

TANZANIA / JUDGMENT

kassim salum vs republic 2020

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM fCORAM: MKUYE. J.A., WAMBALI, 3.A. And KITUSI. J.A.^ CRIMINAL APPEAL NO. 186 OF 2018 KASSIM SALUM..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Dar es Salaam) fMwandambo. J.^ dated the 8th day of June, 2018 in Criminal Appeal No, 41 of 2Q17 JUDGMENT OF THE COURT 11th August & 20th October, 2020

MKUYE, J.A.: The appellant KASSIM SALUM was found guilty as charged of the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code) in the District Court of Ilala at Ilala. He was sentenced to life imprisonment. Aggrieved, he appealed to the High Court but his appeal was unsuccessful save for the reduction of sentence from life imprisonment to thirty (30) years. Still protesting his innocence, he has preferred this appeal to this Court. The brief facts leading to this appeal are that: On the material day, the complainant, LATIFA MOHAMED (PW3) was accompanied with her sister AISHA ALLY (PW2) heading to purchase electricity from the local vendor. While on their way, they were approached by the appellant who demanded to be handed over a mobile phone by PW3 but she declined. A struggle ensued between the two then the appellant hit PW3 on her stomach who lost energy and threw her phone away. Then, the appellant pushed her for which she fell on boiling oil used to fry chicken that burnt her back and buttocks area and the appellant picked the mobile phone and left. According to PW3, the place where the fracas ensued was lit such that she was able to identify the appellant. Also, YAHAYA RIDHIWANI (PW1) who was a local vendor of fried chicken managed to identify him (appellant) as they lived in the same street. The matter was reported to the police. However, the appellant was surrendered to the police by his relatives for his safety on allegation that there were some people who planned to slaughter him due to his bad behavior. In order to prove their case, the prosecution fielded five witnesses and the defence had two witnesses. 2 In this appeal, the appellant has raised ten (10) grounds of appeal in the substantive memorandum of appeal; and three (3) grounds in the supplementary memorandum of appeal which can be extracted as follows: One, that, no distinctive features of the stolen mobile phone were given by the complainant and that she gave two different versions on how she identified it (exh P2). On top of that, there was no any chronological documentation or paper trail showing its seizure, custody and control; and that, the 1st appellate court failed to consider that

the mobile phone was a normal item that could change hands easily. Two, the 1st appellate court abdicated its duty of scrutinizing the entire evidence and thus failed to consider the appellant's main petition of appeal. Three, the appellant was not given a chance to object to the admission of the cautioned statement after his advocate had not objected to its being tendered; and that the said cautioned statement was not read over after being cleared for admission. Four, the 1st appellate court upheld the appellant's conviction on the basis of incredible visual identification evidence by PW1 and PW3 and the contradictory evidence of prosecution witnesses. Five, the case was not proved beyond reasonable doubt and that the defence case was not considered. Six, the 1st appellate court erred in 3 commuting the sentence from life imprisonment to thirty years imprisonment which was still excessive. When the appeal was called on for hearing, the appellant appeared in person, unrepresented while linked through video conference from Ukonga Central Prison; whereas the respondent Republic was represented by Ms. Faraja George, learned Senior State Attorney assisted by Mr. Yusuph Abood, learned State Attorney. When the appellant was called upon to amplify the grounds of appeal he sought to adopt his ground in both memoranda of appeal; and opted to hear the submission from the learned State Attorney first and reserved his right to rejoin later, if need would arise. Initially, Ms. George intimated to the Court that she was supporting the appeal but upon a short dialogue with the Court she abandoned her earlier position and declared her stance of supporting both the conviction and sentence. Regarding the complaint on the identity and the chain of custody of the stolen mobile phone (grounds No. 1, 3 and 8 of the substantive memorandum of appeal), Ms. George submitted that PW3 had described the said stolen mobile phone to be TECNO, black M. 3 which she bought at Tshs. 110,000/= and that she would identify it if shown. And, when 4 she was recalled to testify in court, she identified the said phone with scratches and that it was distinguishable from other phones. As to the chain of custody, she said, there was no need of having a certificate of seizure as the said phone was recovered from PW5 who had bought it from the appellant who eventually led the police to her. With regard to the complaint that the grounds of appeal lodged by the appellant were not considered by the 1st appellate court, the learned Senior State Attorney conceded to it. She pointed out that though the appellant had filed 10 grounds of appeal, the court considered only four grounds filed later by the appellant's advocate and argued in court, adding that, the 1st appellate judge was not obligated to look into his grounds of appeal in the circumstances. She was of the view that since the appellant was represented there was no prejudice occasioned to him. In relation to the issue that the appellant was not given an opportunity to object to the tendering of the cautioned statement and failure to read it over in court, Ms George conceded to it. She equally agreed that it was wrongly relied upon as it was not read over in court. She referred us to the case of William Kassanga v. Republic, Criminal Appeal No. 90 of 2017 Page 15 (unreported) where the Court disregarded the cautioned statement which was not read over after being admitted in court and urged us to do the same. With regard to the issue of credibility of witnesses, contradictory evidence and proof of the case generally, (grounds No. 9 and 10 of substantive memorandum of appeal and grounds 1, 2 and 3 of supplementary memorandum of appeal), it was Ms. George's contention that the case was proved beyond reasonable doubt by 5 witnesses, PW1, PW2 and PW3 being the key witnesses. PW1 and PW3 explained on how the offence was committed and the phone was grabbed from PW3. She said,

PW1 and PW3 testified to the effect that the incident happened on the road while there was enough light illuminating from a bulb with 60 watts. PW1 knew both the appellant and the victim (PW3) and he saw them at a distance of about one meter. PW3 identified the stolen mobile phone and that the witnesses did not contradict each other. The learned Senior State Attorney added that the appellant was properly identified as there were conditions favouring identification. There was sufficient light, the witness knew the appellant even before and the incident took ample time, hence, the identification evidence was watertight. She concluded that the trial court properly analysed the evidence and came to the conclusion that the case was proved beyond reasonable doubt. In the end, the learned Senior State Attorney urged the Court to find that the appeal devoid of merit and dismiss it. In rejoinder, the appellant stressed that the mobile phone was a normal item which could change hands easily; and he wondered why PW1 and PW3 did not mention the appellant's name to PW2. He lastly, prayed to the Court to find that the appeal has merit and allow it. Having summarized the submissions from either side, we think that we should now be in a position to deliberate on the issues raised. We begin with the issue of the identification of the stolen mobile phone and lack of a certificate of seizure issued when the same was recovered from PW5. Both lower courts found that PW3 gave description of the stolen mobile phone as shown at pages 77 and 109 of the record of appeal, respectively and that the evidence of PW4 and PW5 corroborated the identity of the said mobile phone. At this juncture we must emphasize that in matters involving theft, identification of the stolen property is a crucial requirement. (See *David Chacha and 8 Others v. Republic*, Criminal Appeal No 12 of 1997 (unreported)). Also, issuance of the certificate of seizure is very important particularly on items seized in connection with the commission of the offence as it will show the place where the item was seized and such certificate will be signed by an independent witness, (*Seleman Abdallah and Others v. Republic*, Criminal Appeal No. 354 of 2008 (unreported)). In the case at hand, we do not see any reason to fault the lower courts' findings on this issue. We agree with Ms. George that the testimony of PW3 clearly described that her stolen phone was TECNO M3, black in colour, screen touch bought at Kariakoo at Tshs. 110000/= and that she could identify it if shown, and the fact that she identified it when she was recalled in court after it had been tendered in court to be hers, sufficiently proved that it was the one. Though at first PW3 did not state that the phone had scratches, the evidence of PW5 to whom the mobile phone was retrieved by the police upon being led by the appellant, and her confirmation that she bought it from him with scratches corroborates that it was the one which was grabbed from PW3. As regards the complaint about the chain of custody of Exh P2 or lack of certificate of seizure, we think, it is baseless. The evidence on record shows that the mobile phone was retrieved from PW5 who stated to have bought it from the appellant. PW4 tendered it in court and was admitted as Exh P2 without any objection from the appellants advocate. Neither did he cross examine the witness who tendered it on that aspect. It is also noteworthy that the same was recovered within a very short period of time from when it was stolen. It is also notable that there is no indication that the trail of the said exhibit from its seizure from PW5 to the time it was tendered in court was broken. In our considered view, much as by its nature it could change hands easily, for the reasons we have given above, we still strongly hold that it was the very mobile phone that was snatched by the appellant from PW3. Given the circumstances, even if there was no certificate of seizure, the

evidence of PW3, PW4 and PW5 proved that the TECNO, M3 black with scratches retrieved from PW5 and produced in court was the very one at issue. Hence, we find this ground to be devoid of merit. We turn to the complaint that the appellant was not given the opportunity to object to the tendering of the cautioned statement (Exh P3) and that it was not read over. We think, this issue must not detain us much. We equally agree with the learned State Attorney that the appellant was not asked whether he objected to its being tendered or not. On the contrary, it was the appellant's advocate who did not object to its being tendered. Neither was it read over in court after being admitted in court which, we think, was a crucial anomaly. Unfortunately, the 1st appellate court upheld the appellant's conviction on among other evidence, the appellant's cautioned statement (Exh P3). However, in answering the 1st limb of the complaint, we think that since the appellant was represented by an advocate (Mr Kikuli) as shown at page 30 of the record of appeal who did not object to its being tendered, it is presumed that they had already agreed on the position to be taken. He cannot now be complaining since he ought to do so to his advocate during the hearing of the case. Regarding the 2nd limb of complaint that Exh P3 was not read over after its admission, we equally, agree with Ms. George. The law is, very clear on this aspect. In the case of *Steven Salvatory v. Republic*, Criminal Appeal No. 275 of 2018 (unreported), when this Court was faced with an akin scenario, it cited with approval the case of *Robinson Mwanjisi v. Republic*, [2003] TLR 218 on the legal position after a document has been cleared for admission and stated as follows: "Applying the above stated legal position to the instant case, it is dear that after exhibit PI was tendered and cleared for admission, it did not complete the third stage of being read out in court so that its contents could be heard by the 10 appellant. Thus, exhibit PI was improperly admitted in evidence. For that reason, we accordingly expunge it from the record". On our part, we associate ourselves with the above cited authority. Even in this case, as Exh. P3 was not read over after being admitted in court, it was certainly wrongly relied in evidence. Hence, we accordingly disregard it. (See also *William Kassanga's case* (supra)). We now turn to the complaint that the visual identification evidence by PW1 and PW3 was incredible and contradictory. As was hinted earlier on, we shall deal with this issue along with issues that the case was not proved beyond reasonable doubt and that the defence case was not considered. This issue is covering the credibility of the visual identification evidence by PW1 and PW3 and of other witnesses; contradictory evidence, and that the defence evidence was not shaken. It is noteworthy that both trial and the 1st appellate court found that the appellant was correctly identified by the prosecution witnesses. On credibility of witnesses, it basically involves the ability to assess if the witness is telling the truth. In other words, it involves the issue whether the witness appears to be telling the truth as he believes it to be. See - *Salumu Ally v. Republic*, Criminal Appeal No. 106 of 2013 (unreported). Regarding the issue of visual identification, the law is now settled that the court should not act on such evidence unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. (See *Waziri Amani v. Republic*, (1980) TLR 250; and *Aidan Malulenga v. Republic*, Criminal Appeal No. 207 of 2006 (unreported)). Apart from that, where in criminal cases the determination of the case depends essentially on the identification, the evidence on conditions favouring a correct identification is of utmost importance. (See *Raymond Francis v. Republic* (1994) TLR 100 at 103. In the case of *Scapu John and Another v. Republic*, Criminal Appeal No. 197

of 2008 (unreported), the Court went on listing factors to be considered in identification as follows:

- 1) How long the witness had the accused under observation.
- 2) What was the estimated distance.
- 3) If the offence took place at night which kind of light did exist and what was its intensity.
- 4) Whether the accused was known to the witness before the incident.
- 5) Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the latter's concentration. Applying the principles stated in the above cases, we agree with Ms. George that PW1 and PW3 who were credible witnesses properly identified appellant at the scene of crime. PW1 was able to identify him as shown at page 13 of the record of appeal because there was light from a 60 watts bulb at his place of business that enabled him to identify the appellant at a distance of only one meter from where he was and that he knew him prior to the incident as they resided in the same street. PW3, also stated at page 22 of the record of appeal that she was able to identify the appellant due to enough light from the stalls around which lit the area as if in the afternoon. Also, she knew the appellant as they grew up together and played together. From the evidence of the two witnesses we are satisfied that there were favourable conditions for the proper identification of the appellant which eliminated all possibilities of mistaken identity. Failure to mention the appellant to PW2 who was together with PW3, in our view, is of no assistance to him in the circumstances of the case. As regards the identification of the mobile phone (Exh P2), we have discussed it exhaustively when dealing with ground No. 1 and we wish to add here that there were no contradictions between PW3 and PW5 as the same was properly identified. On the complaint that the appellant's evidence was not considered, we find such claim to be incorrect. The trial court considered it extensively at pages 77 - 80 of the record of appeal and found that it did not raise any reasonable doubt. On the other hand, the 1st appellate court did not deal with it as it was not raised as a ground of appeal. In our view the prosecution witnesses were credible witnesses and it is our finding that the courts below properly found that the case was proved beyond reasonable doubt. The other appellant's complaint was in relation to the 1st appellate court's failure to determine the grounds of appeal which he had personally lodged earlier on. We think, we should not detain ourselves on this issue. Having gone through the record of appeal we agree with Ms. George that, indeed, the grounds of appeal which were lodged by the appellant in person as seen at pages 83 -87 were not determined by the 1st appellate court. According to the record of appeal on 17th July, 2017 when the appeal was called on for hearing, Mr. Maganga who was the learned advocate for the appellant prayed to the 1st appellate court for leave to file supplementary grounds which leave was granted for the same to be filed within seven days. On 9th April, 2018 when the appeal came for hearing Mr. Maganga prayed to focus his arguments on the supplementary grounds, filed by him and the court granted leave to do so which was the basis for the High

Court's decision. Under normal circumstances, since the appellant was under representation, he is presumed to have agreed with his advocate that his appeal be approached that way. And, in the circumstances, we think, the 1st appellate judge was not obliged to look at the grounds of appeal filed by the appellant himself. This ground is, therefore, baseless. The last complaint by the appellant is on the reduction of life imprisonment to 30 years imprisonment which he argue, was still on the high side. The learned Senior State Attorney contended that the High Court properly reduced it to 30 years imprisonment in terms of section 5

- (a) (ii) of the Minimum Sentences Act, Cap 90 RE 2002. 15 At this juncture we deem it instructive to reproduce section 286 of the Penal Code under which the appellant was charged and provides for the sentence as hereunder:

286. Any person who commits robbery is liable to imprisonment for fifteen years and if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with any other person or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses persona/ violence to any person, he is liable to imprisonment for life, with or without corporal punishment. [Emphasis added] On the other hand, section 5 (a) (i) and (ii) cited by the learned Senior State Attorney provides as follows: "5. Notwithstanding the provisions of section 4 - (a)(i) any person who is convicted o f robbery shall be sentenced to imprisonment for a term o f not less than fifteen years; (ii) if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more person; or if at or immediately before or immediately after the time o f robbery, he wounds, beats, strikes or uses any other personal violence to any personr he shall be sentenced to imprisonment to a term of not less than thirty years. [Emphasis added] In this case, the record of appeal bears out that PW3 was wounded by the appellant in the course of the commission of the robbery. At one stage of her testimony PW3 stated the manner she was seriously wounded at her back and buttocks and that she will not forget in her whole life. Though the PF3 was expunged by the 1st appellate court, we are satisfied that the nature of the wounds of a person who fell into the boiling oil justifies the sentence of 30 years imprisonment. Hence, this ground appeal also fails. All said and done, we find that this appeal is devoid of merit and we, therefore, sustain the decisions of the two courts. Consequently, the appeal is hereby accordingly dismissed in its entirety. Order accordingly DATED at DAR ES SALAAM this 15th day of October, 2020. R. K. MKUYE JUSTICE OF APPEAL F. L. K. WAMBALI JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL The Judgment delivered this 20th the day of October, 2020 in the presence of the appellant in person via Video Conference from Ukonga Central Prison and Ms. Daisy Makakala learned, State Attorney for the respondent/Republic is hereby certified as a true copy of the original. 18

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