

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT DODOMA (APPELLATE JURISDICTION) (DC) CRIMINAL APPEAL NO. 13 OF 2017 (ORIGINAL ECONOMIC CASE NO. 23 OF 2016 OF THE DISTRICT COURT OF KONDOA DISTRICT AT KONDOA) HASHIM S/O OMARI@ LUBUVA & 3 OTHERS APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

02/08/2017 & 13/09/2017 H. H. KALOMBOLA.J.: The three appellants namely HASHIM OMARY @ LUBUV A, SHAIBU ISMAIL @ HASSAN! and ABDUL RAMADHANI @ MTINDA were aggrieved by the decision of the District Court" of Kondoa in Criminal Case No. 23/2016. They were each sentenced to serve 30 years in jail. They each .filed own petition of appeal but when I went through them they mainly focus on issue that the prosecution case was not proved beyond reasonable doubt as identification was not properly established. The 3rd appellant went on to state the caution statement was recorded 1 contrary to Section 50 (1) (a) and 51 of the Criminal Procedure Act (Cap 20 R.E. 2002), he was not arrested in possession of the alleged stolen property, there was no judgment at all since the trial Court did not obseNe the requirements of Section 235 (1) of the Criminal Procedure Act and that Section 312 (2) of th~_ Criminal Procedure Act the offence of which they were sentenced with was not specified. The 2nd appellant added that he was not mentioned by the witnesses (PW1 and PW3) at the earliest opportunity to the people who gathered at the scene. While 1st appellant added his defence was ignored and th~_ Court relied upon th_e _prosecu-t-ion - evidence -- only. Like the 2nd appellant _he said Section 235 (1) and Section 312 (2) of the Criminal Procedure Act were not complied. That he was convicted basing on suspicion, the caution statement was recorded contrary to the Law, Sections 50 (1) (a) and 51 of the Criminal Procedure Act. Lastly the evidences of PW1, PW5 and PW6 were in contradiction. On the day of hearing all the appellants had nothing more in addition whereas Ms Nsana the learned State Attorney who appeared for the respondent/ Republic found the issue of identification was not clear (as per PW1 and PW2 testimonies). That these witnesses failed to show how they identified the appellants while it was 2:00 midnight. PW1 and PW3 did not give explanation on the intensity of the light in such they referred to the case of THE REPUBLIC YRS GERWATO (1960) ER 174 and that of AMAN! YRS THE REPUBLIC (1980) TLR 250, in support and insist identification was done in unfavourable condition. 2 Moreover PW3 guarded different promises, he was far from the house which was invaded. PW3 said he managed to identify ~ 141 the 3rd appellant who was at a distance of about 5 paces from PW 1 's house but

he did not mention him immediately after except when he was testifying in Court, which situation creates doubt. Further PW3 said to have identified the 4th appellant by face but he did not go further to explain how the 4th appellant looked. They found identification was not proper. Talking of the 6th ground of appeal that prosecution evidence was in contradiction in regard to PW1, PW5 and PW6 testimonies. They on their part agree PW 1 and PW 6 evidences were in contradiction. That identification parade was conducted on 14/1/2016 which included different people some were short and others were tall. Whereas PW6 commented on the people who were arraigned to have almost resemble. It is thus their submission the trial Court in the said situation ought to have keenly analyse the evidence. In respect of PW7 evidence it is their submission he gave contradictory testimony as at one time he said there were other people in the room at time he was recording the 3rd appellant Caution Statement and at another time he said there were no other people {asper page 22 of the proceedings}. It is thus their submission the trial Court had duty to resolve the contradictions, to discuss them as it was found in the case of MOHAMED SAID MATULA YRS THE REPUBLIC {1995} TLR at page 3. In the premises they find the trial Court erred and misdirected itself for it used the contradictory statements without evaluating/ discussing them. 3 I As to the 7th ground of appeal which was raised by the 3rd appellant which is about the Caution Statement, they support the 3rd ground because it shows at page 20 of the proceedings the caution statement was read in the Court before it was tendered in evidence. It is their submission this is a wrong procedure. Moreover. in the proceedings PW7 said when he was interrogating the 3rd appellant there were other people to mention, one D/Cpl Elineema. Accordingly it is submitted if that was the case, it is doubtful if the said statement was given freely and the trial Court ought to have noted while conducting inquiry before it admitted the statement. _____IA---reg-arc:i---to the 9th and 13th grounds of appeal, they support the appellants that their defence was ignored because the 1st, 2nd and 4th appellants told the Court that they were not in Kondoia when the incident occurred. It is thus submitted the trial Court- did not clearly say why it did not discuss and consider the appellants defence of alibi, in the circumstances this was an error/omission on the part of the trial Court. All in all it is their submission the appeal has merit. , have considered the respondent and the trial Court record, I have come to an agreement with the State Attorney submission that identification of the appellants at the scene of Crime in particular by PW 1 who was the victim is doubtful. It is doubtful because according to PW 1 testimony the incident occurred at midnight, she came from sleep, so although she said the bandits had switched on electricity lights but due to shock it is difficult to properly identify them. And going by PW3 who told the 4 Court that he saw the 2nd accused by name of Shaibu coming from PW1 's. house while he was going to attend alarm thereat. He explained to have identified the 2nd accused as electricity lights were on, outside PW1 's house. That he saw the 2nd accused who was at about 4 steps from PW1 's house. As I have said hereinabove the incident is said to have occurred at midnight accordingly the circumstances was unfavorable for the identification of the culprits by the witnesses. The Law on visual identification is very clear as it was stated in the case of GALOUS FAUSTINE STANSLAUS (Appellant) VERSUS THE _____ RE~UHLLC--(-RespGr:ident),- -E:fm·inol-App-eal-No~2/2U09_(C-A==Arusha) that:- "The Law on visual identification, be it of a stranger or of a known person (i.e recognition) is now settled. It -is trite -law- that· such evidence is of the

weakest types and courts should not act on it unless all possibilities of mistaken identity are eliminated. Furthermore, the Courts must be fully satisfied that the evidence clearly shows the conditions favouring a correct identification and is accordingly water tight." In the present case, the evidence does not show there was condition favouring a correct identification of the appellants at the scene of crime by PW 1 and PW3. Since that the prosecution side relied on visual identification evidence provided by these witnesses while at the same time this type of identification is mostly considered as weak, this Court join 5 I hands with the appellant as well as the state attorney arguments that the appellants were not correctly identified at the scene of crime. As long as the evidence in relation to identification was not watertight, the appellant's guilt was not proved beyond reasonable doubt. Consequently the convictions are hereby quashed and are set aside as well as all the sentences imposed on all the appellants. The appellants are to be released forthwith from prison unless they are otherwise lawfully held. Ordered .Q.C..£Ordngly. ~~~~! -/-1· -n-n ~ ~ ~~~~ (-~HH~KALOUJ(M_ ---BOLA) ' :t / f_/.'. ~ t_]? (Di ,, ; !"-11 ,,, C)'r-1f \ \ . . JUDGE ;· : ,_ J, '!:·,,,{ b\ ,L.:,_ \"¥_. -1'~\, 1,'i:N .;:a.,;.;,;--== ~' 'I··L'"·~· . \ .A>· :, ~· ·, :-~'0· / _ 'J \ t;/.:t;,,,./4 13/09/2017 ~,i'--:=~y· ,,, ,. . /4: . · l"~..... J~L. ~,, -· ~/:f . .. ' ~~~~ ~ Right of Appeal explained. 6 DATE: 13/09/2019. Coram: Hon. Madam H. H. Kalombola,J. 1st Appellant: Present 2nd Appellant: Present 3rd Appellant: Present 4th Appellant: Present Respondent- Ms Magoma State Attorney - Present. C/c: F. Nkamirwa. MS. MAGOMA STATE ATTORNEY SUBMITS. We are ready to receive the judgment. COURT Judgment is read today 13/09/2017 in the presence of all 13/09/2017 Right of Appeal explained. JUDGE 13/09/2017 7

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