IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And ORIYO, J.A.

CRIMINAL APPEAL NO. 92 OF 2009

JOHN JACOB..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Sambo, J.)

Dated the 4th day of December, 2008
in
Criminal Appeal No. 137 of 2007

JUDGMENT OF THE COURT

17th & 23rd November, 2011

LUANDA, J.A.:

This is yet another appeal where both lower courts did not properly evaluate the evidence pertaining to the question of identification. Indeed we are very much disturbed and astonished by this state of affairs despite our efforts in explaining in a number of judgments the circumstances which are to be taken into consideration when discussing the question of

identification. We urged the lower courts to critically evaluate the evidence on the record so as to reach a just decision.

In the District Court of Babati, the above named appellant was charged with armed robbery contrary to Section 287 A of the Penal Code, Cap. 16 R.E. 2002. He was convicted as charged and sentenced to thirty (30) years imprisonment.

Aggrieved, the appellant appealed to the High Court of Tanzania, Arusha Registry where he was not successful. Still dissatisfied, he has come to this Court on appeal.

In his memorandum of appeal, the appellant has raised two grounds touching on the question of identification and credibility.

In this appeal, the appellant who was unrepresented fended for himself; while the respondent Republic was represented by Mr. Zacharia Elisaria, learned State Attorney. Mr. Elisaria did not resist the appeal and rightly so.

Briefly the prosecution case from a total of four witnesses is to this effect:- On the fateful day around 1:00 hrs, when Hamisi Salum (PW1) and Mwatatu Abdallah (PW3), husband and wife respectively, were sleeping, a group of armed robbers forced open the door by using a stone. They entered inside the house; demanded money and stabbed PW1. It is the evidence of PW1 that the appellant was holding a gun. And it is further the evidence of PW1 that the appellant was the one who stabbed him on his face, head, left hand and neck while holding the gun. We failed to comprehend. Whatever the situation, the bandits managed to take a number of items including money.

As to how he was able to identify the appellant and others, PW1 said he was able to do so by aid of a **kerosene lamp** which was burning and that the appellant was a familiar face. PW3 gave almost similar evidence and also claimed to have identified the appellant and raised an alarm but no one responded as the appellant had fired two gun shots to scare would be rescurers. The bandits vanished.

PW1 was taken to the village office where he said he mentioned the appellant being one of the bandits. Later he was sent to hospital via police station where he was admitted for a month. When he was discharged, he heard about the arrest of the five people in connection with the robbery committed at his homestead. He went to police and confirmed the five to be among the group of the bandits who invaded his house. But the record does not show PW1 to have mentioned the names of those five people arrested. According to D/Constable Dingonye (PW4) he said the appellant was arrested on 5/1/2006 at Endagile village in possession of a local made gun popularly known as "gobole." He did not say who arrested him.

Be that as it may, the appellant on the other hand denied to commit the offence. He, however, admitted to have been arrested but on different date i.e 6/1/2006 in connection with a different offence. He was arrested for possessing illicit liquor.

Both lower courts were satisfied that the conditions prevailing were conducive for correct identification that the appellant was among the robbers.

Arguing in support of the appeal, Mr. Elisaria submitted, as observed earlier on, that the main ground in this appeal is the question of identification. Basically Mr. Elisaria said the offence was committed during night time; involving a group of seven people, it was sudden and above all the light which came from a **kerosene lamp** which kind of a lamp is not stated leave alone the intensity of the light it illuminated and notwithstanding the appellant was a familiar face to PW1 is not enough for correct identification. In other words the evidence of identification is not watertight to ground a conviction. He urged us to allow the appeal.

This is the second appeal. We are alive to the well known principle that generally this Court, being a second appellate Court, is precluded from interfering with the concurrent findings of fact of the courts below unless it is shown that there is misdirection or non-directions on the evidence or completely misapprehend the substance, nature and quality of the evidence, resulting in unfair conviction then it can intervene. (See **D.P.P. v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Salum Mhando v. R** [1993] TLR 170).

Having that principle in mind let us see whether the concurrent findings of the courts below were correct. There is no doubt at all as found out by the lower courts that the house of PW1 was invaded by robbers after they forced open the door and stole a number of items including money by force and in the process PW1 was injured. The crux of the matter in this appeal is:- Was the appellant one amongst the robbers who invaded PW1's house?

It is in the evidence that the offence was committed during night time. So, the question is, were the prevailing conditions favourable for correct identification? The trial court properly addressed itself that the case solely depends on the question of identification. He cited two cases *inter alia*, the celebrated case of **Waziri Amani v. R** [1980] TLR 250. The Court stated:-

> *"In this case the offence was committed at 01:00 hrs and Accused to [sic] PW1 and PW3 there was light of a kerosene lamp. These witnesses identified*

the accused person by this light. The accused was the one holding a gun. The witnesses further testified that they know the accused person for [sic]. He used to go to their house with his friend. This means that the accused was not a stranger to them at the night of the crime."

Like the trial court, the first appellate High Court also cited the case of **Waziri Amani** cited *supra* and then said, we reproduce:-

"In the instance case I am fully satisfied as the trial court did that the evidence against the appellant is absolutely watertight. PW1 stated clearly that at the time when the appellant and his friends stormed and or invaded his house at night, the room was being lighted with ***lantern lamp*** *which assisted him identify the appellant. Not only that, but in his evidence he revealed that he knew well the accused/appellant because he used to go there for*

business with his friend Gabriel. He said the accused stabbed him on the face, head, left hand, back and neck which means he observed the appellant at a close range or distance."

We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of Eastern African in **Abdallah bin Wendo and Another v. Rex** [1953] 20 EACA 116 and followed by this Court in the case of **Waziri Amani** cited *supra* regarding the evidence of visual identification, that no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely water tight.

In **Philipo Rukaza @ Kitchwechembogo v. R**, Criminal Appeal No. 215 of 1994 Court of Appeal of Tanzania (unreported) this Court observed:-

"We wish to say that it is not always impossible to identify assailants, even very violent ones even at night, and even where the victims are terrorized

and terrified. It is evidently because of this truth that even bandits who scatter terror and in danger in barbaric acts sometimes take the precaution of disguising themselves by various artifices. The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny due regard being paid to all the prevailing condition to see if in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in identification notwithstanding the honest belief of a truthful identifying witness."

In the instant case, the record is dead silent as to the kind of the **kerosene lamp** which was burning and not a lantern lamp as the first appellate judge seemed to understand. So it could be "koroboi" or hurricane lamp as well. Further to that it did not state the kind of light it

illuminated whether it was bright or otherwise. Indeed the need to state the intensity of the light it illuminated was underscored by this Court in **Issa Mgara @ Shuka v. R.**, Criminal Appeal No. 37 of 2005 (unreported). The Court said:-

> *"It is not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details on the source of light and its intensity."*

Not only that, the record is also silent as to the distance from where the lamp was and the point of confrontation so as one to weigh or see whether at all the light assisted the witness to identify his assailants. Furthermore, it did not state the size of the room and the time the robbers took to accomplish their mission. These factors, which are crucial in this case, ought to have been considered before a positive assertion is made as to whether the witnesses had identified the robbers. These factors were not considered at all.

Assuming that the witnesses at the scene of crime PW1 and PW2 managed to identify the appellant, is it practicable for one to hold a gun, shoot in the air and stab someone? We find it impracticable for the appellant to hold the gun, shot in the air and at the same time stab PW1 with what, again the record is silent. This in our view is an indication that the conditions prevailing were not conducive.

It is also on evidence that the appellant was a familiar face. We have no quarrel with that. In actual fact it is one of the relevant factors to be considered when the evidence of visual identification is the subject of discussion. However, we wish to point out that the question of familiarity will only hold if the conditions prevailing at the scene of crime were conducive for correct identification. If the conditions are not conducive for correct identification, as in this case, then the question of familiarity does not arise at all. So, when the question of familiarity especially during night time is raised, the court must first satisfy itself whether the conditions prevailing are conducive for correct identification. It is not enough to give a bare statement that the witness knew his assailant before the incident. The

witness must explain the circumstances which enabled him identify at the scene of crime.

From the foregoing, we are far from being persuaded that the conditions prevailing were conducive for correct identification. We entirely agree with Mr. Elisaria.

In sum, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant be released from prison forthwith unless he is detained in connection with another matter.

Order accordingly.

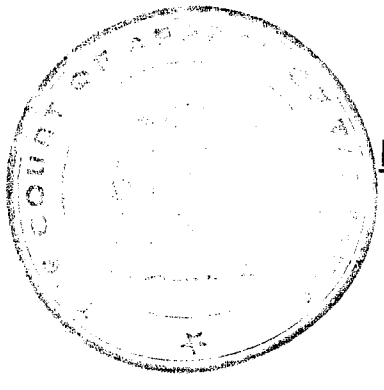
DATED at **ARUSHA** this 19th day of November, 2011.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



Z. A. Maruma
DEPUTY REGISTRAR