IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J. A., ORIYO, J. A., And MMILLA, J. A.)

CRIMINAL APPEALS NOs. 213 & 215 OF 2014

1. JOSEPH MICHAEL
2. HASHIMU KALUMUNA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(De-Mello, J.)

Dated the 26th day of May, 2014
in
(HC) Criminal Appeal No. 40 of 2013

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JUDGMENT OF THE COURT

13th & 18th March, 2015.

MBAROUK, J.A.:

In the District of Nyamagana at Mwanza, the appellants were arraigned and convicted for armed robbery, contrary to section 287A of the Penal Code, Cap. 16 (R.E. 2002) as amended by Act No. 4 of 2004. Upon conviction, the appellants were

sentenced to a statutory minimum sentence of thirty (30) years imprisonment. Their appeal before the High Court (De-Mello, J.) was dismissed in its entirety. Undaunted, they have preferred this second appeal.

A brief account of the facts at the trial court were as follows: On 25th January, 2012, at around 7:00 p.m. in the evening at Nyegezi area within Mwanza city, PW1, Fatuma Joseph a business woman was with her colleague called "Tall" talking about business matters. Thereafter, PW1 left for home. While approaching her house, PW1 saw a person called Joseph, identified as the 1st Appellant shinning a torch on her face, hence asked him "vipi mbona unanimulika usoni", literally meaning why are you shinning a torch on my face? A few steps from her house, PW1 found the 1st Appellant's friend called Hashimu identified as the 2nd Appellant. PW1 asked them "Nyie vipi mbona mpo pamoja?" literally meaning why are you together? The 1st and 2nd

Appellants remained silent, but the 2nd Appellant hit PW1 with an iron-bar on her hand, which led her handbag to fall down. Thereafter, the 1st Appellant hit PW1 on her head which made her to fall down and the 1st Appellant took PW1's cell phone while she was still on the ground. When she stood up, she heard them saying "Huyu katujua twende tummalize," literally meaning let us finish her as she has identified us. The 2nd Appellant hit PW1 with an iron bar again but it didn't hit her well. PW1 further testified that, she had with her a vouchers for voda, Tigo, Zain with Tshs. 600,000/=, and Tshs. 1,440,000/= cash money, 4 mobile phones, 3 Nokia, and another Ericson and 2 phones which belonged to her clients. At the scene of crime, PW1 testified that there was a security light far away. PW1 was then sent at the Police station where she was provided with a PF3 for medical treatment. She further testified that, after getting treatment, she told a policeman who came at the scene of crime that she

identified the people who hit her with the help of the security light and mentioned the names of the 1st and 2nd Appellants.

On his part, PW3 E. 4646 D/Cpl. Sospeter, a C.I.D. officer, testified to the effect that, when he visited the scene of crime, he found blood on the ground on a pavement between one house and another. He also saw the light about 50 meters from the scene of crime.

In their defence, the appellants categorically denied to have committed the offence charged against them.

In this appeal, the appellants appeared in person unrepresented. The 1st Appellant preferred a memorandum of appeal containing seven grounds of appeal and the 2nd Appellant preferred a five grounds memorandum of appeal. Both appellants prayed to adopt their written submissions in support

of their grounds of appeal and had nothing to submit. They requested for the learned State Attorney who represented the respondent/Republic to submit his reply to the grounds of appeal first and they will give their rejoinder later.

On his part, Mr. Lameck Merumba, learned State Attorney for the respondent/Republic did not support the appeal and opted to argue the appeal generally. He clustered the appellants' grounds of appeal into one main ground that identification was not water-tight. This was after the learned State Attorney found that some of the grounds of appeal were not the basis of the trial High Court's judgment.

He started by submitting that, both appellants were identified by PW1 who knew them before and went on further to name them at the earliest possible time to PW2 Mariam Joseph

who is her sister. He added that, PW1 even mentioned the work each appellant was doing for a living. In their defence each appellant supported that contention, where the 1st Appellant said that he was a mason, the 2nd Appellant said, he was working in a butcher shop. That proves that PW1 knew the appellants before, the learned State Attorney said. In support of his argument, he cited to us the decisions of this Court in the cases of **Marwa Wangiti Mwita Vs. Republic** [2002] TLR 39, **Mohamed Haruna @ Mtupeni and Another Vs. Republic,** Criminal Appeal No. 259 of 2007 and **Fungile Mazuri Vs. Republic,** Criminal Appeal No. 147 of 2012 (Both unreported).

In their rejoinder submissions, the 1st Appellant had nothing to submit. On his part, the 2nd Appellant strongly argued that, how can a person where a torch light is beamed to his face identify that person with a torch as claimed by PW1? He urged

us to find that PW1 was blinded by that beam of a torch light. Secondly, the 2nd Appellant submitted that PW3 the C.I.D. officer who went to the scene of crime found that the said security light was 50 meters from the place where he found blood on the pavements. Thirdly, he said, PW1 failed to give the intensity of that security light and the direction of the source of that light. Fourthly, he said, as the incident happened in the darkness, the prosecution was duty bound to eliminate all the elements of mistaken identity. For those reasons, the 2nd Appellant, prayed for the appeal to be allowed.

Various decisions of this Court have emphasized the necessity of proper identification of an accused person as a crucial element in proving a criminal charge especially during night time where there is darkness. This is to make sure that the possibilities of mistaken identity are eliminated.

It is now a settled law that, visual identification evidence is of the weakest kind and most unreliable and no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight. See the decision of this Court in a well celebrated case of **Waziri Amani Vs. Republic** [1980] TLR 250.

In the instant case, we agree with the learned State Attorney that PW1 knew the appellant, but the question is whether in the circumstances of this case where PW1 herself testified that the incident occurred at 7:00 p.m., when it was dark and the security light was far away. It is clear that, PW1 failed to explain the intensity of that security light at the scene of crime and that was supported by the evidence of PW3 the C.I.D. officer who investigated this case who testified that when

he visited the scene of crime, he found the security light mentioned by PW1 was 50 meters from the place where the alleged incident of robbery occurred. The collection of those issues has made us to ask ourselves, whether we can establish without any doubts that PW1 correctly identified the appellants at the scene of crime.

In the case of **Issa S/O Mgara @ Shuka Vs. Republic,** Criminal Appeal No. 37 of 2005 (unreported), this Court stated as follows:-

> *"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 ...give out light*

with varying intensities ... ***Hence the overriding need to give in evidence sufficient details of the intensity of the light and the size of the area illuminated."***

[Emphasis added.]

As pointed out earlier, PW1 has failed to give sufficient details of the intensity of the light at the scene of crime. Taking her own words that security light was far away, and PW3 who testified that the light was 50 meters from the place where the robbery occurred. That creates doubt as to whether PW1 correctly identified the appellants even if he knew them before. This Court in the case of **Said Chally Scania Vs. Republic,** Criminal Appeal No. 89 of 2005 (unreported) encounted a similar situation and it held as follows:-

"We wish to stress that even in recognition cases, ***clear evidence on source of light and its intensity is of paramount importance.*** *This is because, as occasionally held,* ***even when a 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."***

[Emphasis added.]

Also see, **Riziki Method @ Myumbo, Vs. The Republic,** Criminal Appeal No. 80 of 2008 and **Kulwa s/o Mwakajape and Two Others Vs. Republic,** Criminal Appeal No. 35 of 2005 (Both unreported).

In the circumstances and for the reasons stated above, we are of the considered opinion that the guilt of the appellants was not proved beyond reasonable doubt. Hence, we see it prudent to give the benefit of doubt in favour of the appellants.

In the event, we allow this appeal, quash the convictions and set aside the sentences. The appellants are to be released forthwith from prison unless otherwise they are lawfully held. It is so ordered.

DATED at **MWANZA** this 16th day of March, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL