IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J. A., SEHEL, J.A, And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 268 OF 2019

MSAFIRI SAIMON MKOI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam, at Kisutu)

(Magutu, SRM-Ext. Jur.)

dated the 14th day of June, 2019
in
Criminal Appeal No. 5 of 2019

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JUDGMENT OF THE COURT

13th August, 2021 & 8th December, 2021

MWARIJA, J.A.:

This appeal arises from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu (the RM's Court) in which Magutu, SRM–Ext. Jur., dismissed the appellant's appeal in Criminal Appeal No. 5 of 2019. In that appeal, which originated from the decision of the District Court of Kinondoni, the appellant and another person, Gerald Cosmas Massawe (hereinafter referred to by his first name of Gerald) challenged their conviction by that court, of the offence of armed robbery contrary to s. 287A of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019]. They were jointly charged and convicted with another

person, Iddi Yasin Mavunda who passed away in prison before institution of the appeal in the High Court, the appeal which was later transferred to the RM's Court.

According to the charge, on 31/10/2014, at Kimara Bucha in Dar es Salaam within Kinondoni District in Dar es Salaam Region, the appellant together with Iddi Yassin Mavunda (the deceased) and Gerald (the appellant's co-accused persons) stole two motor vehicles make Mitshubish Canter with registration numbers T.824 CTJ and T.471 AFK total valued at TZS 76,625,000.00 the property of Hakika Breweries Ltd. and that, immediately before such stealing, they assaulted one Hamis Mbegu Mwinyigogo with an iron bar in order to obtain and retain the stolen property.

The appellant and his co-accused persons denied the charge. As a result, the case had to proceed to a full trial at which, whereas the prosecution relied on the evidence of 11 witnesses, the appellant and his co-accused persons were the only witnesses for the defence. At the conclusion of the trial, the learned trial Resident Magistrate was satisfied that the case had been proved beyond reasonable doubt. Consequently, they were convicted and sentenced to thirty years imprisonment.

The background facts giving rise to the arraignment and ultimate conviction of the appellant and his co-accused persons may be briefly stated as follows: On 31/10/2014 at night, Hamis Mbegu Mwinyigogo (PW2), a security guard employed by Kiwango Security Company Ltd (the KSCL) was on duty guarding a depot belonging to Jackline Mgolia (PW1), a businesswoman who runs a winery at Bagamoyo known as Hakika Breweries Ltd. (hereinafter "HBL" or "the Company"). After production at Bagamoyo, the wine used to be transported for storage at the depot situated at Kimara Bucha area. The transportation was done by use of the company's motor vehicles including those with registration numbers T.471 AFK and T.824 CTJ make Mitshubish Canter (the stolen motor vehicles).

On the material date, the two motor vehicles were parked at the depot after delivering consignments of wine. In the night however, some bandits intruded into the depot premises. They attacked and seriously injured PW2 thereby taking away the two mentioned motor vehicles.

In the morning, PW2 was found at the yard in an unconscious state. He was taken to Kimara Hospital for treatment and after he had regained consciousness, he narrated the incident implicating the appellant as the person who collaborated with two other persons to

commit the offence. After the police had conducted investigation, the appellant and his co-accused persons were arrested and charged as shown above. The appellant and Gerald were arrested by No. F 5946 D/C Revocatus (PW6) on 24/11/2014 and 23/11/2014 respectively. On his part, the deceased was arrested by No. H 604 D/C Samwel Kigana Yombo (PW7) on 12/12/2014.

After their arrest, their cautioned statements were recorded. The statements of the appellant and Gerald were recorded by D. 7010 D/Sgt Gaspar (PW9). It was PW9's evidence that the appellant admitted to have committed the offence after he had assaulted PW2 by hitting him with an iron bar. He said further that, according the appellant's confession, the initial plan in facilitating the commission of the offence was to drug PW2 and thus the appellant gave him some chips which had been adulterated by drugs with the intention of causing him to sleep. The appellant then went away leaving PW2 at the sentry but when he returned, he unexpectedly found that PW2 was still awake. He then decided to hit him with an iron bar. The witness sought to tender the statement and despite the objection by the appellant, the learned trial Resident Magistrate admitted it for the reasons which, he said, would be given later in the ruling on the case to answer.

Narrating the incident, PW2 stated in his evidence that on the material date, himself and the appellant were until the material time employed by the KSCL as security guards and were on duty at the HBL's depot situated at Kimara Bucha area. He went on to testify that, at about 20:00 hrs the appellant left the sentry and after 30 minutes he returned having carried two plastic bags containing chips. He gave one of the bags of chips to PW2 who proceeded to eat that food. At about 23:00 hrs, the KSCL inspector arrived and after being informed that the sentry was safe, he went away to inspect the other premises guarded by KSCL security guards.

PW2 went on to state in his testimony that, in the midnight, he saw the appellant entering the yard through the main gate in the company of two tall persons. After a short time, they got out and went closer to PW2 who was sitting on a chair. He inquired from the appellant about those two persons, but before he replied, the appellant got hold of him and one of the two persons hit him with an iron bar on his face thereby causing him to sustain injuries on his eyes and mouth. As a result of the injuries, he became unconscious and when he regained consciousness on 1/11/2014, he realized that he was in hospital at Kimara from where he was later referred to Mwananyamala Hospital for further treatment. At Mwananyamala Hospital, PW2 was

attended by Dr. Julius Nasis Riwa (PW11) who, according to his evidence, PW2 was injured on his right hand side of the face and on the mouth thus caused to suffer pains. The witness tendered the PF3 in which he had posted PW2's medical report. The same was admitted in evidence as exhibit P9.

Evidence as regards the incident was also given by PW4 who was at the material time employed by HBL as a driver. He was the driver of motor vehicle with registration No. T. 815 CGE. He testified that in the morning of 1/11/2014 at 5:00 hrs when he went to take the said motor vehicle from the yard, he found that the gate had not been properly closed. He did not also find any of the two security guards who were on duty on the previous night. Having unsuccessfully tried to call the Director of HBL, he decided to take the motor vehicle and drove to Bagamoyo to collect wine. When he returned to the depot, he found people having gathered and noticed that PW2, who was lying down had been injured. He added that, when he retuned to the depot, he found that the police had also arrived at there.

On her part, PW1 testified that after having been informed of the incident, she went to the scene where she found that the two motor vehicles were missing. She reported the incident to Mbezi Kwa Yusuf Police Station. It was her evidence further that, the appellant, who was

one of the security guards on duty on the material night, was not found at the scene. She added that, she knew the appellant who was the employee of KSCL, the security firm hired by her company to guard the depot. On how the motor vehicles' ignition keys were being kept, it was her evidence that, when a driver returns a vehicle, he hands the key to the cashier for safe keeping in a strong room. The same would then be handed to in the morning.

Her evidence to the effect that the appellant was on duty at the depot on the material night was supported by the testimony of Wilson Machambe Chacha (PW5) who was until the material time, the Guard site Inspector of the KSCL. It was his evidence, first, that the appellant was employed by KSCL as a security guard, secondly, that on the material night, he was stationed at the depot and thirdly, that when he conducted inspection at the depot at 23:00 hrs, he found him on duty and signed the patrol sheet to signify that he was present and that, there was no occurance at the sentry. PW5 tendered the patrol sheet which was admitted in evidence as exhibit P6.

As pointed out above, Iddi Yassin Mavunda passed away while in prison. On his part, Gerald Cosmas Massawe who together with the appellant appealed to the High Court in Criminal Appeal No. 5 of 2019 giving rise to this appeal, won his appeal. We do not therefore, find it

necessary to recite the substance of his evidence as well as that of the deceased.

In his evidence, the appellant distanced himself from the allegation that he was involved in the commission of the offence charged. Testifying as DW1, he stated that, he was until the material time, employed by a security company known as Davila and his place of work was at a house situated at Mikocheni area, owned by one Farida. He went on to state that, on 24/11/2014 at about 10:00 hrs while at the bus stand in Morocco area, one person who was a stranger to him, approached him and wanted to know his name telling him that he (the appellant) looked alike with a person known to that stranger. DW1 went on to state that, before he could answer that stranger, he felt that someone was trying to snatch his wallet from his hind pocket. He thus used a pen to hit him and a fight ensued between him and the suspected thief. The people who were around separated them and few minutes thereafter, he was arrested by policemen who took him to Oysterbay Police Station. On 20/1/2015, he was charged in Court.

It was the appellant's further testimony that the allegations against him were not true because he was neither employed by KSCL nor was he on duty at the depot on 31/10/2014. He added that, if that was true,

the prosecution should have tendered the Occurance Book (OB) signed by the security guards who were on duty on the material date. In cross-examination however, the appellant stated that he was employed by KSCL.

In convicting the appellant, the trial court relied on the evidence of PW2 to the effect that he was on duty together with the appellant on the fateful night and that, in collaboration with two other persons, he assaulted PW2 with an iron bar. The trial court acted also on the evidence of the witnesses who testified that in the morning, they found PW2 lying down in an unconscious state and that, the stolen motor vehicles were missing from the yard. It was moved further by the evidence of the appellant's cautioned statement which was recorded by PW9.

The appellant and Gerald were aggrieved by the decision of the trial and thus appealed to the High Court. As shown above, the appeal was transferred to the RM's Court to be heard by Magutu, SRM–Ext. Jur. Having re-evaluated the evidence, the learned Senior Resident Magistrate found that the same was insufficient to prove the case against Gerald. His appeal was therefore allowed and was consequently released from prison. The learned first appellate magistrate was however, satisfied that the evidence had sufficiently proved the charge

against the appellant beyond reasonable doubt. She held that, according to the prosecution evidence, there was no doubt as regards identification of the person who assaulted PW2 at the scene and the fact that after his attack, the stolen motor vehicles were taken away.

Even though she found that the appellant's cautioned statement was improperly admitted in evidence, and thus expunged it because an inquiry was not conducted after the defence side had objected to its admission, the learned first appellate magistrate found that the remaining evidence on record is sufficient to found the appellant's conviction. Like the trial court, she was of the view that PW1, PW2 and PW5 were credible witnesses and their evidence was thus reliable. She therefore, agreed with the findings of the trial court, first, that the appellant was employed by KSCL, and secondly, that he was on duty at the HBL's depot on the material night. She considered also the fact that immediately after the incident, the appellant disappeared and found such conduct to be relevant. The learned first appellate magistrate relied to that effect, on s. 10 (2) of the Evidence Act [Cap. 6 R.E. 2002, now R.E. 2019] (the evidence Act), the Courts decision in the case of **Chukudi Denis Okechukwu v. Republic**, Criminal Appeal No. 507 of 2015 and the persuasive decision of the Supreme Court of Uganda in the

case of **Remigius Kiwanuka v. Uganda**, Criminal Appeal No. 41 of 1995 (both unreported).

The appellant was further aggrieved by the decision of the first appellate court hence this second appeal. In his memorandum of appeal, he preferred nine grounds of appeal which may however, be consolidated into five grounds as paraphrased below:-

1. That the learned first appellate magistrate erred in law in failing to find first, that the appellant's plea was not taken and secondly that in conducting proceedings, the trial court did not comply with s. 210 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA).
2. That the learned first appellate magistrate erred in law and fact in upholding the appellant's conviction which was wrongly based on the evidence of PW2, PW4, and PW5 to the effect that the appellant was employed by HBL and that he was on duty at its depot at Hakika Breweries while according to exhibit P6, his place of duty on the material night is shown to have been the premises situated at Burudani area.
3. That the first appellate court erred in upholding the appellant's conviction by relying firstly, on the evidence of PW2 and PW5, the witnesses who had interests to serve and without the evidence of a

handwriting expert and secondly, by acting on unreliable evidence of PW5 to the effect that the appellant signed the patrol sheet (exhibit P6) on the fateful night.

4. That the learned first appellate magistrate erred in failing to find that the prosecution evidence as regards the keeping of the stolen motor vehicles' ignition keys was uncertain regard being had to the fact that in the morning of the fateful day, PW4 took his motor vehicle, evidencing that he had the key in his possession, the position which should have been taken to apply to the drivers of the stolen motor vehicles and should thus have been taken to the suspects of the committed crime.
5. That the learned first appellate magistrate erred in law and fact in failing to find that the case was not proved beyond reasonable doubt against the appellant.

At the hearing of the appeal, the appellant appeared in person unrepresented while the respondent Republic was represented by Ms. Doroth Massawe, learned Senior State Attorney assisted by Ms. Clara Charwe, learned State Attorney. When he was called upon to argue his appeal, the appellant opted to let the learned Senior State Attorney

submit first in reply to the grounds of appeal and thereafter, make rejoinder submission, if he would find it necessary.

Submitting in reply to ground one of the paraphrased grounds of appeal, which subsume the 1st and 2nd grounds of the appellant's memorandum of appeal, Ms. Charwe argued first, that the appellant's contention that his plea was not taken is not correct because, according to the original record, the charge was read over to him and pleaded not guilty thereto. Secondly, the learned State Attorney argued that, although it is true that the learned trial Resident Magistrate did not comply with s. 210 (3) of the CPA, the omission is not fatal because it did not prejudice the appellant and therefore, the irregularity is curable under s. 388 of the CPA. To bolster her argument, Ms. Charwe cited the Court's decision in the cases of **Iddy Salum @ Fredy v. Republic**, Criminal Appeal No. 192 of 2018 and **Yuda John v. Republic**, Criminal Appeal No. 238 of 2017 (both unreported).

Submitting further in reply to ground two of the paraphrased grounds of appeal, which incorporates grounds 3, 5, 6 and 7 of the appellant's memorandum of appeal, the learned State Attorney argued that from the evidence of PW2, PW4 and PW5, there was no uncertainity as regards the fact that HBL premises at Kimara Bucha are also known as Burudani and that HBL did not have any other depot in

that area. She added that, the appellant, who was one of the KSCL's security guards could not, for that reason, have been on duty at any other premises than at the KSCL depot. She went on to argue that, indeed, from the evidence of PW5, he inspected the security guards who were on duty at the area, among them being those who were at HBL, which according to his evidence, was also known as Burudani Wine premises where upon, the appellant signed exhibit P6 to show that he was on duty at those premises. It was the learned State Attorney's further argument that, there was sufficient evidence from PW4 and PW5 that the appellant was on duty on the material night.

On the appellant's contention that the prosecution should have called the handwriting expert to prove the allegation that he signed exhibit P6, Ms. Charwe submitted that, it was not necessary to do so because under s. 49 (1) of the Evidence Act, evidence of the person who saw the appellant signing the said document was sufficient to establish that fact.

With regard to ground three of the paraphrased grounds of appeal which combines the 4th and 8th grounds of the appellant's memorandum of appeal, Ms. Charwe argued briefly that, the evidence on how the motor vehicles' keys were being kept was clearly explained by PW8 and

PW1; that the same were being kept in the strong room. In any case, the learned State Attorney argued, in his evidence, PW4 did not say anything about the manner in which the keys were being kept at the offices of HBL after return and parking of the motor vehicles at the yard. For that reason, Ms. Charwe argued, his evidence was not contradictory to any of the prosecution witnesses on that aspect.

The learned State Attorney concluded by arguing that, the case against the appellant was proved beyond reasonable doubt. It was her submission therefore, that the learned first appellate magistrate was justified in upholding the decision of the trial court. She submitted thus that, ground five of the paraphrased grounds of appeal which is the 9th ground of the appellant's memorandum of appeal, is devoid of merit.

In rejoinder, the appellant admitted that his plea was taken and conceded also that his complaint that the evidence of PW1 and PW4 was contradictory as regards the allegation that the appellant was at the scene of crime, is a new ground. With regard to the respondent's reply submission however, the appellant reiterated the contents of his grounds of his appeal, **one**, that s. 210 (3) of the CPA was not complied with, **two**, that the manner in which the motor vehicles' keys were kept was not certain and in that regard, that he did not have the burden of seeking clarification by cross-examining the prosecution witnesses with a

view of clearing doubt on how the same were being kept. He argued that, the suspects should have been those who had the responsibility of keeping the keys in safe custody. **Three,** that the handwriting expert ought to have been called to establish that he signed exhibit P6, **four**, that he was not employed by KSCL and **five**, that the case was not proved against him beyond reasonable doubt.

We have duly considered the submissions of the learned State Attorney and the appellant. Form the submissions, we need not be detained much in determining the first paraphrased ground of appeal. It is an undisputed fact that the learned trial magistrate did not comply with s. 210 (3) of the CPA. That provision requires a magistrate to inform a witness that he is entitled to have his recorded evidence read over to him and if he so asks, the magistrate is required to record any comment which may be made by the witness.

The issue here however, is whether or not the omission has prejudiced the appellant. Having considered the application of the provision in question, we agree with the learned State Attorney that the irregularity is not fatal because no miscarriage of justice has been occasioned to the appellant. We say so because it is the witness in a case who has been afforded that right. The appellant cannot therefore, complain on behalf of the prosecution witnesses. Of course, he can

complain that the provision was breached against him in his capacity as a witness for the defence. However, having not complained in his memorandum of appeal about the authenticity of this recorded evidence, it is obvious that he was not prejudiced. See from instance, the case of **Iddy Salum @ Fredy** (supra) cited by the learned State Attorney. In that case, the Court observed as follows:

> *"In the first place, it is the witness, not the accused person to whom the right to require that the recorded evidence be read over to him is afforded. The appellant did not therefore, have the right to complain on behalf of the prosecution witnesses – see for example, the cases of* ***Abuu Kahaya Richael v. Republic****, Criminal Appeal No. 557 of 2017 and* ***Athuman Hassan v. Republic****, Criminal Appeal No. 84 of 2013 (both unreported) ... secondly, although in his capacity as a witness for the defence, the appellant should have been so informed, the omission by the trial court to inform him of that right did not prejudice him. We hold this view because in his grounds of appeal, the appellant has not complained about the authenticity of his recorded evidence."*

The position is similar in this case. As stated above, the appellant has not complained that his evidence was not properly recorded. For these reasons, this ground of appeal is devoid of merit.

With regard to ground two, as observed by the learned first appellate magistrate, the appellant admitted in cross-examination that he was employed by KSCL. From his own evidence therefore, that fact is proved. On whether or not he was on duty at the depot on the fateful night, the evidence of PW2, PW4 and PW5 was believed by the two courts below. The said witnesses were found to be credible. As a second appellate court, we are not required to interfere with that finding unless there are sufficient reasons for doing so. This is where, for example, there has been a misapprehension of the evidence or violation of a principle of law leading to injustice – see for example, the cases of the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149 and **Wankuru Mwita v. Republic**, Criminal Appeal NO. 19 of 2012 (unreported). In the latter case, the Court stated as follows:

> *"The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are pervese, demonstrably wrong or clearly*

unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; violation of some principle of law or procedure or have occasioned a miscarriage of justice."

The appellant was known to both PW2 and PW5 as they were the employees of KSCL. PW2 was on duty with the appellant on the date of the incident. There could therefore, be no possibility of a mistaken identity of the person who assaulted him before the stealing of the two motor vehicles. The evidence of PW2 was strengthened by that of PW5 who confirmed that the appellant was present on duty on the material night. We therefore, find that this ground is also meritless.

In our considered view, the finding on ground two is sufficient to dispose of ground three of the appeal. The presence of the appellant at the scene has been proved by the evidence of PW2, the person who was on duty on the material night. His evidence is supported by that of PW5, who, in the course of inspecting the security guards at the depot, found that both the appellant and PW2 were present and the sentry was safe. The absence of evidence of a hand writing expert proving that the appellant had signed the patrol sheet (exhibit P6) did not, in our view,

affect the credible evidence of PW2 and PW5 to that effect. This ground thus also lacks merit.

In ground four of the appeal, the appellant raises the possibility that the offence night have been committed by the drivers of the stolen motor vehicles or the keepers of the motor vehicles keys. His proposition is based on the fact that, in the morning of the fateful day, PW4 arrived at the yard and in the absence of any official of HBL, took the motor vehicle which he was driving. According to the appellant, if the ignition keys of the motor vehicles were kept in the strong room as testified by PW1, PW4 could not have access to the ignition key of the motor vehicle which he took from the yard in that morning.

Having considered the appellant's argument, we do not find that the complaint raises doubt that the offence might have been committed by other persons in exclusion of him. This is for the reason that, as found above, there is cogent evidence of PW2 that the appellant, who was in the company of two other persons, assaulted him by use of an iron bar causing him to become unconscious and in the morning, HBL's two motor vehicles were found to have been stolen. There is no doubt that, the assault on PW2 cannot be explained otherwise than having been done with the intention of stealing the said property. That said, we similarly find no merit in this ground of appeal.

From our findings on the four grounds above, there is no gainsaying that ground five must also fail. We therefore agree with the learned State Attorney that the case was proved beyond reasonable doubt against the appellant.

For the foregoing reasons, the appeal is hereby dismissed in its entirety.

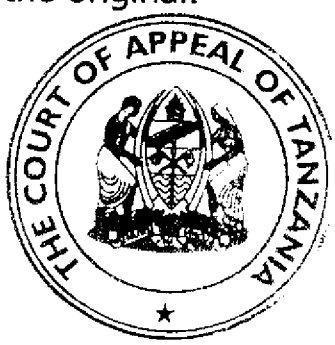
DATED at **DAR ES SALAAM** this 7th day of December, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 8th day of December, 2021 in the presence of the Appellant in person and Ms. Ester Kyara, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
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