IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 377 OF 2015

SALUM PAGI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Tabora)

(Mziray, J.)

dated the 16th day of May, 2007
in
DC. Criminal Appeal No. 5 of 2005

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JUDGMENT OF THE COURT

19th & 25th April, 2016

MUSSA, J.A.:

In the District court of Maswa, the appellant was arraigned for robbery with violence, contrary to sections 285 and 286 of the Penal Code, Chapter 16 of the Revised Laws (the Penal Code). The particulars of the charge sheet were that on the 1st day of February, 2004, at Mwabayanda Village, within Maswa District, the appellant stole a sum of shs. 55,000/= in cash, 20 kilograms of rice, 3 shirts, 3 pairs of trousers and 50 kilograms of salt, properties of a certain Mindulu Sanduli. It was further alleged that immediately before and after such stealing, the appellant employed actual

violence on the person of the said Mindulu Sanduli by the use of an iron bar in order to obtain and retain the stolen properties.

The appellant refuted the charge, whereupon the prosecution lined up four witnesses. In reply, the appellant gave an affirmed statement and featured two witnesses to fortify his account. At the end of the trial, the appellant was found guilty, convicted and sentenced to a term of fifteen (15) years imprisonment. The appellant was aggrieved but his appeal against conviction was dismissed by the High Court and, in addition, the first appellate court (Mziray, J., as he then was,) expressed the view that the sentence meted out by the trial court was illegal. Accordingly, the same was set aside and substituted with a term of thirty years (30) imprisonment. The appellant is still discontended and hence this second appeal. Ahead of our consideration of the points of contention, we propose to briefly explore the factual background.

The case for the prosecution was pioneered by the alleged victim, (Mindulu Sanduli), who gave testimony as PW1. His account was that on the fateful day, around 1:00 a.m., he was on bed at his Mwabayanda Village residence. His sleep was, however, disrupted by an unwavering sound of a barking dog. Apparently apprehensive, PW1 woke up and opened the

entrance door to see what was going on outside his house. He had a torch in hand and upon flashing it on, he saw a group of six persons. According to him, the appellant, who happens to be his son in law, was amongst the group. The witness told the trial court that the appellant was wearing a black pair of trousers and a white shirt. Upon seeing him, the appellant is said to have exclaimed: "*Ni huyo huyo*", which may be literary translated to: "*That is him.*" PW1 then anxiously retreated into the house, but the intruders were on his heels and, no sooner, they made their entrance into the residence. The bandits assaulted PW1 with an iron bar whilst demanding to be given money. He surrendered to them a sum of shs. 50,000/= to which they were not satisfied and continued to assault him. Upon realising that no more money was forthcoming from PW1, the bandits resorted to the properties itemized in the charge sheet which they took and cleared themselves from the scene.

There was some further evidence from Wilson Sanduli (PW2), who is the son of PW1. The witness was sleeping in another room but heard noises as the bandits were demanding money from his father. PW2 did not move out of the room but he simply opened the window and peeped through. He noticed flashes of torch lights outside the house and, peeping further, he

recognized the appellant with the aid of a moonlight. Like PW1, the witness also claimed that the appellant was clad in a black pair of trousers and a white shirt. When the bandits were gone, PW1 went outdoors and raised an alarm. The alarm was heard by a neighbour, namely, Mathias Lugata (PW3), who immediately attended the scene. Whilst there, PW3 interviewed the wife of PW1 who told him that he recognized the appellant, her son in law, to be amongst the bandits. Unfortunately, for whatever cause, PW1's wife was not called to testify. PW3 then took PW1 to Mwabayanda Village Dispensary onwards to Maswa Government Hospital where he was admitted for treatment.

In the meantime, the incident was reported to the police and on the 4th February, 2005 the brief was assigned to No. E9248, Detective Constable Kilian (PW4), for investigation. PW4 visited PW1 at Maswa Hospital where he recorded his statement. He told the trial court that, in his police statement, PW1 asserted that he was invaded by two people but managed to identify the appellant only. Later on that same day, through a whistle blower, the Constable came across the appellant at Maswa Hospital and arrested him. The appellant was eventually arraigned for the offence giving

rise to this appeal. That concludes the prosecution version as unveiled during the trial.

In reply, the appellant was relatively brief in his complete disassociation from the prosecution accusation. He did not, however, refute the detail that PW1 is his father in law. He also accepted the claim that he was arrested at Maswa Hospital where he had gone to visit a sick relative. The appellant featured his father, namely, Paulo Philipo (DW 3), as his witness. In effect, DW 3 told the trial court that he was the one who sent the appellant to Maswa Hospital to attend his (appellant's) sick sister. He claimed that the appellant spent three days at the Hospital, ahead of his arrest. The witness did not, however, assign any dates. The appellant's other witness was Anna Paulo (DW 2), apparently, his hospitalised sister who, nevertheless, declined any knowledge of whatever was under enquiry. With this detail, so much for the defence case during the trial.

On the whole of the evidence, the learned trial District Magistrate was of the view that the determination of the case was wholly dependent on the issue of the sufficiency and reliability of the evidence of visual identification. The Magistrate resolved the issue in the affirmative, particularly on account of the fact that both PW1 and PW2 described the attire of the appellant and

also named him to the police in the aftermath of the incident. As already intimated, the appellant was found guilty, convicted and sentenced accordingly. Again, we have already hinted that, save for the sentence, the first appellate court found no cause to fault the conviction which was upheld.

The appellant presently seeks to impugn the verdict of the first appellate court upon four grounds which are substantively rested upon the complaint that the evidence of visual identification was barely watertight. At the hearing before us, the appellant appeared in person, unrepresented, whereas Mr. Iddi Mgeni, learned State Attorney, stood for the respondent Republic. When he was asked to elaborate his points of grievance in the memorandum of appeal, the appellant added that he was not found with any of the properties which were allegedly stolen. He deferred further elaboration to a later stage after the submissions of the learned State Attorney.

For his part, Mr. Mgeni initially commenced his submissions by fully supporting the conviction and sentence. However, midway in the course of his submissions, as he was deliberating the issue of visual identification, the learned State Attorney changed his stance and, instead, supported the appeal. Thus, in his refurbished submission, Mr. Mgeni contended that the

conditions at the scene were not favourable for an unmistaken identification. Mr. Mgeni had reference to the fact that the incident occurred at night and under a terrorizing atmosphere as well as the fact that the PW1 and PW2 did not elaborate on the intensity of their respective identifying sources of light. To this submission, the appellant, quite understandably, had no rejoinder.

We have given due consideration to the concurrent arguments from either side. Admittedly, the prosecution evidence seeking to implicate the appellant was wholly based on evidence of recognition, as distinguished from a mere visual identification of the appellant at the scene by PW1 and PW2. As we have already intimated, the evidence to the effect that the appellant is the son in law of PW1 was undisputed and it was, therefore, an established fact that the appellant was well known to both PW1 and PW2. The witnesses claimed to have recognized the appellant both visually and aurally and, in that regard, we think it is important to reiterate what we said in the unreported Criminal Appeal No. 152 of 2011 – **Felician Joseph vs The Republic**:-

> *"In our considered opinion, the above revelations and findings vindicate our long settled jurisprudence to the effect that visual and aural identification*

evidence, be that of a stranger or a previously under unfavourable conditions, such as at night, is of the weakest kind and unreliable. Such evidence should be approached with utmost circumspection. No court should act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."

Furthermore, in another unreported Criminal Appeal No. 37 of 2005 – **Issa Mgara @ Shuka vs The Republi**, the court tellingly cautioned with respect to evidence of recognition:-

"...even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence of sources of light and its intensity is of paramount importance."

Corresponding remarks were made in Criminal Appeal No. 166 of 2004 – **Shamir John vs The Republic** (also unreported) where it was additionally observed that the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made.

We are, however, keenly aware that both courts below were concurrent in the finding that he appellant was sufficiently recognized or identified, as they put it, at the scene of the crime. Thus, in our approach to the evidence of recognition in this case, we will be guided by what was stated in the unreported Criminal Appeal No. 28 of 2001 – **Shabani Daudi vs The Republic**:-

> *"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact 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, interfere."*

As we shall shortly demonstrate, in the matter at hand, there was a material misapprehension by both courts below with respect to the quality of the evidence of recognition which justifies our intervention.

As already revealed, the evidence was to the effect that PW1 recognised the appellant through the aid of a torch held in his hand and

which he flashed in the direction of where the six culprits he saw were positioned. The witness did not, however, clarify on the intensity of the torch light. Furthermore, his son (PW2) who was peeping from a window, testified to there being flashes of torch lights outside the house, which suggested that some of the culprits were also wielding torch lights. That being so, the likelihood of PW1 being dazzled by the flashes wielded by the suspects cannot be overruled. Speaking of PW2, it should be recalled that, according to his testimony, the fateful night was blessed with a moonlight which aided him to recognize the appellant. As was the case with PW1, the witness did not elaborate on the intensity of the moonlight but, going by his other account that there were flashes of torch lights outside the house which, obviously, were intended to lit the scene, it is deducible that, if at all, the light coming from the moonlight was weak.

Quite apart from the insufficiency and unavailability of any evidence relating to the intensity of the alleged sources of light, it should be recalled that according to PW4, the victim (PW1) revealed to him that he was confronted with two bandits but only managed to recognize the appellant. As it were, the detail materially detracts from PW1's testimonial account that the culprits were six in number. This revelation, undoubtedly, casts suspicion on the reliability of PW1's testimony.

To us, the foregoing disquieting factors go to the quality of the recognition evidence which, we so find, materially fell short. To this end, unlike the two courts below, we uphold the appellant's main grievance and, accordingly, allow, this appeal. The conviction and sentence are hereby respectively, quashed and set aside.

We would have ended here but, for the sake of completeness and, for future guidance, we feel it is instructive to interject a remark or two with respect to the substitution, by the first appellate court, of the sentence of thirty (30) years imprisonment in lieu of the fifteen (15) years which were meted out by the trial court.

As it turned out, throughout the trial proceedings, the appellant stood arraigned for simple robbery and the prosecution did not at any stage of the trial, amend the charge sheet even when it became apparent that the particulars of the charge as well as the evidence supported the serious offence of armed robbery. Thus, at the conclusion of the trial, the appellant was convicted for simple robbery to which he was charged. Incidentally, the appellant did not attend the proceedings of the first appellate court on account of his own indication that he did not wish to be present. The learned State Attorney who was representing the respondent Republic

impressed upon the first appellate court that the sentence of fifteen years imprisonment was illegal in view of the fact that the offence was perpetrated by the use of lethal weapons and constituted armed robbery. Ironically, the first appellate Judge was obliged and, for sake of clarity, we think we should extract the relevant portion of the attendant Order:-

> *"In total,* ***I find that the appellant was properly convicted.*** *On the sentence of 15 years imprisonment imposed on the appellant, I set it aside and substitute thereon a sentence of thirty years imprisonment with twelve strokes of corporal punishment."* [Emphasis supplied].

With respect, from where we stand, if the learned Judge felt the conviction was proper, he had no justification, in the first place, to interfere with the sentence meted out by the trial court on account of illegality. In effect, the first appellate court ended up by imposing a sentence which is prescribed for the more serious offence of armed robbery, which was not indicted, on the heels of the existing charge for the minor offence of robbery. The adopted approach was, no doubt, misconceived as throughout the trial, the appellant stood arraigned for simple robbery. The prosecution had every opportunity to amend the charge at any stage of the trial and if

they desired to benefit from the minimum sentence of thirty (30) years imprisonment, they should have sought the indulgence of the trial court to amend the charge under the provisions of section 234 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws. That provision stipulates as follows:-

> *"Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just."*

Thus, where, as here, there is some evidence suggestive of the fact that the appellant committed armed robbery but, the prosecution did not move the trial court to alter the charge from simple robbery to armed

robbery; it was not open for the first appellate court to impose the sentence prescribed for armed robbery which was after all, not indicted. So much for our brief digression.

Back to the appeal, having allowed it, we will, finally, order the release of the appellant from prison custody forthwith, unless he is otherwise held there for a lawful cause. Order accordingly.

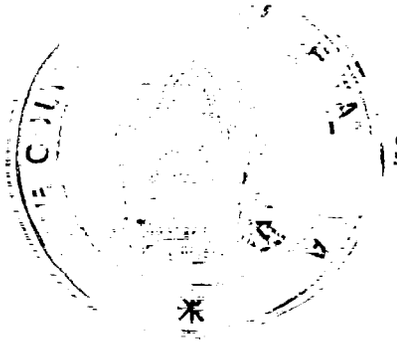
DATED at **TABORA** this 22nd day of April, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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



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