IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 1 OF 2011

SALUMU MUSSA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Teemba, J.)

dated the 21st day of May, 2010
in
Criminal Appeal No. 61 of 2009

JUDGMENT OF THE COURT

31 March & 6 April, 2011

LUANDA, J.A.:

In the District Court of Muheza at Muheza, the appellant was charged with armed robbery contrary to section 287 A of the Penal Code, Cap. 16. He was convicted and sentenced to thirty (30) years imprisonment and 12 strokes of the cane as mandated by law. The appellant was aggrieved by the finding of the trial court, he appealed to the High Court where he was not successful. Still dissatisfied, he has preferred this appeal in this Court.

In this appeal, the appellant appeared in person and unrepresented; whereas the respondent/Republic was represented by Mr. Faraja Nchimbi learned State Attorney. Mr. Nchimbi did not support the conviction.

Briefly the evidence which led to the appellant's conviction was that on 14/4/2008 at around 3.00 a.m. while Mwajuma Mohamed (PW1) was asleep she was awaked by noises of chicken. She woke up and went to see what was the cause. She put the electricity on. She proceeded to the chicken hut. Alas! she met a person who later claimed to be the appellant entering his compound. She could not identify the person at that juncture because the person was wearing a hat which covered his face. The person had a screw driver. Then PW1 was ordered to go inside the house, which she complied, and the intruder demanded money. PW1 was threatened with a screw driver. PW1 picked courage and put up a resistance; she decided to fight. The screw driver dropped down. The intruder drew a knife and cut PW1 on her face and arm. The intruder took Tsh 2,200,000/= from the drawer of the cupboard and mobile phone.

After the taking of the above mentioned items, PW1 managed to remove the hat the intruder was wearing. She thus came to recognize the

intruder to be the appellant. The appellant left. PW1 raised an alarm. The alarm made Mwanaisha d/o Jumambili (PW2) a secondary school student staying in PW1's house to wake up. In an attempt to rush to the place or area in responce to the alarm raised, PW2 said she met the appellant with the appellant coming from PW1's room. She said she managed to have identify the appellant through electricity lights which were on inside and outside the house.

Juma Amiri Mbuyu (PW3) a father in law of PW1 on the other hand testified that as there were a number of breakages and stealing incidents in the area, he decided to keep vigil at the PW1's house. On the fateful day he saw the appellant twice at PW1's compound before and after the robbery. The first time was at around 1.00 a.m. when the appellant was standing behind PW1's house and asked him what he was doing. On hearing that, the appellant took to his heels with his two colleagues whom he could not identify. The second time was when he was responding to an alarm raised by PW1. When he was drawing near to PW1's house, he saw the appellant jumping cattle kraal of PW1. The matter was then reported to police. The appellant, according to PW1, was arrested on 29/12/2008 and then charged.

The appellant denied to commit the offence. He, however, said he was arrested on 26/12/2008.

In his memorandum of appeal, the appellant basically raised three grounds. **One**, that the conditions prevailing at the time of the commission of the offence were not conducive for correct identification. **Two,** that the evidence on the prosecution case contains contradictions. **Three**, the tendering of PF3 was done contrary to S.240 (3) of the Criminal Procedure Act, Cap 20.

Submitting in support of the appeal filed by the appellant, Mr. Nchimbi said that the main ground in this appeal is the question of identification. He said the incident took place at night time. So the identification of the appellant must be watertight. In this case he said the record does not show the intensity of the electricity; no mentioning of the distance from where the appellant was vis-à-vis the witnesses; the time taken to observe etc. He submitted that the evidence of identification before the trial court which the High Court concurred falls far short of the guidelines set forth in the case of **Waziri Amani v Republic** [1980] TLR 250.

Apart from identification, Mr. Nchimbi could not find any explanation as to why after the arrest of the appellant it took three months to charge him in court.

We agree with Mr. Nchimbi that the main ground of appeal in this appeal is the question of identification. However, this being a second appeal we are alive to a well known principle of law that normally this Court does not interfere with findings of fact by the courts below. In cases where there are misdirections or non- directions on the evidence a court of a second appeal is entitled to look at the relevant evidence and make its own findings of fact (see **The DPP v Jaffari Mafaume Kawawa** [1981] TLR 149.

Both lower courts were satisfied that the appellant was identified because the conditions were favourable. When convicting the appellant, the trial court said:-

> *"If it is a question of identification and given that all the prosecution witnesses knew him well I have no doubt that the light that was*

available then enabled them to identify him without any mistake. It is said after committing the offence he disappeared from the village and came to be apprehended in December of the same year."

And the High Court said:-

"The scene of crime is a house which had electricity light inside and outside. The light was sufficient to enable the witnesses to identify the appellant easily. This is so from the evidence of PW1, PW2 and PW3. It is on record that PW1 switched on the light in her room. PW2 also said the lights were on when she opened her door. She identified the appellant who was known to him before. Another piece of evidence in this regard is that of PW3, who saw the appellant before and after the incident. The appellant was again seen when running away from the scene. From the evidence of these

witnesses, they were close to the appellant in such a way they could not fail to identify the suspect. PW1 spent considerable time with the appellant in her bed room. PW2 and PW3 came face to face with the appellant. In the circumstances of this case, where the witnesses and the appellant are village - mate known to each other there could be no mistaken identity given the fact that there was enough/sufficient electricity light."

PW1, PW2 and PW3 testified in court that they saw the appellant. Indeed when one reads their evidence, he would be impressed that the conditions were favourable for correct identification that the appellant was the robber. However, having subjected their evidence to a careful scrutiny coupled with some salient points, which we will explain, we are of the different view.

PW1, PW2 and PW3 each testified and claimed that they managed to see the appellant with the aid of the electricity light. But none disclosed the type of the electricity light and the intensity it illuminated. The question is:

was the light bright enough to allow for correct identification? We are asking that question because lamps be of electric bulbs or fluorescant tube lights give out light with different intensities.

PW3 claimed to have seen the appellant twice. But on both occasions he did not say the distance he was vis-à-vis the appellant. Not only that, but he did not also attempt to explain the attire the appellant he was putting on and his physical appearance. PW2 on the other hand also claimed to have seen the appellant when just awakened from slumber. Like PW3 she did not say the distance she was vis-à-vis the appellant. She also did not explain the attire the appellant was putting on and his physical appearance. PW1 said the intruder was wearing a hat which covered his face. It was after PW1 had removed the hat from the intruder and this was after the intruder had already taken the money and mobile phone she said she recognized the intruder as the appellant and thereafter left. PW1 did not say how long it took from the time when she removed the hat from the intruder to the time he left. Like PW2 and PW3 she neither attempted to say the attire the appellant was putting on nor explain his physical appearance. It is on record that the appellant was their villagemate and they knew him very well. In otherwords the appellant was familiar to them.

We have no quarrel with that. In actual fact one of the relevant factors to be considered by the trial courts in cases depending on identification is familiarity. But familiarity alone is not enough. A witness who claimed to have known the accused person prior to the commission of the offence must go further and give more details as to how he identified the assailant at the scene of crime. The need to do so is to make sure that all errors pertaining to identification are eliminated.

In **Philipo Rukaiza @ Kichwechembogo v Republic** Criminal Appeal No. 215 of 1994 this Court observed:-

> *"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 conditions 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 notwith*

identifying witness."

Apart from the above observation the following salient points were not addressed by both lower courts which we find very relevant and crucial in this case.

Firstly, no police officer had testified as to when the incident had was reported to the police and what the complainant had reported of. This piece of evidence is relevant to show whether the appellant had been named. And naming a suspect immediately after the incident is further assurance of the witness reliability.

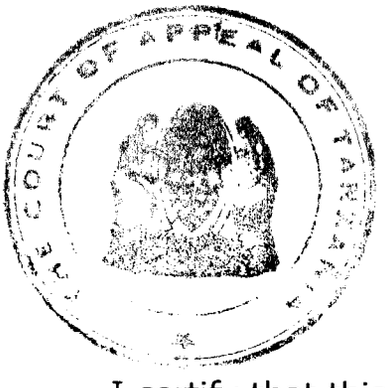
Secondly, it is on record that after the incident the appellant disappeared from the village. The record does not show whether efforts were made to trace him if really the appellant was the suspect. Thirdly, there is no evidence as to the place the appellant was arrested. PW1 merely said that with the help of militiamen the appellant was arrested. PW1 should have gone further and say where the appellant had been arrested. And to crown it all, as correctly observed by Mr. Nchimbi, why was the appellant was sent to court on 25/3/2009 after a period of almost three months?

Taking the totality of all above stated factors we agree with Mr. Nchimbi that the prosecution case was not forthcoming as to whether really they identified the appellant. Since there is doubt in the prosecution case, the benefit should be resolved in favour of the appellant.

In fine, we allow the appeal. We quash the conviction and set aside the sentence. We order the appellant to be released from prison forthwith unless he is held in connection with another lawful cause.

DATED at TANGA this 6th day of April, 2011

J. H. MSOFFE
JUSTICE OF APPEAL



B. M. LUANDA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL