IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 26 OF 2016

IBRAHIM RAMADHANI MANGUVU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Arusha)

(Moshi, J.)

dated the 3rd day of June, 2015
in
Criminal Appeal No. 14 of 2015
.....

JUDGMENT OF THE COURT

25th & 28TH October, 2016

JUMA, J.A.:

Appellant Ibrahim Ramadhani @ MANGUVU, IBRAHIM KESSY @ IBRA and JUMA RAMADHANI, were in the District Court of Monduli charged with the offence of Armed Robbery contrary to section 287A of the Penal Code Cap. 16. The particulars of the charge alleged that on 12th July 2014 at Daraja la Mahamoud Mto wa Mbu in Monduli District of Arusha Region, the appellant and his co-accused, stole Tshs. 60,000/= cash and a motorcycle (Toyo Reg. No. T957 CWW) properties of one Samwel Michael.

The particulars further alleged that immediately before and after such stealing they used machetes to threaten the owner of the stolen property in order to obtain and retain the stolen property.

Only the appellant was found guilty, convicted and sentenced to serve thirty years in prison. His co-accused were acquitted.

On appeal to the High Court of Tanzania at Arusha, the learned first appellate Judge (Moshi, J.) dismissed the appellant's appeal.

The complainant Samwel s/o Michael (PW1), who operated a motorcycle taxi (*boda boda*) for transportation of passengers alleged that it was around 21:00 hours he was at *Mto wa Mbu* bus stand waiting for passengers. A customer, who had tried but failed to agree fare with Ismail Carlos (PW2) — another *boda boda* operator, came over to where PW1 was. The customer wanted to hire a ride to "*Mahamoudi's place*" to collect a coat his warm jacket in time to watch a live World Cup football match on Television. Once at *Mahamoudi's place*, the passenger directed PW1 to turn to the left. As PW1 was negotiating his *boda boda* to avoid a pool of water, the erstwhile passenger turned nasty when he snatched the motorcycle key and began to assault PW1.

The assailant was soon joined by other bandits from the nearby banana plantation. They used knives to slash PW1, poured sand into his mouth before tying him up. His shouts crying for help were to no avail, because that place was isolated without households around. PW1 lost consciousness. By the time he regained his senses around midnight, the bandits had stolen his camera, phone, Tshs. 70,000/- and the motorcycle.

PW1 testified that he was able to identify the appellant at the bus stand from what he described as big electricity lights from two bars. He was also able to identify the second accused (Ibrahim Kessy @ IBRA) who he had known as a vegetable vendor at Kigongoni.

Apart from the complainant, the prosecution called and relied on the evidence Ismail Carlos (PW2) who was the first to be approached by the customer. PW2 testified that he declined to take the passenger to *Mahamoudi's place* because he had once taken a passenger there only to be robbed. PW2 testified that he was able to see the passenger clearly because they were negotiating the fare at close quarters. He also confirmed that there were two bars which had big electricity lights which was enough to identify the passenger.

In his defence, the appellant not only denied any involvement in the armed robbery, but also highlighted the contradictions in the complainant's evidence regarding the registration number of the motorcycle. He stated that in the police station the complainant had indicated that he knew the registration number, but in court he stated that the registration number was unknown. Similarly, he blamed the complainant for informing the police that the bandits stole his Tshs. 60,000/=, but in court the amount rose to Tshs. 70,000/=.

The memorandum of appeal which the appellant predicated his second appeal has five grounds of appeal. In the **first** ground, the appellant faulted the learned Judge of first appeal for upholding his conviction which was based on dock identification of the appellant by the complainant. The **second** ground contends that the conditions at the place where the complainant purported to identify the appellant was not conducive for a watertight and unmistaken identification. The **third** ground faulted the first appellate court for failing to notice the variation between the charge sheet and the evidence adduced by the complainant (PW1). The **fourth** ground faults the first appellate Judge for failing to evaluate

the evidence and instead allowed her own speculation to influence her judgment. **Finally**, all the grounds of appeal considered, the appellant contends that the prosecution case against him was not proved beyond reasonable doubt.

The appellant appeared before us in person, unrepresented. After urging us to consider all his grounds of appeal, expounded his ground questioning his identification at the scene of crime by way of big electricity lights from two bar that were nearby. He stated that the intensity of this source of light was not clarified. He faulted the complainant for failing to describe his appearance to justify the claim that he identified him. He submitted that the complainant even failed to indicate for how he took the advantage of the source of lights from the two bars to identify the appellant.

The appellant also questioned the way the first appellate Judge made a factual error on page 66 of her Judgment by stating: *"Furthermore, the witness (PW1) was familiar to the appellant. The appellant was not stranger to him. He knew him as a person who owns a vegetable grocery."* The appellant referred us to the evidence of PW1 who stated that he knew

the second accused (Ibrahim Kessy @ IBRA) as the vegetable vendor but not the appellant.

The appellant finally submitted to question the veracity of the evidence of the complainant. He pointed at the variance between the allegation in the Charge Sheet contending that Tshs. 60,000/= was stolen during the armed robbery but in his evidence the complainant claimed that Tshs. 70,000/= was stolen. In so far the appellant is concerned, this discrepancy suggests that the complainant is not a credible witness and the first appellate Judge erred in failing to consider the discrepancy.

The learned State Attorney Ms Rose Sulle, conceded to the appeal and submitted that the respondent Republic did not support the conviction. She submitted that critical to her support of the appeal is the want of probity of the identification evidence of the complainant, PW1. The complainant did not specify the distance which separated the source of lights and where he was standing with the appellant. She submitted that it is the requirement of the law that an identifying witness must specify the distance from the source of light which facilitated positive identification. It was not enough,

she submitted, for the complainant to testify that there was big electricity lights without the specificity of distance and intensity of the lights.

The learned State Attorney further submitted that given the difficult conditions pertaining for positive identification, the complainant did not specify if he knew the appellant before the incident. To support his submission that the identification evidence of the complainant is unsafe, she referred to us the decision of the Court in **William Mwita vs. R.**, Criminal Appeal No. 65 of 2001 (unreported) where the Court cited a statement of law it made in Raymond **Francis vs. Republic 1994 TLR 100 (CA)** on identification evidence:

> *"(i)-It is elementary that in a criminal case whose determination depends essentially on identification, evidence on condition of favouring a correct identification is of utmost importance.*
>
> *(ii)-As the identification of the appellant was the crux of the matter and having regard to the fact that the robbery took place at 8:00 p.m. when it was dark— the condition were not favourable for a correct identification of the appellant.*

(iii)- Since all the witnesses admitted seeing the appellant for the first time during the incident that day it was necessary in their evidence of identity to describe in detail the identity of the appellant when they saw him at the time of the incident."

Ms. Sulle next moved on to the identification evidence of PW2 and contended that this evidence does not meet the threshold of unmistaken positive identification under difficult conditions. She submitted that although PW2 also claimed that there were lights from nearby bars, like the complainant, PW2 did not specify how far the source of lights was from where PW2 was standing talking to the appellant.

The learned State Attorney conceded that indeed there is a discrepancy between the amount of money that was stolen as alleged in the charge sheet and the amount of money which the complainant actually mentioned in his evidence. She however submitted that the question of probity of the identification evidence is sufficient to determine this appeal.

On our part, we agree with the learned State Attorney that even without going into all the grounds of appeal which the appellant raised, the

question whether the conditions were favourable to enable the complainant and PW2 to identify the appellant, is sufficient to determine this appeal.

In so far as evidence of visual identification is concerned the first appellate Judge borrowed a quotation from the decision of the Court in **Waziri Amani vs. R.** [1980] TLR 250 to emphasize precaution which courts are required to take to ensure that possibilities of mistaken identification are minimized if not eliminated:

> *"...To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar."*

Although the first appellate Judge was not in any doubt that the complainant did not state the intensity of the light which enabled the complainant to identify the appellant, she all the same went ahead to find that the complainant identified the appellant:

> *"...it is my view that PW1 did identify the attacker. I find so for there is the following pieces of evidence; the witness (PW1) had ample time to identify the attacker.*

There is evidence that the appellant approached the victim (PW1) and requested him to ride him to a place called Mahamoud. They did have time to negotiate the price and to have conversation. That means that, they were so close to each other hence the issue of proximity does not arise here. The place where they had negotiations was illuminated by electricity light from two nearby....."

However, the above finding by the first appellate Judge is not consistent with what the complainant actually stated with regard to elimination of possibilities of mistaken identity over an incident that took place at night, around 9 p.m. The complainant was very sparse and did not say as much as what the first appellate Judge imputes to him. On page 9 of the record the complainant stated:

"...The 1st accused followed me at the stand there were two bars which had electricity lights big ones so I identified the 1st accused clearly when we were negotiating business...."

From the above little the complainant said, PW1 said nothing about the duration of time he spent with his assailant. Similarly, without requisite evidence on the intensity of light and the distance from the source of lights

to where the complainant and his assailant were, it is hazardous to guess that riding together on the motorcycle to *Mahamoud* area facilitated positive identification under otherwise difficult conditions. Under cross examination by the appellant, PW1 suggested that the appellant was wearing a lather coat. The irony of it is that PW1 testified that the passenger who hired his motorcycle was going to pick up his coat, and return back in time to watch a football match.

We think, the appellant and the learned State Attorney are entitled to express their exasperation that learned first appellate Judge mistakenly suggested that the complainant knew the appellant from the latter's business at a vegetable grocery. The record does not bear out the first appellate Judge because it shows that the complainant stated that he knew the second accused but said nothing about knowing the appellant before the incident. We think, if the complainant (PW1) had known the appellant as suggested by the first appellate Judge, PW1 would have mentioned his name to the police. Instead, according to the evidence of Detective Corporal Benedict (PW3), it was one Hassan Ibrahim who mentioned the appellant's name to the police leading to his arrest. Although Hassan

Ibrahim was listed during the Preliminary Hearing as one of the prosecution witnesses, he did not testify.

In their totality, the above factors make the evidence of visual identification of the appellant at the scene of crime to be highly suspect and not worth belief. We cannot say that the identification of the appellant was so watertight as to exclude possibilities of mistaken identity. This doubt shall be resolved in favour of the appellant and constitute good reason for this Court to interfere with the concurrent findings of fact by the trial and the first appellate court.

We as a result allow this appeal. We order that, the appellant to be forthwith released from prison unless otherwise lawfully held.

DATED at **ARUSHA** this 26th day of October, 2016

M. C. OTHMAN
CHIEF JUSTICE

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL