

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 200 OF 2015

POTIAN JOSEPH.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
At Arusha)**

(Massengi, J.)

Dated 23rd January, 2015

in

(HC) Criminal Appeal No. 81 of 2014

JUDGMENT OF THE COURT

Date 8th & 15th October, 2015

KILEO, J.A.:

The appellant Potian Joseph was charged with, and convicted of armed robbery contrary to section 287A of the Penal Code in the District Court of Babati at Babati. He was sentenced to the mandatory sentence of 30 years imprisonment and in addition he was ordered to pay 1,500,000/- as compensation to the victim of the robbery. He lost his appeal in the High Court hence this second appeal.

The facts of the case as they were unveiled from the prosecution case at the trial were simple. It was alleged that on 28/07/2012 at around 22 hrs the complainant (PW1) was on his way from the market

having sold his garlic and obtained shs 1,230,800/- when he was accosted by the appellant who robbed him of the money and his phone. In the process PW1 was seriously injured to the extent of losing consciousness and being admitted in hospital for some time. The complainant claimed that he identified the appellant as his assailant as there was moonlight. Other witnesses linked the appellant to the crime as they claimed to have met him coming from the spot where the victim was attacked. One of the witnesses said that when he got to the scene he found the victim saying, "Potianusiniue".

The appellant denied any involvement in the commission of the crime claiming that on the date of the incident he was not at the scene having gone to Haydom to prepare his farm.

At the hearing of the appeal the appellant appeared and argued his appeal in person. The respondent Republic which opposed the appeal was represented by Mr. Fortunatus Muhalila, learned State Attorney.

The appellant filed a memorandum of appeal consisting of the following four grounds:

1. *That, the Learned first appellate Judge misdirected herself and consequently erred in law in holding that the appellant was positively identified at the scene of crime*

2. *That, the learned first appellate Judge misdirected herself in law and in fact in ignoring the contradictions and inconsistencies in the prosecution evidence.*
3. *That, the Learned first appellate judge erred in law and infact when she failed to subject the evidence on record to a thorough evaluation and hence reached on an erroneous decision.*
4. *That, the learned first appellate Judge erred in law and infact when she held that PW1, PW2 and PW3 proved the prosecution case beyond reasonable doubt.*

As can be gathered from the above grounds the appellant's major complaints mainly centre on identification and inconsistencies in the prosecution case.

Identification and credibility of the witnesses are really the main issues in this case.

Since the incident occurred at night identification became a crucial issue. The appellant contended that identification was not water tight as witnesses did not explain the extent of the brightness of the moonlight. The appellant also submitted that the inconsistencies in the witnesses' testimonies rendered their evidence unreliable. Mr. Muhalila on the other hand argued that the appellant was well known to the identifying

witnesses and the possibility of mistaken identity did not arise. As for inconsistencies in the witnesses' evidence he contended that they were very minor differences with regard to the time mentioned and could not affect the credibility of the witnesses.

It is trite law that evidence of visual identification, be it of a stranger or a known person (i. e. recognition) is of the weakest type and courts should not act on it unless all possibilities of mistaken identity are eliminated. There is no dearth of authorities on the principles underlying visual identification. These include the celebrated case of **Waziri Amani v. R** [1980] TLR 250, **Raymond Francis v. R.** [1991] TLR 100 **Said Chally Scania v. R.** Criminal Appeal no. 69 of 2005 (unreported) **Issa s/o Mgara @ Shuka v. R.** Criminal Appeal No. 37 of 2005 (unreported) in **Issa Mgara's** case the Court emphasized that:

".....even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognise someone whom he knows, as was the case here, mistakes in recognition of close relatives and friend are often made."

In **Jaribu Abdallah v. R.** Criminal Appeal No. 220 of 1994 (unreported) the Court held that in addition to conditions favouring

correct identification, of equal importance is the credibility of witnesses.

The Court stated in that case

"....it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

Referring to **Nyakango Olala James v. R.**, Criminal Appeal No.32 of 2010 (unreported) the Court in **Galous Faustine Stanslaus v. R.** Criminal Appeal No 2 of 2009, (unreported) advised that courts should be wary of not only of honest but mistaken identifying witnesses but also of outright dishonest witnesses. Also the Court in **James Kisabo @ Mirango v. R.**, Criminal Appeal No. 261 of 2006 (unreported) stated:

"Even in most favourable conditions, there is no guarantee against untruthful evidence."

Coming to the present case, can we say that circumstances pertaining at the scene were favourable for water tight identification? What about reliability of the witnesses?

The Court in **Said Chally Scania** (supra) drawing inspiration from **Waziri Amani** (supra) 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

identification is correct and reliable. To do so, he will need to mention all the aids to unmistakable identification like proximity of the person identified, the source of light, its intensity, the length of the time the person being identified was within view and also whether the person is familiar or a stranger."

Admittedly, the appellant in this case was not a stranger to the witnesses. However, the incident occurred at night. Witnesses referred to moonlight as their source of light enabling them to recognise the appellant. Though under certain circumstances identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the complainant said there was "*enough moonlight.*" It is our considered view that it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained. The victim claimed that the appellant emerged from the sisal estates. Possibility of clear vision being obstructed in the circumstances could not be ruled out.

Apart from the fact that it was not established that the circumstances pertaining at the scene were favourable for watertight identification, credibility was also at stake. Normally, a trial court's finding as to credibility of witnesses is usually binding on an appeal court unless

there are circumstances on an appeal court on the record which call for a reassessment of their credibility. See for example; **Omari Ahmed v. Republic** [1983] TLR 52 (CA), **Ali Abdallah Rajab v Saada Abdallah Rajab and Others** [1994] TLR 132 (CA).

When he addressed us the appellant pointed out some inconsistencies in the testimonies of the witnesses which he claimed weakened the case for the prosecution. For example he claimed that whereas the victim said that he lost consciousness before anyone could come for his rescue as it was night, PW3 claimed that when he went in response to the cry for help he found Augustino saying "Potianusiniue." ("Potiand on't kill me.") Incidentally, PW2 whom PW3 said he was with, did not state in his testimony that he heard the words "Potianusiniue", nor did PW2 say that he was with PW3. It is inconceivable that such crucial piece of evidence would have escaped the witness's mind and attention if really those words were uttered.

Another inconsistency that the appellant mentioned referred to dates. While PW1 claimed that the incident occurred on 28/07/2012, PW2 gave the date as 27/07/2012. Though this discrepancy might appear to be minor when taken in the light of the other inconsistencies it reduces the weight of the prosecution case.

PW1 claimed that the appellant was putting on a blue T-shirt and a black trouser. It is doubtful however whether someone can differentiate between blue and black in a moonlit night.

We are of the considered view, given the circumstances of the case as discussed above, that the credibility of the witnesses could not be guaranteed.

In the end we find that the appeal by Potian Joseph was filed with good cause. We accordingly allow it. Conviction entered is quashed and sentence is set aside. We order that the appellant be released from custody forthwith unless he is therein held for some lawful cause.

Dated at Arusha this 13th day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL