IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 346 OF 2017

(Originating from Criminal Case No 155 of 2013 at Kinondoni District Court)

FRIDAY ERASTO KIMARO..... APPELLANT

VS

REPUBLIC ..... RESPONDENT

JUDGEMENT

MWENEMPAZI, J.

The appellant Friday Erasto Kimaro was charged and convicted with the offence of Armed Robbery contrary to Section 287A of the Penal Code [Cap. 16 R.E. 2002] as amended by Act No. 3 of 2011. He was sentenced to serve 30 years imprisonment as prescribed by the law. He is aggrieved and therefore appealing against the conviction and sentence. In the trial court, it was alleged that on the 11th day of April, 2013 the accused person stole a mobile phone make TECHNO valued at Tshs. 75,000/- the property of Zakhia Adimu and in order to achieve that he used a screwdriver to stab the owner on her face so as he can obtain and retain the said phone.

In his petition of appeal, he filed three grounds of appeal. First, that the trial court was wrong both in law and fact by convicting the appellant basing on evidence of visual identification at the scene with no detailed description of the appellant. Second, that the trial court erred in law and facts by convicting the appellant basing on the evidence of an identification parade of PW1(Zakia Adimu) and PW4 (Juma Hamidu) during the trial with no prior description of the appellant. Third, that the learned trial magistrate erred in law and facts by convicting the appellant with the offence of armed robbery while the evidence of PW1 and PW2 are very contradictory in respect of the stolen properties.

The appellant was unrepresented and the Respondent was represented by Clara Charwe, learned State Attorney. At the hearing, on the 5th June, 2018 the appellant prayed to file and additional ground of appeal. The added ground was that the learned trial magistrate erred in law by violating the procedure governing variance between the charge and evidence and amendment of charge, as a result the proceedings are now confusing. The record, show that witnesses, PW1 are D.8323 D/CPL Mussa, and Zakia Duni, PW2 are Juma Hamis and D.8323 Mussa, PW3 are Everyne Kiama and H. 521 PC. Namohe while PW2 Juma Hamisi is the same person who testified as PW4 by the name of Juma Hamidu. The appellant submitted on the arguments one after another as it will be shown below.

On the first ground the appellant submitted that there are obvious errors in the proceedings of the case during trial. The record is confusing. Evidence recorded has two witnesses labelled PW1, Cpl. Musa and Zakia Duni. Two witnesses labelled PW2, Cpl. Musa and Juma Hamisi. Two witnesses labelled as PW3. This has affected the flow of the case and the judgement.

On the second ground, the appellant submitted that he was convicted by the magistrate relying on insufficient evidence of identification. I was identified by Zakia Duni (PW1) and Juma Hamis or Juma Hamidu who is PW2 or PW4. I was arrested on the 26th April, 2013. Zakia Duni was present he referred at page 10 of proceedings.

On the third ground, submits that the magistrate failed to assess the evidence to see the contradictions in the evidence of Zakia Duni (PW1), Cpl. Musa (PW2) and Juma Hamidu (PW4) concerning the item which was robbed. PW1 says she was robbed of a phone worthy Tshs. 75,000/= make Techno and Tshs. 5000/= which were in her purse. Also, there were contradiction in the mode of arrest. Cpl. Musa and PC Namohe; PC Namohe testified that the appellant was arrested on the 26th April, 2013. Cpl. Musa testified that many suspects were arrested on 27th April, 2013 as criminals of Kigogo Area by Police on patrol. He was therefore praying that this court should quash conviction, set aside the sentence and set him free.

In response to the submission by the appellant the Respondent appellant did support the appeal filed by the appellant. The Respondent's Attorney submitted that essentially the appellant's appeal hinge on two grounds. The 1st and 2nd ground of appeal focus on the evidence of identification. The 3rd and 4th ground focus on the contradictions in the evidence tendered in court. Regarding confusion as submitted by the appellant above, the learned attorney submitted that, after the prosecution had led evidence to support the charge which was filed on the 14th May, 2013 and three witnesses had testified in court, they prayed to substitute charge. Thus, on 26th September, 2013 a new charge was read over to the accused for him to plea. This is reflected at page 12 of the proceedings. Then hearing commenced afresh. This time the prosecution called five witnesses among which were the three witnesses who had already testified in court before substituting a charge. This is a source of the confusion in the sequence and naming of witnesses.

Substitution of charge is allowed under section 234 of the Criminal Procedure Act, Cap. 20 R.E 2002. The referred section provides for variance of charge and evidence. In it there are factors to be considered when the situation arises. The Respondent submit that the silence by the trial magistrate has had no effect to the rights of the appellant to defend himself. The same provides as follows:

234. Variance between charge and evidence and amendment of charge

(1) .....

(2) Subject to subsection (1), where a charge is altered under that subsection–

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and

(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.

In this case, the accused(appellant) was called upon to plead to the new charge in accordance to section 234(2)(a) of the Criminal Procedure Act, Cap. 20 R.E.2002. Nothing further was done in respect of compliance to the legal

requirements as provided for in section 234(2)(b) of the CPA. In the case of ***Republic v. Jumanne Mohamed*** [1986] T.L.R.232(HC) this court had an opportunity to consider the provisions of section 234(2)(b) of the Criminal Procedure Act, Cap. 20. It held that: -

> "*Where the accused before a court of law is a layman or a lawyer who is not likely to know (sufficiently) the provisions of section 234(2)(b) of the Act,* ***the court is under duty, in the interest of justice, to inform the accused of his rights under the subsection and find out from him which right, if any, he proposes to exercise. The accused's reply should be reflected on the record of the case****. The failure on the part of the learned trial magistrate to comply with s.234(2) (b) of the Act in the instant case was, in my settled opinion, a serious error, capable in law of vitiating the decision he arrived at the end of the trial.*"

The holding above guides us on the correct position of law and procedure to be followed. The question to consider therefore, is whether the appellant was deprived of his rights by not being informed of his rights by the court and whether the same had the effect in the decision arrived at by the court. Upon perusal of the evidence as recorded during hearing, three witnesses testified in court before a charge was substituted on the 26th September, 2013. Again, the testimony of the three witnesses testified earlier before substitution is not consistent when they

came again to testify after a charge had been substituted. In my view, the appellant was and is right at this stage to complain, especially so, him being a lay man. The second time they came to testify the witness namely; PW1 D. 83238/CPL MUSA, PW2 JUMA HAMIS and PW3 H.521/PC Namohe had a chance to rectify the evidence. The same was relied upon by the trial court to convict the appellant, though for the respondent that is not the case. To them the evidence to be followed is after substitution of the charge.

On the issue of identification, in the proceedings Zakia Duni/Adimu and Juma Hamidu testified to have seen and identified the appellant. Their identification is general. PW1 identified Matiku and the other was identified by face. PW4 Juma Hamidu, saw two people and he was able to identify the appellant by face. He used to see him. It is the view of the respondent that the account on identification are insufficient. Though the event took place at around 6:00 Hours, witnesses were supposed to give detailed description of the appellant. This was not done and therefore the account did not meet the standard required in the evidence of visual identification. The evidence of identification require that a witness gives description of the face, attire, time of observance, distance and whether the accused was a person known to him/her or you met for the first time during the occurrence of the event. The court was referred to the case of ***Jackson Zebedayo Wambura***

and Charles Wambura v. Republic, Criminal Appeal No. 213 of 2015, Court of Appeal of Tanzania at Dar es Salaam.

The learned State Attorney also submitted that despite of the fact that witnesses who identified the appellant did not give to the police officers, description prior to the identification parade exercise, the identification parade which was supervised by PW5 did not meet the standard required by law. The witness gave a general statement that the appellant was identified by two witnesses. It is not clear whether the supervisor explained to the appellant his rights, how witnesses were handled before and after identification parade. It is not clear if the participants of the parade had identical attire or not and how was the appellant identified. In the referred case above it was held that an evidence based on identification parade conducted without proper procedure has little value against the appellant.

The learned State Attorney submitted that the respondent agrees on the discrepancy in the items stolen but that descrepancy did not go to the root of the case as to affect the right of the appellant. The evidence on the mode of arrest also deserve attention. Cpl. Musa say that the appellant was arrested on 27/4/2013. PC Namohe says the appellant was arrested on 26 /4/2013. At page 21 Cpl. Musa says the appellant was arrested as one of the criminals in Kigogo area. There is no clear

link to the event. We pray this appeal be allowed, conviction be quashed, sentence set aside and the appellant be set free.

As it was rightly submitted by the learned State Attorney, the evidence on identification is insufficient to warranty absence of mistaken identity. It was held in the case of ***Mohamed Alhui v Rex*** [1942] 9 EACA 72 which was quoted with approval in the case of **Raymond Francis Vs. The Republic**[1994]T.R.L.100 (CA) that :-

> "In *every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given'.*"

In the testimonies in the case at hand we don't have such description to fulfil the legal requirement for evidence of visual identification.

Also, the evidence on identification of the appellant at the identification parade is too general. PW5 PF 177188 A/INSP. Ezekiel testified that he conducted identification parade against the appellant. The parade had a total of ten people including the appellant. In that exercise Zakia na Juma Hamidu identified an

accused after that parade. The report is in the Exhibit PE 2(a) and PE 2(b). Zakia Adimu had a chance to see the appellant during arrest as it is in the evidence of H.521/PC Namohe. On the 29th August,2013 PW3: H.521/PC Namohe testified in court that, I quote: -

> *"On 26th April, 2013 in the afternoon I was at working with my fellow, I was called by my leader I was with PC Rajab, we were addressed to go to arrest accused who uses (is used) to rob people at Mikumi Stand and Kigogo area, after getting instruction we got details* ***from the complainant we went with complainant up to Magomeni Mikumi***" (page 9-10 of proceedings)

The complainant referred to in that piece of evidence quoted is PW1 Zakia Duni who testified in court on the 7th November, 2013 that she identified the appellant in the Identification parade. (page 14). In the case of ***R vs. Mwango s/o Manaa***(1936) 3 EACA 29 one of the conditions of a properly conducted identification parade is that none of the witnesses are allowed to see the accused before the parade. Obviously, in this case the identification parade was not conducted according to the guidelines prescribed by law.

For the reasons above, I find that there are doubts as to the correct identification of the appellant which must be resolved in favour of the appellant.

The appeal is allowed in its entirety. The conviction is quashed, sentence set aside and the appellant should be set free immediately otherwise he is lawfully held.

T.M. MWENEMPAZI

JUDGE

22/6/2018