IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 23 OF 2015

DERICK ALPHONCE ..... 1ST APPELLANT

SIMON SELEMAN SALU..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Senior Resident Magistrate with (Extended Jurisdiction) at Mbeya)

(Lyamuya, SRM.)

dated the 1st day of September, 2014

in

Criminal Appeal No. 22 of 2014

.....

JUDGMENT OF THE COURT

22nd September, 2017 & 2nd October, 2017

MZIRAY, J.A.:

The appellants, Derick Alphonce and Simon Seleman Salu, were charged in the District Court of Mbozi at Vwawa, along with two other persons namely Florence Selestine @ Masala and Patrick Stephen @ Kamagali with two counts; conspiracy to commit the offence of armed robbery contrary to section 384 of the Penal Code

Cap.16 of the Revised Edition, 2002 and armed robbery contrary to section 287A of the same Act.

The appellants were found guilty hence, were convicted and sentenced each to serve five (5) years imprisonment term for the first count, and thirty (30) years imprisonment term for the second count. Aggrieved by that decision, they unsuccessfully appealed to the High Court, and have now lodged this second appeal in this Court.

The case for the prosecution as established at the trial was that on 22/06/2012 at about 04:00Hrs at Serengeti Guest House in Tunduma Township within Momba District in Mbeya Region the appellants did steal Tshs. 106,000/= the property of Evarist Kanu Kalumwangi and immediately before and after such stealing did fire two bullets in the air and injured the said person by using iron bars in order to obtain the said amount of money.

The background facts of the case were fully and clearly set out by both the trial court and the first appellate court, but we feel that it is indispensable to once again summarize them, albeit very briefly.

At the time of the incident the two appellants were lodging a room at Serengeti Guest House in Tunduma Township. PW2, Kalumwangi Evarist was also occupying a room in that guest house. He is a Congolese from the Democratic Republic of Congo and he came to Tunduma for business to buy fish. The guest house was being attended at the material time by PW1 Neema Mwasumbi who was the receptionist assisted sometimes by PW3, Zakayo Mwasenga when she was absent. The two appellants had been in that guest house from 19/6/2012 to 22/6/2012 and during that time PW1 became familiar with them and she even provided room services to the first appellant by taking tea to him when he fell sick. The second appellant had registered himself in a fake name of Selemani Salum Mohamed.

On the night of the incident, PW1 was at the reception where she heard commotion and shortly thereafter gun shots in one of the rooms of the guest house. She realized that the two appellants broke into the room of PW2 and before taking cash from him they thoroughly assaulted him. The appellants having accomplished their mission came to the reception and demanded keys for the main gate.

They assaulted PW1 and the second appellant threatened her with a pistol. They managed to seize the keys for the gate, opened it and vanished away. In her evidence, PW1 stated that she identified the appellants by their shape and voices. The matter was subsequently reported to police whereupon they arrived at the scene and assisted PW2 by taking him to hospital. PW2 informed the police that the bandits took USD 100,000 from him and he identified the appellants after the bandits had switched on the light. The television set was also on. Outside the room of PW2 the police picked two empty cartridges. Police then mounted an investigation to net the culprits.

On 4th October, 2012, while PW1 was coming from a place called Chimbuya, she saw the 1st appellant in a Bar and identified him. She called Police who went to arrest him. On interrogating, the 1st appellant admitted to have participated in the alleged crime. On 5th October, 2012, he was taken before PW4, Leonard Kazimzuri, Justice of Peace, and his extra judicial statement was recorded. He confessed to have committed the crime.

From the statement of the 1st appellant, PW8, D/C Shauri who investigated the case had a solid lead. He had the particulars of all

suspects which easily led to the arrest of the second appellant and the other suspects. Through the investigation conducted, the 2nd appellant was traced to be at Majiyamoto village, Mpanda District. On 5th January, 2013, he was arrested. On 17th January, 2013 he was transferred to Tunduma Mbeya and subsequently charged. On 22nd January, 2013, Police conducted identification parade. The second appellant was positively identified by PW1 and PW3. In a nutshell, that was the prosecution case.

When called for their defence, each appellant denied involvement in the alleged crime and each raised a defence of *alibi*. While the first appellant alleged that he was admitted at Dareda Hospital in Manyara Region at the time of the incident, on the other hand, the second appellant stated that he was in Songea, in Ruvuma Region. The two denied knowing each other prior to the incident. They further challenged the prosecution case for failing to produce the customers' register book to ascertain if they had ever lodged in that guest house during that time. In all, the two appellants alleged before the trial court that the case against them was a mere fabrication calculated to put them in jeopardy.

The appellants filed separate memoranda of appeal. The first appellant's memorandum raised seven (7) grounds, while those of the second appellant raised eight (8) grounds. Both grounds in the memoranda of appeal mainly hinged on the issues of identification, inappropriate identification parade, contradictions between the prosecution witnesses and generally insufficiency of the evidence on which the conviction was founded.

At the hearing of the appeal the appellants appeared in person unrepresented, whereas Mr. Ofmedy Mtenga, learned State Attorney represented the respondent/Republic. Both appellants elected for the Republic to submit first, undertaking to respond later on if a need would arise.

On his part, the learned State Attorney from the outset submitted that, he did not support the appeal, in other words he supported the conviction and sentence imposed on the appellants by the trial court and upheld by the first appellate court. Then, Mr. Mtenga opted to argue the appeal generally. He started by pointing out that the evidence of PW1 and PW3 is clear that the two appellants lodged at Serengeti Guest House. PW1 testified at length

on how she was close to the two appellants when they were at the guest house and that on 22/6/2012 at 4.00am when the offence was committed she identified them by shape and voices. The learned State Attorney submitted that the voice identification was corroborated by the conduct of the appellants themselves as immediately after the commission of the offence they disappeared at the guest house. On the issue of voice identification the learned State Attorney relied on the unreported case of **Stuart Yakobo V. Republic**, Criminal Appeal No. 202 of 2004.

Basing on the evidence of identification on record, the learned State Attorney was of the view that identification parade was not necessary in the circumstance of the case taking into account that PW1 and PW3 had been with appellants for three clear days. The learned State Attorney then urged us to find the appeal to have no merit, and he prayed for the same to be dismissed.

In response, the appellants submitted that the case against them was not proved beyond reasonable doubt as required in law. They alleged that the customers' register book was not tendered in the trial court as exhibit to show that they indeed lodged in that

guest house on the material date. They further argued that there were contradictions in the prosecution evidence. They pointed out that the evidence of PW5 contradicts that of PW1 on the number of the culprits who invaded the guest house. They asked the Court for the said contradictions be resolved in their favour.

As to the issue of identification, the appellants denied to have been properly identified. They submitted that the conditions during the robbery were not conducive to accurate and reliable identification as the offence was committed at night. Worse enough, the prosecution did not tell or explain the intensity of the light at the scene on the fateful day. With all these, they pleaded with the Court to be released.

We will start with the issue of identification. It is not in dispute that the offence took place at 4:00hrs inside one of the rooms at Serengeti Guest House situated at Tunduma. PW2 testified that at the material hours the television was on and that it was the bandits after entering in the room who switched on the light. PW2 however testified that the bandits took USD 100,000 from him and he identified one of the culprit and the second appellant. PW2 did not

either explain the intensity of light at the scene or describe the physique, attire of the appellants they had put on at the scene, the time he had with them under observation, source of light and the distance between him and the appellants.

There is a chain of decisions of the Court elaborating on the necessity of compliance with guidelines in order to avoid mistaken identity of a suspect when the evidence before the court is that of visual identification. In **Waziri Amani vs Republic** [1980] TLR 250 and **Raymond Francis vs Republic** [1994] TLR 2 the guidelines were stated by the Court as follows:

> *(i) If the witness is relying on some light as an aid of visual identification he must describe the source and intensity of that light.*
>
> *(ii) The witness should explain how close he was to the culprit(s) and the time spent on the encounter.*
>
> *(iii) The witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features to the next person that he*

comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence.

(iv) Ideally, upon receiving the description of the suspect(s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again.

If a witness is testifying about identifying another person in unfavorable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification. In **Issa s/o Mgara @ Shuka vs Republic,** Criminal Appeal No 37 of 2005 (unreported) this Court observed:-

"It is common knowledge that lamps be the electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc give out light with varying intensities.....hence the overriding need to give in sufficient details the

intensity of the light and size of the area illuminated."

In the instant case, the same was not provided. We are increasingly of the view that, notwithstanding the fact that the robbery is alleged to have been committed at night, the requisite relevant guidelines were not considered because the testimonial account of PW2 does not suggest to have described the physique, attire or any perculiar body features of the appellants at the scene, the time he had with them under observation, source of light, the intensity of light, the distance between him and the appellants. The uncertainty about those factors would be risk taking to hold that PW2 positively and unmistakably identified the appellants as the actual robbers. His evidence does not render any assurance that he managed to recognize them. It was thus necessary that sufficient details be given by the witness of who claimed to have identified the appellant.

Moreover, this Court has had occasions to make warning that in cases where a witness may have known the suspect before, mistakes

may still be made. In **Issa Ngara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005, CAT (unreported) it was held that:-

> *"... even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*

In this respect, and in view of the deficiencies in the evidence of PW2, the Court cannot be fully satisfied that he properly identified the appellants.

Regarding the identification of the appellants by **shape** and **voice**, PW1 explained to the trial court that the period from 19/6/2012 to 22/6/2012 when the appellants were staying in the guest house, in her capacity as a receptionist, she served them on different occasions, something which made her to be familiar with their voices and she also identified them by their shapes.

It has been held by the Court in several decisions that voice identification is one of the weakest kind of evidence. In the case of **Kenedy Ivan vs R**, Criminal Appeal No. 178 of 2007 (unreported), the Court stated: -

> *"It is true..., that voice identification is one of the weakest kinds of evidence and great care and caution must be taken before acting on it. This is so because there is always a possibility of a person imitating another person's voice. For voice identification to be relied upon it must be shown that the witness is familiar with the voice as being the same voice of a person at the scene of crime."*

The same had been echoed by the Court in an earlier decision in the case of **James Revilian Ntungilwage** and **Another vs R**, Criminal Appeal No. 128 of 1999 (unreported):

> *"It is equally doubtful that her identification of the appellants by voice..., was reliable. Identification by voice would be helpful if there was reliable visual identification on the part of PW1. That is, the evidence by voice, would enhance the visual identification if it*

had been shown that the conditions were favourable for PW1 to see the appellants properly."

Yet in **Stuart Erasto Yakobo vs Republic**, (*supra*), cited by the learned State Attorney and in **Gerald Lucas vs. The Republic**, Criminal Appeal No. 220 of 2005 (unreported), this Court had the following to say concerning voice identification;

"...voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it... there is always a possibility that a person may imitate another person's voice. For voice identification to be relied upon, it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime..."

In the case at hand we are of the settled view that the few times she (PW1) had with the appellants in three days period is not enough to hold that PW1 was familiar with the voices of the appellants to the extent of being able to recognize them, much time was needed, given the fact that voice of a person can be imitated.

With regards to the shape of the appellants, with great respect, we are not aware if the identification of shapes has been precedented. What we know exactly is that the witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features and not by shape.

In this regard, we are doubtful if the appellants were properly identified at the scene of the crime. As we have already stated above, we conclude that the evidence of identification of the appellants at the scene of the incident, be it visual or by voice, was poor and unreliable to sustain a conviction.

Before we conclude, we propose to address the issue pertaining to the propriety of the charge sheet which was raised by the Court *suo motu*. On this, the learned State Attorney submitted that since the evidence as per the first appellate court was inclined on robbery and not conspiracy thus it was wrong for the prosecution to charge the appellants with the offence of armed robbery as alternative charge to the offence of conspiracy to commit an offence.

On our part, we deem it imperative and worthy to remind the prosecution on the importance of proper framing of charges against the accused persons and according to law.

It is on record that the appellants were charged and convicted on both main count and alternative count. It was not proper to convict the appellants on the two counts as if they were framed in two separate counts. In the case of **Wainaina** and **Others vs Republic** [1973] 1 EA 182**,** the High Court of Kenya settled that no findings to be made on the alternative charge when conviction is entered on the first count of the charge.

In the case of **Achoki vs Republic** [2000] 2 EA 283 the appellant was charged and tried on one main count of attempted rape and an alternative count of indecent assault on a female. The trial court convicted the appellant on the main charge of attempted rape and made no findings on the alternative charge of indecent assault. His appeal to the High Court was dismissed. On a second appeal, the Court of Appeal agreed with both the trial court and the High Court and endorsed the findings that once an accused is convicted on the main count the trial court is prohibited to make

findings on the alternative charge, which naturally is left to remain on the record.

Although the authorities we cited herein above are from a foreign jurisdiction, still they have a persuasive value and we believe also that it should be the position of the law in our jurisdiction.

Coming back to the case at hand, we are of the considered view that the trial court having convicted the appellants of the main count of conspiracy to commit the offence of armed robbery, it incorrectly proceeded to make findings on the alternative charge of armed robbery. It was therefore a serious misdirection on the part of the trial court to convict the appellants both on the main charge and the alternative charge. The first appellate Court was supposed to detect this error and direct the trial court accordingly. That misdirection in our view must have prejudiced the appellants who had to serve a prison term of thirty years each on a charge of robbery which was supposed to have remained in the record. Had the trial court complied with the law, the appellants would have by now completed the jail term of five years in the main charge of

conspiracy to commit an offence of armed robbery. It is at this point we say that the conviction on both counts prejudiced the appellants.

Taking into account all the circumstances in this case stated herein above, we are constrained to allow the appeal. In the event, we allow the appeal, quash the convictions and set aside the sentences imposed.

In the result, we order that the appellants be released from custody forthwith, unless they are otherwise lawfully held.

DATED at **MBEYA** this 2nd day of October, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL