IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 264 OF 2015

HASSAN SAID..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mutungi, J.)

dated the 14th day of June, 2013)
in
DC Criminal Appeal No. 4 of 2012

JUDGMENT OF THE COURT

6th &15th April, 2016

ORIYO, J.A.:

The appellant was arraigned before the District Court of Dodoma, at Dodoma with the offence of armed robbery contrary to section 287A of the Penal Code as amended by Act No. 4 of 2004. He was convicted as charged and sentenced to thirty years imprisonment. His first appeal to the High Court (F.S.K. Mutungi, J.) was dismissed. Still aggrieved, he has now come to the Court on a second appeal.

The brief background of the case at the trial court was that the appellant and his co-accused allegedly stole sh. 70,000/= cash money and one bag containing an assortment of clothes and other properties belonging to one Mlewa Saluwa, (PW1), his grandfather. Further, the appellant allegedly hit PW1 on the head with a hammer and threatened him with a bush knife in order to obtain and retain the said properties. When neighbours responded to the victim's call for help, the robbers had fled. However, the neighbours decided to make a follow up of the bandits with the aid of the torch light until they apprehended the appellant and his accused hiding in the dark of the night in an unfinished house.

The appellant upon arrest was found with the items mentioned by the complainant; a bag with the latter's clothes, a hammer and a bush knife; which he disowned at the trial. Actually he raised the defence of **alibi** in that at the material time he was not in Dodoma as he had travelled to Dar es Salaam. It is with this background that the appellant has come to the Court on a second appeal.

At the hearing, the appellant appeared in person without legal representation. The respondent Republic was represented by Ms. Beatrice Nsana, learned State Attorney. The appellant prayed that the learned State

Attorney submits first and he would make a reply thereon; a prayer which was granted by the Court.

The learned State Attorney, forthrightly submitted that after studying the record; she was in support of the appeal, basically on the issue of weak identification evidence of the appellant. She stated that the complainant claimed to have identified the appellant at night aided by a torchlight held by some other person. However, the evidence fell short of details on the intensity of the torch light, the length of time the incident took place, etc. Similarly, for PW3, a relative of the appellant testified to have identified him relying on the moonlight at that time of the night without details on the strength of the moonlight or otherwise. She referred to the decisions of the Court in **Richard Mawoko and Another vs. Republic,** Criminal Appeal No. 318 of 2010 (Mwanza) and **Gwisu Nkonoli and 3 others vs Republic,** Criminal Appeal No. 359 of 2014, (Dodoma); (both unreported). It is noteworthy to state here that both decisions were decided on the basis of the principles of visual identification as laid down in the Court's decision in **Waziri Amani vs. Republic** (1980) TLR 250.

It is now settled that as a second appellate court, where there are concurrent finding of facts by the two courts below, the Court would not,

under normal circumstances, interfere with such concurrent findings of facts. But this approach is based on the assumption that the findings are based on the correct appreciation of the evidence. However, in the event both courts below completely misapprehend the substance, nature and quality of such evidence which result in an unfair conviction in the interest of justice, this Court must interfere (see, **Abdallahaman Athuman vs. Republic** Criminal No. 149 of 2014, (unreported), **Edwin Mhando vs. Republic** (1993) TLR 170, **Michael Haishi vs. Republic** (1992); TLR 92; among others.

There is no gain saying that the appellant was charged and convicted on the basis of visual identification. He listed ten complaints as grounds of appeal in his memorandum of appeal, basically revolving around the inadequacy of the evidence of visual identification relied upon to convict him; particularly, the reliance on the aid of moonlight and torch light in the identification process, which event took place at night time. Another similarly important complaint of the appellant is the application of the doctrine of recent possession against him to convict without evidence of proper identification of the allegedly stolen properties before they were tendered in evidence in Court. The remaining complaints were that he was

convicted on the weakness of his defence instead of being based on the strength of the prosecution case.

Starting with the sufficiency of the evidence of visual identification of the appellant at the scene. Both courts below accepted the evidence of visual identification of the appellant at the scene as correct and as we have already stated, the Court will not interfere with such concurrent findings of facts below unless both courts misapprehended the substance, nature and quality of such evidence, (See **Edwin Mhando v. Republic** (supra).

It is however, now well settled, that if a witness is relying on some source of light as an aid to visual identification such witness must describe the **source** and **intensity** of such light in details. The Court has repeatedly in its various decisions in this respect, emphasized on the importance of describing the source and the intensity of the light which facilitated a correct identification of the appellants at the scene of crime; See **Waziri Amani v. Republic** (supra), **Richard Mawoko and Another vs. Republic,** Criminal Appeal No. 318 of 2010 (CAT) at Mwanza and **Gwisu Nkonoli and 3 others vs. Republic,** Criminal Appeal No. 359 of 2014 (CAT) at Dodoma; (both unreported).

We are settled in our mind that in the case under consideration the identification evidence of the appellant at the scene was not watertight; and as the Court observed in **Issa Mgara v. Republic**; Criminal Appeal NO. 37 of 2005 (unreported) where it stated:-

> *"....even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source 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."*

Concerning the identification of the stolen goods, it is now settled that a detailed description by giving special marks of the stolen items has to be made before such exhibits are tendered in court in order to avoid doubts on the correctness of the allegedly stolen items. In the case of **Mustapha Darajani vs Republic**, Criminal Appeal NO. 242 of 2015 (unreported), in similar circumstances, this Court stated as follows:-

> *"In such cases,* ***description of specific mark to any property alleged stolen should always be***

given first by the alleged owner *before being shown and allowed to tender them as exhibits."* *[Emphasis supplied.]*

Unfortunately, it is apparent that the doctrine of recent possession in the case under consideration was misapplied. In the circumstances and for the reasons stated hereinabove, we are satisfied that the prosecution case was not proved beyond reasonable doubt.

The appeal is therefore allowed, the conviction and sentence quashed and we order the immediate release of the appellant from prison unless otherwise lawfully held.

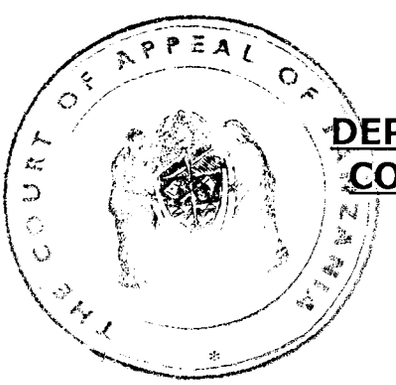
DATED at **DODOMA** this 14th day of April, 2016.

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL