IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 311 OF 2018

ALLY MIRAJI MKUMBI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Lila, J.)

dated the 23rd day of October, 2014
in
Criminal Appeal No. 10 of 2013

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JUDGMENT OF THE COURT

21st April, & 17th June, 2021

KOROSSO, J.A.:

The appellant, Ally Miraji Mkumbi was jointly charged with Sijali Jerald @ Ndomba (who was acquitted by the trial court) in the District Court of Bagamoyo at Bagamoyo for armed robbery contrary to section 287A of the Penal Code, Cap 16 Revised Edition 2002. It was alleged that the appellant and Sijali Jerald @Ndomba jointly and together on the 16th March, 2012 at around 2.00 hours at Mwavi-Kiwangwa village within the District of Bagamoyo, Coast Region did steal cash and various items worth Tshs. 4,655,000/- the property of Miraji Mkumbi (PW1). The stolen items included, cash Tshs.

4,585,000/-, one mobile phone Nokia make worth Tshs. 70,000/- and one muzzle loading gun with serial number BG00574. Immediately before stealing, the appellant did injure PW1, the owner of the stolen items on the head, using a bush knife (panga) in order to obtain and retain the said properties.

The appellant (then the 1st accused) and the 2nd accused then, pleaded his innocence against the offence charged and the case proceeded to trial.

In the trial, to prove their case, the prosecution relied on evidence of five prosecution witnesses and two exhibits. Upon closure of the prosecution case, the trial court held that the prosecution failed to establish a *prima facie* case against the 2nd accused person and he was consequently acquitted while the defence hearing proceeded for the 1st appellant. In his defence, the appellant relied on his own testimony categorically denying the charges.

To appreciate the circumstances surrounding the appellant's arraignment and conviction, understanding the factual background of the case albeit in brief is important. On 18th March, 2012 at around 2.00 hours, Miraji Mkumbi (PW1) was abruptly awakened from his sleep by torch lights and then the doorlocks were unlocked by

someone with keys and four bandits entered inside. One of them went straight to the drawers, opened it, then moved to search the bags and then took what they found there, including a mobile phone Nokia make, a muzzle loading gun and cash Tshs. 4,500,000/- which was proceeds from selling pineapples. In the process, PW1 was cut on the head with a bush knife and beaten all over his body. Thereafter the culprits left the scene.

Subsequently, PW1 reported the robbery incident first to one of his sons (PW4), then to the hamlet chairman and thereafter to the Village Executive Officer (PW3). The next day, he reported the incident at the Police Station and was given a PF3 which he took to the hospital. The robbery incident and the injuries inflicted on PW1 were witnessed by his wife, Mwenda Mhanida (PW2).

According to Seif Mohamed Mayala (PW3), on the 18th March, 2012 at about 5.00 hours while at home, PW1 and one Khalfan Shaban Miraji (PW4) went to his house and gave him the details of the robbery and informed him that it was the appellant who committed the robbery. PW1, PW3 and PW4 set a trap which led to the arrest of the appellant during the afternoon and thereafter the

appellant was taken to the police station, put into custody and subsequently arraigned.

In his affirmed testimony in defence, the appellant substantially denied committing the offence charged and narrated circumstances that led to his arrest, stating that he was arrested while he was at his house.

After a full trial, being satisfied that the evidence of the prosecution witnesses and the admitted exhibits sufficiently proved the offence charged against the appellant, the trial court convicted and sentenced the appellant to thirty (30) years imprisonment. Aggrieved, the appellant filed an appeal to this Court found in the memorandum of appeal predicated on six (6) grounds which are conveniently condensed into five main complaints as follows: **One,** the prosecution side failure to call important witnesses and its reliance on suspicions to prove case. **Two**, discontent with the evidence related to identification of the appellant not meeting the guidelines set (ground 1 and 2(b)). **Three**, reliability and credibility of the evidence of PW1, PW2 and PW4 (3rd ground). **Four,** procedural irregularities (5th ground) and **five,** failure to prove the case beyond reasonable doubt (6th ground).

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, the respondent Republic was represented by Ms. Monica Ndakidemi assisted by Ms. Agatha Lumato both learned State Attorneys.

When the appellant was called upon to argue his grounds of appeal, he adopted his grounds and then opted to let the learned counsel for the respondent Republic to argue the appeal first and he be allowed to rejoin thereafter, if need arise.

Ms. Ndakidemi commenced by informing the Court that she was resisting the appeal but later in the midst of her submission she changed her stance resorting to supporting the appeal. At the outset, she argued that some complaints are new, that is, complaints that the prosecution failed to call important witnesses and that it relied on suspicions to prove case. She argued that these complaints were not canvassed nor considered by the first appellate court, and that in view of the settled position on the matter, the Court should refrain from addressing those grounds.

Regarding the complaint on procedural irregularity, that is, non-compliance with section 214 of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA) by the trial court, she conceded to the complaint but argued that this was not fatal because the appellant did not show how he was affected by the non-compliance. Ms. Ndakidemi contended further that there was no injustice occasioned since the appellant was present when all the prosecution witnesses testified before the change of the magistrates.

In response to the complaints raised by the appellant challenging visual identification, the learned State Attorney was in tandem with the appellant's arguments that the prosecution failed to establish that the appellant was properly identified. She argued that both the trial and first appellate courts reliance on the evidence of PW1, who testified that he identified the appellant as one of the invaders being his son and assisted by the light emanating from the torches carried by the robbers was insufficient to disprove possibility of mistaken identity. She argued that, since the incident occurred during the night, the guidelines set by case law for proper identification under such unfavourable circumstances were not met.

Ms. Ndakidemi contended further that PW1 neither disclosed the intensity or brightness of the light which enabled his identification of the appellant nor the time spent to observe the appellant. She argued that there was no evidence related to proximity to the appellant at the crime scene or any specific identification marks to give strength to his evidence of having identified the appellant at the scene of crime. She further argued, that the first appellate court's finding that both PW1 and PW2 identified the appellant as the culprit was not supported by evidence since it was only PW1 who testified to have identified the appellant as one of the robbers who invaded his house on the fateful night. She therefore argued that the evidence related to identification of the appellant left doubts on whether or not the appellant was recognized to the standard required and that the doubts should benefit the appellant.

With regard to the complaints of non-compliance of section 210 of the CPA by the trial court, the learned State Attorney contended that her perusal of the record of appeal has discerned such non-compliance which led her to conclude that the complaint is misconceived.

Ms Ndakidemi submitted that since the prosecution side failed to prove their case to the standard required, the appeal should be allowed, conviction be quashed and sentence be set aside and the appellant be set free.

Unsurprisingly, in view of the submissions of the learned State Attorney, when accorded an opportunity to rejoin, the appellant had nothing substantive to state but to concur with the learned State Attorney and pray that justice prevail in our determination of the appeal.

We shall start our deliberations of the grievances fronted by the appellant before us which are contended by the learned State Attorney to be new complaints not canvassed and determined by the first appellate court as found in complaint number one. Having gone through the respective complaints and the record, we agree with the learned State Attorney. It is well settled that this Court will only address matters raised and determined by the High Court as held in **Mustapha Khamis vs Republic,** Criminal Appeal No. 70 of 2016, **John Nkwabi @Kakunguru vs Republic**, Criminal Appeal No. 443'A' of 2019 and **Samwel Sawe vs Republic,** Criminal Appeal No. 135 of 2004 (all unreported). Consequently, having restated the

position hereinabove, we shall disregard consideration of the new complaints.

In our deliberation, we shall bear in mind that in a second appeal, the practice is that the Court should very sparingly depart from concurrent findings of fact by the trial and first appellate court. Only in exceptional circumstances, that any interference may be warranted and it is when it is clearly shown that there was misapprehension of the evidence, miscarriage of justice or violation of some principles of law or procedure by the courts below (see, **Joseph Safari Massay vs Republic,** Criminal Appeal No. 125 of 2012, and **Felix s/o Kichele & Another v. Republic**, Criminal Appeal No 159 of 2005 and **Julius Josephat vs Republic**, Criminal Appeal No. 03 of 2007 (all unreported).

Essentially, relying on the evidence on record that of PW1, PW2, PW3 and PW4, there is no doubt that on the 18th March, 2012 at around 2.00 hours, a robbery occurred at the house of PW1 and PW2 and various items as expounded in the charge were stolen. There is also no question that the appellant is PW1's son. The pertinent question for our determination is whether it is the appellant who committed the said robbery.

With respect to grievance number two that relates to whether or not the appellant was properly identified. The law is well settled on the import of visual identification and conditions for relying upon it and for a court to find conviction. Decisions of this Court have held that such evidence should not be relied upon unless the court is satisfied that the evidence is watertight and all possibilities of mistaken identity are eliminated (See: **Waziri Amani vs Republic** (supra), **Emmanuel Luka and Others vs Republic**, Criminal Appeal No. 325 of 2010 and **Omari Iddi Mbezi and 3 Others vs Republic**, Criminal Appeal No. 227 of 2009 and **Taiko Lengei vs Republic**, Criminal Appeal No. 131 of 2014 (both unreported))

In the case of **Waziri Amani vs Republic** (supra), we laid down some guidelines for consideration in establishing whether the evidence of identification is impeccable. These include; the time the culprit was under the witness observation, witness's proximity to the culprit when the observation was made, the duration the offence was committed, if the offence was committed in the night time, sufficiency of the lighting to facilitate positive identification, whether the witness knew or had seen the culprit before the incident and description of the culprit. Furthermore, mention of the culprit's peculiar features to

the next person the witness comes across after the incident further solidifies the evidence on identification of the culprit, especially when repeated at his first report to the police officer who interrogates him. The trial court and the first appellate court were satisfied that the appellant was properly identified by PW1 and that this was corroborated by PW2, PW3, PW4 and exhibit P1 and P2. It should be noted that the appellant's cautioned statement (Exhibit P2) was expunged by the first appellate court.

In the instant case, the case against the appellant hinged on evidence on visual identification at the scene of crime. As rightly pointed out by the learned State Attorney, the prosecution evidence did not observe the guidelines set for proper identification as shown hereinabove. PW1's evidence that he relied on the light from the torches held by the robbers to recognize the appellant is clearly not enough. This is because **one**, there was no evidence provided on the intensity brightness of the light relied upon that is from the torches from PW1 and PW2. **Two**, the size of the room was not revealed to enable us to gauge the intensity of such light, since undoubtedly in a smaller room the intensity will differ from a larger room. The issue of sufficiency of light is important and we observed this in **Juma**

Hamad vs Republic, Criminal Appeal No. 141 of 2014 (unreported) where we stated that clear evidence must be given to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable identifying witness to see and positively identify the accused persons. **Three**, undoubtedly torch light assists the one who holds it to see and not the one flashed against, as stated by the Court in the case of **Michael Godwin and Another vs Republic**, Criminal Appeal No. 66 of 2002 (unreported) that: -

> *"... It is common knowledge that it is easier for the one holding or flashing the torch to identify the person against whom the torch is flashed. In this case, it seems to us that with the torch light flashed at them, (PW1 and PW 2), they were more likely dazzled by the light. They could therefore not identify the bandits properly...We entirely subscribe to the above proposition".*

(See also: **Mohamed Musero vs Republic** [1993] TLR 290 and **Oscar Mkondya and 2 Others vs DPP**, Criminal Appeal No. 505 of 2017 (unreported)).

We subscribe to the observations above and hold that there is nothing in evidence in the instant case to depart from the observation therein. We are fortified in that regard because there is no doubt that

PW1 was also similarly in the same position in that the flash light was flashed towards him and thus it would have been impossible for him to identify/recognize the appellant. Even if for the sake of argument, it could be stated that the flashlight was directed to find the drawers and bags, PW1 having arisen from sleep, and undoubtedly in fear for his life, the possibility of him concentrating to identify the culprit was minimal. However, being aware that the identification of the appellant by PW1 is based on recognition, since the appellant is PW1's son, it is a fact that even in recognition cases, there is also room for making mistakes in the recognition of close relatives and known friends or persons. In the case of **Issa Mgara vs Republic**; Criminal Appeal No. 37 of 2005 (unreported) we stated: -

> *"...even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here mistakes in recognition of close relatives and friends are often made."*

PW1's evidence was that he recognized the appellant as his son because he opened the door locks, took keys and opened drawers

which he assumed his son knew where keys were. However, as stated hereinabove the evidence on intensity of light was unavailable and PW1 did not testify on the duration the incident took or he had the culprits under observation. Although he stated that at a certain time he was close to one of the culprits but it seems it was when he was being beaten and injured but without adequate light so the possibility of positive identification of the culprit was very limited.

It is PW4 who stated that PW1 told him that he recognized the appellant from his voice when he was outside, but this fact was not stated by PW1 himself and it thus remains to be hearsay. PW1 neither revealed the clothes worn by the appellant nor any other description to assist in strengthening the evidence of recognition.

Taking all this evidence into consideration, we are of the view that the evidence on identification was not watertight, and with due respect had the trial and first appellate court properly analysed the evidence related to identification, they would not have arrived at the conclusion they did. Especially taking into account that it was only PW1 who testified to have identified the appellant, and such evidence has to be closely examined and evidence to corroborate material aspect is usually sought be it direct or circumstantial which was

absent in the instant case (See, **Christian Kale and Another vs Republic** [1992] TLR 302).

With regard to reporting the incident and the culprit as early as possible, we are aware that PW3 and PW4 testified that PW1 reported to them that it was the appellant who robbed them, unfortunately no police officer was called upon to testify on the first report to the police and what was reported. In this case we find that the evidence and circumstances did not favour a correct identification of the appellant and thus the complaint is meritorious.

We have also gathered that first appellate court considered some matters when upholding the conviction which did not emanate from the evidence. For instance, in the judgment (at page 51) the learned appellate Judge states:

> "*Further, according to evidence the incidence took enough time as the assailants opened the drawer, took money and t**hen went to PW1 and PW2 who they beat** ... Such time was sufficient **to enable PW1 and PW2 recognize the appellant**, their son*" (emphasis added).

There is nowhere in the record where it states that PW2 was also beaten, the evidence of PW1 and PW2 is that PW1 was the one

beaten. Similarly, PW2 did not state she recognized the appellant. This was without doubt misapprehension of evidence which has paved way for us to interfere in the concurrent findings of facts on evidence related to identification of the appellant by prosecution witnesses.

Regarding complaints in grievance number three, on the trial and first appellate courts finding that the prosecution witnesses credible and reliable that is, the evidence of PW1, PW2, PW3 and PW4 despite contradictions in their testimonies. Suffice to say, it is important to note that any competent witness in terms of section 127 of the Law of Evidence Act, Cap 6 Revised Edition 2002 (the TEA) is entitled to be believed, and invariable is a credible and reliable witness, unless there are reasons to challenge this as held in the case of **Goodluck Kyando vs Republic** [2006] T.L.R. 363.

Determining credibility and reliability of witnesses depends on assessment made by the presiding magistrate or Judge during the trial on the evidence presented in court. Apart from the demeanour of a witness, according to the case of **Shabani Daud vs Republic**, Criminal Appeal No. 28 of 2001 (unreported): -

> "*The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of*

the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses ..."

Having scrutinized the record of appeal, we have discerned that at page 33 of the record of appeal the trial court relied mostly on the evidence of PW1 to find that the offence charged was committed and on the evidence of PW1, PW2, PW3, PW4 and PW5 to reach a finding that it was the appellant who committed the offence and was properly identified. Therefore, in essence though not categorically stated, the trial and first appellate courts found the evidence of the stated witnesses reliable and credible to convict and uphold conviction of the appellant.

Our perusal of the evidence has revealed inconsistencies which with due respect, if the trial and the first appellate courts had properly analyzed the evidence would have probably led them to reach a different conclusion. While PW1 stated he knew it was the appellant who robbed them because he opened the door and the drawers with a key, PW4 testified that, PW1 had told him that, he had first recognized the voice when the appellant was outside. PW1's evidence did not recount anything related to when the appellant was outside, he stated that he just saw bandits unlocking the door and coming in

after he had seen the light emanating from their torches, a fact also alluded to by PW2. While PW2 stated that when she said "*Mume wangu tumeingiliwa na majambazi*", there was a response from outside saying, "*Ni kweli sisi ni majambazi kutoka Kibaha, sema iko wapi hela",* PW1 did not testify on this. PW2 also stated:

> "*They told me not to vibrate (sic) and if I do so they will cut me in two slices. I toid my husband to give them money so as not to kill. They opened the draw (sic) and took the money...*"

On the same transaction, PW1 stated:

> "*... I was at home sleeping there after I saw lights from four torches. Saw the first accused and others entering in. The first accused unlocked the locks since he knew the locks and the keys. He took the keys and opened the draw of the table... He then took luggage's and searched whereby he got Tshs. 4, 500,000/-...*"

Essentially, whilst PW1 states the robbers did not find the money in the drawer, PW2 states they took the money from the drawer and after she had told PW1 to give them the money. PW1 never mentioned about the bandits covering the face of PW2, while PW2 said her face was covered. PW3 stated that PW1 had told him

that he and the appellant fought for the drawer key a matter not alluded to by PW1 in his testimony.

Apart from the above discrepancies in evidence, other matters which left unanswered questions, include the fact that as stated earlier, the evidence of PW1 did not establish circumstances which led him to have identified the appellant at the crime scene. PW1's evidence did not reveal for instance, where the keys were kept which were invariably used by the culprits to unlock the doors and the drawers and to enter the house to facilitate easy access by the robbers. There is also whether it was only the appellant who had knowledge of the whereabouts of the said keys and none other. PW1 did not give evidence to show that the appellant knew that he had money from the sale of pineapples to warrant him to plan to rob them that night. Suffice to say, what we gather from the discerned inconsistencies and contradictions in the evidence of PW1, we find that had the courts below properly evaluated his evidence, they would have found that his evidence was far from being reliable. It is clear that the discrepancies in evidence on what transpired after the robbers entered are crucial and leave gaps into the prosecution

evidence, doubts which we hold should benefit the appellant. We thus find the appellant's complaint to have merit.

The fourth grievance is engrained with complaints of procedural irregularities and we find important to start by recapitulating section 210(3) of the CPA.

> *"210(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence".*

The complaint that the evidence of the witnesses was not read over as per section 210(3) was conceded by the learned State Attorney. Our perusal of the record of appeal has discerned that, the trial court complied with the said provision for all the prosecution witnesses that is, PW1, PW2, PW3, PW4 and PW5 and thus the complaint is misconceived and baseless and we therefore dismiss it.

With regard to grievance number five that challenges that the prosecution failed to prove their case, we need not spend too much time on this, since in the foregoing discussion we have already found that there are doubts in the prosecution evidence upon prosecution

failing to prove that the appellant was properly identified. Therefore, without doubt this ground of complaint has merit.

We are of firm view that our findings in determination of the four grievances identified herein are sufficient to determine the appeal. We find no pressing need to deal with remaining complaints.

In the upshot, we allow the appeal and quash the conviction and sentence imposed to the appellant. We order the immediate release of the appellant from custody unless he is held therein for any other lawful purpose.

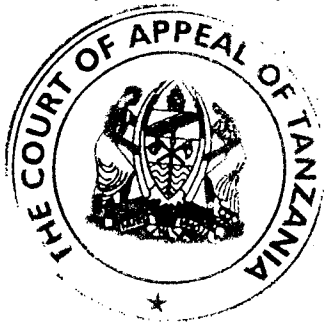
DATED at **DAR ES SALAAM** this 15th day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 17th day of June, 2021 in the presence of the appellant linked through video conference from Ukonga prison and Ms. Violeth David, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL