IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO J.A.)

CRIMINAL APPEAL NO. 547 OF 2017

OMARY HUSSEIN @ LUDANGA
HASHIMU ABDALLLAH @ SIMBA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from judgment of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 18th day of January, 2016
in
Criminal Appeal No. 32 of 2015

.....

JUDGMENT OF THE COURT

15th & 30th September, 2021

MKUYE, J.A.:

In the Resident Magistrates' Court of Arusha Region at Arusha, the appellants, Omary Hussein @ Ludanga and Hashimu Abdallah @ Simba (hereinafter the 1st and 2nd appellants) were, together with two others who were acquitted on appeal at the High Court, charged with an offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E 2002 (now 2019) as amended by clause 10A of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011. Upon full trial, they were convicted and sentenced to thirty years imprisonment.

Dissatisfied with the decision of the trial court, the appellants appealed to the High Court but their appeal was dismissed. Still protesting their innocence, they have lodged their appeal to this Court.

Before embarking on the appeal, we find it apt to narrate the facts leading to this appeal, albeit briefly. They go thus:

The complainant, sister Mary Shobana SDN (victim) was an employee of Notredame School situated at Njiro within the Municipality of Arusha in Arusha Region. On 16/3/2013, the victim accompanied by Erick Justine Kimanguka, the driver (PW7) were on errands within the City of Arusha where they went to the Bank and then passed at the Shoprite Supermarket. Then, they went back to Njiro. When they reached outside the gate of the school (Notredame School), the victim alighted from the motor vehicle. As she proceeded to the gate, she was accosted by two persons who shot her on the leg and she fell on the ground. The assailants then took from her a bag which was later revealed to contain money worth Tshs. 30,000,000/=. While all this was happening PW7 had been ordered to lay face down on the steering wheel. After they had accomplished their mission, the assailants left on board a motorcycle which they had arrived with. The victim was taken to hospital where she was hospitalized.

After the incident, the police received information from an informer that the appellants were involved in the robbery. A search was mounted whereby the appellants were arrested at Honolulu hotel. Then, an identification parade was conducted and PW7 allegedly managed to identify the 1st appellant. The appellants recorded their cautioned statement in which they alleged to have admitted their participation in the commission of the offence. However, during the trial they disowned the said statements claiming that they were tortured and upon an inquiry being conducted, the same were admitted as Exhibits P1 and P2 respectively.

In their defence, the appellants disassociated themselves with the offence. Nevertheless, they were convicted and sentenced as indicated earlier on.

It is noteworthy that, in sustaining the conviction of the appellants, the High Court relied on PW7's identification evidence that he identified the 1st appellant at the scene of the crime and that he further identified him in the identification parade. The first appellate court also relied on the appellant's cautioned statements which were admitted in the trial court.

The appellants have lodged a joint memorandum of appeal on nine grounds of appeal as follows:

1) *That, the first appellate court erred in law and fact when it held that, the 1st appellant was properly identified at the scene by PW7.*

2) *That the first appellate court erred in law by relying on cautioned statements of the appellants which were not read after admission.*

3) *That the first appellate court erred in law by not finding that, the cautioned statements of the appellants were obtained contrary to the requirement of law.*

4) *That, the first appellate court erred in law and in fact by holding that failure by the prosecution to call a ballistic expert occasioning (sic) any miscarriage of justice.*

5) *That, the first appellate court erred in law and fact when she relied on speculative ideas that a toy pistol was enough to prove armed robbery.*

6) *That, the first appellate court erred in law and fact when she held that the 1st appellant was properly identified at the scene and the evidence of 2nd appellant corroborated that of 1st appellant.*

7) *That, the first appellate court erred in law and in fact for failure to draw adverse inference because the prosecution failed to call the complainant sister Shobana and the ballistic expert.*

8) *That, the first appellate court erred in law and in fact in disregarding the caution statements marked as Exhibits P2, P3 and P4 and the court ought to have given the appellants the benefits of doubt offered to the 3rd and 4th appellants.*

9) *That, the first appellate court erred in law and in fact for failure to consider the defence.*

When the appeal was called on for hearing, the appellants appeared in person without any representation; whereas the respondent Republic had the services of Ms. Adelaide Kassala, learned Senior State Attorney and Ms. Lilian Aloyce Mmasy, learned State Attorney.

The appellants prayed to adopt their memorandum of appeal. Submitting in support of the grounds of appeal, the 1st appellant assailed the identification evidence in three folds. He contended that, **One,** PW7 who alleged to have identified him at the scene of crime did not give the appellant's description before he identified him in the identification parade. To fortify his argument, he referred us to the cases of the **REX v. Mohamed bin Allui** (1942) 19EACA 72 and **Bushiri Amiri v. Republic,**

[1992] TLR 65 in which essentially the need of providing description of suspects physical appearance and clothes was emphasized. **Two,** that the identification parade was conducted in contravention of the law. He pointed out that PW4 who supervised the identification parade did not explain to the appellant his rights. The case of **Francis Majaliwa Deus and Others v. Republic,** Criminal Appeal No. 139 of 2005 (unreported) was cited in support. **Three,** that the identification parade report/register was not read over in court after being admitted in evidence.

The 1st appellant also challenged the cautioned statement for being taken in contravention of section 50, 51, 57 and 58 of the Criminal Procedure Act, Cap 20, RE 2019 (the CPA) and that the said cautioned statement was not read out after its admission in court.

In addition, he challenged the prosecution for failure to call a ballistic expert who could have provided a link between the pistol alleged to have been used to shoot the victim and the one the 2nd appellant was found in possession. He also lamented against the prosecution's failure to call the victim to testify in court.

In this regard, he implored the Court find that the prosecution failed to prove the case beyond reasonable doubt and therefore allow

the appeal, quash the conviction, set aside the sentence and release him from custody.

As to the 2nd appellant, in the first place he joined hands with what was submitted by the 1st appellant. Nevertheless, he added that his cautioned statement was recorded out of time since he was arrested on 5/4/2014 and the same was recorded on 6/4/2014. On top of that, he contended that the cautioned statement was not read out in court after it was cleared for admission.

He also adamantly argued that it was not proved if the pistol he legally owned was used in the commission of the offence since the ballistic expert did not testify in court. He also blamed the prosecution for not calling the owner of Honolulu Hotel where he was arrested to testify in court.

He further mantained that on the date of incident 16/3/2013 he was at Morogoro for masonry job and preparation of his young brothers' wedding ceremony.

Like the 1st appellant, he also urged the court to find that the case against him was not proved beyond reasonable doubt with an order for allowing the appeal and setting him free.

For the respondent Republic, Ms. Mmassy in the first place supported the appeal along the line of argument of the appellants. She explained that **one,** PW7 did not describe the 1st appellant before he identified him in the identification parade. **Two,** the pistol was not proved to have been used in the commission of crime in the absence of ballistic expert analysis. **Three,** the appellant's cautioned statements were not read out in court after admission and thus prayed that the same be expunged. In the end, the learned Senior State Attorney prayed to the Court to allow the appeal, quash the conviction, set aside the sentence and release the appellants from custody.

In rejoinder both appellants had nothing to add.

Having considered the grounds of appeal, the submissions from either side and the entire record of appeal, we think, this appeal can be determined on three main issues as follows:

1) Whether the 1st appellant was properly identified.
2) Whether the appellants' cautioned statements were properly admitted.
3) Whether the offence against the appellants was proved beyond reasonable doubt.

The 1st appellant complaint is that PW7 cannot be said to have identified him since he identified him in the identification without prior giving the description of the suspect before identifying him. It is now settled principle that before one can identify a suspect in the identification parade, he must give description of such person prior to identifying him. This was clearly stated in the case of **Francis Majaliwa Deus and 2 Others** (supra) while citing with approval the case of **Mohamed bin Allui** (supra) where the Court emphasized the importance of the witness to give a description on physical appearance, clothes worn by the suspect and any other peculiar mark or identity.

Further to that, in the case of **Flano Alphonce Masalu, @ Singu v. Republic,** Criminal Appeal No. 366 of 2018 (unreported) the Court when confronted with similar scenario quoted its earlier decision in **Emilian Aidan Fungo @ Alex and Another v. Republic,** Criminal Case No. 278 of 2009 (unreported) where it stated as hereunder:

> *"It is trite law that for any identification to be of any value, the identifying witness (es) must have earlier given a detailed description of the suspect before being taken to the identification parade."*

In this case, we agree with both appellants and the learned Senior State Attorney that PW7 did not give any detailed description of the 1st

appellant at the time he wrote his statement to the police which could have enabled him to identify the 1st appellant during the identification parade. In this regard, his identification evidence was vitiated.

Another complaint regarding identification parade is that PGO 232 of the Police Force Auxiliary Order was not complied with as PW7 did not explain to the 1st appellant his rights. Unfortunately, even the learned Senior State Attorney conceded to it. However, our perusal of the record of appeal at page 64 has revealed that Ass. Insp. Happiness (PW4) testified to have given the 1st appellant his rights including his right to stand anywhere in the parade and to exchange clothes with others in the parade if he wished. In fact, she even allowed him and all who were involved in the identification parade to sit down because he was diabetic and was feeling bad at that time. For easy reference we let the record speak for itself:

> *"on 9/4/2013 at about 10:00 hours I was directed by my boss to conduct an identification parade.* ***I collected nine (9) people and other that the accused was brought and I gave him all his rights. The first accused Omary Hussein was brought and I gave him all his rights... and that he has right to stand anywhere in the parade and even to***

> ***exchange clothes with other persons. The 1st accused told me that he had diabetes so he was feeling bad so he prayed to sit down. I allowed him to sit down. Also, I asked all the responsible persons in the parade to sit down to sit down as he did*** *by then a person who was responsible to conduct(sic) the identification parade was absent in that area..."* [Emphasis added]

PW4 then prayed to tender the identification parade register which was admitted by the court as exh. P6 without any objection from appellant's advocate, one, Mr. Tarimo.

As it can be clearly seen in the except above, PW4 explained the rights of the suspect to 1st appellant as regards the place he wished to position himself in the identification parade; and that he could exchange clothes with other persons including allowing him together with other persons in the parade to sit down due to his illness. So, we do not agree with the 1st appellant that he was not given his rights.

However, we agree with both 1st appellant and Ms. Mmassy that the identification parade register was not read out after being cleared for admission. The requirement of reading over the document after it

has been cleared for admission was reiterated in the case of **Robinson Mwanjisi and 3 Others v. Republic**, [2003] TLR 218 as follows:

> *"Whenever it is intended to introduce any document in evidence, it should be cleared for admission and be actually admitted, before it can be read out."*

Also, in the case of **Anania Clavery Betale v. Republic,** Criminal Appeal No. 355 of 2017 (unreported) it was observed that failure to read out exhibits admitted in court after being cleared is not proper as it becomes prejudicial.

In this case, as the identification parade register was not read over after being admitted before the court, we find that it was prejudicial to the appellant as he could not have been in a position to understand its content. As was stated by Ms. Mmassy, this was a fatal omission which cannot be cured under section 388 of the CPA. In the circumstances, we expunge it from the record of appeal.

The other complaint in respect of both appellants is in relation to their respective cautioned statements. Their complaint is twofold, that the same were taken in contravention with section 50, 51 and 57 of the CPA; and that they were not read over after being cleared for admission.

Having gone through the record of appeal we have observed that both appellants were arrested on 5/4/2013 at Honolulu - Tarakea. While the 1st appellant said he was arrested at 19:00 hours and recorded his cautioned statement from 21:00 hours to 22:17 hours; the 2nd appellant said he was arrested at about 19:30 hours and his cautioned statement was recorded by WP 4821 D/C Firimina from 21:45 to 22:20 hours. As it is, looking at the evidence available it is not true that the same were recorded in contravention of section 50(1)(a) of the CPA requiring the cautioned statement to be taken within four hours from the time of restraint or that the time when WP D/Ssgt Agnes and Asst Insp. Firimina completed the interviews was not indicated. Neither can it be said that section 58 of CPA was violated as the statement was taken in form of interview.

However, we agree with both appellants and the respondent that their cautioned statement, (exhibits P1 and P5) were not read over after they were cleared and admitted in evidence. As we have alluded to earlier on, on the basis of **Robinson Mwanjisi's case** (supra) this was a fatal irregularity which cannot be cured by section 388 of CPA. As we have stated in relation to the identification parade register, failure to

read out the cautioned statements rendered them to be of no evidential value. We, thus, expunge exhibits P1 and P5 from the record.

The other complaint by the appellants is the failure by the prosecution to call the ballistic expert who could have provided a link between the pistol found with the 2nd appellant and the one that was fired during the incident; and, sister Mary Shobana who was the victim of the offence.

Admittedly, the record of appeal bears out that neither the ballistic expert nor the victim were called to testify in court much as the prosecution had during preliminary hearing, indicated to call them.

Our perusal of the evidence in the record of appeal has revealed that indeed, the evidence on record does not show the link between the pistol the 2nd appellant was found in possession with and the one which was used in the commission of the offence. As the prosecution had, during the preliminary hearing listed the examination report on pistol with serial no. 016080 among the intended prosecution exhibits, it was expected that its author would have been called to testify in court to clear the dust whether it was the same that was used in the commission of the offence and the linkage with the 2nd appellant. Again, sister Mary Shobana who was the victim of the offence was not called to testify in

court instead her statement was tendered and admitted in court as Exh.P7 in her absence without sufficient reason being shown for her failure to testify in court.

Much as we are aware that in terms of section 143 of the Evidence Act, Cap 6 R.E. 2019 no particular number of witnesses is required for the proof of any fact, the law is very clear where a crucial witness who is within reach is not called to testify in court. Failure to call such material witnesses entitles the Court to draw adverse inference where such witnesses are within reach but are not called without sufficient reason being shown by the prosecution - (See **Aziz Abdalla v. Republic** [1991] TLR 71.

In our considered view, the witness who examined the pistol (ballistic expert) and **Sister Mary Shobana** (the victim) were material witnesses who could have cleared dust in relation to the pistol the 2nd appellant was found in possession and as to how and who committed the offence. Given the circumstances we find that this ground is merited.

Following the expungement of the evidence relating to the identification and cautioned statements which were relied upon to sustain the conviction, we find that there remains no other evidence to

sustain it, meaning that the prosecution failed to prove the case against both appellants to the hilt.

To conclude, in view of what we have endeavoured to explain, we find that the appeal is meritorious and we allow it. Consequently, we quash the appellants' convictions and set aside the sentences thereof. We further order for the appellants' immediate release from prison unless they are otherwise held for other lawful reason (s).

It is so ordered.

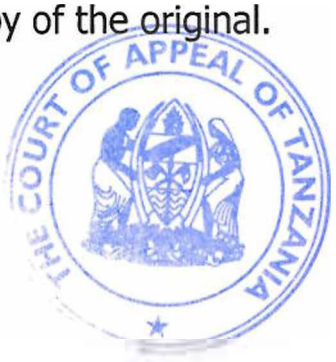
DATED at **ARUSHA** this 30th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 30th day of September, 2021 in the presence of the appellants in person and Ms. Lusaje Samuel, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL