IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 130 OF 2011

KIJIJI MTATIRO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Sumari, J.)

Dated 01st day of June, 2007
in
Criminal Appeal No. 208 of 2004

.....

JUDGMENT OF THE COURT

19th & 24th September, 2013

ORIYO, J.A.:

The appellant, Kijiji Mtatiro was one of the three persons charged with the offence of Robbery with violence, contrary to sections 285 and 286 of the Penal Code, Cap 16, R.E. 2002.

The appellant was the third accused in the District Court of Musoma District sitting at Musoma. They were convicted as charged and sentenced to thirty (30) years imprisonment each, together with twelve (12) strokes.

They were also ordered to compensate the victims the cash robbed, Tshs. 500,000/=; and a total of Tshs. 300,000/= being compensation for injuries inflicted on them. Aggrieved, the appellant unsuccessfully appealed to the High Court, sitting at Mwanza. Still protesting his innocence, he has now come to this Court with a Memorandum of Appeal containing nine (9) grounds of appeal.

At the hearing of the appeal, the appellant had no legal representation, he fended for himself. The Republic/respondent was represented by Ms Revina Tibilengwa, learned State Attorney. At the request of the appellant, Ms Tiblilengwa was the first to make her submissions. Of the nine grounds of appeal filed by the appellant, the learned State Attorney opted to base her arguments in support of the appeal on one aspect only; that is whether the appellant was sufficiently identified at the scene of crime.

Sailing through the testimonies of PW1 (Nuru Hamisi), PW2 (Selina Ryoba) and PW3 (Bhoke Joseph) who was the host of PW1 and PW2 at her family residence on the fateful night, Ms Tibilengwa stated that the prosecution witnesses testified that the incident took place in the middle of

the night, around 1 a.m., on 13/6/2003 and they identified the robbers by the use of light from a chimney lamp, without disclosing the intensity of the light and the time the robbers spent in accomplishing the robbery incident. The learned State Attorney took issue with the evidence of the prosecution witnesses in that each knew the robbers since long time before the incident, since 1990 to be precise. She expressed suspicion on this piece of evidence because if the bandits were known to each of the witnesses she found it strange that they neither gave a description of the robbers, their names, clothes or their home places which they claimed to have visited on account of charcoal business. For instance, the witnesses alleged that they were assaulted and seriously injured by the appellants in the course of the robbery and immediately after the robbers left, they cried for help and neighbours gathered at the scene. Ms Tibilengwa found it not to be normal that the names, descriptions or the homes of the robbers were not given to those neighbours or to the police where the witnesses reported the incident and were given PF3 for their treatment at the hospital.

The learned State Attorney made specific reference to the evidence against the appellant. She stated that, according to the evidence on record, the appellant, who lived in the neighbourhood was not arrested until 22/6/2003 and no plausible reasons were given why it had to take that long to arrest him, if well known to the witnesses including his residence.

The learned State Attorney submitted that in view of the contradictions, unexplained delays and gaps evident in the prosecution case, it makes the prosecution identification evidence doubtful in that the appellant was sufficiently identified at the scene of crime. Ms. Tibilengwa, urged us to give the benefit of doubt to the appellant and allow the appeal.

It is settled law that evidence of visual identification, be that of a stranger or a person previously known, particularly when done under unfavourable conditions, is of the weakest kind and should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. The principles to be taken into account were enunciated by the Court in the

celebrated decision in the case of **Waziri Amani vs. Republic** [1980] TLR 250 at page 252. However the principles enumerated therein were not meant to be exhaustive or conclusive; and each case is to be decided on its own merits.

As observed earlier the cornerstone of Ms. Tibilengwa's submissions is that the evidence of visual identification at the scene on the fateful night was not watertight; it was doubtful and rendered it dangerous to ground a conviction thereon.

Beside the weak evidence of visual identification, there is yet another aspect of the case stated by the learned State Attorney in that the witnesses did not name the appellant and his co-accused to the people who had assembled at the scene in answer to the alarm raised after the incident or to the police to whom they reported the crime. Given the fact that the appellant was well known to the witnesses, no reasons were given on why they failed to name him or any of the other robbers at the time of reporting the incident to the police. This Court has consistently held that:-

".....the ability of a witness to name the offender at the earliest opportunity is reassuring

although not a decisive factor" ***Jaribu Abdalla V. R.,*** *[2003] TLR 27,* ***Mussa Mustapha Kusa and Another V. R.,*** *Criminal Appeal No. 57 of 2010 (unreported).*

In **Marwa W. Mwita and Another V. R.**, Criminal Appeal No. 6 of 1995, (unreported), the Court said:-

".....the ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability in the same way as unexplained delay or failure to do so should put a prudent court to inquiry."

In James **Kisabo @ Mirango and Another V. R.**, Criminal Appeal No. 216 of 2006 (unreported) the Court stated:-

"Contrary to the findings of the two courts below, we do not find any credible evidence on

record, to prove that PW1 had mentioned or described any of the appellants to the police or to her neighbours that volunteered to testify. The two courts below should therefore have been more cautious and not wholesomely accept PW1's evidence as credible especially on the question of identification, because even in the most favourable of conditions, there is no guarantee against untruthful evidence or mistaken identity. It was prudent for the two courts below to have looked for corroboration before proceeding to found a conviction. On our part we are not prepared to accept that in the circumstances, the evidence of visual identification of the appellant was watertight."

There is no gainsaying that both the trial magistrate and the learned first appellate judge, with respect, failed to treat the identification evidence of PW1, PW2 and PW3 with caution. The only factor which they

considered was that since the appellant was previously well known to them, there could not be any mistaken identity of the appellant.

The witnesses testified that they identified the appellant and his co-accused by the light from a chimney lamp placed on a wall to light a verandah and adjoining bedroom. The incident having taken place at 1 a.m., in the absence of evidence to the contrary, it was dark outside and the possibility of impeccable visual identification at the scene in the circumstances is highly doubtful. In the case of **Said Chally Scania v. Republic,** Criminal Appeal No. 69 of 2005 (unreported) the Court held:-

> *"...we think that where a witness is testifying about identifying another person in unfavourable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identifiacation is correct and reliable. To do so, he will need to mention all aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity..."*

In similar circumstances, in the case of **Kulwa s/o Makwajape and Two Others V. R.,** Criminal Appeal No. 35 of 2005, (unreported),

the Court held:-

> *".....the intensity and illumination of the lamp is important so that a clear picture is given of the condition in which the appellants were identified."*

See also a subsequent decision of **Nyakango Olala James V. R.,** Criminal Appeal No. 32 of 2010 (unreported).

In view of the evidence on record, and the relevant laws pertaining to visual identification, we agree with the learned State Attorney that the undisputed evidence available on record was insufficient to ground a conviction. The visual identification evidence is doubtful. As urged by the learned State Attorney, the benefit of doubt goes to the appellant.

In the event, we allow the appeal, quash and set aside the appellant's conviction. The sentence of imprisonment and compensation orders are also set aside.

We order that the appellant be set free forthwith unless otherwise lawfully held.

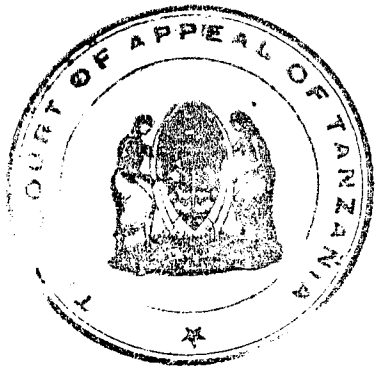
DATED at MWANZA this 23rd day of September, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL