IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 126 OF 2015

TAGARA MAKONGORO--1st APPELLANT
SHUKRANI WANDWI---2nd APPELLANT
KIHOGO PIUS --3rd APPELLANT

VERSUS

THE REPUBLIC--RESPONDENT

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

(Bukuku, J.)

dated the 17th day of February, 2015
in
Criminal Appeal No. 51 of 2014

....

JUDGMENT OF THE COURT

29th November & 3rd December, 2019.

MWANGESI, J.A.:

At the District court of Musoma in the Region of Mara, Tagara s/o Makongoro, Shukrani s/o Wandwi and Kihogo s/o Pius, who are the appellants herein, together with Manyerere s/o Inyasi and Abdi s/o Idd Kambi, who are not parties in this appeal, stood arraigned for the offence of armed robbery contrary the provisions of section 285 and 286 of the Penal Code, Cap. 16 Volume 1 of the Laws as amended by section 9 of Act No. 10 of 1989 **(the Code)**. The particulars of the offence were to the effect that on the 11th day of December, 2003 at about 23:45 hours at

Maneke village within the District of Musoma in Mara Region, the accused did jointly and together, steal cash money TZS 800,000/00, and one bicycle make Phonex valued at TZS 72,000/00, all total valued at TZS 872,000/00, the properties of one James s/o Kairanya and immediately before such time of stealing, did use a panga to cut the said James Kairanya on his head, in order to obtain the named properties.

When the charge was read over to the accused, they all protested their innocence. To establish the commission of the offence by all accused persons, the prosecution paraded five witnesses namely, James Kairanya (PW1), Magdalena James (PW2), Juliana Kairanya (PW3), Kairanya James (PW4) and D. 45 Detective Station Sergeant Godrichi (PW5). Additionally, there were tendered two exhibits that is, Police Form No. 3 (PF 3), which was issued to PW1 (exhibit P1) and another PF3, which was issued to Magdalena Samo w/o James (exhibit P2).

On their part in defence, the appellants depended on their own sworn/affirmed testimonies, which was supplemented by the testimonies of other three witnesses that is, Matinde d/o Magesa, Siwema d/o Kilisa and Rehema d/o Joseph. It is worthy pointing out here that, there was no defence entered by the first appellant because, according to the records, he escaped from the lawful custody a short moment before the hearing of

the case commenced. In that regard, the hearing of the case against the first appellant, proceeded in *absentia* in terms of the provisions of section 226 of the Criminal Procedure Act, Cap 20 R.E 2002 **(the CPA)**.

At the end of the day, after the learned trial Senior Resident Magistrate, had evaluated the evidence placed before him, was of the considered view that the prosecution had managed to establish the case against the appellants herein beyond reasonable doubt. As a result, all the appellants were convicted as charged and sentenced to the mandatory term of thirty (30) years' imprisonment. In addition, it was ordered that there would be inflicted six strokes of the cane on each of them. On the other hand, the trial court held that, the evidence led against the other two accused who are not in this appeal, was weak and as a result, they were both acquitted and set at liberty.

The second and third appellants started to serve their jail term on the 8th day of June, 2006 when the judgment was read over to them, whereas the first appellant who was sentenced in *absentia*, started to serve his jail term on the 29th October, 2010, which was after being arrested and taken before the trial court for sentencing.

Aggrieved by the decision and the sentences handed down to them by the trial court, the appellants unsuccessfully challenged them in the High Court of Tanzania at Mwanza. Still undaunted, the appellants have come to this Court for a second appeal, each preferring a separate memorandum of appeal. In his memorandum of appeal, the first appellant listed five grounds of appeal, whereas the memorandum of appeal by the second appellant, consists of five grounds. On his part, the third appellant, listed six grounds of appeal.

Before embarking to consider the merits or demerits of the appeal before us, we think it is apposite, albeit in brief, to give the factual background of the incident leading to the decision which is being impugned by the appellants, as could be gleaned from the evidence on record. It is disclosed by the evidence on record, that the complainant (PW1), was a resident of Maneke village, while the appellants were residents of a nearby village of Tegeruka. Both villages are situated within Musoma District. On the fateful date that is, the 11th day of December, 2003, during night time, the homestead of PW1 was invaded by a group of bandits who stormed inside his sitting room, after forcibly breaking the outer door. Thereafter, they again forcibly made entry into his bed room by breaking the inner door.

PW1 testified further in the trial court that, after the bandits had entered inside his sitting room and before entering into his bed room, he managed to identify the first and second accused persons, who are not parties to this appeal, with the aid of light which was emitted by a burning lamp. And when the bandits were in the process of breaking the door leading to his bed room where he was sleeping with his wife, PW1 managed to escape through a window. Hardly had he landed down, when he was invaded by the bandits who had been outside, and started to assault him using different types of arms, which resulted to his being seriously injured on the back, shoulder, thigh and the right hand as verified by exhibit P1. During the fracas, PW1 claimed to have managed to identify the appellants herein.

The wife of PW1, who testified as PW2, was not spared in the scuffle. She was as well assaulted by the bandits, who were commanding her to give them money. There was exhibit P2 to verify the injuries which she sustained. In the process, the bandits managed to part away with different items that included bags of clothes, a bicycle make Phonex, a radio make RISING, plus cash amount of TZS 800,000/00. Neighbours responded to the alarm which was raised by PW2, and assisted in taking the victims of the incident to the village authority and later to the Hospital for treatment.

Following the information which was given by the victims to the village authority and later to the Police, the appellants were arrested on diverse dates and charged with the offence of armed robbery. On their part, all the appellants disassociated themselves from the alleged offence completely, arguing that at the alleged period of time, they were at their respective homes. Nonetheless, as earlier indicated above, the trial court as well as the first appellate court, were convinced beyond doubt by the version from the prosecution witnesses and as a result, entered conviction to the appellants and sentencing them accordingly, leading to the appeal at hand.

When the appeal was called on for hearing before us, the appellants entered appearance in person, legally unrepresented, whereas the respondent/Republic, had the services of Mr. Emanuel Luvinga, learned Senior State Attorney, who was assisted by Ms. Dorcas Akyoo, learned State Attorney.

Our close observation of the grounds of appeal contained in the separate memoranda of appeal lodged by the appellants, disclosed that there are basically only two matters at issue. The first issue arises from the first ground of the first appellant wherein, he complained that he was convicted without being accorded the right to be heard. And the second

issue which arises from the remaining grounds of appeal by all appellants, is in relation to the visual identification allegedly made by the prosecution witnesses to the appellants, as to whether it was cogent to justify the conviction.

We therefore, directed the parties to address us on those two matters. Upon the appellants being invited to address us, all of them after requesting the Court to adopt the grounds of appeal in the way they have been presented in their respective memoranda of appeal, they opted to let the learned Senior State Attorney, address the Court first, while reserving their right of rejoinder if need would necessitate so.

On taking the floor, Mr. Luvinga, strongly resisted the complaint by the first appellant that, he was convicted and sentenced without being heard by the trial court. He argued that it was the appellant himself, who forfeited his right after escaping from the lawful custody, when the case was called on for hearing. Such act by the first appellant, compelled the trial court to proceed with the hearing of the case against him in terms of the provisions of section 226 of **the CPA**. The learned Senior State Attorney, thus urged us to dismiss this ground of appeal because it was wanting in merits.

With regard to the issue of visual identification, which was based by the lower courts to hold the appellants culpable to the charged offence, it was the argument of the learned Senior State Attorney that, all the three appellants were properly identified by PW1 as reflected on page 16 of the record of appeal, where the witness stated that, he managed to identify them at the time of assaulting him after he had come out of his room through the window. The witness did categorically inform the trial court that, there was ample light from the moonlight, which aided him to correctly identify his assailants who were known to him before.

On being prompted by the Court as to whether the light which is alleged to have aided PW1 to identify the appellants was adequate in view of the principle laid down in the famous case of **Waziri Amani Vs Republic**, the learned Senior State Attorney, submitted that, the threshold laid in the said case were met in the instant appeal. After all, Mr. Luvinga, went to argue, as it was held in the case of **Kenedy Ivan Vs Republic,** Criminal Appeal No. 178 of 2007 (unreported), the guidelines set in **Waziri Amani** (supra), were not meant to be exhaustive or conclusive. The circumstances of each particular case, has to be put into consideration.

When further probed by the Court, as to why it took a long time to arrest the appellants, if they had really been properly identified as testified

by PW1, the learned Senior State Attorney, submitted that, the same was a result of mere sloppiness on the part of the Police, in making a follow up to the information which was given to them by the complaint. In any event, the learned Senior State Counsel argued that, the anomaly was inconsequential as it did not go to the root of matter. He thus surmised his submission by urging us, to dismiss the appeal.

On the obvious reasons that all the appellants were lay persons, who had no legal representation, there was nothing useful which was achieved from them in rejoinder. All appellants just requested the Court to find that they were improperly convicted and sentenced to the charged offence as there was no sufficient evidence to implicate them. They therefore, implored the Court to allow their appeal and set them at liberty.

As we earlier indicated above, the first issue which stands for our determination, is whether the first appellant was not accorded the right to be heard. To be in a better perspective in resolving this issue, we hereby reproduce *in verbatim,* what transpired at the trial court before commencement of hearing the case: -

Date: 13/7/2005

Coram: *J.H.K. Utamwa, SRM*

Pp: *ASP Tenge*

Accused:

C/C: Chacha

PP: *we are ready for phg but accused No. 3 (first appellant) was not brought from remand.*

Accused No. 1: Our colleague was discharged in another case yesterday.

Signed.

Court*: Prosecution to inquire and give feedback to the court.*

Signed.

Court*: Phg on 27/7/2005*

AFRIC

Signed.

Date: 27/7/2005

Coram: *J.H.K. Utamwa SRM*

Prosecution: *ASP Tenge*

Accused: All present except No. 3

Prosecution*: accused No. 3 escaped from lawful custody, we pray for A/W and hg to proceed u/s 226 of the CPA 1985.*

Signed

Order*: Hg u/s 226 of the CPA on 9/8/2005*

AFRIC

Signed

Date: 9/8/2005

***Coram**: J.H.K. Utamwa SRM*

***Prosecution**: Insp. Dismas*

Accused: present

Inter: Mr. Chacha

***Pros.**: Accused No. 3 not in court, we prayed to proceed u/s 226 of the CPA 1985, we are not ready for Phg.*

Signed

***Court**: the case is old enough, Phg must proceed*

Signed

***Court:** Phg on 10/8/2005*

(2) If phg does not proceed then law to take its cause

(3) Prosecution given last adjournment. AFRIC.

What we could gather from the proceedings extracted above, is the fact that while attending in court with regard to the case leading to the appeal at hand, the first appellant had another case in which he was discharged on the 12th July, 2005 as reported by his colleague (first accused), to the court on the 13th July, 2005. Subsequent to his discharge

in the said other case, the first appellant vanished in the air while fully aware that, he still had another case in court (which led to this appeal). In that regard, his failure to appear in court and defend himself in regard to the case the subject of this appeal, was nothing other than an attempt to evade the course of justice. He has therefore, to bear the consequences of his own making.

The provisions of section 226 of **the CPA** which was invoked by the trial court to proceed with the hearing of the case in the absence of the first appellant, stipulates in part that: -

*"**S 226. Non-appearance of parties after adjournment***

*(1) **If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present;** and if the complainant does not appear, the court may dismiss the charge and acquit the accused with or without costs as the court thinks fit.*

(2) n/a

*(3) Any sentence passed under subsection (1) **shall be deemed to commence from the date of apprehension and the person***

effecting such apprehension, *shall endorse the date thereof on the back of the warrant of commitment.*" [Emphasis supplied]

In view of what transpired above and the dictates of the provisions section 226 of **the CPA** quoted above, we are constrained to join hands with the learned Senior State Attorney, and hold that the first ground of appeal by the first appellant, is baseless. We accordingly dismiss it.

The second issue is in regard to the evidence of visual identification that was made by the prosecution witnesses, which is being challenged by the appellants. It is on record as reflected in the judgment of the trial court that, the conviction of the appellants was founded on the evidence of visual identification, which came from a single witness, who happened to be PW1. Part of the judgment on page 72 of the Record of Appeal, reads thus: -

> *"As to the accused persons No. 3, 4 and 5 (the appellants herein), I will take them together for the nature of evidence against them is similar. The triplex team is implicated by the evidence of a single identifying witness PW1."*

While Mr. Luvinga, forcefully argued before us that the identification which was made by PW1 to all the three appellants on the material night,

was perfect and reliable, because there was conducive environment created by the shining moonlight, on the other hand, the appellants argued that, the alleged identification was shaky and ought not to have been believed by the two lower courts, and form the basis of their conviction.

As a general rule, the evidence of visual identification made by a single witness during night to perpetrators of an offence under unclear environment, is very unsafe to be acted upon unless there is corroborative evidence. See for instance: **Afrika Mwambogo Vs Republic,** [1984] T.L.R. 240, **Hassan J. Kanenyera and Others Vs Republic** [1992] T.L.R 100 as well as **Shamir John Vs Republic,** Criminal Appeal No. 166 of 2004 (unreported).

We are also mindful of the principles enunciated in an unbroken chain of decisions of this Court including, **Waziri Amani Vs Republic** (supra), **Raymond Francis Vs Republic** [1994] T.L.R. 100 and **Mohamed Mustafa @ Rajabu and Two Others Vs Republic,** Criminal Appeal No. 27 of 2017 (unreported), which did emphasize that before a court can found conviction basing on visual identification, such evidence must be watertight so as to remove the possibility of honest but mistaken identity. The court is therefore, enjoined to consider the following guidelines: -

(i) The time the witness had the accused under observation;

(ii) The distance at which he observed him;

(iii) The conditions in which such observation occurred, for instance whether it was day time or night time. Whether there was good or poor lighting at the scene;

(iv) Whether the witness knew or had seen the accused before or not.

Before upholding the finding of the trial court, the learned Judge of the first appellate court, indicated to have keenly considered the above named guidelines, when she stated in her judgment in part on page 127 of the Record of Appeal that: -

> *"Taking into account the physical close proximity during the struggle/fight between PW1 and the appellants, and considering that the fight took some time which gave PW1 enough time to observe the appellants, who were constantly talking, and also pleading to them "kweli watu wa nyumbani kabisa mnaamua kuniuwa" I am of the considered view that, PW1 was in a position to identify his assailants without any doubt."*

With due respect, we beg to differ with the reasoning which was advanced above by the learned Judge of the first appellate court. While we are at one with her observation to the fact that, when PW1 was being

assaulted by the assailants, undoubtedly he was close to them, we hesitate to agree with her on the contention that, such proximity eliminated the possibility of honest but mistaken identity. We have two reasons in arguing so. **First**, the intensity of the light from the moonlight which aided him to make the identification on the fateful night, was not clarified by PW1.

Secondly, it was common knowledge from the testimony of PW1 that, immediately after he had escaped from his bed room through the window, he was confronted with assaults from his assailants. We seriously doubt if under such horrifying situation, PW1 was in a position of making an unmistaken identification of his assailants. At this juncture, we wish to seek some inspiration from the warning that was given by the Court of Appeal of Kenya, in **Wamalwa and Another Vs Republic** [1999] 2 EA 358, where it stated that: -

> *"The Court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of an offence fleetingly and under stressful circumstances."*

There was yet another reasoning given by the learned Judge of the first appellate court, that because the appellants were known to PW1 before, and that at the material time they had been talking while he was

pleading with them, it was easy for him to identify them because he was recognizing them. We again think that, this point was as well unfounded in view of the holding of this Court, in **Hamisi Hussein and Two Others Vs Republic,** Criminal Appeal No. 86 of 2009 (unreported), where it stated that: -

> *"We wish to stress that even in recognition cases, when such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held,* ***even when the witness is purporting to recognize someone he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*** [Emphasis supplied]

As if the foregoing was not enough, there was the question of delay in arresting the appellants after the occurrence of the incident of armed robbery at the premises of PW1. The delay extended up to about five months. When this question was put to the learned Senior State Attorney by the Court, there was no clear answer given. Unfortunately, there was no testimony from the Police officer, who investigated the case to explain as to why there was such delay. Things being as they were we were made to

understand that the appellants were not arrested a short moment after the commission of the offence because they had not been identified by the victim and hence not named. In so observing, we are mindful of our holding in **Wangiti Marwa Mwita and Others Vs Republic** [2002] T.L.R 39, where we stated that: -

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

In the light of what we have attempted to highlight above, there is no gainsaying in holding that, the identification of the appellants, purported to have been made by PW1 on the fateful night, did fall short of grounding conviction to the appellants. The doubts which have been pointed out above, had to be resolved in favour of the appellants. As such, the concurrent findings of conviction against all appellants, which was made by the lower courts basing on visual identification, is hereby quashed resulting in an order allowing the appeal. The sentences of thirty years' imprisonment and six strokes of the cane on each, which were handed down to them, are set aside. In lieu thereof, we order all appellants to be

set at liberty forthwith, unless they are legally held for some other lawful cause.

Order accordingly.

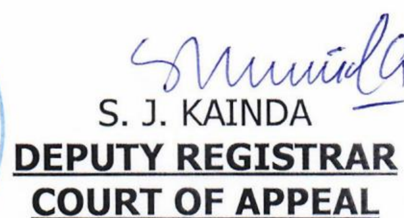
DATED at **MWANZA** this 2nd day of December, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered this 3rd day of December, 2019 in the presence of the Appellants in person, and Ms. Gisela Alex, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL