IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 123 OF 2011

JAMES SIAGI MATHAYO ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Rwakibarila, J.)

dated 08th day of October, 2010
in
Criminal Appeal No. 124 of 2008

JUDGMENT OF THE COURT

29th & 31st July, 2013

JUMA, J.A.:

In the District Court of Tarime, the appellants, James s/o Siagi Mathayo, and Daniel s/o Duke were charged with the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16. The verbatim particulars of the offence provide as follows:

> *Particulars of offence: That Domis s/o Duke and James s/o Siagi are jointly and together charged on the 08 day of March, **2009** at about 23:50 hours at Ruhu Village within the District of Tarime in Mara Region did steal cash TShs. 440,000/= and one Mobile Phone make Nokia*

valued at 60,000/= and Two Tons of Fish valued at TShs. 500,000/= All total valued at Tshs 1,000.000/= the property of MIRAJI S/O OKOMBO and immediately before such time of stealing did threatening to cut him with a machete in order to obtain the said properties. **[2008 is the correct year].**

The background facts leading up to this second appeal is aptly captured in the judgment of the High Court. Miraji Okombo (PW3) was at the time working as a wholesale fish monger operating in Musoma. He supplied fish in bulk to the Fish Processing Factory in Musoma. To facilitate his trade, PW3 owned an engine boat which he used to ferry several tonnes of fish, from the various fish settlements and villages scattered around Lake Victoria, right up to the processing factory in Musoma. In his fish trade, one Ayungo Marandi (PW1) worked as PW3's agent. PW1 supervised the purchase and collection of fish on behalf of PW3, and transport the catch to the fish factory. 8th March 2008 was like any other day in the fish-buying activities of PW1. At around 11:30 p.m. of that day, and after collecting fish from fishing settlements, PW1 was in the fish boat transporting the collection to Musoma. Daniel Duke (1st accused) navigated that boat. In estimation of PW1 the boat at the time carried 2,500 kilogrammes of fish worth Tshs. 5,000, 000/=.

Apart from PW1 and the 1st accused (who navigated the boat), Magee Mbata (PW2) was also in the boat with the responsibility of loading and unloading the collection of fish. In such lake voyages, they would ordinarily set off sail between 3 a.m. or 4.00 a.m. But that fateful day, they left much earlier at 11 p.m. They had to travel earlier because the boat navigator had warned them of impending bad weather and subsequent lake storms. Apart from the usual load of fish, the boat also carried several litres of petrol and a petrol tank.

They had a kerosene lamp which they used as a source of light. According to PW1, one hour into the journey, the boat driver who later became the first accused, suddenly stopped the engine bringing the boat to a halt. Matters took to the worse when a two-engine canoe carrying six people parked beside their boat. Four strangers from the canoe boarded their boat. Amongst the four strangers, PW1 said that he could identify two people by their first names: James and Gira. One of the intruders had a gun. They swung the machete at PW1, and cut him. According to PW1, while himself and PW2 were being beaten up, slashed with machete, the driver of their boat was spared. They never touched him. This raised suspicions over his possible complicity in the crime. The armed robbers

took with them 105 litres of petrol, petrol tank and 2.5 tonnes of fish. PW1, PW2 and the boat driver were left in the boat. A canoe came to their rescue at 3.00 p.m. the following day. In his defence, the appellant denied the allegation that he had invaded the boat in the middle of the lake. He explained that he was arrested at the fish processing factory and he suspected that he was linked to the offence maliciously due to his past differences with PW1 and PW2.

Having heard the witnesses of the prosecution and those of the defence, the trial court acquitted Daniel s/o Duke. Appellant was not as fortunate. The trial court was satisfied that the evidence of visual identification was sufficient to identify the appellant. Without so much as convicting the appellant, the trial court passed a sentence of thirty years in prison. We shall later revert back to the decision of the trial court to sentence the appellant without entering a conviction. The appellant preferred an appeal in the High Court to contest his being found guilty and the sentence imposed by the trial court. His HC Criminal Appeal No. 124 of 2008 (Rwakibarila, J.) was dismissed. With regard to the sentence, the learned Judge called upon the appellant to show cause, why his thirty year prison sentence shouldn't be enhanced, to include corporal punishment. In

the end, the learned Judge of first appeal not only confirmed the thirty year prison sentence which the trial court had imposed, but in ordered the appellant to also suffer twelve strokes of the cane.

In his memorandum of appeal made up of six grounds of appeal. Looked at closely, the main bone of contention arising from these grounds of appeal really is, the identification of the appellant at the scene of crime. There is no doubt in our minds and the learned State Attorney has agreed as much, the main issue in this second appeal is whether the appellant was amongst the pirates who invaded the boat that fateful night, will depend on probity of the evidence of visual identification facilitated by a kerosene lamp in the middle of the lake.

At the hearing of this appeal, the appellant appeared in person, unrepresented. He urged us to let the respondent begin and he would submit thereafter. Mr. Victor Karumuna, the learned State Attorney represented the respondent Republic. Mr. Karumuna resisted this appeal, contending that two courts below reached the right decisions. With regard to the visual identification of the appellant, the learned State Attorney submitted that, there is enough evidence that the appellant was sufficiently identified at the scene of crime by PW1 and PW2 who were in the boat. He

contended that, the kerosene lamp had sufficient lighting to enable unmistaken identification. Mr. Karumuna pointed out that the appellant and other colleagues in crime were easily identifiable because they did not cover their faces. Transfer of a ton of fish from the boat to the canoe must have taken considerable time, Mr. Karumuna observed. This duration of time facilitated positive identification.

In his submission, the appellant still insisted that the learned Judge on first appeal erred in law for failing to realize that the evidence of PW1 and PW2 on visual identification did not rule out the possibility of mistaken identity at night of the incident.

Before we address ourselves to the submissions on the question of whether the appellant was identified at the scene of crime, there is another matter which we asked the learned State Attorney to submit on. We drew the attention of Mr. Karumuna to the fact that the trial magistrate (P.I. Kimicha-PDM) did not convict the appellant despite finding him guilty of the offence. That is, even if the evidence of identification is sufficient, there is a problem of lack of conviction. This is apparent in the last three paragraphs of page 11 of the judgment of the trial court:

"I [have] carefully considered the identification of the two witnesses of the second accused first they knew the second accused before. Second, the distance from them to the second accused they were in the same boat when the two witnesses were identifying the second accused. The second accused even came close to PW2 when he was taking PW2 cell phone. Also considering the evidence of PW4 that after the second accused had taken boat RNM 28 on 8/3/2008, and after one day he returned with bulk of fish, meaning 9/3/2008. ...

From above evidence I am quite satisfied the visual identification is proper that the two witnesses had seen the second accused involving in the said crime. I find the second accused guilty to the offence he had been charged with.

The first accused is highly suspicious was the master mind of the offence that occurred. But however suspicious it may be does not render a person to be found guilty however much it may be. I hereby acquit the first accused for the offence he had been charged with.

Pros. No previous conviction of the second accused."

Then the District Court of Tarime heard mitigation and proceeded to pass a sentence of thirty years imprisonment. This anomaly of sentencing the appellant without convicting him, escaped the attention of the High

Court sitting to hear the appellant's first appeal. The High Court not only purported to dismiss the first appeal, but confirmed the thirty years sentence which the trial court had passed. In addition, he ordered the appellant to suffer twelve strokes of the cane.

After revisiting the record, Mr. Karumuna agreed that indeed the trial court did not enter any conviction and according to the learned State Attorney, all subsequent proceedings, including mitigation, sentencing and appeal proceedings in the High Court, were all a nullity.

In past also, this Court has dealt with similar situation where upon finding an appellant guilty, the trial court did not enter conviction against them, but proceeded to impose a sentence. Another recent example is our decision in CRIMINAL APPEAL NO 80 OF 2012, **OMARI HASSAN KIPARA VS THE REPUBLIC,** (CAT-Dodoma, unreported) where the trial court found an appellant guilty, but failed to convict. We clearly made a finding to enter a conviction was against the mandatory provisions of section 235 (1) of the Criminal Procedure Act Cap. 20. As a result, not only was the judgment of the trial Court fatally, the judgment of the High Court sitting as a first appellate was defective also because it was founded on a fatally defective judgment of the trial court.

The decision of the trial court that led to the present appeal shall face the same fate. The judgment of the trial court which lacks a conviction cannot be subject of any appeal to the High Court and subsequently to this Court. The judgment of the trial court and subsequent proceedings before the High Court and the resultant judgment of the High Court are all a nullity.

What is the way forward? Should we return or send the record back to the trial court so that it may convict? In CRIMINAL APPEAL NO 145 OF 2011, 146 of 2011 & 147 of 2011, **1. MATOLA KAJUNI, 2. ENOCK ELIA, 3. MANDELA JIMMY VS. THE REPUBLIC** (CAT at Mbeya, unreported) despite the nullity of the judgment of the trial court, we all the same scrutinized the record of the proceedings leading to the second appeal. We found out that the finding of the guilt of the appellants was based on visual identification and the doctrine of recent possession. We were not convinced on the evidence, the appellants were positively identified. We also found that the doctrine was not properly invoked. After this finding, we reasoned that with such doubtful prosecution case, it would not be to the best interests of justice to send the case back to the trial court. We invoked our power of revision. We shall take similar approach.

As we had earlier pointed out, the appellant was found guilty on the basis of evidence of visual identification. And as this Court has always insisted in its numerous decisions, evidence of visual identification is of the weakest kind and most unreliable. Courts are not expected to act on such evidence; unless all possibilities of mistaken identity are eliminated; and that the evidence is absolutely watertight: CRIMINAL APPEAL NO. 56 OF 2013, **1. JOHN BALAGOMWA, 2. HAKIZIMANA ZEBEDAYO, 3. DEO MHIDINI VS. THE REPUBLIC** (CAT at Mbeya, unreported).

Before we determine whether all possibilities of mistaken identity were eliminated by the two courts below, it is important to scrutinize the evidence in question.

Although the trial court suggests that evidence of visual identification came from PW1 and PW2, on a closer scrutiny, only PW1, Ayungo Marandi, gave evidence of visual identification. On page 3 of the record, PW1 stated:

> *"Four people entered our boat. They had two-engine canoe. They were six people. ... I was able to identify two of them. One was James and the other Gira. I only know them by their single name. I usually see these two people with the first accused.* ***I know their name after I heard people calling them****....."* [Page 3, lines 2 to 6]

This does not indicate that PW1 identified James and Gira during the night of armed robbery. PW1 could not have heard people calling these two names in the middle of the lake. He must have obtained the names well after the incident. Again, when cross examined by the 1st accused, PW1 said:

> *"The light of kerosene beam is spread to be able to see about 1-2 kilometres.... If you are in a dark place you can see the other side. The kerosene lamp was between the boats... " [page 3, lines 20-21]*

PW1 is clearly suggesting that the lighting from the kerosene lamp had such a wide coverage that it lighted as far as one to two kilometres away. Yet while still being cross examined by Daniel s/o Duke (1st accused), he said on same page 3 [lines 25-26]:

> *"I did not see the boat where it came from. They were attacking us."*

kilometre, PW1 and PW2 should have seen the approach of the canoe from afar.

Again, when he was cross examined by the appellant, PW1 explained how he identified him. It does not sound like PW1 identifying the appellant in the lake but at a place known as ROYAL, PW1 said:

> *"I .. identified you by the light of the kerosene. We were at the Royal area. I once saw you with the first accused....." [page 3 lines 29-30]*

As we mentioned earlier, only PW1 testified on visual identification. The much PW2, Magee Mbagata could say is more about identification at the factory rather than in the middle of the lake:

> *"I usually heard the name of the second accused at the factory. The other workers at the factory called him James."* [page 3 lines 54-55]

With due respect to the learned State Attorney, we are not persuaded by his submission that visual identification was in the circumstances proper having eliminated all possibilities of mistaken identity. We do not believe that the light sourced from the kerosene lamp had such intensity as to cover a kilometre wide area of the lake. We do not think

that if we send the record back to the district court the evidence of visual identification by PW1 is any way near the watertight mark, to sustain any possible conviction of the appellant.

We as a result invoke our power of revision under section 4 (2) of the Appellate Jurisdiction Act, to quash and set aside the proceedings and judgments of both the District Court of Tarime and that of the High Court on purported first appeal. We order forthwith release of the appellant from prison.

DATED at **MWANZA** this 30th day of July, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL