IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MSOFFE, J. A., KILEO, J.A., And KIMARO, J. A.)

CRIMINAL APPEAL NO 164 OF 2013

RAJABU s/o ISSA NGURE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

[Mjasiri, J.]

dated the 8th Day of December 2003
in
Criminal Appeal No 8 of 2003)

JUDGMENT OF THE COURT

23rd & 25th September 2013

KILEO, J. A.:

The appellant, Rajabu Issa Ngure together with two other persons namely Adinani Ally Juma and Bakari Juma were arraigned in the District Court of Kondoa with the charge of armed robbery contrary to sections 285 and 286 of The Penal Code. The appellant and Adinani Juma were convicted while Bakari Juma was acquitted. Being aggrieved by the conviction and sentence the appellant and Adinani Ally Juma unsuccessfully appealed to the High Court. Still undaunted the appellant has come to this Court on a second appeal.

Briefly, it was tendered in evidence in the trial court that at around 4 am on 04/09/2002 PW1 who was spending the night with one of his wives (PW3) was invaded by a group of bandits whom he identified as the appellant and the two others who appeared in the District Court along with the appellant. Among things that were allegedly stolen from the victims was a radio, cash money and a torch.

The appellant's conviction was grounded mainly on identification and recent possession of stolen property.

The appellant who appeared before us in person filed a memorandum of appeal comprising of six grounds. Basically, the appellant's complaint is based on three major grounds: One, that he was not sufficiently identified at the scene of crime, secondly, that there was no positive identification of the torch that he was found with as being the one stolen from the victim and thirdly, that his defence was not considered.

When he was called upon to submit on his grounds of appeal the appellant did not have much to say, (understandably being a lay person) but left it to the Republic to submit before he could decide whether or not to respond.

Ms Salome Magessa, learned State Attorney who represented the respondent Republic did not support the conviction and sentence. She

argued that identification, which was crucial in the circumstances of the case, was not watertight particularly in view of the fact that intensity of the light from the lamp that was said to have been burning that night (4am) was not given. In support of her argument she made reference to an unreported decision of this Court in Criminal Appeal No. 86 of 2009 - **Hamisi Hussein and 2 Others versus the Republic.**

The Court in the above case cited another decision of the Court in **Issa s/o Magara @ Shuka versus the Republic** where the following statement was made by the Court.

> *"In our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs fluorescent tubes, hurricane lamps, wick lamps, lanterns etc give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in evidence sufficient details the intensity and size of the area illuminated. We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was*

the case here, mistakes in recognition of close relatives and friends are often made."

Bearing the above in mind, mistaken identity in the circumstances could not be ruled out, argued the learned State Attorney.

Ms. Magessa further submitted that there were other aspects of the prosecution case which made proof beyond reasonable doubt to be wanting. These aspects included the delay in the arrest of the appellant, failure to resolve ownership dispute in relation to the 'torch', failure to consider the defence case and the contradiction in the witnesses' testimonies as regards the type of weapon that was used in the commission of the crime.

We will begin our discourse of the matter by looking at the issue of identification. Admittedly, the crime was committed at night. Both PW1 and PW3 alleged to have identified the appellant whom they knew prior to the incident through light from a lamp which was burning in their room that night. The question is, was there proof of sufficiency of the light for purposes of watertight identification? We noted in the **Issa Magara** case cited above that source of light alongside its intensity through which identification is purported to be made is of paramount importance. In the

present case intensity of the light which we think, in the circumstances of the case was crucial, was not given.

Moreover, we must hasten to say that when the circumstances of the case are taken in their totality, the evidence of identification becomes highly suspect. In the first place, as submitted by Ms Magessa the question of ownership of the 'torch' that was allegedly stolen from PW1 was not resolved. To start with, it was not clear whether the 'torch' was stolen from the house where the appellant was sleeping with his wife - PW3 or from his other wife – PW2. PW2's evidence was confusing at most.

Mwakagenda vs. R – Cr. Appeal No. 94 of 2007 (unreported) stated the position of the law in regard to the doctrine of recent possession in the following terms:

> *"where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved,* ***first****, that the property was found with the suspect,* ***second*** *that the property is positively proved to be the property of the complainant,* ***third****, that the property was recently stolen from the complainant,*

*and **lastly**, that the stolen thing constitutes the subject of the charge against the accused... ...."*

In this case the appellant asserted that the 'torch' belonged to him. There is nowhere in the evidence of PW1 where he said he positively identified the 'torch' as being the one stolen from him. There is no dispute that a 'torch' is a very common item and it was upon the prosecution to establish beyond doubt that the 'torch found in possession of the appellant was actually the one stolen from the complainant. The appellant's cross examination of PW7 indicated that the 'torch' actually belonged to him. It is rather puzzling that the one who alleged to have been robbed of his 'torch' did not describe it in court. The resolution of this puzzle could only be explained in favour of the appellant. As for the iron bar which was found in possession of the appellant, and which was claimed to have been used in the robbery, he claimed that it was his property. Iron bars are common items and it was upon the prosecution to establish that the iron bar found with the appellant was the one used in the commission of the crime.

The appellant also complained about his defence not being considered. Ms Magessa conceded to this contention. The appellant raised the defence of alibi in the course of giving his defence. The law on the

defence of alibi is to be found in section 194 (4)-(6) of the Criminal Procedure Act, Cap 20,

R. E. 2002 (CPA) which provides as here under:

"(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.

(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.

(6) If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence."

It is to be appreciated that the appellant who is a lay person could not be expected to understand the rigors of the criminal justice system. It would have been different if the appellant was advised from the very beginning, preferably by the court, about the requirement contained in section 194 of the CPA. All the same, what the law provides is that if notice of the defence of alibi is not furnished pursuant to the provisions of section 194 of the CPA, the court may in its discretion decide not to accord it any weight. We think that the discretion must be exercised judicially and such

exercise will no doubt involve a look at all the surrounding circumstances. When we look at the circumstances of this case for example, we note that the appellant was not immediately arrested. He was arrested two days following the incident. There is no explanation as to why this was so while it is on record that the appellant was PW1's neighbour. The appellant's explanation that he was working at his site and was not at the scene of crime is consistent with the fact that he was not immediately arrested. It could probably be that he was not immediately arrested because identity of the culprits was not certain.

Ms. Magessa did also point out, and we agree with her, that there were inconsistencies in the testimonies of the prosecution witnesses which ought to have been resolved in the appellant's favour. PW4 testified to the effect that when they visited the scene of crime they found 'the cartridge of muzzle' yet none of the victims gave any mention of a gun having been fired. PW4 gave evidence to the effect that in the course of the search the appellant identified the disputed 'torch' as belonging to him. PW6, the police man who was in the search party gave evidence to the effect that the complainant identified the 'torch' as his. In view of these glaring inconsistencies, and bearing in mind that the complainant did not prove

ownership of the disputed 'torch' by describing its special marks it was highly unsafe to enter a conviction against the appellant.

In the end, having considered the appeal as above we find it to have merit. We accordingly allow it. Conviction is quashed and sentence imposed is set aside. The appellant is to be released from custody forthwith unless he is therein held for lawful cause.

Dated at **Dodoma** this 24th Day of September 2013.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL