IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 27 OF 2011

BETWEEN

JOSEPHAT JOHN..... APPELLANT

AND

THE REPUBLIC..... RESPONDENT

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

(Mjemmas, J.)

dated the 14th day of December, 2010
in
Criminal Appeal No. 112 of 2009

JUDGMENT OF THE COURT

21st & 25th May, 2012

KILEO, J. A.:

On 11/04/2005 the appellant Josephat John appeared before the District Court of Bukoba being charged with armed robbery. He was convicted as charged and sentenced to thirty years imprisonment. His appeal to the High Court was unsuccessful hence this second appeal.

The appellant's appeal, the grounds of which are contained in his petition of appeal and supplementary memorandum of appeal center on the question of identification and generally on whether the charge of armed robbery against him was proved beyond reasonable doubt.

Submitting on his grounds of appeal the appellant who appeared in person argued that apart from the fact that the conditions pertaining at the scene of crime were not favorable for a watertight identification; both the 1st appellate court and the trial court denied him justice by their failure to properly evaluate the evidence adduced at the trial. The appellant also lamented that the failure by the trial court to effect service on his witness while he was in custody resulted in a miscarriage of justice.

The respondent Republic was represented by Mr. Aloyce Mbunito, learned State Attorney. At first the learned State Attorney opposed the appeal but upon reflection he supported it. He agreed with the appellant that the surrounding circumstances at the scene of crime were not favorable for watertight identification. He in the event conceded that there was merit in the appeal.

Evidence was adduced during the trial to the effect that on 28.03. 2005 while PW1, Theophil Theonest was on his way home riding his bicycle he was attacked by the appellant and another person who was not charged. The time was 7:00pm. Apart from being stabbed with a knife by the appellant the witness claimed that he was also robbed of his bicycle. The matter was not reported immediately to the police because, according to the complainant, the appellant had undertaken in writing to return the stolen bicycle. It was after the appellant had failed to honor the undertaking that the matter was taken to the police.

According to the appellant, three youths were suspected to have been the culprits but when they could not be traced he was arrested instead and severely beaten. When it transpired that he was going to file a case against those who had beaten him things turned against him and he was taken to court for armed robbery.

Admittedly, the crime the subject matter of this appeal was committed at 7pm. The appellant who was arrested shortly after the incident was not found with the stolen bicycle. Both the lower courts found that the

appellant had been sufficiently identified as having been one of those who had taken part in the robbery.

It has been stated time and again by this Court that in a criminal case where determination depends essentially on visual identification, evidence on conditions favoring a correct identification is of utmost importance. See for example **Raymond Francis v. Republic** (1994) TLR 103. Evidence on conditions favoring correct identification is of utmost importance because, as it was stated in the celebrated case of **Waziri Amani v. R.** (1980) TLR 250, the evidence of visual identification is of the weakest kind and most unreliable. In that case the Court further stated:

> *".....It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court fully satisfied that the evidence before it is absolutely watertight. ...The extent to which the possibility of the danger of an affront to justice...occurring depends entirely on the manner and care to which the trial judge approaches...although no hard and fast rules can be laid down...**it must be shown on the record a careful and considered analysis of all the***

surrounding circumstances of the crime being tried...."

(Emphasis supplied)

As already stated, the crime in this case is said to have been committed at 7.00 pm. This was night time pursuant to the construction of the term *"night"* given in section 4 of the Penal Code. The complainant testified at the trial that the sun had not yet set down when he was robbed and he was able in the circumstances to recognize the appellant. Even if it were to be taken that the sun had not yet set down there were circumstances which we think if they had been properly considered by the lower courts they would have found that identification was not watertight. There was undisputed evidence that the complainant was assailed as he was riding his bicycle through the forest. We are of the considered view that with the trees and shrubs surrounding him at the time the crime was committed the possibility of mistaken identity could not be ruled out.

Moreover, the record shows that the appellant was arrested a short time after the crime was committed in a bar which was in the neighborhood. The appellant and the complainant were known to each other. It is very

unlikely under the circumstances that a person who had committed a robbery would immediately go to repose in a bar within the vicinity of the area where he had committed the crime.

Another matter that has greatly exercised our minds is the behavior of the complainant following the robbery. It is on record that he refrained from going to report the matter to the police after he was informed that the appellant had agreed to return his bicycle to him. He only went to the police allegedly after the appellant had failed to return the bicycle. Robbery is a grave matter. The complainant said that he was seriously injured in the course of the commission of the crime. We find it inconceivable that someone who had been the subject of a robbery and who was seriously injured in the process would let matters lie merely because the culprit had promised to return his property.

We are satisfied that the evidence adduced in support of the charge was not at all strong, and the appellant's defense, properly considered, raised serious doubts as to his guilt.

The above considerations would suffice to dispose of the appeal. However, we feel obliged to comment; albeit briefly on the failure by the trial court to effect service of summons upon the appellant's witness whom he claimed had witnessed his presence at the bar at the time when the crime was being committed. It is on record that the appellant had informed the trial court that he had a witness for his defense case. He gave the name and the address of his witness. The matter came up for continuation of defense hearing on 26/10/2005. The record (at page 14) shows the Public Prosecutor on this day as having stated:

> *"The case is for defense. The accused was given summons to summon his witness."*

The appellant who had been in remand custody all the time informed the court that he was unable to get his witness and he closed his defense case.

We are of the considered view that where, as in this case, an accused is in remand custody and has indicated that he requires a witness to appear and testify on his behalf, the trial court is obligated to ensure that the witness is served with summons to appear and testify. An accused who is in remand custody and under prison authority cannot be expected to effect

service by himself. Section 231 (4) of the Criminal Procedure Act (CPA) spells out the duty of a trial court where an accused has stated that he has witnesses to call. It is provided thus under this provision:

> **"Section 231 (4) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses."**

Care must always be exercised to ensure that justice is not only done but is also seen to be done. Here we have an accused faced with a serious charge attracting a prison term of 30 years. He does not have legal counsel. We are satisfied that before a court can finally arrive at a conviction in such a case –or any case for that matter, the court must satisfy itself that all avenues have been exhausted in ensuring that the accused gets a fair trial. This Court, in **Hangwa William v. The Republic**

–Criminal Appeal No.117 of 2009 (unreported) had occasion to consider the import of section 231 (4) of the CPA. In the course of its consideration it made the following observation:

> *"This provision specifically applies to accused persons.*
>
> *There is no indication in this case whether the trial court was even aware of this provision. But what is even more disturbing is that even the first appellate court, did not care to look into the complaint, but just dismissed it with a wave of the hand.*
>
> *Those disturbing features in the conduct of the appellant's trial, especially his defence; would give doubts to any impartial tribunal, as to whether the appellant received a fair trial."*

Having said that we are settled in our minds that if the courts below had carefully considered all the circumstances pertaining to this case they would have found that the case against the appellant had not been proved beyond reasonable doubt. Consequently we find the appeal to have been lodged with sufficient ground for complaint. We allow it accordingly and we order an immediate release from custody of the appellant unless he is held for some other lawful cause.

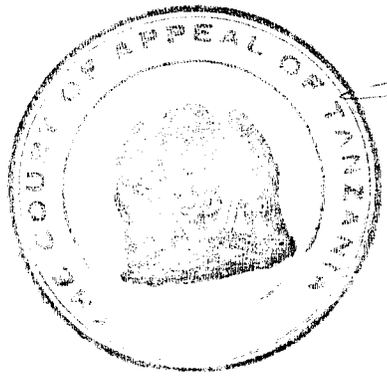
DATED at **MWANZA** this 23rd day of May, 2012

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
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