

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

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

CRIMINAL APPEAL NO. 597 OF 2015

**1. ZUBERI MOSES @ AHUNGU
2. JOHN MESHACK
3. FESTO GIDIONI NUSHURA APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

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

(W.E. Lema, PRM – Extended Jurisdiction)

dated the 8th day of December, 2015

in

PRM. Criminal Appeal No. 21 of 2015

REASONS FOR JUDGMENT OF THE COURT

20th & 29th April, 2016

ORIYO, J.A.:

The appellants, Zuberi Moses @ AHUNGU, John Meshack and Festo Gidion Nushura @ NDALU, were in the District Court of Singida convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16. Upon conviction, the trial magistrate (A.H. Mwetindwa-RM)

ordered the three appellants to serve a sentence of thirty years (30) in prison.

Aggrieved, the appellants preferred an appeal which was heard in the Resident Magistrate's Court of Singida as PRM Criminal Appeal No. 21 of 2015 by W.E. Lema-PRM on extended jurisdiction. Their first appeal was on 7/12/2015 found without merit and dismissed accordingly. Still dissatisfied, the appellants have on second appeal, come to this Court. On 20/04/2014 after we had considered the grounds of appeal and submission of the respondent's attorney we allowed the appeal and ordered their immediate release from prison unless they were otherwise lawfully held. We reserved our reasons for so doing which we now give.

Zuberi Moses @ AHUNGU (the first appellant) preferred five grounds of appeal which in their essence consist of four areas of complaint. **Firstly**, he contests his conviction on the basis of visual identification evidence which he described to be weak and unreliable. **Secondly**, he questions the identification parade. Failure to evaluate the evidence offered by the defence is his **third** area of complaint. **Finally** he questions the proof of

the offence of armed robbery where the prosecution failed to exhibit as their evidence, any lethal weapon allegedly used in the offence.

In their joint memorandum of appeal, John Meshack (the second appellant) and Festo Gidion (third appellant) brought eight grounds of appeal, which may be summarized into the following areas of complaints. **Firstly**, they protest their visual identification at the scene of crime by PW2, PW3 and PW4 and failure of these prosecution witnesses to mention them to any other person immediately after the incident had occurred. **Secondly**, the two appellants question the probity of the evidence of identification parade where PW2, PW3 and PW4 purported to have identified them. **Thirdly**, they are concerned with contradictions in the evidence of prosecution witnesses, especially where PW2 claims that there was no light and he had to jump outside to switch on the lights, whereas PW3 and PW4 said that lights were on. **Fourthly**, they contend that they were convicted without the two courts below taking into account the evidence they offered in their own defence. The **fifth** ground contends that their conviction had more to do with the weakness of their defence instead of the prosecution proving its case beyond reasonable doubt.

Sixthly, they question the failure to adequately evaluate the evidence. **Finally**, the two appellants complain that the trial court went to convict them without taking into account that the charge sheet had along the way been substituted.

The background to the three appellants being charged and convicted of the offence of armed robbery can be traced back to 20/4/2013 at around 19:30 p.m. On this day kiosk attendants, Yusuph Maulid (PW2) and Gharib Hassan (PW3) were at a kiosk belonging to Hussein Ally (PW1). The time had come for PW2 to go home for the night. As he was opening the gate, PW2 met three people who immediately began to fire shots into the air as they threw insults at him. It was too much for PW2. He threw down his bicycle, sought cover in the kitchen where he was joined by Nassoro Hussein (PW4) and one Adam. According to PW2, their locking themselves up in the kitchen did not last long because the bandits broke down the door as they shot onto the wall injuring PW2. The bandits took their victims to the bedroom and demanded that PW3 give them the keys to the shop, to which he complied.

At around the time the incident of armed robbery was taking place, the kiosk owner (PW1) was in Arusha. Word reached him however that his kiosk was being robbed. By the time they left, the bandits had damaged the doors PW1's bedroom, kitchen and shops. Three people sustained injuries.

Five days after the incident, Assistant Inspector Ephraim Nyamhenda (PW6) conducted an identification parade in two groups. Each group had ten other people plus two accused persons. The three appellants were positively identified in that parade. PW6 tendered two documents to show how he conducted the identification parade. The documents were collectively admitted as exhibit PE1.

The appellants denied involvement in the commission of the crime. They also claimed to have been away from the scene of crime when the crime was being committed.

The appellants appeared before us in person, unrepresented. The respondent Republic was represented by Ms. Chivanenda Luwongo, learned State Attorney. When called upon to address us the appellants did not have much to say, they merely asked us to adopt their grounds and

preferred that the learned State Attorney for the respondent submits first. Ms Luwongo did not see it fit to support the conviction. She conceded that identification upon which the appellant's conviction was based was not watertight. She pointed out that there were contradictions in the testimonies of the witnesses with regard to the source of light that the victims claimed enabled them to definitely identify their intruders. The learned State Attorney further submitted that the identification parade was not conducted properly and as such could not be relied upon to sustain a conviction. She also wondered why an identification parade was conducted, if the victims knew the appellants before.

On our part we agreed with the appellants and the learned State Attorney that the proof of the case for the prosecution fell far short of the standard required in criminal cases.

Admittedly, the case revolved around the question of identification. The incident occurred at night. It has been said, time and again by this Court, that evidence of visual identification is of the weakest kind and before a trial court can rely on it to ground a conviction it has to be satisfied that the identification is watertight and leaves no possibility of

mistaken identity. Conditions favouring correct identification as well as credibility of witnesses must be closely examined. In the case of **Waziri Amani v. Republic**, [1980] 250 the Court held:

- (i) *Evidence of visual identification is of the weakest kind and most unreliable;*
- (ii) *No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is*

The Court also enumerated some factors which should be considered in the determination of watertight identification. These factors include:

The time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.

Credibility of witnesses is also to be considered when visual identification is in issue. See for example, **JARIBU ABDALLAH v. R** Criminal Appeal No. 220 of 1994 (unreported) where the Court stated

"... in matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions for identification might appear ideal but that is no guarantee against untruthful evidence."

(Also see, **ABDALLA MUSSA MOLLEL @BANJOO v. R** Criminal Appeal No. 31 of 2008 (unreported).

In this case the evidence of source of light was hazy. PW2 for example said that he was able to identify the assailants with the aid of electricity light. The intensity of the light was not explained. Moreover, during examination in chief he did not say anything about visual identification. It was only during re-examination that he said he identified them through electricity light solar power. We think this was an afterthought.

Further, neither PW3 nor PW4 specified the source of light which enabled them to identify the culprits whom they claimed to have known prior to the incident. The prosecution witnesses claimed that they knew the appellants prior to the incident. Ms Luwongo rightly wondered why conduct an identification parade if the appellants were known to them before? The

Court in **Abdul Farijalah and another v. Republic**, Criminal Appeal No. 99 of 2008 (unreported) explained the purpose of an identification parade as follows:

"....It is trite law that the test in an identification parade is to enable a witness to identify a person or persons whom she or he had not known or seen before the incident....An identification parade held soon after the incident in which a witness positively identifies an accused lends assurance to the court of that witness's dock identification of that person. "

There was no need in the circumstances of this case to conduct an identification parade and the one that was conducted was just a façade. In any case, the parade itself was not properly conducted as required by GPO 232. For one thing, the names of the suspects who are the appellants did not appear in the list of those who formed the parade. PW6 who tendered the identification parade register (exhibit P1 collectively) did not give a detailed account of his compliance with the PGO 232 which guides as follows:

- a) *The officer-in-charge of the case will make the preliminary arrangements for the parade and shall enter the number of persons attending the parade and the suspects in the space provided under Head No. 3 in the Identification Parade Register (P.F. 186). He will enter the names of the witnesses under Head No. 4 of the register in the order in which they are to be called. A supPLICATE copy of all entries in the register will be made by inserting a sheet of carbon paper between the original and duplicate pages.*
- b) *Although the officer-in-charge of the case may be present, he will take no part in conducting the parade. The officer conducting the parade must be an officer unconnected with the case and, whenever possible, a Gazetted Officer, Officer below the rank of Assistant Inspector are not permitted to conduct Identification Parade.*
- c) *At a reasonable time prior to the parade, the officer-in-charge of the case will inform the suspect that he will be put up for identification. Any objections raised by the suspect will be noted and communicated by the officer-in-charge of the case to the officer conducting the parade before it is held.*
- d) *If the suspect desires the attendance of a solicitor or friend, arrangements must be made for him to attend the parade if he wishes to do so. The person so attending will be required to remain in the background, observing only and saying nothing.*

e) *The place selected for the parade should have a good light. No unauthorized persons will be permitted to attend or witness the parade.*

The witnesses will be assembled under the charge of a Police Officer who has no connection with the case in a room or place out of sight and hearing of the parade, from which they can be called to the parade by the officer conducting it.

The witnesses will not be allowed to see or hear the suspect before he is put up for identification, nor should they be assisted by any description or photograph of him, or in any other way.

Officers who made the arrest or who took part in the investigation will not be sent to bring or notify witnesses to attend the parade and will not communicate with them before the parade is held.

i) *Arrangements will be made to ensure that witnesses have no opportunity to see, or be seen by; any of the persons to be paraded.*

j) *There is no objection to the suspect being put up for identification in the clothing he was wearing when the offence was committed (providing that such clothing does not show stains, marks, or tears which patently distinguish his clothing from that of other persons on the parade). Alternatively, the suspect may be put up for identification in the clothing he was wearing when arrested.*

k) Persons selected to make up the parade should be of similar age, height, general appearance and class of life. Their clothing should be in a general way similar.

The persons selected for the parade must not be known to the complainant or the identifying witnesses as identification would then have little value.

Police Officers will not be used to make up the parade unless the case is one in which a Police Officer is concerned as a suspect.

n) There should be eight or more persons on the parade for one suspect; ten or more for two suspects. If there are more than two suspects, more than one parade will normally be held, with different personnel being used to form each parade.

o) When the officer conducting the parade has arrived and has taken charge of the proceedings, the suspect will be brought on to the parade. The officer conducting the parade will explain the purpose of the parade and will ask the suspect if he has any objection to any person participating in the parade. Any objection raised by the suspect will be noted in the Identification Parade Register and immediate steps taken to replace those persons to whom the suspect objects. The suspect will then be invited to stand where he please in the line. The position he selects will be noted in the Register.

- p) Great care must be taken that the suspect is not wearing handcuffs or anything else that might distinguish him from the others. No attempts at disguise will be permitted.
- q) The first witness will be called to the parade by the officer conducting it, who will explain the purpose of the parade in the hearing of those on parade and invite him or her to point out by touching any persons he or she identifies. Under no circumstances shall the witness be touched or led during his or her examination of the parade.
- r) If the witness requires any person on the parade to walk, talk, see him with his hat on or off, this may be done but the whole parade must be asked to do likewise.

The officer conducting the parade will note carefully in his Identification Parade Register any identification or degree of identification made and any material circumstances connected therewith including any wrong identification, and any remark or objection made by the suspect. He shall ask the witness who makes, the identification; "In what connection do you identify this person?" and shall similarly record precise details of the witness's reply. No other questions are permissible.

- t) On leaving the parade, the witness will be conducted to a place where he or she is out of sight and hearing of the parade and cannot communicate in any way with other witnesses waiting or members of the Force and will remain there under

the charge of a Police Officer, who has no connection with the case, until the parade is finished.

*u) Subsequent witnesses will be brought into the parade and handled in accordance with the same procedure set out in sub-
paras. (a) – (t) above.*

Another aspect of the identification parade that we noted is the fact that none of the people who formed the parade was ever called to testify in support of the case for the prosecution.

It is for the above reasons that we allowed the appeal by Zuberi Moses Ahungu, John Meshack and Festo Gidion Nushura and ordered their immediate release from prison unless they were otherwise lawfully held.

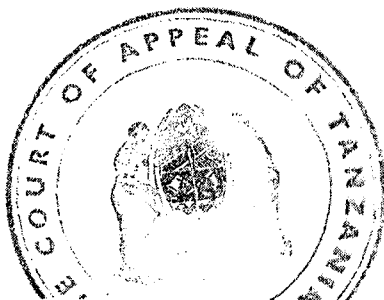
DATED at DODOMA this 29th Day of April 2016.

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