IN THE COURT OFAPPEAL OF TANZANIA
AT MBEYA

(CORAM: LUBUVA, J.A., MBAROUK, JA.A and OTHMAN, J.A.)

CRIMINAL APPEALNO. 99 OF 2008

(Appeal from the decision of the High Court of Tanzania At Sumbawanga)

(Mmilla, J.)

Dated the 19th day of April, 2005
in
(DC) Criminal Appeal No. 34 of 2005

JUDGMENT OF THE COURT

8 & 14 July 2008

OTHMAN, J.A.:

This is a second appeal.
The appellants were, on 14.02.2005, each convicted by the District Court of Sumbawanga of conspiracy to commit an offence c/s 384 of the Penal Code, Cap. 16, (R.E. 2002) and of the offence of robbery w3ith violence c/ss 285 and 286 of the same code, and were respectively, on those charges sentenced to a term of one year imprisonment and to fifteen years imprisonment with six strokes corporal punishment, to run concurrently. A second accused (Kevin s/o Vincent) was convicted of the offence of accessory after the fact c/ss 387and 388 of the penal Code and sentenced to one year imprisonment. A fourth accused (Nikom s/o Ndogo) was, on 10.02.200, discharged and acquitted under section 230of the Criminal Procedure act, 1985.

On first appeal, the High court (Mmilla, J.) on 19.06.2006 quashed the appellants' conviction on the offence of conspiracy to commit an offence c/s 284 of the penal Code, and set aside the sentences imposed. However, he confirmed their conviction by the District Court of Sumbawanga for the offence of robbery with violence c/ss 285 and 286 of the Penal Code, and the sentence imposed. Aggrieved, they have preferred this appeal.

The facts giving rise to this appeal may be briefly stated. Prosecution witness PW1 (Hadija d/o Said) testified that on 22/12/2004 at 4.p.m., while walking along a narrow street she was robbed by the appellants of her mobile phone. She was ambushed and strangled (PW1). It was a Siemens A50 Serial No. 35644731944686, valued at Tshs. 45,000/= and bearing the abbreviation of her initials –"KHA" (exhibit p1). That she identified the 1st appellant, a longtime neighbour, whom she knew before. Then he wore a white T-shirt and Khaki trousers (PW1). Furthermore, that she identified the 2nd appellant, whom she had seen for the first time, by face. He wore a black coat and dark blue trousers. PW1 immediately reported the incident to the Police (PW1). She gave them the 1str appellant's name (PW1). Pw2 (D/Cpl. Thomas), PW3 (PC Marcus) and PW4 (D/Cpl. Osiana), all policemen, gave evidence that the2nd acquitted accused and the 2nd appellant led them to the 4th acquitted accused, who w as found in possession of the stolen mobile phone. He claimed that they had given it to him as a pledge or security for a Tshs. 40,000/= loan.

In his defence, the 1st appellant (DW1) claimed that all the co-accused were strangers to him. The 2nd appellant (DW3) said that he was called to the police station on 24/12/20-04, and arrested. He too claimed not to have known the other accused. DW2 the 2nd acquitted accused, reiterated the same. He said he was forced by the police to sign the cautioned statement (Exhibit P2).

The trial Court, relying on PW1'S visual identification, the 2nd acquitted accuser's cautioned statement (Exhibit P2), which it found to be a confession and the evidence of PW2, pw3 and PW4 on the recovery of the mobile phone with the 4thacquitted accused held that there was ample evidence to support the two charges against the appellants. On first appeal, the learned High Court judge as we stated earlier allowed the appeal in respect of the offence of conspiracy to commit an offence c/s 384 of the penal code, but dismissed it as regards the offence of robbery with violence c/ss 284 and 285of the penal Code, subject of the instant appeal.
Carefully extracted from the 1stand 2nd appellants' memorandum of appeals, respectively, lodged on 4/.07.2008 and 2.06.2008, the central ground of appeal is to the effect that the learned judge erred in convicting them on pw1'svisual identification, a sole witness.

At the appeal hearing on 8.007.200, the appellants, laymen were unrepresented. They urged us to take into account their memoranda of appeal.

Mr. Luoga learned State Attorney, for the respondent Republic supported the 1st appellant's conviction, but did not as regards the2nd appellant. He

submitted that the 1stappellant's identification by PW1was beyond reasonable doubt. This, considering that the robbery took place during the day; PW1knewhim before the incident, which knowledge he did not deny; and she reported him to the police. Relying on section 143 of the Evidence act, 1967 he submitted that no particular number of witnesses is required for the proof of any fact. ThatPW1's credible evidence as held by the two courts below was sufficient to w sustain conviction .

Turning to the 2nd appellant, Mr. Luoga submitted that because PW1 did not know him before the incident, and saw he for the first time at that occasion, the police should have conducted an identification parade which they did not,. There was doubt, he maintained, on his positive identification. That apart, he pointed out that the evidence of PW2 contradicted that of PW3 and PW4. That while PW2 stated that the 4th accused had identified the1st and 2nd appellants as the one who had pledged the mobile phone with him, PW3 and PW4 said it was only the 2nd acquitted accused. Finally, he drew the Court's attention that there was no linkage between the 2nd acquitted accuser's caution statement (Exhibit P2) and the appellants.

This appeal essentially turns around visual identification evidence. It forms the most significant part of the proof of gui8lt of the offence of robbery with violence/ss284and 285 of the penal Code, the appellants were charged with on 27.12.2004. the law is well settled that in a case involving evidence of visual; identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is water tight (See for instance, **Waziri Amani VR** (1980) T.L.R. 250; **R.V. Eria Sebwato** [1960] E.A. 174; **Abdallah bin Wend and Another. Rex** (1953) E.A. 116. A court of law is required to examine carefully and closely the circumstances and factors in which the identification came to be made, regard had to any weakness in the identification evidence.

It is on record that the High Court found that PW1 positively, identified both the appellants. The learned judge reasoned:

> "To begin with, the trial court's finding that the complainant's evidence was credible cannot be easily faulted. In the first place, the first appellant did not contradict the complainant's evidence that she had known him prior to the date of the incident. He was expected to have done so at the time he gave his defence. Again, the complainant told the police that he identified the first appellant's companion by face and description how both of them were dressed on the date of the incident. The fact that she

> identified him in Court confirmed the fact that she had marked his face. As will be recalled the crime was committee on board day light therefore that the possibility of mistaken identity was not likely as was correctly put by the trial Court".

Having anxiously examined the record and bearing in mind the circumstances and conditions of identification; we agree with Mr. Luoga that the 1st appellant was positively identified by PW1. **One,** the robbery occurred on 22.12.2004 at 4 p.m., day time. **Second,** PW1 knew the 1st appellant before. He was her long time neighbour. **Three,** she described the clothes he wore. A white T-Shirt and Khaki trousers. **Four,** the incident took place along a narrow street, and the mobile phone was in her pocket suggestive of proximity in the encounter. **Five,** pw1 immediately named him to the police at Sumbawanga Police Station. This prompted his arrest on 212.12.2004 or 23.12.2004 by PW3 (PW1, PW2, PW3, DW1). With these as circumstances favourable to identification, the concurrent findings of the trial court and the High Court that the possibility of mistaken identification was not likely and that the1st appellant was correctly identified, cannot, in our considered view be faulted.

The 1st appellant also complained that the two courts below had erred in relying on the sole evidence of PW1. As correctly submitted by Mr. Luoga, section 143 of the Evidence Act, 1967 stipulates that subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact. It is the position of the law as stated by the Court in **Hassan Juma Kanenyera and Others v. R** [1992]TLR 100 that:

> !it is a rule of practice, not of law that corroboration is required of the evidence of a single witness made under unfaovourable conditions, but the rule does not p[r4ecludea conviction on the evidence of a single witness if the court is fully satisfied that the single witness is telling the truth."

(See also, **Anangisye Masendo Ng'wan'gwa v. R** (1993)TLR 2002).

From the evidence that we3 have carefully analyzed, the conditions of identification as regards the1st appellant were favourable for his accurate identification. Moreover, both the trial court and the High Court in their appreciation of the evidence found PW1 credible. With respect, neither has any infirmity been pointed to us to dissbelievepW1 nor have we found any circumstances showing any questionable evaluation of the evidence by those two courts. As a question of fact, they were entitled to that finding on the credibility of PW1. The complaint is without cause.

Next, we advert to the2ndappellant'svisual identification. PW1 had never seen him before the incident. She was attacked from behind (PW1). The duration of the encounter is unknown. Much as she gave evidence that she had passed him before walking into the narrow street and that he wore a black coat and a dark blue trousers it does not surface from the record that he was arrested because of any descriptive information on him that she immediately relayed to the policed on 22.12.20904 as was the case with the 1st appellant's arrest.

These being the circumstances appearing, there is merit in Mr. Luoga's submission that the police should have conducte3dan identification parade., it is trite laws that the test in an identification parade is to enable a witness to identify a person or persons whom he or she had not know or seen before the incident - See **Hassani Said Nundu V.R,** Criminal Appeal No. 126 of 2002 (CAT) (unreported). PW1 was such a witness. An identification parade held soon after the incident in which a witness positively identifies an accused lends assurance to the court of that witness's dock identification of that person.

All examined, we are of the considered view that had the learned judge on first appeal taken into account the weaknesses in the identification evidence and process, he would no doubt have come to the conclusion, as we have, that the 2nd appellant was not positively identified. There was room for mistaken identification.

A question so remains whether or not there was any other reliable evidence connecting the 2nd appellant to the commission of the robbery. For that we must come to the evidence of PW2, PW3 and PW4. Pw2 testified that the2nd appellant had admitted to have participated in it.PW3 said he recorded his cautioned statement. It is surprising, to say the least, if he indeed did so, that it was not seen fit by the prosecution to tender it in evidence. That which was tendered and admitted was that of the2nd acquitted accused (Exhibit P2.) We have closely examined it. We are in agreement with the learned judge that as it did not contain an admission of all the ingredients of the offences charged, it did not amount to a confession in terms of section 3 (1)of the Evidence Act, 1967, cap 6, R.E. 2002. Moreover, he exculpates himself. This renders it of no evidential value against the appellants, his co-accused (See, Section33 (1), Evidence Act, 1967; **Hassan said Nundu's** case *supra.*

There remains one piece of evidence that was considered and acted upon by both the trial court and the High Court, which in our considered view ought not to have been. PW2 testified that the 4th acquitted accused

identifiedthe1st and 2nd appellants as those who had pledged the stolen mobile phone (exhibit – P1) with him for a Tshs. 40,000/= loan repayable in two days. PW3 and PW4, on the other hand, said he only identified the 2nd acquitted accused. From the evidence, PW2 did not go to the 4th accused. It was PW3 and PW4 who went to him, having been led there by the 2nd acquitted accused and the2nd appellant. Being the only witnesses on this fact, their version should have been relied upon rather than that of PW2 . In these circumstances and on the evidence as a whole, with respect, we are of the settled view that there was no other sufficient evidence connecting the 2nd appellant to the offence.

For the above reasons, we dismiss the appeal in respect of the 1st appellant. With regar5d to the 2nd appellant we allow the appeal, quash the conviction, and set aside the sentence and corporal punishment. He is to be released forth with from custody, unless otherwise lawfully held. We so order.

DATED at MBEYA this14th day of July, 2008.

D.Z. LUBUVA
JUSTICE OF APPEAL

M..S. MBAROUK
JUSTICE OF APPEAL

M.C. OTHMAN
JUSTICE OF APPEAL

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

DEPUTY REGISTRAR
