IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO. 306 OF 2010

1. IMAMU SELEMANI MSOVU
2. KASSIM ATHUMANI } ..... **APPELLANTS**

VERSUS

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

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

(Teemba, J.)

dated the 9th day of July, 2010
in
Criminal Appeal No. 12 of 2009

JUDGMENT OF THE COURT

29 March & 8 April 2011

MANDIA, J.A.:

The appellants were convicted of Armed Robbery c/ss 285 and 286 of the Penal Code as amended by Act Nos. 10 of 1989 and 6 of 1994. They were each sentenced to imprisonment for thirty years in addition to each paying Shs. 970,000/= as compensation to the complainant. Their joint appeal to the High Court of Tanzania at Tanga was dismissed in its entirety, hence this second appeal. At the

hearing of this appeal, the appellants appeared in person while the respondent/Republic was represented by Mr. Faraja Nchimbi, learned State Attorney. The memorandum of appeal filed by the appellants is a long-winded self-help job which is almost incoherent. Out of it we could isolate the ground of complaint to be visual identification – that the appellants were not positively identified at the scene of crime.

The evidence adduced during the trial tended to show that on 23/9/2007 at about 7 p.m. PW1 Bakari s/o Kilangilo was inside his shop at Mkwajuni Sekioga area. The shop premises are in the same house in which PW1 lives with his wife PW2 Zawadi d/o Nurdin. While PW1 Bakari Kilangilo attended customers at the shop, the wife PW2 Zawadi Nurdin attended to domestic duties. Between 7 p.m. and 7.30 p.m. two persons visited PW1 Bakari Kilangilo and proposed to him a business deal involving the sale of two bags of beans. PW1 told the duo it was night and they should come the next morning. We are not told how long the discussion for the maize deal took. The record only says the two left after being told to come the following morning. We are not told how long the duo stayed out of scene, but

PW1 Bakari Kilangilo testified that the two went back to his shop suddenly and one of them, we are not told who, asked for sweets (pipi) and another came with a bag inside which were pangas. PW1 went on to say that there was a third person, we are not told who this was, who carried a gun and forced PW1 to put his hands up. PW1 went on to say he decided to go outside his shop and one person cut him with a panga on his face and left eye and he cried out for help. PW1 testified that it was the first appellant who cut him with a panga. He described the first appellant as short, wearing black clothes with no hat to cover his head. According to PW1 the second appellant stood at the window while the first appellant cut him (PW1) with a panga. He went on to say that his identification of the first and second appellants was aided by two hurricane lamps, one of which he placed inside the shop premises and the second one outside the shop at the window. On 9/10/2007 PW1 attended an identification parade at Korogwe Police Station and picked the appellants as his assailants on 23/9/2007. As for PW2 Zawadi Nurdin she identified the first appellant as the person carrying a panga and one who beat her.

On 9/10/2007 at 6 p.m. PW3 Inspector Yahaya Mkomandala, the officer in charge of Mombo Police Station conducted an identification parade at Korogwe Police Station. With regard to the conduct of the parade PW3 is on record as saying this:-

> *"I was started to take Bakari s/o Kilangilo and examined him that you should pass through this line to identify the accused who was committed the offence against him, and you should touch him on the shoulder among the identification parade. He passed the parade and he identified Imamu s/o Selemani and this 1st accused person was identified by Zawadi d/o Nurdin."*

The appellants did not object when the identification parade register was put in evidence as Exhibit P3, but in his defence the first appellant querried the conduct of the identification parade when he said, at p. 34 of the record:-

> *"At the time the identification parade was operated there three people sat on bench and I was joined to the other 8 people on the parade. While that people sat on the bench are the people who responsible to understand and identify us. That people came to me and they identified me by the way touching me. The identification parade was operated unlawfully or illegal."*

The record at p. 34 refers to events on the day the parade was conducted. There is however evidence, at p. 33, which shows that the parade was conducted twice, first time on 8/10/2007 when the witnesses failed to pick any of the suspected assailants, and on 9/10/2007 when the first appellant was picked. The record goes thus:-

> *"On 8/10/2007 at about 17.00 hours, the identification parade was operated at the police compound. That day the people did not identified me and returned at lockup. On 9/10/2007 the identification parade was operated, on the parade two people were identified me."*

The events of 8/10/2007 and 9/10/2007, when put together, tend to show that on 8/10/2007 witnesses failed to pick any suspect. The parade was repeated the following day and, according to the record at p. 34, the identifying witnesses and suspects were made to sit on the same bench before the identification exercise began. This is what made the first appellant remark, at page 34 of the record, that "the identification parade was operated unlawfully or illegal."

The trial court correctly cited the law with regard to identification of suspects, in particular Police General Order 232, the authorities of **R v MWANGO MANAA** (1936) 3 E.A.C.A. 29, **S. MUSOKE v R** (1958) EA 715 and formed the opinion that the conduct of the parade was legal. The legality of the identification parade was raised as an appeal to the High Court. In dealing with this issue, the first appellate judge had this to say at p. 108 of the record:-

> *"First and foremost, I must state at this juncture that, the appellants allegations that the witnesses were outside and saw them when they were removed from the lock up is*

an afterthought. It is so because they never challenged PW3 on this point when he was testifying in court."

The above quotes show that the two lower courts agree on one fact only, and this is the fact that an identification parade was conducted in which the appellants were picked by witnesses as participants in a robbery which was allegedly committed as shown in the charge sheet. The two lower courts however did not go further to rule on the legality of the process leading to the picking of the appellants, that is, the legality of the identification parade. We say so because the trial court quoted, in our view correctly, the provision in the Police General Orders which provided thus:-

"Arrangements will be made to ensure that witnesses have no opportunity to see, or be seen by any of the persons to be paraded."

We have quoted above the evidence of PW3 Inspector Yahaya Mkomandala on how he conducted the parade. His evidence shows that his main concern was the instructions of the witnesses to go and

pick the suspected robbers. He did not give any evidence showing that he made arrangements that the witnesses and the suspected robbers do not see each other before the exercise as emphasized in Police General Order 232. Despite this obvious gap in the evidence of PW3 Inspector Yahaya Mkomandala, both the trial court and the first appellate court adjudged the parade to be fair. The first appellate court went further. The appellants contested the parade in the trial court proceedings and in the appeal by showing that they were made to sit on the same bench with the witnesses **before** the parade. The remark of the appellate High Court in this aspect shows that the appellate court dismissed this fear of injustice as imaginary. This concurrent finding of fact came by because the defence of the appellants was not considered. It is trite law that to arrive at a correct and balanced opinion a court must consider both the prosecution and defence cases and then make a finding on each contested issue of fact, and then on the case as a whole. Failure to consider the case as a whole is a misdirection which can lead to the upsetting of a verdict – see **Hussein Idd and Another vR** (1986) TLR 166. Where there is such misdirection, an appellate court is

entitled to take the position of the trial court and assess the evidence so as to arrive at a proper finding – see **The Director of Public Prosecutions vs Jafari Mfaume Kawawa** (1981) TLR 149. We are also fortified in our view by the case of **SSENTALE v UGANDA** (1968) EA 365 which laid down the rules for the conduct of identification parade. We are particularly concerned with the apparent breach of rule 3 which states:-

> *"3. That the witnesses do not see the accused before the parade."*

In the present case a specific allegation was made by the defence that the witnesses were mixed with the suspects on a bench before the parade but the two courts below brushed aside this allegation. This was a serious lapse in view of the allegation that a first parade was held on 8/10/2007 where the witnesses failed to pick any suspect, and that it was after the mixing of witnesses and suspects on 9/10/2007 that the witnesses finally picked the appellants. Our concern is also raised by the Identification Parade Register Exhibit P3 which gives the names of two police officers E

7625 D/Sgt Melkiad who is shown as in charge of witnesses before the parade and F 4931 D/C Donald who is shown as having been in charge of witnesses after the parade. In view of the fact that the evidence of PW3 Inspector Yahaya Mkomandala did not show that the identifying witnesses were handled properly as required in the Police General Orders, and in view of the defence allegation that the parade was conducted contrary to the Police General Orders, evidence of these two witnesses was crucial to clear the doubt raised. There was no such evidence so the evidence on the identification parade is of little probative value.

The evidence on the conduct of the identification parade ties up with the visual identification at the scene of the crime. When testifying in court PW1 Bakari Kilangilo was subjected to cross-examination by the third accused in the trial court, now the second appellant. This is what he said at p. 15 of the record:-

> *"I know you through the light of the lamp at the scene of crime and another day at the identification parade."*

Mr. Nchimbi, learned State Attorney who argued in support of the conviction and sentence, moved this court to accept the argument that the circumstances at the scene augured for positive identification of the appellants. He fronted the argument that because the evidence of PW1 Bakari Kilangilo shows that there were two hurricane lamps – one inside the shop and one on the wall – there must have been enough light to conduct shop business of accepting money and paying out change, which means there was enough light for the purposes of visual identification. Learned State Attorney also advanced the argument that the testimony of PW1 Bakari Kilangilo shows that the alleged robbers visited his shop twice – the first time in which they pretended they had two bags of beans to sell to PW1, and the second time when one of the appellants pretended to buy sweets (pipi) and then suddenly turned round to robbery. He also mentioned the visual identification of PW2 Zawadi Nurdin who is the wife of PW1 Bakari Kilangilo. Mr. Nchimbi, learned State Attorney, urged this court to accept that the guidelines set by **WAZIRI AMANI v R** (1980) TLR 250 have been met in the particular circumstances of this case.

We agree that the guidelines set out in the **WAZIRI AMANI** case (supra) are not exhaustive, and that each case must be decided on its own particular merits. This observation notwithstanding, we are of the view that the guidelines set out in **WAZIRI AMANI** (supra) have a useful and crucial purpose that is, guarding against the possibility of a court entering a conviction on the basis of evidence based on mistaken identity. The particular circumstances of this case show that evidence on identification is wanting and the identification parade was not carried out in accordance with the provisions of the law. It will therefore be unsafe to uphold the convictions based on doubtful evidence. As the law stands, where there is doubt it is resolved in favour of the appellants. We therefore allow the appeal, quash the convictions and set aside the sentences. The appellants should be released from custody forthwith unless they are held on some other lawful cause.

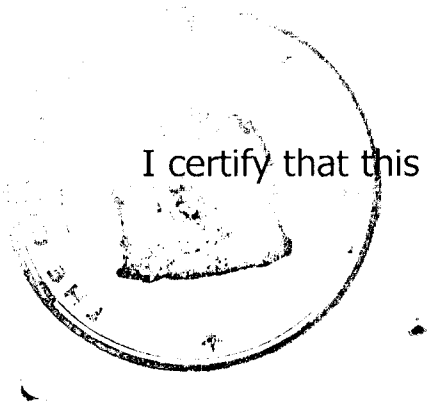
DATED at TANGA this 7 day of April, 2011.

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