IN THE COURT OF APPEAL OF TANZANIA
AT TABORA
(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)
CRIMINAL APPEAL NO. 276 OF 2014

SOSTENES MYAZAGIRO @ NYARUSHASI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Tabora)

(Rumanyika, J.)

dated the 4th day of February, 2014
in
(DC) Criminal Appeal No. 66 of 2013

JUDGMENT OF THE COURT

7th & 9th December, 2015
MUGASHA, J.A.:

In the District Court of Kibondo the appellant was arraigned with two counts of armed robbery and rape contrary to sections 287A and 130(1) and 131(1) of the Penal Code Cap. 16 RE. 2002 respectively.

The appellant did not plead guilty. He was acquitted for the offence of rape and convicted with armed robbery. Aggrieved, he appealed to the High Court where the learned Judge convicted the appellant with rape and sentenced him to 30 years imprisonment. However, the appellant was acquitted on the charge of armed robbery whereby respective conviction was quashed and the sentence of 30 years imprisonment set aside. Dissatisfied, the appellant has lodged a second appeal and in the memorandum of appeal

seven grounds of appeal which we have conveniently condensed into two namely: **One,** the evidence on visual identification is not watertight and the appellant was not properly identified at the scene of crime**. Two,** the defence of alibi was not properly considered as the prosecution's burden of proof was shifted on to the appellant.

The background to the appeal at hand is briefly as follows: it was alleged that on 21/11/2006 at 01.00 hours the house of **PW1 LAURENCIA d/o DASTAN** and **PW2 DOLOTHEA PAULO** was invaded by armed bandits. The assailants broke the door, assaulted them, and demanded to be given money. They also raped PW1 and PW2 and placed an empty bottle in the private parts of PW2. The bandits managed to take away Tshs. 5,000/= from PW2, foodstuffs, clothes, chicken and a goat. PW1 and PW2 testified to have been aided by a wick lamp and managed to have identified the appellant. PW3 (**PAULO MIKONDO**) PW1's father who during the incident was in another house, testified to have managed to identify the appellant aided by light of the torch which the bandits had. The appellant denied the offence and raised the defence of alibi in that on the fateful day he was admitted at the Kibondo hospital. He tendered the hospital medical certificate but **DR. JOSEPH TUTUBA** who was called as a court witness testified that the medical certificate was forged as the appellant was not hospitalized.

At the hearing of the appeal the appellant was unrepresented and Mr. Idelphonce Mukandara learned state attorney represented the respondent Republic. The appellant opted to hear initially the submission of the learned state attorney reserving the right of reply.

From the outset, the learned state attorney declined to support the conviction. He submitted that, the appellant was not properly identified at the scene of crime as light emanating from the wick lamp was weak and not sufficient. He argued that, the evidence of PW1 and PW3 that the bandits used torch light tells that the light from the wick lamp was not sufficient to aid proper identification of the appellant. He also submitted that while PW1 and PW2 testified that after bandits had departed neighbours came to the scene and assisted them to report the incident at Mkugwa police station, neither the neighbours nor the police investigator were paraded as witnesses. He added that a Sungusungu Commander who is alleged to have arrested the appellant was not paraded as a witness denying the trial court to know the circumstances surrounding the arrest. This cast doubt on the prosecution case because the neighbours and the police were material witnesses.

As to the effect of appellant telling lies about his admission in the hospital which was disproved by the evidence of the medical doctor, he argued that, it does not waive the duty of the prosecution to prove its case beyond

reasonable doubt. As for the appellant he supported the submission of the learned state attorney and urged us to set him free.

In convicting the appellant for rape, the High Court was satisfied that the presence of 'lantern lamp' aided the identifying witnesses to properly identify the appellant that he raped the victims. This being a second appeal, the mandate of the Court to interfere with the findings of facts on the Courts below is confined on unreasonableness of the decision, misapprehension of the evidence or violation of the principle of law. (See **IDDI SHABANI @ AMASI VS REPUBLIC** , CRIMINAL APPEAL NO. 111 OF 2006 (Unreported).

Thus, the issue for our determination is whether the appellant was properly identified at the scene of crime. Initially, we wish to point out that, there is a misapprehension of the evidence on record on the nature and type of light at the scene of crime and shifting the burden to the appellant to prove his innocence. Besides the courts below acting on the visual identification did not consider that all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight.

Both PW1 and PW2 testified that they identified the appellant with the aid of wick lamp while PW3 managed to identify the appellant with the aid of the torch held by the appellant. The Court has on numerous occasions re-stated that evidence of visual identification is of the weakest kind and most

unreliable. As such, courts must not act on visual identification unless and until all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight (**JOHN BALAZIOMWA, HAKIZIMANA ZEBEDAYO AND DEO MHIDINI VS REPUBLIC**), Criminal Appeal No. 56 of 2013 (unreported) which was referring to the case of **WAZIRI AMANI VS REPUBLIC** (1980) TLR 250. Where identification is done at night the Court has given guidelines on precautionary measures when evaluating evidence of visual identification where conditions are not conducive or rather favourable for the proper identification in order to avoid mistaken identity. In **RAYMOND FRANCIS VS REPUBLIC** (1994) TLR, 100 the Court said:

> *"... It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring correct identification is of utmost importance"*

In **SHAMIR S/O JOHN VS REPUBLIC,** CRIMINAL APPEAL NO. 166 OF 2004 (Unreported) this Court said:

> *"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone he knows, the court should always be*

aware that mistakes in recognition of close relatives and friends are sometimes made"

Watertight identification in our considered view, entails among other things the following:

- How long the witness had the accused under observation.
- What was the estimated distance between the two?
- If the offence occurred at night which kind of light existed and what was its intensity.
- Whether the accused was known to the witness before the incident.
- Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like which may have interrupted the latter's concentration.

In our perusal of the judgment of the trial court, notwithstanding the evidence of PW1, PW2 and PW3 that the appellant was not a stranger we did not see a deliberate attempt by the two courts below to eliminate all possibilities of mistaken identification of the appellant. The trial court itself made generalized statements on visual identification –

"We look the matter of identification of PW1, PW2 and PW2 said they identified at night through kerosene lamp... PW3 said also he switch on his torch which lighted on ... accused

face he identified clearly and he know he is son of Nyarubashi".

The evidence of PW1, PW2 and PW3 does not support the trial magistrate's assertion particularly on the source of light at scene of crime and who held the torch. The identifying portions in the evidence of PW1 is at page 7 where she was cross-examined by the appellant and stated that:

"I identified you because there was light of kerosene lamp (koroboi)."

At page 9 of the record PW2 testified as follows:

"The neighbours told us that, when they saw you in group and you're (sic) holding the gun... I know your name as NYARU. There was a kerosene lamp which helped me to identify you."

As for PW3 at page 10 he stated as follows:

"When I looked at the window I saw the accused carried a gun on his hand. It was easy to identify the accused because they switched the torch so there was light."

It is not disputed that the fateful incident occurred at mid night in the darkness. It is clear that both PW1 and PW2 did not explain on the intensity of the (koroboi) a wick lamp which assisted their visual identification of the appellant. PW3 did not claim to have lighted the torch on the face of the appellant and as such, we think the trial magistrate misapprehended evidence of PW1, PW2 and PW3 when he ruled out possibility of mistaken identity

considering that, the intensity of the light from the wick lamp stood unresolved. We are satisfied that, the light from a wick lamp was not sufficient to enable unmistaken identification of the appellant.

Besides, the evidence of PW1 that he identified the appellant when breaking the door leaves a lot to be desired. How could PW1 in the darkness and while inside the house see the bandits before they had stormed into their house? This confirms the testimonial account of PW2 that they were told by neigbours that the appellant was in the group of bandits and held a gun. Besides, the neighbours escorted them to the police to report the incident. However, neither the neighbour nor a police officer were paraded as a witness which puts the prosecution evidence to question. The neighbours and the police were material witnesses to clarify to the court if the identifying witness did at the earliest opportunity mention the appellant to be one of the bandits at the scene of crime. Failure to parade those material witnesses' clouds the prosecution case with doubts leaving questions unanswered and this Court is entitled to draw adverse inference as said by the Court in **AZIZ ABDALLA VS REPUBLIC (1991) TLR. 71** the Court held:

> *"The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason*

being shown, the court may draw an inference adverse to the prosecution".

We viewed this as a serious anomaly on the prosecution which ought to have fielded the material witnesses.

In the first appellate Court the judge showed that he was very much alive to the risks of relying on visual identification especially at night, is of the weakest kind. However, the judge concluded that under a "lantern lamp" the issue of improper visual identification cannot arise. With due respect we consider this to be a misdirection because none of the witnesses testified on the presence of a lantern lamp at the scene of crime.

In our considered view, the conviction of the appellant was based on the weakness of the defence case following the disproval of the same by the medical doctor. It is the principle of the law that, the burden of proof lies on the prosecution and the accused bears no duty to prove his innocence. (**SEE ARMAN GUEHI VS REPUBLIC,** CRIMINAL APPEAL NO. 242 of 2010 and **NYEURA PATRICK VS REPUBLIC** CRIMINAL APPEAL NO. 73 of 2013 (all unreported).

In the case at hand, even if the appellant opted to keep quiet the burden of the prosecution to prove its case was not discharged. But the appellant opted to rely on the defence of alibi whose failure was turned against him because he lied on his admission to the hospital. The Court has in

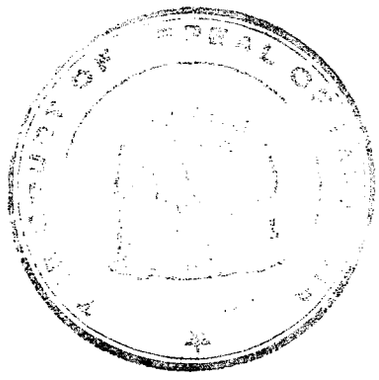
several occasions said that, lies of an accused person can be used to corroborate the prosecution case. **(SEE FELIX LUCAS KISINYIKA VS REPUBLIC,** CRIMINAL APPEAL NO. 129 OF 2002 (unreported). In **MASUMBUKO S/O MATATA @ MADATA AND TWO OTHERS VS REPUBLIC,** CRIMINAL APPEALS NO. 318, 319 and 320 OF 2009, (Unreported) the Court categorically stated that, lies of an accused can be used to corroborate evidence against him.

We accept that in this case, there is some evidence that the appellant presented some false evidence on the *alibi.* The question to be answered is, could the prosecution evidence in the present case be corroborated by those lies? In the case of **AZIZ ABDALLA VS REPUBLIC** (supra) the Court said: the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm or support that which as evidence is sufficient and satisfactory and credible. In the case under scrutiny, in the absence of watertight evidence on the visual identification of the appellant and the principle enunciated in the case of **AZIZ ABDALLA VS REPUBLIC** (supra), the lies told by the appellant added no value on the discrepant prosecution evidence.

In view of the aforesaid, we think that the failure of the two courts below did not relate evidence on record to principles guiding on evidence of visual identification. We are of the view that, the identification was not

watertight and we give the appellant the benefit of doubt. We therefore, allow the appeal quash conviction, set aside sentence and order the immediate release of the appellant unless he is held for some other lawful cause.

DATED at **TABORA** this 9th day of December, 2015.



B. M. LUANDA
JUSTICE OF APPEAL

S. A. MUGASHA
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