

TANZANIA / JUDGMENT

20100512 TZCA Mwanza

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..ii -! ~ ,i. IN THE COURT OF APPEAL OF TANZANIA ATMWANZA I I (CORAM: MSOFFE, J.A., MBAROUK, I.A. And BWANA, J.A.) I I CRIMINAL APPEAL NO. 27 OF 2006. I

1. THOBIAS MANG'ERA MANGO }..... APPELLANTS
2. SHUKURANI MASENGENYA MANGO I I I VERSUS I THE
REPUBLIC ~- RESPONDENT I (Appeal from the Judgment of
the High Court of Tanzania at Mwanza} : I I (Masanche, J.) I I I I st Dated the 31 day of
October, 2005 1
- I m HC Criminal Appeal No. 201 of 2004 JUDGMENT OF THE COURT 11 May & 13th May,
2010 BWANA, J.A.: I The two appellants were among. five persons who ! were charged I with
the offence of armed robbery contrary to Section\$ 285 and 286 of I the Penal Code. One of
the five, Wilfred Wilbert (accu.sed No. 3), died I I in the course of the trial. At the conclusion
of the said trial the fourth I i and fifth accused persons were acquitted. The two appellants
herein I 1 Ii f i and who stood trial as first and secohd accused, were convicted of the 1 i I
offence. Each one was sentenced to thirty (30) years imprisonment. I i' I Aggrieved by that
decision of the trial court - the District Court I I of Mwanza at Mwanza - they uns!ccessfully
appe lled to the High I 1 Court. Undaunted, they preferred this second appeal. Before us, the
first appellant lwas represent .d by Mr. Feran 1 I Kweka, learned advocate. The second
appellant was unrepresented. The respondent Republic was repre~nted by Mr. Jictor
Kahangwa, I,, learned Senior State Attorney. 11 I ! The appellants lodged separatei
memoranda of appeal. The first appellant gave six grounds of appeal\ while the seco~d
appellant had seven grounds of appeal. Both memofanda of appeal ?re couched in a 1
language indicative that they wer~ drafted by non-professional lawyers. The bottom line of
their app~als may be sumled up as being I the following:- i:
 1. That the case against them was not proved beyond reasonable I I doubt as expected in a
criminal case. I 2 ..
 2. That they were not adequ tely identified as the ones who committed the offence.
 3. Non-compliance with the provisions of Section 214 of the Criminal Procedure Act (the CPA)
occasioneJ failure of justice.

4. The Courts "a quo" erred in law by relying on the evidence of the appellant as an accomplice to convict them.
5. The second appellant had raised the defence of "alibi" but it was not considered. Mr. Kweka, learned counsel, adopted the grounds of appeal as lodged by his client although he had no part in their drafting. We will shortly consider those grounds of appeal. Before we do so, however, it is proper to appraise ourselves on the issues involved in this case, albeit briefly, as culled from the court records. Fatuma Said Ahmed, PW4, used to work with Zeid Bureau de Change at Mwanza Hotel. On 3rd of July 1999 at about 8:30a.m, two bandits struck at the said Bureau de Change and stole large sums of money, the property of Zeid Bureau de Change. Immediately before the robbery, the first appellant visited the Bureau. He was described by PW4 as a frequent customer and therefore, known to her although she did not know his name. This time he did not stay long inside the Bureau. He just told PW4 that he was travelling. Immediately after the appellant left the Bureau, two bandits entered the place and at gun point forced PW4 to surrender the money she had. While Wilfred Wilbert (later charged as 3rd accused) pointed a pistol at her, the second appellant herein collected the money and put it in a wallet. Both bandits then vanished. Following PW4's description of the bandits to the police, a team of police officers consisting of PW1, PW2 and PW3 managed to arrest Wilfred Wilbert at Bwiru area of the city of Mwanza. After interrogation he admitted to have participated in the robbery at the Bureau. Some cash money and travellers cheques were found hidden under a carpet in the house where he was. He then led the team of police investigators to a place where his fellow bandit was. That fellow bandit is the second appellant. He was apprehended at Balele Guest House at Kitangiri area of Mwanza. When searched, the appellant was found in possession of shs 40,000/= hidden under his underwear. In the guest room occupied by the second appellant the police also found sunglasses and a jacket, both matching the description given by PW4. She had told the police what kind of jacket the second appellant was wearing and that he had sunglasses on. The second appellant admitted to the police that he participated in the robbery and that the first appellant was among them. He then led the police to Igogo area to a place where the first appellant was. He was arrested and subsequently charged together with the other suspects. In his defence, the first appellant denied to have participated in the robbery. He stated that on the material day and time, that is on 3rd of July 1999 at 8:30am, he was hospitalized at Bugando Medical Centre, in Ward J4, as a TB patient. However on the 4th of July, he was taken by the police from his hospital bed to Central Police Station for interrogation. It is important to note at the outset that this appellant jumped bail. After a considerable lengthy period, the court decided to proceed with the hearing of the case in his absence, pursuant to the provisions of Section 226 (1) of the CPA. We consider this to have been a proper procedure. The appellant was arrested on 8 July, 2003 at a time when five prosecution witnesses had already testified. This Court had the occasion to remark in the case of Omary I I Kijuu V Republic - Criminal Appeal No. 39 of 2005 (unreported) thus:- "..... there was also another fact which the Courts below considered and in our view, properly so. The appellant disappeared ... after the event. He emerged two (2) years later and got arrested This act of disappearing ... after the event and

reappearing after so long is inconsistent with his innocence ... " (Emphasis added) The second appellant raised the defence of "alibi" although he had not given notice of the same before the start of hearing of the case, as required under Section 194 (4) of the CPA. We will consider the consequences thereof shortly. We have noted earlier that this is a second appeal. It is trite law that an appellate court should not disturb concurrent findings of fact by courts "a quo" unless it is evident that there are misdirections or non-directions on the evidence. Likewise, if it is evident that there is misapprehension of the evidence; a miscarriage of justice; or a violation of some principle of law or practice, then a second appellate court is entitled to re-examine the relevant evidence and make its own findings of fact. (See: *The DPP vs Mfaume laffui Kawawa*, 1981 TLR 149; *Issa Mgara @ Shuka v Republic - Criminal Appeal No. 37 of 2005* (unreported); *Leonard Zedekia Maratu vs Republic - Criminal Appeal No. 86 of 2005* - (unreported)). In this case, there is no dispute that a robbery took place at Zeid Bureau de Change. It is also not in dispute that PW4's description of the bandits, their attire and circumstances surrounding the robbery immediately before and immediately after, led to the arrest of the suspects, including the two appellants. Some of the suspects were found in possession of money hidden at peculiar places. The attire the second appellant had on during the robbery, I was found with him in the room he had rented at Balele Guest House. Both the trial court and the first appellate court found PW4 as well as PW1, PW2 and PW3 to be credible witnesses. We are hesitant to fault those findings of fact. It is considered vital that the case against the appellants was proved to the required standard in a criminal trial. That was not all. On the question of identification, the evidence of PW4 is crucial. She was the sole witness who was confronted by the bandits. She had visual contact with them. It is settled law that in a case which depends entirely on the evidence of a single identifying witness, such evidence must be absolutely watertight to justify a conviction (See: *Yohanis Msigwa v Republic* -1990-TLR 148; *Masudi Amlima v Republic* - 1999 TLR 25; *Maelo Mwita @ Maseke and another v Republic* -Criminal Appeal No. 63 of 2005 (unreported)). The guidelines for visual identification as provided in the much cited case of *Waziri Amani v Republic* (1980) TLR 250 although neither exhaustive nor restrictive, nevertheless do amplify the point we intend to reemphasize herein. Courts of law are required not to act on such evidence: "unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight." The trial court as well as the first appellate court held that PW4's identification of the appellants was adequate and that there was no mistaken identity. We do agree with those findings. The issue of whether or not non compliance with section 214 of the CPA occasioned failure of justice therefore prejudicing the appellants was considered at great length by the first appellate judge. It is correct that during the trial, the venue changed three times. The first trial magistrate was transferred before concluding the case. The second magistrate had to disqualify herself after the accused persons expressed lack of confidence in her. Whether the second magistrate acted properly in so disqualifying herself should not detain us. The issue at hand is the application of section 214 (1) of the CPA, namely that when there is a change of venue then the accused person should be accorded an opportunity to inform the court

whether the trial should proceed from where it had reached I 9 I I with the previous magistrate, or it should start "denovo". There is no dearth of authorities on this subject. In the instant case the issue is I I whether such omission occasioned injustice to the appellants. It is our judgment that it did not. The omissions were not fatal. Further, it I I should be noted that the court has discretion under Section 214 (1) I I of the CPA to proceed with the hearing without according an accused I person an opportunity provided for under that section. I I I . On the issue of accomplice evidence, it is trite law that an accomplice is a competent witness. Therefore & I . It is not a conviction illegal merely because it proceeds upon the uncorroborated testimony I ; I of an accomplice (Section 33 and 142 of the Tanzania Evidence Act). The court would, however, in an appropriate case, enter such a conviction where it finds such evidence to be true and warns itself of I I the danger of convicting on such uncorroborated evidence. (See; I I Fanuel Joseph Mbendule vs Republic - (1989) TLR 221; Pascal Kitingwa v Republic - (1994) TLR 65; Michael Mathias v Republic - Criminal Appeal No. 9 Jf 2007 - (unreported). In the present case, it is evident that the I accused person mentioned I I " his co-accused persons to the police after he had implicated himself. This however, was corroborated by the evidence of PW4, whose evidence is material to the entire case. The defence of "alibi" was raised by the second appellant. He I showed that on the material morning, he was at Bugando Medical I Centre where he had gone to see the first appellant and one other I person. Both the trial court and the first appellate court rejected this piece of evidence. They based their decisions on the point that the I appellant did not comply with the requirements of the law as provided under Section 194 (4) and (5) of the CPA. Both subsections !

- (4) and (5) are imperative. Subsection (4) requires an accused I person to give notice to both the court and the prosecution of his ! intention to rely on such a defence. Where he fails to do so, he is ! given another opportunity under subsection (5) to furnish the I prosecution with the particulars of the "alibi" at any time I before the I prosecution closes its case. Both subsections were not complied with I in this case. Therefore the court had discretion not to accord any I weight to that defence. (S.194 (6)). However having considered I the I I I I evidence of PW4, the courts below rightly decided to believe her and ! to accord no weight to second appellant's defence of "alibi". We are hesitant to differ with those concurrent findings of fact. Therefore, for the foregoing reasons, we do not find any basis for which to fault the findings of the two courts below on all I substantive matters considered herein. The appeal I is patently I I wanting in merit. Accordingly it is dismissed in its entirety. The appellants to serve the prison terms as imposed by the trial court. DATED at MWANZA this 11th day of May, 2010. J. H. MSOFFE JUSTICE OF APPEAL M.S. MBAROUK JUSTICE OF APPEAL S. J. BWANA JUSTICE OF APPEAL I certify that this is a true copy of the original. c::=& -q (J. S. MGETTA) DEPUTY REGISTRAR 12

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