IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 273 OF 2014

JOHN BEDFORD NOMBO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

at Songea)

(Manento, J.)

dated the 5th day of April, 2004

in

Criminal Appeal No. 24 of 2003

.....

JUDGMENT OF THE COURT

26th & 31st August, 2015

MMILLA, J. A.:

John Bedford Nombo (the appellant), is behind bars serving a sentence of thirty (30) years imprisonment after he was on 20. 2. 2003 found guilty, convicted and sentenced by the District Court of Mbinga District in Ruvuma Region for the offence of armed robbery contrary to sections 285 and 286 of the Penal Code Cap. 16 Vol. I of the Laws. He unsuccessfully appealed to the High Court of Tanzania at Songea (Manento, J.), hence this second appeal to this Court.

To begin with, we have found it essential to revisit, albeit briefly, the background facts surrounding this case.

The charged incident was alleged to have occurred on 14.10.2000 at about 3:00 hours. On that day around that time, PW1 Bosco Ndunguru was asleep in his house with his wife and children. Suddenly, he heard his children crying for help. He woke up, lit the torch he had, and headed to the children's room. When he was at the corridor, he allegedly came "face to face" with the appellant who was in the company of one other person whom PW1 did not identify, both of whom were armed with machetes (pangas). Immediately thereafter, simultaneous to demanding to be given money, the appellant repeatedly attacked PW1 with a panga he had. Seeing that the complainant was not yielding to their demands, the appellant and his colleague forcefully entered into the complainant's bed room which they ransacked, looting there from several properties including cash T.shs.700, 000/= which was kept in one of complainant's trousers pockets, one radio cassette make National worth T.shs.135,000/=, a wrist watch make Seiko worth T.shs.5,000/=, one jacket worth Tshs.5, 000/=, and one piece of "kitenge" worth T.shs.1,500/=, after which they hurriedly left. In the course of the attack PW1, his wife and children had all trough raised alarm, but it

was not readily responded to by the neighbours. The record reveals that the neighbours arrived at the scene of crime after the bandits had vanished. The former took the complainant who was unconscious, to an unnamed police station where a PF3 was issued, subsequent to which they rushed him to hospital for treatment. He was hospitalized and was discharged after three days.

In his defence before the trial court, the appellant protested his innocence. He in particular raised a defence of alibi that on the date of the charged offence, he was away from Mhekela village as he had travelled to Mbinga Township at which, after meeting his friend, one Fabian Kapinga, they together proceeded to Mpepai village to buy maize for business. After a couple of days, he returned to, and remained at Mbinga Township where he stayed until the time he was arrested. Unfortunately, he was not believed.

Before us, the appellant appeared in person and fended for himself, while Mr. Wilbroad Ndunguru, learned State Attorney, represented the respondent Republic.

The appellant's memorandum of appeal has raised seven (7) grounds which we have found, upon a careful scrutiny that they converge on one

major point that he was not sufficiently identified by the complainant, his wife and their daughter. The learned State Attorney supported the appellant's concern that the latter was not adequately identified. He has thus persuaded us to allow the appeal.

At the commencement of the hearing of this appeal, the appellant elected for the learned State Attorney to begin, opting to submit thereafter if need might arise.

As already pointed out, the crucial issue is whether the appellant was sufficiently identified by the three eye witnesses namely; PW1 Bosco Ndunguru, PW2 Agnetha Ngongi and PW3 Maria Ndunguru. In Mr. Ndunguru's view, the answer is in the negative. He submitted that the appellant was not sufficiently identified for three reasons; **one** that, though PW1, PW2 and PW3 said they identified the appellant with the aid of the light sourced from the torch which PW1 flashed in the appellant's direction when he came face to face with him at the corridor, those witnesses did not however, explain the intensity of that light; **two** that, since it was alleged that the appellant repeatedly attacked PW1 with a panga immediately after they came face to face, there was a likelihood that the torch he held fell down, thus compounding the problem of visibility; and **three** that, though

the three eye witnesses testified that they had known the appellant before the date of the charged incident, the fact that PW1, PW2 and PW3 failed to describe the appellant, especially as regards the kind of clothes he had put on and also his physic, it cannot be said that mistaken identity was in any way possible vouched. In supporting his argument, he cited the famous case of **Waziri Amani v. Republic** [1980] T.L.R. 250. He urged the Court to hold that the evidence of visual identification was not water-tight and allow the appeal.

In his rejoinder submission, the appellant had nothing useful to say in reply to the submission of the learned State Attorney; rightly so in our view because of the nature of Mr. Ndunguru's submission which was in his favour. He rested his fate in the hands of the Court.

After carefully scrutinizing and weighing the evidence on record, we hasten to agree with Mr. Ndunguru that the merits or otherwise of the appeal before us revolve mainly on the aspect of visual identification from the three eye witnesses; PW1, PW2 and PW3. We are saying so because there is no dispute that the charged incident occurred at mid-night, therefore the conditions for identification required to have been, and should have been clearly established by cogent evidence.

We wish to revisit the Court's emphasis in the case of **Waziri Amani v. Republic** (supra) that evidence of visual identification is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water-tight. As will be remembered, the Court stressed in that case that before relying on such evidence, the trial courts should put into consideration the time the witness had the accused under observation, the distance at which the witness had the accused under observation, if there was any light, then the source and intensity of such light, and also whether the witness knew the accused before. See also the cases of **Raymond Francis v. Republic, [1994] TLR 100,** and **Aburaham Daniel v. Republic**, Criminal Appeal No. 6 of 2007 CAT (unreported), among others.

In the present case, the alleged robbery took place at mid-night. Although PW1, PW2 and PW3 said they managed to identify the appellant with the aid of the torch light, it is unfortunate that none of them explained its intensity. Worse more, as rightly submitted by Mr. Ndunguru, because the appellant was alleged to have repeatedly attacked PW1 with a panga immediately after they came face to face, human nature being what it is, it is highly possible that he dropped the torch, thereby reducing chances for

proper identification of their assailants. That being the case, we agree with Mr. Ndunguru that it was unsafe for the trial court and the first appellate court to have found that the condition was ideal for proper identification.

Also, it is true that all, PW1, PW2 and PW3 were express that they had known the appellant before that day. However, these witnesses did not describe the appellant; say the kind of clothes he had put, his physic, or any other special marks. Without doing so, it cannot be said that the possibilities of mistaken identity were eliminated. See the cases of **Issa Mgara @ Shuka v. Republic,** Criminal Appeal No. 37 of 2005 CAT and **Philipo Rukaiza @ Kichechembogo v. Republic,** Criminal Appeal No. 215 of 1994, CAT, (both unreported). In the former case of **Issa Mgara @ Shuka v. Republic**, the Court cautioned that:-

> *"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..., hence the overriding need to give in evidence sufficient details of the intensity and size of the area illuminated. 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 recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."

An equally significant and useful caution was expressed in **Philipo Rukaiza @ Kichechembogo v. Republic** (supra) where the Court emphasized that:-

"The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in identification notwithstanding the honest belief of a ruthful identifying witness."

See also the cases of **Shamir John v. Republic,** Criminal Appeal No. 166 of 2004 CAT and **Mengi Paulo S. Lihana & Another v. Republic,** Criminal appeal No. 222 of 2006 CAT (both unreported).

We are firm therefore, that because the possibilities of mistaken identity in the circumstances of the present case could not be ruled out, it

was improper for the trial court to have found, and the first appellate court to have upheld that the appellant was sufficiently identified, this is because we are hesitant to agree that the condition at the scene of crime was ideal for favourable and/or correct identification.

That said and done, we agree with Mr. Ndunguru that the appellant was not sufficiently identified. Consequently, we find and hold that the prosecution did not prove the case against the appellant beyond reasonable doubt. We thus quash the conviction and set aside the sentence thereof. We accordingly order his immediate release from prison unless otherwise continually held for some other lawful cause.

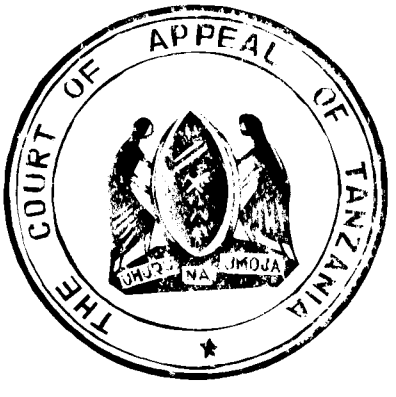
DATED at **IRINGA** this 31st day of August, 2015.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL