IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 167 OF 2017

1. JULIUS CHARLES @ SHARABARO
2. EMMANUEL NASANIA
3. ISSA MAKALA .....**APPELLANTS**

VERSUS

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

(Appeal from the Decision of the High Court of Tanzania)
at Dodoma

(Mansoor, J.)

dated the 23rd day of March, 2017
in
Criminal Appeal No. 43 C/F 46 of 2015

JUDGMENT OF THE COURT

16th & 20th July, 2018

MWARIJA, J.A.:

In the District Court of Iramba, Julius Charles @ Sharobaro, Emmanuel Nasania and Issa Makala (the 1st – 3rd appellants respectively), were charged with the offence of armed robbery contrary to section 287A of the Penal Code [cap. 16 R.E. 2002] (the Penal Code). It was alleged that on 24/12/2013 at about 20.00 hrs at Zinziligi village in Iramba district within Singida region, they stole cash Tshs 28,000/= the property of Clement James and immediately before such stealing, they injured the said person by cutting him with a machete on his head and shoulder.

On 15/1/2014 when the charge was read over to them, the 1st and 3rd appellants denied the allegation. On his part, the 2nd appellant pleaded as follows:-

" *It is true we were together* "

Upon that plea, the facts were read to him. The relevant part reads as follows:-

> *"The accused and the victim know each other. The incident occurred on 24/12/2013 about 20.00 hrs, where the scene was lighted with moonlight. Before the incident, the accused and the victim met and greeted each other, before attaching (sic) him, cutting him on the head and right shoulder before taking a sum of 28,000/=."*

To those facts, the 2nd appellant's reply was that:-

" *It is true; I admit the facts as correct and true."*

He was, as a result, convicted and sentenced to thirty years imprisonment.

Later on, the trial commenced against the 1st and 3rd appellants. At the end, they were found guilty and sentenced each to thirty years imprisonment. All the appellants were aggrieved by conviction and sentence and thus appealed to the High Court. Their appeal was unsuccessful hence this second appeal.

The facts giving rise to the appellants' arraignment and their subsequent imprisonment can be briefly stated as follows: On 24/12/2013 in the night, the victim, Charles James (PW1), was on the way going to his home. He was from a nearby bar. At a certain distance from the bar, he met three persons who stopped and ordered him to give them money or else they would kill him. According to his evidence, he identified those persons to be the appellants who were known to him. They were at the same bar shortly before he left. They suddenly attacked him using a machete and robbed him of Tshs 28,000/=. He was injured with a machete on his head and shoulder by the persons he identified to be the 2nd and 3rd appellants.

Following the incident, he shouted for help and a person by the name of Kagame @ Athumani arrived at the scene. When they saw that person, the culprits threatened to cut him with the machete. He was forced to run away. PW1 also seized the opportunity and ran away from the scene. He sought assistance at the house of one Sixmund who called his neighbour, one Felix and together, they took PW1 to police station where he was issued with a PF3 and later to the nearby Health Centre for treatment. He was later referred to Kiomboi Hospital for further treatment.

At the trial, apart from the evidence of PW1, the prosecution relied on the evidence of other three witnesses; the 2nd appellant (PW2), Athumani Mambo (PW3) and Omari Kalomo (PW4). The 2nd appellant, who, as shown above, was the 1st and 3rd appellants' co-accused, supported the evidence of PW1 that he (PW2) was one of the persons who attacked and robbed the latter on the material date of the incident. According to his evidence, the 1st appellant was the one who took the stolen money. He said however, that he did not know who had the machete amongst them.

As for PW3, it was his evidence that on the material date of the incident, he was also at the bar. He left at about 21.00 hrs and at around 10.00 hrs, while at his home, he heard a person shouting that he had been attacked with a machete. When he went to the scene, he identified the 2nd appellant who was known to him. According to this witness, he managed to identify the 2nd appellant by aid of moonlight. He added that the said appellant threatened him with a machete and being frightened, decided to seek refuge at the bar.

In their defence, the 1st and 3rd appellants denied the offence. The 1st appellant (DW1) testified that on 24/12/2013, he was sick and thus stayed in doors for the whole day. On the next day, a certain police officer arrived at his home in the company of one militiaman. They arrested him on the allegation that he was involved in the commission of the offence. He was taken to Kiomboi police station and was later charged in court.

The 3rd appellant (DW2), gave a similar defence. He testified that on 24/12/2013, he spent the whole day at home. On the next day, he decided to have a walk. He went to the 2nd appellant's home. Incidentally, he found there a police officer and a militiaman who arrested him in connection with the offence in question. He was taken to police station where he was later charged. His wife, Mwajuma Ramadhani (DW3) supported his evidence; that on 24/12/2013, he stayed at home as from 18.00 hrs till the next day on 25/12/2014.

In its decision, the trial court was satisfied that the prosecution had proved its case against the 1st and the 3rd appellants beyond reasonable doubt. It mainly relied on the identification evidence of PW1. The learned trial Resident Magistrate was of the view that although the offence was committed in the night, there was moonlight which enabled PW1 to

sufficiently identify the 1st and 3rd appellants. He found further that PW1's evidence was corroborated by the evidence of PW3 which is to the effect that he identified the 2nd appellant at the scene. The trial court relied also on the evidence of the 2nd appellant which, according to the trial magistrate, did not require corroboration.

The appellants were aggrieved and thus appealed to the High Court. Whereas the 2nd appellant challenged his conviction, contending that he was convicted on an equivocal plea of guilty, the 1st and 3rd appellants appealed against the finding by the trial court that the prosecution had proved the case against them beyond reasonable doubt. As stated above, their appeal was unsuccessful.

The 2nd appellant's memorandum of appeal consists of three grounds, contending in essence that, the High Court erred in upholding his conviction which was founded on an equivocal plea of guilty. On their part, the 1st and 3rd appellants had each raised five grounds in their memoranda of appeal. They contend that the High Court erred in law in failing to find that their conviction was based on unreliable evidence.

At the hearing of the appeal, the appellants were represented by Mr. Godfrey Wasonga, learned counsel whereas the respondent Republic was represented by Ms Chivanenda Luwongo, learned State Attorney.

In arguing the appeal, Mr. Wasonga decided to argue the appellants' grounds of appeal generally confining his submission to two paraphrased ground as follows:-

1. *That the learned High Court judge erred in law in upholding the conviction of the 2nd appellant while the trial court had wrongly based his conviction on an equivocal plea of guilty.*

2. *That the learned High Court judge erred in upholding the conviction of the 1st and 3rd appellants which was based on an unreliable identification evidence.*

On the first ground which is in respect of the 2nd appellant, Mr. Wasonga argued that the said appellant did not plead guilty to the charge. According to the learned counsel, what was stated by the appellant in his plea is that he was with the other appellants. He argued further that the facts were insufficient and the same did not disclose the offence charged. In the circumstances, he said, the 2nd appellant's conviction was bad for having been based on a plea which was not unequivocal.

As for the 2nd ground concerning the 1st and 3rd appellants, Mr. Wasonga submitted that the evidence of identification which the trial court acted upon to convict the appellants was unreliable. He argued that since the offence was committed in the night, identification was made under difficult conditions and therefore, the trial court ought to have satisfied itself that such evidence was watertight. He said that, although according to the evidence of PW1, there was moonlight which aided him to identify the appellants, that evidence is unreliable because the intensity of the moonlight was not described.

In reply to the first ground of appeal, at first Ms Luwongo submitted that the 2nd appellant's plea was unequivocal and for that reason, he was properly convicted. On reflection however, the learned State Attorney conceded that the plea was not unequivocal. He prayed to the Court to quash the conviction and order that his plea be taken afresh.

With regard to the evidence on which the 1st and 3rd appellants' conviction was founded, the learned State Attorney agreed that it centred on identification. She argued however, that the appellants were properly identified because, according to the evidence of the identifying witness,

there was enough moonlight at the scene of crime. She contended that, the conditions stated in the case of **Waziri Amani v.R** [1980] TLR 250 were met and for that reason, that evidence was properly acted upon to convict the 1st and 3rd appellants. She admitted however, that according to the record, PW1 did not mention the appellants to any one of the persons he reported the incident immediately after its occurrence.

To begin with the evidence of identification, which formed the basis of the 1st and 3rd appellants' conviction, it is trite that evidence of visual identification is of the weakest kind and for that reason, should not be acted upon to found conviction unless all the possibilities of a mistaken identity have been eliminated. In the case of **Waziri Amani** (supra), cited by Ms Luwongo, the Court stated as follows:

> " *Evidence of visual identification is not only of the weakest kind, but it is also most 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".*

In the present case, identification was made in the night by aid of moonlight. PW1 said that there was "enough moonlight". Relying on the conditions stated in the **Waziri Amani Case**, Ms Luwongo submitted that

the persons who attacked and robbed PW1 did so at a close range, that he had known them before and that there was moonlight which was sufficient to enable PW1 to identify his assailants. She relied also on the evidence of PW3 and the 2nd appellant, submitting that their evidence corroborated PW1's evidence.

To begin with the evidence of the 2nd appellant and PW3, in our considered view, it is not correct that their evidence is of corroborative value. PW3 said that he identified the 2nd appellant at the scene of crime. He did not testify that he identified the 1st and 3rd appellants. As for the 2nd appellant, being the 1st and 3rd appellants' co- accused, his evidence required corroboration and for that reason, that evidence is not worth of corroborating another evidence. See for example, the case of **Akiba s/o Daudi v. Republic,** Criminal Appeal No. 81 of 2004 (unreported).

Notwithstanding the above stated reasons, the crucial issue is whether the condition at the scene of crime was favourable for proper identification. Whereas PW1 said that there was "enough moonlight to identity a person", PW3 said that "there was moonlight on that night". None of the two witnesses described the intensity of the moonlight.

In the case of **Pontian Joseph v The Republic** Criminal Appeal No. 200 of 2015 (unreported), we had this to say on general assertion by a witness that there was "sufficient moonlight" or enough moonlight without describing its intensity:

> *"Though under certain circumstances identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the complainant said there was " enough moonlight". It is our considered view that it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained."*

In his evidence, PW1 did neither describe the nature of the surroundings at the scene of crime nor the brightness of the moonlight, the factors which were necessary for the purpose of determining whether or not identification could be made without any possibilities of mistaken identity.

As to the evidence that PW1 had known the appellants before, the factor which was relied upon to give credence to his identification evidence, we wish to state that the test for reliability of evidence of identification made under difficult conditions applies also to recognition

evidence. This was clearly stated in the case of **Issa Mgara @ Shuka v.R** Criminal Appeal No. 37 of 2005 (unreported) in which the Court stated that:-

> *"even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence 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 ... mistakes in recognition of close relatives and friends are often made."*

PW1's evidence of recognition is, in our view, highly unreliable. Apart from the fact that the intensity of moonlight was not described, nothing was said as regards his failure to name the appellants to the persons to who he reported the incident. As held in the case of **Marwa Wangiti Mwita and Another v.R** [2002]TLR 39 the omission to do so raises doubt in the witnesses' evidence. The court stated as follows:-

> " *The ability of witness to name a suspect at the earliest opportunity is an all important assurance of his*

reliability, in the same way as delay or complete failure to do so should put a prudent court to inquiry."

Having found that the identification evidence, which formed the basis of the 1st and 3rd appellants' conviction, is unreliable, we hereby allow the 1st and 3rd appellants' appeal. Their conviction is quashed and the sentence is set aside. They shall be released from prison unless they are otherwise lawfully held.

With regard to the 1st paraphrased ground concerning the 2nd appellant's plea, we agree with both Mr. Wasonga and Ms Luwongo that the entered plea of guilty was equivocal. It is clear from the words used by the appellant, as reproduced above in this judgment, that the same are ambiguous. As argued by Mr. Wasonga the words may be interpreted to have the meaning that the 2nd appellant admitted to have been with the 1st and 3rd appellant, not that he admitted involvement in the commission of the offence. Similarly, the facts are imperfect because, although the 2nd appellant was jointly charged with the 1st and 3rd appellants, the facts show that the offence was committed by the 2nd appellant alone. A conviction based on an equivocal plea is an unsound conviction in law.

The remedy is to quash it, set aside the sentence and ordinarily, an order for taking plea afresh will be issued - See for example, the case of **Ngasa Madina v. The Replublic,** Criminal Appeal No. 151 of 2005 (unreported). In that case, the appellant's conviction was based on the plea of guilty which was not unequivocal. The Court quashed his conviction, set aside the sentence and the trial District Court was directed to take his plea afresh. We have found in this case, that the 2nd appellant's plea was equivocal. We agree therefore, that the High Court erred is upholding his conviction.

As a consequence, we hereby quash the 2nd appellant's conviction and set aside the sentence. The original record shall be returned to the trial court for it to take the 2nd appellant's plea afresh and proceed with the case against him according to the law.

DATED at **DODOMA** this 19th day of July, 2018.

K. M. MUSSA
JUSTICE OF APPEAL
A.G.MWARIJA
JUSTICE OF APPEAL
R.E. MZIRAY
JUSTICE OF APPEAL

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

S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL