

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (IN THE DISTRICT REGISTRY) AT MWANZA ~ · · , H·IGH COURT CRIMINAL APPEAL No. 169 OF 2017 · --=· . ,;"}·::'sf' . ' / (Originated from original Criminal Case No. 12 of 2016 at the District Court of Mwanza before Hon. A. A. Moshi (RM) dated on 17h Novembe0 2016)

1. ZACHARIA S/O MWITA BWISO CHACH APPELLANTS
2. LUKUBA S/O KAWA@ LUKUBA versus THE REPUBLIC W ··· ~ ·········
········· RESPONDENT

JUDGMENT

-- 6tl1 Dec, 2017 & 25ti, Feb, 2018. J. A. DE-MELLO, J; Before A. A. Moshi a Magistrate in the Resident Court of Mwanza, the Appellants were _arraigned and, convicted for Armed Robbery, .. contrary to section 287 A of the Penal Code Cap. 16. Revised Edition· of the laws of Tanzania, as amended by Act No. 3 of 2011. She found found both guilty, convicted and, sentenced to the mandatory minimum sentence of thirty (30) years imprisonment Aggrieved, they each preferred separate Petitions of Appeals whic~ was consolidated as one, having similar grounds and follows:- ~ v · 1

- i. That, the presiding Magistrate erred in law and, in fact to rely on unfavorable visual identification of the suspect at the scene of crime whose elementary factors were not established and proved in Court. ii. That, the Appellants identification was rather dock identification as neithe~ prior description was ever disclosed to any recipient and proved in Court. iii. That, the victim (PW1) failed to name the Appellant as the earliest possible opportunity i.e. to the alarmists and before policemen, so casts doubt to the Appellant's identification. iv. That, the Appellant was wrongly implicated in the Doctrine of Recent possession/ recovery of the stolen property (Exh. Pl collectively) whose identity (by its prior description and, peculiar mark) was not proved thus shake its ownership an assertion as to whether it was stolen.
- v. That, admissibility and, reliance of the Appellants confession statement (Exh. PE 2 collectively) was made injustice as to Trial Court did not caution i_tself as to its extraction which was involuntary made by single Police investigator PW3. v,. That, the presiding Court erred to reject the Appellants' strong defence in both main and mini-Trials regardless the

prosecution case was not hilt (sic). . 2 vii. That, the evidence by PW2, the alleged owner, varies with/to the offence charged as per charge sheet (as to value of the stolen good) thus shake the prosecution case. Before I labour on the grounds of Appeal, briefly the facts at the Trial Court were that, on the 27 th August 2015, at around night hours at Nyakato National, whose street is popularly known as Isegege "B" within Nyamagana District, in Mwanza Region, the Appellants allegedly, broke into and, stole some properties, including CPU {Central Processing Unit), two Monitors and, one Mobile Phone make Nokia, all in total valued at TShs. 1,890,000/= belonging to Emmanuel Igunga. The invasion breaking in and stealing was by use of force and, iron bars, it is alleged further as the victim, (PW1) was threatened. Being familiar and, with aid of tube light, PW1 managed to easily identify the two Appellants. On the following day of 28 th August, 2015 both the Appellants were arrested by the villagers at the bush as they dropped the said CPU. Upon their arrest, they were brought to Nyakato Police Station and, the later to the Court to answer the charge as levied against them. The Prosecution lead four witnesses excluding the victim himself in whose judgment the Trial Magistrate basically and solely depend on visual identification of PW1 Frank Eric. Drawn from page 3 of the said judgment the Magistrate had this to say and I refer; "On issue of identification of accused person, PW1 identify the first accused at the scene of crime as he said he knows the accused before that day as the 1st accused was "konda" at the time PW1 was at secondary school and was ordered him to sit down. . . 3~ PW1 also identify 4 th accused at the scene of crime and said that Lucuba was the one with iron bar at the scene of crime and that he met him before at Butimba Prison he was a Cell leader. PW1 went on saying that he point to Police Officer when he saw 4 th accused passing at Urban Primary Court premise when PW1 was at. District Court the information which led the 4 th accused to be arrested and after analyzing the evidence in this case the Court finds the prosecution prove their case against the first accused Zacharia Mwita@Chia and the fourth accused Lucuba Kawa@Lukuba ... ". Appellants were in total denial as they both pleaded not guilty as seen on page 1 of the proceedings while retracting their caution statements. Appearing in person, had nothing constructive to add value to their grounds of Appeal, undoubtedly for reasons of being lay and, requested the learned State Attorney who represented the Republic/Respondent to commence submissions for their response. Principal State Attorney Castus Ndamugoba, categorically opposed the Appeal, drawing attention to page 6 of the proceeding whereas PW1 Frank Erick with regard to his visual identification. That, it was by aid of a tube light and familiarity that PW1 managed to identify the accuseds. Responding to the 5th ground, on confession 1 Counsel Ndamugoba submitted that, the verdict never relied on it but, purely on key eye witness on visual identification, praying for dismissal of the Appeal while upholding conviction and, sentence 4 The Appellants in their lay submissions wondered how verdict was reached considering that even the weapons allegedly used were never tendered as proof for the said armed robbery. Mindful of this being a first Appeal I am attracted to the principle of law that of reviewing the evidence during Trial. It has always been a settled law that, visual identification evidence is of the weakest kind and highly unreliable as Court's are cautioned not to rely unless all possibilities of mistaken identity are eliminated. A list of

several cases have subscribed to this principle but top of them all is the celebrated one of Waziri Amani vs. R, [1980] TLR 250. In the instant case, the Appellants were involved in the incidence for the reasons that, they were identified at the scene of Crime which took place during night time by the evidence of PW1 who knew them before. On this alone I asked myself as to whether or not such evidence gathered did eliminate elements of doubt to qualify conviction? PW1 testimony when was cross-examined at page 6 of the proceeding, stated:- " ... I heard that sound from the shop outside in our house as there are frames (shops) in our house. I open the small gate and move outside I met with Lukuba with a piece of iron bar knock at his hand, when I try to move back at the house he started laughing I ask him what are you doing here this hour before reply Chia appeared with sime" at his hand pointing its edge toward me. I ask them did you want to steal from us, they say it is none of my business, chia asked me to sit down ~ h e y remoited all lights . ~---, 1 . . . <.. _ _ 5 outside the shops so it was dark place. So I identified them as . . • there was a big light at the gate, the light of coil light ... (sic). I know them, as Chia I know him was Mpiga debe" at national while was schooling at Mwanza Secondary, it was the time I was in form ii Lukuba I met him at Butimba Prison where I was allocated at Butimba Lukuba was askari, I stay at Butimba prison for two months ... "{sic) Seriously and, based on that, does this form basis of identification as per the percepts of law? How on earth in the absence of intensity of the alleged tube light, distance apart, time taken under observation, dressing and distance between parties can one safely claim to be familiar? In the case of Issa Mgara@Shuka vs. R, Criminal Appeal No. 37 of 2005 (unreported) the Court of Appeal had this to say:- "In our settled mind we believe that it is not sufficient to make bare assertions that there was light at the scene of crime. It is common knowledge that lamps, be they electric bulbs, fluorescent tubes, hurricane lamps ... give out light with varying intensities ... Hence the overriding needs to give in evidence sufficient details of the intensity of the light and the size of the area illuminated". (Emphasis is of this Court). See also what the case of Said Chalya Scania vs. R, Criminal Appeal No 89 of 2005 had on the similar stance stating ~ 1 {ort~ws; ~UY~- 6 . Q "We wish to stress that even in recognition cases, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when a witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made" (emphasis is of this Court). The list is exhaustive to include many others such as the cases of Riziki Method@Mnyumbo vs. R, Criminal Appeal No. 80 of 2008 and, Kulwa s/ o Mwakajape and Two others vs. R, Criminal Appeal No. 35 of 2005 (unreported). Before I conclude, looking at the judgment itself one wonders whether the guiding and basic principles for judgment writing have been duly adopted. Much as judgment writing is a matter of personal style, there is however no "bomb proof formula or house style" for standard format. Strictly though, it is the structure as provided for under Order XX Rule 4, Order XXIX Rule 2 & 3, and section 312 of Cap. 33 that, has to conform. If you read the judgment from the lower Court, it is glaring obvious that it has based on narration of evidence as opposed to objective evaluation of evidence. There is by large missing of analysis and evaluation of evidence, worse even when_ relying on visual identification and that of PW1 alone. This as observed,

simply lead the Trial Magistrate to end up her judgement stating; "This Court is therefore find guilty Zacharia Mwita@Chia first accused and Lucuba Kawa the fourth accused of offence of Armed . . . , .) . Robbery, and its hereby convict Zacharia Mwita@Chia and Lukuba X7~--= . Kawa Lu·cuba as charged".<~ _ 7 Sadly, andas gathered from page 1 of the said judgment the Trial Magistrate without properly consider and, accordingly apportion weight if any. Fleeting references like these ones without even rejecting defence is not soundful. See the case of Lockhart Smith vs. Republic (1965) E.A 211 which held among others; "The P_rinciple is elementary but fundamental none the less, and authority, if authority be needed for the proposition that failure to take into account any defence put up by the accused will vitiate conviction, is not hard to find .. so important indeed is it that this judge of fact as the leaned Magistrate was here, should keep continuously in mind ... ". With all the above, , I would order for a Re-Trial De-Novo of this matter and, before a different Magistrate as soon as it seems practicable, considering that, it is still early since, the Appellants commenced their thirty years (30) sentence. The second year in fact. It so ordered.~ J. A. DE-MELLO JUDGE 8

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