IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 302 OF 2008

MWIGULU DOTTO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kaduri, J.)

dated the 1st day of September, 2008
in
Criminal Appeal No. 76 of 2007

JUDGMENT OF THE COURT

29 & 31 October, 2012

ORIYO, J.A.:

The appellant, Mwigulu s/o Dotto, was prosecuted in the District Court of Meatu District, at Meatu, with the offence of armed robbery, contrary to sections 285 and 286 of the Penal Code, Cap 16, R.E. 2002. He was convicted as charged and sentenced to thirty (30) years imprisonment and twelve (12) strokes of the cane. Aggrieved by the conviction and sentence the appellant appealed to the High Court at Tabora where the appeal was dismissed in its entirety. Still aggrieved, he has come to this

Court in a second appeal with six (6) grounds of appeal, which can conveniently be condensed into a single ground of appeal that:

> ***The Prosecution failed to prove the case against the appellant beyond reasonable doubt.***

The trial court convicted the appellant after it was satisfied that the evidence of PW1 and PW2 proved the guilt of the appellant beyond reasonable doubt.

The case for the prosecution was that Daudi Kongwa, (PW1) and Alex J. Kanyata, (PW2), were both residents of Mwambegwa Village, Meatu District. At the material time PW1 was a committee member of Mwambegwa Primary Cooperative Society while PW2 was the village secretary.

On 29th June 1998, at about 1:30 pm, when both PW1, PW2 were in the process of buying cotton from farmers on behalf of Mwambuzi Ginnery, they were invaded by three bandits being led by the appellant who wielded a gun and fired three shots in the air demanding to be given money. As a

result, a fracas ensued and those present, including PW1 and PW2 fled and the appellant was able to steal shs. 93,420/= cash left in a cash box at the society. One of the farmers, Muyanga Salum, who was not called to testify, later informed PW1 and PW2 that he knew the appellant well as a former school mate and a resident of Paji Village, from where the appellant was actually found and arrested.

In his defence, the appellant denied the commission of the offence. However he conceded to be a resident of Paji Village, where he was reconstructing his house at the time of arrest. He challenged the identification at the scene by PW1 and PW2 allegedly because after arrest he was taken to the Mwambwegwa Primary Cooperative Society first for the villagers to see him before he was taken to the police station. He asserted that the route was intended to enable the prosecution witnesses easily identify him in court.

When the appeal came up for hearing, the appellant appeared in person; he did not have the services of an advocate. Ms. Pendo Ephraim Makondo, learned Senior State Attorney, appeared for the respondent

Republic. The learned Senior State Attorney did not oppose the appeal and her main thrust was on the evidence of visual identification of the appellant at the scene of incident. She went through the evidence of PW1 and PW2 on whose evidence the trial court relied upon to convict the appellant. She pointed out a number of deficiencies, defects and contradictions in the prosecution evidence. For example, she pointed out that PW1 testified to have identified the appellant by face and that he was the bandit carrying a gun. In the same breath, PW1 also testified that he did not know the appellant by face because he had covered his whole body. He also denied to have seen the gun carried by the appellant and he only got his name from one Muyanga Salum. The learned Senior State Attorney pointed out similar problems with the testimony of PW2. Instances of such problems included PW2's evidence that he knew the appellant well but proceeded to state that he was mentioned by Muyanga Salum and that he was able to identify him at the identification parade.

The learned Senior State Attorney challenged the evidence of visual identification particularly for the reason that Salum Muyanga who allegedly gave the appellant's name to both PW1 and PW2 did not testify at the trial.

We agree with the learned Senior State Attorney that the central issue in this appeal is whether the appellant was sufficiently identified at the scene of crime. In the present case, there is no doubt that the crime took place in broad daylight and among those present at the scene of crime at the material time, it is only PW1 and PW2 who testified. But as rightly pointed out by the learned Senior State Attorney, there are certain aspects of the evidence of PW1 and PW2 which are not plausible. For instance, PW1 alleged that when the appellant and the other two bandits invaded the place and demanded money, they blocked the entrance and nobody could go out. The same PW1 further alleged that they had to run out desperately when the said bandits fired the gun in the air. PW1 does not state how they fled from the place if bandits had blocked the entrance. PW1 stated that he knew all the three bandits by face including the appellant who held a shotgun. On cross examination by the appellant and the prosecutor, PW1 contradicted himself. He denied to have known the appellant before and did not see the gun as the appellant appeared at the scene with his whole body covered.

PW2 alleged to have seen the gun carried by the appellant but did not know its type. If we take the testimony of PW1 to be true, how could PW2 see the gun carried by the appellant who had covered his entire body? Muyanga Salum, allegedly gave PW1 and PW2 the appellant's name as a former schoolmate but the said Muyanga Salum was not at the scene of crime. We wonder how the lower courts could believe this piece of hearsay evidence of visual identification of the appellant without any further proof. The record is silent on why Muyanga Salum was not called to testify. Was there such an informer in actual existence? We do not know. In the midst of all these irregularities in the prosecution evidence of visual identification without an iota of prior description of the appellant or his attire at the scene, we feel doubtful on the credibility of the evidence of visual identification of the appellant.

It is trite law that courts should closely examine the evidence of visual identification by a witness, as it was stated in the landmark decision of **Waziri Amani vs Republic** [1980] TLR 250: -

> *"... in a case involving evidence of visual identification, no court should act on such*

evidence unless all possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight..."

See also a few, similar decisions of this Court in **Raymond Francis vs Republic**, [1994] TLR 100, **Juma Senge vs R**, Criminal Appeal No. 164 of 2008 , **Obadia Msese vs R**, Criminal Appeal No. 243 of 2008, **Shamir John v R**, Criminal Appeal No. 166 of 2004 (all unreported).

We have closely examined the evidence of PW1 and PW2 and we have also taken account of the submissions made by the learned Senior State Attorney and we are of the strong view that the appellant was convicted on insufficient evidence of visual identification.

Accordingly, we allow the appeal. The conviction is quashed and the sentence set aside. We order that the appellant be released from prison forthwith unless held for some other lawful cause.

There was also an order that the appellant was to pay shs. 93,420/= to Mwambegwa Primary Cooperative Society. The said order of compensation is also vacated.

DATED at TABORA this 30th day of October, 2012.

J. H. MSOFFE
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.

(E. Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL