IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 131 OF 2014

TAIKO LENGEI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Arusha)

(K.M. Sambo, J.)

dated the 11th day of April, 2013

in

Criminal Appeal No. 72 of 2011

JUDGMENT OF THE COURT

18th & 25th February, 2015

KAIJAGE, J.A.:

In the District Court of Monduli at Monduli the appellant along with three others were arraigned for three (3) counts. 1st count of conspiracy to commit an offence (for 1st – 3rd accused), 2nd count of armed robbery (for 1st – 3rd accused) and 3rd count of receiving stolen property (for 4th accused). Throughout the trial, the appellant herein stood as the third accused and his co-accuseds namely; Mwisali s/o Njasi @ Namisye,

Lembris s/o Sayareki and Nakai d/o Loshilo were, respectively, the 1st, 2nd and 4th accused persons.

Following a full trial, the 2nd and 4th accused persons were acquitted. The appellant and the 1st accused were found guilty and convicted as charged on the first two counts. Each was sentenced to three (3) years imprisonment on the 1st count and thirty (30) years imprisonment plus twelve (12) strokes of the cane on the 2nd count. The sentences were ordered to run concurrently. It is pertinent to observe here that the 1st accused was convicted and sentenced in absentia. The appellant's appeal to the High Court (K.M.M. Sambo, J.) was dismissed, hence this second appeal.

The evidence upon which the appellant's conviction was grounded could be stated, briefly, as follows; on 3/6/2008 at 10:30 hours or thereabout, PW5 Fabian Mgasa was driving a motor vehicle registration No. T. 388 APG, make Toyota Land Cruiser in which PW6 Msafiri Juma and two Australian tourists were passengers. Apparently, they were heading to Oldonyolengai. Arriving at a place commonly known as Athuman hill, about 40 kilometers past Mto Wa Mbu, they were stopped by three (3) men dressed in Masai clothing and were armed with a gun, knives and sticks.

What exactly transpired at the scene of the undisputed robbery features thus in PW5's testimonial account:-

> *"In front of us there were three people wearing Masai clothes. They wanted to cross the road. We saw one of them point out a gun, then he fired. I felt that it was a tyre burst. One of them came in the middle of the road and he pointed a gun to the tyre, he fired a gun.... I tried to switch off the car. I took the keys up to surrender and one of them came to me and ordered me to lie down. One of them entered the car, he took all luggages and ferried them outside to his fellow. They said " Pesa zitoke" give us money – tell those wazungu to take out money. They took everything. They searched us and one of them fired a gun to insist more money....."*

In their respective evidence, both PW5 and PW6 related to the trial court that after they were dispossessed of their cash and personal effects most of which belonged to the said two tourists, the thugs took to their heels and disappeared in the nearby forest. This was after they had seen another motor vehicle approaching the scene of crime. Upon its arrival, that car assisted in taking the victims of robbery to Mto Wa Mbu police

station where the robbery incident was reported to PW3 No. F 2256 DC Yasin who, together with other police officers mounted immediate police investigations. The said two prosecution witnesses also advanced a claim, in their respective testimonies, that they identified the appellant at the scene of crime to be among the perpetrators of the robbery in question. In this regard, they gave the descriptive particulars of the appellant. However, they made no such description to PW3, a police officer to whom they firstly reported the robbery incident. It is worth taking note, at this stage, that the description of the appellant was made for the first time in the course of trial.

In the course of investigations, the police authorities received a tip of the possible perpetrators of the robbery incident. In that connection, the 1st, 2nd and the 4th accused persons were arrested. The majority of the victims' personal effects allegedly stolen in the course of robbery were recovered from the house then occupied by the 4th accused. The appellant was arrested after PW4 D 7086 Cpl. Joseph had, on 21/7/2008, obtained and recorded the 4th accused's cautioned statement (EXH P 111) in which the appellant is implicated only to the extent of having stolen a gun from the former, soon after the 1st and the 2nd accused persons were arrested.

In her cautioned statement, the 4th accused further states that the stolen gun was earlier entrusted to her by the 1st and 2nd accused persons for safe custody.

Believing that the said stolen gun could have been used by the bandits during the robbery incident, the appellant was questioned by the police on it's whereabouts. Following the police interrogation, the appellant led PW3 and other police officers to Engaruka in Monduli Juu where a gun, make SAR 86957, was recovered hidden in a certain house. In the course of trial, that gun was tendered by PW3 and admitted in evidence as EXH. PIV.

At the close of the evidence in support of the charge and upon being addressed in terms of section 231 (1) (a) and (b) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA), the appellant is on record to have opted to exercise the following option:-

"I will defend myself under oath."

Curiously, in the trial court's judgment at page 52 of the record, the learned trial magistrate observed that the 1st accused and the appellant "opted not to defend themselves." The appellant was thus convicted

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Curiously, in the trial court's judgment at page 52 of the record, the learned trial magistrate observed that the 1st accused and the appellant "opted not to defend themselves." The appellant was thus convicted

without being heard in defence. This unsatisfactory feature was belatedly discovered. It was never raised as a ground of appeal and the parties herein did not address it. We propose to leave it at that. Be that as it may, the appellant's conviction was predicated upon visual identification evidence adduced by PW5 and PW6 and the invocation, by the trial court, of the doctrine of recent possession.

After its re-evaluation and consideration of the evidence on record, the first appellate court sustained the appellant's conviction on the strength of visual identification evidence and the doctrine of recent possession.

The appellant lodged a four points memorandum of appeal premised on the following grievances:-

1. *That the first appellate court erred in law and in fact when it held that the appellant was properly identified at the scene of crime.*
2. *That, the doctrine of recent possession was wrongly invoked by the first appellate court.*
3. *That, the case for the prosecution was not proved beyond reasonable doubt.*

Before us, the appellant appeared in person, unrepresented. He had nothing to say in elaboration of his grounds of appeal. He only reserved his right to respond to the learned State Attorney's submission. The respondent Republic had the services of Mr. Marcelino Mwamunyange, learned State Attorney, who did not support the appellant's conviction.

Addressing the first ground of appeal, the learned State Attorney submitted that the purported visual identification evidence of PW5 Fabian Mgasa and PW6 Msafiri Juma was wanting in cogency and ought not to have been relied on to ground a conviction for armed robbery. He took this stance because the evidence on record is clear that the appellant and his co-accused persons were strangers to the said identifying witnesses who never gave the descriptive particulars of the appellant or his co-accuseds to the police or to any other person soon after the occurrence of the robbery incident. Again, he faulted the dock identification of the appellant by the same prosecution witnesses which was not preceded by an identification parade. To support his contention, he cited to us our recent decision on the issue in **NOEL GURTH aka BAITH and ANOTHER vs R;** Criminal Appeal No. 33 of 2013 (unreported). He accordingly invited us to find that the

visual identification evidence of the said prosecution witnesses was not watertight.

On the second and third grounds of appeal, the learned State Attorney emphatically submitted that there is no scintilla of evidence on record suggesting that the appellant was ever found in possession of any item stolen from the victims of the armed robbery. If anything, the appellant is said to have led the police officers to a place when the SAR gun (EXH.PIV) was retrieved, he said. He maintained, however, that the prosecution led no evidence linking that gun with the robbery incident. He finally urged us to find that the case for the prosecution was not proved beyond reasonable doubt as against the appellant.

As we proceed to dispose of this appeal, we propose to be guided by the principle stated thus in **EDWIN MHANDO v. R.,** [1993] TLR, 170:-

> *"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premise that the finding of facts are based on correct appreciation of the evidence. If, as in this case, both courts below completely misapprehended the substance, nature and quality*

of evidence, resulting in an unfair conviction, this Court must, in the interest of justice, intervene."

In the light of the foregoing extract, we must state, from the outset, that in the present case the nature and quality of the evidence relied upon by the first appellate court in upholding the appellant's conviction merit our intervention.

On the first ground of appeal, we are, with respect, in full agreement with the learned State Attorney's submission. The law on the value of visual identification evidence is now fairly settled. In the first place, it is evidence of the weakest kind and courts should not act on such evidence unless satisfied that all possibilities of mistaken identity are eliminated and the evidence is absolutely watertight. (See; **WAZIRI AMANI V. R.,** (1980) TLR 250). Secondly, in matters of identification, it is not enough merely to look for factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification may appear ideal but that is no guarantee against untruthful evidence (See**; JARIBU ABDULLAH V. R.**, Criminal appeal No. 220 of 19994 (unreported).

Admittedly, the undisputed robbery incident in the present case took place in broad daylight during which PW5 and PW6 asserted, in their respective testimonial accounts, that they unmistakably identified the appellant as being one of the perpetrators of the robbery. As hinted earlier, their evidence entailed the descriptive particulars of the appellant as he was allegedly seen at the scene of crime. On this aspect of the case, the Court of Appeal for Eastern African in **MOHAMED ALHUI V. REX** (1942) 9 E.A.C.A. 72 made the following pertinent holding:-

> *"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance and ought always to be given: first of all, of course, by the persons who gave the description and purports to identify the accused, and then by the person or persons to whom the description was given."*

In this case, the evidence on record is clear that PW5, PW6 and other victims of the robbery reported the incident to the police authorities at Mto Wa Mbu police station soon after its occurrence. Yet, as said earlier, the descriptive particulars of the appellant was never given to PW3 D.C. Yasin,

a police officer to whom that incident was firstly reported. Their belated description of the appellant was made in the course of trial on 25/11/2009 which was over fifteen (15) months after the robbery incident. Upon these glaring brief facts, we are of the firm view that the purported identification of the appellant by PW5 and PW6 in the course of trial was undoubtedly dock identification. Commenting on the value of dock identification evidence where no identification parade is held, this Court in the case of **MUSSA ELIAS AND *TWO OTHERS V. R.,*** *Criminal Appeal No. 172 of 1993* (unreported) said:-

> *"PW3's dock identification of the 3rd appellant is valueless. It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial."*

On the authority of the holding in **MUSA ELIAS** case (supra), we find that the dock identification of the appellant by PW5 and PW6 which was not preceded by an identification parade was evidentially worthless. Indeed, the failure by the said prosecution witnesses to make the

description of the appellant at the earliest opportunity to PW3 or other persons renders their assertion of having identified the appellant at the scene of crime highly suspect, implausible and has cast grave doubts on the credibility and reliability of these two witnesses.

Next, we turn to the discussion of the second and third grounds of appeal together. In sustaining the appellant's conviction, the first appellate court apart from relying on the purported visual identification evidence, it also invoked the doctrine of recent possession. In his judgment appearing on pages 113-117 of the record, the learned Judge of the first appellate court said:-

> *"The finding of the stolen items with the particulars of the victims indicate that the prosecution proved the case beyond reasonable doubt against the appellant."*

On our part, we have had an advantage of perusing and subjecting the entire proceedings in the record to a very close scrutiny. In so doing, we found no evidence implicating the appellant in having been found in possession of any item belonging to any victim of the robbery incident. As correctly submitted by the learned State Attorney, we hasten to make a

finding that by invoking the doctrine of recent possession, the first appellate court misapprehended the evidence on record thereby sustaining the appellant's conviction against the weight of evidence.

However, if the evidence of PW4 D.7086 Cpl. Joseph and that in the 4th accused's cautioned statement (EXH.PIII) is anything to go by, the appellant is implicated in having led PW3 and other police officers to a certain house in Monduli Juu where a gun SAR 86957 (EXH.PIV) was retrieved. All the same, as correctly submitted by the learned State Attorney, this piece of evidence is not without its attendant serious shortcoming.

We have found no evidence on record establishing the requisite nexus between the said gun and the robbery incident in question, not to mention the absence of the ballistic expert report. As matters stand, it is not easy to say with certainity EXH.PIV is the same gun that was used by the bandits in the course of committing the robbery. In the same vein and having discredited the visual identification evidence of PW5 and PW6, the outstanding evidence touching on the gun by itself, without more, does not squarely link and place the appellant at the scene of the robbery incident

on 3/6/2008. There being no credible evidence linking the appellant with the offence of armed robbery, the charge of conspiracy to commit the same offence remain unestablished.

All the above considered, we are satisfied that the case for the prosecution against the appellant was not proved beyond reasonable doubt. Accordingly, we allow this appeal, quash the appellant's conviction and set aside the sentences meted out and upheld, respectively, by the trial court and the High Court. Consequently, we order the immediate release of the appellant from prison unless otherwise lawfully held.

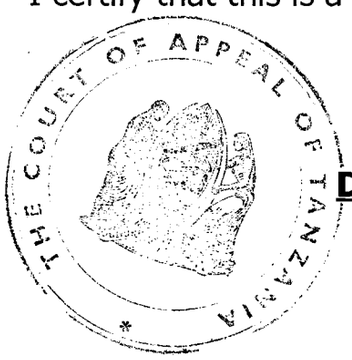
DATED at ARUSHA this 25th day of February, 2015.

E.A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL