IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KIMARO, JA., MASSATI, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO. 125 OF 2012

JOSEPH SAFARI MASSAY..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the judgment of the High Court of Tanzania At Arusha)

(Sambo, J.)

Dated the 31st day of May, 1999
in
Criminal Appeal No. 38 of 2011
.....

JUDGMENT OF THE COURT

10th & 13th December, 2013

MMILLA, J.A.:

The appellant, Joseph Safari Massay, together with three (3) other persons who were acquitted by the trial court for insufficiency of evidence against them, were charged before the District Court of Monduli in Arusha Region with the offence of armed robbery c/s 287A of the Penal Code Cap. 16 of the Revised Edition, 2002 as amended by Act No.4 of 2004. Upon conviction, he was sentenced to thirty (30) years imprisonment. He

unsuccessfully appealed to the High Court of Tanzania at Arusha, hence this second appeal which is against both conviction and sentence.

The background facts of the case were briefly that on 10.2.2008, PW1 and PW2 who were husband and wife and residents of Karatu Township, closed their shop around 23.00 hours and left for their home. On arrival at Marie Stoppers area, they saw four persons in front of them who flashed torch light in their faces and immediately switched it off. Upon that, PW1 who had also a torch flashed it in the faces of those four persons and allegedly managed to identify them. While he identified all the four by face, he also identified two of them by names. Those he identified by names were Joseph Safari (the appellant) and Reginald Joseph. He said he knew them well because they were regularly buying cigarettes at his shop. According to PW1, the four of them had visited his shop for the last time on that day (10.2.2008) at 9.30 pm. At the time he met them at the scene of crime, the four were armed with pieces of iron bars. PW1 asked them if there were any problems, they told him that there were no problems. The bandits, it was said, allowed the couple to pass. However, as the latter were passing by, PW1 was hit with an iron

bar in the head and he fell down. The second blow landed on his chin after which he lost consciousness. On regaining awareness, he found himself at Lutheran Hospital. He was told his assailants were arrested and were at Karatu Police Station. He was the one who tendered the PF3 in court as exhibit.

Meanwhile, after PW1's attack by the bandits, PW2 raised an alarm while running away from the scene of crime. As she continued running, she met PW3 who had a torch. While PW3 proceeded to the scene of crime at which he joined others who had responded to the alarm in chasing the bandits who were running away, PW2 kept on running until she reached Camp David Bar at which she saw six (6) persons to whom she quickly related what had befell her and her husband. Those 6 people escorted her to the scene of crime, but they did not find her husband. They recovered thereat however, an umbrella and the shop keys. From there, those 6 people escorted her to her home, but again, her husband was not there. They returned to Marie Stoppers at where they found that the people had arrested the appellant. At that point, she was informed that her husband was taken to hospital. After that, she was escorted back

to her home. She went to hospital to see her husband the day that followed. She learnt that her cellular phone which was at the time of the robbery in the hands of her husband was stolen.

The police got information about that incident on that very night after the people who had arrested the appellant handed him to them. They interrogated the appellant who allegedly told them that Reginald Joseph Gwandu (second accused before the trial court) was amongst his accomplices. He led them to the home of the said Reginald Joseph. They found the latter and arrested him. The other two accused persons were arrested later on. The appellant and his colleague were eventually charged in the District Court of Monduli as aforesaid.

In his defence before the trial court, the appellant testified that he was arrested on 11.2.2008 around 20.45 hours on the way to his home from Brazil Hotel at which he spent some time listening to news after clocking off that day's work at around 6.00 pm at Gerkum. He said he was arrested by a group of traditional guards (sungusungu) amongst whom he identified a policeman named Victor (PW6). He said he was arrested for

no apparent reasons, and that those people assaulted him. He denied to have committed the alleged crime.

In this Court, the appellant appeared in person and was not defended. The memorandum of appeal he filed raised three grounds; **one** that the two courts below erred in law and in fact when they failed to carefully assess the credibility of the prosecution witnesses; **two** that the two courts below erred in law and in fact by confirming his conviction which was based on insufficient evidence of visual identification; and **three** that the two courts below erred in law and in fact when they convicted him believing that he was arrested a short time after the incident when he ran away without considering the defence he had given.

At the commencement of hearing of the appeal, the appellant prayed to produce a written submission in elaboration of his grounds of appeal. We granted the prayer. We endeavour to take into consideration his said submission.

On the other hand, Mr. Zakaria Elisaria, learned Senior State Attorney represented the respondent/Republic. He declared on the onset that he was resisting the appeal.

The submission by Mr. Elisaria in respect of the first two grounds of appeal overlapped. The essence of his submission in that regard was that the two courts below were justified to believe the evidence of the prosecution witnesses, firstly because PW1 and PW2 sufficiently identified him at the scene of crime with the aid of the light sourced from two torches; firstly the light from the torch which was possessed by the appellant and his team which they switched off after a couple of seconds, and secondly the light which came from PW1's torch which was similarly switched off after a couple of seconds. Mr. Elisaria submitted that apart from that, there was the evidence of PW3, PW4 and PW5 who said that on arrival at the scene of crime, they joined other persons who were chasing one of the bandits until they succeeded to arrest him. The trio said that the appellant was the person they chased and arrested. He submitted therefore that the evidence of PW3, PW4 and PW5 corroborated that of PW1 and PW2 that the appellant was one of the

persons they identified at the scene of crime. He reiterated that the evidence of the prosecution witnesses as a whole was strong and reliable, therefore that it was properly believed and relied upon by the two lower courts.

Regarding the complaint in the third ground that the two courts below wrongly believed that he was arrested after a short chase without taking into consideration his defence, Mr. Elisaria insisted that appellant's defence that he was arrested on 11.2.2008 without any apparent reasons was considered but rejected on the weight of the prosecution evidence that he was chased from the scene of crime until they arrested him not far from the scene of crime. In Mr. Elisaria's opinion, the appellant's assertion that his defence was not considered is baseless.

Though the defect in the charge sheet was not raised as a ground of appeal, Mr. Elisaria felt he had a duty to discuss it upon noticing that it did not name the weapon with which the bandits were armed, also that it did not show against whom the force was used. He was quick to add however, that in the circumstances of this case, the defect was not fatal

because the evidence of PW2 was that the appellant and his accomplices hit PW1 with an iron bar. He also said that the appellant was given opportunity to cross examine the witnesses, a chance he utilised well. He likewise submitted that the appellant was afforded opportunity to make his defence. He submitted therefore that because of such factors, the appellant knew the nature of the case which was facing him, hence that the error in the charge sheet did not prejudice him; therefore that it was curable under section 388 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). He urged the Court to dismiss the appeal in its entirety.

On his part, the appellant submitted very briefly that the people who allegedly chased and arrested him on 10.2.2008 did not inform the trial court at which place they arrested him. He also contended that PW3 and PW4 did not tell the trial court where exactly they were at the time they allegedly saw him. He insisted that he was arrested on 11.2.2008 on his way back home from his place of work and not on 10.2.2008 as stated by the prosecution witnesses.

On being probed by the Court if the trial magistrate who took over the conduct of the case from the previous magistrate informed him of his rights under section 214 of the CPA, the appellant was categorical that they were not informed of any rights. He prayed the Court to allow this appeal.

The main issue in this appeal is whether the two courts below properly found that the appellant was sufficiently identified.

We propose to address the grounds raised generally, but that matters pertaining to the defect in the charge sheet and on whether or not the trial court explained to the appellant the rights presumed under section 214 of the CPA will be specifically addressed.

As will be appreciated, the two lower courts made concurrent findings of fact that the appellant was sufficiently identified. They particularly found that the evidence of PW1, PW2, PW3, PW4 and PW5 was strong, credible and reliable. This being a second appeal, this Court would not, as a general rule, readily interfere with such concurrent findings of fact except where there are serious misdirections, non-

directions or misapprehensions on the evidence leading to miscarriage of justice. We are relying on, among other cases, what this Court said in **Musa Mwaikunda v. Republic** [2006] T. L. R. 387, **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T. L. R. 2297 and **Rashid Ramadhani Hamisi Mwenda v. Republic**, Criminal Appeal No. 116 of 2008, CAT, Tabora Registry (unreported).

The prosecution case mainly depended on the evidence of five witnesses. According to Mr. Elisaria, PW1 and PW2 were the witnesses who identified the appellant and his colleagues with the aid of the light sourced from two different torches; firstly from the torch which was possessed by the appellant and his team, and secondly from the torch in complainant's possession. We endeavour to look into the evidence of these two witnessed more closely.

We think we should begin by restating the principle that since, as often expressed, visual identification evidence is of the weakest kind, such evidence whether it be of a single witness or more, must be absolutely watertight to justify a conviction. In the case of **Waziri Amani v.**

Republic [1980] L.R.T. 250, this Court expounded certain factors to be taken into account by a court in order to satisfy it on whether or not such evidence is watertight. They include the following:-

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

In our present case PW1 and PW2 said that on arrival at Marie Stoppers at the place where the appellant and his accomplices were standing, the later flashed the torch on them but switched it off immediately. Soon thereafter, PW1 switched on his torch which again he hurriedly switched off. Given such a situation, it is possible that identification was done in a matter of seconds or rather that it was swiftly done. As such we think, there was a possibility of having mistakenly identified them. We are saying so because PW1 and PW2 were not clear as to how long that exercise took. We heed to a caution expressed by the

Court in the case of **Jaribu Abdalla v. Republic**, Criminal Appeal No.220 of 1994, CAT, (unreported) that:-

> *"In matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."*

In that same case, the Court proceeded to say that:-

> *"Eye witness testimony can be a very powerful tool in determining a person's guilt or innocence. But it can be devastating when false witness identification is made due to honest confusion or outright lying."*

This is no doubt a call to our courts to be extra conscious when visual identification evidence is all what there is that is relied upon.

With the above in mind, and having said that PW1 and PW2 did not have ample time to identify the bandits, we hold that the evidence of those two witnesses on the point was weak, and required corroboration, which is the reason why we think, the trial court was justified to acquit the rest of the bandits on account that such evidence against them was not conclusive because it was not corroborated.

On the other hand however, in contrast to the fate of his colleagues, that very evidence was upheld against the appellant, weak as it were, because it was corroborated by that of PW3, PW4 and PW5 who said that he was chased from the scene of the crime and they succeeded to arrest him on that very night not very far from the scene of crime. That was, in our view, sufficient evidence corroboration of PW1 and PW2 that the appellant was one of the attackers. See the case of **Abdalla Bakari v. Republic,** Criminal Appeal No. 268 of 2011, CAT, Arusha Registry (unreported) in which the appellant was overpowered and arrested at the scene of crime. His assertion on appeal to this Court that he was not sufficiently identified was rejected. It is on this basis that we agree with Mr. Elisaria that the two lower courts cannot be faulted for having held, as we also do, that the evidence of the prosecution witnesses as a whole against the appellant was strong and reliable, therefore that it was properly believed and relied upon.

We would also wish to consider at this stage the trial court's failure to comply with section 240 (3) of the CPA at the time it received the PF3 which was tendered by the complainant himself. At the time it admitted

that document as evidence in court, the trial court did not inform the appellant of his right stipulated under that provision to elect on whether or not to call the doctor who treated the complainant to appear in court for cross examination. It is settled law that where the trial court fails to do so, such evidence becomes valueless and requires to be expunged from the record as we accordingly do. See the case of **Kashana Buyoka v. Republic,** Criminal Appeal No. 176 of 2004, CAT and **Nyambaya Kamuoga v. Republic,** Criminal Appeal No. 90 of 2003, CAT (both unreported).

We wish to hurriedly point out however, that the relevance of that piece of evidence was merely to add weight that force was used in perpetrating the charged offence. In the present case, we get such evidence from PW2 who said that PW1 was hit with an iron bar, and PW5 who said that on arrival at the scene of crime he found PW1 lying down bleeding from the injuries he sustained. Thus, removal of the PF3 as evidence in the case has no serious effects on the prosecution case.

There was also the complaint that his defence was not considered. Mr. Elisaria submitted that the appellant's defence was considered but rejected. He asserted that in its judgment appearing on page 64 of the appeal record, the first appellate court rejected the appellant's contention on the basis of the clear evidence that PW3 and PW4 chased the appellant and arrested him, therefore that it was not true that he was not arrested near the scene of crime.

With great respect, we agree. The appellant's defence did not raise reasonable doubt. He tried to raise the defence of alibi but there was no break after his arrest. His contention that he was arrested on 11.2.2008 and not 10.2.2008 was in our considered view rightly rejected. Under such circumstances, the appellant's allegation that his defence was not considered lacks merit.

On the other hand, it is true that the charge sheet did not say what kind of weapon was used, also against whom the said force was applied. The learned Senior State Attorney conceded that it was a defect. We share the same view. The particulars of the offence ought normally to

have stated or identified the weapon the robbers were armed with, and against whom the said force was used.

In our view, the test on whether or not the defect is curable the test to be applied in such circumstances is whether the omission worked serious prejudice on the part of the appellant. The rule has always been that where a substantial miscarriage of justice has not flown from the defect, the provisions of s. 388 of the CPA can be brought into play and the conviction be sustained.

In the circumstances of the present case, we agree with the submission of Mr. Elisaria that there was no miscarriage of justice because the appellant understood the nature of the offence he was faced with. As already stated above, there was evidence from PW2 that PW1 was hit with an iron bar, as well as that of PW5 who said that on arrival at the scene of crime he found PW1 lying down and bleeding from the injuries he sustained. That was evidence that the bandits were armed with an iron bars, and that force was applied against PW1. That evidence made good the omission, which as submitted by Mr. Elisaria, was curable under section 388 of the CPA.

In any case, in terms of section 5 (1) (a) (ii) of Minimum Sentences Act Cap. 90 of the Revised Edition, 2002, an offence of armed robbery is committed with or without a weapon where there is more than one robber. That section provides that:-

"Notwithstanding the provisions of section 4–

(a) (i) .....

(ii) if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to imprisonment to a term of not less than thirty years."

See the cases of **Ngelela Machibya v. Republic**, Criminal Case No. 69 of 2013, CAT, Tabora Registry, **Kombo Omari v. Republic**, Criminal Appeal No, 211 of 2005, CAT, Dar es Salaam Registry and **Adam Ally v. Republic**, Criminal Appeal No. 121 of 2002, CAT, Arusha Registry (all unreported).

In the present case, the offence was committed by four persons; therefore that omission to state that the appellant and his accomplices were armed was not a fatal defect.

Last but not least is the fact that on reading the proceedings of the trial court, we were given to understand that the case was first heard by J. S. Mgetta, learned Principal Resident Magistrate (as he then was) who recorded the evidence of 5 prosecution witnesses, and that at a later stage it was taken over by Ms M.P. Mrio, learned Resident Magistrate who recorded the evidence of only one prosecution witness and the evidence in defence. However, the latter Resident Magistrate did not find it necessary to inform the appellant and his colleagues about the changes in order to hear their views in that regard.

We are aware that prior to the amendment of section 214 of the CPA vide Act No. 9 of 2002, it was mandatory for the trial court to inform the accused person(s) of their right on whether they wanted the case to start afresh before the magistrate taking over the trial or to proceed from where it ended. After that amendment however, in terms of section 214

(1) of the CPA it became the court's discretion to consider whether or not to address him (them) of those rights.

Much as we agree that it is the discretion of the magistrate so taking over to decide if he considers it necessary to re-summon the witnesses and recommence the trial or the committal proceedings, we are convinced that the record ought to have reflected how the discretion was exercised (See **Mwita s/o Mhere and Ibrahim Mhere v. Republic** [2005] T. L. R. 107), probably tending to show as well that she/he was satisfied that the accused did not suffer material prejudiced by such change of magistrate. Fortunately however, after due consideration, we are of the settled view that in this case no material prejudice ensued. The reason is clear that the appellant was given opportunity to cross examine the witnesses, a chance he utilised well. He likewise, he was afforded opportunity to make his defence. In view of those factors, the appellant knew the nature of the case which was facing him, hence that the error in the charge sheet did not prejudice him

In fine, for reasons we have given, we find the appeal to be devoid of merits and we dismiss it in its entirety.

Appeal dismissed.

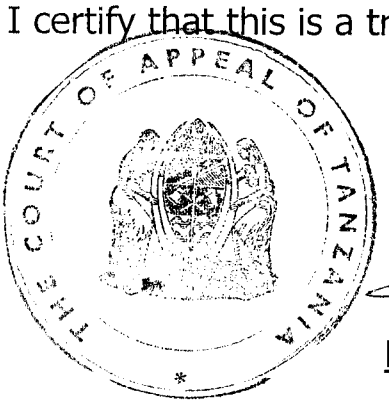
DATED at **ARUSHA** this 13th day of December, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL