THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LUBUVA, J. A., RUTAKANGWA, J. A., AND KIMARO, J. A.)

CRIMINAL APPEAL NO. 107 OF 2005

DEOGRATIUS GODWIN.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Arusha)

(Mushi, J.)

dated the 17th day of Julai, 2003
in
Criminal Appeal No. 156 of 2000

JUDGEMENT OF THE COURT

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28 September 2006 & 4 October 2006

LUBUVA, J. A.:

This appeal arises from the decision of the High Court (Mushi, J. as he then was) in Criminal Appeal No. 156 of 2000. Upon conviction by the District Court at Babati in Criminal Case No. 59 of 2000 of the offence of armed robbery contrary to Sections 285 and

286 of the Penal Code the appellant together with others, not subject of this appeal, was sentenced to thirty years (30) term of imprisonment and twelve strokes of corporal punishment. The appeal to the High Court was dismissed, hence this appeal has been preferred.

The facts as found at the trial were simple and straight forward Raphael Baptist (PW.2) was a farmer residing at Darakuta Ranch within Magugu area, Babati District, formerly Arusha Region which is now the newly created Region of Manyara. Marcel Schunder (PW.3) also a resident of the same area was a neighbour of PW.2. On 23.2.2000, in the morning both PW.2 and PW.3 went to Arusha for normal transaction in the City of Arusha. At about 10.00 p.m. the same day the two set off from Arusha back to their place in Magugu. They traveled in a motor vehicle, Toyota Land Cruiser Registration No. ARK 403 which was driven by PW.3. On arrival at the village called Mdori, a group of thugs invaded and attacked PW.2 and PW.3 whose car was forced to stop on account of the fact that the road had been blocked with stones. PW.3 was seriously injured, he was hit with an iron bar (nondo) below the right eye. He (PW.3) became

unconscious and PW.2 was also beaten up. In the process, the thugs made away with the motor vehicle and an assortment of personal items including cash money Tanzania Shilling 500,000/=.

The thugs drove away the motor vehicle towards Babati Township where it was abandoned. PW.2 and PW.3 were left helpless at Mdori. When PW.3 recovered consciousness, they reported to the nearest police post at Minjingu. The investigation by police eventually led to the arrest of the appellant and others. It was alleged by the prosecution that the appellant was among the group of thugs who waylaid and robbed PW.2 and PW.3.

In his defence at the trial, the appellant denied any involvement in the commission of the offence. He said on 23.2.2000, the day of the incident, he together with accused numbers 2 and 4 at the trial (the appellant was accused number 3) traveled to Babati arriving there in the evening. They were heading to Duru Village to consult a local Doctor. They stayed over night at the Moonlight Guest House and Bar Room No. 4 in Babati. The following morning

he, together with his colleagues were arrested by the police and charged in court.

The District trial Magistrate was satisfied that the prosecution had proved its case against the accused person including the appellant. The defence raised was rejected, hence the appellant was duly convicted and sentenced. From the decision of the District Court, an unsuccessful appeal was lodged to the High Court which, as said before dismissed the appeal.

In this appeal, the appellant appeared in person. In addition to the memorandum of appeal which he had filed comprising five grounds, he added another three grounds. In our view, the essence of those grounds relate to the identification of the appellant. That is that the conditions at the time of the incident not being favourable, the appellant was not identified conclusively. The learned judge on first appeal erroneously convicted him on the basis of such evidence.

In his submission to elaborate this issue, the appellant urged the following points. First, that as the incident took place during a dark night when with the head lights of the motor vehicle on, conditions of identification by PW.2 and PW.3 were not favourable. In that situation, possibilities of mistaken identity by these witnesses could not be ruled out. All the more so, he said having regard to the fact that PW.3, the driver of the motor vehicle at the time was concentrating on the control of the motor vehicle. Furthermore, he said there was the fact that PW.3 was in critical condition after the attack when he became unconscious. Secondly, PW.2 was also pre-occupied with the attempt to render assistance to the injured PW.3 as well as an all out effort to rescue himself and run for his safely. In such situation, he said it was doubtful if PW.2 was in a position to identify the appellant or even other alleged robbers.

Third, with the lights inside the car switched on, it was not possible for PW.3 inside the motor vehicle to see and identify someone outside the car. Similarly, it was doubtful that PW.3

identified the appellant who it was alleged by PW.3 was peeping into the car from the left door of the car.

Fourth, that although the appellant was under police custody since 24.2.2000, he was not called at the identification parade on 28.2.2000. This raises doubt on the evidence against the appellant.

Lastly, the evidence of PW.1 is doubtful. First, PW.4 was not one among the witnesses listed at the preliminary hearing. Second, in his initial report to the police he (PW.4) said he had been robbed by unknown persons. If infact he had seen and identified the appellant at the scene of crime he would have said so to the police (PW.4).

In this appeal, there is no gainsaying the fact that the central issue for determination pertains to the identification of the appellant at the time of the incident. All the more so as the incident took place at night when it was dark. During the trial, the hearing of the first appeal in the High Court and in this Court as well, the issue was

raised. As indicated earlier, it is vigorously contended by the appellant that he was not properly identified because condition at the time of the incident was not favourable. In such circumstances, it was apparent from the submission of the appellant that the learned judge on first appeal was being faulted in sustaining the conviction of the appellant based on the evidence in which it can hardly be said that all possibilities of mistaken identity were eliminated.

With regard to the identification of the appellant in this case, it is common ground that the only eye witness whose evidence implicated the appellant was Raphael Baptist (PW.2). This witness, it will be recalled, was the one who was traveling in the car together with PW.3, the driver. In order to have a better perception of what exactly he saw at the scene, it is instructive to examine closely the evidence of PW.2 in relevant parts. It is to be observed that at the trial, the appellant was referred to as the 3rd accused. In his evidence PW.2 stated inter alia:-

> When the driver Marcel Schunder was reversing, we abruptly attacked (sic). The driver was beaten by a piece of iron bar (nondo). He was knocked by that Nondo just below the right eye. At that time the motor vehicle stopped. The driver became unconscious.

PW.2 further stated:

> This accused 1 did search all boxes which were in that motor vehicle. Due the fact that this accused 1 was taking long time in searching the motor vehicle, other persons (accused person) came very close to the motor vehicle and at motor vehicle and at motor vehicle (sic) and at my left side I saw this third person from accused 1 (accused 3).

> He was peeping inside the motor vehicle through the doors.
>
> ....

Apart from this evidence, there is no other evidence on which the identification of the appellant was based. On this evidence, we pause to consider whether PW.2 identified the appellant properly. From the evidence on record, particularly the evidence of PW.2, who was together with the PW.3 in the car, with the head lights of the car switched on, it is not possible, as urged by the appellant for those inside the car such as PW.2 and PW.3 in this case to identify people outside the car. All the more so in a dark night as was the case on the day of the incident.

According to the evidence of PW.2, the appellant among other accused persons, was seen at the left side of the motor vehicle at the scene of crime peeping inside the car through the doors. It should also be pointed out that PW.2 had also stated that at the time of the incident, the window glasses of the motor vehicle were open. In that situation, given the prevailing circumstances at the time, it is doubtful

that a person seen for the first time through the window of the motor vehicle during a dark night could properly be identified solely on such evidence. We think more evidence was required.

In an effort to search for further evidence in support of PW.2's visual evidence on the identification of the appellant, holding of an identification parade would have assisted the prosecution. In this direction, for inexplicable reasons, the appellant was not presented at the identification parade held on 28.2.2000.

Although from the evidence it is not disputed that the identification parade was held and PW.2 identified accused No. 1 who is not involved in this appeal, the appellant was not among the persons presented for identification. So, PW.2 had no opportunity of identifying the appellant at the identification parade. As PW.2 answered when cross examined by the appellant (3rd accused), he would have identified the appellant if he (appellant) was present at the identification parade. Failure to present the appellant for the identification parade at the police station on 28.2.2000, when the

appellant was already in police custody since 24.2.2000 raises doubts why this was not done. Furthermore, failure to avail the appellant at the identification parade apart from raising doubt against the prosecution also weakened the evidentiary value of PW.2's evidence. The identification of the appellant at the identification parade, if at all, would have strengthened PW.2's evidence that he identified the appellant during the incident. As happened, and as the appellant has insisted, failure to do so raises doubt in the case which should be resolved in his favour.

Mrs. Neema, learned State Attorney gallantly, submitted that the evidence of D.4371 D/Cpl. Peter (PW.4) if considered together with the evidence of PW.2 proved that the appellant was among the robbers. With respect, we do not agree. This is so because all that PW.7 said in his evidence at the place where the motor vehicle, subject of the robbery, was found in Babati, the next day, two people who were seen to disembark from the car and four others who were seen around the same car ran away when he (PW.7) approached. PW.7 was not able to identify these people. On this evidence the

appellant is not in anyway connected with the incident of the people fleeing from the car. So, the evidence of PW.7 does not in any way assist the case against the appellant. We reject the submission of the State Attorney on the point that the evidence of PW.7 reinforces PW.2's evidence.

In recapitulation, having regard to the whole circumstance of the case, we do not think that the evidence of visual identification in this case was such that it can with any element of certainty be said that all possibilities of mistaken identity had been eliminated. The evidence before the trial court was not watertight. Forinstance, at the scene of crime, the evidence of PW.2, honest though he may well be, was, possibly not enough in the circumstances, for conclusive identification of the appellant. It was dark night time, with panic after the invasion by the thugs who hit PW.3 to unconsciousness. On the other hand, PW.2 also having been injured but still struggling to assist PW.3 in reversing the car or trying to take the place of PW.3 in driving the car unsuccessfully, the conditions were unfavourable for a proper identification of the appellant. The circumstances of this case,

we think were such that the conditions laid down by this Court for proper identification based on visual identification in **Waziri Amani v. Republic** (1980) TLR 250 were not satisfied.

In the event, for the foregoing reasons, we are with respect, not in agreement with Mrs. Neema, learned State Attorney that the prosecution evidence left no doubt as to the correct identification of the appellant. To the contrary, we are satisfied that doubts still remained that possibly the appellant's identity was mistaken. Admittedly, this was a serious heinous and high handed case of robbery. The circumstances in which the appellant is alleged to be involved are highly suspicious. However, suspicion alone, however strong it may be is not enough to ground a conviction in a criminal charge.

All in all therefore, we allow the appeal, quash conviction and set aside the sentence. The appellant is to be set free forthwith unless otherwise lawfully held.

DATED at ARUSHA this 4th day of October, 2006.

D. Z. LUBUVA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. RUMANYIKA
DEPUTY REGISTRAR