THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL NO. 173 OF 2020.

(Originating from Criminal Case No. 19 of 2018, in the District Court of Rungwe District, at Tukuyu).

DICKSON MWAITELEKE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

04. 05 & 24/08/2021.

UTAMWA, J:

This is a first appeal by the appellant, DICKSON MWAITELEKE. It is against the judgment (impugned judgment) of the District Court of Rungwe District, at Tukuyu, (the trial court) in Criminal Case No. 19 of 2018. Before the trial court, the appellant stood charged with a single count of causing grievous harm contrary to section 225 of the Penal Code, Cap. 16 R.E. 2002 (Now R.E. 2019), henceforth the Penal Code. The allegations in the charge sheet were that, on the 2nd day of January, 2018, at about 21: 00 hours, at Tandale Kiwira, in Kibumbe village, within Rungwe District in Mbeya Region, the appellant did unlawfully cause grievous harm to one

Oscar s/o Hebron @ Sam (henceforth the complainant) on his face by using a blunt object that caused him to suffer serious injuries.

The appellant pleaded not guilty to the charge. At the end of the full trial nonetheless, he was convicted as charged and sentenced to serve in prison for four years.

Aggrieved by the conviction and sentence, the appellant preferred the present appeal. His petition of appeal had a total of nine grounds of appeal couched in the common layman's language we use to encounter in appeals lodged by unrepresented convicts serving sentences in prisons. The grounds of appeal however, can be condensed to only two as follows:

1. That, the trial magistrate erred in law and facts in not considering the defence evidence in deciding the case.
2. That, the trial magistrate erred in law and facts in convicting and sentencing the appellant though the prosecution had failed to prove the charge against him beyond reasonable doubts.

In fact, the improvised second ground of appeal was constituted by a multi-complaint narration in the petition of appeal as follows: that, the trial magistrate erred in failing to properly evaluate the prosecution and the defence evidence, hence reaching into a wrong decision. The appellant was not properly identified at the scene of crime and the complainant did not make any alarm for help if it was true that he was invaded. He also complained that, the police form No. 3 (PF. 3) of the complainant was erroneously admitted in evidence and there were contradictory prosecution evidence especially that of the complainant and of the PW. 2. The complainant said, the appellant assaulted him by fists. However, PW. 2

said, he (appellant) had a knife and chain. Again, no weapon was produced during the trial as exhibit and key prosecution witnesses, like a police officer who drew the sketch map of the scene of crime and the investigator of the case were not summoned to testify in court.

Owing to the two improvised grounds of appeal listed above, the appellant prayed in his petition of appeal for this court to allow the appeal at hand. He further urged it to quash the conviction, set aside the sentence imposed by the trial court against him and set him free from the prison.

When the appeal was called upon for an oral hearing through a virtual court link while the appellant was in Ruanda Prison-Mbeya, the appellant appeared without any legal representation. He declared to the court that, he had nothing to add to his petition of appeal. On the other side, the respondent was represented by Ms. Sarah Annesius, learned State Attorney who did not support the appeal.

In resisting the appeal, the learned State Attorney for the respondent submitted as follows: regarding the first ground of appeal, she contended that, the impugned judgment of the trial court shows that, the trial magistrate considered the appellant's defence of *alibi* from page 3-5 of his judgment. He however, rejected the defence. She therefore, argued that the first ground of appeal lacks merits.

Concerning the second ground of appeal, the learned State Attorney for the respondent challenged the complaints raised by the appellant as follows: that, the appellant's argument that the trial magistrate did not evaluate the evidence is not merited. This is because, it is clear that, the trial magistrate evaluated both the prosecution and the defence evidence

from page 2-5 of the impugned judgment. As to the identification of the appellant, the learned State Attorney contented that, he was properly identified at the scene of crime. The evidence of the prosecution witness (PW.) No. 1 (the complainant) shows (at page 4 of the typed proceedings of the trial court) that, he identified the appellant through electric lights and he knew him as his relative even before the event. The evidence by PW. 1 was corroborated by the evidence of PW. 2 (David Joseph) as shown from page 6-7 of the typed proceedings of the trial court. The two witnesses therefore, properly identified the appellant.

It was also the contention by the learned State Attorney that, the appellant's contention that the failure by the complainant to make an alarm for help at the scene of crime weakened the prosecution case, is lame. This is because, according to the complainant's evidence, there were many people at the scene of crime, but they could not help him since the appellant had a knife and threated to injure them. Concerning the PF. 3 of the complainant, the learned State Attorney submitted that, the same was properly tendered in evidence by PW. 3, the doctor who had medically examined the complainant. This followed the appellant's own wish to cross-examine the PW. 3 as shown at pages 4-5 and 11-12 of the typed proceedings of the trial court.

The learned State Attorney for the respondent also refuted the fact that the evidence by PW. 1 (complainant) and PW. 2 contradicted each other. He argued that, the fact that the appellant had the knife and chain as testified by the PW. 2 did not obstruct him from assaulting the complainant by fists and kicks as testified by the complainant himself. She

further argued that, though the doctor (PW. 3) testified that the complainant had suffered normal injuries, the complainant himself said, he was seriously injured to the extent of losing a tooth. That amounted to grievous harm as rightly held by the trial court. The law guides that, a court is not bound by an expert opinion.

It was further the submission by the learned State Attorney that, failure by the prosecution to produce weapons used in committing the crime as exhibit did not negatively affect the prosecution case. This was because, the same were not retrieved from the appellant. The law also guides that, failure by the prosecution to produce an exhibit does not necessarily make its case weak. She further contended that, failure to call the police witnesses was also not fatal to the prosecution case since the three witnesses who testified in court proved the charge beyond reasonable doubts. Section 143 of the Evidence Act, Cap. 6 RE. 2019 also provides that, no specific number of witnesses is required for proving a charge.

For the above reasons, the learned State Attorney urged this court to dismiss the appeal for want of merits.

Alternatively, the learned State Attorney for the respondent contended that, the trial magistrate did not cite (in the impugned judgment, at page 5) the provisions of law under which the appellant was convicted as required by section 312(2) of the Criminal Procedure Act, Cap. 20 R.E 2019 (the CPA). She thus, prayed for this court to return the record to the trial court for it to comply with the law.

When the appellant was given chance to make rejoinder submissions, he only insisted his grounds of appeal.

When the court prompted the learned State Attorney on the effect of the irregularity in convicting the appellant, she submitted that, she does not think if the irregularity in fact, prejudiced the appellant.

I have considered the grounds of appeal, the record, the submissions by the learned State Attorney for the respondent and the law. Before I consider the merits of the appeal, I am obliged to consider the legal issue raised by the learned State Attorney through her alternative contention and prayer following the failure by the trial court to comply with section 312(2) of the CPA.

The issue at this juncture is thus, this: whether the non-compliance with section 312(2) of the CPA was fatal to the impugned judgment according to the circumstances of the case at hand. Indeed, I agree with the learned State Attorney that, section 312(2) of the CPA was not complied with by the trial court. This was because, it convicted the appellant without specifying the offence of which, and the section of the Penal Code under which the appeal was convicted. Nonetheless, I do not consider this omission as fatal. This is due to the following reasons: in the first place, the learned State Attorney herself, upon being prompted by the court, submitted that, the irregularity did not prejudice the appellant. The appellant himself did not complain in any way that the omission had caused injustice to him. The trial court also showed in its judgment (at page 5 of the typed proceedings) that, it had convicted the appellant as charged. The appellant thus, understood that he had been convicted under

the section that appeared in the charge sheet which had been read to him in court. That is, I hold, the reason why he did not complain against that omission. Besides, the appellant was charged with a single count as I pointed out earlier. No party could thus, entertain any ambiguity regarding the section under which the appellant was convicted.

In fact, the omission was inconsequential and can be curable under the principle of overriding objective. This principle has been recently underlined in our laws though it existed long time before. It was underscored through section 6 of the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 which amended *inter alia*, the Civil Procedure Code, Cap. 33 R.E 2019. The principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice without being overwhelmed by procedural technicalities. The principle has been underlined by the Court of Appeal of Tanzania (the CAT) in various cases including **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

In fact, the omission under consideration is not only curable under the principle of overriding objective, but it can also be remedied under section 388 of the CPA. These provisions supports the principle of overriding objective since they save orders, decisions etc. of subordinate courts made erroneously, but that do not cause any injustice to the parties. The omission at issue falls under this category or irregularities for the reasons I have just adduced above.

Certainly, the prayer by the learned State Attorney for this court to return the records to the trial court for complying with section 312(2) of

the CPA will have the effect of delaying the case unnecessarily since no injustice had been caused by the omission as observed earlier. Courts of this land should not entertain options which unnecessarily delay justice. It is more so upon the statutory emphasis of the overriding objective discussed previously. The CAT once observed in a criminal appeal that, the overriding objective principle can be invoked in certain circumstances to facilitate speedy delivery of justice; see the case of **Jackson Zebedayo @ Wambura and another v. Republic, Criminal Appeal No. 419 of 2018, CAT at Dar es Salaam** (unreported).

Furthermore, the learned State Attorney did not cite any precedent binding to this court, which was made after the statutory emphasis of the principle of overriding objective through the amendment of the law cited above, which said precedent guides that omissions of the nature discussed above are fatal to all criminal trials before subordinate courts.

Again, one may argue that, the amending law cited above related to the statute that govern civil proceedings only. However, courts of law are enjoined to promote fair trials in both civil and criminal proceedings. The right to fair trial is fundamental and is protected under article 113(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). The CAT also held in the case of **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported) that, the right to fair trial is one of the cornerstones of any just society and is an important aspect of the right which enables effective functioning of the administration of justice. In promoting the right to fair trial for parties in court proceedings therefore, courts of law should not

discriminate criminal proceedings from proceedings of civil nature. Indeed, the observation by the CAT in the **Jackson Zebedayo case** (supra) was in relation to a criminal appeal before it as I observed earlier.

Owing to the reasons listed above, I answer the issue posed above negatively that, the trial court's non-compliance with section 312(2) of the CPA was not fatal to the impugned judgment according to the circumstances of the case at hand. I will not thus, return the record to the trial court as prayed by the learned State Attorney. Instead, I will proceed to determine the appeal on merits.

Regarding the first ground of appeal, the issue is whether or not the trial court failed to consider the appellant's defence. In answering this issue, I hastily agree with the learned State Attorney for the respondent that, in fact, it is clear that, the trial court at page 5 of the typed impugned judgment duly considered the appellant's defence of *alibi* and rejected it for not following the legal requirements set under section 194(4) and (5) of the CPA. The appellant cannot thus, complain that his defence was not considered by the trial court. I thus, answer the issue on the first ground of appeal negatively. This ground of appeal therefore, lacks merits and I accordingly overrule it.

Concerning the second ground of appeal, the major issue is whether or not the prosecution proved the case against the appellant beyond reasonable doubts. In considering this issue, I will test the complaints raised by the appellant in his petition of appeal in support of the improvised second ground of appeal. I prefer to commence with the complaint that the appellant was not properly identified. The sub-issue

here is *whether or not the appellant was properly identified at the scene of crime on the material date and time*.

In my view, the circumstances of the case do not speak in favour of answering the sub-issue just posed above affirmatively. This is because, in the first place, it is not disputed, according to the record that the prosecution claimed that the event occurred at night time (i.e. at 21.00 hours). Again, according to the record, the prosecution based its case wholly on the evidence of visual identification of the appellant by the complainant and PW. 2 (David Joseph). The law on visual identification therefore, will guide me in resolving the sub-issue on the appellant's identification. In our jurisdiction, this branch of the law is mainly governed by case law.

The general rule on the evidence of visual identification is this: *the evidence of visual identification of an accused person in difficult circumstances (like darkness, smoke, fog etc.) is the weakest and most unreliable, no court should therefore, act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight*. This rule was underscored in the famous precedent of the CAT, i. e **Waziri Amani v. R [1980] TLR 250**. The CAT in the case of **Michael Godwin v. Republic, Criminal Appeal No. 66 of 2002, CAT at Mwanza Registry** (Unreported) also underlined this position of the law by branding the above stated rule, the "Cardinal Principle" of visual identification.

Another important guideline on the evidence of visual identification is that; the onus of proof for proper identification of a culprit lies on the

prosecution and the standard is the usual one of beyond reasonable doubts; see **Abdarahman Omary Gumbo v. Republic, Criminal Appeal No. 47 of 1991, High Court at Tanga Registry** (unreported). The decision in **R. v. Eria Sebwato (1960) E.A. 174** also put emphasis on this stance when it held that, the onus of proof in visual identification is very strict.

Again, the CAT in the case of **No. 313/86 Philipo Rukaiza @ Kitwechembogo v. Republic, Criminal Appeal No. 215 of 1994, CAT at Mwanza** (unreported) held that, where the evidence in a case is wholly footed on visual identification, then such evidence must be subjected to careful scrutiny. In so doing, all possible precautions should be taken to eliminate any suspicion of unfairness and reduce the chances of testimonial errors; see also the case of **Benedicto Kwesigabo vs. Republic, Criminal 11 of 1989, High Court at Mwanza** (unreported).

In the matter under consideration, only three witnesses testified in support of the charge. These were the complainant, PW. 2 and PW. 3 (Alexander Masalu, the doctor who medically examined the complainant after the event). The PW. 3 however, did not testify that he was at the scene of crime. There was thus, only two prosecution witnesses (the complainant and PW. 2) who testified in relation to the identification of the appellant. I will now test their evidence on visual identification of the appellant.

Starting with the complainant, he told the trial court that, he identified the appellant through the assistance of electricity lights from a

nearby petrol station and shops. He also said, he knew well the appellant before the event since he is his uncle. The complainant however, did not disclose the intensity of the electrical lights at issue. In other words, he did not tell the trial court as to how bright were the lights. It is common knowledge that, brightness of electrical lights differ from one electrical source to another. Illumination of electrical tube-lights or bulbs for example, differ depending on their capacities/powers in terms of watts or colours. This court is entitled to presume these facts by virtue of section 122 of the Evidence Act. These provisions guide that, the court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The spirit embodied under these provisions was underscored by the CAT in the case of **Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015** (unreported).

Indeed, in law, an identifying witness is required not only to disclose the source of the light that assisted him to identify the culprit, but he/she is also enjoined to describe its intensity. Such description of the intensity of the light is a vital aspect of a proper identification of a culprit in such circumstances. For this understanding, the CAT underlined that, light is the primary factor which assists in the identification of a person, others are mere secondary factors; see the case of **Jimmy Zacharia v. Republic, CAT Criminal Appeal No. 69 of 2006, at Arusha (**unreported). For this reason, the law also guides that, failure to describe the intensity of such

light weakens the prosecution evidence on visual identification of the culprit; see the **Waziri Amani case** (supra).

Furthermore, the complainant did not disclose to the trial court the distance from the actual scene of crime to the sources of the electrical lights that allegedly assisted him in identifying the appellant. It is also common knowledge that, long distance from the source of light, even electricity lights, reduces the ability of a human vision. Again, this court is entitled to infer this fact under section 122 of the evidence Act discussed earlier. The complainant did not also describe the environment of the scene of crime for purposes of demonstrating that there was no any obstacle to a proper vision. These omissions were fatal since they are among the very important elements of a proper identification of a culprit under such difficult circumstances; see the case of **Saidi Chally Scania v. Republic, CAT Criminal Appeal No. 69 of 2005, at Mwanza** (unreported). This was also the emphasis in the **Waziri Aman case** (supra).

Moreover, it is a legal requirement that, an identifying witness must *inter alia*, disclose in his/her evidence, the duration of the time of observing the event; see the **Saidi Chally case** (supra) and the **Waziri Aman case** (supra). The complainant in the matter at hand however, did not do so. Besides, he testified that, after the assault at issue he lost consciousness until the next day when he found himself home. This also suggests that, he had a very brief moment of observing the event. This fact negates the fact that he properly identified the appellant.

Another important guideline of the law is that, an identifying witness must mention the culprit (if he knew him before the event) or describe him (if he did not know him before the event). Such naming or description must be done soon after the event to another person or persons. It is recommended that the same should be performed before the arrest of the suspect. That other person or persons (to whom the culprit was named or described by the identifying witness) must also testify in court to that effect; see the decisions in **R. v. Mohamed Alui (1942) EACA 72** and **Karol Bijanda v. Republic, CAT Criminal Appeal No; 30 of 1990, at Mbeya (**unreported). In the matter at hand nonetheless, thought the complainant said he knew the appellant before, he did not testify that he mentioned him to any other person as his assailant. He did not also do so immediately after he had recovered his consciousness. Again, no witness testified that the complainant had mentioned the appellant to him/her as his attacker. This omission thus, fatally affects the prosecution evidence of visual identification against the appellant.

Indeed, the fact that the complainant knew well the appellant before the event was not a reason why the trial court could agree that he had properly identified him. Admittedly, the law guides that, it is easier to recognize a familiar person in difficult conditions (like the ones under discussion), than to identify a strange face. Nevertheless, the same law guides that, that fact does not overrule the possibilities of mistaken identity among known persons, close relatives or friends; see the healthy prudence of Lord Widgery C.J, in the English case of **R. v. Turnbull & Others (1976) 3 ALL ER. 549.** This stance was underscored by the CAT as an

applicable rule in Tanzania, especially where the source of light is doubtful (as in the case at hand); see the decision in **Walter s/o Dominic Omundi and another vs. Republic, CAT Criminal Appeal No. 15 of 2005, at Arusha** (unreported).

It is also shown in the evidence of the complainant that, the appellant had talked to him before he assaulted him. The complainant did not however, say that he identified him through his voice as a familiar person. But, even if that was the case, that could not be of any help to the prosecution case. This is because, the law provides that, identification of culprits by voice is unreliable because, possibilities of imitation cannot be ruled out; see the decision by the CAT in the case of **Frank Simon v. Republic, Criminal Appeal No. 91 of 2007, CAT at Mbeya** (unreported at page 8 of the typed judgment).

It is also on record that, the evidence by the complainant contradicted that of PW. 2 as rightly put by the layman appellant in his petition of appeal. In his testimony, the complainant said, the appellant assaulted him by mere fists. On the other hand, PW. 2 testified that, he assaulted the complainant by fists and a chain which he used to whip him (see the fifth paragraph at page 6 of the typed proceedings of the trial court). The effect of this contradiction is that, it implies that, there was not sufficient light to enable the two key and eye witnesses to properly observe the event. The discrepancy thus, also weakens the prosecution evidence on the identification of the appellant.

In relation to the evidence of the PW. 2 as another identifying witness, it is clear from the record that, he did not testify as to how he

identified the appellant. His mere averment that he saw him assaulting the complainant at that night cannot be blindly believed. His evidence was in fact, no better than that of the complainant. It also had similar weaknesses to the ones related to the evidence of the complainant. It follows thus, that, the reasons used to discard the identification evidence of the complainant apply *mutatis mutandis* in discarding the evidence by the PW. 2 on the identification of the appellant.

Having observed as above, I do not see if the prosecution discharged its duty of proving the identity of the appellant as the assailant of the complainant beyond reasonable doubts as required by the law; see **Abdarahman Omary case** (supra). The prosecution evidence did not thus, pass the test set in the "Cardinal Principle" of visual identification. I consequently, answer the sub-issue on visual identification of the appellant negatively thus, the appellant was not properly identified at the scene of crime on the material date and time.

The above finding that the appellant was not properly identified, makes it unnecessary to consider the rest of the complaints raised by the appellant in the petition of appeal. This is because, as I observed previously, the prosecution case was exclusively pegged on the evidence of visual identification of the appellant by the complainant and the PW. 2. The finding I have just made above therefore, is forceful enough to dispose of the entire appeal without considering other complaints made by the appellant. I thus, differ with the learned State Attorney for the respondent on the above listed reasons.

I therefore, answer the major issue regarding the second ground of appeal negatively that, the prosecution did not prove the case against the appellant beyond reasonable doubts. I therefore, uphold the second ground of appeal.

Owing to the reasons shown above, I hereby allow the entire appeal. I quash the conviction against the appellant and set aside the sentence imposed against him. I further order that, he shall be released from the prison forthwith unless held for any other lawful cause. It is so ordered.

JHK. UTAMWA.

JUDGE.

17/08/2021.