IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 594 OF 2015

HUSSEIN ELISHA MASUNZU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Singida at Singida)

(Lema, PRM Ext. J)

Dated 11th day of December, 2015
in
PRM Criminal Appeal No. 53 of 2015

JUDGMENT OF THE COURT

19th & 25thApril, 2016

JUMA, J.A.:

The appellant Hussein Elisha Masunzu and seven other accused persons were in the District Court of Manyoni charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002. It was alleged in the particulars of the offence that around 23:30 hours on 29th March 2014 at Kayuyi village in Manyoni District in Singida Region the appellant and his co-accused were armed with a local made

gun (Muzzle Loader) and bush knife, they stole money in cash totalling Tshs. 4,700,000/= the property of Diana d/o Ramadhani. It was further alleged that immediately before and after the stealing, they used the bush knife to cut her on the face, back and the right small finger in order to obtain or retain the money.

At the close of the prosecution case, the appellant Hussein Elisha Masunzu, Henry Steven @ Mayani, Swed Rajabu @ Kimasharo and Swed Ally @ Swed were found with a case to answer and placed on their respective defences at the trial. The learned trial magistrate (F.H. Kiwonde-DRM) convicted the appellant together with Henry Steven @ Mayani and Swed Rajabu @ Kimasharo and sentenced them to serve thirty (30) years in prison. Swed Ally @ Swed, who was the 8th accused person, was however acquitted. The appellant brought this second appeal to manifest his grievance with the dismissal of his first appeal by W.E. Lema-PRM to whom the hearing of appeal was transferred on extended jurisdiction.

The brief background of how the incident of armed robbery took place is captured in the testimony of the complainant, Diana Ramadhani (PW1). It was around 11 pm on 29/3/2014, the complainant, who operated

a grocery where she sold beer and local brew going by the name *"Wanzuki"*, was at home with other members of her family. There were many patrons who had come for drinks, but as the night wore on, customers left and three remained. One of the three customers was SWED ALLY @ SWED. Later on two of the three customers left leaving behind SWED ALLY @ SWED. It was at this moment when this customer pulled out a muzzle loading gun, locally known as *"gobore"*. He pointed that weapon at the complainant and ordered her to surrender the money. Realizing that the bandits had set upon their premises other members of the family shouted for help, as the complainant ran towards the room used by her son Msengesi Ally Juma (PW3). The other erstwhile customers, who had earlier left, returned this time brandishing a bush knife. They used the machete to slash down the doors to loosen up the locks.

The bandits slashed the complainant's finger as she tried to protect a baby she was carrying on her back from the onslaught. She sustained injuries on her back, shoulders and waist. The complainant went to her bedroom to look for the money which the bandits wanted. Three bandits were already ransacking her bedroom looking for money when she entered.

The complainant testified that the appellant was amongst the bandits who were in her bedroom and she stated that it was Swed Ally @ Swed who had actually slashed her using a machete as he was demanding money. At first the complainant surrendered Tshs. 4,000,000/= cash but the bandits, led by Swed Ally @ Swed, were adamant that she had Tshs. 40,000,000/= which she should hand over. It was Swed Ally @ Swed who slashed the complainant on her face. Gravely injured and with great difficulty, the complainant managed to get out of her room and went to the house of her neighbour, one Mzee Richard. When the police arrived they called a vehicle which transported the gravely injured complainant to St. Gaspar Hospital.

Defending himself after the closure of the prosecution evidence, the appellant (DW3) denied the accusation that he was amongst the bandits who attacked and robbed the complainant at Kayuyi village.

In his memorandum of appeal to this Court, the appellant relies on a total of ten grounds of appeal. The **first**, **second**, **third** and **fourth** grounds in their effect, question the visual identification evidence which placed him at the scene of crime. He also faults the two courts below for

apprehending the evidence in a double standard way. He was in particular concerned with the way the evidence that placed him at the scene of crime and convicted him of armed robbery was acted upon differently to acquit the 8th accused (Swed Ally @ Swed) who was identified by witnesses at the scene of crime. He pointed out how at various stages of their testimonies, the complainant (PW1) and her son (PW3) said that they definitely identified the 8th accused as the bandit who actually slashed the complainant, yet the two courts below still acquitted him but went ahead to convict the appellant on similar evidence of identification. The appellant urged the Court to discourage the double-standard way similar evidence is used to convict and also acquit.

In his **fifth**, **sixth** and **seventh** grounds of appeal the appellant urged us to fault the veracity of the evidence of the complainant and other victims of that incident for failing to mention the names of the bandits they claimed to know when the earliest opportunity to do so presented itself when assistance came, but they failed to mention the names. He gave the example of Richard Kapona (PW4), a neighbour who was first to respond to the cries for help but the victims failed to disclose to him the names of their assailants. This failure, the appellant contended, creates doubt in the

evidence of prosecution witnesses as to whether they identified the appellant as one of the bandits. In his eighth ground, the appellant claims that despite his objection over the medical examination report (PF) which the complainant tendered, the two courts below failed to comply with section 240 (3) of the Criminal Procedure Act governing the right of an accused to require the medical officer who prepared the report to testify and be cross examined.

At the hearing of the appeal, the appellant appeared in person, without the assistance of a learned counsel. Mr. Evod Kyando learned State Attorney represented the respondent Republic. The appellant preferred to let the learned State Attorney to respond to his grounds of appeal first and he would submit thereafter.

Mr. Kyando supported the appellant's conviction and sentence. He submitted first on the double standard alleged in the grounds of appeal. He argued that as much as the 8th accused was the main player in the armed robbery, he did not see any double-standard in the way the two courts below handled and acted on the identification evidence because the appellant and the 8th accused were separately targeted by identification

evidence and the evidence targeting each one of them was separately evaluated by the trial court and correct conclusions were reached with respect to each of them. He argued further that the appellant should be more concerned with the identification evidence that weighs against him instead of comparing his conviction with the acquittal of the 8th accused. In his view, just as the 8th accused was properly identified at the scene of crime, the appellant was similarly properly identified at the scene of crime. Mr. Kyando added that the 8th accused was wrongly acquitted even if the respondent did not appeal against that acquittal.

Elaborating on the source of light that assisted the positive identification of the appellant, the learned State Attorney referred us to page 22 of the record where the complainant testified that there were five four feet long bright tube lights which assisted the positive identification.

In his brief response, the appellant reiterated his reliance on his ground of appeal. He submitted that there is no way he could have committed the offence at Kayuyi while he lived at Mitundu village. He also wondered why the items that were allegedly stolen were never found with any of the accused person.

The role of the Court on the second appeal is confined to determination of points of law and the Court rarely interferes with concurrent finding of facts by the two courts below. From submissions on the grounds of appeal, and as rightly pointed out by the two courts below, the main point of law that call for our determination in this appeal is concerned with the evidence of visual identification. That is, whether the visual identification evidence was properly evaluated so as to place the appellant at the scene of armed robbery.

The guiding legal premise when courts face evidence of visual identification or evidence of recognition is now settled. In **Aidan Fredinand Mnamba, Emmanuel Lucas Mbonde, Alfeus Mkekena Maumba and Mustafa Ally Nagelite vs. R.**, Criminal Appeal No. 187 of 2014 (unreported) the Court restated this premise:

> *"We are fully alive to the fact that the evidence of visual identification is of the weakest kind and most unreliable. For that matter it ought to be acted upon cautiously when all possibilities of mistaken identity are eliminated,"*

Categories of what conditions are "unfavourable conditions" for creating the possibilities of mistaken identification calling for caution; are not exhaustive. It all depends on the circumstances pertaining to any particular set of facts. In **Aidan Fredinand Mnamba, Emmanuel Lucas Mbonde, Alfeus Mkekena Maumba and Mustafa Ally Nagelite vs. R** (supra) a bushy area and dark hours of the night were regarded as unfavourable conditions. The decision also reiterated that even in cases where the appellant was not a stranger to an identifying witness, the law still requires the removal of any possibility of mistaken identity.

With the clarity of the legal premise guiding the evidence of identification and recognition, we propose to deal first with the line of submission by Mr. Kyando to the effect that there were five four feet long bright tube lights which facilitated the identification of the appellant. With due respect, a closer glance at the evidence, it is clear to us that the complainant described the source of light from the tube lights in a generalized way without so much as showing how the five tube lights were spread out in the several rooms of the house, and the intensity of lights in each of the rooms where the appellant was supposedly identified. An

extract from the evidence of the complainant betray the generalized description of source of lights:

> *"...At that night, there were burning electricity lamps make tube lights the 4 feet tube lights, they were five of them, they had bright light that enabled me to see and identify the bandits."*

The totality of the evidence of the complainant and other prosecution witnesses who were in that household has not come out clearly on how the five tube lights were spread out in several rooms and spaces in the house. First, the evidence on record is not forthcoming on whether the grocery where drinks were sold and where patrons would frequently sit down to enjoy their drinks was an outdoor outfit or one of the rooms inside the house had been converted to sell drinks and accommodate customers. We do not know how many tube lights were in that grocery.

Next, when the bandits began their assault, the complainant ran to what she described as neighbouring room belonging to her son (PW3). They barricaded themselves while shouting out calling for help. We do not know how many tube lights were switched on in this room and intensity of lighting when the bandits slashed their way in by breaking down the doors

into that room. In her evidence, the complainant stated how she next moved to her bedroom wherein she found three bandits. She did not explain how she identified these three bandits. She then moved from her bedroom through her sitting room where she claims that there were other bandits. She did not describe the state of lighting.

The same general description of source of light without so much as relating it to proper identification of the appellant is apparent in the evidence of PW3, PW5 and PW6:

PW3:

> *"...I identified the bandits since there was burning lamp, a bulb (electric), there was enough light, it shone in the room, I knew the 8th accused before the date of event.... We were all in the room which the 8th accused asked for money..."* page 36.

PW5:

> *"...I managed to identify the 1st and 2nd accused since there was burning lamp (the long tube light)"*—page 48.

PW6:

".... I started running, he shot/fired on air the pistol, we ran into the room we shut the door.... The bulb was burning and there was enough light..."—page 55

None of the prosecution witnesses specified the duration they kept the appellant under their observation under any of the five tube lights and in which part of the household. Had the trial and first appellate courts adequately addressed the questions we have highlighted, the learned trial magistrate could not have stated: "*I am satisfied that the 1st, **2nd (i.e. the appellant herein)** and 4th were properly identified by the witnesses on the date of event.*

Similarly, had the learned Principal Resident Magistrate on Extended Jurisdiction properly subjected the source of lights in relation to the appellant, the first appellate court could not have arrived at generalized conclusion that:

"..The identification of the appellant was properly done with elimination of all possibilities of mistaken identity. The trial Magistrate did evaluate prosecution and defence evidence and came with the conclusion that the case was proved to the required standard in criminal law

in respect of the appellant, whereby his defence/denial cast no doubt on his guilt.."

Similarly, we do not agree with the learned State Attorney that all possibilities of mistaken identity of the appellant were eliminated to justify his conviction for the offence of armed robbery.

For the foregoing reasons we have come to the conclusion that the appellant's conviction is not safe. We therefore, allow his appeal, quash his conviction for the offence of armed robbery, set aside the sentence of thirty (30) years imprisonment which was meted out to him, and order that he be released from prison forthwith unless otherwise lawfully held.

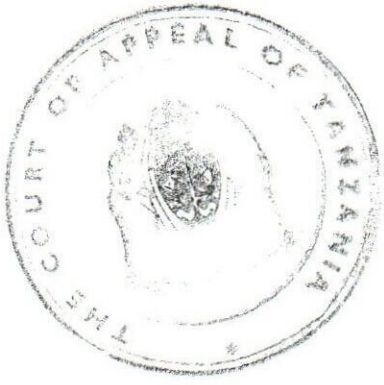
DATED at **DODOMA** this 21st day of April, 2016.

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