IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 90 OF 2016

1. KHATIBU S/O HAMIS
2. HAMISI S/O SALEHE ..... **APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam

(Mwakipesile, J.)

Dated the 11th day of September, 2013

In

Criminal Appeal No. 88 of 2012

JUDGMENT OF THE COURT

6th February & 12th April, 2018

MWARIJA, J.A.:

In the District Court of Kibaha, the appellants and another person, Rashid Ramadhani, who was the 1st accused person at the trial (hereinafter referred to by his first name of Rashid), were jointly and together charged with the offence of armed robbery contrary to section 287 A of the Penal Code [Cap. 16 R.E. 2002] as amended by Act No. 4 of 2004. It was alleged that on 29/11/2010 at about 03.00 hrs at

Kibondeni area in Kibaha district, the appellants and Rashid did steal cash Shs. 400,000/= and other properties all total valued at TShs. 800,000/=, the property of Mahija Eliasa (PW1). It was contended further that before such stealing, they did cut PW1 on her head by using a machete in order to obtain and retain the stolen properties. The charge was denied by both the appellants and Rashid.

After a full trial, the appellants were found guilty as charged. They were consequently sentenced to thirty years imprisonment. On his part, Rashid was found not guilty and was thus acquitted. Aggrieved by the conviction and sentence, the appellants unsuccessfully appealed to the High Court. They have, as a result preferred this second appeal raising the following five grounds of appeal.

1. *THAT ... both trial magistrate and the learned Appellate Judge grossly erred in law and fact taking into account the un-credible and unreliable visual identification evidence of PW1, PW2 and PW3 against both appellants at the LUCUS (sic) IN QUO as major basis for conviction.*

2. *THAT, the learned Appellate Judge grossly erred in law and fact by upholding to (sic) conviction and sentence meted on to the appellants in a case where there is variance between PW1, PW2 and PW3 evidence as regards the date of commission of the offence and that appearing in the charge sheet.*

3. *THAT, both trial magistrate and learned appellate Judge failed themselves in law and fact by not assessing contradictory evidence of PW1, PW2 and PW3 as to the source of light that enabled them to positively identify bandits at the scene.*

4. *THAT, the learned Appellate judge grossly erred in law and fact by convicting both appellants in a case whose proof was below the required standard as PW4 did not disclose when, how and where he did apprehended (sic) both to corroborate PW2's evidence who alleged to have known them from before and residing in the some (sic) vicinity.*

5. *THAT, the learned Appellate Judge grossly erred in law and fact by convicting both appellants in a case where the prosecution failed to prove their guilt beyond any shadow of doubt as charged."*

The background facts giving rise the case can be briefly stated as follows: On the material night of the incident at about 03.00 hrs, while she was asleep in her bedroom, PW1 was awoken by noise outside her house. She heard people talking, one of them asking to be shown where the door of the house was situated. When she opened the bedroom window, she saw a mob of about 10 persons. She became suspicious and went to wake up his in-law, one Abuu Maulid (PW3) who was asleep in another room. She asked him to escort her outside the house where a certain quantity of timber had been placed. She was worried that the same might have been stolen. They found the timber intact but while returning back in the house, they met the mob at the main door. They suddenly attacked PW3 by using the width of machetes and a spade.

In the course of being attacked, PW3 suffered a cut wound on his hand, the injury which, according to the medical officer who examined him, Dr. Julius Mshigati (PW5), caused PW3 a dangerous harm. As PW3

was being attacked, PW1 ran inside the house and locked the door. The culprits did however; break it by using a brick. They eventually entered into the bedroom and stole her properties including her golden ring which they forcefully removed from her finger and cash Shs. 300,000/=. They also entered into the other room where PW1's sister was sleeping and took a mobile phone and cash Shs. 107,000/=. In another room, the culprits did also steal some properties including 10 pairs of shoes and three door locks.

The robbery incident was reported to Kibaha police station on the fateful night by PW1. She was escorted there by the neighbours who turned up after she had notified them of the incident.

In their evidence PW1, PW2 and PW3 testified that they identified the appellants. According to PW1, she identified them when he saw them outside and when they entered in the house because, there was light from solar energy outside and inside the premises. On the part of PW2, it was her evidence that she had known the appellants before the date of the incident because they stayed at Kwa Mathias area when she also resided. In that night, during the fracas, she entered into PW1's room and took cover in the toilet by covering herself with a heap of

clothes which had been kept there for laundry purposes. She said that he identified the appellants because, when they entered into the bedroom, the light was on. Similar evidence was also tendered by PW3. He said that he identified the appellants by aid of electricity light, adding that he had known them before the date of the offence.

The prosecution relied also on the evidence of No. F. 3241 D/Cpl Joseph (PW4). He is the police officer who investigated the case. According to his evidence, at the time when he was assigned the task, Rashid had already been arrested and locked up in police custody. On what led to the appellants' arrest, PW4 said that it was because they were mentioned by Rashid to be persons who committed the offence.

In their defence, the appellants exculpated themselves from the offence charged. The 1st appellant testified that he was arrested on 16/12/2010 at about 23.45 hrs at a bus stand area while on his way home. He was taken to police station where, upon being questioned, he denied involvement in the commission of the offence. He challenged the prosecution evidence refuting the allegation that he was identified at the scene of crime. It was his defence that, since no identification parade was conducted, the tendered evidence is unreliable not only because it

is contradictory but because it was from the prosecution witnesses who are all relatives.

On his part, the 2nd appellant testified that he was arrested on 29/12/2010 at about 23.00hrs while on the way going to his home. He said that he was, at that time, coming from his business of selling fried potatoes (chips). He denied the evidence of PW1, PW2 and PW3 that they identified him at the scene of crime. He also refuted their evidence that they had known him before the date of the incident.

In its judgment, the trial court found that the prosecution had proved its case against the appellants beyond reasonable doubt. The trial Principal District Magistrate was of the view that the appellants were properly identified at the scene of crime. According to the trial magistrate, although the offence took place in the night, there was sufficient light which enabled the witnesses to make a proper identification. As stated above, the High Court concurred with the finding of the trial court and thus upheld the conviction and sentence.

At the hearing of the appeal, the appellants appeared in person, unrepresented by a counsel. On its part, the respondent Republic was

represented by Mr. Joseph Maugo, learned Senior State Attorney. He was being assisted by Mr. Yusuf Aboud, learned State Attorney.

In arguing their appeal, the appellants opted to hear first, the respondent's submission in response to the raised grounds of appeal and thereafter exercise their right of rejoinder, if the need to do so would arise. In his submission, Mr. Maugo started by informing the Court that the Republic was opposing the appeal. On the 1st ground of appeal, he argued that the appellants were properly identified because there was light from a solar panel at the scene of crime. He stressed that, the appellants were not strangers to the identifying witnesses and that they were observed at a close range, thus properly identified. He cited the case of **Fadhili Gumbo @ Mololo v. R.** [2006] TLR 50 to bolster his argument that, since there was un-contradicted evidence of visual identification from PW1, PW2 and PW3 that evidence is reliable and, as a result, the same was properly acted upon to convict the appellants.

With regard to the 2nd ground of appeal, it was Mr. Maugos' submission that, although there is a variation between the date of the offence stated in the charge and that which was stated in the evidence, the irregularity is not fatal. He argued that since the 1st and 2nd

appellants were arrested on 16/12/2010 and 29/12/2010 respectively, it is obvious that they could not have been arrested and charged on 22/12/2010 with the offence said to have been committed on 29/11/2011. Furthermore, he added, PW1 and PW2 who gave their evidence on 4/5/2011 could not have testified on the incident said to have taken place on 29/11/2011, after the date of their evidence.

As regards the 3rd ground of appeal, the learned Senior State Attorney submitted that the visual identification evidence of PW1, PW2 and PW3 does not have any contradiction as regards the conditions under which they identified the appellants. He argued that the evidence of the three identifying witnesses is to the effect that they identified the appellants by aid of electricity light.

On the 4th ground, Mr. Maugo submitted that the complaint is devoid of merit because there is no connection between the arrest of the appellants by PW4 and the evidence of PW2, that he had known the appellants before the date of the incident.

Finally, on the 5th ground, it was Mr. Maugo's argument that the prosecution had proved the case against the appellants to the required standard. He reiterated his submission that there was sufficient evidence

of visual identification which proved the case against the appellants beyond reasonable doubt.

In rejoinder, whereas the 1st appellant stressed that the evidence of PW1, PW2 and PW3 is unreliable on account that the three witnesses are relatives, the 2nd appellant challenged reliability of the witnesses' visual identification evidence, arguing that the intensity of the light alleged to have aided them to identify the appellants, was not disclosed. They prayed that the appeal be allowed.

Having considered the submissions made by the learned Senior State Attorney and the appellants, as a starting point, we wish to consider the 2nd ground in which, the appellants have complained that their conviction was based on the charge which was defective. It has not been disputed that whereas in the charge sheet, it is stated that the offence took place on 29/11/2010, according to the evidence of PW1, PW2 and PW3, the offence was committed on 29/11/2011.

We need not be detained much in determining this point. In our considered view, the variation between the date in the charge and the evidence is not fatal. According to PW1, she reported the robbery incident to the police in the same night of its occurrence. Thereafter, on

1/12/2010, PW4 was assigned to conduct investigation. At that time, Rashid had been arrested. The 1st and the 2nd appellants were later arrested on 16/12/2010 and 29/12/2010 respectively. Similarly, according to the evidence of PW5, PW3 who was injured during the robbery incident was medically examined on 30/11/2010. Furthermore, PW1 and PW2 gave their evidence on 4/5/2011. They could not have given evidence on the event which had not taken place. All these facts show that the date of the offence shown in the recorded evidence of PW1, PW2 and PW3 was either mistakenly made by the witnesses or inadvertently recorded by the trial magistrate.

It is out of the foregoing reasons that, as stated above, in our considered view, the irregularity is not fatal. It is curable under S. 234 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002]. See for example, the case of **Nkanga Daud Nkanga v The Republic**, Criminal Appeal No. 316 of 2013 (unreported). In that case, the Court had this to say on the situation which is similar to the one in the case at hand.

> *"The incident occurred at 2.00 hours after 25.7.2009 had just changed to 26.7.2009 which Mr. Karumuna refers to as '**deep in the night**'. In our view, that is*

not at all a big deal because after all, such a variance was curable under section 234 (3) of the CPA."

Our view is also supported by the decision of the Court of Appeal of Kenya in the case of **Oguyo v. Republic** [1986 – 1989] 1 E A 430. Relying on S. 214 (3) of the Kenyan Criminal Procedure Code which was in *pari materia* with S. 234 (3) of our CPA, that court held as follows:-

"The variation between the date given in the charge and that which emerged in the evidence was covered by section 214 (3) of the Criminal Procedure Code and it was therefore not necessary to alter or amend the charge."

On the basis of the foregoing reasons, we do not find merit in the 2nd ground of appeal.

That said and done, we now revert to the 1st ground of appeal which, from the parties' submission, is central to the determination of the appeal. There is no dispute that the appellants' conviction was based on the evidence of visual identification. It is trite law that such kind of evidence cannot be acted upon unless all the possibilities of mistaken

identity have been eliminated and the court is satisfied that the evidence is absolutely watertight.

The position was succinctly stated in the case of **Demeritus John @ Kajuli and 3 Ors v. The Republic**, Criminal Appeal No. 155 of 2013 (unreported). In that case, the Court had this to say on the nature and the conditions which must be met before the evidence of visual identification is acted upon to found conviction:-

> *"In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also unreliable and a court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely watertight. (See* ***Waziri Amani v. Republic*** *[1980] TLR 250;* ***Raymond Francis v. Republic*** *[1994] TLR 100;* ***Republic v. Eria Sebatwo*** *[1960] E.A. 174;* ***Igola Iguna and Nori @ Dindai Mabina v. Republic;*** *Criminal Appeal No. 34 of 2001 (CAT – unreported) .... It is most essential for the court to examine closely whether or not the conditions of identification are*

favourable and to exclude all possibilities of mistaken identification."

The conditions apply even where the evidence at issue is that of recognition. In the case of **Hamis Hussein & Others v. Republic,** Criminal appeal No. 86 of 2009 (unreported) the Court stated as follows:-

"We wish to stress that even in recognition cases when 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 friend are often made."

In the case at hand, the evidence of visual identification relied upon by the prosecution and which formed the basis of the appellants' conviction was made under difficult conditions because the offence was committed in the night. The two lower courts found that, despite that fact, the appellants were properly identified by PW1, PW2 and PW3 on

account, firstly, that there was sufficient light and secondly, that the said witnesses had known the appellants before the date of the offence.

This being a second appeal, the Court can only interfere with the finding of facts if there was misdirection or non-direction on the part of the two courts below – See for example, the cases of **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149; **Alfeo Valentino v. Republic**, Criminal Appeal No. 92 of 2006 and **Bakari Omari @ Lupande v. The Republic**, Criminal Appeal No. 130 of 2006 (both unreported).

The issue is whether or not, from the adduced evidence, the two lower courts properly directed themselves in holding that the appellants were properly identified at the scene of crime. In her evidence PW1 said that she managed to identify the "culprits" while they were outside and when they entered inside the house because there was light both outside and inside the house. When she was cross – examined by the 1st appellant, she stated as follows:-

> *" I saw you outside within a short distance of about 10 to 15 metres.... I use solar power, that is enough light to identify any body passing outside."*

She said further that she had known the 1st appellant as a petty businessman. When she was cross – examined by the 2nd appellant, she stated that she identified him by aid of light from a solar system and that, although she was horrified, she "kept aware for identification."

On how she managed to identify the appellants, PW2 contended that after the bandits had entered into the house, she ran into PW1's bedroom's latrine and hid by covering herself with a heap of clothes. It was her evidence further, that she identified the 1st appellant when he entered into the toilet room because there was light in that room. She stated as follows:-

> *"I run inside PW1 bedroom and went to the toilet room took clothes and covered myself at that time lights were on.... One of the culprit (sic) came to the toiled which I took cover and touched the clothes but he did not take them or even touched me. It was the 2nd accused [the 1st appellant] who came to the toilet and made a few search."*

She said also that she had known the 2nd appellant before the date of the offence because she used to see him passing near the house in which she resided at Kwa Mathias area.

With regard to PW3's evidence, the same was to the effect that there was "*electricity light*" which enabled him to identify the appellants. Earlier on, he said, he saw a mob approaching. They flashed torchlight at him. They asked him as to what he was doing there, claiming to be members of the peoples' militia ("sungusungu"). According to his evidence, he had known the 2nd appellant before the date of the incident. He said that he used to see the said appellant at Lango Kuu Street.

Having duly considered the visual identification evidence tendered by PW1, PW2 and PW3, we are settled in our minds that the same is not watertight. Firstly, although in their evidence, PW2 and PW3 contended that they had known the appellants before the date of the offence, that evidence is doubtful. The reason is that, their evidence is based on the simple fact that they either used to see the appellants passing at the witnesses' respective places of residence or at where the appellants resided in Kwa Mathias area. Secondly, from their evidence as analysed above, although these witnesses stated that they identified the appellants by aid of light from a solar panel, the intensity of that light was not described so as to ascertain its sufficiency in enabling a proper identification.

The doubt on the sufficiency of the alleged light is amplified by the evidence of PW3 who said that, when the bandits arrived at the scene of crime, they flashed torchlight at him. It is doubtful that the bandits should have used torches if there was sufficient electricity light outside the house as stated by the witnesses. There is also a serious doubt on the evidence of PW2 who said that she identified the 1st appellant when he entered into the toilet room. This is because she did not describe how she managed to do so while she had covered herself with a heap of clothes such that she was unable to be seen by the bandit who entered into that room.

Despite the above stated shortfalls in the visual identification evidence of PW1, PW2 and PW3, their failure to mention the appellants to the police or the neighbours who turned up and escorted PW1 to report the incident at police station on the fateful night, makes their evidence doubtful. From the evidence of PW4, the appellants were implicated in the offence because they were mentioned by Rashid. As stated in the case of **Marwa Wangiti Mwita & Another v. Republic**, Criminal Appeal No. 6 of 1995 (unreported).

"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his ability; in the same way as un-explained delay or complete failure to do so should put a prudent court to inquiry."

In the same vein, in the case of **Evance Nuba & Tegemeo Paul v. R**, Criminal Appeal No. 425 of 2013 (unreported), the Court had this to say:-

"...this Court has persistently held that failure on the part of the witness to name a known suspect at the earliest available opportunity renders the evidence of that witness highly suspect and unreliable."

In the case at hand, there was no explanation as regards the witnesses' failure to name the appellants if at all they identified them as alleged in their evidence.

In view of the foregoing, we find that, had the first appellate Court properly re-evaluated the evidence guided by the above stated principles, it would not have upheld the finding of the trial court that the appellants were properly identified at the scene of crime. As

demonstrated above, that evidence was highly unreliable and could not have been acted upon to found conviction. Since that evidence formed the basis of the appellants conviction, the need for considering the other grounds of appeal does not arise.

In the event, we hereby allow the appeal. The conviction of the appellants is hereby quashed and the sentence imposed on them is set aside. They shall be released from prison forthwith unless they are otherwise lawfully held.

DATED at DAR ES SALAAM this 6th day of April, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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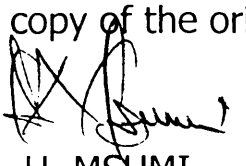

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