IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 299 OF 2016

SEBASTIAN MUNA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 1st day of March, 2016
in
Criminal Appeal No. 75 of 2015

JUDGMENT OF THE COURT

29th June & 5th July, 2018

MWAMBEGELE, J.A.:

Before the District Court of Hanang sitting at Katesh, the appellant Sebastian Muna was charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002 (hereinafter referred to as the Penal Code). He was sentenced to serve a mandatory minimum sentence of thirty years in prison. The conviction and sentence did not

amuse him, he unsuccessfully appealed to the High Court. Undeterred, he lodged this second appeal on four grounds of complaint. For easy reference, we reproduce the grounds as follows:

"1. THAT, the first appellate court erred in law and in fact in upholding the appellant's conviction relying on faulty identification evidence adduced by PW2.

2. THAT, the first appellate court erred in law and in fact when it failed to see the glaring contradictions and discrepancies in the testimonies of the prosecution which should have been resolved in favour of the appellant.

3. THAT, the first appellate court misdirected itself and consequently erred in law in holding that the appellant was properly identified at the scene of crime on the basis of the tenuous and unreliable evidence of PW1, PW3 and PW4.

4. THAT, the first appellate court erred in law and in fact in not finding that the case against the appellant was not proved on the required standard."

At the hearing of the appeal before us on 29.06.2018, the appellant appeared in person, unrepresented. Ms. Veritas Mlay, learned Principal State Attorney and Ms. Amina Kiango, learned State Attorney, joined forces to represent the respondent Republic.

Fending for himself, the appellant faulted the decisions of the two courts below that evidence on identification was insufficient to mount a conviction. He challenged the testimony of William Ginache (PW2); the victim, that he could not have identified the culprit with the help of the moonlight. Moonlight, however bright, cannot facilitate identification of a culprit, he argued. He added that PW2 did not state the duration the incident took, the distance between him and the appellant, he did not describe any attire and whether he was masked or not.

Still on identification, the appellant challenged the testimony of Mwamini Rajabu (PW3)and Anna Eliud (PW4) who claimed to have seen him with PW2, that they did not state the source of light with which they used to identify him.

The appellant did not stop there. He challenged the prosecution evidence as marred with contradictions in that, while Mwamini Giinathe (PW1) testified that PW2 told her that he was robbed by Nyaturu youths who told him "toa ulichonacho", PW2 himself testified that it was the appellant and two others who robbed him and told him "toa pesa". These contradictions, he argued, make the prosecution evidence contradictory and weaken the prosecution case.

On the above grounds of weak evidence of visual identification and contradictions in the testimonies of the prosecution witnesses, the appellant prayed that the appeal be allowed.

For the respondent Republic, Ms. Mlay expressed her stance at the very outset that the appellant's appeal was meritorious. She found the first and third grounds of complaint regarding poor evidence of visual identification as justified. She submitted that the incident took place at night. PW3 and PW4 on whose strength the appellant was arrested, did not state the source of light they used to identify the appellant. Neither did they testify on the distance and the duration they spent with the appellant. She added that no description of the

attire of the appellant was stated by the identifying witnesses; that is, PW2, PW3 and PW4.

The learned Principal State Attorney cited **Harod Sekache @ Salehe Kombo v. Republic**, Criminal Appeal No. 13 of 2007 (unreported) in which it was held that a witness on evidence of identification must give clear evidence to show that the identification is clear and reliable by mentioning all the aids to unmistaken identity; showing proximity to the person being identified, the source of light and its intensity as well as the length of time the person being identified was within view. On the description of the attire of a person being identified, the learned Principal State Attorney referred us to **Josiah Ezekiel @ Belito v. Republic**, Criminal Appeal No. 13 of 2007 (also unreported).

On the complaint regarding contradictions in the testimony of the prosecution witnesses, the learned Principal State Attorney was of the view that it was justified in that PW2 referred the incident to have taken place on 28.10.2012 and later he testified the incident took place on 29.10.2012. Another contradiction, she submitted, was in the

evidence by PW1 to the effect that PW2 told her that he was invaded by Nyaturu youths while PW2 himself testified that it was the appellant and two others who invaded and robbed him. This contradiction, she submitted, should be resolved in favour of the appellant.

The learned Principal State Attorney also submitted that the High Court used extraneous matters to uphold the conviction of the appellant. She referred us to p. 6 of the judgment where it is stated that the appellant was identified with the help of light emitted from a torch. There was no such evidence on record, she submitted.

Ms. Mlay thus submitted that the case by the prosecution was not proved beyond reasonable doubt. She thus beckoned upon us to reverse the findings of both courts below by quashing the conviction, setting aside the sentence and releasing the appellant from custody.

With the foregoing response of the Principal State Attorney for the respondent Republic, the appellant had nothing in rejoinder.

We will determine this appeal in the manner used by the learned Principal State Attorney; by discussing the first and third grounds of complaint together and discussing the second and fourth grounds separately.

The first and third grounds of complaint hinge on unreliable visual identification of the appellant. In the present case, PW2 claimed to have identified the appellant. Likewise, PW3 and PW4 testified to have seen the appellant twice trying to lift him up as he appeared drunk. The law relating to visual identification has long been settled in this jurisdiction. It is that in order to convict on the evidence of visual identification, the same must be absolutely watertight.

In this jurisdiction, **Waziri Amani v. Republic** [1980] TLR 250 remains a landmark case on visual identification. This case has uninterruptedly been followed by the courts. The case provided guidelines with sufficient lucidity on the evidence of visual identification. Guided by the cases of **Republic v. Eria Sebwato** [1960] E.A 174, **Lezjor Teper v. the Queen** [1952] A.C 480, **Abdallah Bin Wendo and Another v. Republic** (1953) 20 E.A.C.A

166, **Republic v. Kabogo wa Nagungu** (1948) 23 K.L.R (1) 50 and **Mugo v. Republic** [1966] EA 124, the Court provided the following guidelines on visual identification:

> *"Evidence of visual identification is of the weakest kind and most unreliable. No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is absolutely watertight".*

The Court added:

> *"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record* ***a careful and considered analysis of all the surrounding circumstances of the crime being tried.*** *We would, for example, expect to find on record questions as the following posed and resolved by him;* ***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. *These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity".* (Emphasis supplied).

Admittedly, the appellant was known to PW3 and PW4 but that does not eliminate the possibility of mistaken identity. Faced with an identical situation in **Boniface s/o Siwingwa v. Republic**, Criminal Appeal No. 421 of 2007 (unreported), the Court held:

"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown, as is in this case, that the conditions for identification are not

conducive, then familiarity alone is not enough to rely on to ground a conviction. The witnesses must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken".

In the light of the **Siwingwa** case (supra) we are convinced that despite the fact that the appellant was familiar to the identifying witnesses, that did not eliminate the possibility of mistaken identity.

Reverting to the case at hand, we are of the considered view that the testimonies of the identifying witnesses; that is, PW2, PW3 and PW4 were too general to reach the threshold provided by **Waziri Amani** (supra). We shall demonstrate. Starting with PW3 and PW4, these did not state how they managed to identify the appellant. They did not state any source of light it being not disputed that the offence was committed at night. Neither did they state the distance between them and the appellant. They did not even describe the attire of the appellant. In short no evidence was led by them on identification. It was as if it was not an issue at all. As if to clinch the matter, PW2; the

victim, did not sufficiently testify on how he identified the appellant. On identification, PW2 simply stated:

> *"There was a bright moonlight which was strongly shining which helped me to identify the accused person".*

PW2 never went further to testify on the attire of the appellant. It is doubtful if PW2, who admitted to have been adequately imbibed, identified his assailants in that tipsy state of affairs. These doubts, so our criminal jurisprudence dictates, must be resolved in favour of the appellant. In **Harod Sekache @ Salehe Kombo** (supra), a case relied upon by the respondent Republic, we reproduced an excerpt from our previous decision of **Said Chaly Scania v. Republic**, Criminal Appeal No. 69 of 2005 (unreported). We think the excerpt is worth of recitation here. We stated:

> *"We think that where a witness is testifying about identifying another person in unfavourable 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 like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger".

We subscribe to that view. In the case at hand, PW2 testified only on the source of light and familiarity with the appellant. All the ingredients of unmistaken identity were left out in his testimony. PW3 and PW4, as already alluded to above, did not lead any evidence on identification.

The above said, we agree with the appellant and the respondent that the evidence of visual identification in the present case fell short of proof that the appellant was sufficiently identified.

Regarding contradictions in the testimony of witnesses for the prosecution, we, again, agree with the appellant and the learned Principal State Attorney that there were apparent contradictions which must be resolved in favour of the appellant. While all the witnesses

testified that the incident took place on 29.10.2012, PW2 referred to both 28.10.2012 and 29.10.2012. The second contradiction is found in the testimony of PW1 and PW2 in respect of what PW2 told her. While PW1 stated that PW2 told her that he was robbed by Nyati youths, PW2 testified that he was invaded and robbed by the appellant and two others. The third contradiction is in respect of PW3 and PW4 who testified that the appellant was trying to lift up PW2 who appeared drunk. However, PW2 testified that he was attacked by the appellant and his fellows. These discrepancies in evidence weakened the prosecution's case. It is a blotch in the prosecution's case which must be resolved in favour of the appellant.

Finally, we agree with the learned Principal State Attorney that the first appellate court imported extraneous matter into evidence to confirm the decision of the trial court. There is no piece of evidence on record to show that the identifying witnesses had a torch whose light they used to identify the appellant. This importation is an unfortunate occurrence which prejudiced the appellant and offended the ends of justice.

In the upshot, we find this appeal meritorious and allow it. The findings of the two courts below are reversed. The conviction of the appellant is quashed. The sentence meted out to the appellant is set aside. The appellant Sebastian Muna should be released from custody immediately unless held for some other lawful cause.

Order accordingly.

DATED at **ARUSHA** this 4th day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL