IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 152 OF 2011

FELICIAN JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Bukoba)

(Mlay, J.)

dated the 17th day of February, 2011
in
Criminal Appeal No. 59 of 2000

JUDGMENT OF THE COURT

22nd & 28th May, 2012.

RUTAKANGWA, J.A.:

The appellant first appeared in the trial District Court of Ngara District on 11th February, 2000. He was facing two charges, namely House Breaking and Stealing contrary to sections 294 and 265 of the Penal Code respectively. He denied the charges. He was remanded in custody. On his third appearance in court, on 29th February, 2000, a new charge of

"Robbery with Violence" c/ss 285 and 286 of the Penal Code was laid at his door. He denied the charge and a full trial followed immediately.

At the end of the trial, the appellant was found guilty as charged and convicted accordingly. He was sentenced to thirty years imprisonment and ten strokes of the cane. Aggrieved by the conviction and sentences, he unsuccessfully appealed to the High Court, hence this second appeal.

The appellant's memorandum and supplementary memorandum of appeal list eight grounds of complaint against the judgment of the High Court. All in all, the crux of his complaints is that the case against him was based on contrived and patently weak evidence of recognition (both visual and voice/aural). Before canvassing this crucial ground of appeal, we have found it apposite to highlight the important aspects of the evidence upon which the appellant's conviction was based.

The evidence in support of the charge came from Magdalena Joseph, Veronica Joseph, Merica Zacharia and Thomas Joseph, who testified as PW1, PW2, PW3 and PW4 respectively.

All the prosecution witnesses testified that they were attacked by bandits in the dead of the night when they were already asleep on 2nd October, 1999. According to PW1 Magdalena's reckoning, the bandits numbered seven. While four entered her room, the other three stormed into another room wherein one Antonia (her daughter) was asleep. PW1 Magdalena further testified that she managed to identify only the appellant, as the bandits had torches which they were "flashing" at them. In addition, the appellant was carrying a gun and a torch as well, and was the one who was demanding money she had received as bride price. After stealing cash money, a shirt, a pair of kitenge and a pair of khanga, they vanished. It was while she was responding to the appellant's question on cross-examination, that she recalled the bandits to have taken one bicycle belonging to her "last born child". The bicycle, she said, was taken from her house.

On her part, PW2 Veronica told the trial court, that when the door of their house was broken open, **six** bandits entered the room in which she **was sleeping on one bed with her mother, PW1 Magdalena.** She,

too, only recognised the appellant who compelled her "mother to give them the money obtained as bride price", which they took plus some other articles. The bandits ordered them "to keep silent", and then left. No alarm was raised, but the "leaders of the village" and "other people", she claimed, went to see them on the following morning.

According to PW3 Merica, the bandits also struck at their home in which she was sleeping with her husband Zacharia Joseph. According to her, although the bandits "were many" and armed with a gun, her husband, who did not testify, managed to fight them off and in the process she managed to identify only the appellant, who had remained outside, by aid of moonlight and torchlight the bandits **had flashed at her**.

PW4 Thomas, who was allegedly in another close house, also testified that his house was broken into and a bicycle and Tshs. 2,200/- stolen therefrom. He further claimed to have managed to identify only the appellant by his voice and by the aid of light from a torch **flashed by the appellant at "the place where he had hidden some money".** While under cross-examination, this witness said:-

"The neighbours did not respond easily as they were threatened to be killed by the bandits."

In his sworn evidence, the appellant told the trial court that he could not have committed the offence because he was at a distant village in Rulenge Ward. He remained there until 9th October, 1999. On 25th October, 1999 he was summoned at the local police station. He personally reported there the following day. As to what prompted the prosecution witnesses to testify against him, he said:-

"The whole case is the (sic) concocted one because I am not in good blood (sic) with my mother, young brothers and sister together with my stepfather due to the fact that, they are alleging that my junior wife is the (sic) wizard ..."

This claim which was not considered at all by the two courts below, we must hastily point out, was brought out clearly during the cross-examination of the prosecution witnesses by the appellant.

We are minded to point out that we found it necessary to go into this detailed narration of the disjointed prosecution evidence for three main reasons. **One,** the judgments of the two courts below, as correctly hinted by Mr. Edwin Kakolaki, learned Principal State Attorney, were perfunctorily written. This was inspite of the naked lamentable fact that it took the High Court a good ten (10) years to compose and ultimately deliver its 'reserved judgment'. **Two**, the strong allegation of the appellant that the case against him was fabricated by the prosecution witnesses, because of a family feud. **Three**, going by the evidence on record, apparently three separate and distinct robberies were committed.

As we alluded to earlier on in this judgment, the appellant is protesting his innocence, on the basis that the so-called recognition evidence upon which his conviction was premised, was plainly contrived, a fact not discovered by the two courts below because of their slapdash

approach. At the hearing of the appeal he appeared before us unrepresented and had nothing to say in elaboration of the grounds of appeal. The respondent Republic was represented by Mr. Kakolaki.

Mr. Kakolaki declined to support the appellant's conviction because the prosecution evidence of recognition was highly suspect. He took this stance because, as he lucidly argued, this evidence was highly improbable, inconsistent, has open lies which go to dent the credibility of all prosecution witnesses and appears to have been based on mere suspicions. For this reason, he pressed us to hold that the said evidence was not watertight at all to warrant a conviction for any offence.

There is no gainsaying here that the prosecution case stands or falls on the basis of the alleged recognition evidence of the four prosecution witnesses. This is so simply because the appellant was neither arrested at the scene of the crime nor was he found in possession of any of the allegedly robbed articles of any of the complainants.

In disposing of this appeal, therefore, we have found it convenient to begin by re-stating the law on the issue of eyewitness identification evidence. It is a mundane truth that "the criminal justice system relies heavily on eyewitnesses to determine the facts surrounding criminal events. Eyewitnesses may identify culprits, recall conversations, or remember other details. An eyewitness who has no motive to lie is a powerful form of evidence for jurors, especially if the eyewitness appears to be highly confident about his or her recollection. In the absence of definitive proof to the contrary, the eyewitness's account is generally accepted by the police, prosecutors, judges, and juries." (See: "Eyewitness Evidence: Improving Its Probative Value", by Gary L. Wells (Iowa State University), Amina Memon (University Aberdeen) and John Jay (College of Criminal Justice), found in the journal entitled Psychological Science in The Public Interest, Vol. 7, No. 2 of 2006 at pp.45.]

The above truth notwithstanding, the same learned authors, further tellingly observe:-

> *"However, the faith the legal system placed in the eyewitnesses has been shaken recently by the advent of forensic DNA testing. Given the right set of circumstances, forensic DNA testing can prove that a person who was convicted of a crime is, in fact, innocent. Analyses of DNA exoneration cases since 1992 reveal that mistaken eyewitness identification was involved in the vast majority of these convictions, accounting for more convictions of innocent people than all other factors combined."*

In our considered opinion, the above revelations and findings vindicate our long settled jurisprudence to the effect that visual and aural identification evidence, be that of a stranger or a previously known person, particularly one done under unfavourable conditions, such as at night, is of the weakest kind and most unreliable. Such evidence should be approached with the utmost circumspection. No court should act on such evidence unless, all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight. See, for instance:-

(a) **Abdalla Wendo and Another v R.,** (1953) 20 EACA 166;

(b) **Waziri Omari v. R.,** (1980) TLR 250;

(c) **Jaribu Abdalla v. R.,** Criminal Appeal No. 220 of 1994;

(d) **Issa Mgare @ Shuka v. R.**, Criminal Appeal No. 37 of 2005

(e) **Said Chally Scania v. R.,** Criminal Appeal No. 69 of 2005;

(f) **Shamir John v. R.,** Criminal Appeal No. 166 of 2009;

(g) **Kulwa Makwajape** & 2 Others v. R., Criminal Appeal No. 35 of 2005,

(h) **Njamba Kulamiwa v. R.,** Criminal Appeal No. 460 of 2007;

(i) **Mengi P.S. Luhana & Another v. R.**, Criminal Appeal No. 222 of 2006;

(j) **Nyakango Olala James v. R.,** Criminal Appeal No. 32 of 2010 etc. (all unreported).

Very significantly, in **Jaribu Abdalla** (supra), this Court held thus:-

> *"..... in matters of identification, 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." [Emphasis is ours].

The above proposition of law was thus re-asserted in **Nyakango's** case:-

*"This principle of law is still very valid today as it was when it was first propounded. Therefore, eyewitness testimony ... can ... be devastating when false witness identification is made due to honest confusion or outright lying. (**Mengi Paulo S. Luhana & Another v. R.** ..."*

We have already shown above that that the two courts below discharged their duty to analyse the evidence of identification very slovenly. It was, with due respect, not subjected to any objective evaluation at all. The learned trial magistrate after giving a summary of the evidence, said:-

> *"That being the evidence it comes into my mind that it is possible* ***the accused might have been seen by the said witnesses*** *and I agree that if the accused and his co-bandits* ***had torches flashing it is possible they might have flashed to the face of the accused and*** *the said witnesses, since he was very familiar to them,* ***they might*** *have seen him clearly..."*
>
> *[Emphasis is ours.]*

So the appellant was convicted on the basis of mere suspicions.

Upholding the conviction of the appellant, the learned first appellate judge, in a virtually one-page judgment, said:-

> *"There was sufficient evidence at trial court i.e. PW1, PW2, PW3 and PW4 proved the case against the accused (appellant).*

The appellant was identified by PW1 (his mother) and there is no dispute was among the bandits and they were armed with a gun. Therefore the conviction and sentence of the trial court is upheld, the appeal is dismissed."

We have noted with regret and sorrow that the learned judge did not in anyway allude to the evidence of any witness, including the appellant, before concluding that there " was sufficient evidence" placing the appellant at the scene of the crime. We wish to respectfully point out that that was an unsatisfactory, and indeed an unacceptable way of dealing with a first appeal which has been admitted for hearing.

The two courts below having failed to discharge their statutory duty, we were constrained to intervene in the interests of justice. Our own objective evaluation of the prosecution evidence has led us to this inescapable conclusion. The conviction of the appellant was not based on watertight visual and/or aural identification evidence. It was not even based on honest but mistaken identification evidence. It was based on

outright lies of the four prosecution witnesses. We shall demonstrate why we have so concluded.

The particulars of the charge which the appellant had to answer read as follows:-

> *"That Felician s/o Joseph charged on the 2nd day of October, 1999 at about 00.01 hrs at Katelele Village within Ngara District in Kagera region did steal cash Tshs. 63,770/-, one bicycle type Avon valued Tshs. 60,000/-, seven pairs of Khanga, Four Gowns all properties valued at Tshs.193,640/- the property of one Magdalena w/o Joseph and immediately before stealing did use actual violence in order to obtain or retain the said property."*

This charge, dated **29th February, 2000** was in substitution of the first one dated **11th February, 2000.**

The initial charge, as already shown herein, contained two counts of house breaking and stealing. This charge, we are convinced, was based on the first information/report of the incident by the witnesses to the police, if any report was made. No police officer testified at the trial of the appellant, to indicate what was reported to them and when. All the same, going by the first count, the appellant had allegedly broken and entered into the dwelling house of PW1 Magdalena, with intent to commit the offence of stealing therein (not robbery). The particulars in the second count show that the accused had stolen:-

> *"... cash Tshs. 63,770/- and one Bicycle valued at Tshs. 123,770/-."*

There is no mention of khangas and gowns and the value of the same bicycle is not the same.

In their evidence both PW1 Magdalena and PW2 Veronica contradicted each other on this issue. PW1 Magdalena testified that the appellant and his co-bandits robbed them of her own cash money

amounting to Tshs. 25,000/-, one shirt, one pair of khanga, one gown and an unspecified amount of money they had received as bride price. On her part, PW2 Veronica, who unequivocally stated to have witnessed the entire robbery, told the trial court that the bandits robbed her own **Tshs. 16,020/-,** Tshs. 47,000/- (bride price money), **two bush knives, one pair of shoes, sandals, six shirts and blouses.** The underscored articles were neither mentioned by PW1 Magdalena nor were they a subject of both charges. Furthermore, PW2 Veronica, who was allegedly in the same room with PW1 Magdalena never saw the bandits stealing any gown, a bicycle and/or any khanga. It is very difficult for us, therefore, to determine who among the two witnesses was actually telling the truth. Their credibility is further undermined by the fact that had the appellant committed the robbery at gunpoint, these 2 witnesses would not have failed to report accordingly to the police. That they did not do so is given credence by the fact that the first charge preferred against the appellant, four (4) months after the alleged robbery, was house breaking and simple stealing. Needless to over-emphasize here then, is that the robbery claim was an afterthought.

PW1 Magdalena testified that on the night of the robbery, she was sleeping in one room with PW2 Veronica. According to her, the bandits were seven in number. Only three entered her room while the other four proceeded to another room in which Antonia was sleeping. This evidence is in sharp contrast with that of PW2 Veronica. PW2 Veronica testified that only six bandits were involved.

PW3 Merica specifically stated that they "all reside at (sic) the same homestead with Magdalena." We have already shown that both PW3 Merica and PW4 Thomas claimed that the bandits also struck at their homes after robbing PW1 Magdalena and PW2 Veronica. This evidence is inconsistent with that of Magdalena and Veronica who testified that the bandits left after committing a robbery at their house. The two never spoke of any robbery being committed at the homes of PW3 Merica and PW4 Thomas. Had there been such multiple robberies, PW1 Magdalena and PW2 Veronica would not have failed to mention them. Furthermore, their neighbours, who were allegedly threatened to be killed by the appellant (who was well known to them) as well as PW3 Merica's husband, who allegedly single-handedly overpowered the armed bandits, would not

have failed to testify, as well as Antonia. Failure to call these essential witnesses, as Mr. Kakolaki rightly argued, leads to only one irresistible inference. Had they testified they would have belied these four prosecution witnesses. We agree.

The unreliability of PW1 Magdalena's evidence is conclusively demonstrated by her evidence during cross-examination. Asked by the appellant if she was aware that he has another homestead at Bushubi, she replied in the negative. We think she was not being honest because, for once, PW2 Veronica told the trial court, also on cross-examination that:-

> *"The accused has got another house at Bushubi, but it is so close to our village."*

The mother of the appellant then was aware of that home, but she was deliberately prevaricating to undermine the appellant's avowed defence of **alibi.**

Another factor which compelled us to disbelieve the prosecution's purported visual identification evidence is the delay in arresting the

appellant. There is no dispute here that the appellant was arrested on 26th October, 1999 (almost four weeks after the alleged robbery), when he presented himself at the police station. There is no iota of evidence on record to suggest that he had taken to flight or had all along been hiding to avoid arrest. The nagging but pertinent question which remains unanswered is: If these four prosecution witnesses were not lying and had unmistakenly recognised the appellant among the robbers, why did they not report him to the village authorities, if not the police, immediately? That they failed to do so renders their evidence highly suspect. That is why, as Mr. Kakolaki rightly pointed out, both PW1 Magdalena and PW2 Veronica told the trial court that the appellant rendered himself a suspect by his failure to go and commiserate with them on the robbery immediately after the incident. To us, the answer to this suspicion was simple. According to the appellant he was at another village on the night of 1st/2nd October, 1999. Now, if their immediate neighbours were apparently unaware of the alleged multiple robberies, how could the appellant have immediately known these robberies?

From the above analysis of the four prosecution witness's evidence, it is increasingly obvious to us, that the inherent open lies, inconsistencies and implausibilities, support the appellant's consistent claim that the case against him was a frame-up. The respondent Republic shares this appellant's conviction. On the evidence available, we are constrained to agree with them. We, therefore, hold without any demur that on top of the obvious fact that the witnesses could not have impeccably recognised the appellant being aided only by light from torches which were being flashed at them, which light would have temporarily blinded them, their evidence carry all the hallmarks of having been contrived to victimise the appellant.

All said and done, we allow this appeal in its entirety. The appellant's conviction is hereby quashed and set aside as well as the sentences imposed on him. The appellant is to be released forthwith from prison, where he has been needlessly languishing for nearly ten years, unless he is otherwise lawfully held.

DATED at MWANZA this 25th 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