IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 118 OF 2008

ATHUMANI BUJI.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

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

(Uzia, J.)

Dated 28th day of April, 2008
in
Criminal Appeal No. 11 of 2007

JUDGMENT OF THE COURT

31st & 1st August, 2013

RUTAKANGWA, J.A.:

This is a second appeal. The appellant was initially arraigned in the District Court of Tunduru (the trial court), with one Mustapha Abdalahaman and five others, for the offence of armed robbery. They were said to have robbed one Rashid s/o Abbas (PW1) of his property worth Tshs. 40,000/=. The appellant and his co-accused had denied the charge.

To prove its case, the prosecution called two (2) witnesses. These were PW1 Rashid Abbas and PW2 Mohamed Hamidu. Of the two witnesses only PW1 Rashid, testified to have eyewitnessed the said robbery. PW2

Mohamed participated in a police identification held on 20th July, 2003, for the purpose of identifying the suspected robbers.

The only evidence of PW1 Rashid in support of the charge was relatively brief. He identified himself to the trial court as a peasant-cum-trader. On 12th July, 2003 at around 15:00hrs, he said, he was riding a bicycle heading for Msechela village. On the bicycle he was carrying "two boxes of soap, 9 kgs. of DAGAA and other things." When he reached a place known as Jeshini, **three people,** armed with swords, emerged from the surrounding bushes. They ordered him to let the bicycle go at the risk of being "injured by the swords." He obeyed the order, abandoned his bicycle and left. Before he lost view of the bandits, he turned back and saw two of the bandits removing his goods from the bicycle and disappearing with them into the bushes, leaving the bicycle behind. When testifying on 2nd September, 2003, he told the trial court that the two bandits who vanished with his goods, were the appellant and Mustapha. We have found it necessary to point out this fact here because we have found no iota of evidence on record going to show that PW1 Rashid had given the description of any bandit to any person, and the two accused were strangers to him.

After picking his abandoned bicycle, PW1 Rashid claimed to have reported the incident at Tunduru police station. The witness when under cross-examination from both the appellant and Mustapha, categorically stated that he identified both of them at an identification parade conducted at the "police court yard". On this, he was belied by PW2 Mohamed who testified to have been one of the people who were lined up together with the appellant at the identification parade on 12/7/2003, and witnessed PW1 Rashid "touching" only the appellant and "mentioning him to be among the persons who robbed him" and not any other person.

After the closure of the prosecution case, the learned trial Principal District Magistrate, held that the appellant and Mustapha, who were the 2nd and 3rd accused persons, had a case to answer. However, and rightly so in our view, he found the 1st, 4th, 5th and 6th accused persons with no case to answer. The charge against the 7th accused had been withdrawn before the trial commenced.

Both the appellant and Mustapha denied committing the robbery. They both told the trial court that they were strangers to each other. The appellant testified that he was arrested on 16/7/2004 at about 09:30 hrs. at the trial court's premises by a police officer. He was taken at Tunduru

police station. An identification parade was conducted on 20/7/2004 at which PW1 Rashid pick him out and was subsequently charged.

On his part, Mustapha testified that he was arrested at his home on 19/7/2004 and detained at the police station. At an identification parade held on 20/7/2004, he was not picked out by anybody.

In his short judgment which is patently lacking in analysis, the learned trial Principal District Magistrate, found the appellant guilty of the offence of attempted robbery and sentenced him to fifteen years imprisonment and twelve strokes of the cane. We have found out that the guilty verdict was premised on the undisputed fact that PW1 Rashid had picked him out at the identification parade. Mustapha was acquitted because he "just mistaken with any other persons not in court".

Aggrieved, the appellant preferred an appeal to the High Court. The High Court sitting at Songea dismissed the appeal. In dismissing the appeal, the learned first appellate judge was convinced that the appeal was without merit. This is how he reasoned:-

> *"Some of the bandits were identified by the complainant, one of them was the appellant, this was possible due to day time, therefore the problem*

of identification was not an issue. There was also an identification parade constituted by the police to confirm the identity of the appellant by the complainant. The appellant did not raise any objection on the procedure applied in constituting a police parade during trial. He raised the issue of irregularity at a stage of appeal. Clearly that was an afterthought. There is no doubt that the complainant (PW1) identified the appellant as a person who robbed him.

With regard to conviction, I am also in agreement with the State Attorney that, the trial magistrate erred in law in convicting the appellant of attempted armed robbery..."

The learned appellate judge substituted a conviction of armed robbery for that of attempted armed robbery and sentenced him to thirty years imprisonment.

Convinced of his innocence, the appellant has attempted this second appeal. In his six grounds of appeal, the appellant is chiefly reproaching

the learned first appellate judge for dismissing his appeal on the basis of very weak visual identification evidence of PW1 Rashid, who never mentioned the identities of the robbers to anybody before the identification parade was held. The appellant is also challenging the value of the identification parade evidence because no single police officer testified at his trial. The appellant appeared before us in person and unrepresented and adopted his grounds of appeal.

The respondent Republic was represented by Mr. Maurice Mwamwenda, learned Senior State Attorney. Mr. Mwamwenda supported the appeal for two main reasons. One, the visual identification evidence of PW1 Rashid was inconclusive and unconvincing. Two, there was no proof that the identification parade was properly conducted as the police parade Officer never testified.

We have gone through the prosecution evidence, and the judgments of the two courts below and we are of the considered opinion, that this appeal stands or falls on the basis of the purported visual identification evidence of PW1 Rashid. The credibility of this witness is the determining factor. There is no gainsaying that the armed robbery was allegedly committed during "day time." But that is far from proving that the

"problem of identification was not an issue", as the learned first appellate judge would wish everybody to believe. Before hastily reaching this conclusion, we have learnt, the learned judge did not consider at all the fact that PW1 Rashid and the appellant were strangers to each other. His evidence was not recognition evidence, hence the holding of an identification parade, eight (8) clear days after the incident. This was also four days after the arrest of the appellant. His evidence, therefore, was to be approached not casually but with the greatest circumspection. The nagging but pertinent unanswered questions are: Who arrested the appellant and why was he arrested? Why did it take four days to conduct the identification parade after the appellant's arrest, if PW1 Rashid had made an unmistaken identification of the appellant and had immediately reported the incident to the police and given his description to the police? Why were other five (5) persons (apart from Mustapha) arrested and indeed charged in connection with the same armed robbery?

The evidence of PW1 Rashid is very unequivocal on these facts. One, the bandits were only three in number. Two, he never raised any alarm. Three, immediately after the said robbery, people "from both directions of the road" converged at the scene of the crime. Four, he never gave the

descriptions of any bandit to any person before the identification parade was held. It is a pity that the two courts below while assessing the credibility of PW1 Rashid, the sole visual identification witness, did not direct their minds to these facts. Had they done so, in our considered view, they would not have taken his word at its face value. We are saying so for the following reasons.

One, if any person met PW1 Rashid at the scene of the crime or anywhere else thereafter, PW1 Rashid would not have failed to give him or her the description of his assailants. This person or such persons would definitely have testified to bear PW1 Rashid out, on the robbery incident at least and the identity of the bandit or identities of the bandits. If PW1 Rashid had reported the robbery immediately at Tunduru police station, the officer who received the report, the officer who arrested the appellant and/or the officer who conducted the identification parade would have testified. These would have given evidence on the description given by PW1 Rashid of all or some of the bandits; why the appellant was arrested; and how the parade was conducted giving clear evidence of the circumstances under which PW1 Rashid identified the appellant at the parade. Moreover, there is no evidence on record to show that the parade

was conducted in a fair manner and if that was not the case, the evidence of the parade would carry little value: see, **Mwango s/o Manaa v. Rex** [1941] 8 EACA 29, **Raymond Francis v. R.** [1994] TLR 100, **Francis Majaliwa Deus v. R.,** (C.A.T.) Criminal Appeal No. 139 of 2005 (unreported), etc. In the absence of this evidence, the evidence of PW1 Rashid in court becomes mere dock identification evidence which lacks value – **Mussa Elias & Two Others v. R.,** (C.A.T.) Criminal Appeal No. 172 of 1993, and **Annes Allen v. D.P.P.** (C.A.T.) Criminal Appeal No. 173 of 2007 (both unreported), etc.

We are aware that the appellant had challenged the propriety of the identification parade. The learned first appellate judge dismissed this complaint because the appellant had not raised it at his trial. We have found this reason unconvincing because not only did the officer, who purportedly conducted that parade who could have been queried on the way it was carried out, not testify, but no single police officer testified. Had they testified would they have belied PW1 Rashid? May be, otherwise we cannot trace any reason on record for their failure to testify. An adverse inference against the prosecution ought, therefore, to be drawn here.

Two, it is trite law, that for "any identification parade to be of any value, the identifying witness(es) must have earlier given a detailed description of the suspect before being taken to the identification parade". See, **Emmillian Aidan Fungo @ Alex & Another v. R.,** (C.A.T.) Criminal Appeal No. 278 of 2008, **Ahmad Hassan Marwa v. R.,** (C.A.T.) Criminal Appeal No. 264 of 2005 (both unreported). Such evidence of prior description is sadly missing here. This fact further diminishes the weight of PW1 Rashid's visual identification evidence.

Three, if there was indeed any attack on PW1 Rashid, in broad day light by strangers who never threatened to harm him if he shouted, cried, etc. why did he not raise any alarm? Why did those people who allegedly converged at the scene of the crime, not go in hot pursuit of those three bandits, who were not heavily armed? These facts render PW1 Rashid's evidence highly suspect.

Four, and most importantly, if PW1 Rashid had made an impeccable identification of the appellant and Mustapha to have been among the three bandits who robbed him, why were seven (7) suspects in all arrested and charged in the first instance? This fact alone goes to prove beyond any reasonable doubt that all of them were arrested on mere suspicions. PW1

him but more so of their identities, if any robbery took place anyway. It seems to us it was mere guess work.

In view of the above, we are increasingly of the view that had the two courts below objectively scrutinised the evidence of PW1 Rashid, they would not have readily held that he made an unmistaken identification of the appellant at the scene of the crime. After all, if his evidence was cogent enough to convict the appellant, the same ought to have been used to convict Mustapha. We think it will serve a very useful purpose if we return to what we explicitly said in **Jaribu Abdalla v. R.,** Criminal Appeal No. 220 of 1994 (unreported), and have been repeating it whenever an appropriate occasion, as this one, presented itself. We held:-

> *"The conditions for identification might be ideal but that is no guarantee against untruthful evidence."*

See also, among others, **Ahmad H. Marwa v. R.** (*supra*).

In this case, therefore, it was not enough for the two courts below to look at factors (in the present case, only one factor) favouring an accurate identification, more importantly they had to scrupulously look at the credibility of PW1 Rashid. They, unfortunately, did not do so. Had they

done so, in our respectful opinion, they would have realized that his evidence was patently wanting in cogency. PW1 Rashid merely wished that the appellant was one of the robbers, but failed to prove so.

In the upshot we agree with the appellant and Mr. Mwamwenda that the appeal has merit and we allow it. We accordingly quash the conviction of the appellant and the sentences imposed on him, and set them aside. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

DATED at **IRINGA** this 31st day of July, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL