IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MASSATI, J.A. ORIYO, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO.111 OF 2014

DUKE MWAKUBALI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Karua ,J.)

dated the 8th day of November, 2014

in

Criminal Appeal No. 36 of 2012

JUDGMENT OF THE COURT

13th &,20thAugust,2015

MUSSA, J.A.:

In the District Court of Kyela, the appellant was arraigned and convicted for robbery, contrary to sections 285 and 286 the Penal Code, Chapter 16 of the revised Laws. Upon conviction, he was handed down a custodial sentence of fifteen (15) years imprisonment and, in addition, the appellant was ordered to redress the complainant a sum of shs. 1,041,000/= by way of compensation.

Dissatisfied, he preferred an appeal to the High Court which was, however, dismissed in its entirety (Karua, J). Still discontented, the appellant presently seeks to impugn the verdict of the first appellate court in a lengthy memorandum comprised of eight (8) points of grievance. Ahead of our consideration of the points of contention, it is necessary to briefly explore the factual background.

From a total of five witnesses, the case for the prosecution was to the effect that around 7:45 p.m on the 19th April 2001, at Bwato hamlet, within Kyela District, the appellant stole a sum of shs. 1,041,000/= in cash, from the person of a certain Tulimbuni Mbujule. It was further alleged that immediately before the act of stealing, the appellant employed actual violence on the victim in order to obtain the stolen cash. The victim, who was featured as PW1, informed the trial court that she presently resides at Serengeti Village. She was previously a resident of Isuba Village and knew the appellant thoroughly well as he was her neighbor at that Village.

Her evidence was to the effect that on the 14th April, 2011 she sold her plot of land at Serengeti Village to Hosea Mwambambale (PW4) in consideration for a sum of shs. 1,000,000/=. Her desire was to purchase another piece of land at Isuba Village and so, on the fateful day, she departed for Isuba Village with a sum of shs. 1,041,000/= in hand. As she

was walking towards her destination, around 7:45 p.m, by sheer chance, PW1 met the appellant at Bwato hamlet. It was said that in an apparent friendly gesture, PW1 asked the appellant as to why he was still at Bwato at that particular moment in time. Nonetheless, in her testimonial account, the lady (PW1), did not go so far as to tell the appellant's response to her enquiry. According to her, thereafter, she and the appellant walked together towards Isuba Village. Then, all of a sudden, the appellant physically descended on the lady and dispossessed her of the amount of shs. 1,041,000/= in cash and her cellular phone. The appellant then ran clear of the scene and PW1, who was rendered unconscious by the encounter, was rescued by a passer-by, namely, Dimon, who took her to a police post and later Ipinda heath center for medical attention. Gabriel Talalame (PW3), the clinical officer who attended her, observed that PW1 had multiple bruises on her neck, mouth tongue and on both chicks. In the meantime, the appellant allegedly disappeared from his abode till when he was traced at Uyole, Mbeya City, on the 24th September, 2011 and, accordingly, arraigned. This detail concludes the prosecution version as adduced in the course of the trial.

In reply, the appellant was relatively brief in his complete disassociation from the prosecution accusation. Nonetheless, he did not quite refute the detail that he was apprehended at Uyole, Mbeya City, on the 24th September, 2011. He said he was arrested by three police officers who took him to Ipinda police post onwards to Kyela police station. Thereafter, the prosecution accusation was formally laid at his door. The appellant deplored as sheer fabrication the entire account of PW1, the alleged victim of the robbery.

On the whole of the evidence, the presiding learned District Resident Magistrate found the prosecution version to be unerringly credible. The appellant's defence was considered but rejected. In the upshot, the appellant was found guilty, convicted and sentenced to the extent as already indicated. As hinted upon, the first appellate court found no cause to fault the findings of the trial court which were upheld, hence the present quest.

At the hearing before us, the appellant entered appearance in person, unrepresented, whereas the respondent Republic had the services of Ms. Lugano Mwakilasa, learned Senior State Attorney, who was being assisted by Mr. Francis Rogers, learned State Attorney. Upon being reminded of the contents of his memorandum of appeal, the appellant

wholly adopted it without more. He did not venture any elaboration which he deferred to a later stage, if need be, in the wake of the submissions of the Republic. For her part, Ms. Mwakilasa supported the appeal, mainly on account that the evidence of the identification of the appellant at the scene fell short of being watertight. To buttress her contention, the learned Senior State Attorney referred to us two celebrated decisions of the Court, viz- **Waziri Amani Vs The Republic** [1980] TLR 250 and; **Raymond Francis Vs The Republic** [1994] TLR 100. In his rejoinder, the appellant, quite understandably, fully supported the submissions of the learned Senior State Attorney.

With eight (8) points of grievance, the memorandum of appeal is obviously lengthy but as was correctly refined by the learned Senior State Attorney, this appeal turns on the sufficiency of the evidence of visual identification of the appellant at the scene of the crime. We are keenly aware that both courts below accepted the identification claim advanced by PW1 and thus, this being a second appeal we are only enjoined to address questions of law. But it is well settled that this approach rests on the premise that the concurrent findings of fact by the courts below are based on a correct appreciation of the evidence. If both courts completely misapprehended the substance, nature and quality of the evidence,

resulting in an unfair conviction, this Court must, in the interests of justice, intervene (see; **Edwin Mhando Vs The Republic** [1993] TLR 170).

From the record of the trial court, it is beyond question that the occurrence giving rise to the appellant's conviction took place around 7:45p.m and thus, it was dark already. In this regard, it was PW1's bold claim that she met the appellant at that time of the night, conversed with him and the two of them briefly walked together before the appellant turned behind her back. It was, therefore, necessary to closely scrutinize the circumstances under which the witness identified or recognized the appellant as well as her reliability. In this respect, we propose to go by the guide lines laid down by the oftly referred case of **Waziri Amani Vs The Republic** (supra):-

> *"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 is watertight. The following factors have to be taken into consideration; the time the witness had the accused under observation, the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or*

night (whether it was dark, if so was there moonlight or hurricane lamp ect) whether the witness knew or had seen the accused before or not."

Upon a close scrutiny, PW1's brief account scantily, if at all, addressed the foregoing outlined factors. More particularly, the witness simply claimed that she previously knew the appellant as her neighbour at Isuba hamlet and that, on the fateful day, he conversed and briefly walked abreast him. But, as was riposted by the learned Senior State Attorney, for one, PW1 did not even particularize the appellant's reply in response to her question when they met and; for another, her detail about the appellant being her neighbour at Isuba hamlet was contradicted by PW2 who said that, at the material times, the appellant was a resident of Masoko hamlet in Bwato Village which is, actually, where the incident occurred. Further, what cements the concern that PW1 was bitty in her alleged recognition of the assailant, is her response during cross-examination:-

"What makes us to believe that it was you is the decision you took to run away."

To this end, we entirely subscribe to the sentiments raised by Ms. Mwakilasa to the effect that PW1's evidence of visual recognition of the appellant was not free from serious misgivings which should be resolved to

the benefit to the appellant. In the circumstances, we take the position that the concurrent findings by the two courts below with respect to the visual identification of the appellant were arrived at through a misapprehension of the evidence. In the result, we are constrained to interfere in the interests of justice and, accordingly, we allow this appeal. The appellant's conviction and sentence are hereby, respectively, quashed and set aside. He is to be released from prison custody forthwith, unless if he is otherwise lawfully detained.

DATED at **MBEYA** this 19th day of August, 2015.

S.A.MASSATI
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

K.M.MUSSA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL