IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: JUMA, C.J., MZIRAY, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO 366 OF 2017

RAYMOND MWINUKA...APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

(Appeal from the Judgment of the High court of Tanzania at Iringa)

(Feleshi, J.)

dated the 14th day of July, 2017
in
DC Criminal Appeal No. 25 of 2017

JUDGMENT OF THE COURT

21st & 29th August, 2019

KITUSI, J.A.:

The appellant was charged with and convicted of one count of Armed Robbery contrary to Section 287 A of the Penal Code, Cap 16 R.E 2002 and two counts of causing grievous harm contrary to section 225 of the Penal Code, Cap 16 R.E 2002, hereafter the Penal Code. He was finally sentenced to 30 years imprisonment for the first count of Armed Robbery and to 2 years imprisonment for each of the counts of grievous harm. It was ordered that the sentences should run concurrently.

Aggrieved by the convictions and sentences, the appellant unsuccessfully appealed to the High court. Still aggrieved he has appealed hereto by a Memorandum of Appeal containing six grounds.

At the trial it was alleged that on 2nd September 2016 at about 19.50 hours at Madunda Village Manengi Ward, Ludewa District within Njombe Region, the appellant stole Tshs 5,700,000/= from one Asteria Kayombo and that immediately before or after the time of stealing he used a machete to cut the victim on the heard, face and left hand and also an iron bar to beat Asteria Kayombo's different parts of her body in order to obtain or retain the stolen money.

In the second and third counts it was alleged that on the same date and at the same time and place, the appellant caused grievous harm to Rehema Mlelwa and Asteria Kayombo respectively by using a machete and iron bar.

When the appellant pleaded not guilty, the prosecution sought to establish the following by evidence; Asteria Kayombo (PW) is a mother to Rehema Mlelwa (PW2) and a sister to the appellant's mother and was enjoying good relationship with her sister's son, the appellant. She even

lent him money, Tshs 4,250,000/= and offered him to use her chainsaw. However, when it was time for the appellant to repay the money to PW1 he could not do so and PW1 stated that her efforts to demand it back proved unfruitful.

On 2nd September, 2016 at about 19.50 hours when PW1 and PW2 were at home, the appellant allegedly invaded them. According to PW1, she heard a sound such as something had been dropped, and suddenly the appellant appeared and grabbed some money totaling TShs 5,700,000/= which PW1 had kept on the table. When PW1 resisted, the appellant cut her on the head, face and hands using a "panga" which he had been carrying with him. PW1 raised alarms which attracted the attention of PW2 who was in another room. PW2 went to where PW1 was, and tried to put a fight so as to assist PW1, but all she ended up getting were cuts from the appellant's panga causing her permanent disfigurement of one of her hands.

PW1 and PW2 described the area as having been well illuminated by fluorescent lamps, which they referred to as tube lights. This fact was confirmed by Nobert Haule (PW3) a man who went to the scene in

response to PW1's alarms and witnessed the appellant attack PW1 and PW2 by using the "panga" and iron bar and that he did not dare intervene because the appellant appeared to be dangerously furious. Of the tube lights, PW3 said they were many, and he estimated each to be a metre long.

When the appellant had allegedly made away with the loot, PW3 sought assistance from other people who helped him take PW1 and PW2 to hospital. It was Dr. Apolinary Moses Nombo (PW4) who attended PW1 and PW2 who, he testified, had sustained cut wounds on their heads, faces and hands. PW4 stated that some of the victims' bones had been shattered beyond repair. He completed the victims' respective PF3s which were collectively admitted as Exhibit P2.

In defence the appellant stated that on 2/9/2016 he spent the day at Kitewele village cutting woods and only returned to Matunda village when it was 19.00 hours. He stayed at home until at 20.45 hours when he went to his neighbour to assist him burn bricks and thereafter returned home. This version was supported by Maria Ngailo (DW2), presumably appellant's wife, who stated that the appellant returned home from Kitewele village at

19.30 hours and left again in her company for his neighbour's house after dinner. After the couple returned home they retired to bed. In their testimonies both the appellant and DW2 stated that they became aware of the attack on PW1 and PW2 and that the two had been hopistalized.

The trial Magistrate considered the following issue, which we reproduce:

> *"Whether the accused's defences and witness argued to had (sic) been absent at the Scene of Crime, correctly created doubt to the prosecution's evidence or whether the prosecution witnesses proved the offences watertight against the accused."*

The learned trial Magistrate resolved the issue by relying on the evidence of PW1, PW2 and PW3, concluding that they properly identified the appellant by the aid of electricity light. He rejected the defence of *alibi* that had been raised for being unsubstantiated because no evidence was adduced by the persons with whom the appellant had been at Kitewele village.

As alluded to earlier, the appellant's first appeal was unsuccessful, the High court judge taking the view that the appellant was adequately identified because he was a person familiar to PW1 and PW2 and also that there was no suggestion of existence of grudges between those witnesses and him. He agreed with the trial court that the appellant had not accounted for his whereabouts at 19.50 hours when the alleged robbery took place.

Still dissatisfied the appellant has raised the following grounds to challenge the decision of the first appellate court, to wit; **One**, PW1 and PW2 adduced contradictory evidence because they did not state how he gained entry into the house and what he exactly stole; **two**, that the prosecution witnesses did not describe him; **three**, that the High court Judge erred in not addressing his mind to the existing conflict between him and PW1 arising from the loan; **four**, that the evidence of PW1 and PW2 did not prove the offence of armed robbery; **five**, that the High court erred in upholding the conviction for grievous harm without medical evidence; **six**, that the prosecution did not prove the offence beyond reasonable doubt.

At the hearing, the appellant appeared in person whereas Mr. Alex Mwita and Ms. Hope Charles Masambu, learned State Attorneys appeared for the respondent Republic. After the appellant opted to hear submissions by the State Attorney first, Mr. Mwita took the floor. The learned State Attorney chose to submit on the 6th ground in the course of which, he promised, he would be canvassing the other grounds. We thought that was a focused approach so we allowed Mr. Mwita to proceed in the way he had chosen.

The learned State Attorney submitted that there was enough evidence of visual identification by PW1 and PW2 because of light, familiarity, duration which was estimated to be five minutes, and proximity, as the appellant allegedly attacked the victims by a machete, therefore within close range. The learned State Attorney submitted that the factors for unmistaken identity as stipulated in the case of **Waziri Amani v. R.** [1980] 50 had been met.

In addition, Mr. Mwita submitted that the courts below made concurrent findings as regards visual identification and he invited us not to interfere with those findings because we are sitting on second appeal. He

cited the case of **Daudi Lugusi and 2 Others v. R**. Criminal Appeal No. 221 of 2014 (unreported).

Specifically, Mr. Mwita briefly submitted on the other grounds of appeal beginning with ground 2. He submitted that PW1 and PW2 did not need to describe the appellant to anyone because he was a person known to them. As for the alleged conflict between the appellant and PW1, he submitted that the High court Judge rejected the allegation because the appellant had not cross-examined PW1 on the same. Similarly, the defence of alibi was dealt with by the High court by concluding that the appellant had no accounted for his whereabouts at 19.50 hours of the fateful day.

On the 5th ground the learned State Attorney submitted that the offences of grievous harm were proved by the evidence of PW4, the medical officer who described how PW1 and PW2 were badly wounded.

When Mr. Mwita was invited by the Court to comment on the charge of Armed Robbery being preferred along with those of grievous harm, he considered it appropriate because in the latter charges the appellant is serving a lesser sentence.

When the ball was on the appellant's court, he faulted the trial court and the first appellate court for believing PW1 and PW2 who could not even tell how he gained entry into their house. He repeated his complaint that these witnesses did not described him by height size and complexion.

The appellant submitted that like the trial court, the High court did not consider his defence, particularly the fact that he was being victimized because of the debt.

In resolving the competing submissions in relation to the grounds of appeal, we begin by observing that all six grounds are evidential in nature. Aware of a host of decisions of this Court cautioning against our interference with concurrent findings of facts by the two courts below, we shall guard against unwarranted interference of such facts. The decisions on that principle are in cases including; **Daudi Lugusi and 2 Others V. Republic** (supra), cited to us by Mr. Mwita, and **Jafari Mohamed V. Republic,** Criminal Appeal No. 112 of 2006 (unreported). In the latter case it was held;

> *"An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it*

unreasonable or perverse" leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law: see, for instance, ***Peters v Sunday Post Ltd.*** *[1958] E.A. 424:* ***Daniel Nguru and Four Others V.R.,*** *Criminal Appeal No. 178 of 2004, (unreported);* ***Richard Mgaya*** *(supra), etc".*

In view of the foregoing, the scope of our deliberations will depend on whether or not we find rationale for interfering with the findings of facts by the District court and the High court. We take the issue of visual identification as forming the bedrock of the case, therefore we shall test if we have reasons to disturb the findings of the two courts as regards that issue.

It is our view that both the District court and the High court addressed the issue of visual identification by applying the relevant principles to the evidence, and concluded that the appellant was positively identified. The fact that the confrontation was between the victims and a familiar person, at close range, around a well lit scene, lasting for about five minutes were, rightly in our view, sufficient to omit any possibility of mistaken identity.

With this solid finding on the question of visual identification we think the District court and the first appellate court rightly rejected the defence of alibi and appellant's suggestion of bad blood between him and PW1. We wish to say a little more about the alleged bad blood.

First, of all we agree with the High court Judge that by not cross-examining PW1 on the bad blood and raising it on appeal, the allegation was an afterthought. It is trite law that failure to cross-examine a witness on an important point is tantamount to accepting its truth. [**Hassan Mohamed Ngoya v. Republic**, Criminal Appeal No. 134 of 2012 (unreported)]. In this case the appellant stands on weaker ground because the alleged bad blood was not even raised by him during his testimony.

For this reason, PW1's evidence that she was enjoying good relationship with the appellant was not challenged. The contention by the appellant that the case was borne out of grudge is baseless.

Secondly, the evidence that PW1 and PW2 had been attacked and wounded was supported by the appellant himself and his wife (DW2). They even confirmed that PW1 and PW2 had been admitted in hospital.

We find the appellant's suggestion that the case has been fabricated, quite inconsistent with the evidence that PW1 and PW2 were wounded, which he himself supported.

On the whole it is our conclusion that the appeal against the conviction and sentence for Armed Robbery has not merits.

Before we take leave, we wish to consider the issue we raised and asked Mr. Mwita to address us on. This is whether it was proper to charge the appellant with Armed Robbery and in addition charge him with grievous harm. As alluded to earlier, Mr. Mwita was of the view that there was nothing wrong with that procedure.

With respect we hold the view that the procedure adopted was irregular and in saying so, we are highly persuaded by the decision of Lugakingira, J. (as he then was) in **Nyanga Manyika v. Republic** [1980] TLR 141. Holding No. 1 of that case states:-

> *"(1) There is a rule of practice, which has crystalized into a rule of law, that a charge should not be duplex, which is to say that a single count should not charge the accused with commission of two or more offences .... I think, however, that*

there is limitation to the application of the rule. I respectfully hold the view that when a series of acts which constitute a series of the same offence are committed in such circumstances as to amount to one single transaction, then, in reality, there is committed one offence which ought to be charged in one count."

We respectfully associate ourselves with those views because the alleged assaults on PW1 and PW2 which caused them grievous harm, were a series of acts forming the commission of Armed Robbery. We think it is even worse when the counts of grievous harm were not preferred as alternative counts. In the case of **Godfrey Mwasumbi and Rashid Shaban v. Republic**, Criminal Appeal No. 29 of 2015 (unreported) we discussed circumstances under which one may be charged or convicted in the alternative.

It is therefore unusual to convict one with both Armed Robbery and Assault, when the assault is part of the Armed Robbery. It is like convicting a person with Theft and with Receiving the same items involved in the theft.

For those reasons we quash the convictions for Grievous Harm in the second and third counts and set aside their respective sentences. As earlier stated, the appeal against the conviction and sentence for Armed Robbery has no merits. It is hereby dismissed.

DATED at **IRINGA** this 29th day of August, 2019.

I. H. JUMA
CHIEF JUSTICE

R. E. S. MZIRAY
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on this 29th day of August, 2019 in the presence of Appellant in person and Mr. Alex Mwita, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL