arrested at Sirari on 11th February, 2016, he denied any involvement in the alleged offence. He asserted that, although during the said search the police found nothing in his house, but they forcefully arrested him. He thus repudiated his cautioned statement alleging that he was tortured and forced to sign it.

As intimated earlier, at the end of the trial, the learned trial Magistrate found that the prosecution case was proved beyond reasonable doubt thus, the appellant and his co-accused were found guilty, convicted and sentenced as indicated above.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were confirmed. Still dissatisfied, the appellant has come to this Court, hence this second

appeal. In the memorandum of appeal, the appellant has raised five grounds of complaint which can be conveniently paraphrased as follows; **one**, that the visual identification at the scene of crime was not watertight to eliminate all possibilities of mistaken identity; **two,** the identification parade was conducted contrary to the requirements of the law; **three,** the appellant's cautioned statement was illegally procured and unprocedurally admitted in evidence contrary to the mandatory provisions of the law; **four,** the evidence of PW4, PW5 and PW7 was incredible and unreliable; **five**, the District Court of Musoma had no jurisdiction to entertain the case as the offence was committed at Bunda and there was no transfer certificate from the Resident Magistrate Court of Mara; and **finally**, the prosecution case against the appellants was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person without legal representation whereas the respondent Republic was represented by Ms. Rehema Mbuya, learned Senior State Attorney.

When given an opportunity to amplify on his grounds of appeal, the appellant prayed to abandon the fifth ground and adopted the remaining grounds. He then preferred to let the learned Senior State Attorney to respond first, but he reserved his right to rejoin, if need to

do so would arise. We respected his choice and we thus invited Ms. Mbuya to commence her submission.

Upon taking the stage, Ms. Mbuya, from the outset, declared her stance of supporting the appeal. She then, before advancing her arguments, proposed to argue the first and second grounds conjointly and then, the remaining grounds separately.

Starting with the first and second grounds of appeal, Ms. Mbuya conceded that the visual identification of the appellant at the scene of crime which was relied upon by the trial court to convict him was not watertight. She clarified that, although, PW4, PW5 and PW7, the prosecution's eye witnesses at the scene of crime testified that they managed to identify the appellant with the aid of electricity tube light, they did not explain its intensity. That, since the appellant was not known to all identifying witnesses prior to the incident, they were expected to explain the intensity of the light that aided them to identify him to avoid any possibility of mistaken identity. It was her argument that, since the incident happened at night under unfavorable circumstances including the terrifying situation obtaining at the scene of crime, all conditions of visual identification stated in the case of **Waziri Amani v. Republic**, [1980] TLR 250 ought to have been met.

As for the identification parade, Ms. Mbuya argued that the same was unprocedurally conducted because PW4, PW5 and PW7 did not give any descriptions of the appellant prior to the said parade. She added that, even the appellant's arrest was not an outcome of the information/description given to the police by the said witnesses. It was her argument that, the said omission raised doubt on the identification parade's evidence which should be resolved in favour of the appellant. She insisted that, since the evidence on appellant's visual identification at the scene of crime and at the identification parade was not watertight, the same could not have been relied upon by the trial court and the first appellate court to ground the appellant's conviction.

As regards the third ground, Ms. Mbuya readily conceded that the appellant's cautioned statement (exhibit P2) was admitted in evidence contrary to the mandatory requirements of the law. To clarify on this point, she referred us to page 15 of the record of appeal and argued that, when the said statement was tendered by PW2, the appellant objected to its admissibility alleging that it was involuntary recorded as he was tortured and forced to sign it. However, the learned trial Magistrate did not conduct an inquiry to ascertain those allegations, and instead, he overruled the said objection and unprocedurally admitted the repudiated statement in evidence as exhibit P2.

She added that, even after being admitted, the said statement was not read out to the parties as required by the law. She contended that, the said procedure was improper, because the learned trial Magistrate was required to first conduct an inquiry to determine the issue of voluntariness raised by the appellant before admitting that statement into evidence. Based on those omission, Ms. Mbuya argued that, exhibit P2 deserved to be expunged from the record of appeal and she thus invited us to do so. Finally, and on the basis of the pointed shortcomings, Ms. Mbuya prayed for the appellant's conviction to be quashed, the sentence imposed on him be set aside and he be released from prison.

In his brief rejoinder, the appellant did not have much to say other than supporting what was submitted by Ms. Mbuya and insisted that his appeal be allowed and he be set free.

We should state at the outset of our determination that, this being a second appeal, the Court will rarely interfere with concurrent findings of facts made by the courts below. The exceptions to the rule are when the findings are perverse or demonstrably wrong and occasioning miscarriage of justice. This position was well stated in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149;

Mussa Mwaikunda v. Republic [2006] TLR 387 and **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 (unreported). In determining this appeal, we shall be guided by the above principle.

We propose to start with the third ground on the issue of admissibility of exhibit P2. Having perused the record of appeal, we agree with Ms. Mbuya that, when the admissibility of the appellant's cautioned statement was objected by the appellant on account of it being involuntary recorded, the learned trial Magistrate was duty bound to conduct an inquiry and come up with a determination as to whether the same should be admitted or otherwise. In the case of **Twaha Ally and 5 Others v. Republic,** Criminal Appeal No. 78 of 2004 (unreported), when faced with similar issue, the Court stated that:

> *"...If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession;* ***the court must stop everything and proceed to conduct an inquiry or trial within trial into the voluntariness or otherwise of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence****..." [Emphasis added].*

It follows therefore that the procedure that was adopted by the learned trial Magistrate, in this appeal, of admitting that exhibit without

conducting an inquiry was, with respect, improper. As such, exhibit P2 cannot be validly relied upon in evidence.

In addition, we have as well noted that, exhibit P2 together with other documentary exhibits in this appeal, such as exhibits P1, P3, P4, P6, P9 and P10 were all unprocedurally admitted in evidence as all were not read out to the appellant after their admission. This was a fatal irregularity as emphasized in the case of **Robinson Mwanjisi and Others v. Republic** [2003] TLR 218 where the Court stated that:

> *"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 read out...."*

In our considered view, the essence of reading the respective exhibits is to enable the accused person to understand what is contained therein in relation to the charge against him so as to be in a position of making an informed and rational defence. Thus, the failure to read out the said documentary exhibits was a fatal irregularity as it denied the appellant an opportunity of knowing and understanding the contents of the said exhibits. In **Shabani Hussein Makora v Republic**, Criminal Appeal No. 287 of 2019, the Court reiterated the essence of reading out exhibits immediately after being cleared for admission in the following terms:

> *"It is settled law that, whenever it is intended to introduce any document in evidence, it should be admitted before it can be read out. Failure to read out documentary exhibits is fatal as it denies an accused person opportunity of knowing or understanding the contents of the exhibit because 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."*

(See also **Jumanne Mohamed & 2 Others v. Republic,** Criminal Appeal No. 534 of 2015 (unreported).

Therefore, in the case at hand, since all documentary exhibits P1, P2, P3, P4, P6, P9 and P10 were not read out to the appellant after admission in evidence, they all deserve to be expunged from the record as we hereby do. It is therefore clear that both courts below wrongly acted and relied upon on the said documentary evidence to ground the appellant's conviction. In the result, we allow the third ground of appeal.

Now, the next question is whether after expunging all documentary exhibits from the record, there is sufficient evidence on record to ground the appellant's conviction. The determination of this issue, brings us to the first and second grounds of appeal on the visual

identification of the appellant at the scene of the crime and the identification parade.

We wish to state that, we agree with Ms. Mbuya that, the law is settled that visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. The principles to be taken into account were enunciated by this Court in the famous case of **Waziri Amani** (supra) to include: **One,** the time the witness had the accused under observation; **two,** the distance at which the witness observed the accused; **three,** the conditions where such observation occurred, for instance, whether it was during day or night time and whether there was good or poor light at the scene; and **four,** whether the witness knew or had seen the accused before or not -see also cases of **Issa s/o Mgara @ Shuka v. Republic,** Criminal Appeal No. 35 of 2005, **Masolwa Samwel v. Republic,** Criminal Appeal No. 348 of 2016 and **Byamtonzi John @ Buyoya and Another v. Republic,** Criminal Appeal No. 289 of 2019 (all unreported).

Now, in the case at hand, it is on record that in convicting the appellant, the learned trial Magistrate relied mostly on the evidence of PW4, PW5 and PW7 the prosecution eye witnesses at the scene of

crime. This can be evidenced at page 47 of the record of appeal, where the learned trial Magistrate concluded that:

> *"I have no doubts that the identification of the accused persons was correct as the time spent was enough to identify them, but also* ***intensity of the tube light inside and outside helped the identification****...this make this court to believe that the identification of the accused persons was correct." [Emphasis added].*

The above finding was upheld by the first appellate court. In her submission before us, Ms. Mbuya faulted both lower courts for grounding conviction of the appellant on the evidence of PW4, PW5 and PW7 as she argued that those witnesses did not describe the intensity of the light which assisted them to identify the appellant at the scene of crime. To verify this point, we have revisited the evidence of the said witnesses. PW4 and PW5 at pages 20 and 22 of the record of appeal, both testified only to the effect that '*there was tube light inside and outside the shop.*' On his part, PW7 at page 26 of the same record, testified that, '*There was a bulb light, its source is electricity, it was bright enough.*'

It is apparent from the above extracts that, apart from stating that there was electricity tube light inside and outside the shop, the identifying witnesses did not describe the intensity of that light. Failure

by an identifying witness to describe the intensity of light which aided him or her to make identification raise doubts on credibility of his or her evidence. In the case of **Hassan Said v. Republic,** Criminal Appeal No. 264 of 2015 (unreported), the Court observed that:

> *"It is however, now settled, that if a witness is relying on some source of light as an aid to visual identification such witness must describe the source and intensity of such light in details. The Court has repeatedly in its various decisions in this respect, emphasized on the importance of describing the source and the intensity of the light which facilitated a correct identification of the appellants at the scene of crimes. See* ***Waziri Amani v. Republic*** *(supra),* ***Richard Mawoko and Another v. Republic,*** *Criminal Appeal No. 318 of 2010 (CAT) at Mwanza and* ***Gwisu Nkonoli and 3 others v. Republic,*** *Criminal Appeal No. 359 of 2014 (CAT) at Dodoma (both unreported)."*

Again, in the case of **Mgara Shuka v. Republic,** Criminal Appeal No. 37 of 2005 (unreported), the Court acknowledged the fact that light has different intensities and thus underscored the need for the identifying witness to describe the intensity of such light. The Court stated that:

> *"In our settled mind, we believe that* ***it is not sufficient to make bare assertions that there was light at the scene of 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 pressure lamp or fluorescent tube. ***Hence, the overriding need to give in sufficient details of the intensity of the light and the size of the area illuminated.*** '[Emphasis added].

We therefore agree with Ms. Mbuya that, even in this case, it was not enough for PW4, PW5 and PW7 to make bare assertions that there was electricity tube light inside and outside the shop without giving sufficient details on its intensity and the size of the area that was being illuminated to rule out the possibility of mistaken identity. Even if the electricity light was bright enough as asserted by PW7, but since the appellant was a stranger to the identifying witnesses, possibilities of mistaken identity would not have been eliminated.

Furthermore, the reliability of the identification of the appellant by PW4, PW5 and PW7 at the identification parade had a lot to be desired. We say so, because, the identifying witnesses did not give the descriptions of those who robbed them to anybody, leave alone PW3 or any other police officer, before the identification parade was conducted.

It is trite law that to afford credence in the identifying witness, the conduct of the parade must be preceded with the identifying witness' description of the suspect to the police before seeing him at the parade. In situations where an identification parade is conducted without prior description of the suspect, the identification report is taken to be unworthy of credit. In **Muhidini Mohamed Lila @ Emolo and 3 Others v. Republic,** Criminal Appeal No. 443 of 2015 (unreported), the Court stated that:

> *"...since therefore, in the case at hand, the requirement of giving the description of the suspects prior to the identification parade was not complied with, there is no gainsaying that the evidence obtained from the parade is unworthy of credit."*

Similarly, in the case at hand, we agree with Ms. Mbuya that the Identification Parade conducted by PW3 is unworthy of credit.

On the foregoing reasons, we are of the settled view that, had the trial court and the first appellate court properly scrutinize the evidence of PW4, PW5 and PW7, would have found that such evidence was not watertight. In the circumstances, we agree with Ms. Mbuya that the appellant's conviction was based on insufficient evidence of visual identification. As such, we find merit in the first and second grounds of appeal. Since the findings on these grounds suffice to dispose of the

appeal, the need for considering the other remaining grounds of appeal does not arise.

In the event we allow the appeal. The conviction of the appellant is hereby quashed and the sentence imposed on him is hereby set aside. Consequently, we order for immediate release of the appellant from prison unless he is being held for some other lawful causes.

DATED at **MWANZA** this 11th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 12th day of July, 2022 in the presence of the Appellant in person and Mr. Deogratius Richard Rumanyika, the learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL