

TANZANIA / JUDGMENT

20100510 TZCA Mwanza

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IN THE COURT OF APPEAL OF TANZANIA ATMWANZA (CORAM: MSOFFE, J.A., MBAROUK, I.A.,
And BWANA, J.A.) CRIMINAL APPEAL NO. 195 OF 2006 NO. A. 5204 WRD VIATORY

PASCHALAPPELLANT VERSUS THE

REPUBLIC111..... RESPONDENT. (Appeal from the Judgment
of the High Court of Tanzania at Bukoba) (Luanda, J.) dated the 20th day of June, 2006 in Criminal
Appeal No. 1 of 2003 JUDGEMENT OF THE COURT · ' 10th May & 12th May, 2010 BWANA, J.A.:

The appellant was one of four people jointly charged with nine counts. One count was for being
in possession of fire arms and ammunition contrary to section 3 of the Arms and Ammunition
Ordinance, Cap 223 read together with Sections 56 (1) and 59 (2) and paragraph 20 of the First
Schedule of the Economic and Organized Crime Control Act No. 13 of 1984, as amended. The
other eight counts were of Armed Robbery contrary to sections 285 and 286 of the Penal Code.
The offences were alleged to have been committed on 28th and 30th March, 1996. The first
count, that of being found in possession of arms and ammunition, was committed on 30
March, at 12:30pm at Mwanio Mgumu area of Bukoba District while the offences of armed
robbery are said to have been committed on the 28th March, at 8:30am at Kyakakela area of
Bukoba District, Kagera region. The prosecution called seven witnesses in support of their
case. It was alleged that the accused persons were found in possession of a sub machine
gun (the SMG) and thirty (30) rounds of ammunition. It was further alleged that the said SMG
was used by the accused persons to commit armed robbery at Kyakakela area where
passengers in a motor vehicle were robbed at gun point. All the accused persons denied
responsibility. At the end of the trial, the first accused was acquitted but the other three were
convicted and sentenced each to serve prison term of 15 years, imprisonment with two
strokes of the cane for the first count. For the armed robbery, each one was sentenced to a
prison term of thirty

(30) years imprisonment. The sentences were to run concurrently. In the course of writing his
judgement, the trial magistrate considered the issue of the eight different counts of armed
robbery against each accused person. He came to the conclusion that the accused persons
should have been charged with only two counts - that of unlawful possession of fire arms
and the other, that of armed robbery. He then proceeded to deliver his judgment along those
lines. Out of the three convicted persons, only the present appellant appealed to the High
Court against both conviction and sentence. Before proceeding with the hearing of the

appeal, the first appellate court judge (Luanda, J. as he then was) considered a procedural issue that had arisen. The same issue has occupied our minds. The issue before Luanda, J. (and before us now) was whether the court can amend the charge sheet at the stage of writing a judgement. Apparently the trial magistrate had amended the charge in the cause of writing the judgement. The accused persons, therefore, were not accorded an opportunity to enter their pleas as required under section 234 (2) of the Criminal Procedure Act, 1985, (the CPA). For ease of reference, we reproduce that provision: 0'5. 234 (2). Subject to subsection (1) where a charge is altered under that subsection- (a) the court shall there upon call upon the accused person to plead to the altered charge!

- (b) (Emphasis provided.) The said sub section (1) of section 234 of the CPA states: "where at any stage of a trial, it appears to the court that the charge is defective either in substance or form/ the court may make such an order for alteration of the charge either by way of amendment of the charge or substitution or addition of a new charge as the court thinks necessary having regard to the merits of the case/ the required amendments cannot be made without injustice "(Emphasis added.) Since the accused persons were not called upon to plead to the altered charge at that late stage of the case, Luanda, J. held that the amendment to the charge was not done at an appropriate stage. I I We subscribe to that finding/holding. He/ then invoked section 373 (1) I I I
- (a) of the CPA and vacated the judgement. The sentences imposed I I against the appellant were set aside. Upon satisfying himself that there were sufficient materials on which the record of the case, Luanda, J. proceeded to write another I I judgement, in place of the one vacated. It is against this judgement by Luanda, J. that the appellant has come before this Court, raising nine grounds in his memorandum of appeal. The epicenter of those grounds of appeal may be said to be identification and cautioned statement. The appellant appeared in person while the respondent Republic was represented by Mr. Edga Luoga, learned Senior State Counsel Attorney. The said respondent did not support the conviction of the I I appellant as will be shown shortly. The issue of visual identification forms the basis of this appeal. I I, I It is, in a nutshell, the appellant's averment that he was not adequately identified at the scene of crime. Further, he shows that he did not lead the police to the site where the SMG was hidden. One of the co-accused persons did so. Mr. Luoga gave three reasons why he did not support the conviction of the appellant. The three reasons raised touch on identification of the appellant; the retrieval of the SMG and the cautioned statement. On the first issue, that of identification, it was Mr. Luoga's submission that conditions at the scene of the robbery were not favourable for adequate visual identification. I It is on record that there was gun fire, followed by an order from the assailants to all passengers in the vehicle to come out, lay down with their faces facing the ground. None of the witnesses testified to have known the appellant before the date and time of the robbery. It is Mr. Luoga's further submission that the whole saga took the victims by surprise so much that the possibility of mistaken identity could not be ruled out. Therefore it would be unsafe to sustain a conviction on such evidence. He cited the decision of this Court in the case of Ayubu Zahoro vs Republic - Criminal Appeal No. 177 of, 2004 (unreported). We are in agreement with the views

expressed by Mr. I Luoga on this issue of visual identification. Indeed the conditions I existing at the scene of the robbery were not favourable for adequate I ' visual identification. They did not meet the necessary guidelines as I I enunciated in the Waziri Amani (1980) TLR 252 case and I subsequent decisions of this Court on the issue. In our judgement therefore we are of the settled view j that it would be unsafe to sustain a conviction based on such evid~nce. 1: The foregoing views are cemented further by the fact that it I was not the appellant who led a team 6f policemen investigating the I matter to the scene where the SMG ~sed in robbery, was hidden. According to the evidence on record it was the second accused (Emmanuel Rutha) who informed the police and led them to the place where the SMG was hidden. In the course of investigations the appellant was found in 1 possession of shs. 400,000/= in his Jackets. He insisted that the I,I I money was his. He was a merchant. Trere was no cogent evidence I I to show that the said money was part !Of the loot from the robbery. 7 1". There was a request that an order be,: made to the effect that the I shs. 400,000/= be handed back to the fppellant. We intend to order 1 so. On the question of cautioned statements it was Mr. Luoga's ~ ' submission (and correctly so in our considered view) that the said, statements were not recorded in complilnce with the requirements of I either section 57 or section 58 of the CT. I As such, they could not b~ relied upon in sustaining a conviction. . Taking into consideration our reasbning shown above regarding I.I i ' identification, retrieval of the SMG and ~he cautioned statements, this • l !: . : appeal should succeed. We, accordinglyIYJ, allow the appeal, quash the conviction and set aside the sentence~ imposed. We further ordet I that unless the appellant is otherwise l jwfully held, he should be set I free forthwith. Our attention was drawn to the ~rders by the trial court date! 6th August, 1999 (at p.253 of the retard). We believe that those orders should have been vacated by luanda, J, together with th~ judgement of the trial court as shown ~arlier in this judgement. ThiS I 8 i ·I I; is because, in our view, the said orders lmanate from the judgement of the trial court. Therefore they could not remain intact while the, said judgment had been vacated. Since the High Court did not Jndorse those orders in its I' subsequent judgment or impose fresh pnes, we state in conclusion I j that those orders (at p. 253 of the reFord) were vacated as well: Therefore the shs. 400,000/= found in! possession of the appellant; !' (exh. P. 8 as tendered and recorded at p. 85 of the court record} i should be returned to him. DATED at MWANZA, this 10th day nf May, 2010. I J. H. MSOFFE JUSTICE OF APPEAL i M.S.MBAROUK JUSTICE OF APPEAL I I' I! S. J. BWAN~ JUSTICE OF APPEAL 9 ' . "

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