IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 350 OF 2014

ELIPAFULA TIMOTHEO ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

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

(Munisi, J)
Dated the 19th day of February, 2014
In
Criminal Appeal No. 11 of 2011

JUDGMENT OF THE COURT

29th September, & 1st October, 2015

JUMA,J.A.:

The appellant, ELIPAFULA TIMOTHEO, was in the District Court of Mwanga convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16. Upon his conviction, the trial magistrate (S.O. Msigiti-SDM) sentenced him to serve a sentence of thirty years (30) in prison. The trial court also ordered the appellant to suffer six strokes of the cane as corporal punishment and to pay the complainant the value of the stolen property worth Tshs. 1, 100,000/=.

Aggrieved, the appellant preferred his first appeal in the High Court at Moshi. Msuya, J. dismissed it after finding that the appellant had been identified at the scene of crime as the perpetrator of the offence of armed robbery. Still dissatisfied, the appellant has come to this Court.

Briefly stated, the background facts giving rise to the present appeal are as follows: At around 19:00 hours on 18/8/2009, Grace Silla (PW1) was at her retail shop at Kifula Ugweno, selling mixed hardware and domestic commodities. While in her shop, one person came in and asked to buy cigarettes which PW1 did not have in her stock. That person went outside carrying a small bag which he had. Meanwhile two other customers walked into the shop. One of them bought airtime vouchers and was scratching for voucher numbers when the person who had gone out after failing to get cigarettes returned with a pistol and pointed at PW1 directing her to remain silent. According to PW1, the three intruders were the appellant, Adriano and Babu who were on the same mission.

Adriano and Babu went behind the counter and joined the appellant to demand money from PW1. The three did not believe PW1 when she told them that she did not have money. They took her to a room where she

remained under the guard of the appellant while Adriano and Babu went to the shop counter to take all the money they found. They also pulled out drawers and took pieces of *Kitenge* clothes and mobile phone vouchers.

The bandits then demanded to check the bedrooms. PW1 took them to all the three rooms of the house. The bandits did not find anything in bedrooms because PW1 did not sleep in that building. As she took them along, the bandits stole money and her NOKIA cellphone. PW1 managed to escape during a brief moment when the three bandits were arguing over money. They fired their pistol after her as she escaped into the darkness. The police who later visited the scene of crime collected bullet shells which were fired from the pistol.

A day after the armed robbery, Matilda Ombeni Mkwizu (PW2) was at her home at around 6 a.m. when Adriano, the appellant and another person identified as Babu, arrived. Adriano is her husband's nephew. Because Adriano and his two colleagues had promised to stay for the whole day, PW2 went to the shops leaving the guests at home with Kelvin, her nine year old son.

When PW2 returned home after a few hours, Kelvin told her that the guests had left. PW2 noticed that her children were playing with used phone vouchers which the departing guests had thrown. Bryson Elinihaki (PW3) testified about a visit which the appellant and his two colleagues paid at his house on 19/08/2009 at around 9.00 a.m. The visitors wanted PW3 to show them a shorter route to Mruma. PW3 escorted the visitors along a local path right up to Kikweni where he left them to continue with their journey.

Testifying in his defence, the appellant told the trial court how he was arrested by two policemen on 28/8/2009 at a railway crossing. The arresting officers asked him why he was wearing an army cap. After explaining that it was not an army uniform, they took him to his house which they searched. They then took him to the police station at Mwanga where he was asked whether he knew Adriano Simon. He told the police officers that he did not know this person, Adriano. Later, two policemen, one Jean and another Alfred invited the appellant to an identification parade where a woman allegedly identified him. The appellant denied any involvement in the commission of the offence of armed robbery.

Paraphrased, the ten grounds of appeal contend that the prosecution case against him was not proved beyond reasonable doubt. He faults the way the evidence of visual identification was used to place him at the scene of crime. The judgment of the trial court is faulted for lacking points for determination. The appellant contend that the two courts below failed to take into account the contradiction between, on one hand, the evidence of PW1, and on the other hand, the facts stated in the Preliminary Hearing.

The appellant complains about the use of an additional witness (PW5), who was not mentioned in the list of witnesses during the Preliminary Hearing. The appellant also believes that he was convicted on the weaknesses of his defence instead of strength of the prosecution evidence. The appellant complains why the sketch map was not exhibited in evidence. Finally, the appellant is aggrieved with what he describes as his conviction on the basis of "incredible evidence of prosecution witnesses".

The appellant appeared before us in person to argue his grounds of appeal. He also placed reliance on written submissions which he urged us to take into account. On the ground contending the case against him was

not proved to the required standard, the appellant submitted that the witnesses (PW2 and PW3) gave scant details of the bag which the person alleged by PW1 to be the appellant was carrying. The appellant also casts doubt at the claim by the complainant (PW1) that she knew him. Appellant wondered, if in fact PW1 knew him at all as she claimed, why she should say in her evidence on page 4 of the record that: **"I was hearing them calling the accused as Fula. They were three youths generally. The other one was commonly known as Babu."**

Casting further doubt on the claim that the complainant knew the appellant well before the day of the incident, the appellant referred us to the record of appeal (on page 5, line 34) where he was cross-examining PW1. Appellant wondered why the complainant should now refer to him as Lefula. He submitted that because the complainant was not specific whether he knew him as Fula or Lefula which are common names in the area, the two courts below should not have believed her testimony that the appellant was among the bandits who had attacked her.

The appellant next submitted to fault the two courts below for failing to find that the prevailing conditions at the scene of crime were not

conducive for his positive identification. Citing the decision of the Court in **Shamir John vs. R.**, Criminal Appeal No. 166 of 2004 (unreported) as his point of reference, he pointed out that the complainant neither specified the period of time she kept him under observation, nor indicated how close she was to him. In addition, the complainant did not specify the intensity of the tube lights like including their number, and whether the tube lights were outside the house or inside the rooms.

The appellant also wondered that, if the trial magistrate is correct that the complainant had known him and seen him for more than ten times before the incident, why she did not disclose his identity to her neighbours who had responded to her cries for help, and she had to wait to tell the police later. He also wondered why none of these neighbours testified. The appellant referred us to the record of appeal (page 5, 13th to 15th lines) where PW1 testified how after hearing the gunshots, she ran away for about 150 metres to Mrs. Hosein's house. And it was her neighbours who took her back to her house.

Ms. Neema Mwanda, learned Principal State Attorney, who appeared for the respondent Republic, opposed the appeal. She referred to the

evidence of the complainant and insisted that as against the appellant, all the ingredients of the offence of armed robbery under section 287A of the Penal Code were proved beyond reasonable doubt. The learned Principal State Attorney referred to the evidence where PW1 testified how the appellant was in the company of two other assailants when they invaded her shop, stole her Tshs. 650,000/- in cash, air time vouchers (Zein and Vodacom) worth Tshs. 270,000/- and her cellphone. The three assailants were armed with pistol which they fired. The learned Principal State Attorney urged us to dismiss the first and fourth grounds of appeal because the evidence of PW1 proved beyond reasonable doubt all the essential ingredients of the offence of armed robbery for which the appellant was convicted.

In urging us to dismiss the second ground of appeal regarding the identification of the appellant at the scene of crime, the learned Principal State Attorney referred us to the evidence of the complainant. The complainant testified that all tube lights were switched on, she submitted. PW1 recalled how the appellant first asked for cigarette to buy. The

learned Principal State Attorney further contended that PW1 knew both the appellant, and his accomplice Adriano, by their names.

From our examination of the evidence on record and submissions of the parties on ten grounds of appeal before us, we have come to the conclusion that determination of this second appeal hinge on the probity of visual identification of the appellant, and his recognition at the scene of crime. In other words, the two questions of law subject of this second appeal are the evidence of visual identification, and the evidence of recognition.

Whenever reliance is placed on evidence of visual identification or evidence of recognition, this Court has invariably insisted that courts should only act on such evidence after eliminating all the possibilities of mistaken identity and the potential of miscarriage of justice. This underlying caution is borne out of the appreciation that the visual identification is the weakest kind of evidence and invariably the most unreliable: **Waziri Amani v. R.** [1980] T.L.R. 250. In so far as evidence of recognition is concerned, this Court in **Juma Magori @ Patrick and Four Others vs. R.,** Criminal

Appeal No. 328 of 2014 (unreported) cautioned about the danger of mistaken recognition by stating:

> *"...We are also aware that "recognition evidence could not be trouble free", as was stated by Lord Lane in* ***R. v. Bently*** *[1991] Criminal Law Rex. 620 (C.A.), as even "mistakes in recognition of close relatives and friends are often made" (****Issa Mgara @ Shuka*** *(supra))."*

An inevitable question of law which we must determine is whether the visual identification or evidence of recognition by PW1 was made under the conditions that are conducive for positive and unmistaken identification and/or recognition of the appellant. The trial Senior District Magistrate was not in any doubt that PW1 had identified the appellant at the scene of crime:

> *"...Moreover, PW1, testified that he was used to see this accused at the locality for over 10 times and in all times, he was with Adriano whom she knows. That they have even been going to the shop in those previous visits for their needs. By this evidence and as the accused was the first to have asked for the services at the shop before the theft, I am satisfied that PW! identified the accused person un-mistakenly.*

The conclusion reached by the trial magistrate seems to have been influenced by the evidence of two prosecution witnesses, PW2 and PW3; who were not at the scene of crime. These witnesses claimed to have seen the appellant the following morning after the incident. The trial magistrate relied on their evidence to corroborate the identification and recognition evidence of the complainant:

> *"...There has been overwhelming evidence by the prosecution on Adriano and two others to have visited PW2 at an extraordinary time, that is at 06.00 hours and PW3 .... These two witnesses had ample time to be with the accused.... and both have testified that the accused had a bluish small bag on his back. ... These visits when compared to the identification of the accused at the event, brings about undoubted circumstances that the accused was at the event.....Being a resident at Mwanga township, one cannot visit another at Mcheni Ugweno over 20 kilometres and arrive at such time of 6.00 hrs in the morning. As the visit was at a village close to that of the event, then the accused existence at the locality cannot be doubted....."*

Munisi, J. of the first appellate court concurred with the finding of facts made by the trial court:

"...I agree with the trial Magistrate that once a firearm is used in the circumstances under discussion, the resulting offence is armed robbery..."

"...the critical point for determination as far as I am concerned is whether the appellant was properly identified by PW1 and whether the circumstantial evidence used by the trial Magistrate to support PW1's evidence could sustain the conviction entered.....

From PW1's evidence,.....it can be deduced that, the witness was familiar with the appellant as she used to see him at the village trading centre frequently in the company of Adriano and one Babu. She knew appellant by the name of Fula. The way PW1 explained how the three persons presented themselves at her shop and the duration she appears to have had spent with the three, i.e. between the entrance of the appellant on the pretext of buying cigarettes, the subduing of PW1 using a pistol the search for more money through the bedrooms and eventual return to the shop counter leaves no doubt that the witness had ample time with the accused. In my considered view, the time that PW1 stayed with the appellant was more than enough to make a positive identification for somebody who was familiar to her. The trial Magistrate was therefore justified in his findings on this aspect, having found PW1 to be a credible witness...

....The trial Magistrate found corroborative evidence through the evidence of PW2 and PW3. It was PW2's evidence that the appellant, Adriano and Babu visited her in the early hours of the morning of 19/8/2009 and that the appellant was carrying a dark blue small bag....."

We propose to ask ourselves whether there is any good cause for this second appellate court, to interfere with the concurrent finding of fact that the identification and recognition evidence of the complainant placed the appellant at the scene of crime. We can desist from interfering if we are satisfied that all possibilities of mistaken identity were eliminated by the two courts below.

It is clear to us that the trial and the first appellate courts did not advert themselves to the question of intensity of light sourced from undetermined number of tube lights. As a result, in so far as the identification of the appellant by the assistance of tube lights is concerned, we think, the appellant is justified to complain that the two courts below did not take into account the fact that the complainant did not specify the intensity of the tube lights and the position of this source of light to facilitate positive and unmistaken identification. In **Kashima Mnadi vs.**

R., Criminal Appeal No. 78 of 2011 (unreported) this Court had the occasion to remind the trial courts:

> *"...The **evidence must be given to show very clearly the intensity of the light they** produced so that to enable the court assess whether the conditions prevailing were favourable for proper identification. **Bare assertion is not enough.** This Court, in **Issa s/o Magara @ Shuka V R**, Criminal Appeal No. 37 of 2005 (unreported) observed:*
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> > *'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.'..."* [Emphasis added]

Since the complainant has insisted that she knew the appellant well before the incident, we think, the appellant is justified to fault the complainant for identifying his name as **Fula**, and in yet another moment to refer to him as **Lefula**. The appellant is also entitled to discredit the

evidence of recognition by asking why the complainant failed to disclose the name of the appellant to her neighbours who were first on the scene and she had to wait to inform one Corporal Gabriel of Police Post Msangeni who arrived during that fateful night but did not testify. In **Harod Sekache @ Salehe Kombo vs. R.**, Criminal Appeal No. 13 of 2007 (unreported) the Court wondered why the complainant failed to identify the assailant to the neighbours who had rushed to the scene of crime:

> *"...There is another aspect in the evidence which we have found rather discomforting. According to the evidence of PW2 and PW3 many people gathered at the scene of the crime following the alarm raised by PW2. Unfortunately, none of these people testified at the trial of the appellant. Nonetheless, since the two witnesses allegedly identified the appellant, one would have expected them to name or disclose him to the villagers who responded, with a view to having him arrested immediately as he was a resident of that village. .... That the appellant was not so immediately mentioned casts doubt on the veracity of PW2 and PW3 and so on the reliability of their identification evidence..."*

We must also note that the complainant did not identify the name of the police officer to whom she mentioned the name of the appellant as one of her assailants. It was Detective Station Sergeant Johansen (PW4) the investigating officer who identified Cpl. Gabriel from Msangeni Police Post as the police officer who was informed the identity of the appellant and his colleagues. Corporal Gabriel did not testify to confirm whether the complainant mentioned the name of the appellant to him at that early opportunity when he visited the scene of crime.

It is also not clear why the complainant did not mention the appellant to her husband who arrived at the scene about thirty minutes after the bandits had left. We think, if PW1 had at that earliest opportunity mentioned the name of the appellant, her neighbours would be busy looking for the appellant instead of looking for spent gun cartridges:

> *"...When I returned there my husband returned from Moshi after a while. He found me I'd been there for 30 minutes after the bandits had gone. He telephoned the police who came the same night. I was horrified at first and I did not even manage to talk to them. Later I talked to them and narrated what had occurred. They looked for the bullet shells but they found*

nothing on the night. The next day, I got informed (sic) that there were found some bullet shells...."

We think, with the above doubt shrouding the evidence of visual identification and the evidence of recognition used to convict the appellant, this Court cannot conclude that all the possibilities of mistaken identity and recognition of the appellant were eliminated to avoid possible miscarriage of justice.

In the event, we allow the appeal. We quash the conviction and set aside the sentence; and order that the appellant be released forthwith from custody unless he is otherwise lawfully held.

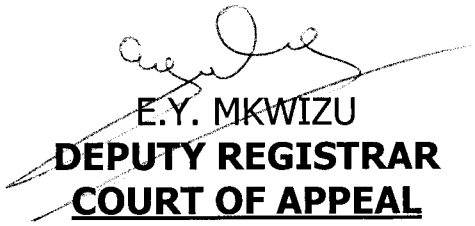
Dated at **Arusha** this 30th day of September, 2015.

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.



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