

- A case was seeking to achieve in the petition. In order for the High Court to invoke its powers under section 15 of the Arbitration Ordinance, rule 6 of the Arbitration Rules 1957 requires explicit reference to be made to section 15 of the Arbitration Ordinance, failure to make reference to the section in the petition is fatal to the petition. Rule 6 provides;

6. All petitions, affidavits and other proceedings under the Ordinance shall be instituted in the matter of the arbitration and in the matter of the Ordinance *and reference shall be made therein to the relevant section of such Ordinance.* [emphasis supplied]

From this it is apparent that it is a mandatory requirement under the rule to make reference in the petition to the relevant section of the Ordinance. The relevant section that vests on the Court with jurisdiction to set aside the award is section 15. In this case, there was no such reference made to this section in the Petition. It being a mandatory requirement under rule 6, the petition before the High Court was rendered incompetent. Likewise, the cross-petition was not free from the same error because in it, no reference was made to any of the rules. Consequently both the petition and cross-petition in the High Court were incompetent.

It follows therefore that as the proceedings in the High Court were a nullity, the same are accordingly, quashed and set aside. The appeal in this Court which arises from such proceedings is also incompetent; it is accordingly struck out with costs.

JARIBU ABDALLAH v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT DAR ES SALAM

(Makame, Kisanga and Lugakingira, JJ.A.)

CRIMINAL APPEAL No. 220 OF 1994

(From the decision of the High Court of Tanzania at Dar es Salaam, Mackanja, J. dated 19 December 1994, in Criminal Appeal Case No. 158 of 1993)

Evidence – Identification of offender – Offender not named by witnesses when the first opportunity presented itself – Offender named after sometime – Credibility of witnesses.

Evidence – Statement purported to be a confession – Statement never put in evidence – Statement repudiated – Whether Court can act on it.

The appellant was convicted and sentenced to 30 years imprisonment by the District Court for armed robbery. His first appeal to the High Court was unsuccessful, hence, the appeal to this Court. The evidence against the appellant, and which was believed by the Trial Court, was three-fold: that he was visually identified at the scene of the crime, that his photograph was later picked up at the scene, and, that he made a statement confessing to the offence. The overall contention of the appellant in this appeal was that the High Court failed to direct itself fully and correctly on the evidence.

Held: (i) In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The ability of the witness to name the offender at the earliest possible moment is a reassuring, though not a decisive factor;

(ii) Where a previous statement has been used to contradict the evidence of the accused, the statement has to be admitted in evidence to form part of the record, unless the accused explains the contradictions;

A (iii) It was wrong in law to use a statement that did not form part of the evidence and could not be referred to for any purpose;

(iv) The totality and nature of the evidence make it unsafe to sustain the conviction.

B *Appeal allowed*

Statutory provisions referred to:

(1) Appellate Jurisdiction Act 1979, section 6(7)(a)

C *Ms Mkwizu* for the Republic

JUDGMENT

(Dated 10 August 2001)

D **Lugakingira, J.A.:** The appellant was sentenced to 30 years imprisonment upon conviction in the District Court of Morogoro on a charge of armed robbery. His first appeal to the High Court was unsuccessful.

E Both Courts found that the appellant was among the gang which, on the night of 6 January 1992 broke into the shop-cum-residence of PW1 at Kingolwira, assaulted him, and made off with various shop items. There was no evidence of the use of arms but of late this is

F of no significance in robbery cases. The evidence against the appellant and which was believed at the trial was three-fold; that he was visually identified at the scene of crime by PW1, PW2 and PW3, all residents in the house, that his photograph was later picked up at the scene,

G and that he made a statement confessing to the offence.

The appellant appeared in person at the hearing to support his eight-point Memorandum of Appeal. Taken together the grounds of appeal revolve around the three items of evidence just stated. The

H overall contention is that the High Court failed to direct itself fully and correctly on the evidence. *Ms Mkwizu*, State Attorney, appeared for the respondent Republic. She had earlier lodged a preliminary objection contending that the appeal was grounded on matters of

I

fact but she came round to concede in the end that the memorandum could be read to disclose some points of law.

In accordance with section 6(7)(a) of the Appellate Jurisdiction Act 1979, as amended, a party to criminal proceedings commenced in a Subordinate Court may appeal to this Court on matter of law but not on a matter of fact. A finding on a matter of fact as such will, therefore, not be assailed before this Court, but whether the finding is perverse having regard to the nature and totality of the evidence, is a point of law fit for the Court's consideration. The central question in this case is whether, having regard to the nature and totality of the evidence, the finding that the appellant was among the criminal gang was legally tenable. We have had the opportunity to examine the record carefully and we think, with respect, the evidence was both flawed and wanting. We will demonstrate this by reference to the three items of evidence.

First of all, it was not in dispute that the appellant was not immediately named. This was significant since the appellant was well known to the three prosecution witnesses, his house was just behind their own, and he was at home at the time. Many villagers came to the scene but the three witnesses admitted that they did not name anyone to them. Moreover, the police came to the scene that same night, according to the appellant, and they came or returned to the scene in the evening of the following day according to PW2; yet no attempt was made to arrest the appellant, which means he was not named on those occasions. At some unknown date he left for Dar es Salaam where he was arrested sometime in February. In matters of identification, it is not enough merely to look at factors favouring accurate identification; equally important is credibility of the witness. The conditions for identification might appear ideal but is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is, in our view, a reassuring, though not a decisive, factor. We can find no reason why the three prosecution witnesses, one of them an army corporal, were unable to name the appellant when the

A opportunity presented itself. He was just there, right behind their house, and they could trust the police, if not the villagers, to act on their report. We think their silence has raised alarm but the High Court never addressed the matter.

B There was, next, intriguing evidence about the appellant's photograph being picked at the scene of crime by PW2. It does not sound as being in the natural course of events that anyone would walk around with their photograph after midnight; leave alone on a mission to commit a crime. It seems that DW8, the appellant's brother solved the riddle. He stated that the photograph was in fact collected by the police from their home at Mkono wa Mara. We note that the witness was not cross-examined on this, but the trial magistrate invited the prosecutor to re-cross-examine him when he tendered an album to show where the photograph was plucked from. The exercise was still unimpressive, for the witness was merely asked who removed the photograph, which he had already stated, and what steps he took, as if he had any choice in the matter. Both Courts below mentioned this affair in their judgments, but no more, there was no comment on its implications on the prosecution case. It seems to us that PW2 was untruthful on the source of the photograph. Such apparent mischief cannot and should not be glossed over as happened in the instant case, but a Court properly directing itself should be concerned why the mischief was hatched in the first place. Were the High Court minded to address the question it would probably have doubted PW2 on other aspects of his evidence, not least his dramatic story about observing the robbery from the ceiling.

H Finally, both Courts, the High Court to a lesser degree, relied on a statement allegedly made by the appellant while in the police custody at Dar es Salaam, terming it a confession. The appellant denied making the statement and it seems the intention of the prosecutor was to use it to contradict the appellant's evidence because he brought it out in the course of cross-examination. When the trial magistrate heard its contents, however, he declared it a confession and went on

to treat it as such in his judgment although it was never put in evidence. The judge on first appeal, perhaps by misreading the record, thought the statement was part of the evidence. And while observing that it was repudiated and that it could be discarded without harm to the prosecution case, he fell back on it and said it was amply corroborated.

We say that the use of the statement was wrong in law. Where a previous statement has been used to contradict the evidence of the accused, the statement has to be admitted in evidence to form part of the record, unless the accused explains the contradictions. In this case the prosecutor was not even given the chance to demonstrate whatever contradictions he had in mind, let alone to decide what to do with the statement. Because the learned magistrate had his own ideas about confessions, but apparently no idea about the established principles governing their reception and use, he literally hijacked the statement and the initiative from the prosecutor and subsequently made use of it although it was not in evidence. It is also evident that the statement was decisive in his decision because after extensive reference to it, he declared "...I am not prepared to take any of the defence claims by the sixth accused [as the appellant was] and the entire bunch of his witnesses". As just stated, it was wrong in law to use the statement, it could not be referred to for any purpose since it did not form part of the evidence. Had the learned judge on first appeal carefully examined the record and realized the correct position, he would not have concurred that there was a confession, and that would have made the prosecution case even weaker. We think these factors sufficiently demonstrate the perversity of the findings leading to the appellant's conviction. The totality and nature of the evidence make it unsafe to sustain the conviction. We allow the appeal, quash the conviction and sentence and order the appellant's release from custody.