IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A. And LILA, J.A.)

CRIMINAL APPEAL NO. 186 OF 2016

1. SADICK HUSSEIN NYANZA
2. MUSA YUSUFU } **.....APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(KOROSSO,J.)

dated the 02nd day of November, 2015
in
HC. Criminal Appeal No. 128 of 2014

.....

JUDGMENT OF THE COURT

8th April, 2019 & 30th April, 2019

LILA, J.A.:

This is a second appeal by the Appellants. The appellants were dissatisfied with the decision of the High Court (Korosso, J.), on first appeal, in Criminal Appeal No. 128 of 2014. The Appellants and another one who was acquitted by the High Court were charged in the District Court of Bagamoyo of the offence of armed robbery. The offence section made reference to section 287(A) of the Penal Code Cap 16 R.E. 2002 as amended by Act No. 4 of 2004 (The Code).

It was alleged in the charge sheet that the appellants and another one jointly and together on 17th July, 2012 at or about 23.30 hours at

Kibiki village within Bagamoyo District Coast Region did steal cash money Tshs. 2,000,000/=, the property of Ibrahim Rajabu, and immediately before or after such stealing did assault him by using an axe on his face in order to retain the stolen property.

The prosecution evidence before the trial court was short and straight forward. According to Ibrahim Rajabu (PW1), the Kibiki area chairman who also owned a shop, and his wife Tatu Abdul (PW2), as they were taking dinner at about 23.00 hours, the watchman one Jafari who did not testify in court, alerted them that it was no longer safe as there were movements of people outside the house. No sooner, about six people managed to cut the gate and stormed into the house. They were armed with iron bars and an axe with which they attacked PW1 on the forehead while pressing to be given money. That, PW1 heeded to the demand and gave them Tshs. 2,000,000/=. In order to avoid further assault, PW1 hid under the table and managed to run to the house of one Maimuna Nassoro (PW3). PW1 and PW2 said there was light both inside and outside the house from a tube light of 100 voltage and PW1 had a torch which shed light in the house with which they managed to identify the bandits. PW1 said he identified Musa, Sadiki and another one who he did not mention and that Musa was the one who was armed with an axe and Sadiki had an iron bar. He further said that he was

issued with PF3 by the police, he attended treatment and he tendered it as exhibit (P1). PW2 said she identified Musa, Sadiki and Ramadhani at the time they were entering into the house. Both PW1 and PW2 said they knew them very well before the incident because they live in the same village. In the course the bandits also made away with mobile phones of other people which were taken there for the purpose of charging and airtime vouchers. PW1 tendered a PF3 as exhibit (P1). On being cross-examined, PW1 said that the watchman who also lives at Kibiki was first to see the bandits before he was informed.

On her part, PW3 told the trial court that PW1 ran to her house on the fateful night while bleeding and he named Sadiki, Mussa and Ramadhani to be the ones who had invaded them that night.

Assistant Inspector Jerome (PW4), informed the court that upon being informed of the robbery incident he went to the scene. That PW1 named Sadiki and Mussa as being the robbers. That he stopped PW1 from naming other robbers thereat for security purposes. He said an axe was used to cut the gate so as to gain access and according to the injuries sustained by PW1, he suspected that PW1 was cut by a "panga". That, PW1 was taken to Chalinze Police Station where he was issued with a PF3 so that he could get treated.

In their respective defences, both appellants distanced themselves from the accusations raised by the prosecution against them. The 1st appellant said he knew PW1 well and personally went to police station upon being told that he was required there by a police officer one Nassar whereat he was then arrested and charged with the present offence. The 2nd appellant said he was arrested by three police officers at the disco at about 00:30 hours.

Nevertheless, the trial court was fully satisfied that the offence of armed robbery was committed and the appellants were involved in the incident. It was satisfied that the appellants and the other one were properly identified by means of electricity light from the solar power and torch, they were known by PW1 and PW2 prior to the incident and were named by PW1 and PW2 to PW3 and PW4 who visited the scene immediately after the incident. Ultimately, all of them were convicted and each of them was sentenced to serve the statutory minimum sentence of thirty (30) years imprisonment.

As intimated above, the findings and sentences meted by the trial court aggrieved the appellants and the other person. They preferred an appeal to the High Court. As it were, the appellants' appeal was not successful while that other person's appeal succeeded and was discharged. In respect of the appellants, the High Court was at one with

the trial court that the appellants were properly identified at the scene of crime. It entertained doubts in the identification of the other person because he was not named by PW1. The High Court was also of the view that no adverse inference could be drawn to the prosecution case for failure to call the investigator and other witnesses because the trial court was satisfied that PW1, PW2 and PW3 were not only credible and reliable witnesses but also their evidence was strong enough to prove the case against the appellants.

Still believing that the two courts have not done justice to them, the appellants preferred the present appeal. In their joint memorandum of appeal, the appellants have raised ten (10) grounds of complaints. However, comprehensively considered, they boil down to five grounds, namely; **one**, the charge was defective (ground 1); **two**, the appellants were not properly identified (grounds 2, 3 and 6); **three**, both courts below wrongly failed draw an adverse inference on the prosecution case following failure call the watchman as a witness (ground 8); **four**, no evidence was led on how the appellants were arrested and whether they were searched after their arrest (grounds 5, 7 and 9) and **five**, the first appellate court applied double standard in acquitting the other person and maintaining their convictions on the same evidence. In totality, the

appellants contended that the case against them was not proved to the required standard and they urged the Court to set them at liberty.

In this appeal, the appellants were unrepresented and they fended themselves whereas the respondent Republic enjoyed the services of Ms. Cecilia Mkonongo who was assisted by Ms. Yasinta Peter, both learned State Attorneys.

In her submission, Ms. Mkonongo strongly resisted the appeal. Arguing in respect of ground one of appeal, she contended that although the offence section in the charge sheet cited section 287(A) of the Code instead of section 287A of the Code, the defect does not go the root of the case hence the appellants were not prejudiced. She said the defect is not fatal and is curable under section 388 of the Criminal Procedure Act, Cap 20 R. E. 2002 (The CPA) by simply removing the brackets.

In respect of the other grounds of appeal, the learned State Attorney opted to argue grounds 5, 6, 7 and 8 jointly. She argued that the appellants were known to PW1 and PW2 before the incident because they live in the same village and were named to PW3 and PW4 immediately. She said there was solar light which was complimented by light from a torch held by PW1 which illuminated the room hence

enabled PW1 and PW2 to see and recognize the appellants. She referred us to the case of **Fadhili Gumbo @ Malota Vs. R** [2006] TLR 52 to cement her arguments. On our prompting, however, she conceded that in that case torch was not used.

Regarding grounds 5 and 7, Ms. Mkonongo was emphatic that both courts believed the prosecution witnesses as being reliable hence it was not necessary for them to call many other witnesses because under section 143 of the Tanzania Evidence Act, Cap 6 R. E. 2002 (TEA), it is not the number of witnesses which matters but their credibility. In bolstering her argument she referred us to the case of **Aziz Abdallah Vs. Republic,** [1991] TLR 71. She also contended that the defence case was given a deserving weight and she gave an example of page 41 of the record where the same was fully analyzed.

In rejoinder, both appellants maintained that they were convicted on a fatally defective charge and urged the Court to also consider the other grounds of appeal and let them free.

We will first consider a legal issue raised by the appellants that they were convicted on a fatally defective charge.

It is evident from the record that the charge against the appellants was predicated under section 287(A) of the Code. According to the

appellants that section is non-existent. The issue before us for resolve is, therefore, whether the brackets inserted in the offence section is fatal and renders the charge fatally defective.

Under our law, it is mandatory that a charge sheet should describe the offence and should make reference to the section of the law creating the offence (See section 135 of the CPA). We agree with the learned State Attorney that the proper offence section which ought to have been cited is section 287A of the Code. Apparently, the problem is the brackets. We agree with the appellants only to the extent that the brackets were wrongly inserted. But, we are of the considered view that the error did not go to the root of the case and the appellants were not thereby prejudiced. As rightly argued by the learned State Attorney, the infraction is curable under section 388 of the CPA. This ground of appeal lacks merit.

We now proceed to consider the other grounds of appeal.

In the present case it was alleged that the robbery incident took place at night, at about 23:30 hours and the appellants were neither found and arrested at the scene of crime nor found in possession of the stolen money. Their conviction, as intimated above, was solely based on being visually identified by PW1 and PW2 at the scene of crime. It is

now settled law that in a case entirely depending on identification the evidence of visual identification especially when the incident happens at night is of the weakest kind and no court should act on it and found a conviction unless all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is absolutely watertight to justify a conviction. In the circumstances, it was absolutely necessary for the trial court to satisfy itself that the identification of the appellants was impeccable before arriving at a finding of guilty. The guidelines to be considered by the courts were, with lucidity, stated in the case of **Waziri Amani Vs. R** [1980] TLR 250 to be:-

I. Time the witness had with the accused under observation.

II. The distance from which the witness had the accused under observation.

III. If there was any light, then the source and intensity of such light.

IV. Description of the appellant's attire. Also whether he was tall or short.

V. Whether the witness knew the appellant before.

The Court has maintained that the above considerations apply even to cases of recognition because even recognizing witnesses often

make mistakes or deliberately lie (See **Maselo Mwita @ Maseke and Another Vs. Republic**, Criminal Appeal No. 63 of 2005 (Unreported).

The evidence relied upon by the prosecution in the present case is recognition. The value or significance of the evidence of recognition need not be overemphasized. The Court has maintained that it is more assuring and more reliable than identification of a stranger (See **Athumani Hamisi @ Athumani Vs. Repulic,** Criminal Appeal No. 288 of 2009 (Unreported).

In view of the above legal position we are, in the present case, faced with an issue whether the appellants were a party to the armed robbery.

In determining the above issue we propose to, first, consider whether the circumstances were favourable for a proper identification. While giving an account of what transpired that night, PW1 is recorded to have told the trial court that:-

> *"...They were throwing stones and on the the iron sheets and cutting the door by using vishoka (an axe). They managed to cut the gate and put it down while I was inside the house shouting thief ! thief !. They continued cutting and managed to enter inside*

and started beating me by using iron bars and axe on the forehead saying that they need money from me, inside that house there was a table, I entered under the table as I was bleeding, I managed to escape and went to my neighbours to seek assistance.

I run to the house of Maimuna. They were about six (6) people. I managed to identify only three people. Mussa, Sadiki and another. There was solar light and I had a torch that helped me to identify them..."

On her part, giving an account on the same event, PW2 said that:-

"...Shortly those people broked (sic) the door and entered inside the house and hit my husband on the head by an iron bar saying that they need money. They injured him stole from therein and run away.

I was also beaten needing the shop keys but I had no those keys. They took iron bar and broke the padlock of the shop door and stole from therein various items including mobile phones, vouchers and the money. I identified three people who are before

this court. They were many, but I identified Mussa 2nd accused, 1st accused Sadiki and Ramadhani 3rd accused..."

From the above set of facts it is plain that the incident took a very short time. There was shock and panic as well as havoc in the house. Neither of the witnesses told the trial court the distance at which they observed the bandits and the time they took to observe them. That aside, neither of the witnesses told the trial court how they managed to recognize them by giving the descriptions to PW3 and PW4. The two witnesses simply said they identified them and proceeded to name them. That was insufficient. The circumstances do not suggest that there was room for the two witnesses to concentrate on any of the bandits so as properly identify any of them. Insisting on the need to provide descriptions of the person identified, the Court, in the case of **Shamir John Vs. Republic**, Criminal Appeal No. 166 of 2004 (Unreported), stated that:-

"...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 close relatives and friends are sometimes made."

Apart from the above, the extent or intensity of light in the room casts doubts. Both PW1 and PW2 stated that they were aided by light from solar and a torch held by PW1 to identify the appellants. When we inquired from the learned State why use two sources of light at the same time if, according to PW1, the tube light was of 100 volts, she insisted that they complimented each other. In our considered opinion, any objective consideration of the stated situation, would lead to only one reasonable conclusion that there was no enough light in the room. The Court was faced with a situation where two sources of light were said to have enabled a witness identify an appellant in the case of **Selemani Athumani Bakari @ Carlos and Another Vs. Republic**, Criminal Appeal No. 163 of 2013 in which the witness said she could identify the appellant with the help of tube light and moonlight. The Court stated that:-

"In our considered view, the two sources of light do not function together. Where there is reasonable intensity of tube light, the moonlight may not shine so as to compliment the former."

We subscribe to the above position. Like in the above case, if there was light from a 100 volts solar tube light then there was no need to use the torch. The use of the torch suggests that there was insufficient light in the room hence the conditions for a proper and unmistaken identification were unfavourable. More so, the expression that there was also torch light was, in our view, an exaggeration intended to establish that there was sufficient light in the room. That raises doubts on the credibility of PW1 and PW2 which is also a relevant factor to be considered in cases entirely dependent on visual identification as the Court had occasion to state in the unreported cases of **Jaribu Abdalla Vs. Republic**, Criminal appeal No. 220 of 1994 and **Mengi Paulo samwel Luhana and Another Vs. Republic**, Criminal appeal No. 222 of 2006 cited in the case of **William Kitonge @ Mwita and Two Others Vs. republic**, Criminal Appeal No. 185 of 2010. In the former case of **Jaribu Abdalla** (supra), the Court categorically stated that:-

> *"...In matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of the witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."*

And, in the latter case of **Mengi Paulo samwel Luhana** (supra), the Court lucidly held that:-

> *"...Eyewitness testimony...can be devastating when false identification is made due to honest confusion or outright lying."*

Much as we agree with the learned State Attorney that PW1 and PW2 well knew the appellants prior to the incident, which fact was not controverted by the appellants, and in fact, the 1st appellant admitted knowing PW1, that was no guarantee that the appellants were the ones who stormed into their house and robbed them of the money. We have read the case of **Fadhili Gumbo** (supra) and we are satisfied that it is distinguishable in that in the present case both the solar light and the torch were allegedly simultaneously used to illuminate in the house while in the cited case the source of light considered by the Court was moonlight and the witnesses were not only close and knew the bandits before the incident but also had ample time in observation of the bandits.

The above finding would be sufficient to determine the appeal but we find ourselves obliged to consider another ground of complaint which touches on the failure by both courts below to draw an adverse

inference on the prosecution case following failure to call the watchman to testify.

Although the learned State Attorney conceded that the watchman one Jafari was first to see the bandits and is the one who alerted PW1, she, at first, insisted that he was not a crucial witness for the prosecution. But, on reflection that he was outside the house and the role the watchman played, she conceded that he was a crucial witness. With respect, we agree with the stance taken by the learned State Attorney that it was necessary to call him as a witness. He was the first to see the bandits before alerting PW1 and according to PW1 there was light inside the house as well as outside the house. So, the watchman was better placed to see and identify them than PW1 and PW2 who were inside the house. We agree with the learned state Attorney that under section 143 of TEA no specific number of witnesses is required to prove a case and that what is important is the credibility of the witness (See **Yohanis Msigwa Vs. Repulic** [1990] TLR 148). But, the watchman was an essential witness in proving both the occurrence of the alleged robbery and the identity of the bandits. The record bears out that he was not called and no reasonable explanation was forthcoming from the prosecution despite being said that he also resided at Kibiki. He was within reach but for unexplained reason was not called to testify.

This, no doubts, leads us to an irresistible inference that had he been called as a witness he would have given a testimony unfavourable to the prosecution case. The Court had insisted on the need for the prosecution to call witnesses who are available and are able to testify on material facts connected to the commission of the offence in the case of **Azizi Abdalllah Vs. Republic** (supra) where it stated that:-

> *"The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

This was a fit case for both courts below to draw an adverse inference to the prosecution case for failure to call the watchman to testify.

For the above reasons, unlike the two courts below, we are satisfied that the prosecution failed to provide sufficient evidence which could have eliminated the possibilities of mistaken identity of the

appellants at the scene of crime. On that account, we are constrained to hold that the quality of identification was not impeccable and it cannot therefore be said that the appellants were properly identified at the scene of crime.

For the reasons we have stated, we are satisfied that the evidence on identification of the appellants was not water tight. Consequently, the prosecution did not prove the case against the appellants beyond doubts. We accordingly allow the appeal, quash the convictions and set aside the sentences meted by the trial court and maintained by the High Court and hereby order the appellants' release from prison forthwith unless held for any other lawful cause.

DATED at **DAR ES SALAAM** this 18th day of April, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL