IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: KILEO, J.A., MJASIRI, J. A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 229 OF 2010

RAHIM S/O ISAKA
HUSSEIN S/O JUMA } ..... **APPELLANTS**

VERSUS

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

(Appeal from the Decision of the High Court of Tanzania at Iringa)

(Uzia, J.)

dated the 23rd day of August, 2010
in
DC. Criminal Appeal No. 49 C/F 51 of 2009

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JUDGMENT OF THE COURT

10th & 11th December, 2012

MUSSA, J. A.:

In the District Court of Iringa, the appellants were arraigned and convicted of armed robbery. The charge laid before the trial court alleged that on the 15th day of October, 2007, at Makorongoni area, within the Municipality, District and Region of Iringa, jointly and together, the appellants stole a Nokia mobile phone and a sum of shs. 9,000/= in cash;

properties of a certain Mashaka Nyagawa. It was further alleged that immediately before such stealing, the appellants did assault the said Mashaka with an iron rod in order to obtain the stolen properties. Upon conviction, the trial court handed down, as against both appellants, the statutory minimum sentence of a term of thirty years imprisonment. Their appeal to the High Court (Uzia, J.) was unsuccessful, hence this appeal.

The factual setting from which the conviction culminated is fairly brief. The case for the prosecution, as comprised of two witnesses, was to the effect that the alleged victim, that is, Mashaka Nyagawa (PW1), operates a business of video shows at Makorongoni area. On the fateful day, Mashaka knocked off his business around 10.00 p.m. or so, following which he proceeded home on foot. Upon reaching Barabara mbili area, as he was walking along a narrow alley *(kichochoroni)*, Mashaka was confronted by the appellants whom he previously knew quite well as his customers. Almost momentarily, the second appellant viciously attacked him with a brick that landed on his mouth. In response, Mashaka, actually, grabbed and held the second appellant in captivity but, his grip could not last long after he was dealt with a blow from the first appellant by the use

of an iron rod. In the result, both appellants ran clear of the scene, but only after they had their victim dispossessed of his Nokia mobile phone and a sum of shs. 9,000/= in cash. Further down his testimony, in the course of cross-examination, Mashaka claimed that he identified the appellants through the aid of electric lights and that the alley he was walking along, was not far from the main road.

When all dust was clear of the scene, Mashaka, who had lost seven teeth from the encounter, was helped to hospital by a certain John and he was, apparently, admitted. They had passed via the police station where the victim was given a PF3 which he, eventually, adduced into evidence, presumably, to shed light on the nature of his injuries. Rather unfortunately, the document was admitted by the trial court without the appellants being asked to express whether or not they would wish the medical officer called for examination. To the extent that the PF3 was improperly admitted, as it were, in contravention of the mandatory requirement of section 240 (3) of the Criminal Procedure Act, we are left with no other option than to discount and expunge the document from the record of the evidence.

Further testimonial evidence in support of the case for the prosecution was adduced by the investigation officer, namely, detective corporal Lawrence (PW2). He was assigned the case for investigation on the 17th October, 2007 but, by that time, Mashaka was seriously ill to the extent that he was unable to speak. The next day, that is, October 18th, was when he took the victims statement. Nonetheless, as will soon become apparent the statement availed in court was, paradoxically, taken before the incident in March, 2007. The appellants were originally arraigned in the Primary court but after a month or so, the case was transferred to the District Court.

In reply to the foregoing prosecution version, both appellants completely disassociated themselves from the alleged incident. More particularly, in an attempt to impeach the testimony of Mashaka, the second appellant adduced into evidence, two police statements, allegedly, made by Mashaka on the 18th March and 16th October, 2007. As hinted upon, the former statement was, supposedly, recorded prior to the occurrence! The statements were, respectively, admitted as exhibits D2 and D1. As it turns out, in the latter statement, Mashaka implicated only

the second appellant for attacking him with a brick and an iron rod. He further claimed that the second appellant took away his nokia mobile phone worth a sum of shs. 150,000/= and an unascertained amount of cash. In contradistinction, he told the police in the former statement, that he was attacked by two assailants (not one) and that, aside from the iron rod, the other weapon used was a stone (not a brick). To add more controversy, in the March 18th statement, Mashaka reduced the value of his mobile phone to 80,000/= and quantified the amount of money stolen in cash to a certain sum of shs 9,000/=. As it were, in the course of testimony, both Mashaka and the Corporal were keen on disowning the October 16th statement.

On the whole of the evidence, the trial court, unreservedly, accepted the prosecution version following which a conviction was had. On a first appeal, the High Court found no cause to vary the verdict of the trial court despite the fact that the Republic had declined to support the conviction. The appellants seek to impugn the verdicts of both courts below upon separate petitions which are, nonetheless, broadly similar in content. In a nutshell, their common grievances against the conviction relate to the

improper reliance, by the two courts below, on insufficient evidence of visual identification; the improper admission of the PF3 and; finally, is a complaint to the effect that their respective defence versions were not accorded due consideration.

Before us, the appellants, unrepresented, fully adopted their respective petitions without more. Mr. Maurice Mwamwenda, Senior State Attorney for the Republic, declined to support the conviction. In his submission, the conditions at the scene of the crime were not ideal for a correct identification and, furthermore, it was unsafe to convict on the strength of an identification by a single witness. In support of the submission, we were referred two cases – viz – **Afrika Mwambongo v R (1984) TLR 240 and; Hassan Juma Kanenyera v R (1992) TLR 100.**

Dealing with the appeal, we should express at once that having expunged the PF3 from the record of the evidence, we need not address the complaint about its improper admission. As regards the grievance pertaining to insufficient evidence of visual identification, it seems to us that both courts below misapprehended the nature and effect of an

identification done by a single witness, at night and under a moment of horror. In this regard we wish to reiterate the guidelines to presiding officers as meticulously, laid down in the case of **Waziri Amani v R (1980) TLR 250:-**

> *"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find in the record questions such as the following posed and resolved by him: The time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time; whether there was good or poor light at the*

scene; and further whether the witness knew or had seen the accused before or not".

In the case under our consideration, it cannot be gainsaid that the foregoing guidelines were hardly met. More particularly, there was no elaboration as to the location as well as the intensity of the electricity light, through which the witness, purportedly, identified the appellants. Assuming, for the sake of it, that Mashaka had reference to street lights, it is still incomprehensible that those lights would have lit beyond the main street to the alley as well. To add to the light ailment, is the fact that the attack was made in circumstances of traumatic surprise and that it was so outrageous to the extent of having the victim dispossessed of his seven teeth. Thus, upon our re-evaluation, we are, respectfully, of the view that the prevailing conditions and circumstances at the scene of the crime cannot be said to have been ideal for an unmistaken identification.

Quite apart, in cases, such as the present, whose determination is essentially dependent on visual identification, it is not enough to merely look at the factors favouring or disfavouring an accurate identification. Equally important and decisive is the credibility of the identifying witness.

Granted that the trial court is best placed and advantaged to determine matters of credibility but; in the present situation the learned trial Magistrate did not take a balanced approach in his determination of the issues of impeachment of Mashaka that was raised by the second appellant. As already hinted, the second appellant adduced into evidence Mashaka's two previous police statements that were self contradictory upon certain material details and, in some respects, they were inconsistent with his testimonial account. The trial court simply rejected the October 16th statement on the strength of a mere disclaimer from the prosecution without assigning plausible reasons. And, as already intimated, it proceeded to accept a statement that was, on the face of it, recorded prior to the occurrence. From content of the statements under reference, one gathers details to the effect that, whereas, the March 18th statement was recorded by corporal Lawrence (PW2); the October 16th statement was recorded by a police officer in the name of F.8105 PC Raphael. In his testimonial account, the corporal did not quite address the mystery about recording the statement prior to the occurrence. And, neither was constable Raphael called to explain how he recorded the statement from

Mashaka who was by then, supposedly, bed ridden and incapacitated of speech.

In any event, one would have expected; as, indeed, it was in the best interests of the prosecution to bring evidence that would have justified or explained away the mysteries and inconsistencies obtaining in the two statements. In the absence of such clarification we are constrained to hold that the inconsistencies which are, incidentally, upon material matters cannot be reconciled and the same adversely travel to the root of the credibility of the witness Mashaka. To say the least, the alleged identification of the appellants was by a witness whose evidence was impeached, suspect and hardly worthy of belief.

In the light of the foregoing circumstances, we think that the identification of the appellants was not beyond the pail of doubt and, for that matter, it is unsafe to uphold the conviction. We accordingly, allow the appeal, quash the conviction and set aside the sentence. The appellants are to be released from custody forthwith unless they are otherwise held there for some other lawful cause.

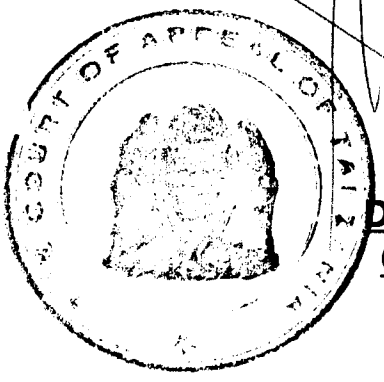
DATED at IRINGA this 11th day of December, 2012.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL