IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 224 OF 2018

1. **SAULO MWANDU @ KAMANDO**
2. **JOHN AMOS** ..... **APPELLANTS**
3. **VENANCE FARIALA**

VERSUS

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

(Appeal from the Judgment of the High Court of Tanzania, at Sumbawanga)

(Sambo, J.)

dated the 29th day of April, 2014

in

Criminal Appeals No. 38,39 & 40 of 2014

.....

JUDGMENT OF THE COURT

22nd November & 3rd December, 2021

MWAMBEGELE, J.A.:

In this appeal, the five appellants, Saulo Mwandu @ Kamando, John Amos and Venance Fariala (the first, second and third appellants, respectively) are challenging the judgment of the High Court of Tanzania, sitting at Sumbawanga (Sambo, J.) which upheld the conviction and a sentence of thirty years in jail passed against each of them by the Court of the Resident Magistrate of Rukwa at Sumbawanga. Before that court, the appellants were jointly charged with five counts of the offence of armed

robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. They pleaded not guilty to the charge, after which a full trial ensued.

In a bid to prove its case, the prosecution marshalled eight witnesses. The defence case comprised of four witnesses including the three appellants themselves. After the full trial, as already stated, the trial court (Matembele, SRM) found the guilt of the three appellants established to the hilt. He thus convicted them and awarded each a prison term of thirty years. Their first appeal to the High Court was barren of fruit, hence this second appeal.

The facts comprising the background to this appeal, as told by the prosecution witnesses, can briefly be stated as follows: on the night of 11.01.2013, Geoffrey Amos Mazimba (PW2), Renatus Kanoni (PW3), Livinus Kanyongo (PW4) and Alfred Mrisho (PW5), together with two or three other fishermen whose names are not disclosed by evidence with certainty, were in a fishing expedition in Lake Tanganyika at a place near Samazi Village in Kalambo District, Rukwa Region. At about 22:00 hours, they were invaded by three bandits armed with a gun, knives and paddles.

They were attacked with paddles and a butt of the gun and the bandits made away with an assortment of items including boat engines and cash.

On the following day; that is, on 12.01.2013, the robbery was reported to Matai Police Station where Setielly Mathew (PW7); a detective police officer, took charge of the investigation of the case. PW7 first visited the scene of crime where the complainants told him that they were attacked by Kamando, Juma and Shaban. They also told intimated to him that the robbers spoke Kiswahili with a Congolese accent.

At a later stage, the complainants got wind that there were some used boat engines being sold at Kapembwa Village in Zambia. That information was relayed to PW7 on 19.01.2013 and also told him that they intended to make a follow-up there. PW7 agreed but advised them to liaise with the Immigration Office at Kasanga with a view to complying with immigration requirements. The complainants, including Respice Patrice Kazumba (PW1) and Lauterty White (PW6), went to the neighbouring village in Zambia where, with the help of the Zambian police authority, they managed to retrieve the stolen boat engines and, in the process, the second and third appellants were arrested. In the meantime, the first

appellant was arrested on 22.01.2013 at Karewani area in Kasanga township.

On 25.01.2013, PW7, together with fellow policemen A/Inspector Hosiano Mwaluju, DC Rashid and DC Raphael, were assigned to go to Mpulungu Police Station in Zambia to pick up the allegedly stolen items and the two suspects. There, PW7 and his colleagues were handed four boat engines which the complainants had identified as theirs and the second and third appellants.

Upon arrest, the first appellant was made to write a cautioned statement in which he confessed to have committed the offence in the company of the second and third appellants. That cautioned statement was tendered after an inquiry was conducted and admitted in evidence as Exh. P5.

In their respective defences at the trial, the appellants denied to have committed the offence. The first appellant called his brother, Venance Kamando (PW2) to support his evidence that he was arrested after his son was killed on allegations of armed robbery offences. The second appellant testified that he hailed from Musoma in Mara Region but lived in Kigoma and that he was arrested on 08.01.2013 at Mpata Village in Mpulungu Area

in Zambia while taking local brew at a shop selling that stuff. He testified that he had gone there to sell fruits from Kigoma. That he was brought to Tanzania where he was charged with the offence the subject of this appeal. The third appellant testified that he was a Congolese and had gone to Mpulungu area in Zambia where he had a two weeks' permit to live. That he was arrested by Zambian Police on armed robbery allegations and taken to Tanzania for prosecution.

The appellants filed their respective memoranda of appeal to the Court. The memorandum of appeal of the first appellant comprises five grounds of appeal while the second and third appellants is composed of seven grounds each. Their memoranda of appeal depict the following complaints: **one**, that the cautioned statement of the first appellant was received in contravention of the law; **two**, that the evidence of visual identification of the appellants was not watertight; **three**, that the first appellate court erred in upholding the appellants' conviction based on evidence of dock identification; **four**, that the evidence of PW1 and PW6 was not corroborated by people from Zambia; **five**, that the doctrine of recent possession was not applicable as the appellants were not found in possession of stolen items; and, that the case against the appellants was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellants appeared in person, unrepresented. The respondent Republic appeared through Ms. Scholastica Ansigar Lugongo, learned Senior State Attorney. When we called upon the appellants to argue their respective appeals, they, in turns, adopted their respective memoranda of appeal and preferred to hear the response of the learned Senior State Attorney for the Republic. They, however, reserved their respective rights of rejoinder if need to do so would occasion itself.

Responding to the appellants' appeal, Ms. Lugongo expressed her stance at the very outset that she was supporting the appeal of all the three appellants. Her concession was pegged on two main grounds; **first**, that identification of the appellants at the scene of crime was not watertight, and, **secondly**, that the cautioned statement of the first appellant was not read after it was admitted in evidence.

On the visual identification of the appellants, Ms. Lugongo submitted that the identifying witnesses in the case were PW1, PW3, PW4 and PW5. These witnesses did not testify on the intensity of the light through which they could identify their assailants. They did not even describe the attire of the appellants. She cited and supplied to us our unreported decision in **Mussa Mbwaga v. Republic**, Criminal Appeal No. 39 of 2013 to buttress

the point that where determination of the guilt of an accused person depends on identification, evidence on conditions favouring a correct identification is of utmost importance. In the appeal at hand, she submitted, the offence was committed at night thus making the evidence of positive visual identification of the appellants of utmost importance.

With regard to the cautioned statement of the first appellant (Exh. P5), the learned Senior State Attorney submitted that it flouted the requisite procedure which must invariably be adhered to so as to give it passport of being properly admitted in evidence. She pointed out the shortcoming in its admission as not being read out loud in court after it was admitted. That irregularity was fatal and made Exh. P5 expungable from the record, she contended. The learned Senior State Attorney placed reliance on our unreported decision in **Adolf Macrin v. Republic**, Criminal Appeal No. 249 of 2011 to reinforce the point that dock identification was not sufficient to mount a conviction against an accused person.

Having argued as above, the learned Senior State attorney wound up by submitting that the evidence on the record of appeal had it that the prosecution did not prove the case appellants beyond reasonable doubt.

She thus implored us to allow the appeal and release the appellants from prison.

In rejoinder, each of the appellants, for obvious reasons, supported the landing of the learned Senior State Attorney that their appeal should be allowed and that they should be set free.

We must state at the outset that we find a lot of sense in the conceding submissions of the learned Senior State Attorney that the prosecution evidence failed to prove the guilt of the appellants beyond reasonable doubt. The case for the prosecution was indeed shaky. As put by Ms. Lugongo, and to our mind rightly so, the case for the prosecution stood or fell on the evidence of visual identification by the four identifying witnesses. On this issue, we think it is important to come to grips with the law relating to visual identification founded upon prudence in this jurisdiction. It is to this issue to which we now turn.

The law relating to visual identification of a culprit is well settled in this jurisdiction. On this issue, we find it pertinent to recite the guidelines set out in the oft-cited decision of the Court in **Waziri Amani v. Republic** [1980] T.L.R. 250 and which have been religiously followed by the Court.

Speaking through Mwakasendo, JA, we articulated in **Waziri Amani** (supra) at pp. 251 – 252:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight****."*
>
> [Emphasis ours].

We went on at p. 252:

> *"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity; it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.* ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at***

which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."*

[Emphasis supplied].

Applying the above guidelines to the appeal before us, we are certain that the evidence of PW1, PW3, PW4 and PW5 who were the identifying witnesses, was terribly weak. We shall demonstrate. The robbery took place at about 22:00 hours. The identifying witnesses did not testify on the distance at which the culprits were when they identified them. None of the identifying witnesses testified the attire the appellants were in, save only that they testified that they were in civilian clothes. They stated that the crime scene was illuminated by light from a hurricane lamp but not one of them testified on the intensity of that light. To appreciate our stance, we find it irresistible to reproduce what each one stated with regard to the visual identification of the assailants. PW2 testified at p. 22 of the record of appeal:

"Those people were three coming into the boat from the other place towards us. My fellow six fishermen, whom we were together, jumped into another boat. But, as I was the owner of that boat, I restrained myself from jumping into the waters. Those people having arrived at my boat started beating me by using ... [a paddle] and the gun .... Having seen that they would kill me, I jumped out from the boat. That is when they took my boat and disappeared. ***I managed to identify them as they were coming from the dark and coming towards my light. Those people are the three accused who are present at the dock****."*

[Emphasis supplied].

As for PW3, he is recorded at p. 26 as saying:

"While we were fishing we used the light which was being discharged by generator and light of two lamps (Karabai). The bandits who attacked us were using a boat which was not belng pulled by engine. The bandits were armed with weapons to wit one SMG, one muzzle gun and two knives. ***Those bandits were wearing civilian clothes. Those bandits are the three accused persons who are present at the dock****."*

[Emphasis added].

PW4, as appearing at p. 29 of the record of appeal stated:

> *"There were three bandits one among them had an SMG, while the other was holding a muzzle gun plus knife and the 3rd person was not holding any weapon.* ***Those people were in civilian clothes. I identified the said bandits through a help of lamp lights to wit Kerosene lamp. We had also the assistance of generator light which produced light in sport light. I can identify the said persons as they are the accused persons who are present before the dock****."*
> [Emphasis ours].

And PW5 testified at p. 32 as follows:

> *"The bandits had a boat which is manually driven, there were three bandits.* ***The said bandits had two fire arms. The said bandits wore civilian clothes****. In our group we were about eight people. Having attacked us they ordered us to jump into the water. I complied with their order by jumping into the water and started swimming. Our captain was arrested and being beaten, he is known as Livinus. At the time when they attacked us it was at 22.00 hrs.* ***Though it was night time I managed to identify the bandits as I was being assisted by the light of lamp (Karabai)****."*

[Emphasis supplied].

We have taken time and space in this judgment to reproduce above what the four identifying witnesses testified with regard to visual identification. It will be appreciated that their evidence is not only discrepant of material particulars but also did not meet the minimum threshold of the elements of visual identification that should be observed by judges and magistrate as articulated in **Waziri Amani** (supra). What the four identifying witness did was but dock identification which we have observed times without number that, without any corroboration by other evidence (say an identification parade), is worthless – see: **Adolf Macrin** (supra), **Julius s/o Justine & Four Others v. Republic**, Criminal Appeal No. 155 of 2005 (unreported) and **Herode s/o Lucas & Another v. Republic**, Criminal Appeal No. 407 Of 2016 (also unreported), to mention but a few.

In **Julius s/o Justine**, we recited the following excerpt from our previous decision in **Musa Elias and Two Others v. Republic**, Criminal Appeal No. 172 of 1993 (unreported) which we think merits recitation here:

> *"Furthermore, PW3's dock identification of the 3rd appellant is valueless. It is a well established rule that dock identification of an accused person by a*

witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial".

In the case the subject of this appeal, the appellants were not positively identified at the scene of crime. The appellants were strangers to the identifying witnesses and no identification parade was conducted. It is for this reason we agree with the learned Senior State Attorney that the appellants were not positively identified at the crime scene. The complaint by the appellants on this aspect, as rightly put by the learned Senior State Attorney, is meritorious.

The learned Senior State Attorney also relied on the improper admission in evidence of the first appellant's cautioned statement (Exh. P5) and implored us to expunge it. She is right. We are ready to take the course proposed by the learned Senior State Attorney. It is apparent on the record of appeal at p. 67 that the exhibit was admitted in evidence after an inquiry was conducted and the same found admissible. However, after reception, it was not read out loud in court with a view to allowing the appellants to know its contents. That was not done and, we respectfully think, it prejudiced the appellants. It is expungable from the

record as oftenly held by the Court in a number of its decisions – see: **Robinson Mwanjisi and 3 Others v. Republic** [2003] T.L.R. 218 and a string of decisions we need not mention here that have followed it. We feel pressed to remark at this juncture, that we are aware that, in some deserving cases, an exhibit not read out loud after admission may be relied upon by a court of law – see, for instance, **Chrisant John v. Republic**, Criminal Appeal No. 313 of 2015, **Ernest John Mwandikaupesi v. Republic**, Criminal Appeal No.408 of 2019 and **Stanley Murithi Mwaura v. Republic**, Criminal Appeal No. 144 of 2019 (all unreported). However, we are certain the facts obtaining in the case the subject of the appeal at hand do not call upon us to put the case in that category. We are therefore satisfied that Exh. P5 was improperly admitted in evidence and we expunge it from the record.

We would have ended there if it were not for the record of appeal to be not free from other disquieting aspects that make the case for the prosecution arid of hope. The second and third appellants were allegedly arrested in possession of the recently stolen boat engines at Kapembwa Village in Zambia. However, PW1 and PW6 who went to Kapembwa Village in Zambia did not so testify. The two witnesses testified that the stolen boat engines were found in possession of people whose names their

testimonies could not disclose who said they bought the same from the second and third appellants. That information by the buyers of the allegedly stolen engines led to the arrest of the second and third appellants. It is not that the second and third appellants were found in possession of such stolen boat engines as held by both the trial court and the first appellate court. With utmost respect to both courts below, their finding on the doctrine of recent possession is not backed by evidence. To make matters worse, the persons from Zambia in whose hands the recently stolen boat engines were found, were not brought to testify and no reason why was stated by the prosecution. This not only adds salt to the wound in the prosecution case but also entitles us to make adverse inference on the prosecution's case. Both ailments contribute to making the prosecution's case crumble.

In view of the foregoing discussion, we are increasingly of the considered view that the evidence by the prosecution fell short of proving the case against the appellants beyond reasonable doubt.

For the reasons we have assigned, we are satisfied that the complaints of the appellants in this appeal were lodged not without justifiable cause. We thus find merit in this appeal and allow it. As a result

we quash the judgments and convictions of the two courts below and set aside the sentences meted out to the appellants. Consequently, we order the release of the appellants Saulo Mwandu @ Kamando, John Amos and Venance Fariala from prison forthwith unless they are detained there for some other reason.

DATED at **MBEYA** this 3rd day of December, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of the appellants, in person and Ms. Zena James learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL