IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CORAM: (OTHMAN, C.J., RUTAKANGWA,J.A., And LUANDA,J.A.)

CRIMINAL APPEAL NO. 2 OF 2009

GALOUS FAUSTINE STANSTLAUS ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Rugazia, J.)

Dated 14th November, 2008

in

DC. Criminal Appeal No. 58 of 2008

JUDGMENT OF THE COURT

7TH & 15TH November, 2011

RUTAKANGWA,J.A,:

In this second appeal, the appellant appeared before us in person fending for himself. He was complaining that he was wrongly convicted by the District Court of Rombo District (the trial court) of the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code, and unjustifiably sentenced to a term of imprisonment of thirty years and ten strokes of the cane. Since the High Court sitting at Moshi, on a first appeal,

erred in law in dismissing his appeal against the conviction, he claimed, he had to prefer this appeal to establish his innocence.

The respondent Republic in this appeal took a different position. Through Mr. Zakaria Elisaria, learned State Attorney, it argued that the conviction was justified and the sentences imposed were appropriate.

Before canvassing the most pertinent arguments advanced in support of the contrasting positions taken, we have found it apposite to give a brief account of what led to the conviction of the appellant. It was as follows:-

The victim of the undisputed armed robbery was one Amandi Ngareya. He testified as PW4 at the trial of the appellant and three others who were jointly tried with him. PW4 Amandi, as of 17th June, 2001, resided with his family at Katangara Mashati village where he runs a retail shop. One of the family members who was staying with him was Deoskeri Amandi, (PW5), his son.

On 17th June, 2001, at around 8:30 p.m., many bandits invaded the home of PW4 Amandi. They were armed with a club, machete and a pistol. As PW4 Amandi and his wife made frantic efforts to resist the invaders, he was seriously injured by the bandits who were demanding to be given money. Being helpless, he succumbed and gave them Tshs 300,000/=. Not

satisfied with the money, the bandits also stole a video deck, a radio and one panga, and left.

After the departure of the bandits, an alarm was raised. The neighbours who responded rushed the injured PW4 Amandi to Mashati dispensary and he was subsequently referred to the K.C.M.C. hospital. Furthermore, a report of the robbery was made at Rombo Mkuu Police station.

PW1 No. C7459 Det.Sgt. Ramadhani visited the scene of the robbery on the morning of 18th June, 2001. When he interrogated PW4 Amandi's wife, she told him that she did not identify any of the bandits. However, PW5 Deoskeri told him that he had recognized the appellant, Severin Massawe, Novatus Serengia and Benedict Mroso. These named suspects were arrested separately on divers dates, but after one and a half months had elapsed. The appellant, for instance, was arrested on 20/08/2001. All of the suspects never owned up to the robbery and were never found in possession of any of the robbed properties.

At the trial of the appellant and his co-accused, only PW4 Amandi and PW5 Deoskeri, gave incriminating evidence against them. This was visual identification evidence. Both claimed to have identified the appellant

among the robbers, being aided by light from electric bulbs which were on at the scene of the crime.

The appellant categorically denied being a party to the commission of the armed robbery. He told the trial court that his home village is Mrere Mashati, but he was arrested at Sango Moshi, where he had been living since 1999 doing petty business, on 20/8/2001. The policemen who arrested him, told him that they were looking for a motor cycle which had been stolen at Moshi. He was, nevertheless, eventually joined with his co-accused, who were strangers to him, to answer the charge of armed robbery at the home of PW4 Amandi.

The trial court believed the visual identification evidence of PW4 Amandi and PW5 Deoskeri. It did so because the four accused persons being neighbours in the same village could not have been mistakenly recognized by the two witnesses, as there was electric light at the scene of the crime. These two facts greatly worked on the mind of the learned first appellate judge in dismissing the appellant's appeal.

Without making any reference to the specific evidence touching the appellant before him and his defence evidence, the learned judge relied on the holding of his colleague judge, while deciding an earlier appeal

which had been lodged by the appellant's co- accused, Severin Massawe and Another (i.e Criminal Appeal No. 102 of 2007). In determining that appeal, that learned judge had held thus:

> *"On the issue of identification there is evidence on record to the effect that the appellants were not strangers to PW4. They are long time acquaintances. They live in the neighborhood. They are neighbours and know each other ... according to PW4 and PW5 there was sufficient light at the scene of the crime ... The electric light that were on offered favourable conditions for proper identification of the appellants ..."*

On the strength of this extract from a judgement of a different judge dealing with a different appeal, the learned first appellant judge, without much ado, said:-

> *"In conclusion this court was satisfied beyond doubt that the appellants, were properly identified.* ***I also join hands with***

my brother Judge and find as such."

(Emphasis is ours).

The appellant's appeal was thus dismissed, paving a way for this second appeal.

The appellant's memorandum of appeal lists five substantive grounds of complaint against the judgement of the High Court. These are:- **One,** the High Court erred in law in not quashing his conviction because the case in the trial court was prosecuted by a person below the rank of inspector of police. **Two**, it was wrongly found that he was unmistakenly identified at the scene of the crime. **Three,** the two identifying witnesses were wrongly taken to be creditable witnesses as none of their neighbours testified to support their allegations. **Four,** the PF3 (Exh.P6) was wrongly acted on because the appellant was not informed of this rights under s. 240 (3) of the Criminal Procedure Act, Cap 20 (the Act) to have its author summoned for the purposes of cross – examination. **Five,** as he was not found in possession of any stolen property, he was wrongly convicted.

In protesting his innocence before us, the appellant relied on these grounds. He had nothing to say in elaboration. He only significantly added

that if the two identifying witnesses knew him before and recognised him among the robbers, his home would also have been searched.

On his part, Mr. Zakaria, argued that the conviction of the appellant is unimpeachable because he was recognized among the robbers. Although he conceded that the evidence on record does not show the intensity of the light and the duration of the encounter, he insisted that the appellant was well identified as he hailed from the same village as the identifying witnesses. He accordingly urged us to dismiss the appeal in its entirety.

After studying the entire evidence on record and the judgments of the two courts below, we have found the second ground of complaint very crucial in the determination of this appeal. Admittedly, the case against the appellant rested entirely on the purported visual identification evidence of PW4 Amandi, and PW5 Deoskeri.

The law on visual identification, be it of a stranger or of a known person (i.e recognition) is now well settled. It is trite law that such evidence is of the weakest type and courts should not act on it unless all possibilities of mistaken identity are eliminated. Furthermore, the courts must be fully satisfied that the evidence clearly shows the conditions favouring a correct identification and is accordingly watertight: see, for

instance, **WAZIRI AMANI V.R.** (1980) T.L.R 250, **RAYMOND FRANCIS V.R.** (1991) T.L.R 100, **SAID CHALLY SCANIA V.R.** Criminal Appeal No. 69 of 2005 (unreported), **ISSA S/O MGARA @ SHUKA V.R.** Criminal, Appeal No. 37 of 2005 (unreported) **ABAS S/O MATATALA V.R.,** Criminal Appeal No. 33, of 2008 (unreported), etc.

In the case of **SAID C. SCANIA** (*supra*), the Court emphasized that where a witness is testifying about another in unfavourable circumstances, clear evidence mentioning all aids to unmistaken identification, like the source of the light and its intensity must be given. Unfavourable circumstances include night time, a sudden invasion by a mob, use of dangerous weapons such as firearms, which produce a "weapon-focus effect" in the mind of the witness, etc.

In **ISSA MGARA'S** case (*supra*) the Court thus emphasized:-

> *"... even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone*

whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."

Courts, therefore, should be wary of not only honest but mistaken identifying witnesses, but also of outright dishonest witnesses **(NYAKANGO OLALA JAMES V. R**, Criminal Appeal No. 32 of 2010 (unreported)). "Even in most favourable conditions, there is no guarantee against untruthful evidence," this Court held in **JAMES KISABO @ MIRANGO V.R.,** Criminal Appeal No. 261 of 2006 (unreported). In matters of identification in criminal cases, this Court held in **JARIBU ABDALLA V.R.,** Criminal Appeal No. 220 of 1994 (unreported), that

"... it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence".

The above firmly established legal principles, therefore, will guide us in our determination of the second ground of appeal. Applying, then, these

principles to the facts of this case, this germane question immediately arises: Was the visual identification evidence against the appellant watertight?

The trial court answered the above posed question affirmatively. This was because, as found on page 48, line 9 of the record appeal, all accused persons testified that they knew the complainant as they lived in the same village and further that there was electric light at the scene of the crime. We respectfully hold that the learned trial magistrate misapprehended the evidence. Our own study of the evidence has led us to the conclusion that none of the accused persons so testified. Secondly, it was only the 3rd accused (Novatus) and the 4th accused (Benedict) who resided in the same village as PW4 Amandi and PW5 Deoskeri and not the appellant and Severin. But, to us that was no guarantee for an impeccable identification of the two among the many robbers. Had it been so, the wife of PW4 Amandi who saw the bandits, would have recognized them. She did not, as already shown.

Concerning the light at the scene there is no dispute that neither PW4 Amandi nor PW5 Deoskeri testified on the intensity of the light from the said electric bulb(s). As this Court has consistently held this was fatal to

the prosecution case. See, for example, **MAGORI MAIRO & THREE OTHERS V. R**. Criminal Appeal No. 328 of 2007, **S. SCANIA V. R.** (*supra*) and **ISSA MGARA V.R**. (*supra*), etc.

The learned first appellate judge, as we have already shown, with due respect, did not address himself to the above enumerated principles. Being a first appeal, which is in a form of a re-hearing, he had a duty to consider and re-evaluate the entire evidence including that of the appellant and arrive at his own conclusions of fact. He did not do so. He only relied on the findings of another judge in another appeal, as already shown. We respectfully hold that this was an error of law. If PW4 Amandi and PW5 Deoskeri were "long time acquaintances" and "neighbours" of the appellants in that Criminal Appeal No. 102 of 2007 (supra), we have found no cogent evidence on record showing that the appellant herein was such an "acquaintance" and/or "neighbour".

While under examination in chief, PW4 Amandi simply asserted that he knew "all 4 accurred persons". He never elaborated. Answering the appellant's question on cross-examination, this witness said that he had

known him before the incident as he had been seen at Mrere market. He never mentioned when was that and who had seen him. But this answer also clearly shows that the appellant was neither a resident of Katangara village nor an "acquaintance" of PW4 Amandi and PW5 Deoskeri. Had it been so PW4 Amandi would have unequivocally said so.

On his part, PW4 Deoskeri while being examined in chief, boldily asserted that he knew all the four accused persons as they were neighbours . But while being cross-examined by the appellant he belied himself saying:

"Your home is near our village".

It goes without saying then, that the appellant was not a resident of Katangara. This piece of discrediting evidence, unfortunately, was not considered at all by the learned trial magistrate and the learned first appellant judge. The litany of lies and unanswered nagging questions may be expanded.

PW4 Amandi testified that he had seen and identified Severin (1st accused) holding a pistol and the appellant was carrying "a new panga". On this he was fundamentally belied by PW5 Deoskeri. PW5 Deoskeri

testified that it was Severin who was having a panga and a pistol and the appellant was not armed at all. Faced with these irreconcilable contradictions, in our considered opinion, it cannot be seriously argued that the two witnesses identified the appellant, who, as it is now obvious, was a stranger to them. This goes to vindicate the earlier referred to legal principle to the effect that even the most favourable identification conditions have never been a guarantee against untruthful evidence.

Furthermore, the credibility of PW4 and PW5 was greatly undermined by the undisputed and unexplained delay in arresting the appellant and the fact that his homes were never searched at all. Had he been identified among the robbers and he was known to the two witnesses as alleged, he too, would have been searched at his home, as he correctly argued before us.

In the light of the above, we are settled in our minds that had the learned first appellate judge, and indeed the trial magistrate, directed himself on the law governing the value of visual identification evidence and the patently discrediting contradictions in the evidence of PW4 and PW5, he would not have found that the identification evidence was watertight and that the appellant's guilt was proved beyond reasonable doubt. We

are, therefore, constrained to allow this appeal in its entirety. The conviction is hereby quashed and set aside as well as all the sentences imposed on him. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

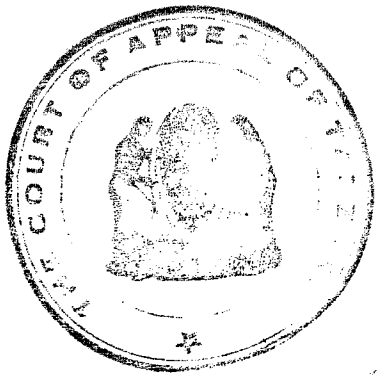
DATED at **ARUSHA** this 12th day of November, 2011

M. C. OTHMAN
CHIEF JUSTICE

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

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



Z. A. Maruma
DEPUTY REGISTRAR