**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: LILA, J. A., SEHEL, J. A., And KITUSI, J. A.)**

**CRIMINAL APPEAL NO. 70 OF 2017**

**SAMWEL s/o NYAMHANGA ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Decision of the High Court of Tanzania, at Mwanza.)**

**(De-Mello, J.)**

**Dated the 23rd day of November, 2016**
**in**
**H.C Criminal Appeal No. 155 of 2015**

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## JUDGMENT OF THE COURT

9th & 17th June, 2020

**SEHEL, J.A.:**

The appellant was charged before the District Court of Geita at Geita with an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 as amended by Act No. 3 of 2011. The particulars of the offence are that on 16th September 2013 at 10:00 hrs at Lukirini Street within Geita District in Geita Region, the appellant did steal cash money Tshs. 6,600,000 and mobile phone make Nokia valued at Tshs. 60,000; all totaling to Tshs. 6,660,000 the property

of Baraka s/o Mussa and that before and after stealing did cut him with a knife on his stomach in order to obtain and retain the said stolen properties.

After hearing two prosecution witnesses, Baraka Mussa (PW1) and Shaibu s/o Abdallah (PW2) together with the defence evidence of the appellant, the learned trial magistrate was satisfied that the appellant was positively identified at the scene of the crime and there was no question of mistaken identity. Accordingly, the appellant was found guilty as charged, convicted and sentenced to a term of thirty (30) years imprisonment and to suffer twelve (12) strokes of the cane.

Aggrieved with the decision of the trial court, the appellant lodged a six point petition of appeal to the High Court. He complained that; the evidence of recognition by PW1 and PW2 was weak due to a failure to give detailed description of the culprit; there was no evidence adduced to support the allegation that the matter was reported to the police; the identification by PW1 and PW2 was a dock identification; the case was poorly investigated such that no investigative officer was called to testify; the allegation by PW2 that he was familiar with the appellant lacked corroboration; and there was a general assertion of identification which the trial court acted on it without eliminating the possibility of mistaken identity.

In its analysis of the appellant's grounds of appeal, the first appellate court directed itself on the law on visual identification and after reappraising the evidence of PW1 and PW2, concluded that the appellant was not only recognized but also identified by PW1 and PW2. It also found that the mentioning of the appellant at the earliest opportune time added value to the identification. Thus, it dismissed the appeal. It suffices to state here that the High Court, did not deal with the other grounds of complaints raised by the appellant such as non-calling of the investigative officer who would have established when, where and why the appellant was arrested.

Still protesting for his innocence, he has come to this Court on second appeal with three main grounds of appeal. **One,** the trial and first appellate court erred in law and fact by relying on bare assertions of recognition as a sole basis for the appellant's identification, regardless of the identifying witnesses' failure to offer detailed description, so uncogent and unreliable. **Two**, the first appellate court did not adjudge the appellant's grounds of appeal presented at the High Court. **Three**, the trial and first appellate courts were lured by the time in which the fracas happened, i.e. during the day and thus failed to analyse the entire evidence on record as it opposed to the known yardsticks and elementary factors well provided for by the law and precedent.

Before dwelling to the grounds of appeal, let us give a brief background that led to the appellant's conviction and being sentenced. It happened that on 16th September, 2013 at around 10:00 hrs Baraka s/o Mussa (PW1) was on his way to Kulumwa village. Upon reaching at Rukirini, he saw a group of about eight youths standing on both sides of the road carrying knives and sticks. They approached and stopped him. From that group of people, PW1 identified the appellant by his first name, Samwel. PW1 told the trial court that Samwel pointed to his fellows by saying "Ndiyo huyu" literally means "this is the one" and it was Samwel who had hit him with a hammer while others assaulted and stabbed him with a knife on the stomach. He fell unconscious. And that gave the robbers a chance to steal from him Tshs. 6,600,000; one mobile phone and two bags of gold stones. Good Samaritans including PW2 helped him.

PW2 on his part told the trial court that on that fateful day he was on his way to Kukuruma forest to dig gold stones. But upon reaching at Rukirini area, he saw a group of youths who were not more than ten, armed with knives, sticks and hammer. At that point, he was behind PW1. The youths stopped them and demanded money. PW2 said that he managed to identify the appellant because he was ten paces away from where PW1 was being assaulted and they used to reside in the same street. PW2 mentioned the

appellant by his two names, Samwel Nyamhanga. Regarding the items stolen from PW1, he said, he saw the appellant grabbing a black coat and two bags of gold after hitting PW1 with a hammer. PW1 became unconscious thus went to assist him. He took him to the police station where he was issued with a PF3. That PF3 was tendered and admitted as Exhibit P1.

After the medical treatment, PW1 returned the PF3 to the police and it was at that moment, according to PW1, he mentioned his assailant to the police, the appellant, Samwel. That information led the police to arrest the appellant at Rukirini area.

In his sworn defence evidence, the appellant made a general denial. It was his defence that on 16th September, 2013 at about 17:00 hrs he was arrested by the police, taken to the police station where he was asked about his name, occupation and address and thereafter kept in the police cell. He attacked the prosecution evidence of PW1 and PW2 that it was a total lie as he wondered why he was the only person identified from a group of about eight to ten people.

As stated earlier, the trial court was persuaded with the prosecution evidence. Accordingly, it convicted and sentenced him to a term of thirty (30)

years imprisonment and to suffer twelve (12) strokes of the cane. His appeal to the High Court was dismissed hence the present second appeal.

At the hearing of the appeal, the appellant appeared in person through video conference, unrepresented, whereas, Mr. Robert Kidando, learned Senior State Attorney appeared for the respondent Republic.

When the appellant was called upon to argue his appeal, he simply adopted his memorandum of appeal and wanted to hear a response from the learned Senior State Attorney while reserving his rights to rejoin, if need would arise.

Initially Mr. Kidando opposed the appeal. It was his submission that the High Court was correct in dismissing the appellant's appeal and was justified in upholding the conviction and sentence passed by the trial court because the appellant was positively identified by PW1 and PW2. Submitting on the issue of identification canvassed in the first and third grounds of appeal which were jointly argued, Mr. Kidando contended that the conviction of the appellant rests on the strength of identification of recognition where both PW1 and PW2 said were familiar with the appellant. He referred us to page 5 of the record of appeal where the appellant, at the preliminary hearing, told the trial court that he was familiar with Baraka Mussa, the victim, and that piece of evidence,

according to Mr. Kidando, was supported by the evidence of PW1 found at page 11 of the record of appeal, where PW1 said, amongst the people he identified was Samwel and he pointed to the appellant who was at the dock.

Mr. Kidando fortified his stance by referring us to page 13 of the record of appeal where PW2 told the trial court that he saw the appellant stealing from PW1. To Mr. Kidando's view that piece of evidence corroborated the evidence of PW1. Further, the learned Senior State Attorney pointed out that the appellant was a resident of the same street with PW2 thus PW2 was able to identify him very easily and particularly by his two names, Samwel Nyamhanga.

It was his submission that since the incident occurred in the morning at about 10:00 hrs and PW2 was only ten (10) paces away from the incident then there could never be an issue of mistaken identity.

When probed by the Court as to whether there was positive identification of the appellant given the fact that the identifying witnesses were in a horrifying conditions, the learned State Attorney was quick to flip his stance by supporting the appeal. He, therefore, found merit on the first and third grounds of appeal that there ought to be a detailed description on how the appellant was identified from the group of about eight people who were armed with hammer, sticks and knives in order to eliminate the possible mistaken identity.

For the second ground, Mr. Kidando conceded that the first appellate judge did not deal with each and every grounds of appeal advanced by the appellant in his petition of appeal to the High Court.

Before, he rested his submission, we invited Mr. Kidando to address us on the propriety of the charge sheet vis a vis the evidence. The learned Senior State Attorney submitted that there is a variance between the charge and the evidence adduced on stolen items. He said, the alleged two bags of gold stones mentioned by PW1 and PW2 are not indicated in the charge sheet as one of the items stolen. He added that that variance lessened the credibility of the key identifying witnesses because it is incomprehensible for the charge sheet not to mention valuable item like gold stones. With these deficiencies, Mr. Kidando urged us to allow the appeal, quash the conviction, set aside the sentence and the appellant be released from prison custody.

Having carefully considered the grounds of appeal, the submission of the learned Senior State Attorney and the record before us, we propose to start with the complaint of whether the appellant was adequately identified by PW1 and PW2? The issue of identification rests on the appreciation of evidence as such it is a question of fact and as alluded to above, the two lower courts concurrently found that the appellant was so identified by PW1 and PW2. This

being a second appeal, as a matter of law, the Court would rarely interfere with concurrent findings of fact by the lower courts, unless it is shown that the lower courts have completely misapprehended the substance, nature, and quality of the evidence as to result into an unfair conviction, a miscarriage of justice or a violation of some principle of law. This position was stated in **DPP v Jaffari Mfaume Kawawa** [1981] TLR 149 and **Salum Mhando v. The Republic** [1993] TLR 170.

We shall thus be guided by that principle in this appeal. It is trite law that in a case whose determination depends on identification the evidence must be watertight before a conviction can safely lie. Minded by that, the first appellate court correctly directed its mind to the famous case of **Waziri Amani v Republic** (1980) TLR 280 where it was held:

*(i) evidence of visual identification is of the weakest kind and most unreliable.*

*(ii) no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.*

The first appellate court also cited the cases of **Raymond v. The Republic** [1994] TLR 100; **Sindon v The Queen** [2011] VSCA 195 and **Republic v. Lovett** [2006] VSCA 5 then went on to reproduce part of the evidence of PW1 and PW2 on how they identified the appellant that they both named the appellant, the distance where PW2 was standing from the incident, the familiarity of PW2 with the appellant, how PW2 witnessed the assault being inflicted upon PW2 by the appellant, and the snatching of PW1's coat and two bags of gold stones. The first appellate judge then concluded:-

> *"Cumulatively, and prudently considered, the assaults and encounter, lead to a cogent and quality standard for not only recognition but more so identification as drawn from the two witnesses. It being a broad-light morning, the identification was quite overwhelming and, of exception quality. The two witnesses never minced word and thus consistent, credible and reliable. To add value to this was the mentioning of the appellant and him alone, at an earliest opportune time."*

With respect, we do not know why the learned first appellate judge came to conclude that the appellant was mentioned at the earliest opportunity. The evidence on record does not wholly support that finding. Although PW2 claimed

that he knew the appellant by his name as Samwel Nyamhanga as they used to reside in the same street, and recognized him from the group of not more than ten people, he is also on record to have said:-

*"Baraka become unconscious and he was taken to police in order to be given a PF3 form for medical treatment"*

There was no mention at all in the record that he reported the matter to the police. If PW2 knew the appellant as the two courts below found, why did he not mention the name of the appellant to the police when he went to collect PF3 for PW1's treatment? PW1 who was unconscious after the attack claimed that he mentioned the name of the appellant, Samwel to the police and that led to the appellant's arrest. We believe that the first appellate court presumably arrived at the conclusion that the appellant was mentioned at the earliest opportune time by inference without questioning itself as to whether PF3 was returned to the police at the earliest opportunity?

In the case of **Waziri Amani v. The Republic** (supra), we observed that:

*"....Although there are no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a*

*careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night – time, whether there was good or poor lighting at the scene, and further whether the witness knew or had seen the witness before."*

But, if we accept PW1's explanation that he mentioned the appellant at the time when he returned PF3, then why, as per the proceedings on the preliminary hearing and not disputed by the appellant, was he arrested on 19th September, 2013, three days after the occurrence of the incident.

In the case of **Omari Iddi Mbezi and 3 Others v. The Republic**, Criminal Appeal No. 227 of 2009 (unreported) we reiterated for the need of the trial court to follow several guidelines before relying on the evidence of visual identification in order to avoid mistaken identities of the suspects. Amongst them were:

*"The witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who*

*would in turn testify to that effect to lend credence to such witness's evidence....ideally, upon receiving the description of the suspect(s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again."*

In the present appeal, there is no evidence suggesting that the appellant was mentioned at the earliest opportune time as found by the first appellate court. The only available evidence is that PW1 knew the appellant before without further explanation on how he came to know him. He said, he mentioned the appellant at the time when he returned PF3 but we are not told whether that was the first available opportunity for him to do so. There being no further evidence coming from the person to whom the ordeal was reported we failed to find credence on PW1's evidence. To us there is no connection between the appellant's arrest made on 19th September, 2013 and the incident that occurred on 16th September, 2013. This loose end could easily have been averted by calling a police officer to whom it was alleged that the matter was reported. Failure of calling that police officer diminishes the credibility of PW1's evidence.

Having discredited the evidence of PW1, we now turn to the evidence of PW2 who claimed to have known the appellant as they used to reside in the

same street and that he was about ten paces from the scene and as it was during the day, he was able to identify the appellant by his name, Samwel Nyamhanga. However, the two courts below disregarded some key factors on the evidence of visual identification. As stated herein, this witness did not name the appellant to the police when he went to collect PF3 for PW1's treatment.

In **Jaribu Abdalla v. Republic** [2003] TLR 271 we said:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The ability of the witness to name the offender at the earliest possible moment is a reassuring, though not a decisive factor."*

Since in this appeal, PW2 did not mention the appellant at the time when he went to collect PF3 which time we take to be opportune time for him to do so then his credibility is also questionable.

More so, given the scenario to which the two identifying witnesses were on that incident day then it is doubtful on how they were able to pin point the appellant out of a group of youths who were about eight but not more than ten in numbers and they were armed with knives, sticks and hammer. Obviously, PW1 and PW2 were in an intense moment of fear, panic and horror and that is

why they failed to give any description of the appellant such as his height and the type of clothes he had put on that day.

With regard to the variance between the charge sheet and the evidence of PW1 and PW2 on the stolen items, we go along with the submission by the learned Senior State Attorney that that variance dented the credibility of these two identifying prosecution witnesses. We say so because we find it impossible for the police not to itemize the two bags of gold stones in the charge sheet which may have been much more valuable than Nokia mobile phone valued at Tshs. 60,000 and Tshs. 6,000,000. This variance in our view is an indication that the witnesses were not trustworthy. All these factors if taken into consideration cast a shadow of doubt on the correct identification of the appellant. It was therefore wrong for the two courts below to have held that the appellant was positively identified by PW1 and PW2.

All said, we are satisfied that the identification of the appellant at the scene of crime was not watertight so as to warrant his conviction and sentence. In the circumstances, we allow the appeal. Accordingly, we quash conviction entered against him and set aside the sentence of imprisonment for thirty (30) years and the order that he should suffer twelve (12) strokes of the cane. We

direct that the appellant, **Samwel s/o Nyamhanga** be released from custody forthwith unless he is held for some other lawful cause.

**DATED** at **MWANZA** this 16th day of June, 2020.

S. A. LILA
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

The Judgment delivered this 17th day of June, 2020 in the presence of appellant in person – linked via video conference Isanga - Dodoma, and Ms. Dorcas Akyoo, learned counsel for the Respondent is hereby certified as a true copy of the original.


B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**