IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., MWAMBEGELE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 359 OF 2016

WAKUTANGA MATATIZO.....1ST APPELLANT

MAGINA SAHANI .....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Makani, J.)

Dated the 24th day of June, 2016
in
DC Criminal Appeal Nos. 69 & 70 of 2015

JUDGMENT OF THE COURT

27th November & 11th December, 2019

WAMBALI, J.A.:

The appellants Wakutanga Matatizo and Magina Sahani (the first and second appellants) appeared before the District Court of Shinyanga at Shinyanga where they were jointly charged with the offence of Armed Robbery contrary to section 287A of the Penal Code Cap. 16 R.E. 2002.

It was alleged in the particulars of the offence that the appellants jointly on 17th February, 2013 near Japanese corner within Shinyanga Municipality in Shinyanga Region stole Tshs. 12,000/=and a mobile phone make Nokia Chinese type worth Tshs 55,000/= being the properties of one John Sebastian and that at the time of stealing they were armed with machete and immediately before the time of stealing they used violence to the said John Sebastian.

The appellants denied the charge. The prosecution relied on five witnesses and produced two exhibits namely, the sketch map and cautioned statement of the first appellant which were admitted by the trial court as P1 and P2 respectively to prove the case against the appellants. The appellants defended themselves as they had no witnesses to summon in support of their defence. At the height of the trial, the learned trial court magistrate was fully satisfied that the case against the appellants was proved to the required standard. As a result, they were convicted and sentenced to imprisonment for thirty years.

Aggrieved, they unsuccessfully appealed against both convictions and sentences in consolidated DC Criminal Appeal Nos. 69 & 70 of 2016 as the High Court confirmed the findings and decision of the trial court, hence the present appeal to the Court.

The complaints of the appellants are contained in two separate memoranda of appeal lodged before this Court. Specifically, the first appellant preferred four grounds of appeal, whereas the second appellant preferred eleven grounds of appeal. However, for the reason which will be apparent shortly, we do not deem it appropriate to reproduce the respective grounds of appeal herein.

At the hearing of the appeal before us, the appellants appeared in persons, unrepresented while Mr. Miraji Kajiru, learned Senior State Attorney appeared for the respondent Republic.

As it were, upon going through the grounds of appeal and after hearing the submissions of the learned Senior State Attorney and the appellants, it came to light that, the major ground of complaint is whether the appellants were properly identified by the victim at the scene of the crime.

The appellants opted to let the learned Senior State Attorney respond to their sole ground of appeal, but reserved their right to rejoin thereafter.

In his response, at the outset, Mr. Kajiru conceded that the evidence in the record of appeal on whether the appellants were properly identified is not watertight. In his view, the victim John Sebastian (PW3) did not explain sufficiently the source and the intensity of the light at the scene of the crime

which helped him to identify the appellants. Mr. Kajiru argued further that although PW3 testified that he knew the appellants before the incident as they used to go to his place of work as customers; still he did not mention their names and the clothes they wore at the scene of the crime on that particular day. Indeed, he argued that PW3 did not sufficiently describe the appearance of the appellants to the persons who he first met after the incident. This is despite PW3's testimony that he told the persons he met that the appellants wore T-shirts and caps bearing the CCM emblem, he argued.

In the circumstances, Mr. Kajiru submitted that the identification of the appellants by PW3 did not meet the guiding factors enumerated by the Court in **Waziri Aman v. Republic** [1980] TLR 250 considering that the alleged incident occurred after midnight.

The learned Senior State Attorney concluded his submission by urging the Court to allow the appeal arguing that in totality the evidence in the record of appeal did not prove the prosecution's case on the offence of Armed Robbery against the appellants.

On his part, the first appellant supported the submission of the learned Senior State Attorney and emphasized that he did not commit the alleged offence. He therefore, prayed that his appeal be allowed.

The second respondent, similarly, agreed with the submission of the learned Senior State Attorney that the prosecution did not prove the case against him to the required standard. He indeed insisted that there is no watertight evidence that he was identified at the scene of the crime. In the event, he prayed for his appeal to be allowed.

Having heard the parties, we have no doubt to state that the major issue for our determination is whether the appellants were identified at the scene of the crime.

It is not disputed that the concurrent finding of facts by both the trial court and the first appellate High Court is that, the appellants were properly identified at the scene of the crime as the ones who invaded PW3 and dispossessed him of Tshs 12,000/= and a mobile phone make Nokia Chinese type worth Tshs. 55,000/=.

To appreciate the substance of the evidence of PW3 on how he identified the appellants at the scene of the crime, we deem it appropriate to reproduce part of his testimony hereunder:

> " *On 17/2/2013 at 1:00 hrs I was on the way home from my work, when I reached at Japanese corner area I met two people and I know them and they used to come*

to my office several time. Then they stopped me and I saw them clearly through light of neighbour houses..."

PW3 testified further that after the two persons dispossessed him of the properties alluded to earlier on, they released him and he ran towards another direction of AIC Church where he met "sungusungu." Specifically, PW3 stated as follows:

"Then they released me and I ran to the direction of AIC Church then I met sungusungu. I told them what happen to me then they told me to go with them to look for them there at Kambalage area, but we did not see them ... we went the direction of old stand but we took the main road up to CCM Office ... then we saw two people running beside the CCM building ... I saw them come in front of us and identified them easily because in that area there was light all the shops has tube light outside there at Mnara wa Voda. I also identified their clothes ... especially the tops one was wearing a T-shirt with streps and CCM caps while the other one was wearing a white T-shirt."

Moreover, the evidence of PW3 was to the effect that they only succeeded to arrest the first appellant as the second appellant escaped and he could not be traced until when he was arrested by the police after a long time.

PW3 also testified that after the first appellant was arrested he went with him and the police to the police station.

It is noteworthy that when PW3 was cross examined by the first appellant, he stated that he identified him due to the clothes he wore and because he knew him for a long time before the incident. He however, conceded that he did not know his name.

In addition, PW3 claimed that on that particular day *sungusungu* arrested the second appellant before he escaped to an unknown place.

From the evidence of PW3, we entertain no doubt that at the scene of the crime; the witness did not disclose the source of light and its intensity which might have helped him to conclusively believe that the persons he saw at that particular night (1.00 hrs) were no other than the appellants. Although PW3 testified that he knew the appellants before, yet he did not know their names and therefore, he needed to ensure that any possibility of mistaken identity as regards the persons he saw on that date was eliminated. It is in this regard that we are of the considered opinion that, PW3's evidence on the source and extent of light had to be fully disclosed to eliminate the doubts raised by the appellants on the possibility of mistaken identity.

At this juncture, it is pertinent to refer to the decision of the Court in **Issa Mgara @ Shuka v. Republic**, Criminal Appeal No 37 of 2005 (unreported) in which it was stated that:-

> *"It is not enough to say that there was light at the scene of the crime, hence the overriding need to give sufficient details on the source of light and its intensity."*

Moreover, from the testimony of PW3 reproduced above, it is apparent that, when he first met with the persons he described as *sungusungu,* he did not describe appropriately the appearance, nature and the attire of the appellants who he alleged to have identified at the scene of crime. Nevertheless, we note that PW3 only stated that he identified them by the clothes they wore at the time of the commission of the offence. PW3 repeated the same testimony when he was cross-examined by the first appellant.

However, it is our considered opinion that the allegation by PW3 that he identified the appellants because of the clothes they wore on that day remained to his knowledge only. We say so because according to the record of appeal, there is no indication that he disclosed those descriptions to the persons (sungusungu) he first met. Similarly, there is no indication that PW3 informed any police officer when he went at the police station after the arrest of the first

appellant concerning the description of his assailants. We strongly hold that view because if he told those persons he met at the first encounter, the evidence of Juma Makongo (PW1) and John Kija (PW2), who were among those he first came in contact at the said place would have corroborated his testimony to that effect. Unfortunately, the evidence of both PW1 and PW2 do not bail out the testimony of PW3 on that fact. Thus, in view of the evidence in the record of appeal, we cannot safely conclude that PW3 disclosed in sufficient detail the description of the appellants at that particular area when he met *sungusungu*. In our respectful opinion, there is no sufficient evidence to show that through PW3's description of the appellants, *sungusungu* were enabled to be sure that, those they encountered at that particular area and time were none other than those who attacked and robbed him of his belongings at the scene of crime.

We must emphasize that when the question of identification is involved the requirement of describing a person to the first person a victim meets is of the highest importance to dispel the doubts as to mistaken identity. It is in this regard that in **Republic v. Mohamed Alui** (1942) EACA 72, which was referred with approval by the Court in several of its decision, to mention **Yohana Chibwingu v. Republic**, Criminal Appeal No. 117 of 2015

(unreported) among others, the erstwhile Eastern African Court of Appeal stated as follows:

> *"... in every case in which there is a question as to identity of the accused, the fact of there having been given a description and the terms of that description are matters of highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by the person to whom the description was given."*

In the present appeal, as we have alluded to above, apart from the failure of the complainant (PW3) to describe his assailants who invaded and robbed him to those who he first met, even those persons who he allegedly informed of the said description, specifically PW1 and PW2 could not confirm that allegation as evident in their evidence in the record of appeal. To be specific, both PW1 and PW2 said nothing concerning the description of the appellants.

Therefore, having subjected to proper scrutiny the evidence of the prosecution, specifically PW1, PW2 and PW3 and the defence of the appellants, we are of the settled opinion that, the prosecution did not prove sufficiently that, the alleged identification of the appellants at the scene of the crime was

resolved conclusively. We therefore, agree with the observation of the Court in **Philipo Rukandiza @ Kichwechembogo v. Republic**, Criminal Appeal No. 215 of 1994 (unreported) where it was stated that:-

> *"The evidence in every case where visual identification is what is relied on must be subjected to scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled."*

In the circumstances, since the conditions favouring a correct identification were not fully explained by the prosecution witnesses at the trial, which is the most important factor in reaching the verdict as to the guilt of the appellants, we agree with the learned Senior State Attorney and the appellants that the sole ground of appeal on insufficient identification has merit. We therefore, respectfully, disagree with the concurrent findings of the two courts below that the appellants were conclusively identified at the scene of the crime. In the event, as this ground is sufficient to dispose of the appeal, we allow it in its entirety.

In the result, we quash the convictions and set aside the sentences imposed on the appellants. Consequently, we order their immediate release from prison unless lawfully held for other lawful causes.

We so order.

DATED at **TABORA** this 10th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2019 in the presence of the appellants in person and Mr. Tito Ambangile Mwakalinga, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL