IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J.A., MKUYE, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 566 OF 2015

KABATI IDDI @ KABATI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza Registry)

(De-Mello, J.)

dated the 2nd day of December, 2015
in
HC. Criminal Appeal No. 106 of 2015

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JUDGMENT OF THE COURT

10th & 17th July, 2018

MWANGESI, J.A.:

At the district court of Musoma sitting at Musoma, Kabati Iddi @ Kabati, the appellant herein, stood arraigned for three counts of armed robbery contrary to the provisions of section 287A of the Penal Code, Cap 16 as amended by Act No. 3 of 2011. It was the case for the prosecution in the first count that, on the 15th day of August, 2014 at Kigera Bondeni area within the District and Municipality of Musoma in Mara Region, the accused did steal cash TZs 130,000/=, the property of one Chausiku d/o Mugeta

and immediately before or after stealing, did use a machete to assault the said Chausiku d/o Mugeta in order to take the said property.

In the second count, it was stated by the prosecution that, on the same date, time and place as in the first count, the accused did steal one mobile phone make Techno worth TZs 35,000/=, the property of one Esther Mugeta and immediately before or after the time of stealing, did use a machete to threaten the said Esther Mugeta in order to take the said property. And, for the third count it was the version of the prosecution that, on the same date, time and place as in the first count, the accused did steal one mobile phone make Nokia worth TZs 55,000/=, the property of one Nyanumbu Mugeta and immediately before or after the time of stealing, threatened her with a machete in order to take the said property. The appellant protested his innocence when the charge was put to him.

The facts giving rise to the judgment being impugned as could be gleaned from the records in the case file can briefly be stated that, on the 15th day of August, 2014, during night, the house of Chausiku w/o Mugeta who had been staying with her daughters PW2 and PW3 was invaded by armed bandits the appellant inclusive, who stormed inside after breaking the main door using a big stone commonly known as "fatuma". Therein,

they went straight to the bedroom of PW1, where they demanded for money and some other valuables. As their demands were not forthcoming, they cut PW1 with a panga on several parts of her body forcing her to give out TZs 130,000/=. The harassment did not spare the daughters who had been sleeping in other rooms. They were as well assaulted and robbed their mobile phones.

Neighbours responded to the alarm which was raised at the house of Chausiku only to find that, the bandits had already left and disappeared. Chausiku Mugeta and Nyaumbu Mugeta, who had been seriously injured were taken to the Hospital through the Police Station where the incident of armed robbery was reported. PF3s were issued to Chausiku and Nyanumbu so that they could go to get treated the injuries which they had sustained. On the other hand, the police commended their investigation on the incident. Later, the appellant was arrested and charged with the offence of armed robbery.

To establish the offence against the appellant, the prosecution paraded about six witnesses and tendered two exhibits. On his part in defence, the appellant relied on his own affirmed testimony which was not supplemented by any other evidence. It was testified by Esther Mugeta

(PW3) during the hearing of the case that, she managed to properly identify the appellant as among the bandits who invaded them on the fateful night because, she knew him before and furthermore, during the commission of the offence, there was ample moon light as well as light from the nearby houses.

As hinted earlier above, the trial magistrate believed the version of the prosecution and held the appellant culpable. He therefore, convicted the appellant to charged offences and sentenced him to the statutory term of thirty years for each count with an order that, the sentences had to run concurrently. The appellant was further ordered to compensate the victims the value of the robbed properties, as well as TZs 200,000/= for each of PW1 and PW2, on the injuries they suffered as a result of the assault as evidenced by exhibit P1 and P2, after completion of the jail term. The finding and sentence of the trial court were upheld by the first appellate Court and hence, this second appeal to the Court.

In his appeal to the Court, the appellant has raised about seven grounds which can conveniently be condensed to four clusters namely, **firstly,** that the evidence of visual identification alleged to have been made by PW3 to the appellant on the material night was not cogent; **secondly,**

that he was not arrested with any of the properties allegedly robbed on the fateful night; **thirdly;** that the arresting Police Officer was not summoned as a witness to testify before the court regarding the circumstances under which he arrested the appellant; and **fourthly;** that as a whole, the prosecution failed to establish the case against the appellant to the standard required by law.

During the hearing of the appeal before us, the appellant appeared in person unrepresented and therefore, fended for himself whereas, the respondent/Republic was being advocated for by Ms Ajuaye Bilishanga, learned Senior State Attorney, who was assisted by Ms Mwanahawa Changale also learned State Attorney.

Upon the appellant being informed by the Court regarding the order to address the Court that, he was the one with the right to begin unless he opted to let the other side begin, he opted to hear the learned State Attorney respond to his grounds of appeal first, while reserving his right of rejoinder if need would arise. To that effect, the Court permitted the learned Senior State Attorney to begin his submission.

In her submission, the learned Senior State Attorney declared her interest from the outset that, she was supporting the appeal. She

however, qualified her stance by stating that, the support was in respect of the first and second grounds only. With regard to the third, fourth, fifth, sixth and seventh grounds, the learned Senior State Attorney argued that, she was not supporting them because they are new as they have been introduced by the appellant in this second appeal, while in the first appeal at the High Court they did not feature. And the fact that they were not dealt with by the first appellate Court, she submitted that this Court lacks the requisite jurisdiction to entertain them. She therefore implored us to strike them out.

As regards the first and second grounds which were jointly argued, Ms Bilishanga submitted to the effect that, the evidence which was relied upon by the two lower courts to hold the appellant culpable to the charged offence was that of visual identification, which came from Esther Mugeta (PW3). She however doubted the said identification which was alleged to have been aided by moonlight as well as light from nearby houses. According to the learned Senior State Attorney, the doubt was twofold. **Firstly**, the nature of the light was not explained by the witness. **And secondly**, the failure by the witness to name the appellant to PW1 and PW2 with whom they were together during the invasion.

In amplification of the first limb, Ms Bilishanga argued that, PW3 claimed to have identified the appellant on the fateful night after peeping through the window and saw him outside their house. The witness alleged to have been aided with ample light from the moonlight as well as from the nearby houses. She was in doubt as to how the two could be harmonized. And with regard to her failure to name the appellant to her colleagues, the learned Senior State Attorney submitted that, in their testimony, PW1 and PW2 told the trial court that, they did not identify the bandits and they had no any idea as to who they were. If PW3 had indeed identified the appellant, she wondered as to why she failed to name to them. She therefore, urged the Court to grant the benefit of doubt to the appellant and allow his appeal.

On the obvious fact that, the submission of the learned Senior State Attorney was in favour of the appellant, he had nothing useful to chip in, in rejoinder other than supporting all that was submitted, and requesting the Court to set him at liberty because he was illegally being detained.

The issue that stands for the Court to deliberate and adjudicate in the light of what has been submitted above, is whether the appeal by the appellant is founded. To begin with, we are in agreement with the learned

Senior State Attorney that, from the third to the seventh grounds of appeal by the appellant, they are new in that, they were not traversed to by the first appellate Court. That being the case, this Court has no jurisdiction to deal with them. See: **Hassan Bundala @ Swaga Vs. Republic,** Criminal Appeal No. 386 of 2015 and **Yusuph Masalu @ Jiduvi and Another Vs. Republic**, Criminal Appeal No. 163 of 2017 (both unreported).

As regards the evidence of visual identification which is the gist of the first and second grounds of appeal, we again share the views of the learned Senior State Attorney that, the conviction of the appellant was basically founded on that piece of evidence, which came from PW3 only. We are well awake to the settled position of law and practice that a second appellate court, should sparingly interfere with the concurrent findings of fact of the two lower courts. And that, interference should only be done where it appears on the face of it that, there has been misapprehension of evidence, a miscarriage of justice or a violation of some principle of law or practice. See: **Dr. Pandya Vs. Republic** [1957] EA 336, **Daniel Nguru Vs Republic**, Criminal Appeal No 178 of 2004 and **DPP VS. Norbert Mbunda,** Criminal Appeal No. 108 of 2004 (both unreported).

In our considered view, we think this is a fit case where such interference should be invoked. According to the testimony of Esther Mugeta (PW3) as reflected at page 14 of the record of appeal, she was recorded to testify in part that:

> *"I remember on the 25/08/2014 at about 01: 00 hours, I was at home and we were invaded by two bandits who broke the door of our house by a big stone Fatuma and they entered inside the house. Went direct to my mother's bed room and stayed for a while, then they came to me and ordered me to give them money, but I did not give them and it was only one person who gave me all those orders and then came to me and then, I heard one person from outside telling these two bandits who were inside that (piga sana) beat them a lot. Then I peeped through the window and outside, I saw a person called Kabati Iddi, who is the accused in the dock ... I saw him well and due to the moonlights (sic) all around that night and close electricity light of the houses around)".*

The testimony of Chausiku Mugeta (PW1) on the other hand, who was also at the scene of crime in regard to identification of the bandits who

invaded them on the fateful night, was categorical that, she was not able to identify any, when she stated thus:

> *"I did not see them and identify them, as they resisted me not to see them well, thereafter, they ran away and disappeared. Then we came out and raised an alarm. Then those who responded took us to the central Police Station – Musoma."*

On her part, Nyanumbu Mugeta (PW2), who was also among the victims who was at the scene of crime on the material night, testified in part to the effect that:

> *"I saw them and did not well identify them all. We saw them going away and raised an alarm and neighbours responded to the alarm they rescued us ..."*

We have reproduced parts of the testimonies of each of the three witnesses above in regard to their testimonies on identification of the bandits on the fateful date, for purposes of having an objective appraisal to what PW3 testified in court. Apart from PW3 having positively identified the appellant as indicated in her testimony, she did not wish to reveal the same to her colleagues and thereby, leaving them with no idea even when they were testifying in court. To us, such situation as it was for the learned

Senior State Attorney, was a bit surprising and as such, it has left us skeptical with the authenticity of the testimony of Esther Mugeta. By any parity of reasoning, it would have been expected to find the name of the identified bandit being named to the other colleagues in the incident at the earliest possible moment.

The foregoing position notwithstanding, the way the witness allegedly identified the appellant was also not short of doubt. The witness claimed to have managed to positively identify the appellant through the window with the aid of moon light as well electric light from nearby houses. Such statement cannot be without ambiguity as one cannot state with specificity as to whether it was light from the moon or the electricity which aided the witness to identify the appellant.

The law in regard to evidence of visual identification being relied upon by courts to ground conviction is settled as it has severally been held by the Court. The cardinal principle was set out by the erstwhile Court of Appeal of East Africa in the famous case of **Republic Vs. Eria Sebwato** [1960] EA 174, which was later thoroughly adopted in **Waziri Amani Vs. Republic** [1980] TLR 250. Adopting the principle in the two, the Court in **Raymond Francis Vs. Republic** [1994] TLR 100, stated that:

"... It is elementary that in criminal case whose determination depends essentially on identification, evidence on condition favouring a correct identification is of the utmost importance."

The principle as enunciated in **Waziri Amani Vs. Republic** (supra), was restated in **Michael Godwin and Another Vs. Republic**, Criminal Appeal No. 66 of 2002 (unreported), where it was briefly stated that:

"The cardinal principle pertaining to evidence of visual identification is that, it is the weakest and most unreliable and courts should only act on it, when satisfied that, possibilities of mistaken identity are eliminated."

A further detailed warning to courts in regard to evidence of visual identification was given in the decision in **Shamir s/o John Vs. Republic,** Criminal Appeal No. 166 of 2004, which was cited in **Philimon Jumanne Agala @ J4 Vs. Republic,** Criminal Appeal No. 187 of 2015 (both unreported), when the Court cautioned that:

"Admittedly, identification in cases of this nature (visual identification), where it is categorically disputed, is a tricky issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment, whenever the case

against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken.

It is now trite law that, the courts should closely examine the circumstances in which the identification by each witness was made. The court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observer impeded in any way, as for instance by passing traffic or a press of people? Had the witness ever seen the accused before? If occasionally, had he any special reasons for remembering the observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

Finally, 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 a close relatives and friends are sometimes made."

See also: **Morris Jacob @ Shuka Vs. Republic,** Criminal Appeal No. 220 of 2012, **Hassan Bundala @ Swaga Vs. Republic,** Criminal Appeal No. 386 of 2015 and **Yusuph Masalu @ Jiduvi and Others Vs. Republic**, Criminal Appeal No. 163 of 2017 (all unreported).

We had to ask ourselves as to whether in the light of the testimony of PW3 as quoted above, it could be said that it did pass the warnings which have been illustrated in the holdings above. Our answer is in the negative. As we have attempted to highlight above, the sole evidence from the testimony of PW3 was not cogent enough to be safely relied upon in holding the appellant culpable to a serious offence as the one which faced the appellant. Had the trial court and the first appellate Court cautiously evaluated the testimony of PW3 in the light of the cited decisions, undoubtedly, they would have reached at a different conclusion.

In the event, we hold that the appeal by the appellant is merited. We allow it by quashing the concurrent finding of the two lower courts, setting aside the sentences which were imposed and the ancillary order of compensation. In lieu thereof, we direct that the appellant be set at liberty forthwith, unless he is otherwise lawfully held for some other ground.

Order accordingly.

DATED at **MWANZA** this 14th day of July, 2018.

S.E.A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL