IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 85 OF 2007

KAPTEN MWAIPUNGU ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mwipopo, J.)

Dated the 12th day of December, 1997
In
Criminal Appeal No. 44 of 1997

JUDGMENT OF THE COURT

Date13 & 17 June, 2011

MBAROUK, J.A.:

In the District Court of Kyela at Kyela, the appellant with eight others were jointly charged with the offence of armed robbery contrary to section 285 of the Penal Code, Cap. 16 as amended by Act No. 10 of 1989. Four out of the nine accused were convicted and sentenced to thirty (30) years imprisonment, the appellant inclusive. Aggrieved, the appellant unsuccessfully appealed to the High court (Mwipopo, J.). Undaunted, the appellant has preferred this second appeal.

Briefly stated, the facts giving rise to the case were that, on 19.1.1996 at about 1.30 a.m midnight , while on their way to a bus stand

to get a bus going to Dar es Salaam, one Aswile Statel Mwakyando (PW. 1) who was accompanied by Hezron Dickson (PW6) and Obedi Andindi s/o Mwandemele (PW.2) with their sons who intended to go to Morogoro to attend school. While they were near the house of Kyamba and Musa, PW1, PW2 and PW.6 were ambushed by a group of ten people whom they initially thought that they were police. A gun was shot and they were ordered to sit down and put their bags down which were then taken by those bandits. PW.1, PW.2 and PW.6 claimed to have identified the appellant with other bandits with the help of the moon light and electricity lights. PW.1 said, he had known the appellant for the past six years. PW2 said, he knew the appellant very much as they were together at school. Whereas, PW.6 said, he knew the appellant for a long period as a resident of Kyela and identified him at the scene of crime holding a big knife threatening him. The record has shown that the appellant was arrested on 21-1-1996 while travelling to Tukuyu by Kyela Express Bus.

In his defence, the appellant categorically denied any involvement in the alleged crime. He claimed to have travelled by Kyela Express Bus with his blue bag containing a perfume and a knife and when they reached Ipinda junction, he saw two boys entering the bus with a red bag in which a gun was later found and associated to him.

As shown earlier, both the trial court and the first appellate court were convinced that the case against the appellant was proved beyond reasonable doubt hence convicted and sentenced him accordingly.

In this appeal, the appellant appeared in person unrepresented. He filed an eight points memorandum of appeal which we think boil down to two grounds namely:

(1) Non compliance with section 192 of the Criminal Procedure Act (the Act) as the preliminary hearing was not conducted.

(2) That, the appellant was not properly identified at the scene of crime.

On the point of non – compliance with section 192 of the Act, the appellant had nothing much to elaborate, understandably so being a lay person.

On his part, Mr. Prosper Rwegerera, learned State Attorney for the respondent Republic, submitted that although it is true that the preliminary hearing was not conducted, that alone has not vitiated the proceedings as

no injustice was occasioned. In support of his argument he cited to us the decision of this Court in **MT 69664 PTE Robert Maushi Machibya v. Republic**, Criminal Appeal No. 76 of 2005 and **Kalisti Clemence @ Kanyaga v. Republic,** Criminal Appeal No. 19 of 2003 (both unreported).

Let this point not detain us, as it is now trite law that non-compliance with section 192 of the Criminal Procedure Act only vitiates the preliminary hearing proceedings, not the trial proceedings. For instance see the decisions of this Court in **Mt. 7479 sgt Benjamin Holela v. Republic** [1992] TLR 121, **Joseph Munene and Another v. Republic,** Criminal Appeal No, 109 of 2002, **Kalisti Clemence @ Kanyaga** (supra) (both unreported) to name a few. For that reason, we are of the considered opinion that even if section 192 of the Act was not complied with by not conducting the preliminary hearing proceedings, that the omission does not have the effect of rendering the trial proceedings a nullity.

As on the point that the appellant was not properly identified at the scene of crime, the appellant submitted that the prosecution witnesses at the trial court failed to disclose the intensity of the moon light and that of electricity light. Also, he said, the distance from the house where there was electricity light to where the incident of armed robbery occurred was

not disclosed. He further submitted that if PW1, PW2, and PW6 properly identified him and as they claimed that they knew him very well before the crime was committed, why they failed to name him at the police station. He said the incident happened on 19-1-1996, but he was arrested on 21-1-1996 while he was at his residence all that time. Furthermore, the appellant contended that no identification parade was conducted. He then urged us to find that he was not properly identified at the scene of crime.

Initially, Mr. Rwegerera opted to support the conviction and sentence imposed on the appellant, but, he later changed his mind having noticed the discripencies in the identification evidence. He thus supported the appeal and conceded that the identification evidence is not watertight.

In the instant case, the main issue of concern is whether the evidence was such that it left no doubt as to the correct identification of the appellant. As the record shows, the incident happened at mid-night and PW1, PW2 and PW6 (the victims) testified to the effect that they were able to identify the appellant by the help of moon-light and electricity light. Both, the trial magistrate and the High Court Judge were satisfied that the appellant was properly identified at the scene of crime. However, in this case, the evidence is silent on how bright the illumination and intensity of

the moon light and electricity light was, so as to aid a correct identification of the appellant. Not only that, even the distance from the source of electricity light and where the incident occurred was not stated.

It is common knowledge that, evidence of visual identification is a class of evidence which is vulnerable to mistake particularly in the conditions of darkness. For that reason, as a rule of prudence, courts must exercise caution in relying on such evidence. Various decisions of this Court have underscored that point and reached to a conclusion that courts should not act on such evidence unless all possibilities of mistaken identity are eliminated and that evidence is absolutely watertight. For instance see the decision of this Court in the case of **Waziri Amani v. Republic** [1980] TLR 250.

In this case, there were assertions that there was moon light and electricity light without further clarification. In the case of **Issa s/o Mgara@Shula v. R,** Criminal Appeal NO. 37 of 2005 (unreported), this Court stated that:

> *"It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick*

lamps, lanterns etc; give out light with changing intensities ... ***Hence the overriding need to give in sufficient details of the intensity of the lights and size of the area illuminated"***

(Emphasis added).

It is clear in this case that the trial magistrate and the learned High Court Judge had not addressed themselves on this point. Had they done so, we think they would have come to a different conclusion.

Apart from all that, it is also equally important that even if PW1, PW2 and PW6 testified that they knew the appellant before the incident, but they all failed to specifically mention his name at the police station, and that led to the delay in arresting the appellant. The unexplained delay to name a suspect may justify suspicions on the veracity of a witness. See the decision of this Court in the Case of **Athumani @Buyongera v. R,** Criminal Appeal No. 222 of 1994 (unreported).

In this case, the issue pertaining to the unexplained delay in naming the appellant was not addressed by the two courts below. It is an important issue which if not resolved casts doubt on the veracity of the

witnesses. Had the two courts below addressed themselves on that aspect, we think they would have arrived to a different conclusion.

For the reasons stated herein above, it is doubtful that the appellant was properly identified by PW1, PW2, and PW6. In the circumstances we allow the appeal, quash the conviction and set aside the sentence. In the event, the appellant is to be released from custody forthwith unless otherwise lawfully held.

DATED at **MBEYA** this 15th day of June, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL