IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KIMARO,J.A.,ORIYO,J.A., And MWARIJA, J.A.,)

CRIMINAL APPEAL NO. 174 OF 2010

1. SALEHE MOHAMED
2. ZARAU HERMAN .....**APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)
(Shangwa, J.)

Dated 23rd day of June, 2010
in
HC Criminal Appeal No. 82 of 2007

JUDGMENT OF THE COURT

16th February & 1st March ,2016

ORIYO, J.A.:

This is a second appeal. It began as Criminal Case No. 18 of 2006 in the District Court of Kilosa in which the appellants were charged with two offences of Armed Robbery contrary to section 285 & 286 of the Penal Code as amended by Act No. 1 of 1999. Both appellants were facing two counts. On the 1st count, they were jointly charged with five other persons while on the 2nd count; the first appellant was charged with six other persons without the 2nd appellant. At the end of the trial, they were found guilty, convicted and sentenced to thirty years imprisonment each. Their

first appeal to the High Court (Shangwa, J.) was dismissed. Being aggrieved they preferred this second appeal.

The prosecution case at the trial on the 1st count was briefly to the effect that, on 6th January 2006 at about 1.30 hours at Magomeni area within Kilosa District, the appellants and other persons stole one bicycle valued at 70,000/=, ten pairs of shoes valued at Shs 60,000/= and cash amounting to Shs 400,000/=, the properties of Hashimu Rashid. The second count was for the 1st appellant only whereby it was alleged that on the night of 6th January 2006, at Magomeni area, within Kilosa District, the first appellant together with six other people did steal one short gun make HELL LONDON mark 1151.1 the property of Ally Mussa.

On first appeal, the High Court sustained the appellants' convictions mainly on the basis of identification, the learned first appellate judge having found the light from electricity lights to be watertight for identification purposes as well as that the appellants were well known to the prosecution witnesses before the incident.

The appellants appeared before us in person with no legal representation. Each had filed a separate memorandum of appeal. In their respective memorandum of appeal the appellants canvassed a number of grounds. In substance, however, they all complained that the identification was not watertight in grounding their convictions.

Ms Ester Kyara, learned State Attorney who represented the respondent Republic, did not deem it fit to support the conviction and sentence on the ground that the charge was defective in that it did not specify against whom the violence / threat was directed at, in obtaining the stolen property. In support of her argument, Ms. Kyara referred us to the decision of this Court in **Munziru Amri Mujibu and Dionizi Rwehabura Kyakaylo Versus Republic, Criminal Appeal No. 151 of 2012** (unreported).

The learned State Attorney submitted that the trial court erred in relying on the evidence of visual identification because the prosecution witnesses failed to name any of the suspects whom they claimed they knew to anyone else; the time they spent with the robbers and the brightness of the light which enabled them to

identify the robbers. She referred us to the Court decision in **Kasim Said and 2 Others Versus Republic, Criminal Appeal No. 208 of 2013,** (unreported).

Going by record, the appellants were specifically charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code. **Section 285** provides:-

> " *Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of robbery."*

The charge sheet which we deliberately reproduce here-under is couched as follows:-

> " *1st Count:*
> *OFFENCE SECTION AND LAW: Armed robbery c/s 285 and 286 of the Penal Code as amended by Act 1/1999.*
> *PARTICULARS OF OFFENCE: That SALEHE S/O MOHAMED, MASUMBUKO S/O LENADI, PETER S/O ABADIA, FADHILI ABDUL, ALLY ABDALLAH*

AND SELEMAN FARAJA (DOTO NGOCHERO) are jointly and together charged on 6th day of January, 2006 at about 01:30 hrs at Magomeni area, within Kilosa District in Morogoro Region did steal one bicycle valued at Tshs. 70,000/=, ten pairs of shoes valued at Tshs. 60,000/=, Cash money 400,000/= Total valued at Tshs. 630,000/= the properties of one ***HASHIMU RASHID*** *of Magomeni and immediately before, or after such stealing did shoot one bullet in order to obtain or retain the said stolen property."*

Having carefully read the charge reproduced above and the cited legal provision, we agree with the learned State Attorney that the charge is incurably defective. It is incurably defective because the essential ingredients of the offence of armed robbery are missing. Strictly speaking for a charge of any kind of robbery to be proper, it must state the person on whom actual personal violence or threat was committed - See **Munziru Amri Mujibu and Another Vs Republic**. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, the particulars of the offence of

robbery must not only contain the use of violence or threat but also the name of the person on whom the actual violence or threat was targeted at. This legal requirement is provided for under Section 132 of the Criminal Procedure Act, Cap. 20 RE. 2002 so as to enable the accused person to know the nature of the offence he is going to face. The section provides:-

> *132. Every charge or information shall contain, and shall be sufficient if it contains,* ***a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*** (Emphasis supplied).

In **Mussa Mwaikunda Vs Republic [2006] TLR 387** the Court, observed, the following, inter alia:-

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence."*

In our case, the alleged firing of the bullet as stated in the charge sheet is not shown to have been directed at or a threat in any way to any person from whom the appellant is alleged to have intended to obtain the property. The charge does not disclose any offence. This ground is sufficient to dispose of the appeal.

Assuming for argument's sake that the charge is in order, is the prosecution evidence on record sufficient to ground a conviction? As for identification purposes, Ms. Kyara argued with force that the conditions were not favourable for proper identification. The convictions of the appellants were based on visual identification through electricity light. However, it is in evidence that the incident took place on a dark night. So the evidence of visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight, See **Waziri Amani VR [1980]** TLR 250.

Both PW1, PW2, and PW3 did not state the brightness of the electric light and/ or the position of that light, if the light was outside or inside the house as some of the witnesses testified that

they identified the appellants through a window without stating the position of the light which helped them to identify the appellants. They neither disclosed the distance from the place where they were vis-a-vis the assailant and for how long they observed them; See **Waziri Amani** (supra).

In **Waziri Amani** and subsequent similar cases, a number of factors were enumerated which are to be taken into account by a court in order to satisfy itself on whether or not such evidence is watertight. These factors include: the **time** the witness had the accused under observation, the distance at which he observed him, the **conditions** in which the observation occurred, for instance, whether it was **day or night-time,** whether there was **good or poor lighting** at the scene, etc; See, **Waziri Amani, Raymond Francis Vs Republic** (1994) TLR 100, **Issa Mgare @ Shuka v.R.,** Criminal Appeal No. 37 of 2005 (unreported); etc.

For the reasons we have stated, we find the appeal by the appellants to have merit. We accordingly allow it. Conviction entered against the two appellants is quashed and the sentences

imposed on them are set aside. The appellants are to be set at liberty forthwith unless otherwise held in connection with some other lawful cause.

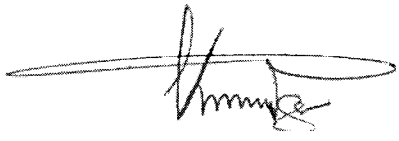
DATED at **DAR ES SALAAM** this 26th day of February, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL