IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 305 OF 2017

1. **RASHID OTHMAN RAMADHAN**
2. **ABDALLAH KHATIB MKETO**
3. **HAFIDH RAMADHAN ALI**
4. **SAMUEL EMMANUEL MBAGA**

.....APPELLANTS

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from Judgement of the High Court of Zanzibar at Vuga)

(Issa, J.)

dated the 16th day of March, 2017
in
Criminal Case No. 6 of 2015

JUDGMENT OF THE COURT

06th &13th December, 2019

KEREFU, J.A.:

The appellants, namely Rashid Othman Ramadhan, Abdalla Khatib Mketo, Hafidh Ramadhan Ali and Samuel Emmanuel Mbaga were, together with Omary Juma Ali and Ramadhan Hassan Shaaban, jointly charged with two counts in the High Court of Zanzibar at Vuga. The first count was on the offence of attempting unlawfully to cause death contrary to section 210 (a) and the alternative count was on causing grievous harm contrary to section 225 both of the Penal Act No. 6 of

2004, respectively. It is noteworthy that at the conclusion of the trial, the alternative count was dropped by the High Court.

As for the first count, it was alleged that, on 16th January, 2015 about 2:00 am at Nungwi Mbuyuni within the Northern 'A' District the appellants attempted unlawfully to cause death of Michael Kurz by attacking him with a 'panga' and wounding him severely on his head, arms, neck, hands and left shoulder.

The appellants denied the charge by raising the defence of alibi to the effect that, none of them was at the scene of crime. In order to prove its case the prosecution paraded a total of ten witnesses and tendered seven documentary and physical exhibits.

In a nutshell, the factual background facts leading to the appellants' arraignment and conviction, can be briefly stated as follows: On 16th January, 2015 at around 2:00am when Michael Kurz (PW1), the victim, was in his house with his wife Delanie Kurz (PW2), he woke up and shortly heard a glass being shattered and PW2 was screaming 'they are coming', 'they are coming'. PW1 saw some people running towards the bedroom. He shut the bedroom door and locked it, but someone from outside hammered the door, broke the lock and opened it. PW1 saw five people and according to his evidence he was able to recognize them as the passage was illuminated by the light. The first person had a red and black scarf on his head and had a cut-off ear and was holding a crowbar. The other person was

tall and strongly built and the other three were of average height. PW1 tried to grab the crowbar. While fighting with the first person, someone hit him with a machete on the hands and head. PW1 fell down on the floor bleeding and the said assailants run away without taking anything.

In support of PW1's evidence, Delanie Kurz (PW2), the wife of PW1 testified that, on that night she was in the house sleeping, but she woke up and went to the bathroom and then to the kitchen to drink some water. On her way back she saw two shadows and thereafter, the glass to their room was smashed. She rans to the bedroom while shouting for her husband to woke up. She saw people with a panga and a metal bar. They went behind the door and locked it. Those people managed to break through and started fighting with her husband. She went out to the car and switched on the lights while shouting to alert the neighbours. One of their neighbours, Chris Goodwill came to the house and assisted them. PW2 testified that, she could not identify the bandits as the incident happened so fast.

Idd Khamisi Hamad (PW3) a watchman who was also said to be at the scene of crime testified that, at that fateful night he was attacked by eight people, while on the eastern side of the house and the invaders passed through the western side by jumping on the fence and entered inside the compound. PW3 further narrated that, they tied and put him on the ground, while warning him not to make noise lest they would kill him. He did not know what transpired subsequently, but he

heard glasses being smashed. He said, he was able to recognize the bandits as there was enough light, though he did not witness anything after he was put on the floor, but he only heard PW1 screaming. He further said, the bandits left their shoes, iron bar and crowbar. That, their neighbour Chris went to report the matter to the Police who came and untied him. PW1 was taken to the hospital for treatment after he obtained a PF3 from the police.

ASP Abdalah Omari Juma (PW5), testified that he was informed on the identification parade where some people were paraded. PW3 passed and he identified the first and third appellants by touching them. PW5 also testified that a second parade was conducted where the fourth appellant was identified. The said parades were conducted on 22/1/2017.

D5648 D/Sgt. Juma (PW6) the investigation officer testified that, on 16th January, 2015 he received information on the incident from Christopher James Goodwill (PW7) that bandits had invaded the home of PW1 and PW2. PW6 together with other police officers went to the scene of crime and found PW3 tied with ropes on his hands and legs. Upon entering the house they found blood in the sitting room, toilet and the wall. They also found PW1 who was severely injured on the head, arms, hands shoulders and neck. They took PW1 to the hospital for medical treatment and opened a case file. From the scene of crime they collected a pair of

black shoes, iron bar and ropes. After seeing the said ropes, PW6 suspected that the bandits are coming from a painters group at Lagema Hotel. They invaded that group and apprehended several people including the second accused person, one Omar. According to the evidence of PW6, when he interrogated the second accused he admitted to have participated in the incident and named the rest of the appellants.

It is noteworthy that, after a full trial, the second accused (Omary Juma Ali) was acquitted but the appellants herein were convicted and sentenced to ten years' imprisonment term.

Dissatisfied, each of the appellants filed their notices of appeal that led to the filing of this Criminal Appeal No. 305 of 2017 containing two sets of memoranda of appeal raising a total of sixteen grounds which raised three main complaints: **one,** failure by the trial judge to properly sum up the case to the assessors and direct them on the vital points and applicable laws, hence the trial was conducted without the aid of assessors. And, in the alternative, **Two**, that the visual identification evidence was not watertight. **Three,** identification parade was not properly conducted.

At the hearing of the appeal before us, Messrs. Rajab Abdalla Rajab and Andrew I. Luhigo, learned counsel teamed up to represent the appellants while, Mr.

Ali R. Ali, learned Senior State Attorney, assisted by Mr. Mohamed Khamis, learned Senior State Attorney and Mr. Suleiman Yusuf, learned State Attorney appeared for the respondent.

Submitting in support of the first ground, Mr. Rajab argued that, the trial judge during the summing up he did not direct and explain to the assessors the vital points of law in relation to circumstantial evidence, visual identification, identification parade and defence of alibi which related to the facts of the case. It was the contention of Mr. Rajab that the trial was vitiated and cannot be safely vouched to have been conducted with the aid of the assessors which is against the dictates of the law as prescribed under section 238 of the Criminal Procedure Act No. 7 of 2004 (the CPA). To bolster his position he referred us to **Kato Simon and Another v. Republic,** Criminal Appeal No. 180 of 2017 (unreported) and emphasized that the failure to direct the assessors on those vital points of law has vitiated the entire trial proceedings.

Thus, it was Mr. Rajab's submission that, though the anomalies would have been remedied in a retrial, in a view of the discrepancies found on the prosecution evidence, a retrial is not worthy. As to the insufficientl of evidence or otherwise, he pointed out that, since the offence took place at night, where the conditions for identification were unfavorable the evidence of visual identification must be

watertight. It was his strong argument that, the appellants were not properly identified at the scene of crime, due to the contradictory account of the prosecution evidence, insufficiency of the light at the scene of crime and circumstances surrounded the occurrence of the offence.

Mr. Rajab argued further that, the finding of the trial judge that there was sufficient light which enabled PW1 and PW3 to make proper identification of the appellants is erroneous because the said witnesses gave contradictory evidence as regards the source of light. He pointed out that, whereas PW1 testified that the passage had three sport lights, PW2 said, it had only two lights while PW3 testified that there was light in the area. He contended that, all witnesses did not explain clearly on the intensity of the said lights in their testimonies, but PW1 while responding to the question raised by the trial court said that, there were three spot lights which had more that 50 watts each, though again he did not specify the distance between the bedroom, where he was and the said passage.

In the circumstances, Mr. Rajab argued that there is doubt as regards to the intensity of the light which aided PW1 and PW3 to make proper identification. He went on to argue that the doubt on the intensity of the light is fortified by the fact that, PW1, PW2 and PW3, were not able to state the proper number of bandits who

invaded the house, PW1 said he saw five people, while PW2 said she saw four and PW3 said that, they were eight.

Mr. Rajabu also faulted the testimonies of PW1 and PW3 that, though they said that they were able to identify the bandits, they did not mention any of them and give proper descriptions on their physique, attire and special marks, except only when PW1 said, the first person had a red and black scarf on his head and had a cut-off ear without further clarification. He said that, since the appellants were not known by PW1 prior to the incident, which took only few minutes and the identification by PW1 was impeded by an attack, the same cannot be said to be watertight. It was the further argument by Mr. Rajabu that, the trial judge did not consider all these glaring contradictions in the evidence of the witnesses, but only concluded in general terms, that the identification was watertight. To buttress his position he cited cases of **Muhidini Mohamed Lila @ Emolo and Three Others v. Republic,** Criminal Appeal No. 443 of 2015 and **Oden s/o Msongela and Five Others v. Republic,** Consolidated Criminal Appeals No. 417 of 2015 and 223 of 2018 (both unreported).

On the third ground, Mr. Rajab argued that the two identification parades were not properly conducted. He clarified that, there is nothing in the prosecution evidence suggesting that, PW3 who was involved in the said two parades, had,

prior to the identification parades, given to the police or any other person, the descriptions of the persons who he saw at the scene. To support his position he referred to **Muhidini Mohamed Lila @ Emolo and Three Others** (supra). On the strength of his arguments, Mr. Rajabu urged us not to order for a retrial but to quash the conviction, set aside the sentences imposed against the appellants and set them free. On his part, Mr. Luhigo supported the submission made by Mr. Rajabu and also urged us to allow the appeal.

In response, Mr. Ali strongly opposed the appeal. Submitting on the first ground, he argued that there is no any misdirection or non-direction to the assessors as the trial judge complied with the requirements of the law. He relied on the case of **Othman Issa Mdabe v. The Director of Public Prosecutions,** Criminal Appeal No. 95 of 2013 and emphasized that, in the summing up notes, the trial judge informed the assessors on the summary of the facts, evidence adduced, relevant law, and possible defence. However, on reflection and upon being probed by the Court as whether or not the assessors were directed on the vital points of law highlighted by Mr. Rajabu, Mr. Ali conceded that there is an omission in the summing up notes, but it was his view that, the same has not occasioned any miscarriage of justice to the parties.

As regards the second ground, Mr. Ali submitted that, the visual identification was watertight as the light at the scene of crime was adequate to enable PW1 and

PW3 to properly identify the bandits. He referred to the testimony of PW3 and argued that, he clearly described the intensity of the lights by testifying that, '*there were four lights which were very bright.*' When asked to clarify on the descriptions of the identified bandits Mr. Ali responded that, PW1 was able to only describe one of the bandits in general terms. Mr. Ali also argued that, PW6 testified that, PW3 told him the physique of the bandits, without giving details on their descriptions. He thus distinguished the cases of **Muhidini Mohamed Lila @ Emolo and Three Others** (supra) and **Oden s/o Msongela and Five Others** (supra) cited by Mr. Rajab, that in those cases, descriptions of accused were not given at all during the trial, while in this case, they were given though not in detail.

Having carefully considered the grounds of complaint, the submissions advanced by the learned counsel for the parties and the record before us, we have to determine the propriety or otherwise of the trial and if the charge was proved against the appellants to the required standard. Before doing so, it is crucial to state that, this being the first appeal it is in the form of a re-hearing. Therefore, the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. (See **D.R. Pandya v. Republic** (1957) EA 336).

We begin our discussion with the requirement of section 238 of the CPA, referred to us by Mr. Rajab. The said section provides that:-

"All trials before the High Court shall be with the aid of assessors, the number of whom shall be three."

In respect of the matter before us, we think the above provision should be read in conjunction with sections 263 and 278 (1) of the CPA. The said sections provide that:-

"263. When a trial is to be held with the aid of assessors, the court shall select three from the list of those summoned to serve as assessors at the sessions.

278 (1) When the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion."

From the above excerpt, the issue of summing up to the assessors is a requirement of the law for the trial judge who sits with the aid of assessors. It is the duty of the trial judge to sum up to them before inviting their opinion. The main purpose is to enable the assessors to arrive at a correct opinion. The said opinion can be of great value to the trial judge only if the assessors understand the facts of the case in relation to the relevant law. We appreciate the authorities cited by Mr. Rajab on this matter and we wish to add the cases of **Washington s/o**

Odindo v. Republic, (1954) 21 EACA 392; **Augustino Lodami v. Republic,** Criminal Appeal No. 70 of 2010 and **Charles Lyatii @ Sadala v. Republic,** Criminal Appeal No. 290 of 2011 (both unreported). Therefore, in order for the assessors to arrive at a correct opinion, it is the duty of a trial judge when summing up, to explain to them the law in relation to the relevant facts as to the vital points of the law involved.

Having in mind the above guiding principles, in the present case, we have taken our time to revisit the record of appeal as pointed to us by Mr. Rajab and indeed, it is apparent that the appellants' conviction was based on circumstantial evidence, visual identification and identification parade. It is also apparent from the judgment that, the trial judge reached his conclusion based on the above legal principles. However, in the summing up notes, the trial judge concentrated much on introductory remarks and summary of testimonies of the witnesses, without directing the assessors on those vital points of law or even on the defence of alibi which was relied upon by almost all the appellants.

On the consequences of the non-direction of the assessors on vital points of law, we wish to refer to the case of **Washington Odindo** (supra), where the defunct Court of Appeal for Eastern Africa stated that:-

> *"The opinion of assessors can be of great value and assistance to a trial judge but only if they fully understand the facts of the case before them in relation to the relevant law.* ***If the law is***

not explained and attention not drawn to the salient facts of the case, the value of the assessors' opinion is correspondingly reduced." [Emphasis added].

As eloquently submitted by Mr. Rajab, this Court has in numerous decisions emphasized on the need for a trial court to direct the assessors on vital points of law whereas non-compliance has been held to be fatal irregularity with the result of vitiating the entire trial proceedings. See the decision in **Charles Lyatii @ Sadala v. Republic**, Criminal Appeal No. 290 of 2011 (unreported), where the Court nullified the trial court proceedings because the assessors were not directed on what malice aforethought was all about. The Court relied on the *ratio decidendi* in the English case of **Bharat v. Queen** (1959) AC 533 and observed that:-

> *"Since we accepted the principle in **Bharat's** case as being sensible and correct, it must follow that in a criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is a non-direction to the assessors on a vital point."*

In **Mara Mafuge and Six Others v. Republic**, Criminal Appeal No. 29 of 2015 (unreported) the Court when faced with a similar situation observed that:-

> *"...we are of well considered view that the summing up to assessors in the present case fell short of the minimum*

threshold required under the law... Therefore, the proceedings are as good as if the trial was without the aid of assessors."

In view of the settled position of the law, we are in agreement with Mr. Rajab that the failure to direct the assessors on vital points of law was a violation of section 238 of the CPA and it cannot be safely vouched that, the assessors were properly informed to make rational opinion as to the guilty or otherwise of the appellants. Hence, the trial was vitiated.

Ordinarily, on the account of the pointed irregularity on the summing up to the assessors, we would have ordered for a retrial. We are however, alive to the fact that, Mr. Rajab has however, submitted against that course on the ground that the prosecution evidence on the record is weak. Mr. Rajab faulted the propriety of the visual identification of the appellants at the scene of crime together with the two identification parades organized to identify the appellants. On the other side, Mr. Ali criticized the course taken by Mr. Rajab, as for him the visual identification was watertight and even the identification parades were conducted in accordance with the law. In this regard, it is crucial to revisit the evidence on record.

We commence with the celebrated principles relating to visual identification as emphasized by case law. In the case of **Raymond Francis v. Republic** [1994] T.L.R 100 the Court, among others, held that:-

"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."

Certain guiding factors to be taken into account by courts in establishing whether the identification of an accused/appellant at the scene of crime was watertight were stated by the Court in the case of **Waziri Amani v. Republic** [1980] T.L.R 250. The conditions include:-

"...the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, if it was day or night time; whether there was good or poor lightening at the scene, whether the witness knew or had seen the accused before or not."

In the case at hand, PW1 claimed to have identified the appellants at the scene of crime and tried to describe their physique, size and attire aided by the presence of light which was in the passage, while he was inside his room. However, his testimony is in general terms and vary to a large extent with his statement, which was recorded at the police on the fateful day of incident. This is the case with the testimonies given by PW2 and PW3 before the trial court. The variation leaves a lot to be desired on the credibility of PW1, PW2 and PW3 that is why the defence relied on these statements to impeach their testimonies which was proper course, in our view, though it went unnoticed by the trial court.

In our considered view, PW1, PW2 and PW3's version in the recorded statements before the police were very much closer to the occurrence of the incident as it bears their fresh recollection of what actually transpired on the fateful incident, than the testimonies which were given after a lapse of almost a year. This Court has held that a credible identifying witness would expected to give descriptions of the suspect in relation to physique, attire, size or any peculiar body features. See the case of **Mussa Hassan Barie and Another v. Republic**, Criminal Appeal No. 292 of 2011 (unreported).

Admittedly, the incident took place at night, therefore the prosecution witnesses were also expected to clearly disclose the source and intensity of the light, but this was not done. Each witness had its own account on the source and intensity of the light which aided them to identify the appellants at the scene of crime. It is therefore crucial to revisit the evidence on this aspect.

At page 63 of the record, PW1 said, *"I was able to identify all of them as the passage was well lit."* When asked by the court on the intensity of the said light, PW1 at page 65 testified that, *"The corridor had three spot lights with each having more than 50 watts."* On her part, PW2 at page 66 testified that, "I tried to go out but I did not have a gate key. I went to the car and puts on the light." As for the lights at the passage PW2 testified that, *"When I was in the passage there were*

lights which were on. Two lights one in each wall." Whereas, PW3, only testified in general terms at page 67 that, 'there was enough light."

It is clear from the above extracted testimonies that there are inconsistencies in explaining the lights which assisted them to identify the appellants. There is no witnesses who clearly explained on the intensity of the light at the scene of crime.

This Court has always reiterated that caution should be exercised before relying solely on the identification evidence. In **Chokera Mwita v. Republic,** Criminal Appeal No. 17 of 2010 (unreported) the Court was confronted with a similar issue. It held that: ***"...neither PW1 nor PW3 spoke of the intensity of its light, thus leaving unattended the issue of likelihood of mistaken identity."*** *[Emphasis added].*

The Court further held that:-

> *"In short, the law on visual identification is well settled. Before relying on it,* ***the court should not act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight."*** [Emphasis added].

See also **Issa s/o Mgara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005 (unreported), where the Court observed that it is not sufficient for the witnesses to make bare assertions that "*there was light*". The Court held that:-

> *"In our settled minds, we believe that* ***it is not sufficient to make bare assertions that there was light at the scene of the crime.*** *It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns, etc give out light with varying intensities...* ***Hence the overriding need to give in sufficient details on the intensity of the light and the size of the area illuminated.*** *"*[Emphasis added].

Similarly, in the matter at hand, it was not enough for PW1, PW2 and PW3 to make bare assertions that there was light without giving sufficient details on the intensity, distance of the said light from where the witness was and the size of the area illuminated to rule out the possibility of mistaken identity.

As regards the two organized identification parades, it was the argument of Mr. Rajab, that the same were conducted unprocedurally for having similar people for both parades and that PW3 did not give details on appellants' body physique, size attire or any peculiar body features that enabled him to identify the appellants from the group of people paraded in the identification parade before the police. On his part, Mr. Ali was of the view that, the parades were properly conducted. With respect, we are unable to agree with the submission of Mr. Ali on this matter, because there is nowhere in the record where it is shown that PW3 gave the descriptions of the appellants to any of the police officer prior to the said parades. It is trite law that, for the evidence of an identifying witness to be credible; such

witness must have given the description of the suspect before he made identification of the suspect at the identification parade. See for instance the case of **R v. Mohamed** [1942] EACA 72 cited in the **Yohana Chibwingu v. Republic**, Criminal Appeal No. 117 of 2015 (unreported) where the erstwhile East African Court of Appeal underscored this requirement in the following words:-

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

As intimated earlier, since in the case at hand, the above requirement of giving the description of the suspects prior to the identification parade was not complied with, there is no gainsaying that the evidence obtained from the parade is unworthy of credit.

Following the omissions, irregularities and deficiency in the prosecution evidence, we are in agreement with Mr. Rajab that a retrial is not feasible.

On the basis of the above stated reasons, we find merit in the appeal and hereby allow it. In the event, the appellants' convictions are quashed and sentences set aside. As a result, the conviction and sentence of Ramadhan Hassan

Shaaban cannot remain on record. They are also hereby quashed and set aside. We order their release from prison forthwith unless they are otherwise lawfully held.

DATED at **ZANZIBAR** this 13th day of December, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

Judgment delivered this 13th day of December, 2019 in the presence of Mr. Rajab A. Rajab, Counsel for the Appellants and in the presence of Mr. Khamis Othman Abdalla, Senior State Attorney for the Respondent is hereby certified as a true copy of the original.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL