IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MBAROUK, J.A., MWARIJA, J.A. And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 423 of 2016

1. **ZEFANIA NDEISABA**
2. **YUSUPH RAPHAEL** .....**APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania at Tanga)

(Khamis, J.)

dated 28th day September, 2016

In

Criminal Appeal No. 66 of 2016

JUDGMENT OF THE COURT

24th & 27th April, 2018

MWARIJA, J.A:.

The appellants and another person, Amos Alex, were charged in the District Court of Handeni with the offence of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 14/7/2015 in the night, the appellants and the said Amos did steal from

Salum Hassan (PW1) cash Tshs. 9,000,000/= and a cellular phone, make Nokia valued at Tshs. 348,000/=.

The offence was committed at Komsanga village within Handeni district in Tanga region. It was alleged further that, before such stealing the appellants assaulted (PW1) on his head and left hand by using a bush knife. When the charge was read over to them the trio denied the offence. After a full trial, the appellants were found guilty, convicted and sentenced to 30 years imprisonment, whereas Amos was found not guilty and was therefore acquitted.

The facts leading to the arraignment and conviction of the appellants can be briefly stated as follows: PW1 and other two persons, Mohamed Ally (PW2) and Edward Kijingo (PW3) were, until the material time of the offence, businessmen dealing in the trade of grains and oil seeds. In July, 2015 they settled in Chekereni village in Kabuku to operate the business of buying sesame. They had secured accommodation in a certain house in that village and all of them stayed in that house which they also used to store bags of sesame which they had bought.

On 14/7/2015 in the night at about 23:00 hrs, they were invaded by a group of armed bandits. One of the bandits started to attack PW1 with a bush knife. He attempted to struggle with the bandit but others joined and hit PW1 with a stool. He ended up being injured on his head and his left hand. As a result, the bandits took Tshs. 9,000,000/= and a mobile phone which were in a bag.

In his evidence, PW1 testified that he identified the appellants to be some of the bandits who committed the offence on the material night. According to him, he managed to identify the appellants by aid of a light from a Chinese lamp that is powered by four batteries. He added, he was able to identify the appellants because he had known them before as he used to see them in the village within the period of two months of his stay in that village.

The evidence of PW1 was supported by that of PW2 and PW3. Both of them testified that they identified the appellants because they were not strangers to them. They also stated that there was sufficient light from a Chinese lamp which enabled them to make proper identification. Whereas PW2 added that one of the bandits had a torch and flashed it on him, PW3

stated that he had known the appellants before the date of the offence because they used to sell sesame and as a result, they had been interacting in that business.

In their defence, the appellants denied the charge. The 1st appellant (DW1) testified that on 17/7/2015, he was served with a letter of the village chairman requiring him to report to police. At the police station he was told that he participated in the commission of the offence. Although he denied the allegation, he was charged. He challenged the prosecution evidence contending that he was not at the scene on the material night.

On his part, the 2nd appellant, who gave his defence as DW3, denied the allegation that he was one of the culprits who committed the offence. He stated that he was arrested on 13/8/2015 at Muheza. He was taken to his home where his room was searched but nothing which could link him with the offence was found. He denied having known the 1st appellant before.

In its decision, the trial court found that the evidence of PW1 as supported by that of PW2 and PW3 proved that the appellants were identified at the scene of crime. The learned trial Resident Magistrate

believed the evidence of the said witnesses to the effect that there was sufficient light from a Chinese lamp which enabled PW1, PW2, and PW3 to properly identify the appellants. He was of the view that the applicable conditions for identification under difficult conditions, as stated in the case of **Waziri Amani v. R**. [1980] TLR 250 were met. As stated above, the appellants were convicted and sentenced to 30 years imprisonment.

Aggrieved by the decision of the trial court, they appealed to the High Court. Their appeal was unsuccessful hence this second appeal.

In their joint memorandum of appeal, they have raised four grounds of appeal which can be consolidated into only one ground, that:

> *The learned High Court judge erred in law in failing to find that the decision of the trial court was erroneously based on unreliable evidence of identification.*

At the hearing of the appeal, the appellants appeared in person whereas the respondent/ Republic was represented by Ms Jenipher Kaaya, learned State Attorney. In arguing their appeal, the appellants opted to hear first, the learned State Attorney's response to the appeal and that they would thereafter make a rejoinder if the need to do so would arise.

Ms Kaaya informed the Court at the outset that, the respondent was supporting the appeal. Before she made her submission however, she pointed out to the Court, existence of a procedural irregularity in the proceedings of the trial court. According to the proceedings, the initial charge, which was later substituted, was read over to the 2nd appellant and Amos on 22/7/2015. When the charge was later substituted after the 2nd appellant was added, only the plea of the 2nd appellant was taken. It means therefore that the 1st appellant had been tried on the substituted charge without having his plea taken.

Relying on the provisions of S. 228 (1) and (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002] and the case of **Amiri Omary v. The Republic,** Criminal Appeal No. 299 of 2015 (unreported), the learned State Attorney submitted that, as a result, the trial of the 1st appellant was a nullity. She urged us to exercise the Court's revisional powers under S.4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA) to nullify the proceedings and the judgments of the lower courts and set aside the 1st appellant's conviction and sentence. On the way forward, Ms Kaaya submitted that the next move in the circumstances, should have been to pray for an order of re-trial against the said appellant.

She submitted however, that since the respondent is supporting the appeal on the ground relating to the nature of the evidence acted upon to found conviction of both appellants, the order of retrial will not be appropriate.

On the substance of the appeal, it was the learned State Attorney's submission that the identification evidence relied upon by the trial court to convict the appellants was not watertight. She argued that all the witnesses contended that they identified the appellants with the aid of a Chinese lamp which uses four batteries to light it. She submitted however that the witnesses did not describe the intensity of the light which came from that lamp. She went on to argue that, according to the evidence, the bandits had a torch which they flashed at the time of robbery. According to the learned State Attorney, ordinarily a person on whom torchlight is flashed cannot identify the person who holds the torch. She cited the case of **Venance Nuba & Another v. R.,** Criminal Appeal No. 425 of 2013 (unreported) to support her argument.

She submitted also that the evidence that the bandits used torchlight raises doubt on the evidence of the prosecution witnesses that there was sufficient light in the room where the offence was committed. She cited to

that effect, the case of **Ally Ramadhani v. R.** Criminal Appeal No. 309 of 2008. (unreported).

With regard to the evidence that the witnesses had known the appellants before the date of the incident, Ms Kaaya argued that the period of two months which the witnesses said that they had known the appellants is not sufficient to eliminate the possibility of a mistaken identity. She referred as to the case of **Abdallah Kabad @ Sengo v. R.,** Criminal Appeal No. 263 of 2016 (unreported) in which, the Court observed that mistaken identify can happen even to identification of a close relative.

From those arguments, the learned State Attorney prayed that the appeal of the 2nd appellant be allowed. For the same reasons, she submitted that an order of retrial of the 1st appellant will not, in the circumstances, be appropriate.

After having heard the arguments of the learned State Attorney, the appellants did not have any rejoinder to make, understandably because the submission was made in support of their appeal.

Having considered the lucid submission made by Ms Kaaya, we agree with her, firstly, that the omission to take the 1st appellant's plea

rendered his trial a nullity and secondly, that the evidence of identification relied upon by the trial court to convict the appellants was not watertight. With regard to the omission to take the 1st appellant's plea, in the case of **Amin Omary** (supra) cited by the learned State Attorney, the Court stated as follows;

> *"The trial magistrate had no legal mandate to proceed to hear the case without so much as reading out the charge and asking the appellant to plead. We do not agree with the suggestion by the first appellate Judge that failure to call upon the accused person to plead can be remedied by entering a plea of not guilty. In* ***1. Rojeli s/o Kalegezi, 2. Habonimana s/o Stanislaus, 3. Hamed s/o Philipo vs. R.,*** *Criminal Appeal No. 141, CF 142 CF 143 of 2009 (unreported) the Court insisted that failure to take a plea of the accused person means that the accused person concerned has not undergone any trial as his plea was not taken. The court ordered the file to be remitted back to the trial court for a fresh trial. We shall in the instant appeal follow similar path, the appellant herein was not in law tried."*

Since as a result of the omission, the 1st appellant has not in law, undergone any trial, we hereby exercise the powers of revision vested in the Court by s. 4(2) of the AJA and hereby set aside his conviction and sentence.

With regard to the evidence of identification which was acted upon to found the 2nd appellant's conviction, the issue is whether the same is watertight. There is no dispute that the offence was committed in the night at about 23:00 hrs hence the alleged identification was made under difficult conditions. In the case of **Waziri Amani** (supra), the Court laid down some of the crucial conditions which must be met before the evidence of identification made in such circumstances is acted upon to found conviction. One of the conditions is that intensity of the light which aided the witness to make identification must be clearly described.

In this case, as submitted by the learned State Attorney, none of the witnesses described the intensity of the four batteries Chinese lamp which was said to be the source of the light used to identify the appellants. In his evidence, when he was cross examined by the 1st appellant, PW1 stated as follows:

"We had Chinese lamp which had 4 batteries hence there was enough light at the room."

On his part, in his evidence, PW2 said:

"We had Chinese lamp which was on hence we managed to identify the accused persons."

As for PW3, he stated as follows in his evidence:

"The light was on as we had Chinese lamp which use battery hence we managed to see the accused persons."

It was in evidence that one of the bandits had a torch and did flash it on the directions of PW2. We agree with Ms Kaaya, firstly, that since the torchlight was flashed on PW2, he could not identify the person who flashed it and secondly, that the act of the bandits of using torchlight raises doubt in the prosecution evidence, that there was sufficient light from the said Chinese lamp, otherwise the culprits should not have used a torch.

As for the evidence that the appellants were known to PW1, PW2 and PW3, we also agree with the learned State Attorney that even if that was

the position, that fact does not eliminate the possibility of mistaken identity.

In the case of **Shamir John v The Republic**, Criminal Appeal No. 166 of 2004 (unreported), also cited by Ms Kaaya, the Court observed as follows;

> *"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."*

We have found above that the witnesses did not describe the intensity of the light which aided them in making identification. Even if the appellants were known to them, under the circumstance which creates doubt, the possibility of mistaken identity cannot be eliminated.

For the reasons stated above, we find with respect that, the High Court erred in upholding the decision of the trial court. We thus hereby allow the 2nd appellant's appeal. As a result, his conviction and sentence are hereby set aside. With regard to the 1st appellant, we agree with the learned State Attorney that after having found that the prosecution

evidence was insufficient to prove the offence charged, an order of retrial is not appropriate. In the event, we order immediate release of both appellants from prison unless they are otherwise lawfully held.

DATED at **TANGA** this 27th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL