IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO 101 B OF 2011

IDRISA SHABAN .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Kaduri, J)

dated the 8th day of December, 2010
in
Criminal Appeal No. 2 of 2002
.....

JUDGMENT OF THE COURT

24th November & 1st December, 2015

MUGASHA, J.A.:

In the District Court of Kasulu, the appellant **IDRISA SHABAN** and two other persons (**CHARLES MAKULE** and **MWITA CHACHA** were arraigned as hereunder:

> *"**STATEMENT OF OFFENCE:** Armed Robbery c/s 285 and 286 of the Penal Code Cap 16 of the laws.*
>
> ***PARTICULARS OF THE OFFENCE:** That Charles s/o Makule, Idrissa s/o Shaban and Mwita Chuma is hereby charged, on 20th day of November, 2008 at about 18.30 hrs at Kasulu Market area within Kasulu District in Kigoma region did steal cash money Tshs. 7,000,000/= and US$ 67,000 the property of one **EVANCE s/o CHACHA** and immediately before or after such stealing the said property did grievous harm **ASHEL***

S/O CHOCHA *by firing him with ammunition of SMG/SAR in order to obtain or retain the said stolen amount of money.*

STATEMENT OF OFFENCE: *Armed Robbery c/s 285 and 286 of the Penal Code Cap 16 of the laws.*

PARTICULARS OF THE OFFENCE: *That Charles s/o Makule, Idrissa s/o Shaban and Mwita Chuma is hereby charged, on the same date and time and place aforementioned from the first count also did enter into the shop of one LUCAS S/O REGAMA and steal various Cellular phones valued at Tshs. 20,000,000/= and immediately before such stealing the said property did fire ammunition into the air in order to obtain or retain the things stolen."*

They all denied the charge subsequent to which the prosecution paraded eight witnesses and two documentary exhibits to establish the prosecution case. The defence had six witnesses including the accused persons. After a full trial, the presiding magistrate found the prosecution case not proved against **CHARLES MAKULE** and accordingly acquitted him. However, the appellant and **MWITA CHACHA** were convicted with both two counts and sentenced to imprisonment for thirty years. They were further ordered to refund the stolen sum of Tshs. 7,000,000/= to **EVANCE CHOCHA** and Tshs. 20,000,000/= to **LUCAS** being value of the stolen cellular phones.

Dissatisfied, they preferred an appeal to the High Court and after a full hearing of the appeal, Kaduri, J acquitted **MWITA CHACHA** and upheld the conviction of the appellant in respect of the first count but acquitted him for the second count. Aggrieved, the appellant has appealed to this Court raising eight grounds in the Memorandum of appeal hereunder reproduced:

1. That, the 1st appellate court wrongly upheld the conviction of the trial court relying on the witnesses PW1, PW2 and PW3 but failed to note that their evidence mislead the truth.
2. That the 1st appellate court wrongly upheld the conviction of the trial court relying on evidence which was contradictory.
3. That the 1st appellate court wrongly upheld the conviction of the trial court relying on evidence of PW3 **ASHEL CHOCHA** who failed to give description of identification and indeed failed to mention the name of appellant ended by saying the 2nd accused and thus his allegation that he knew the appellant is baseless or else there was no need of the identification parade.
4. That the 1st appellate court wrongly upheld the conviction of the trial court relying on evidence of PW3 who mentioned the appellant to PW4 who had lost consciousness while the appellant who was in Kasulu from 20/11/2008 to 24/12/2008 when he was arrested.
5. That the 1st appellate court wrongly upheld the conviction of the of the trial court relying on the evidence of PW1,PW2,PW3 and PW4 who alleged to have heard gun shots while in town before the bandits came to their shop but remained stable without being horrified.
6. That the 1st appellate court wrongly upheld the conviction of the of the trial court relying on evidence of PW6 **SSGT EMMANUEL** who conducted the identification parade on 29.12.2008 four days after date of arrest.
7. That the 1st appellate court wrongly upheld the conviction of the trial court relying on evidence of PW3 who alleged to be shot but failed to note that PW3 was not availed with PF3 and sent to the hospital and the Doctor who attended him was not summoned.
8. That the prosecution case was not proved beyond all reasonable doubt.

The gist of the prosecution evidence during trial is that, on 20th November, 2008 at about 6.00 pm armed bandits invaded two shops one being that of (PW2) **LUCAS LEGAMA** where cellular phones worth Tshs. 28,000,000/= were stolen and the shop of (PW4) **EVANS CHOCHA** where a cash box and Tshs. 7,000,000/= and USD 67,000 were stolen. PW1 **YEKONIA GWIMO** and PW3 **ASHEL CHOCHA** were attendants in the shop of PW4 and witnessed the fateful incident. According to PW3 and PW1, after the bandits stormed into their shop and took the cash box and cash money. Then the appellant shot PW3 on the chest who was seriously wounded but nevertheless managed to identify the appellant who according to the witness: **One,** on the fateful day stood close and in front of him near the door and took Tshs. 400,000/= and the cashbox. **Two,** the appellant was not a stranger to PW3 because on the same day at about 11.00 am he changed dollars with PW4. **Three,** despite being seriously injured PW3 mentioned to PW1 the name of the appellant being one of the assailants. **Four,** the appellant was their former or rather regular customer and **five,** on 28th November, 2008 PW3 was summoned to the police at the identification parade and he identified the appellant from the ten paradees. However, PW1 identified some other bandits but not the appellant. According to PW4 and PW5 the robbery incident was narrated to them by PW3 who also mentioned the appellant to be the culprit. PW6 testified to have conducted the identification parade whereby PW3 identified the appellant as the one who shot him. PW6 tendered the extract of the identification parade form No. 186 which was received in evidence as **EXHIBIT P 1**.

All accused persons denied the offence. In his defence the appellant told the trial court that, he was a regular customer purchasing goods at the shop and knew PW3 **ASHEL CHOCHA** since 2007. On 12th December, 2008, he went to the respective shop to purchase a Mixer at a price of Tshs. 390,000/=. Upon agreement with PW4, the appellant paid the initial instalment of Tshs. 250,000/= and he was issued with a receipt by PW1 who remained with the mixer. On 16th December, 2008 the appellant went to the shop to collect the mixer and was informed that the mixer was not in the shop but in their store. As such, the appellant was required and he paid the remaining sum of Tshs. 140,000/= and was issued with a receipt by PW1. However, on 24th December, 2008 shortly after collecting the mixer from PW4 he was arrested and taken to the police where his receipts were taken by the police officer.

At the hearing before us, the appellant appeared in person and the respondent Republic was represented by Mr. Idelphonce Mukandara, learned State Attorney. The appellant opted to initially hear the submission of the learned State Attorney who supported the appeal. He submitted that, much as the fateful incident is alleged to have been committed at 18.00 hrs when there was sufficient light and conditions were conducive for the proper identification of the appellant who was a regular customer of PW3, however, PW3 did not avail the terms of description of the appellant which cements the appellant's complaint on his delayed arrest to 24th December, 2008 when he went to collect the mixer at the shop of PW4. He argued, in the absence of the evidence that the appellant had escaped and all along resided in Kasulu it is doubtful if the

appellant was properly identified. The learned state attorney also challenged the credibility of PW3 who claims to have been shot and sustained injuries and hospitalised although the record does not indicate if the incident was reported to the police considering that the nature of weapon used and inflicted injury if any, on PW3's chest. In the alternative, he argued that, if PW3 was shot and lost consciousness as alleged, then it is doubtful if in such state he could have identified the appellant.

Regarding the identification parade, he submitted that, apart from lacking terms of description of the appellant from the identifying witness, it is not clear if the appellant was at the parade because his participation is not reflected in any of the two identification parade registers tendered in court. Besides, while PW6 claims to have conducted the parade, the identification parade register shows that it was conducted by a certain Assistant Inspector.

When asked by the Court to comment on the propriety of the second count in the charge sheet, he argued that, the same was defective because it lacks the name of a person to whom the gun was directed during the alleged robbery incident. The appellant had nothing useful to add in rejoinder.

Initially, we propose to address the issue pertaining to the propriety of the charge sheet which was raised by the Court *suo motu*. As intimated earlier, the appellants were charged with two counts of armed robbery contrary to sections 285 and 286 of the Penal Code Cap 16 which provides as follows:

Any person who steals anything and, or immediately before or after the time of stealing, uses or threatens to use actual violence ***to any person*** *in order to obtain or retain the thing*

*Stolen or to prevent or overcome resistance to its being stolen is guilty of robbery" (***Emphasis supplied).**

Guided by the cited section and having scrutinised the charge sheet, we are of settled view that it was incurably defective lacking essential element of the offence of armed robbery. We say so because in the second count the person upon whom actual violence was directed in order to retain the stolen property is not stated. This is a requirement of the law under section 132 of the Criminal Procedure Act CAP 20 RE: 2002 which provides:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

We are aware that all accused persons including the appellant were acquitted on the second count but considering that it is the charge sheet which lays a foundation of a trial, there is no doubt that this was a serious omission on the part of the prosecution as held in the case of **MUSSA MWAIKUNDA VS R** [2006] T.L.R 387 where the Court said:

"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of the offence"

An important element of the offence of robbery is indeed the use of force against the victim for the purposes of stealing or retaining the property after stealing the same. The omission to mention a person against whom force or the gun was directed therefore rendered the second count in the charge sheet defective because the accused persons were unaware of the charges in the second count. But the question we ask ourselves is whether the defect in the second count had any effect on the trial of first count on which the appellant was convicted. We are of a considered view that, the defect in the second count did not adversely impact the first count and the conviction thereof was not at all vitiated.

However, on our part we deem it imperative and worthy to remind the prosecution on the importance of the proper framing of charges against the accused persons and according to law as observed by the Court in the case of **ISIDORI PATRICE VS REPUBLIC,** CRIMINAL APPEAL NO 224 OF 2007 (Unreported) as follows:-

> *"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence with the*

necessary mens rea. Accordingly the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by the law".

The remaining issue for our determination is whether the remaining count of armed robbery was proved against the appellant. It is the complaint of the appellant that he was not properly identified at the scene of crime and that is why his arrest was delayed.

It is on record that, the robbery is alleged to have been committed at 18.00 hrs when light was sufficient and thus conditions favourable for the proper identification of the assailants. There is a chain of decisions of the Court elaborating on the necessity of the compliance with guidelines in order to avoid mistaken identity of a suspect when the evidence before the court is that of visual identification. In **WAZIRI AMANI VS REPUBLIC (1980) TLR 250** and **RAYMOND FRANCIS VS REPUBLIC** (1994) TLR 2 the stated guidelines were stated by the Court as follows:

(i) *If the witness is relying on some light as an aid of visual identification he must describe the source and intensity of that light.*

(ii) *The witness should explain how close he was to the culprit (s) and the time spent on the encounter.*

(iii) *The witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would*

in turn testify to that effect to lend credence to such witness's evidence.

(iv) *Ideally, upon receiving the description of the suspect (s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again.*

This Court in the case of **ADRIANO S/O AYONDO VS REPUBLIC,** CRIMINAL APPEAL NO. 29 OF 2009 (unreported) stated as follows:

> *"...it is settled law that for any identification parade to be of any value, the identifying witness must have earlier given a detailed description of the suspects:"*

In the case at hand, we are increasingly of the view that, notwithstanding the fact that the robbery is alleged to have been committed during day time, the requisite relevant guidelines were not considered because the testimonial account of PW3 does not suggest if he told PW4 the description of the appellant such as, the physique, attire of the appellant at the scene of crime. In this regard, we doubt if the appellant was properly identified at the scene of crime and that is why the arrest of the appellant was effected more than a month after the robbery incident. Besides, there is undisputed evidence on record of the prosecution and the defence that the appellant was a regular customer at the shop of PW4 coupled with the uncontroverted evidence of the appellant which is to the effect that, before his arrest he went to the same shop twice on 12/12/2008 and 16/12/2008 and yet he was not arrested. This confirms that, the appellant was not properly identified at the scene of crime.

Moreover, we agree with the learned state attorney that, even if the appellant participated in the parade, the purported identification is also doubtful in terms of the testimonial account of PW6 and the identification parade register due to the following: **One;** according to the register it is the Assistant Inspector who conducted the identification parade which is not compatible with evidence of PW6 (Detective Seargent Marko) who told the trial court that he is the one who conducted the parade. However, PW6 (**DETECTIVE SEARGENT MARKO**) is not among those authorised to conduct the identification parade in terms of the Police General Order No. 232 paragraph 2 (b) which states:

> *"Although the officer-in-charge of the case may be present, he will take no part in conducting the parade. The officer conducting the parade must be an officer unconnected with the case and, whenever possible, a Gazetted Officer. Officers below the rank of Assistant Inspector are not permitted to conduct Identification Parades."*

In the light of the cited Police General Order, if the identification parade was conducted by PW6 who was not of the rank of Assistant Inspector the purported parade was illegal and as such EXHIBIT P1 was wrongly admitted in evidence and relied upon by the trial court to convict the appellant.

Two, the name of the appellant is not among those who were in the identification parade which waters down the evidence on the appellant being identified at the parade as stated by PW6 and PW3. So in view of the conflicting

evidence and the doubtful evidence of PW6 it is very probable that PW6 did not conduct the identification parade which clouds a shadow of doubt on the identification of the appellant at the purported parade. In any case if the appellant was familiar to PW3 there was no need of conducting the identification parade.

Regarding the delayed arrest of the appellant, as rightly submitted by the learned state attorney the prosecution did not avail any explanation thereto. Considering that the appellant resided within Kasulu Town it cannot be safely vouched that the appellant was not within reach. Besides, there is a lot to be desired as to why the appellant's arrest was not effected on 12/12/2008 and 16/12/2008 when he went at the shop to purchase the mixer. This tells that PW3 did not identify the appellant.

In our perusal of both the judgments of the courts below, we did not see an attempt to eliminate all possibilities of mistaken identification of the appellant. The trial court, made its own generalisations as follows:

> *"In the instant case it was not disputed that the bandits who invaded or raided Kasulu Town in a horrifying manner had in their possession bombs and guns. However, it was not a matter disputed that those bandits who raided Kasulu Town did so during day time, at around 6.00 p.m. conditions favouring correct identification was under circumstances ideal. The victim of the crime had real possibility to honestly identify their assailants. As for the 2nd accused, Ashel confirmed that he properly identified the 2nd accused who shot him on the*

chest because first the accused was not stranger to him. He had known him before as the second accused was their customer. That the second accused used to purchase goods at their shop."

The first appellate court also fell on the same trap believing that the appellant was properly identified at the scene of crime relying on evidence of PW3 at page 54 to 55 of the record. In our considered view, and guided by the record, the credibility of the evidence of PW1 and PW3 is highly suspect. We are aware that, it is now trite law that in assessing the credibility of any witness, the trial court does not enjoy exclusive monopoly. Apart from the demeanour, even the Court on a second appeal has mandate to do so to advance the interests of justice. In this regard the Court stated in **SHABANI DAUDI VS REPUBLIC,** CRIMINAL APPEAL NO. 28 OF 2000 (Unreported) as follows:

"May be we start by acknowledging the credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of an accused person. In these two occasions the credibility of a witness can be determined even by the second appellate court when examining the findings of the first appellate court..."

Furthermore in **FESTO MAWATA VS REPUBLIC,** CRIMINAL APPEAL NO. 299 OF 2007 (Unreported) the Court stated that:

at the same time. On the other hand it is a fact of life again than even lying witnesses are often impressive and or convincing witnesses"

Apparently, during the canvassing of the appellant's complaint that he was not properly identified at the scene of crime, the discrediting falsity of evidence of PW1 and PW3 came to a limelight. We further question the credibility of PW1 and PW3 on following additional fronts: **Firstly,** as earlier stated, the two witnesses were all at the scene of crime working at the shop of PW4. Ordinarily, as the robbery incident occurred in their presence their testimonial account was not expected to vary. At page 9 when PW1 was cross examined by the appellant he replied as follows:

"...you was identified by Ashel s/o Chocha, you shoot him on the chest in order to kill him as he had properly identified you because you never faced me directly but that you faced my colleague Ashel Chocha directly"

In this regard, considering that the appellant was a regular customer and known to both PW1 and PW3 then PW1 ought to have identified him and mentioned his name at the earliest opportunity which was not the case. We are satisfied that, neither did PW3 identify the appellant nor mention him at the earliest opportune time which explains the delayed arrest of the appellant despite being in the vicinity. **Secondly,** it is far from reality that, PW3 who was unconscious after being shot on the chest had the capability to identify the appellant which is also negated by the delayed arrest of the appellant.

As earlier stated, uncontroverted defence of the appellant during the trial highly contradicted the prosecution case which in our view, it was not considered by the courts below.

In a nutshell, the prosecution did not prove the charge against the appellant. He was not identified at the scene of crime or else he ought to have been arrested at the earliest moment which was not the case as the arrest was made more than a month after the alleged robbery. In view of the above observation the appeal is meritorious and it is hereby allowed. Conviction is quashed and the sentence is set aside. The appellant should be released from prison forthwith unless otherwise lawfully held.

DATED at **TABORA** this 30th day of November, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL