

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A. KAIJAGE, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 254 OF 2013

YASSIN HAMISI ALLY @ BIG..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Shangwa, J.)

Dated the 1st day of March, 2013

in

Criminal Appeal No. 81 of 2011

JUDGMENT OF THE COURT

10th November, 2015 & 5th February, 2016

KAIJAGE, J.A.:

In the District Court of Ilala (the trial court), the appellant and three (3) other persons were arraigned for armed robbery contrary to section 287A of the Penal Code. The appellant was the 4th accused. Following a full trial, the appellant's co-accuseds were acquitted. The appellant was convicted as charged and sentenced to thirty (30) years imprisonment. His appeal to the High Court against such both conviction and sentence was dismissed, hence this second appeal.

At the trial, the prosecution led evidence to the effect that during the afternoon hours of the 27th day of March, 2009, PW1 Salvatory Faustine Kiwia went to Dar es Salaam International Airport (DIA) to collect a sum of USD 54,000 sent to him by PW3 Colman Joseph Kiwale, a businessman then based in Kigoma. Apparently, PW3 had earlier entrusted that money to PW4 Pendo Kelvin Teme for onward transmission to PW1 at DIA. The said money which was placed in a plastic bag was accordingly handed over to PW1 by PW4 who had travelled, on the same day, from Kigoma to Dar es Salaam by ATC plane. At this stage, we shall let the testimonial account of PW1 speak for itself on what exactly transpired after he had received the money from PW4. He is on record to have told the trial court the following, among other things:-

*"After counting the money I started walking to take a Daladala. While near the BP Petrol Station, outside the Airport, I saw Yassin (appellant) crossing the road coming towards me. He greeted me. He was wearing a cap, blue jeans and cadet. **The cap was covering his face.** He greeted me "Bwashehe". I crossed the 1st road, while crossing*

*the 2nd road, Yassin (appellant) **appeared in between two city buses** (Daladala). He told me give me the bag (mfuko) I was holding. I was shocked. I was holding the plastic bag which was in the envelope and I did put my hands tightly to my body. I was shocked. He started pulling the bag. I noticed that it is a person I know. The pulling and resistance went on and his cap was dropped. He took a silver pistol from his trouser. He took the bag and shot me on my stomach."*

[Emphasis ours].

Upon being cross-examined by counsel for the appellant, PW1 further stated:-

"Initially I know Yassin (appellant) as Bwashe, in my first statement I referred him as Bwashehe. In the examination in-chief, I said I knew the 4th accused as Yassin. I asked his close friends of his name. I asked them the name of the taxi driver.

The taxi is white in colour from where the taxi is parking it is 100 meters from my shop. I have never entered his taxi."

PW2 No. 3372 Cpl. Magreth stated in her testimonial account that she eye witnessed the robbery incident. She is also recorded to have told the trial court the following, among other things:-

"On 27/3/2009 around noon I was at the Airport buying Luku, I crossed the road to catch a bus in order to go to town, for my private business. At the bus station about 9 to 10 steps, I saw people fighting (wanavutana) one holding a black plastic bag and one was wearing a cap. The one wearing "capello" was telling the man with a plastic bag "toa Mfuko". I was curious to watch because it was like I knew the man with a "capello" before. "Capello" is men's hat. The person holding the plastic bag was resisting. It is the resistance which led to the "capello" falling down. That is when I confirmed that the person with a capello is a

person I knew. I knew him as a taxi driver who used to come at Msimbazi Centre... The act was so quick. The person who had a capello took his pistol and shot the person with a plastic bag. I heard two gun shots. People dispersed. I also dispersed because I was not armed. The person who was shot fell down..."

It was not disputed in the course of trial that PW1 was robbed of USD 54,000 and that he sustained serious bullet wounds on his stomach which, consequently, sent him down unconscious. He was thus rushed to Muhimbili Hospital where, after treatment, he regained his consciousness the next day, on 28/3/2009.

In their respective testimonial accounts, both PW1 and PW2 told the trial court that soon after the undisputed robbery, the appellant hurriedly escaped on a waiting motor cycle holding a plastic money bag he snatched from PW1. They both maintained that the appellant was a familiar face and that he was impeccably identified in the course of robbery which, according to them, happened very fast and did not last for more than one minute. The

said identifying witnesses further stated that in the aftermath of the robbery incident, they gave their respective statements to the police. However, in the course of trial, the prosecution did not adduce into evidence any such statements.

PW2 who was, apparently, a police officer, made it very clear in her evidence that she reported the robbery incident immediately after its occurrence to the police authorities, particularly to PW8 No.14392 Mlilo Jumanne, the then head of investigations at Stakishari Police Station. However, PW8 gave no evidence on PW2 having named the appellant as a person she recognised at the scene of the robbery incident. All the same, the appellant was arrested almost over three (3) months ahead of the robbery incident after being implicated by a criminal suspect who was being interrogated by PW6, No E 67 DC Majaliwa Sababile.

In his affirmed defence, the appellant raised an alibi, stating that on 20/3/2009 he was admitted at Songea Regional Hospital and that upon being discharged on 26/3/2009, he travelled to Dar es Salaam by bus on 28/3/2009. He completely distanced himself from the 27/3/2009 robbery incident. After rejecting the appellant's defence of alibi, the two courts below made concurrent findings of fact that the appellant was the perpetrator of

the robbery that occurred on 27/3/2009 and that he was unmistakably identified at the scene of crime by PW1 and PW2 (the identifying witnesses).

The appellant has lodged a memorandum of appeal listing six (6) grounds of complaint which boils down to the following:-

- 1. That, the appellant's conviction was predicated upon incredible and unreliable visual identification evidence of PW1 and PW2.*
- 2. That, on the whole of the evidence on record, the case for the prosecution was not proved beyond reasonable doubt.*

The appellant appeared in person before us to argue his appeal. The respondent Republic had the services of Mr. Othman Katuli, learned State Attorney who did **not** resist the appeal.

Addressing the said grounds of appeal generally, the appellant forcefully argued that a claim by the identifying witnesses that they knew him before the occurrence of the robbery incident was a blatant lie because none of them named him to those whom the robbery incident was firstly reported. For this reason, he maintained that the said identifying witnesses

gave false incriminating evidence against him and that they made a rehearsal of his name (Yassin) before they testified in court. Besides, the appellant wondered why it took quite sometime before he was arrested if it is true that the identifying witnesses named him to the police authorities immediately after the occurrence of the robbery.

Submitting in support of the appeal, the learned State Attorney cited to us the celebrated case of **WAZIRI AMAN V. R**; [1980] TLR 250 to contend that the visual identification evidence of PW1 and PW2 was, on material aspects, unsatisfactory and not watertight. On this, he singled out two disquieting features attending the case for the prosecution. **First**, he hastened to point out that in view of the fact that the robbery in question happened very fast and the appellant had put on a hat covering his face but which went off his head at some stage in the course of robbery, the prosecution was duty bound to elicit, from the identifying witnesses, clear evidence touching on the time duration which the appellant was put under their observation. Considering the conspicuous absence of such vital evidence, a possibility of mistaken identification of the appellant could not be ruled out, he said.

Secondly, the learned State Attorney asserted that a possible impairment of PW2's visibility and concentration could not also be ruled out considering the absence of evidence touching on PW2's vantage point vis-a-vis the scene of crime and the fact that the robbery incident took place amidst many people and between two parked 'daladala' commuter buses. Coupled with the unexplained delay in arresting the appellant and the lack of cogent evidence to support the identifying witnesses' claims of having named the appellant immediately after the occurrence of the robbery, the learned State Attorney urged us to allow this appeal.

In our determination of this appeal, we wish to state at the outset that the case against the appellant rested entirely on the purported visual identification evidence of PW1 Kiwia and PW2 CPL. Magreth. The law on visual identification evidence in this country is well settled. Such evidence is of the weakest character and in a case depending for its determination essentially on identification, be of a single witness or more than one witness, that evidence must be watertight, even if it is evidence of recognition as was the case here. On what in law should be construed as watertight evidence, this Court in **NHEMBO V. R.**, Criminal Appeal No. 33 of 2005 had this to say:-

"In law,... for evidence to be watertight, it must be relevant to the fact or facts in issue, admissible, credible, plausible, cogent and convincing as to leave no room for a reasonable doubt."

In this case, there is no gainsaying that PW1 was the victim of the undisputed robbery that occurred on 27/3/2009 in broad daylight. The crucial question to be resolved is whether the appellant was impeccably identified by PW1 and PW2 at the scene of crime. On this, we are in agreement with the position taken by both the appellant and the learned State Attorney that the visual identification evidence of the said identifying prosecution witnesses was unsatisfactory, incredible and unreliable.

Going by the record, it is clear that the two courts below made concurrent findings of fact that PW1 and PW2 unmistakably identified the appellant as a robber because the latter was previously well known to the former witnesses and the robbery incident took place in broad daylight. In its decision, at pages 215 – 216 the first appellate court held:-

*"The incident took place during broad daylight.
Both PW1 and PW2 are independent witnesses*

who had nothing to do in common. All of them happened to know him earlier before the incident and none of them had any reason to tell lies against him."

But being the first appellate court, it did not fully subject the entire evidence on record to a fresh objective analysis to assess all the prevailing conditions at the scene of the undisputed robbery as well as the credibility of the two identifying witnesses. We shall pause here to remind ourselves of a clear warning sounded thus by this Court in **JARIBU ABDALLAH V. R.**, [2003] TLR 271:-

"In a matter of identification it is not enough to look at factors favouring correct identification, equally important is the credibility of witnesses. The conditions for identification might appear ideal, but there is no guarantee against untruthful evidence..."

The immediate foregoing firmly established legal principle was re-affirmed and amplified in **JAMES KISABO @ MILANGO V. R.**, Criminal Appeal No. 261 of 2006 (unreported) where this Court said:-

"Even in most favourable conditions there is no guarantee against untruthful evidence."

In this case, broad daylight was not the only condition which attended the robbery incident in question. There were other conditions of which we see no compelling reason for being repetitive by restating them here. Suffice it to say that the other conditions are as amply and ably expounded before us by the learned State Attorney. These other conditions which could be easily distilled from the trial court's record of proceedings were neither alluded to nor discussed by the two courts below in their respective decisions. In our opinion, had the two courts below considered and analysed the totality of all the conditions that attended the scene of crime, they would have found, as correctly submitted by the learned State Attorney, that the visual identification evidence could not be freed from possible errors given the circumstances of this case. As stated by this Court in **PHILIP RUKAZA @ KICHWEMBOGO V. R.**, Criminal Appeal No. 215 of 1994:-

*"The evidence in every case where visual identification is what is relied on **must be subjected to scrutiny due regard being paid to all the prevailing conditions** to see if in all the circumstances, there was really **sure opportunity and convincing ability** to identify the person correctly and that **every reasonable possibility of error** has been dispelled. There could be a mistake in identification notwithstanding the honest belief of a truthful identifying witness..."*

[Emphasis ours].

In this case, having scanned and closely scrutinized the evidence on record and on the strength of the brief foregoing discussion, we cannot say with any degree of certitude that the visual identification of the appellant by the said identifying witnesses was free from every reasonable possible error. Our position on this is compounded by the existence of other circumstances affecting the credibility and the reliability of the identifying witnesses.

In their respective testimonial accounts, both identifying witnesses (PW1 and PW2) stated that they named the appellant to the police authorities soon after the occurrence of the robbery incident. PW2 in particular was categorical when she stated that she informed PW8 the then police officer in - charge of Stakishari police station that she saw one Yassin, the appellant, committing the robbery. Indeed, PW1 the victim of robbery, stated in his evidence that after he had regained consciousness, one day after the robbery incident, he gave a statement to the police in which he named Yassin, the appellant, as his assailant. Curiously, throughout the trial, the visual identification evidence of the appellant by the two identifying witnesses remained uncorroborated by any other evidence. Even a statement allegedly made by PW1 to the police was not adduced in evidence. There is simply nothing on record upon which the identifying witnesses' claims could be ascertained.

We accept, generally that the ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his/her reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry. (See, for instance, **MARWA WANGITI MWITA AND ANOTHER V. R**; [2002] TLR 39. As hinted above, the

identifying witnesses claims that they named the appellant to the police authorities in the immediate aftermath of the robbery are not supported by any evidence on record. A total absence of supportive evidence forthcoming from the police officers to whom the robbery incident was allegedly firstly reported greatly undermined the credibility of the identifying witnesses. In their respective testimonial accounts, PW6, PW8 and their police colleagues who testified for the prosecution did not state that the appellant was ever named by PW1 and/or PW2 to be a perpetrator of the robbery in question.

Indeed, the record is clear on the fact that no attempts were made by the police to look, specifically, for the appellant in the immediate aftermath of the robbery. It is significant to point out here that the undisputed robbery took place on 27/3/2009 and the police authorities belatedly started looking for the appellant on 10/7/2009 when, on the same day, the latter was implicated in the commission of various offences by a criminal suspect who was being interrogated by PW6 at Stakishari police station. When faced with a more or less identical situation, this Court in **IBRAHIM SHABANI ALLY KALULU V. R**; Criminal Appeal No. 110 of 2002 (unreported) made the following pertinent observation:-

"It is our opinion that the slackness in arresting the appellants was not due to inefficiency, but to lack of information as to who they were to arrest."

In this case, the appellant was arrested by the police on 10/7/2009. We think that had the identifying witnesses, one of whom a police officer, named the appellant immediately after the occurrence of the robbery on 27/3/2009, the police would not have waited until 10/7/2009 to start tracing the appellant on the basis of the information supplied by a criminal suspect. Thus, we cannot rule out a possibility that the identifying witnesses (PW1 and PW2) did not name the appellant to anybody in the immediate aftermath of the robbery.

In the light of the foregoing disquieting and patent features attending the case for the prosecution, we find that the case for the prosecution against the appellant was not proved beyond reasonable doubt. The incredible, unreliable and uncorroborated visual identification evidence of the said two identifying witnesses totally failed to place the appellant at the scene of crime on 27/3/2009, just as the same evidence was incapable of sustaining the latter's conviction. We further hold that the combination of

the same unsatisfactory features which the two courts below never adverted to in their minds to justify our intervention, this being a second appeal.

Accordingly, this appeal is hereby allowed in its entirety. We consequently quash the conviction of the appellant and set aside the prison sentence meted out by the trial court and affirmed by the first appellate court. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

It is so ordered.


DATED at DAR ES SALAAM this 1st day of February, 2016.

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
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