IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 131 OF 2010

1. LUZIRO S/O SICHONE
2. KENETH SHUPI OR SOLDER @ SILUNGWE } ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Moshi, J.)

dated the 19th day of June, 1998
in
(DC) Criminal Appeal No. 129 of 1997

JUDGEMENT OF THE COURT

28 June & 5 July, 2011

RUTAKANGWA, J.A.:

The two appellants were convicted by the trial District Court of Mbozi at Vvawa, of the offence of armed robbery. They were sentenced to thirty years imprisonment and twelve strokes of the cane. Believing that they were wrongly convicted, they unsuccessfully appealed to the High Court sitting at Mbeya. This is, therefore, a second appeal against the said conviction and sentences.

Each appellant lodged his own memorandum of appeal. Each memorandum of appeal has a number of grounds of complaint which are almost interrelated. The appellants fended for themselves before us. The

respondent Republic, which was represented by Mr. Tumaini Kweka, learned State Attorney, resisted the appeal of the 1st appellant (Luziro), but supported the appeal by the 2nd appellant (Keneth Silungwe.)

Before canvassing the grounds of appeal and the submissions of both sides in the appeal, we have found it necessary to give, first, a brief account of what led to the prosecution and conviction of the appellants.

According to the prosecution evidence, in the early hours (i.e. at about 03.00 hrs) of 14th January, 1997, a gang of armed bandits, raided the Tunduma market area. They rounded up a number of watchmen who were on guard duties. The watchmen had their arms tied to some electricity poles at the area. Thereafter one shop belonging to Norbat Msigwa (PW 10) was broken into. Various merchandise such as Radio cassettes, cash money Tshs. 15,700,000/= and clothes were stolen therefrom.

The watchmen who were terrorized were Ageni Mwaipopo (PW1), Gaspar Ruhangani (PW3), Alphonce Makongoro (PW4), Bisile Mwankuga (PW6) and Malema Mwakatobe (PW7). While the banditry was going on in the shop, the police were alerted. No. D9916 PC Yasini (PW1) and Cpl. Edes, rushed to the scene of the crime. There was an exchange of gun fire

between the bandits and the police. All of the bandits escaped except one who was allegedly arrested at the scene. This bandit, who was found donning new clothes stolen from the shop, was described by some of the prosecution witnesses to have been the 1st appellant. The arrested bandit and his loot of clothes and radio cassettes (exh. P. B) was sent to Tunduma Police Station.

The arrested bandit allegedly led the police to the homes of the 2nd appellant and one Sinkala. Both were not found at their respective homes. The 2nd appellant's wife, Kissa Mwakyoma (DW4), allegedly told them that her husband was away on safari. The 2nd appellant was arrested at Nakonde in Zambia on 29th January, 1997 by No. E 7484 D/C Gibson (PW5).

At the trial of the appellants, PW3 Luhangani, PW4 Makongoro, and PW6 Mwankiga testified to have positively recognized the 2nd appellant, whom they knew before, among the robbers. They further said that he was the one who was armed with a gun, rounding them up and tying them to the poles. This alleged fact notwithstanding, they all admitted that they never mentioned him to anyone at all. The other two watchmen (PW1

Mwaipopo, and PW7 Mwakatobe) testified not to have seen the 2nd appellant among the robbers at the scene of the crime.

Following the arrest of the two appellants and five others, they were formally arraigned in January, 1997. On 2nd March, 1997, PW9 Assistant Inspector of Police Ephrahim conducted an identification parade. At the said parade PW3 Luhangani, PW4 Makongoro and PW6 Mwankiga purported to pick out the 2nd appellant. However, PW7 Mwakatobe and PW8 Michael Ndunguru, an independent witness at the parade, unequivocally told the trial court that the identifying witnesses failed to pick out any suspect.

While not disputing the armed robbery to have taken place, each appellant denied participating in its commission. Each raised a defence of *alibi.* The 1st appellant claimed that at the time the robbery was taking place he was at Nyamwanga local pombe shop drinking. He was arrested by some militia men while going home on foot, physically assaulted and taken to the police station where he met PW 11 D.C. Yasini. He denied making any confession to anybody. On his part, the 2nd appellant identified himself as a petty businessman dealing in the buying and selling of agricultural produce. He claimed that on the night of the robbery, he was

not at Tunduma but on his way to Dar es Salaam from Nakonde Zambia. To support his *alibi* he tendered in evidence bus fare tickets issued by Nyatico Bus Service.

The trial District court believed the evidence of PW3Luhangani, PW4 Makongoro, PW6 Mwankunga and PW5 P.C. Yasini to the effect that the 1st appellant was arrested at the scene of the crime. This finding of fact sealed his fate and he was accordingly convicted as charged. The learned first appellate judge concurred with this finding of fact and dismissed his appeal with no difficulty. As for the 2nd appellant his conviction was predicated upon the purported visual identification evidence, as supported by the results of the identification parade.

Before dismissing the 2nd appellant's appeal, the learned first appellate judge properly directed himself on the law regarding the defence of *alibi* and the necessity of proceeding with great caution before grounding a conviction on visual identification evidence. All the same, he rejected this appellant's *alibi* for three reasons. One, he had no reason to go back to Zambia to board a bus for Dar es Salaam on 14th January as he had returned from Zambia the previous day. Two, he had returned from Dar es Salaam on 28. 1. 97, "how come that he was arrested the following day (29.1.97) at Nakonde Zambia?", he reasoned. We should pause here

As already shown, this is a second appeal. The case against the two appellants depended exclusively on the credibility of the identifying witnesses. The two courts below believed these witnesses. As a second appellate court, it is not given to us to substitute our own views of the matter unless it can be demonstrated that the concurrent findings of fact of the courts below were predicated on a misapprehension of the evidence, a violation of a principle of law or practice, etc, as Mr. Kweka has gallantly argued in respect of the 2nd appellant. See, for instance, **AMIRATLAL D. MALTASER & ANOTHER v. A. H. JARIWALLA t/a ZANZIBAR HOTEL [1980] TLR 31, ABDALLA MUSA MOLLEL @ BANJOO v. R.,** Criminal Appeal No. 31 of 2008 (unreported) and **ATUFIGWEGE D. MWANGOMOLE v. R.,** Criminal Appeal No. 168 of 2009 (unreported).

On the value of visual identification evidence, the law is equally well settled. First of all, this type of evidence is of the weakest character and most unreliable and should be acted upon cautiously when the court is satisfied that it is absolutely watertight and that all possibilities of mistaken identity are eliminated, even if it is evidence of recognition, as was the case here. See, for instance, **WAZIRI AMANI v.R.,** [1980] T.L.R. 250 and **MENGI PAULO SAMWELI LUHANGA & ANOTHER v. R.,** Criminal Appeal No. 222 of 2006 (unreported). Secondly, 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 ability of the witness to name the offender at the earliest opportunity is a reassuring though not a decisive factor. See, for example, **MWITA W. MWITA v. R.,** (supra), **JARIBU ABDALLA v. R., [2003] T.L.R. 271, AZIZ ATHMAN @ BUYOGERA. V. R.,** Criminal Appeal No. 222 of 1999(unreported), **ISSA BAKARI & OTHERS v. R.,** Criminal Appeal no. 121 of 2008 (unreported), **SAMWEL THOMAS v. R.,** Criminal Appeal No. 123 of 2011 (unreported) etc.

In all these cases, and others, this Court has consistently held that delay or failure in naming a suspect, and more so a known suspect, without a reasonable explanation by a witness or witnesses should never be treated lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted.

In the present case, the so called identifying witnesses, knew the 2nd appellant before. They were victims of a terrifying armed robbery. None of them, luckily, was injured in any way in the course of the robbery. They were fit physically and mentally. Yet, they never named him either to PW11 D.C. Yasini and PW10 Msigwa or at the police station. The only

reasonable conclusion, then, which any reasonable tribunal properly directing itself to the law, would be entitled to reach at is that the witnesses did not see the 2nd appellant among the robbers. Had they done so, they would not have failed to name him immediately. This conclusion is augmented by evidence of PW1 Mwaipopo who never saw the 2nd appellant among the robbers, although he was tied to the pole by the armed bandit. This is the crucial piece of evidence and principle of law which the two courts below never addressed themselves to. Had they done so, in our considered judgment, they would not, in our respectful opinion, have readily held without demur that these three witnesses had recognized the 2nd appellant at the scene of the crime. For these reasons, we are enjoined by law to agree with the contention of the 2nd appellant and Mr. Kweka that the guilt of the 2nd appellant based solely on this doubtful evidence, was not proved beyond reasonable. We accordingly allow his appeal by quashing and setting aside his conviction and the sentences imposed on him. We make an order for his immediate release from prison unless he is otherwise lawfully held.

In determining the appeal by the 1st appellant, we have found it apt to begin with a discussion on his major grievance, as can be gathered from the 2nd, 3rd and 4th grounds of appeal. This is to the effect that the

two courts below erred in law in failing to subject the entire evidence to any objective scrutiny or evaluation before reaching the crucial finding that he was one of the robbers, as he was caught red handed at the scene of the crime. He is contending that had the prosecution evidence been subjected to such scrutiny vis-à-vis his own evidence, the courts below would have found out that the prosecution case was built on patently contradictory evidence and his guilt, therefore, was not proved beyond reasonable doubt. Such evidence, he appears to argue, was not worthy of credence. If that was the case, then that becomes a point of law worth consideration by the Court: see **AMRATLAL DAMODAR MALTASER T/A ZANZIBAR HOTEL** (supra).

Arguing in support of the 1st appellant's conviction, Mr. Kweka urged us to dismiss this particular ground of complaint as the credibility of the prosecution witnesses was assessed on the basis of their demeanour in the trial court. The latter court, he pressed, was the best judge on the issue and its finding should not be disturbed by this Court, especially when it was confirmed by the first appellate court. To this submission, the 1st appellant responded that his conviction was bad as it was based on contradictory evidence.

We accept Mr. Kweka's correct statement of the law that where a witness's credibility is based on his/her demeanour, then the trial court is the best judge. But we think that it is equally settled law that in assessing the credibility of a witness, demeanour is not the only aid. There are other considerations such as coherence of the witness's testimony. Also, impressions as to demeanour must also be tested against the rest of the entire evidence on record: see **SHABANI DAUD v. R.,** Criminal Appeal No. 28 of 2000, **KASEMA SINDANO @ MASHUYI v. R.,** Criminal Appeal No. 214 of 2006 (both unreported). All the same in this particular case, having studied the judgments of the two courts below, we have failed to glean therefrom that the credibility of the relevant prosecution witnesses was predicated upon their demeanour in court. That being the case, we respectfully refrain from acceding to Mr. Kweka's invitation to dismiss outright this ground of complaint.

It is trite law that a trial court must give an objective evaluation to the entire evidence before it and then give a proper consideration to the evidence for the defence by balancing it against that of the prosecution in order to find out which case is more cogent: **D.R. PANDYA v. R.,** [1957] EA 336 and **IDDI SHABANI @ AMASI v. R.,** Criminal Appeal No. 111 of 2006 (unreported).

We have learnt from the record before us that the 1st appellant's only ground of complaint to the High Court against the trial court's decision was premised on the above principle of law. Fortunately, the 1st appellant as well as the 2nd appellant were represented by the same counsel who had advocated for them at their trial. The submission of counsel in support of the 1st appellant's appeal was very brief. He had said:-

> "...First, none of the two appellants were (sic) arrested on the spot. That is what the appellants say. The first appellant said he was apprehended when he was proceeding from a pombe shop. Second appellant was arrested later. He set out the defence of alibi which was strong-it was supported by DW4, his wife ...There were contradictions – PW1 and PW3 said they were tied with rope and untied by PW3 who cut the rope and that they were not covered by a sack. But PW7 said that the rope was cut by PW11..."

That was all he said concerning the 1st appellant and the alleged contradictions.

We have found it necessary to reproduce here counsel's pertinent submission on the issue because before us, the 1st appellant chose to adopt his grounds of appeal and had nothing to say in elaboration therefor.

The same counsel had made a similar submission before the learned trial Senior District Magistrate. In disagreeing with counsel's submission, the learned magistrate, in his apparently reasoned judgment, held:-

> "...As the evidence depicts there is no dispute that the PW10 shop was broken in the night of 14 January, 1997 at 3.00 hrs, and various properties ....stolen. There is no dispute that after the act the accused persons were arrested on allegation that they are the ones who committed the robbery. What is disputed here is whether the accused person are the ones who committed the Act of Armed Robbery at PW10 shop..."

We think that that was a proper direction in law in this case. He went on:-

> "... I propose to start with the 1st accused. The evidence no doubt depicts that the 1st accused was arrested at the scene with various shop items stolen from PW10 shop. The accused in his defence alleged that he was arrested when returning home from Unyamwanga local pombe shop. I find accused allegations not true. How could he be drinking local brew till that dead time of 3.00 hrs. This is impossible. If he was at that local pombe shop drinking then he could have brought evidence to support his allegations as it is not easy for a person to be at a local pombe shop at that time. **Moreover, it was not easy (sic) for the prosecution witnesses who are watchmen at Tunduma market shops to arrest 1st accused without any reason** and if it

was then all people from local pombe shop could have been arrested that night. Therefore as the 1st accused was arrested at the scene with the stolen goods tendered in court as exhibit by complainant PW10, I find the 1st accused denial not true and have failed to rebut the prosecution evidence..." [Emphasis is ours].

From the above extract, it is clear that the trial magistrate did not explicitly address himself to the contradictions pointed out by the defence. However, it appears to us to be obvious from the underlined sentence that he had them in contemplation and found them insignificant as to affect the credibility of witnesses, whom he found to have no good cause to accuse, falsely, the 1st appellant (then 1st accused.) Furthermore, it is our considered opinion that from the above holding it is evident that contrary to the 1st appellant's complaint here, the trial court gave due consideration to his defence but rejected it for reasons stated therein.

In dismissing the 1st appellant's appeal after only summarizing the entire evidence on record and counsel's submissions, the learned first appellate judge held thus:

> "... I would, firstly dispose of the appeal by the first appellant. I would, with respect, agree with both (sic) learned counsel that the first appellant was properly convicted and sentenced. **The facts and evidence against him were rock-solid. He was found and arrested inside the broken shop. He discarded his old clothes and dressed himself in new ones stolen from the shop. His defence was totally unconvincing and an outright lie.** That defence was rightly rejected by the trial court. The sentence handed down was the very minimum prescribed by law. His appeal must, therefore be dismissed in its entirety." [Emphasis is ours.]

We must confess that we have found the above approach to be totally unsatisfactory in the determination of a first appeal. The first appellate judge reached the conclusion that the evidence against the 1st appellant was "rock – solid" before subjecting it to any analysis or scrutiny. As a result, he did not advert his mind to the contradictions pointed out by the defence in its submission. He did not consider, for example, that the so called new clothes the appellant was said to have put on and his "discarded... old clothes" were not part of the evidence. This, in our considered opinion, was an error of law. We are saying so without any reservations. This is mainly because a first appeal is always in the form of a rehearing and/or re-adjudication. The parties are entitled on questions of facts as well as on questions of law to demand the decision of the first appellate court. That court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions although it has neither seen nor heard the witnesses and should, therefore, make allowance in this respect: **D.R. PANDYA v. R.** (supra), **SHANTILAL M. RUWALA v. R.** [1957]EA 570 and **IDDI SHABANI @AMASI v. R.,** Criminal Appeal No. 111 of 2006 (unreported). All the same this does not necessarily mean that the High Court's decision was not right. It is our duty, then, to do what the High Court failed to do.

It was stated nearly 150 years ago in the case of In re **GOOMANEE,** 17 W.R. Cr. 59 (1872) that an appellate court is bound precisely in the same way as the court of first instance to test the evidence extrinsically as well as intrinsically. Proceeding form this principle, the court further held thus:-

> "The sound rule to apply in trying a criminal appeal where questions of facts are in issue is to consider whether the conviction is right and in this respect a criminal appeal differs from a civil one. In the latter case the court must be convinced that the finding is wrong..."

On the basis of the above salutary rule we have asked ourselves this simple but germane question: Inspite of the failure by the learned first appellate judge to re-adjudicate and consider the undisputed discrepancies in the evidence of some of the prosecution witnesses, can it be safely held that the conviction of the 1st appellant was right? In providing an acceptable answer to this question, we shall remain alive to the fact that not every discrepancy or inconsistency in the witness's evidence is fatal to

the case. Minor discrepancies on details or due to lapses of memory on account of passage of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count. Was the evidence of the key prosecution witnesses on the issue, a mass of contradictions? Was it, in whole, a monumental hotch–potch of lies or fabrication, such that if the learned first appellate judge had addressed his mind to them, and made his own findings, he would of necessity have reversed the conviction? Our own evaluation of the entire evidence has led us to a negative answer. Why are we saying so?

The crucial issue all along has been where and why was the 1st appellant, in view of the fact that he has never disputed being away from his home at around 03.00 hrs on 14th January, 1997. Five watchmen who were on duty on the night of 13th/14th January 1997 testified positively on the occurrence of the armed robbery. These were PW1 Mwaipopo, PW3 Luhangani, PW4 Makongoro, PW6 Mwankuga and PW7 Mwakatobe. They were never contradicted on this. All of these witnesses, except PW7 Mwakatobe, were categorical in their evidence that the 1st appellant who was not one of them, that is a watchman, was among the robbers who had broken into the shop of PW10 Msigwa and stolen cash money and

merchandise therefrom. This was because he was arrested by them with the assistance of PW11 P.C. Yasin at the scene of the crime. This latter witness was equally emphatic that after his arrival at the scene of the crime, there was an exchange of gun fire between them and the bandits. As a result, all of the bandits took to flight abandoning their loot (exhibit P. B), but one of them was left behind and was arrested at the scene of the crime and taken to the police post. He testified further that the arrested bandit was no other but the 1st appellant. The arrest of the 1st appellant at the scene of the crime was also confirmed by PW10 Msigwa who arrived there shortly later and found him under arrest together with exh. PB.

In his very brief evidence the 1st appellant claimed that he was arrested by some "sungusungu" people, for no apparent reason, while on his way home from a drinking spree and sent to the police post. The trial court rejected his defence for the reasons already shown in this judgment.

We have given a serious thought to the defence of the 1st appellant when weighed against the evidence of the prosecution witnesses. We, too, are convinced, as were the two courts below, that his defence was a mere after-thought. Here are our brief reasons.

As already shown in this judgment, the 1st appellant was represented by counsel at his trial. There is no complaint before us that he was not effectively represented. If then, the 1st appellant knew very well that he was not arrested at the scene of the crime as a robber but was arrested in the vicinity as he was innocently passing by, ordinarily he would have told his counsel about this, at the earliest opportunity. This would have enabled counsel to cross–examine his accusers on this and in the process, probably discredit them. That he did not do so is indicative of the fact that he had tried to become wise after the event.

We are aware that in a criminal case an accused person must be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence or lack of it. But each case must always be judged on the basis of its peculiar facts. The 1st appellant was facing a very serious charge and he was aware of this. If really he thought he had witnesses who were with him at the pombe shop, he would not have failed to tell so his counsel or the trial court who/which would have arranged to have, at least one of them, summoned to bear him out. Even an attempt to name them at least, would have sufficed. That he did not do so, reinforces our view that his defence was only a figment of his own

imagination. For these reasons, we are settled in our minds that his defence was rightly rejected.

Coming to the discrepancies pointed out by his counsel in the two courts below, after thorough review of the entire evidence, we are satisfied that these were minor discrepancies on details regarding the specific spot where the 1st appellant was found. Having regard to the fact that each witness or most of them arrived at the shop at different times, it could not be expected that each one of them would have found him at the very spot where the first witness (es) found him. The fact that some witnesses testified to have found or seen the 1st appellant inside the shop and others to have found him outside the shop, did not detract from the major fact that he was arrested at the scene of the crime with stolen shop goods which were accepted in evidence without objection from his advocate. Nor did it prove that they were lying. He failed to give any account for his presence there immediately after an armed robbery had taken place. Instead, he resorted to lying to the trial court in his bid to save his neck. Equally insignificant, is the alleged discrepancy on who actually untied some of these witnesses. We have found this claim was based on a faulty premise. This is because PW7 Mwakatobe never testified that PW1 and

PW3 were freed by PW11 P.C. Yasini. He only said that the police freed him. He further said that he never went to the shop. That's why, he was unable to see the bandit who was in the shop.

For the foregoing reasons, we have found ourselves constrained to hold that the alleged discrepancies were minor and inconsequential. Even if the learned first appellate judge had considered them, he would not have reversed the 1st appellant's conviction, as on the truthful evidence on record, he was caught red-handed at the scene of the crime. We are, therefore, satisfied that the conviction of the 1st appellant was right and justified.

All said, we dismiss this appeal in its entirety.

DATED at **MBEYA** 5th day of July, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
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