IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 325 OF 2013

KAMURI MASHAMBA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(De-Mello, J.)

dated the 25th day of September, 2013
in
Criminal Appeal No. 34 of 2012
.....

JUDGMENT OF THE COURT

29th May & 2nd June, 2015

JUMA, J.A.:

It was around midnight on 23/10/2010 and first complainant, Paulo Kigwasho (PW1) was at home at Ilumya village in Magu. He heard motorcycle passing around the area. Shortly thereafter he saw flash of lights and heard a voice enquiring "*alikuja?*" (Did he come?), another replied, "*ndio*" (Yes!). Suddenly, his door and the window of the room where his daughters slept were hit. As he woke from his bed, he heard yet another bang, this time urging him to surrender his money or else be killed. The door gave way as a bullet hit him on his head. Another hit his left hand and left side of his lung.

Still in his bedroom and fearing for his life, PW1 threw Tshs. 600,000/= into the sitting room. The money scattered on the floor distracted the invading bandits; each rushed to where the money was. They struggled amongst themselves to pick the money. About four people

entered PW1's house and the light from the solar electric lamp enabled him to identify the appellant, Kamuri Mashamba, as he competed with others to collect the money.

Meanwhile the second complainant, Emmanuel Paulo (PW2) was asleep in his own house when he, like PW1, heard motorcycles noises outside. From the vantage of his bedroom window, PW2 saw several people had surrounded his parents' house. PW2 had barely opened his doors when he saw people coming towards his house. Two bandits managed to break through his locked door and another two forced their way through the window. The second complainant insisted that he managed to identify the appellant to have been amongst the bandits who entered his bedroom, assaulted him before stealing his Tshs. 200,000/=.

On 24/11/2010 the appellant was charged before the District Court of Magu with two counts of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16. Particulars of the first account alleged that on 24/10/2010 the appellant stole Tshs. 660,000/= the properties of the first complainant (PW1), and use of a firearm in order to obtain or retain the stolen property. The second count alleged the stealing of Tshs. 200,000/= the property of the second complainant (PW2), and use of firearm to obtain or retain the stolen property.

Four witnesses testified for the prosecution. The appellant testified in his own defence as DW1 insisting he is being framed up for the charge of armed robbery. He blamed his arrest on earlier misunderstandings which he and the second complainant had. He also called on his wife Rehema d/o Elias (DW2) to testify in support of his defence. DW2 testified that there is no way her husband was involved because they were in fact asleep at their home when heard the noises indicating an on-going robbery taking place.

On 11/11/2011, R. Masige, the learned trial Resident Magistrate found the appellant guilty and convicted him of two counts of armed robbery. On the first count, the appellant was sentenced to serve thirty (30) years in prison, while on the second count he was sentenced to spend thirty (30) years of imprisonment. The sentences were ordered to run concurrently. Apart from the prison sentence, the appellant was in addition ordered pay compensation of Tshs. 660,000/= to the two complainants.

Aggrieved by the outcome of the trial, the appellant appealed to the High Court. He contested the way he was visually identified by the two complainants. He faulted the exhibition of medical examination report (PF3) by insisting that its admission contravened section 240 (3) of the Criminal Procedure Act, Cap. 20. He was aggrieved of the failure of the trial court to consider his defence and explanation of his earlier conflict with the complainants.

Justice J.A. De-Mello who heard the first appeal, sustained the appellant on his complaint that the medical examination reports were improperly admitted. This was a minor victory to the appellant because the learned judge affirmed the conclusion reached by the trial court to the effect that evidence of visual identification was sufficient to sustain his conviction and consequent sentence.

Dissatisfied with the dismissal of his first appeal, the appellant preferred this second appeal to this Court. In his memorandum of appeal the appellant has raised four grounds, namely:

1.) THAT, the trial and first appellate courts had grossly erred in law and fact by relying on unfavourable visual identification.

2.) THAT, the first appellate judge erred in law and fact to rely on the identification factors in which no descriptive features ever closed.

3.) THAT, the prosecution witness (the victim) failed to mention the appellant at the earliest opportunity.

4.) THAT, the trial and first appellate court based their conviction of the case which was not proved beyond reasonable doubts.

Mr. Victor Karumuna, learned Senior State Attorney who appeared for the respondent/Republic, readily supported the appeal mainly on the first, second and third grounds of appeal which in their totality contest the visual identification of the two complainants. This evidence was not sufficient to sustain the conviction of the appellant, the learned Senior State Attorney concluded. Elaborating on insufficiency of identification evidence, the learned Senior State Attorney referred us to the record of appeal where the first complainant purportedly identified the appellant assisted as he was, by a solar electric lamp. He also referred us to the evidence of the second complainant where this witness was assisted by light from a torch which the bandits had, and lights from the motorcycles, to identify the appellant. The learned Senior State Attorney submitted that these sources of lights were not sufficient within the settled guidelines of the Court to facilitate identification.

Still on the question of positive identification of the appellant, Mr. Karumuna wondered why PW1 and PW2 did not, at the earliest possible opportunity, mention the name of the appellant as their assailant. He also asked why PW1 did not mention the name of the appellant to the villagers who rushed to their assistance but had to wait to inform the police, who did

not even testify to confirm. With respect to PW2, Mr. Karumuna also wondered why he failed to mention the name of the appellant at earliest possible opportunity and had to wait till when he was in hospital when he informed the police who had visited him. On the effect of the failure to mention the assailant at earliest moment possible Mr. Karumuna referred us the decision of the Court in **Mkaima Mabagala vs. R.,** Criminal Appeal No. 267 of 2006 (unreported) which quoted a principle laid down in **Festo Mawata vs. R.**, Criminal Appeal No. 299 of 2007 (unreported) to the effect that:

> *"...Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted."*

On the strength of his foregoing submissions, Mr. Karumuna urged us to allow the appeal.

From submissions presented to us, we must at very outset agree with Mr. Karumuna that conviction of the appellant was based entirely on visual identification evidence of two complainants, PW1 and PW2. The first complainant stated that he identified the appellant with the aid of solar electric lamp. Torch and motorcycle lamps enabled the second complainant to identify the appellant. In so far as probity of the evidence of identifying witnesses is concerned, this Court has on numerous occasions restated that evidence of visual identification is of the weakest kind and most unreliable. Courts are not expected to act on such evidence without first eliminating all possibilities of mistaken identity and satisfying themselves that that evidence is absolutely watertight.- (see- **John Balagomwa, Hakizimana Zebedayo and Deo Mhidini vs. R.,** Criminal Appeal No. 56 of 2013

(unreported) which was referring to **Waziri Amani v. R.** [1980] T.L.R. 250).

The Court has also expounded on how courts can take deliberate measures of caution when evaluating evidence of visual identification especially if identification is done at night, when circumstances do not readily lend themselves to easy identification. For example, in **Omari Iddi Mbezi and Three Others vs. R.,** Criminal Appeal No. 227 of 2009 (unreported) the Court gave a few precautionary measures which courts may, depending on specific facts of the case, follow to avoid mistaken identities:

> *i.) If the witness is relying on some light as an aid of visual identification he must describe the source and intensity of that light.*
>
> *ii.) The witness should explain how close he was to the culprit (s) and the time spent on the encounter.*
>
> *iii.) The witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence.*
>
> *iv.) Ideally, upon receiving the description of the suspect(s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again.*

In our perusal of the considered judgment of the trial court, we did not see deliberate attempt to eliminate all possibilities of mistaken identification of the appellant. Instead, the trial magistrate acted on the generalized assertions by the complainants that they identified the appellant. The trial court itself made its own generalized statements on visual identification:

> *"...The complainant Pw1...has installed a solar power panel. On the material date the security lights from the panel were on....It is from these lights, and after* ***a long observations****, the accused was properly identified by Pw1 and Pw2 who went ahead to tell the and mentioned to Police."* [Emphasis added].

The evidence of PW1 and that of PW2 do not support the trial magistrate's assertion that there were any **long observations** under any source of lighting that facilitated identification of the appellants. The identifying portion in the evidence of PW1 on page 10, lines 8-14 runs as follows:-

> *"...When I threw the money down at the corridor the bandits started struggling for the money.* ***There I saw one of them, the accused. There was a solar electric lamp, which was on, that I managed to identify him.*** *I saw about four people entering into my house. I identify the accused when they were struggling for the money for he was one of the bandits who went and took the money...".* [Emphasis added].

Clearly, the first complainant has not explained how the source of lights actually assisted his visual identification of the appellant. The irony of the identifying evidence of the second complainant is to the effect that it was the bandits who shorn their torchlight and motorcycle lights to enable their victims to identify them! He offered no explanation how the bandits could use their own sources of light to facilitate their own arrest:

> *"...I identified the accused for the bandits had a torch and their motorcycles lamps were on and from these sources there was enough light to identify the accuseds..."*

The earliest possible opportunity available to two complainants was when other villagers rushed to the scene of crime to offer them assistance. PW1 and PW2 both testified that they knew the appellant well before the incident because he lived in their village. PW2 under cross examination stated that he had known the appellant for ten years before the incident. We cannot but wonder just like Mr. Karumuna, why these two identifying witnesses, failed to mention the name of the appellant to fellow villagers including his neighbor like Mabula Mlyakaji (PW3). Mr. Karumuna is with due respect correct to urge us to disregard the evidence of PW1 and PW2 and more so because they had to wait till much later to inform a policeman who did not testify to corroborate their evidence.

We think, the trial magistrate misapprehended the identification evidence of PW1 and PW2 when he ruled out the possibility of mistaken identity where these two witnesses made generalized statements of identification.

The High Court when it sat as a first appellate court, was expected re-evaluate the visual identification evidence of PW1 and PW2 and draw its own conclusions from that evidence. By placing reliance in **Magwisha Mzee vs. R.** Criminal Appeal No. 465 of 2007 (unreported), the learned first appellate Judge showed that she was very much alive to the risks attendant to visual identification especially identification at night which in many respects, is unfavourable and uncertain. A quotation from **Magwisha Mzee vs. R.** (supra) the Court states:

> *"...this court has consistently held that when it comes to issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witness was reasonably bright to enable the identifying witness to see and positively identify the accused person...bare assertion that there was light, would not suffice..."*

After citing several decisions which highlight the principles governing evidence of visual identification as established by the Court, the learned judge did not, we are afraid, play the role of first appellate court to re-evaluate the evidence on record and apply the principles earlier identified. In fact, the learned Judge did not touch any evidence, including that of visual identification before making the following decisive conclusion: *"...With or without the misunderstanding, it was the Appellant who was part of the bandits."*

Having perused the record of appeal, we do not think the two courts below evaluated the identifying evidence of PW1 and PW2 to live up to the principle that there must be sufficient light to enable the identifying witness

to see and positively identify the accused person beyond bare assertion that there was light.

We think that the failure of the two courts below to relate the evidence on record to principles guiding the acting on evidence of visual identification, provides an opening for this Court on second appeal to overturn the concurrent finding of facts which suggested that the appellant was positively identified by PW1 and PW2 at the scene of crime.

For the foregoing reasons, this appeal is meritorious. As a result, the appeal is allowed, conviction quashed and sentence set aside. The appellant is to be released from prison unless otherwise held on a lawful cause.

DATED at **MWANZA** this 30th day of May, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL