IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 256 OF 2007

1. MAFURU MANYAMA
2. KINA IBAGI ..... **APPELLANTS**
3. IMESHO IBAGI

Versus

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Rweyemamu, J.)

dated the 18th June, 2007
in
Criminal Appeals No. 119 and 120 of 2006

JUDGMENT OF THE COURT

10 & 18 FEBRUARY, 2011

MJASIRI, J.A.:

This is a second appeal from the judgment of the District Court at Musoma where the appellants Mafuru Manyama, Kina Ibagi and Imesho Ibagi were charged with four counts of armed robbery contrary to sections 285 and 286 of the Penal Code as amended by Act No. 4 of 2004. They were convicted on two counts and were

each sentenced to thirty years imprisonment and 10 strokes of the cane. They were aggrieved by this decision and unsuccessfully appealed to the High Court. Still dissatisfied with the decision of the High Court, the appellants have preferred this appeal to this Court. The first appellant appeared in person, and the second and third appellants were represented by Mr. Sylveri Byabusha, learned advocate. The respondent Republic had the services of Ms Jacqueline Mrema, learned State Attorney.

Briefly the facts of this case are as follows. On the night of July 19, 2004 all was not well at Kwanga, within the township and district of Musoma in Mara region. Four different incidents of armed robbery occurred within a span of 20 minutes, at four different homesteads and at an interval of five minutes each, that is at 00:00 hours, 00:05, 00:10 and 00:10. Bandits armed with iron rods and machetes created havoc by raiding the said homes where various items were stolen including a bicycle, cash and some clothes. The victims were mercilessly attacked and assaulted with machetes during the raid,

causing them serious injuries. Two of the victims even lost consciousness.

It was alleged by the prosecution that it was the three appellants who were responsible for the robbery. The three appellants were then charged with four counts of armed robbery. They were however convicted of only two counts. The appellants were not found in possession of any of the stolen property.

The prosecution called five (5) witnesses. PW1, the victim of the robbery which occurred at 00.00hours, was badly injured. He lost consciousness during the raid. He testified that he identified the first appellant using the light from a kerosene lantern. According to him, the first appellant was known to him. PW2, the victim of the second robbery which occurred at 00:05 testified that she identified all the three appellants using the light of a kerosene lantern. She stated that she knew all the appellants as they were her neighbours. PW3, the husband of PW2 was also badly injured and also became

unconscious because of the injuries sustained. He testified in court that he knew the first appellant who he claimed was his neighbor. PW2 also stated in court that after raising the alarm she went to inform one Gabriel, her neighbor about the incident and it was Gabriel who called the police. An identification parade was also conducted which involved PW1 and PW2.

The three appellants denied any involvement in the alleged offence. They also raised the defence of alibi to the effect that at the material time of the robbery they were at home.

In the memorandum of appeal to this Court the first appellant listed numerous and lengthy grounds of appeal. The first appellant was essentially challenging the credibility of the testimony of PW1, PW2 and PW3. His complaint was that his conviction was based on insufficient identification evidence. The trial and first appellate courts failed to consider his defence of alibi and also failed to take into account the contradictions and inconsistencies in the prosecution

evidence. Generally the first appellant was of the view that the prosecution had failed to prove its case beyond reasonable doubt.

At the hearing of the appeal, the first appellant adopted his nine grounds of appeal, as contained in the memorandum of appeal without saying anything in elaboration. He made his submissions after Ms Mrema had addressed the Court.

The Counsel for the second and third appellants listed five (5) grounds of appeal. However, he abandoned the fourth and fifth grounds of appeal during the hearing and concentrated on grounds No. 1 to 3 which are reproduced as under:-

1. *That the learned appellate Judge erred in relying wholly on the evidence of visual identification of the appellants without thoroughly considering conditions then obtaining and the contradictory evidence on description of the appellants by PW1, PW2 and PW3 to PW4.*

2. *That the learned appellate Judge erred in considering the defence of **alibi** without prior appraisal of the prosecution case.*

3. *That given the fact that several homesteads and many properties were ransacked on the **same night,** it was improbable for the same appellants to take part and be found at their homes the **same night** and with no stolen property on either of them.*

In relation to grounds No. 1 and 3 Mr. Byabusha strongly argued that the conditions of identification were not conducive and the identification of the appellants was therefore not water tight. He submitted that PW2 was the only witness who identified the second and third appellants. A kerosene lantern was used to identify them and the intensity of the light was not stated. Hence the conditions in the case of **Waziri Amani v. R** 1980 TLR 250 were not met. According to him, PW2 was not a reliable witness. She claimed to have recognised all the appellants because they were neighbours.

However, on the way to the police station, PW2 did not name the people who broke into her house to PW4 who was a policeman. It was PW1 who mentioned the assailants to PW4. PW2 also identified the appellants in the identification parade. If she knew the culprits, there would have been no need for the police to conduct an identification parade. PW1 also gave a different account in his testimony. He claimed to have identified the first appellant only. He did not mention the second and third appellants.

Mr. Byabusha also submitted that the High Court Judge did not take into account the contradictions and inconsistencies of the prosecution witnesses. He made reference to the case **of Mohamed Said Matula v. R** (1995) TLR 3. He also submitted that the appellants were arrested on the same day but were not found with any items alleged to have been stolen.

On the appellants' defence of alibi, Mr. Byabusha submitted that the High Court was wrong in rejecting the appellants' defence of alibi taking into consideration the circumstances of the robbery. He stated that the appellants had no burden to prove their alibi. He

brought to the attention of the Court the case of **Godson Hemedi v. R** (1993) TLR 241.

Ms Mrema on her part, did not support the conviction. She submitted that the identification of the appellants was not watertight. PW1 identified the appellant using a kerosene lantern and the strength and intensity of the light was not stated. It was also not established how long the assailant remained in the room. She stated that PW2 and PW3 gave a different account of where the kerosene lantern was placed in their bedroom.

Ms Mrema concluded that the standards set in **Waziri Amani** (supra) were not met. Ms Mrema also questioned the necessity of the identification parade given the fact that all the appellants were identified by PW2.

She also raised her concern on the contradictions and inconsistencies in the evidence of PW1, PW2 and PW3. PW2 who claimed to have known all the three appellants did not mention the

names of the appellants to PW4. It was PW1 who did so. According to her, PW1 was not in a position to do so as he stated in his testimony that he became unconscious after he was attacked by the robbers. PW1 identified only the first appellant.

She submitted that the case against the appellants was not proven beyond reasonable doubt.

Mr. Manyama the first appellant, in reply joined hands with the submission made by Ms Mrema. He also stated that PW2 stated that she went to one Gabriel, her neighbor, to give information about the theft. However, Gabriel was not called as a witness, though his evidence would have been significant.

Both the Courts below considered and evaluated the evidence and accepted the evidence of the prosecution witnesses. It is settled law that very rarely does a higher appellate court interfere with concurrent findings of facts by the courts below unless there are misdirections or non directions on the evidence, a miscarriage of

justice or a violation of some principle of law or practice. See **Amratlal D.M. trading as Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel 1980 TLR 31, Pandya v. R** (1957) EA 336, **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (1981) TLR 149, **Daniel Nguru & Others v. R** (Criminal Appeal No. 178 of 2004 CA (unreported) and **Mussa Mwaikunda v. R.,** Criminal Appeal No. 174 of 2006 CA (unreported).

The complaint by the appellants was the credibility of PW1 and PW2. In order to convict the appellants for armed robbery the prosecution must prove that:

(1) There was an armed robbery.

(2) It was the appellants who committed the Robbery.

In this case there was no dispute at the trial, and indeed in the first appeal for that matter, that the robbery incidents took place at the above mentioned places on the stated date and time. The crucial

question is, whether the prosecution evidence established beyond reasonable doubt that the appellants were the robbers.

The first point for consideration and decision in this case is whether the appellants were sufficiently identified as being the gangsters. The issue of identification is very crucial. The crime which the appellants were convicted of, took place between 00.00 and 00:10 hours. The premises had kerosene lanterns and the intensity of the light produced to enable correct and unmistaken identification was not established. See **Saidi Chally Scania v. R**, Criminal Appeal No. 69 of 2005, CA (unreported).

The prosecution case relied on the evidence of PW1, PW2 and PW3 for identifying the appellants. We need to establish whether the conditions were favourable for adequate and correct identification.

In the case of **Anthony Kigodi v. Republic**, Criminal Appeal No. 94 of 2005 CA (unreported) this Court stated as under:-

> *"We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of East Africa in* ***Abdallah bin Wendo and Another*** *v. Rex (1953) EACA 116 and followed by this Court in the celebrated case of* ***Waziri Amani v. Republic*** *(1980) TLR 250 regarding evidence of visual identification.* ***The principle laid down in these cases is that in a case involving evidence of visual identification, no Court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the*** evidence ***before it is absolutely watertight ...*** *"* (Emphasis added).

See also **Raymond Francis v. Republic** (1994) TLR 100, **Shamir John v. Republic**, Criminal Appeal No. 202 of 2004 CA, (unreported), and **R v. Turnbull** (1976) ALL ER 549.

In **Raymond Francis** (supra) this Court stated as follows:

" ...*It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."*

The law on the evidence of visual identification is settled. This evidence is one of the weakest kind and should only be relied upon when all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely watertight.

In **Jaribu Abdallah v. R,** Criminal Appeal No. 220 of 1994 CA (unreported) the Court stated:-

"*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 conditions for identification might appear ideal but that is no guarantee against untruthful evidence.* ***The ability***

> ***of the witness to name the offender at the earliest possible moment is in our view reassuring, though not a decisive factor."*** (Emphasis added).

In this case the failure by PW1, PW2 and PW3 to mention the appellants to the police at the earliest opportunity was also significant in giving assurance that they were reliable witnesses. **In Marwa Wangiti Mwita and Another v. Republic,** Criminal Appeal No. 6 of 1995 (unreported) this Court stated thus:

> *"The* ***ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability,*** *in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."* (Emphasis supplied).

PW2 did not name the appellants to the police and to Gabriel even though she claimed in her testimony that she identified them all. According to her testimony she reported the incident to Gabriel

Since it is the Notice of Appeal which instituted the present appeal, the appeal is incompetent.

The preliminary objection is thus upheld. The purported appeal is struck out. The appellant is at liberty to file a fresh notice of appeal and reinstitute his appeal, if he so wishes.

Order accordingly.

DATED at MWANZA this 11th day of February, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL