

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: KWARIKO, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 182 OF 2019

SALUM NJWETE @ SALUM @ SCORPION APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the High Court of Tanzania, Dar es Salaam
District Registry at Dar es Salaam)**

(Miyambina, J.)

dated the 9th day of May, 2019

in

(DC) Criminal Appeal No. 253 of 2018

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JUDGMENT OF THE COURT

21st September & 24th October, 2022

MAIGE, J.A.:

At the District Court of Ilala at Samora (the trial court), the appellant was charged with two counts namely; armed robbery contrary to section 278 A and grievous harm contrary to section 225 both of the Penal Code, [Cap. 16 R.E. 2019, now R.E. 2022]. While he was acquitted of the first count, the appellant was convicted of the second count. He was thus sentenced to seven years imprisonment and ordered to pay Tanzania Shillings Thirty Million (TZS 30,000,000.00) as compensation to the victim.

The brief facts characterizing the background of this appeal can be narrated as follows. On 6th September, 2016, Said Ally Mrisho (PW1), the victim, having spent almost the whole day at his hair cutting salon at Tabata Segerea in Dar es Salaam, hired a motorcycle (bodaboda) in understanding that he would be dropped at Tabata Relini area wherefrom he would take a bus to his residence at Makaburi area within Dar es Salaam. Unexpectedly, the *bodaboda* raider took a different route and as a result, PW1 was dropped at Buguruni Shell at around 22:40 hours where he found some petty traders selling chickens.

PW1 testified that, as he was bargaining for price with one of the petty traders, the appellant appeared and told him, "*brother nina shida naomba unisaidie*", meaning in unofficial translation that, "*brother I have a problem can you please assist me*". When PW1 asked the appellant what kind of assistance did he desire from him and before PW1 had collected the chicken he had just bought, the appellant assaulted him on his shoulder and at the back. As that was not enough, the appellant stabbed him with a knife on the abdomen four times causing him to fall down. At that juncture, PW1 heard the chicken vendor saying; "*Scorpion ushauwa huyo*" meaning in unofficial translation that "*Scorpion you have already killed him*". Thereafter, the appellant searched PW1 and took TZS

300,000.00 from his wallet and TZS 21,000.00 from his left side. Furthermore, the appellant took a silver made bracelet from his hand and a neckless from his neck.

PW1 testified further that, as the appellant was about to take his two mobile phones, one of the petty traders told him; "*Salumu usichukuwe simu yake huyo keshakufa ndugu zake watajuaje*", literally translated means, "*Salumu do not take his mobile phone otherwise his relatives will not know what has happened to him.*" The appellant then disrobed PW1's T. Shirt and drugged him into the middle of the road and asked one of the drivers to knock PW1 but the latter refused. Afterwards, the appellant took PW1 besides the road and chopped off his eyes and as a result, PW1 lost his sight and became unconscious.

With the help of good Samaritans and upon gaining consciousness, PW1 was taken to Buguruni Police Station. At that time, PW1 had, through a mobile phone of one of the good Samaritans, informed his wife of the incident. At the Police Station, PW1 was issued with a PF3 and taken to Amana Hospital. He was subsequently transferred to Muhimbili National Hospital. The medical reports as per exhibits P1 and P2 reveal *inter alia* that, PW1 has completely lost his two eyes such that he cannot see anymore.

Stara Sudi (PW2), the wife of PW1 testified that, on the material date at around 22:00 hours while asleep, she was informed of the incident by PW1 through a mobile phone whose number was new to her. On receiving the information and having conveyed the same to her brother in law Yahaya Kisukari (PW3), PW2 went to Amana Hospital where she found her husband in a bad condition. PW1, she testified, though in a bad condition, was able to narrate to her what happened and named Scorpion to be the person who assaulted him. On the next day when she went at Buguruni Police Station, she revealed to the Police what her husband told her. PW3 made more or less a similar story. Salum Masudi Jerry (PW10) whose testimony was discarded by the trial court told the trial court that, he was present at the scene of the crime as one of the petty traders and he witnessed the appellant, a person well known to him, assaulting PW1.

Hussein Rashidi (PW7) and Deus Joachim (PW8), both petty businessmen at Buguruni area who were declared hostile witnesses, testified that after being informed by police that the appellant was wanted in connection with the incident in question, they notified the appellant and subsequently went with him at Buguruni Police Station and reported to No. F. 1092 D/CPL Bryson (PW9). PW9 testified that, the appellant submitted himself at Buguruni Police Station on 12th September, 2016

and that; on interrogation, he confessed as per exhibit P3 to have committed the offence.

In his defence however, the appellant totally denied any involvement in the commission of the offence maintaining that he was forced to sign into exhibit P3 without knowing the contents thereof. He further claimed that, the victim was beaten by angry mob in connection with an allegation of theft in that area.

As we said above, the trial court convicted the appellant based mainly on the evidence of PW1 as a sole eye witness and his confessional statement in exhibit P3. It also took into account part of the evidence of the two hostile witnesses (PW7 and PW8). It however discarded the evidence of PW10 for being materially contradictory to that of PW1. Being aggrieved by both the conviction and sentence, the appellant appealed to the High Court on thirteen grounds. The grounds, in our reading, raised the following complaints:

- 1. The trial court was wrong in relying on visual identification evidence of PW1 which did not have sufficient description of the intensity of light on the aid of which the appellant was identified.*
- 2. The trial court was wrong in relying on the visual identification evidence of PW1 without due regard to the fact that the appellant was a stranger to him.*

3. *The trial court did not consider in its judgment the evidence of PW1 that the incident lasted for just 4 to 5 minutes.*
4. *The trial court relied on the evidence of relatives in the absence of independent evidence.*
5. *The trial court relied on the retracted confessional statement in exhibit P3 which was procured without following the procedure and out of time.*
6. *The cautioned statement was received in evidence and relied upon without its contents being read out.*
7. *The trial court wrongly relied on the evidence in PF3 in exhibits P1 and P2 while in accordance with the evidence of PW6 there was only one PF3.*
8. *The trial court wrongly relied on the evidence of PW9 in the absence of explanation of the delay to arrest the appellant despite his name being disclosed by PW1 at the earliest opportunity.*
9. *The trial court wrongly believed the evidence of PW1 that he was assaulted by the appellant despite being contradictory to his previous statement before PW9 that he was beaten by the mob.*
10. *That the trial court did not take into account the failure of the prosecution to call the two crucial witnesses from whom PW1 established the name of the appellant.*
11. *The trial court was wrong in relying on the incredible evidence of PW10 and disbelieving the evidence of PW7 and PW8.*
12. *That the trial court did not assess and evaluate the evidence correctly.*

13. That the defence evidence was not sufficiently considered.

In its judgment, the first appellate court reduced the 13 grounds of appeal into three issues namely; **first**, whether the appellant was properly identified; **second**, whether the cautioned statement of the appellant was recorded in accordance with the law; **third**, whether there were contradictions in the prosecution evidence. The first appellate court answered all the three issues against the appellant and dismissed the appeal accordingly. On the second issue, the first appellate court in particular, observed at page 255 of the record of appeal as follows:

"Page 76 of the typed proceedings indicates that there was inquiry conducted by the trial court to ascertain validity of the cautioned statement. I have gone through the entire proceedings and I am satisfied that the findings of the trial court that the appellant's statement was voluntarily given is proper. I therefore find no good reason to dwell much on this ground."

The appellant is still displeased with the conviction and sentence and thus the instant appeal. In the memorandum of appeal, he has raised the following four grounds of appeal:

- 1. The learned first appellate Judge erred in law and fact by sustaining the appellant's conviction relying on PW1's improper visual identification yet the prosecution adduced evidence failed completely to link the appellant with the said Scorpion alleged to commit the offence.*
- 2. The learned first appellate Judge erred in law and fact by sustaining the appellant's conviction relying on repudiated and retracted cautioned statement (exhibit P3) un-procedurally recorded by PW9 who is also alleged to have recorded the statements of all prosecution witnesses.*
- 3. The learned first appellate Judge erred in law and fact in not linking his judgment with the evidence and the grounds of complaint raised in the first appeal.*
- 4. The learned first appellate Judge erred in law and fact by sustaining the appellant's conviction as a result of failure to consider and analyze properly the evidence adduced by the defence which succinctly raised sufficient reasonable hypothesis irresistibly casting doubt about the guilty of the appellant since the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person and unrepresented whereas the respondent Republic had the service of Mr. Adolf Kisima and Mr. Jaribu Bahati, both learned Stated Attorneys. Both the appellant and Mr. Kisima for the respondent made oral submissions for and against the appeal.

We propose to start our deliberations with the third ground of appeal which questions the legality of the judgment of the first appellate court in not determining some of the complaints raised in the grounds of appeal before it. In his submissions, the appellant blamed the first appellate court in ignoring some of his grounds of appeal. He pinpointed some of the unconsidered complaints to include omission by the trial court to consider his defence; use of the incredible evidence of PW10 in disregard of the evidence of PW7 and PW8; placing reliance on the evidence of relatives without there being independent corroborating evidence. In response, Mr. Kissima conceded that indeed some of the grounds of appeal were not considered by the first appellate court. He however invited the Court to step into the shoes of the first appellate court and consider those grounds of appeal and come to its conclusion as to whether the conviction and sentence was proper or otherwise.

We have appropriately considered the concurrent submissions of the parties on the third ground of appeal and we entirely agree with them that, the first appellate court did not, in its three summarised issues, consider all the complaints raised before it in all the thirteen grounds of appeal. The first issue as to the correctness of visual identification evidence in our reading, captured only the first, second and third grounds

of appeal. The second issue as to the validity of the cautioned statement covered only one of the issues raised in the fifth and sixth grounds of appeal namely; whether the cautioned statement was procured voluntarily. It did not address the two remaining legal issues therein raised as to whether or not the confessional statement was procured out of time and whether the same was after being exhibited, read out and explained to the appellant as the law requires. The last issue as to contradictions covered only part of the seventh ground.

Consequently, the complaints raised in the fourth, eighth, ninth, eleventh, twelfth and thirteen grounds of appeal were not considered at all and the fifth, sixth, seventh and tenth grounds were partly considered.

The position of the law on failure to consider the grounds of appeal is settled. It renders the relevant appellate judgment null and void. There are many pronouncements in support of this proposition. For instance, in **Nykwama s/o Ondare @ Okware v. the Republic**, Criminal Appeal No. 507 of 2019 (unreported), it was observed:

"We therefore, agree with Mr. Byamungu that failure to consider appellant's grounds of appeal was a fatal irregularity rendering the first appeal court's judgment a nullity. In this regard, we wish to emphasize that though

it is not the duty of the first appellate court to resolve the issues as framed by the trial court, yet it is expected and bound to address and resolve the complaints of the appellant in the grounds of appeal either separately or jointly depending on the circumstances of each appeal.”

We made a similar position in **Mwajuma Bakari (Administratrix of the Estate of the Late Bakari Mohamed) v. Julita Semgeni and Another**, Civil Appeal No. 71 of 2022 (unreported), where we observed:

“...the appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not to discuss all of them where only a few will be sufficient to dispose of the appeal but it is bound to address and resolve the complaints of the appellant either separately or jointly depending on the circumstance of each case.”

Being guided by the above authorities, therefore, we find that, the first appellate court denied the appellant a right to be heard in not considering, in its judgment, some of the complaints raised in the grounds of appeal. On that account, we find that the judgment of the High Court was a nullity.

The question that follows is what is the appropriate way forward. Mr. Kisima has urged us to step into the shoes of the first appellate court

and determine the omitted grounds of appeal. We understand it to be a settled general rule of law that; a matter not decided upon by the High Court or subordinate court exercising extended jurisdiction, cannot be decided by this Court. This is indeed the effect of the provision of section 4(1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019]. The rationale behind is easy to explain. Appeal is a right and process as well. A party losing in the first appeal, has a right to appeal in the second appeal if the statute allows.

Therefore, if the second appellate court determines a ground of complaint which was before and should have been determined by the first appellate court, parties will be denied a right of a further appeal to the Court. It is perhaps because of that reason that, the Court has in many occasions, refused to step into the shoes of the first appellate court to address the grounds which should have been determined by the first appellate court insisting that, that is within the domain of the first appellate court. See for instance, **Mwajuma Bakari** case (supra) and **Revocatus Mugisha v. Republic**, Criminal Appeal No. 200 of 2020 (unreported).

However, in exceptional circumstances especially where the omitted grounds relate to failure of the first appellate court to re-appraise the evidence, a second appellate court would, in fit cases and if no injustice is occasioned, step into the shoes of the first appellate court and evaluate the evidence. See for instance, **Nyakwama case** (*supra*) and **Hassan Mzee Mfaume v. Republic** [1981] T.L.R. 167. In the latter decision, the Court observed:

"(iii) Where the first appellate court fails to re-evaluate the evidence and consider material issues involved on a subsequent appeal the Court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."

We have carefully considered the invitation by the learned State Attorney in line with the above authorities and we are of the view that, the circumstance and justice of this case dictates for remittance of the record to the first appellate court so that the appeal can be re-heard. We thus allow the appeal to the extent of the third ground of appeal. We nullify the judgment of the High Court and quash the proceedings thereof as from 28th March, 2019 to the date of judgment. We remit the case file

to the High Court before a different Judge to rehear the appeal basing on the grounds of appeal and decide the same as a whole.

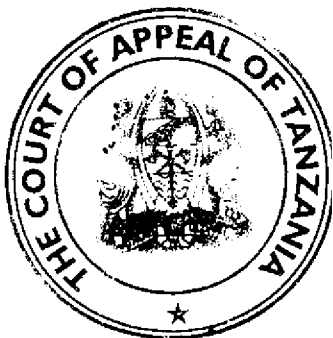
DATED at DAR ES SALAAM this 20th day of October, 2022.


M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of October, 2022 in the presence of the in the presence of appellant appeared in person – unrepresented whereby the Respondent represented Ms. Tuli Helela learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL