IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 95 OF 2020

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

THOMAS JOSEPH CHARLES @ CHITOTO @ CHITEMA ..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT
(Appeal from the decision of the Court of the Resident Magistrate of Dar es Salaam at Kisutu)

(Kilimi, SRM with Ext-Jur.)

dated the 20th day of December, 2019
in
Ext. Criminal Appeal No. 111 of 2019

JUDGMENT OF THE COURT

9th & 18th February, 2022

MWAMPASHI, J.A.:

This appeal arises from the decision of the District Court of Temeke at Temeke (the trial court). The appeal seeks to challenge the decision of the Senior Resident Magistrate (Kilimi, SRM Ext. Jur.) that confirmed the decision of the trial court. In the trial court, the appellant Thomas Joseph Charles @ Chitoto @ Chitoma together with one Tunda Bakari Mekele @ Dotizo, (hereinafter to be referred to as co- accused) who is not subject of this appeal, were charged with and convicted of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002; now R.E. 2019] (the Penal Code). They were both sentenced to serve a period of 30 years imprisonment.

On the first appeal, the Senior Resident Magistrate with Ext. Jur. allowed the appeal against the co-accused but dismissed it in respect of the appellant. Aggrieved, the appellant has preferred this appeal.

It was alleged before the trial court that on 02.09.2017 at Keko Mwanga B area within the District of Temeke in Dar es salaam Region, the appellant and the co-accused stole TZS. 40,000.00, the property of one Abdul Shaban @ Dullah and that immediately before and after such stealing, they attacked the said Abdul Shaban @ Dullah and cut him on his head and hand with a knife in order to obtain and retain the said property.

The facts of the case leading to the appellant's conviction are not complicated. On 02.09.2017 at about 15.00 hours, Abdul Shaban @ Dulla (PW2) was on his way home when he was confronted by a group of five young persons who demanded to be given money by him. PW2 declined and a scuffle ensued in the course of which PW2 was cut on his face and palm with a knife and his TZS. 40,000.00 got stollen. PW2 claimed to have identified the appellant by the name of Chitoma as he used to see him around. Thereafter, PW2 reported the incident at Keko Mwanga Police Station. PW2 is also in record telling the trial court that before being arrested, the appellant approached him and apologised for what

had happened but he asked the appellant to go and surrender himself to the police.

According to No. E. 1740 Cpl Victor of Keko Mwanga Police Station who testified as PW3, he was at the station when at around 15.35 hours, PW2 who was bleeding from his fingers, reported to him that he had been wounded by one Chitoma together with his friends at Keko B near the hospital and that TZS. 40,000.00 had been robbed from him. Another piece of evidence came from No. F. 6044 DC Hamimu (PW1) whose evidence was to the effect that the case was assigned to him for investigations on 03.09.2017. He visited the scene of crime where he collected a knife that was used in the robbery in question. The knife was tendered in evidence and was admitted as exhibit P1. He further testified that on 10.09.2017, he was informed by his boss that the appellant and the co-accused had been arrested. He recorded the appellant's cautioned statement whereby the appellant admitted to have participated in the robbery in question. The relevant cautioned statement was tendered in evidence and admitted as exhibit P2.

In his short sworn defence, the appellant denied to have committed the robbery in question. He explained that he was arrested on 09.09.2017 while at his place of work by the police officers who were on

patrol. Thereafter, he was joined with about 15 other people and taken to the police station where he was charged with the present offence.

After a full trial, the trial court found it proved that the appellant was positively identified at the scene of crime by PW2 as the two were not strangers to each other and also as the incident happened during the day time. The trial court's conclusion that the case against the appellant was proved was also based on the cautioned statement (Exhibit P2) in which the appellant confessed to have committed the offence and also on the finding that before his arrest, the appellant approached PW2 and offered him his apology. In the first appeal the findings and conclusion by the trial court was confirmed. In agreeing with the trial court, the first appellate court added that the identification evidence by recognition was water tight because PW2 named the appellant to the police at the earliest possible opportunity and that the failure by him to give the description of the appellant was not fatal. In dismissing the appeal, the first appellate court did also bless the cautioned statement holding that the same was properly admitted in evidence and that the trial court properly acted on it.

Aggrieved, the appellant has filed a memorandum of appeal comprised of six grounds which may be paraphrased as follows; **One,** that the two lower courts erred in law in relying on the cautioned

statement (Exhibit P2) which was improperly tendered and admitted in evidence; **two**, that the identification evidence by PW2 was not water tight; **three**, that the two lower courts erred in believing PW2's claim that he used to well know the appellant prior to the incident; **four**, that the two lower courts erred in acting on the evidence on the knife (Exhibit P1); **five,** that, there was no evidence to prove that the appellant's arrest was a result of him being named to the police by PW2; and **six**, that the case against the appellant was not proved to the required standard.

On the date of the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent Republic was represented by Ms. Yasinta Peter, learned Senior State Attorney, assisted by Ms. Monica Ndakidemi, learned State Attorney.

When invited to argue his grounds of appeal, the appellant adopted his written submissions he had earlier filed on 31.12.2020. He also opted to let the learned State Attorneys respond to his written submission first but he reserved the right to respond later, should the need to do so arise.

We propose to begin with the first and fourth grounds of appeal in regard to the cautioned statement (Exhibit P1) and the knife

(Exhibit P2) to which Ms. Peter readily conceded. As on the cautioned statement it was submitted by both parties that the same was not read out in court after it had been admitted in evidence and therefore that it was wrong for the two lower courts to rely on it in finding the conviction. They both argued that by not reading it aloud in court, the appellant was denied his right to know not only its substance but also what were its contents. While the appellant cited the case of **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R. 218, to bolster his argument, Ms. Peter relied on the case of **Julius Josephat v. Republic,** Criminal Appeal No. 03 of 2017 (unreported). The Court was thus urged to expunge the relevant cautioned statement from the record.

With regard to the fourth ground of appeal on the knife (Exhibit P1), it was submitted by both parties that the two lower courts erred in relying on the evidence of the said knife because the same was not properly admitted in evidence. It was contended that the knife which was allegedly used in the commission of the offence in question was tendered in evidence by PW1 who did not tell the court how the knife was connected to the case and to the appellant. The parties submitted that the worst part of it was the fact that the knife was not shown and identified by the victim PW2.

The law on documentary evidence tendered in evidence, as rightly submitted by both parties, is settled. Once a document is cleared for admission and admitted in evidence, it must be read out in court. Alongside the case of **Robinson Mwanjisi** (supra), there is a long unbroken chain of authorities which underscore the duty of courts to read out any document after the same has been cleared and admitted in evidence. See for instance the cases of **Julius Josephat** (supra), **Jumanne Mohamed and Two Others v. Republic**, Criminal Appeal No. 534 of 2015, **Florence Atanas @ Baba Ali and Another v. Republic**, Criminal Appeal No. 438 of 2016, **Lack Kilingani v. Republic**, Criminal Appeal No. 402 of 2015 and **Magina Kubillu @ John v. Republic**, Criminal Appeal No.564 of 2016 (all unreported).

As rightly pointed out by the parties, the record of appeal bears it out at pages 7 and 8 that the cautioned statement was not read out in court after it was admitted in evidence. This was a clear irregularity. The omission denied the appellant his right of knowing the contents of the said statement to which he was entitled. In the premises, we find merits in this ground of appeal and allow it by expunging the said cautioned statement from the record.

The fourth ground of appeal should not detain us at all. The trial court acted on the evidence on the knife holding that it was a knife that was used in the robbery in question while there was no evidence to that effect. As rightly argued by both parties, the knife (Exhibit P1) which was tendered in evidence by PW1 was never shown to and identified by PW2 as the knife that was allegedly used in the robbery in question. Further, there was no evidence to the effect that any knife was abandoned at the scene of crime. There was therefore no sufficient evidence linking the said knife not only with the appellant but also with the instant case. The two lower courts did therefore err in relying on such evidence. In the event, the fourth appeal is accordingly allowed.

The second, third and fifth grounds of appeal were combined and argued together by the appellant in his written submission. These three grounds seek to fault the concurrent finding of the two lower courts that PW2 used to know the appellant well before the incident, that he named the appellant to the police at the earliest opportunity and therefore that the appellant was positively identified by recognition at the scene of crime. The submission by the appellant on these grounds was firstly that there is no sufficient evidence proving that PW2 used to know the appellant before the incident. The appellant further contended that under

the circumstances of this case, the fact that the appellant was reported to the police by his nickname Chitoma by PW2 needed to be supported by description of the appellant either by his appearance or distinctive features. He again argued that PW2's identification evidence and the claim that he named the appellant to the police is also questionable because the evidence on record does not show that after the case had been reported and the appellant named, the police acted not only on the report but also on the appellant being named. He insisted that there is no evidence that the appellant's arrest resulted from him being named by PW2.

The appellant also faulted the two lower courts finding that PW2's evidence is credible. He argued that the credibility of PW2 is questionable and the lower courts wrongly relied on his evidence because he did not tell the truth when he claimed that before being arrested, the appellant approached him and apologised for what had happened. The appellant insisted that such a thing could not have happened and wondered why PW2, who knew that the police were looking for the appellant, did not grab that opportunity and arrest him or cause him to be arrested. He therefore prayed for his appeal to be allowed because the case against him was not proved to the hilt as required by the law.

Ms. Peter did not support the said three grounds of appeal. She submitted that the grounds are baseless because there is sufficient evidence on record proving that PW2 knew the appellant well before the incident in question and that he positively recognized him at the scene of crime. She added that PW2 did also report the appellant at the police station by naming and mentioning him by the name of Chitoma which is his nickname. Ms. Peter did submit further that PW2's evidence was supported by the evidence from PW3 to whom the case was reported and who observed the wounds PW2 had sustained. She insisted that the identification evidence from PW2 was watertight and that even the arrest of the appellant was a result of him being named to the police by PW2.

With regard to the sixth ground of appeal it was contended by Ms. Peter that the case against the appellant was proved beyond reasonable doubt. She submitted that the identification evidence from PW2 was supported by that of PW3 and that since the incident happened during the day time and as the appellant used to know the appellant well before the incident, then there was no possibility of mistaken identity. Ms. Peter did also point out that the identification evidence was water tight because PW2 named the appellant at the earliest opportunity. She therefore prayed for the appeal to be dismissed for being baseless.

In his short rejoinder, the appellant reiterated his prayer for the Court to consider his grounds of appeal and written submissions and allow the appeal. He maintained that he did not commit the offence in question and that the case against him was not proved to the required standard.

The second, third and fifth grounds of appeal are mainly on the complaints on the issue of identification. In determining these three grounds we are constrained to take into consideration two things; Firstly, the fact that this being a second appeal, the mandate of the Court, in terms of Section 6(7) of the Appellate Jurisdiction Act, Cap 141, is mainly concerned with issues of law, not matters of facts. Secondly, and of the same importance, is the fact that since this appeal seeks to challenge the concurrent findings by the two lower courts then the established practice that when the Court is hearing a second appeal it should avoid upsetting concurrent finding of fact by the trial and first appellate courts unless the finding is clearly unreasonable or is a result of misapprehension of the substance, nature and quality of evidence, misdirection on the evidence or violation of principle of law or procedure, need to be observed – see **Victoria s/o Mgenzi @ Mlowe v. Republic**, Criminal Appeal No. 354 of 2019 (unreported). Emphasizing on this practice, this Court in **Wankuru**

Mwita v. Republic, Criminal Appeal No. 219 of 2012 (unreported) made the following observations:

> *"The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial and first appellate courts unless it can be shown that there are perceived, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of evidence; mis-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice (see,* ***AMRATLAL DONADAR MALTASER AND ANOTHER T/A ZANZIBAR HOTEL*** *(1980) T.L.R. 31;* ***MOHAMED MUSERO V. R,*** *(1993)T.L.R. 170;* ***COSMAS KARATASI V. R.****, Criminal Appeal No. 119 OF 2004 (CAT, unreported)"*

The two lower courts concurrently found that from the evidence on record, the appellant was positively recognised by PW2 at the scene of crime and therefore, the case against the appellant was proved beyond reasonable doubts. This finding is what the appellant is appealing against before this Court. Our task here is therefore to revisit the said evidence and satisfy ourselves whether in reaching at the said finding, the two courts below did not misapprehend the substance, nature or quality of the evidence to the detriment of the appellant. The issue before us is whether the case against the appellant was proved to the required standard.

In determining the above posed issue, we should firstly point out that it is undeniable that, to the greater extent, the finding by the trial court that the appellant is guilty of the offence charged, which was upheld by the first appellate court, was influenced by the evidence on the cautioned statement (Exhibit P2) and the knife (Exhibit P1). In its judgment the trial court is on record, at page 27 of the record of appeal, remarking thus:

> *"The question that begs an answer is whether the accused person [is] guilty [of] the charged offence. The [cautioned] statement of the first accused, exhibit P2 provides the answer. [The] 1st accused in that caution statement confessed to [have] stabbed the complainant with knife on his face on material day, together with the 2nd accused although he said he got angry because he [met] the complainant [walking] with his sister that was the source of the incidence ...*
>
> *The act of [confessing to have met] the complainant and stabbing him with knife on material date [while] along with the 2nd accused is relevant in connection with the evidence of prosecution witnesses".*

With regard to the evidence on the knife the trial court at page 28 of the record of appeal made the following remark:

> *"Also PW1 F 6044 D/C Hamimu the investigator of this case revealed that, apart from taking the caution statement of the 1st*

accused also he visited the scene area and among other things he collected [the] knife exhibit P1 around which [was] used by accused persons. Usually this evidence of discovery of weapons used in commission of offence by itself is sufficient to form basis of convicting the accused persons."

The cautioned statement (Exhibit P2) having been expunged from the record and the evidence on the knife (Exhibit P1) having been discarded by the Court, the question that arises is as to whether in the absence of such evidence, the remaining evidence was sufficient to ground the conviction. Having carefully revisited the evidence on record, we find that the answer to the above posed question is in the negative. In the absence of the evidence on the cautioned statement and the knife there was no sufficient evidence supporting the charge as we are going to demonstrate hereunder.

Having considered the submissions made for and against the second, third and fifth grounds of appeal, it is our first observation that since the incident happened during the day time and as PW2 claimed to know the appellant well before the incident then his identification evidence was by recognition. Although such evidence is considered to be more reliable than the evidence of identification of a stranger, however, the Court has in a number of occasions warned of the possibilities that mistakes in

recognition of even close relatives and friends may sometimes be made. In the case of **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported) the Court held that:

> *"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made".*

Guided by the above position, we have dispassionately considered PW2's evidence as a whole and observed that taking into account that PW2's claim that he knew the appellant was very general as he merely said that he knew him by seeing him on streets, his evidence of identification by recognition was, under these circumstances, insufficient for the Court to conclude firstly that he used to well know the appellant and secondly that the evidence was water tight. We think that under these circumstances, as it has also rightly been argued by the appellant, PW2 was required to give the description of the appellant, it be on his appearance, attire or any other distinctive feature when reporting the case to the police.

We are also of the considered view that the mere fact that PW2 reported to PW3 that he had been attacked by one Chitoma with his

friends does not, under the circumstances of this case, assist the prosecution. It should be borne in mind that there is no evidence on record to the effect that there was only one person around going by the name of Chitoma and that the Chitoma mentioned by PW2 was the appellant. The unexplained delay in arresting the appellant and the absence of evidence that the police acted on that report and that they were in fact looking for him are other things leading to the conclusion that whoever had attacked and robbed PW2 could possibly be someone else and not the appellant.

Connected to the above is the fact that there is no evidence showing that the appellant's arrest was a result of him being named to the police. We therefore have no reason to disagree with the appellant, who in his defence explained that the police officers who were on patrol just arrested him from his place of work and joined him with about 15 other youths. This piece of defence evidence was not controverted by the prosecution. We find that the identification evidence was not water tight. To our view the identification of the appellant was not free from mistaken identity. For the above reasons we find merits in the second, third and fifth grounds of appeal and allow them accordingly.

In the event and for what we have explained above, the sixth ground of appeal is as well allowed because there was no sufficient evidence to prove the case against the appellant.

In the final analysis we allow the appeal, quash the conviction and set aside the sentence. We order for an immediate release of the appellant from custody unless he is held therein for any other lawful cause.

DATED at **DAR ES SALAAM** this 16th day of February, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered on 18th day of February, 2022 in the presence of appellant in person and Ms. Cecilia Mkonongo, Senior State Attorney for respondent is hereby certified as true copy of the original.

A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL