IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 34 OF 2015

DEOGRATIUS WILLIAM ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Munuo, J.)

Dated the 27th day of April, 2000
In
Vide DC. Criminal Appeal No. 234 of 1996
.....

JUDGMENT OF THE COURT

16th & 23rd February, 2016

LUANDA, J.A.

The above named appellant, with five others, were charged with armed robbery in the District Court of Rombo sitting at Mkuu. It was alleged in the charge sheet that on 1st day of July, 1996 the appellant and those five at about 22.00 hrs at Mbomai Juuu Village within Rombo District did steal one sponge mattress and a sack of dried coffee the property of Henry s/o Mtana and that at the time of stealing they applied violence to the said Henry s/o Mtana in order to obtain the said property.

At the conclusion of the trial, the appellant and three others were convicted as charged. Each was sentenced to 30 years imprisonment. One of the accused person was acquitted. Out of four accused persons who were convicted and sentenced, it would appear only two appealed to the High Court of Tanzania (Moshi Registry) namely the appellant and Wilfred Kanuti. The High Court upheld the finding and sentence meted out against the two. The appellant is still aggrieved, he has come to this Court on appeal. This is the second appeal.

The evidence which implicate the appellant was that of visual identification. Both lower courts were satisfied that the conditions prevailing were conducive for correct visual identification.

In this appeal, the appellant appeared in person, unrepresented and so he fended for himself. The respondent /Republic was represented by Mr. Julius Semali and Mr. Hassan Nkya both learned Senior State Attorneys. The respondent did not resist the appeal. Mr. Nkya said the conditions prevailing were not conducive for proper or correct visual identification.

Briefly the prosecution was that on the fateful day around night time, a group of people, armed, estimated around twelve, invaded the residence

of Henry s/o Mtana (PW1). It is the evidence of Gundelinda d/o Herimeti (PW3) who first saw the group while she was in the kitchen with her grandmother and other two children. While she was going to the main house to fetch water, she saw some body outside flashing a torch. She immediately went back to the kitchen and informed her grandmother. Before they took any step, a group of people entered their compound. It was at that juncture where PW1 heard his wife telling the invaders to spare her life. He peeped through the window and saw the bandits. He said while inside peeping through the window, he was able to identify by face and name at least seven people including the appellant. PW1 took a panga and hid himself behind the door after he locked it. The bandits forced open the door and entered. PW1 cut a thumb of one bandits with a panga. The one who was cut with a panga lamented in agony and cried for help. The bandits left. PW1 discovered the bandits to have left with a matress and a sack of dried coffee.

PW2 Williiam s/o Shabani, who was in another house in the compound, said he identified four out of the group. Two he knew them by names and two by their faces. He knew the appellant by face.

As to what had helped them identify, PW1 said the moon light; he did not explain its brightness. PW2 said it was through a bright moon light. On the other hand, PW3 did not specifically said what helped her identified the bandits. But she said there was moonlight. She did not state its brightness. She also said the bandits had many torches which they flashed. She did not say where the torches were directed to.

The appellant on the other hand had denied to have committed the offence. The appellant informed the Court in his defence that PW1 owed him money amounting 48,000/= for work he had done to him. He paid him 24,000/= leaving a balance of 24,000/=. So, he is saying this is a frame up case so that he would not be paid his money.

As earlier said and correctly pointed out by Mr. Nkya that the main ground in this appeal is whether the findings of fact of both lower courts that the appellant was identified is correct. Both courts below relied on the evidence of PW1, PW2 and PW3 to ground conviction that the evidence of visual identification is watertight

This is the second appeal. We can only interfere with the concurrent findings of fact of the courts below if it is shown that there is misdirection on or non-directions on the evidence or completely misapprehended the substance, nature and quality of evidence, resulting in unfair conviction. (See **DPP V Jafari Mfaume Kawawa** [1981] TLR 149, and **Salum Mhando V R.**, [1993] TLR 170).

There is no doubt at all as found out by the lower courts that the bandints who were armed, invaded the house of PW1 and stole therefrom a mattress and a sack of dried coffee. The crux of the matter in this appeal is whether the appellant was amongst the robbers. The prosecution relied on the evidence of visual identification. Since the incident occurred during night time, the question is whether the conditions prevailing were conducive for correct visual identification. This Court has stated time and again that if the evidence of visual identification is what is relied upon then that evidence must be properly scrutinize due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convicting ability to identify the person correctly and that every reasonable possibility of error had been dispelled. This is because there could be a mistake in the identification, notwithstanding the

honest belief of an otherwise truthful identifying witness. (See **Waziri Amani V R.** [1980] TLR 250 and **Philipo Rukaza @ Kitwechembogo V R.**, Criminal Appeal No. 215 of 1994).

Arguing the appeal, Mr. Nkya said the evidence of visual identification was not watertight. For instance he said PW1 did not say the brightness of the moon; did not state the time the incident it took. If PW1 really identified the appellant he submitted, he should have gone further to describe the attire he was putting. Turning to PW2 he said he identified the appellant by his appearance. He said there was a need to conduct an identification parade. As regards PW3, Mr. Nkya said she did not identify any because she was running from one place to another.

As a whole, we agree with Mr. Nkya that the identification was not water tight. We start with PW3. PW3 claimed to have identified the appellant, among others. As correctly observed by Mr. Nkya, this witness was on a run. It is in her evidence that when she was going to fetch water in the main house, she saw somebody in their compound. She retreated. The bandits went to the kitchen. PW3 claimed to have identified the appellant while in the kitchen. She did not say how she did that. The

evidence is silent as to whether there was any light. If there was any light what kind of light it illuminated. Further, she did not say how many had entered the kitchen if really she saw them. PW3 also claimed to have identified the appellant in her bed room. She said she was underneath her bed. How she identified the appellant, there is no evidence. PW3 further claimed that the appellant is a familiar face. That alone is not enough. We shall revert back to this issue of familiarity at a later stage in this judgment. That is all for the evidence of PW3.

PW2 also claimed he was able to identify the appellant as one of the bandits. He said the moon was bright. He identified the appellant by his appearance. That piece of evidence without first conducting an identification parade is as good as nothing.

Finally the evidence of PW1. PW1 said he saw a group of about twelve people. He managed to identify the appellant among others because he was a familiar face. He claimed he did so because he was about 4 paces from where the bandits were. And he managed to do so by the help of a moon light. He did not explain the brightness of the moon. In any case if the moon was bright why the bandits used torches? It is in

evidence that when the bandits were entering in PW1's compound they flashed many torches which they had in possession. In our view it shows that the conditions prevailing were not conducive at all. Under those circumstances, the question of familiarity is out of place. In **John Jacob v. Republic,** Criminal Appeal No. 92 of 2009 (unreported) this Court said:-

> *"If the conditions are not conducive for correct identification, as in this case, then the question of familiarity does not arise at ali. So, when the question of familiarity especially during night time is raised, the court must first satisfy itself whether the conditions prevailing are conducive for correct identification. It is not enough to give a bare statement that the witness knew his assailant before the incident. The witness must explain the circumstances which enabled him identify at the scene of crime."*

From the foregoing, we have shown that the conditions prevailing were not conducive for correct visual identification. Under the authorities of **Kawawa** and **Mhando** cases cited (*supra*), we are entitled to interfere.

The prosecution case raises doubts. We resolve that doubt in the appellant's favour.

Since this ground alone is enough to dispose of this appeal, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant be released from prison forthwith unless he is detained in connection with another matter.

Order accordingly.

DATED at **ARUSHA** this 22nd day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL