

TANZANIA / JUDGMENT

stephano jackson kibona 2 others vs the republic 2021 tzhc 9476 3 december 2021

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TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MBEYA DISTRICT REGISTRY AT MBEYA CRIMINAL APPEAL NO. 127 OF 2020 (Originating from Criminal Case No. 228 of 2019 District Court of Momba) Between

1. STEPHANO SZO JACKSON KIBONA..... APPELLANT
2. ALEX SZO ALAM NZOWA..... APPELLANT
3. AKSON SZO PHILEMON MSONGOLE..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

A.A MBAGWA, J. The appellants herein and one Frank Henri Mwankina (not in this appeal) were arraigned before District Court of Momba on indictment containing three counts of armed robbery contrary to section 287A of the Penal Code. All the appellants pleaded not guilty hence prosecution paraded six witnesses and produced one exhibit namely, caution statement of Stephano Jackson Kibona in a bid to prove the case. The victims of crime testified as PW1, PW2 and PW3. The appellants, on their part, defended themselves and in addition DW1 Stephano Jackson Kibona tendered PF3(D1) In fine, the trial court found the appellants guilty of all three counts of armed robbery and subsequently convicted them. Consequently, every accused was sentenced to thirty (30) year imprisonment for each count. Page 1 of 9 Dissatisfied with conviction and sentence meted out by the trial court, the three appellants filed a joint petition of appeal to this Court to protest their innocence hence the present appeal. Briefly, the evidence adduced in the trial court may be narrated as follows; It was the prosecution evidence that on the night of 27/10/2019 at Nkangamo village within the district Momba in Songwe region the appellants broke into three different houses and therein stole various items. The three houses allegedly invaded, belong to Yona Choma (PW1), Frank John (PW2) and George Kambaulaya (PW3). Before and after stealing, the appellant assaulted the victims namely, Yona Choma, Frank John and George Kambaulaya in order to obtain and retain the stolen properties. It was the evidence of PW1 (Yona Choma) that on the fateful night, the appellants invaded his house, beat him and ultimately took from him Tshs. 80,000/=, two shaving machines, two mobile phones and two vitenge. PW1 further said that he managed to identify the assailants to be the appellants

through solar light. PW1 said that he used to know the appellants prior to the incident day and that they were carrying machetes and clubs. Similarly, Frank John (PW2) testified that on the fateful night the appellants invaded his house and robbed him tecno phone, robot radio, four pieces of vitenge, kanga and kikoi. He identified the robbers by the aid of solar lights as Stephano, Alex, Ackson and Frank. Further, PW2 told the court that the assailants were carrying machetes and clubs which they used to assault. George Kambaulaya (PW3) also claimed to have been robbed Tanzanian shillings 360,000/=, phones namely, tecno, nokia and guava. Page 2 of 9 He further to told the court that he identified assailants as Stephano. Alex, Axon and Frank for he knew them before incident. According to PW5 F.8448 DC Abel, his role was to interrogate the 1st appellant one Stephano Jackson Kibona. He told the trial court that he recorded the caution statement in which Stephano Jackson mentioned his co-appellants. PW5 tendered the caution statement and the same was admitted in evidence and marked exhibit P1 despite strong objection from the 1st appellant. The last prosecution witness one G. 2106 DC LUGANO PW6 had nothing useful to tell the court than a narration of evidence he gathered during investigation. During their defence, all the appellants denied the allegations. DW1 Stephano Jackson Kibona insisted that he did not make the caution statement (exhibit P1) freely rather he was tortured and told to sign the statement which he did not know its contents. The appellants filed a petition of appeal containing several grounds which can be reduced into the following meaningful grounds:

1. That the trial Resident Magistrate erred in law and fact by failing to consider the conditions necessary for proper identification of the appellants thereby arriving at the wrong decision
2. That the trial Resident Magistrate erred in law and fact by his failure to properly evaluate the evidence thereby making wrong decision
3. That the trial Resident Magistrate erred in law and fact by convicting the appellant based on the weak prosecution evidence. When the matter was called on for hearing, the appellants appeared in person unrepresented whilst the respondent/Republic was represented by Davis Msanga, learned State Attorney. The appellants, being laypersons, had no much to submit rather they adopted the grounds of appeal as contained in the petition and implored the court to consider them and finally allow their appeal. At the very outset, the Court probed Mr. Msanga whether the appellants were properly convicted by the trial court. Mr. Msanga was opined that the appellants were not convicted. He said that the judgment is not categorical as which offences or counts were the appellants convicted of. He therefore prayed the Court to remit the case file to the trial court for proper conviction Alternatively, with respect to the merits of appeal, Mr. Msanga opposed the appeal. He submitted that the solar light was enough to enable the victims identify the assailants. He said that it was not the first time for PW1 to see the appellants hence it was easy for him to identify them. He cited the case of Jumapili Msyete vs Republic, Criminal Appeal No. 110 of 2014 where the Court held that identification by recognition is a proper identification. The learned State Attorney insisted that PW1, PW2, PW3 and PW4 clearly identified the appellants at the scene of crime as there were solar lights. On being probed by the court, Msanga conceded that there is a bit of contradiction in PWTs testimony at page 8 as to whom he knew before the

incident. Further, Mr. Msanga contended that the evidence was properly evaluated. He referred to page 5 and 6 of the judgment and submitted that the trial magistrate correctly evaluated evidence. Alternatively, he said that this Court, this being the first appellate court, has power to Page 4 of 9 reevaluate evidence and arrive at its conclusion. He thus, beseeched the Court to invoke the powers to reevaluate the evidence Moreover, the learned State Attorney maintained that there was cogent evidence and the prosecution case was sufficiently proved. He argued that the stolen properties were not recovered as such, they could not be tendered in court as exhibits. Nonetheless, he was of strong opinion that through six prosecution witnesses, the case was proved beyond reasonable doubt. Also, it was Msanga's submission that there were no contradictions in the prosecution evidence because each victim was invaded at his own place. Mr. Msanga finally prayed the Court to dismiss the appeal. Before delving into the merits of the appeal, it is pertinent to deliberate on the issue of conviction. At page 9 of the trial court judgment, the trial magistrate held as follows; Based on the stated reasons and findings this court comes into conclusion that accused were involved in commission of the offence charged with and therefore convicted as per section 235(1) 312(2) of the CPA [CAP 20 R.E 2002]. There are all four Stephano, Alex, Akson and Frank together Charged with three counts of armed robbery C/S 287 A of the Penal Code [CAP 16 R.E 2002] From the above quotation it is crystal that there was no proper conviction as required by sections 235(1) and 312(2) of the Criminal Procedure Act in that the trial magistrate did not indicate the offence and section of laws under which the appellants were convicted. Ordinarily, the omission would render the appeal incompetent, the consequences of which were to remit the file to the trial court to enter a proper conviction. However, with the coming into force of the overriding principle, it is not always the cases that omission to enter a conviction will necessarily lead to an order of remission of the record to the trial court especially, as in this case, where justice of the case demands otherwise. In some cases, it has been considered prudent to treat the omission as a mere slip and the Court has deemed the conviction to have been entered. See case of Mabula Makoye & Amos Shaban versus the Republic, Criminal Appeal No. 227 of 2017, CAT at Shinyanga. The similar position was taken in the case of Imani Charles Chimango

- v. Republic, Criminal Appeal No. 382 of 2016 CAT at Mtwara in this case conviction against the appellant was entered in the following words; "it is for the foregoing reason both accused in this case Imani Charles Chimango @ Ima and Sharafi Hamis Twalibu @ Chinga are hereby found guilty as per charge and against both accused person as per S. 235(1) of the CPA". After considering the circumstances of the case, the Court of Appeal was satisfied that conviction was entered. In view of the above authorities and taking into account the circumstances of this appeal, I am of the considered views that despite the omission, conviction was entered. As such, the anomaly is cured by section 388 of the Criminal Procedure Act for it did not occasion any injustice. In the premises, I find and hold that the appeal is competent before this Court and proceed to discuss grounds of appeal. Coming to the merits of appeal, having canvassed the grounds of appeal, submission by the State Attorney and record of appeal, the pivotal issue for determination of this appeal is whether the prosecution case was proved

beyond reasonable doubt against the appellants. It is common cause throughout the evidence that the conviction of the appellants was predicated on two pieces of evidence namely, identification of the appellants by the victims and caution statement of the 1st appellant Stephano Jackson Kibona. To start with identification evidence, it needs not to be overemphasized that the issue of visual identification is very crucial in determining the guilt of the accused, it is a settled law that visual identification is the weakest kind and almost unreliable evidence. Where the issue of visual identification arises, the court should consider, among other factors, the time the witness had the accused under observation, the distance at which the witness had the accused under observation, the source and intensity of light and whether the witness knew the accused before. See *Waziri Amani v Republic* [1980] TLR 250 and *Sadick s/o Hamis @ Rushikana & 2 Others versus the Republic*, Criminal Appeal No. 381 CF 382 CF 383 of 2017, CAT at Tabora. In this appeal, PW1 evidence was that he managed to identify Stephano, Alex, Akson and Frank through solar light. He said that he knew the appellants prior to the incident for Akson was his neighbour and the rest he had seen and met them at village centre. PW2 identified the appellants by solar lights and he knew them because Stephano had once worked with him in the farm whilst he used to see Alex in the company of his co accused going to work. PW2 further said that Akson was his neighbour. PW3, on his part, said that he knew the appellants and was able to identify them by solar light. Similarly, PW4 testified that he knew the appellants by their single names as he used to see them going to fetch water. PW4 said that he managed to identify them through solar lights. PW1, PW2, PW3 and PW4 were key prosecution witnesses in that they were at the scenes of crime. However, their identification testimony was too scanty to be relied upon. Though they all said that they identified the appellants by the aid of solar lights, none of them was able to describe the attire the appellants had worn on the fateful night. Further, all the prosecution witnesses testified that they saw the appellants carrying machetes and clubs but no body told the court which specific appellants amongst the four were carrying machetes or clubs. To crown it all, the prosecution witness did not tell the trial court for how long they spent with the appellants under observation. On account of these deficiencies in the identification evidence, it is my findings that the identification was not watertight. Regarding the second aspect of caution statement, the evidence is clear that when PW5 was about to tender it, the 1st appellant Stephano Kibona objected it on the ground of torture. The trial magistrate notwithstanding proceeded to admit it. It is now a settled law that where a statement is objected on the ground of torture, the trial court must conduct an inquiry or trial within trial in order to probe involuntariness or otherwise. See the case of *Nyerere Nyague vs the Republic*, Criminal Appeal No. 67 of 2010, CAT at Arusha. It is undisputed in this case that the trial court did not conduct inquiry to probe the allegations raised by the 1st appellant Stephano Jackson Kibona. Indeed, this was a fatal contravention of the procedural law. To crown it all, the illegally admitted statement was not read out. The consequent effect of the above procedural errors is to expunge the caution statement from the evidence. See the case of *Jumapili Msyete vs the Republic*, Criminal Appeal No. 110 of 2014 CAT at Mbeya, *Robinson Mwanjisi and Three Others v. R* [2003] T.L.R 218 and *Steven Salvatory versus the Republic*, Criminal Appeal No. 275 of 2018, CAT at

Mtwara In absence of the caution statement (exhibit P1), the visual identification evidence becomes shallow to ground conviction. In the final analysis, it is my findings that the prosecution evidence was tainted with several anomalies. As such, the appellants were wrongly convicted based on weak prosecution evidence. Consequently, I allow the appeal, quash conviction entered by the trial District Court and forthwith set aside the sentence imposed. The appellants should be released immediately unless they are held for other lawful causes. It is so ordered Right of appeal fully explained. jy k.k. Mbagwa Judge 03/12/2021 Judgment delivered in the presence of the appellants in person and Sara Anesius, learned State Attorney for the respondent this 3rd day of A.A. Mbagwa Judge 03/12/2021 Page 9 of 9

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