IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

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

CRIMINAL APPEAL NO. 227 OF 2017

1. MABULA MAKOYE
2. AMOS SHABAN ..... **APPELLANTS**

VERSUS

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

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

(Ruhangisa, J.)

dated the 24th day of February, 2017
in
DC Criminal Appeal No. 63 of 2016

.....

JUDGMENT OF THE COURT

25th & 28th August, 2020

MWAMBEGELE, J.A.:

Mabula Makoye and Amos Shaban, the appellants herein, were arraigned before the Court of the Resident Magistrate of Simiyu sitting at Bariadi for armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code). As gleaned from the particulars of the offence part of the charge, they were accused of stealing Tshs. 700,000/= from Lameck Warioba and immediately before such

stealing, they used a machete, an axe and a piece of iron bar to threaten the said Lameck Warioba. That was on 16.04.2015 at about 20:00 hours at Nyamikoma Village within the Busega District of Simiyu Region, so the particulars provide.

The brief material facts of the case are not difficult to comprehend. They go thus. Lameck Warioba (PW1) and Pendo Lameck (PW2) are spouses. They own a shop at Nyamikoma Area in Busega District, Simiyu Region. On 16.04.2015 at about 19:30 hours, the duo arrived home after their business endeavours. They had with them their business sales for the day which they wrapped in a polythene bag. Upon entering the gate to their residence, they were invaded by a gang of robbers whose number they estimated to be seven. The unwelcomed visitors had torches which they used to beam onto their faces. PW2 raised an alarm, telling in the process Vitalis Ernest (PW5) and others who were inside the house to turn the security lights on. When the security lights were turned on, the two appellants were allegedly identified by PW1 and PW2 to be among the culprits. The culprits made away with Tshs. 700,000/=; the subject of the charge.

The first appellant was allegedly arrested by Msafiri Laurent (PW3) and Mseti Michor (PW4) together with other neighbours who responded to the alarm, in the paddy field which was close to the scene of crime, as he was stuck in the mud. He was arrested there and taken to the police. Consequently, the present charge was preferred against the two appellants.

The appellants pleaded not guilty to the charge and after a full trial, they were convicted and each sentenced to serve a mandatory prison term of thirty (30) years. Their quest to assail their conviction and sentence by the trial court in the High Court was an exercise in futility, for Ruhangisa, J. dismissed their appeal on 24.02.2017. Undeterred, they lodged this appeal. The first appellant's memorandum of appeal has only one ground which challenges the first appellate court for upholding the sentence imposed on him while the trial court entered no conviction. The second appellant's memorandum of appeal has three grounds one of which is similar to the first appellant's. The other two grounds are: **one**, that the identification of the second appellant was not watertight and, **two**, the

evidence of the prosecution witnesses did not prove the case against him to the standard set in criminal law.

When the appeal was called on for hearing on 25.08.2020, both appellants appeared, unrepresented. As the hearing was conducted through the virtual court services of the Judiciary of Tanzania, the appellants' appearance was remote; at Shinyanga District Prison. The respondent Republic had the services of Mr. Nassoro Katuga, learned Senior State Attorney assisted by Mr. Jukael Jairo and Ms. Immaculata Mapunda, learned State Attorneys.

When we called upon the appellants to argue their appeal, they sought, and were granted leave, to add additional grounds orally. The first appellant added two grounds; **first**, that the prosecution case was marred with discrepancies and contradictions and, **secondly**, that the case against him was not proved to the standard set in criminal law; beyond reasonable doubt. The second appellant had only one additional ground to add; that the evidence of identification by family members was not corroborated. Having so done, the appellants adopted both sets of their grounds of

appeal; the ones in memoranda of appeal and the oral ones presented at the hearing, and opted to hear the response of the Republic.

It was Mr. Jairo who kicked the ball rolling in response to the grounds of appeal. He kick-started with the ground seeking to assail the first appellate court for upholding the sentence of the trial court which was not preceded by conviction. To this ground, Mr. Jairo conceded. He submitted that the record of appeal at p. 53 is quite loud and clear that no conviction was entered before the appellants were sentenced. That shortcoming is fatal as it offends the mandatory provisions of section 235 (1) of the CPA, he argued. The learned State Attorney added that not even the finding of guilty was recorded in respect of the appellants.

In a bid to address the foregoing ailment, Mr. Jairo went on to submit, the first appellate court ordered at p. 72 for the case file to be remitted to the trial court so that the appellants could appear before the trial magistrate for his compliance with the mandatory provisions of section 235 (1) of the CPA. Indeed, the trial magistrate complied with the order as appearing at p. 76 of the record, he submitted. The learned State Attorney argued that the procedure adopted by the first appellate court was

inappropriate. The proper course of action that ought to have been taken, he contended, was that directed by the Court in **Mussa Athumani Bubelwa & 3 Others v. Republic**, Criminal Appeal No. 287 of 2016 (unreported); to quash the judgment of the trial court and order remission of the case file to it so that a fresh judgment could be composed which would be in compliance with section 235 (1) of the CPA. The learned State Attorney implored us to follow our previous decision in **Mussa Athumani Bubelwa & 3 Others** (supra) to make that order.

On the merits of the appeal, which was argued in the alternative, Mr. Jairo submitted on the ground respecting identity of the appellants that they were amply identified visually and by voice. On the identity of the first appellant, the learned State Attorney submitted that he was identified at the scene of crime through the security lights that were illuminating the area and was arrested in the vicinity while trying to run away as he was stuck in the paddy field. As regards the second appellant, Mr. Jairo submitted that he was also identified through the security lights illuminating the area and by voice. He relied on **Stuart Erasto Yakobo v. Republic**, Criminal Appeal No. 202 of 2004 (unreported) to buttress the

point that identification by voice may be used to found a conviction against a culprit.

The learned State Attorney concluded that if it were not for the omission to convict the appellants which necessitates to nullify the judgment of the trial court and order composition of a fresh judgment, the prosecution proved the case against them to the hilt.

In rejoinder both appellants were very brief. They strenuously resisted the prayer for remitting the matter to the trial court for compliance of section 235 (1) of the CPA. They argued that they were not to blame for the failure to convict and therefore they should not be punished for the mistake of the trial court. The first appellant added that the evidence for the prosecution witnesses was discrepant and that the evidence of visual identification was not watertight. The second appellant added that PW1) and PW2 did not tell the truth. Both appellants prayed that they should be released from prison by allowing their appeal as, they contended, they have been incarcerated for quite a substantial period of time now.

The ball is now in our court to confront the ground of appeal before us. In our consideration of the points of contention raised in this appeal,

we propose to first address the complaint by the appellant which has been conceded by the respondent Republic; that failure to convict the appellants was a fatal ailment. It is no gainsaying that the appellants were not convicted before the sentence of thirty years was imposed on each of them. The first appellate court was alive to this ailment but thought that it could be addressed by remitting the matter to the trial magistrate for compliance with the mandatory provisions of section 235 (1) of the CPA. However, ostensibly, the first appellate court went on to determine the appeal on its merits, dismissed it and thereafter ordered remission of the file to the trial magistrate to comply with the mandatory provisions of section 235 (1) of the CPA.

Mr. Jairo argued that the course taken by the first appellate court was inappropriate. It was his submission that, having realised that no conviction was entered by the trial court, the first appellate court should not have proceeded to hear the appeal on its merits but should have nullified the entire judgment and ordered a fresh one to be composed by the trial court. We partly agree with Mr. Jairo. If the first appellate court thought there was need to remit the matter to the trial court for

compliance with section 235 (1) of the CPA, it should not have proceeded to entertain the merits of the appeal. The path taken by the first appellate court was inappropriate. There was no need of remitting the matter which has been finalised on appeal to the trial court. In the circumstances, on the revisional powers bestowed upon us by the provisions of section 4 (2) of the Appellate Jurisdiction Act (the AJA), we quash the order remitting the matter to the trial court for compliance with section 235 (1) of the CPA. The proceedings of the trial court appearing at p. 76 complying with the High Court order are also quashed.

Except for the foregoing infraction, we think the first appellate court took the right path to hear the appeal on its merits. The first appellate court was of the view, and to our mind rightly so, that the omission to enter a conviction before sentencing was not a fatal ailment; it was curable. We agree. That stance, according to the first appellate court, found support in our previous decisions in **Shabani Iddi Jololo & 3 Others v. Republic**, Criminal Appeal No. 200 of 2006 and **Matola Kajuni & 2 Others v. Republic**, Criminal Appeal Nos. 145, 146 & 147 of 2011 (both unreported) and the decision of the High Court in **Mussa Athuman**

Bubelwa & 3 Others v. Republic, Criminal Appeal No. 90 of 2015 (unreported). Much as we have serious doubts if the authorities cited backed the first appellate court's stance, we are in agreement that the course taken was, in the circumstances, appropriate as it was curable under the provisions of section 388 of the CPA.

There is a string of decisions of the Court that take omission to convict as required by section 235 (1) of the CPA, an incurable irregularity. Those decisions include **Shabani Iddi Jololo & 3 Others** (supra) and **Matola Kajuni & 2 Others** (supra), the cases relied upon by the first appellate court. For the avoidance of doubt, the decision of the High Court in **Mussa Athuman Bubelwa & 3 Others v. Republic**, Criminal Appeal No. 90 of 2015 (supra) was reversed by the Court in **Mussa Athumani Bubelwa & 3 Others v. Republic**, Criminal Appeal No. 287 of 2016 (supra).

With the coming into force of the provisions of section 3A of the AJA which give prominence to the overriding objective introduced into the AJA following its amendment by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 – Act No. 8 of 2018 to determine matters on their merits,

we think, the course taken by the first appellate court to treat the omission as curable under section 388 of the CPA, was quite in order and appropriate in the circumstances. In **Musa Mohamed v. Republic**, Criminal Appeal No. 216 of 2005 (unreported) the Court stood out to somewhat depart from the numerous authorities of the Court which held that failure to convict was a fatal ailment that could not be rescued by section 388 of the CPA. The Court, in **Musa Mohamed** (supra), observed:

> *"This Court being the final court of justice of the land, apart from rendering justice according to law also administer justice according to equity. We are of the considered opinion that we have to resort to equity to render justice, but at the same time making sure that the Court records are in order."*

The Court went on:

> *"One of the Maxims of Equity is that 'Equity treats as done that which ought to have been done'. Here as already said, the learned Resident Magistrate for all intents and purposes convicted the appellant and that is why he sentenced him. So, this Court should treat as done that which ought to have been done.*

That is, we take it that the Resident Magistrate convicted the appellant."

We expounded on this point and made corresponding remarks in yet another decision; **Ally Rajabu & 4 Others v. Republic**, Criminal Appeal No. 43 of 2012 (unreported). Having grappled with the point and discussed the import of the word "shall" in the CPA; that it must be subjected to the protective provisions of section 388 of the CPA in the light of **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006 (unreported), we observed at p. 17 of the typed judgment:

"In the light of the above decisions, we are of the considered view that no injustice has been occasioned by the inadvertence of the judge to enter a conviction before passing sentence. In view of the above named decisions, the irregularities can be cured under section 388 of the Criminal Procedure Act. Therefore, in exercise of our revisional powers under section 4 (2) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) we hereby 'treat as done that ought to have been done' by entering a conviction."

In the recent past; in **Amitabachan Machaga @ Gorong'ondo v. Republic**, Criminal Appeal No. 271 of 2017 (unreported), we were, again, confronted with a similar situation where an akin argument was brought to the fore; that there was no conviction entered before sentencing. We observed at p. 7 of the typed judgment:

> *"Ordinarily we would have remitted the record to the High Court for it to enter the conviction so as to make the matter be properly before us for determination on the merit .... However, both attorneys, for the appellant and for the respondent, urged us to proceed with the hearing and determination of the appeal to its logical conclusion because on the merit, the justice of the case militates against remitting it to the High Court. We readily agreed. Although we are aware that an appeal is not properly before us where no conviction has been entered by the trial court, we think* ***it is not always that such omission to enter a conviction will necessarily lead to an order of remission of the record to the trial court especially, as in this case, where the justice of the case demands otherwise. In other cases, it has been considered prudent***

to treat the omission as a mere slip and the Court has deemed the conviction to have been entered. *See the case of* ***Imani Charles Chimango v. Republic****, Criminal Appeal No. 382 of 2016 (unreported). We shall therefore ignore the omission and proceed with the determination of the appeal on the merit."*

[Emphasis supplied].

We think, with the overriding objective in our midst, the position taken in **Musa Mohamed** (supra), **Ally Rajabu & 4 Others** (supra) and **Amitabachan Machaga @ Gorong'ondo** (supra), would be the most progressive path to take in the determination of this appeal. That is why, we think, the first appellate court took a proper path to entertain the appeal, despite the omission by the trial court to enter a conviction before sentencing the appellants. After all, that infraction prejudiced nobody, not even the law. In the premises, we find and hold that the appeal is competent before us. The complaint by the appellants on this arm is therefore without merit.

The above said, we now proceed to consider the merits of the appeal before us. We will first consider the complaint by the appellants that they

were not properly identified at the scene of crime. On this complaint, we propose, first, to expound on the law on the point. The law relating to visual identification has long been settled in this jurisdiction. It is that in order to convict on the evidence of visual identification, the same must be absolutely watertight. That this is the law, we find it irresistible to pay homage to the oft-cited **Waziri Amani v. Republic** [1980] TLR 250. This case has uninterruptedly been followed by the courts in this jurisdiction ever since it promulgated the principles some four decades down the lane. The case provided guidelines with sufficient lucidity on the evidence of visual identification. Guided by the cases of **Republic v. Eria Sebwato** [1960] EA 174, **Lezjor Teper v. the Queen** [1952] A.C 480, **Abdallah Bin Wendo and Another v. Republic** (1953) 20 E.A.C.A 166, **Republic v. Kabogo wa Nagungu** (1948) 23 K.L.R (1) 50 and **Mugo v. Republic** [1966] EA. 124, the Court provided the following guidelines on visual identification at pp. 151-152:

> *"... evidence of visual identification, as the 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 satisfied that the evidence is absolutely watertight".

The Court added 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].

Adverting to the case at hand, we propose to first deal with the identification in respect of the second appellant. The star witnesses in this case were PW1 and PW2. They testified that they identified the second appellant with the help of light illuminated from the security lights of their house. However, they were too general in their testimonies to reach the threshold provided by **Waziri Amani** (supra). We shall demonstrate. PW1 and PW2 simply stated the source of light but both did not state the intensity of that light. Neither did they state the distance between them and the second appellant. PW2 just stated that the second appellant slapped her which statement makes one assume the distance was so close. But even then, in that state of commotion and fear, we seriously doubt one can say with certainty that the second appellant was sufficiently identified by the star witnesses. Admittedly, the appellant was known to PW1 and PW2 but that does not eliminate the possibility of mistaken identity. Faced with an identical situation in **Boniface Siwingwa v. Republic**, Criminal Appeal No. 421 of 2007 (unreported), the Court held:

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown, as is in this case, that the conditions for identification are not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witnesses must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken".*

In the light of **Boniface Siwingwa** (supra), we are convinced that despite the fact that the second appellant was familiar to the identifying witnesses; PW1 and PW2, that did not eliminate the possibility of mistaken identity. In the circumstances, we do not find it safe to hold that the identification of the second appellant was watertight. We have failed to eliminate doubts of the possibilities of mistaken identity. Such doubts, so our criminal jurisprudence has it, must be resolved in favour of the appellant. In **Harod Sekache @ Salehe Kombo v. Republic**, Criminal Appeal No. 13 of 2007 (unreported), we reproduced an excerpt from our previous decision in **Said Chaly Scania v. Republic**, Criminal Appeal No. 69 of 2005 (unreported) which we think merits recitation here:

"We think that where a witness is testifying about identifying another person in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so , he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger".

We are aware that the witness also claim to have identified the second respondent by voice. We haste the remark here that identification by voice is equally evidence of the weakest kind - see: **Kanganja Ally and Juma Ally v. Republic** [1980] T.L.R. 270, **Nuhu Selemani v. Republic** [1984] T.L.R. 93 and **Badwin Komba @ Ballo v. Republic**, Criminal Appeal No. 56 of 2003, **Kenedy Ivan v. Republic**, Criminal Appeal No. 178 of 2007 (both unreported) and **Stuart Erasto Yakobo** (supra), the case cited to us by the respondent Republic. The identification by voice in the circumstances of this case was not such that it could be said PW1 and PW2 identified the voice of the second appellant with certainty.

In view of the above we find and hold that the identification of the second appellant at the scene of crime was not watertight; both visually and by voice.

With regard to the first appellant, we are equally of the same view that his also was not watertight. The reasons assigned to visual identification of the second appellant apply in respect of the first appellant as well. The situation is even more exacerbated by the fact that the first appellant was a stranger to the identifying witnesses; PW1 and PW2.

However, there is another independent piece of evidence which implicates the first appellant to the commission of the offence; he was arrested red handed while in the process of running away from the scene of crime. This is testified to by PW1, PW2 and PW5 as well as those neighbours who showed up at the scene of crime in response to the alarm raised by PW2. These are PW3 and PW4. Thus for having been arrested red handed in the paddy field close to the scene of crime, the first appellant is implicated to commission of the offence to the hilt.

The complaint by the first appellant that the prosecution's evidence was riddled with contradictions will not detain us. We have not been able

to observe any material contradictions in the case as complained by the first appellant. The law is now settled that the Court will ignore minute contradictions which do not go to the root of the matter – see: **Mohamed Said Matula v. Republic** [1995] T.L.R. 3 and **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported), **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), **Mohamed Haji Ali v. Director of Public Prosecutions**, Criminal Appeal No. 225 of 2018 (unreported) – [2018] TZCA 332 at www.tanzlii.org, to mention but a few.

The above discussion culminates into our finding that the case against the first appellant was proved beyond reasonable doubt while the case against the second appellant was not. The last ground of complaint by the appellant to the effect that the prosecution did not establish their guilt beyond reasonable doubt is answered this way.

In the upshot, the appeal against the second appellant Amos Shaban succeeds. We quash his conviction, set aside the sentence and order his immediate release from prison unless still held there for some other lawful

cause. The appeal of the first appellant Mabula Makoye fails. It is dismissed in its entirety.

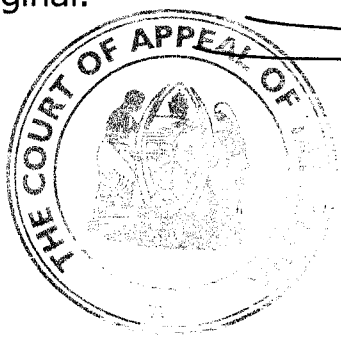
DATED at **SHINYANGA** this 28th day of August, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of August, 2020 in presence of the Appellants via Video link and Jukael Reuben Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL