IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO.282 OF 2014

FREDINAND MATONGO .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Mziray, J.)

dated the 1st day of August, 2005
in
Criminal Appeal No. 59 of 2003

JUDGMENT OF THE COURT

26th November & 1st December, 2015

MUGASHA, J.A.:

In the District Court of Nzega, the appellant was arraigned as hereunder:

"1st COUNT:

OFFENCE SECTION AND LAW: Burglary c/s 294 (1) of the Penal Code Cap 16 VOL. 1 as amended by Act No. 6 of 1994.

PARTICULARS OF THE OFFENCE: *That Fredinand s/o Matongo charged on 18th day of January, 2003 at about 01.00hrs at Vita Village in Nzega District and Tabora Region did enter into the dwelling house of Hamka s/o Bundala with intent to commit felony to wit armed robbery.*

"2nd COUNT:

OFFENCE SECTION AND LAW: Armed Robbery c/s 285 and 286 of the Penal Code Cap 16 VOL. 1 as amended by Act No. 6 of 1994.

PARTICULARS OF THE OFFENCE: *That Fredinand s/o Matongo charged on the same date and time and place within Nzega District and Tabora Region after having broken and enter into the said dwelling house did steal cash Tshs. 258,000/= and one bicycle make Phoenix valued at Tshs. 57,000/= all total valued at Tshs. 315,/= the property of Hamka s/o Bundala and immediately after such stealing did use a bush knife in order to retain the said property stolen."*

The appellant denied the allegation and the prosecution paraded three witnesses and one documentary exhibit to establish its claim. The brief account of evidence during trial as follows: on 17/1/2003 at around 6.00p.m, the appellant went at the house of PW1 (HAMKA BUNDALA) the victim to look for his son who was employed by PW1 to graze cattle but the appellant did not see his son. According to PW1 and PW2 (ANJELINA HAMKA) at around 01.00 the appellant together with four bandits broke into PW1's dwelling house and stole Tshs.258,000/= a bicycle make phoenix and PW1 was cut on the head by a bush knife. PW1 and PW2 told the trial court that they identified the appellant with aid of a lamp light. PW3 (ANDREA MALIMA) went at the scene after the incident and was told by PW1 that he identified the appellant. During the same night they followed the appellant at his residence and took him to the police.

The appellant denied the offence but he admitted to have visited the house of PW1 at 6.00p.m. Thereafter, he went at the pombe club and went at his home to sleep. At night the appellant was awakened by PW3

who narrated to him about the incident and in the morning he was told that the PW1 had identified him at the scene of crime.

The trial court was impressed by the evidence of PW1 and PW2 that they had properly identified the appellant at the scene of crime because of the lamps present in their rooms when the bandits struck. Besides, being a village mate to PW1 and PW2 the appellant was not stranger to the identifying witnesses. Ultimately, the appellant was found guilty, convicted and sentenced to imprisonment to a term of five years for the offence of burglary and thirty years for armed robbery.

Aggrieved, the appellant appealed to the High Court which on ground of duplicity of the charge did quash the conviction and set aside the sentence of burglary but sustained the conviction of armed robbery after it found that the appellant was properly identified at the scene of crime. Still dissatisfied, the appellant has appealed to this Court raising six grounds of appeal which are conveniently condensed into one that, he was not properly identified at the scene of crime and as such, the first appellate court erred to sustain the conviction.

The appellant appeared in person and Mr. Juma Masanja learned Senior State Attorney represented the respondent Republic. The appellant fully adopted his memorandum of appeal but opted to initially hear the submission of the learned state attorney.

At the hearing of the appeal we *suo motu* prompted the learned Senior State Attorney to comment on the propriety of the charge sheet having realised that the charge of armed robbery lacks the name of the person who was threatened with a knife in the alleged robbery incident. The learned senior state attorney conceded that the charge sheet is defective because the statement of the offence did not particularise the victim against whom the violence was directed. As such, he argued that, the appellant was prejudiced because he was unaware of the nature of the charges which is an incurable irregularity which occasioned a miscarriage of justice.

As regards the appeal, the learned senior state attorney supported the appeal. He submitted that, the appellant was not properly identified at the scene of crime by PW1 and PW2 because the intensity of light from the hurricane lamp was not stated. As such, he argued that, the evidence on identification is weak as all possibilities of mistaken identification were not eliminated. He referred us to the cases of **RAYMOND FRANCIS VS REPUBLIC (1994) TLR 100** and **WEREMA WANGOKO WEREMA AND ANOTHER VS REPUBLIC,** CRIMINAL APPEAL NO 67 OF 2003 (Unreported). He also submitted that, during re-examination PW1 stated about the presence of the lamp light at the scene which was unfair to the appellant who had no opportunity to respond to the same, particularly as this was not part of his evidence during examination in chief nor did it arise in cross-examination.

When asked by the Court if the courts below considered the defence evidence, he submitted that the defence evidence was not considered and in addition argued that, the finding by the 1st appellate court that the conditions at the scene were favourable for the witness to identify the appellant is not backed by the record of trial.

We propose to first tackle the issue relating to the propriety of the charge sheet which we raised *suo motu*. The provision under which the appellant was charged is section 285 of the Penal Code which reads 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."*

Having carefully scrutinised the charge in relation with section 285 of the Penal Code, we are of a settled view that the charge sheet is incurably defective for lacking an essential ingredient of the offence of robbery as the person who was threatened is not mentioned. 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".

The essence of sufficiency of the required information in the charge sheet is to enable the accused person to be aware of the charge he is facing as observed by the Court in the case of **MUSSA MWAIKUNDA VS REPUBLIC** [2006] TLR 387 that:

"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 an offence."

In another case of **ISIDORI PATRICE VS REPUBLIC,** CRIMINAL APPEAL NO. 224 OF 2007 (Unreported) the Court stated 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".

In the case at hand, the charge sheet unduly prejudiced the appellant in his defence and as such, he was not fairly tried. Having determined that the appellant was not fairly tried on account of an incurably defective charge, we invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, [CAP 141 RE, 2002] and hereby quash the conviction and set aside the sentence meted out against the appellant.

We are reluctant to make an order for a retrial because we are satisfied that, the evidence adduced by the prosecution witnesses fell short of proving a charge against the appellant. It is on record that, the robbery incident was at mid night in the dark. In this regard, if visual identification should be relied upon then all possibilities of mistaken identity must be eliminated and the court is to be satisfied that the evidence before it is absolutely water tight. (**SEE WAZIRI AMANI VS R** [1980] 250 AND **RAYMOND FRANCIS VS R** [1994] TLR 100 **EMMANUEL LUKA AND OTHERS VS R,** CRIMINAL APPEAL NO. 325 OF 2010 (Unreported).

In its judgment the 1st appellate court at page 33 considering that PW1 and PW2 knew the appellant overruled the possibilities of mistaken identity as follows:

"There was sufficient lighting from the hurricane lamps lit in their respective rooms. There was ample time and distance at which the two witnesses observed the appellant at the scene. There was ample time and the distance was at close range for the two witnesses to make the identification."

With due respect, the finding by the 1st appellate court is not backed by record. Both PW1 and PW2 did not state the intensity of light from the hurricane lamp. They did not state the distance they were between them and the appellant and the time when the appellant was under observation. In the circumstances, we do not think that the witnesses managed to identify the appellant. The sole presence of a hurricane lamp at the scene of crime is not a guarantee of sufficient light at the scene of crime. Evidence as to the intensity of light must be paraded so as to enable the Court to assess if at all the conditions were conducive for the proper identification. Bare assertions that the appellant was a village mate of PW1 and PW2 are in fact not sufficient as observed by the Court in **ISSA S/O MAGARA @ SHUKA VS R,** CRIMINAL APPEAL NO. 37 OF 2005 (Unreported) observed:

"In our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of 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 pressure lamp or fluorescent tube. Hence

the overriding need to give in evidence sufficient details of the intensity and size of the area illuminated."

The Court went on to say:

"We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on sources 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 friends are often made"

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

"A witness might appear to be perfectly honest but mistaken 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"

In the light of what we have endeavoured to explain, it is not certain if the source of light of a hurricane lamp as asserted by PW1 and PW2 was sufficient to eliminate all possibilities of mistaken identity of the appellant. We entirely agree with the learned state attorney that evidence on identification is not at all water tight and under the circumstances it is doubtful if the appellant was properly identified at the scene of crime. As such, we decline to order a retrial.

ordered that the appellant should be released from prison forthwith unless detained for some other lawful cause.

DATED at **TABORA** this 28th 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