IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MMILLA, J.A. MKUYE, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 510 OF 2017

CHRISTOPHER S/O ALLY ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Levira, J.)

Dated the 10th day of October, 2017
in
Criminal Appeal No. 66 of 2017

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JUDGMENT OF THE COURT

5th & 11th June, 2020

MMILLA, J.A.:

Christopher s/o Ally (the appellant), was originally charged before the District Court of Mbeya at Mbeya (the trial court), in Criminal Case No. 133 of 2016 with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Code). It was alleged that on 29.8.2016 at Maendeleo within Iyunga area in the City and Region of Mbeya, he attacked one Magreth Kibona and stole from her a purse which had Tzs. 300,000/=, one mobile phone make

Tecno C 8 valued at Tzs. 220,000/=, one pair of kitenge cloth valued at Tzs. 19,000/=, one piece of khanga cloth valued at Tzs. 4,000/= and one blouse valued at Tzs. 20,000/=. After a full trial, the appellant was found guilty, convicted and sentenced to fifteen (15) years' imprisonment. He unsuccessfully appealed to the High Court of Tanzania at Mbeya in Criminal Appeal No. 66 of 2017, hence this second appeal to the Court.

The brief background facts of the case were that, on 29.8.2016 around 20:00 hrs, Magreth Kibona (PW1), who was on that day accompanied by her younger sister Hilda Tulibuki (PW2), closed her business at Mwanjelwa and proceeded to the bus stand at which they boarded a bus bound for Iyunga area. They alighted at Iyunga bus stand around 21:00 hrs and decided to walk heading to Maendeleo street at which they were residing. After covering a considerable distance from the Iyunga bus stand, they realized that two persons were following them. On reaching a place which was lit with electricity light, PW1 turned and looked at the two persons behind them, she identified one of them whom she knew as Christopher Ally. They continued walking. She turned once again to look at them, but she did not identify Christopher Ally's companion. Then, Christopher and his colleague had closed up to where they were,

where upon she instructed PW2 to give way to those persons so that they could pass. Immediately after catching up with them, the appellant and his colleague hit PW1 using a hard object causing her to somersault, as a result of which she fell down and lost consciousness. The culprits robbed their victims' properties and disappeared. PW2 raised alarm which was answered by several people who gathered at the scene of crime, including PW1's husband. Shortly thereafter, PW1 gained consciousness and was taken to her home which was not very far from the place where the incident took place. A little while thereafter, PW1 was rushed to Mbeya Referral Hospital at which she was admitted for four days.

On 31.8.2016, No. F 3565 DC Andrew (PW3) visited PW1 at the hospital. The latter revealed to him that she was attacked by two persons one of whom was Christopher Ally, a person she very well knew because they were living in the same street. With that information, PW3 launched a manhunt, unfortunately the appellant was not found until 10.9.2016 when they spotted and arrested him at Iyunga bus stand area. He was taken to Central Police Station at which he was interrogated and eventually charged with that offence.

The other witnesses in the case were PW2 who, as earlier on pointed out was in the company of PW1 at the time of the attack. Like PW1, PW2 said that they were attacked by two persons at a place where there was bright electricity light, and that she identified Christopher Ally whom she had very well-known since childhood, and was living in the same street at which she and her sister were living. After the attack, they stole their properties and ran away.

On arrival at Mbeya Referral Hospital, PW1 was attended by Doctor Boaz Yona Mwasambili (PW4). He testified that PW1 was hit on the face bellow the left eye, and that he admitted her because her condition was not good. He discharged her four days later.

The appellant's defence consisted of denials that he did not commit the alleged offence. He said he was arrested on 10.9.2016 on a case of brawling, only to find later on that they charged him with the offence of robbery with violence which he denied. He also contended that he was not correctly identified, and that PW1 and PW2 were not credible witnesses.

As afore-pointed out, the trial court convicted and sentenced him to 15 years' imprisonment, and that his appeal to the High Court botched, hence this second appeal to the Court.

When the appeal was called on for hearing on 5.6.2020, the appellant was not physically present in Court, but he was linked to it by way of video conference. Also, he was not represented by an advocate; he fended for himself. On the other hand, the respondent/Republic enjoyed the services of Mr. Hebel Kihaka, learned State Attorney.

The appellant filed a four point memorandum of appeal as follows:-

1. That, the first appellate court erred in law and on facts for confirming the appellant's conviction and sentence while the evidence did not prove the case against him beyond all reasonable doubts.
2. That, the first appellate judge erred in law and on facts for failure to determine how identification he was identified by PW1 and PW2 taking into account that the offence was allegedly committed at night.

3. That, the first appellate judge erred in law and on facts for not taking into consideration the fact that the incident occurred on 29.8.2016 but he was arrested on 10.9.2016, while PW1 and PW2 said they had identified him at the scene of crime,
4. That, the first appellate judge erred in law and on facts for failure to analyze adequately the evidence which was adduced by the appellant during trial and totally ignored his evidence in defence and erroneously reached at the wrong decision.

At the commencement of hearing of the appeal, the appellant prayed to adopt his grounds of appeal after which he chose for the Republic to reply first, but reserved his right to say something if need be. We respected his choice, following which we invited Mr. Kihaka to proceed.

Mr. Kihaka hastened to inform the Court that he was opposing the appeal. He proposed to begin with the second ground, followed by the third and fourth, and finally the first ground.

As already pointed out, the appellant's complaint in the second ground of appeal is that he was not correctly identified by PW1 and PW2 at the scene of crime. Mr. Kihaka submitted intensely that PW1 and PW2

correctly identified the appellant. Both witnesses, he said, testified in common that they managed to identify the appellant because there was electricity light at the scene of crime which enabled them to see him clearly. They also said that they easily identified him because they had very well known him from childhood and he was living in the same area at Maendeleo Street where they lived. He referred us to the case of **Jumapili Msyete v. Republic**, Criminal Appeal No. 139 of 2007 (unreported) in which the Court talked about the need to look for evidence which have enabled the victim to ascertain the identity of the suspect.

According to Mr. Kihaka, PW1 mentioned the appellant to PW3 at the earliest possible opportunity as having been the person who attacked her, which meant she was certain of her assailant. He urged the Court dismiss this ground.

The appellant's complaint in respect of the third ground is that, since the incident was alleged to have occurred on 29.8.2016, why did it take the police that long up to 10.9.2016 to arrest him if at all PW1 was positive that he was her attacker?

Mr. Kihaka's response was that PW3 began looking for the appellant on 31.8.2018 soon after being informed by PW1 when he visited her at Mbeya Referral Hospital that he was the culprit of the said robbery, and they succeeded to spot and arrested him on 10.9.2016 after enlisting the help of the complainant's relatives. The learned State Attorney argued that after all, the delay was not alarmingly long.

In the fourth ground of appeal, the appellant complains that the trial court did not properly evaluate the evidence on record, also that his evidence in defence was not considered. This again, is disputed by Mr. Kihaka who submitted that the trial court properly analyzed the evidence before it, and indeed it considered the appellant's defence. He referred us to page 38 at which the trial magistrate adequately discussed the gist of the appellant's defence but rejected it on the strength of the prosecution evidence, and also page 62 at which the first appellate court too did the same thing. In the circumstances, Mr. Kihaka implored the Court to likewise dismiss this ground.

Mr. Kihaka finally discussed the first ground in which the appellant alleges that the prosecution did not prove the case against him beyond reasonable doubt. He submitted that because PW1 and PW2 correctly

identified the appellant as the person who attacked and robbed PW1, and since both lower courts held those witnesses as credible, truthful and thus reliable, there is no uncertainty that the prosecution proved the case against the appellant beyond reasonable doubt. He prayed the Court to dismiss this ground too, and consequently find that the appeal lacks merit and therefore dismiss it.

On his part, the appellant insisted that PW1 and PW2 did not correctly identify him because they did not tell the trial court how they identified him, especially when it is considered that they did not describe him, say how he was dressed. He similarly submitted that they did not tell the trial court the distance at which they observed him. He similarly said that PW1 was recorded to have told PW4 (the doctor) that she did not know the person who attacked her, therefore that he was not correctly identified.

On another point, the appellant wondered why the prosecution did not call the leaders of the area at which the incident took place as witnesses in the case. For those reasons, he requested the Court to allow the appeal, quash conviction, set aside the sentence and release him from prison.

We have carefully considered the competing arguments of the parties. We propose to discuss the grounds raised in the sequence adopted by the learned State Attorney, starting with the second, then third, fourth and finally the first.

As earlier on pointed out, the appellant is saying that he was not correctly identified by PW1 and PW2. The basic issue therefore, is whether or not those two eye witnesses correctly identified him.

It is plain and certain that evidence of visual identification is of the weakest kind and most unreliable. Basically therefore, no court should act on such kind of evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that it is absolutely watertight. There are a range of cases to that effect, including those of **Waziri Amani v. Republic** [1980] T.L.R. 250, **Philipo Rukandiza@ Kichwechembogo v. Republic,** Criminal Appeal No. 215 of 1994, **Ally Fumito v. Republic**, Criminal Appeal No. 36 of 2008, **Chalamanda Kauteme v. Republic,** Criminal Appeal No. 295 of 2009 and **Moris Jacob @ Ombee & another v. Republic,** Criminal Appeal No. 220 of 2012 (all unreported). Likewise, it is important to emphasize that in weighing such evidence, the courts have to remain focused on whether or not the conditions at the scene of crime

favoured correct identification-See the cases of **Rajabu s/o Issa Ngure v. Republic**, Criminal Appeal No. 164 of 2013,(unreported) and **Raymond Francis v. Republic** [1994] T.L.R.100. In **Philipo Rukandiza @ Kichwechembogo** (supra) the Court said 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 to 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."*

We may add here that it is not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details on the source of light and its intensity. Where it is a case of recognition, then one would expect evidence on how the victim came to know the suspect, which would include the time of the day the incident happened, the type and intensity of the light etc. which enabled the victim to ascertain the identity of the suspect -See **Jumapili Msyete** (supra). Of course, it should always be remembered that each case has to be decided on its own peculiar surrounding circumstances.

In the present case, we have revisited the evidence of PW1 and PW2. Both of them were explicit that the scene of crime was lit by electricity light which was bright and enabled them to see clearly, and that they managed to identify only the appellant because besides the fact that they were living in the same street of Maendeleo, they had very well-known him since childhood. They added that he attended school at Ikuti Primary School together with their (victim's) younger sister whom they said was a teacher. According to PW1, when the culprits closed up to where they were, she instructed PW2 to give way for them to pass. It was at that moment that the appellant and his accomplice launched the attack, where upon they hit PW1 with a heavy object in the face, grabbed their possessions and disappeared. In view of such evidence, we have no hesitation to say that the possibilities of mistaken identity were vouched; therefore that both lower courts correctly found that the appellant was unmistakably identified. This is the more fortified by the fact that PW1 named the appellant to PW3 at the earliest possible opportune as the one who attacked and robbed her of her effects – See the case of **Marwa Wangiti Mwita and Another v. Republic** [2000] T.L.R. 39 in which we underscored that: -

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

We have also considered the appellant's submission that PW1 ought not to have been believed that she identified him because she told PW4 that she did not know the person who attacked and robbed her. The appellant's concern is founded on what PW4 said when he cross examined him (at page 22); that witness said that ". . . *she complained of being beaten by somebody she did not know.*" It is unfortunate however, that the evidence of PW4 on that aspect was invalid and cannot be relied upon because it was hearsay. It could be different where such testimony could have come from PW1 herself, which is not.

On another point, the appellant said that both lower courts ought not to have believed PW1 and PW2 that they identified him at the scene of crime because they did not describe how he was clad, or if he had any special mark.

We have likewise considered this complaint, but we hasten to point out that in this case the complainant named the appellant by name at the

earliest possible opportunity. As earlier on pointed out, that meant she knew the appellant very much. In the circumstances, we find that the second ground of appeal is without merit and is henceforth dismissed.

Next is the third ground of appeal whereby the appellant wonders why it took long for him to be arrested if at all PW1 and PW2 identified him, essentially when it is considered that PW2 said she was seeing him around.

We dug deep into the Record of Appeal to find out if PW2 said she was seeing around the appellant a little while after that incident. We satisfied ourselves that the record does not support the appellant's concern that PW2 ever made such an expression. That entails that the allegation is baseless. What much is; the police, assisted by the victim's relatives, kept on tracing him until 10.9.2016 when they luckily spotted and arrested him at Iyunga bus stand. Thus, this ground too lacks merit and we dismiss it.

The appellant complained in ground 4 that his defence was not considered. We have carefully traversed the judgments of both lower courts and came to the conclusion that this complaint too is baseless. This is because it is evident from the trial court's judgment at page 38 that the

gist of the appellant's defence was perceptibly considered but rejected on the strength of the evidence for the prosecution. Likewise, the first appellate court considered the appellant's defence at page 62 of its judgment, but again it rejected it because the prosecution evidence was overwhelming. After weighing the analysis which was made by both courts below on this point, we have found no any justifications to fault them. Thus, the fourth ground is similarly baseless and we dismiss it.

We now come to address the first ground which queries that the prosecution did not prove the case against him beyond reasonable doubts.

It is an elementary principle of law that the burden of proof in criminal cases always lies squarely on the prosecution side, unless any particular statute directs otherwise. Even then however, that burden is on a balance of probability and shifts back to the prosecution - See the cases of **Joseph John Makune v. Republic** [1986] T.L.R. 44, **Mohamed Said Matula v. Republic** [1995J T.L.R. 3 and **Boniface Siwinga v. Republic,** Criminal Appeal No. 421 of 2007, (unreported). In **Joseph John Makune's** case the Court explicated that:-

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case, no*

duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities. . . ."

In the present case, the issue is whether the prosecution proved the case against the appellant beyond the required standard.

As earlier on pointed out, there were two key witnesses on whom the prosecution case depended. Those are none other than PW1 and PW2, the only eye witnesses who said they identified the appellant. We have explained in detail when addressing ground No. 2 that those two witnesses unmistakably identified the appellant on the ground that the scene of crime was lit by electricity light which they described as having been bright, also that the appellant was not a stranger to them because they had known him from childhood, equally that as at the date of the charged incident, they were living together at Maendeleo Street. In fact, the appellant corroborated their version at the commencement of his defence at page 24 of the Record of Appeal where he said that he was living at Maendeleo Street at Iyunga area. Furthermore, PW1 informed PW3 at the earliest opportunity that she was attacked by two persons, one of whom was

Christopher Ally, who is this appellant. This again, eliminated the possibility of mistaken identity. In view of that, it is clear that the prosecution side proved the case against the appellant beyond reasonable doubt, hence like the previous 3 grounds, this one too has no merit and is hereby dismissed.

Finally, for reasons we have herein assigned, we find that the appeal lacks merit in consequence of which we dismiss it in its entirety.

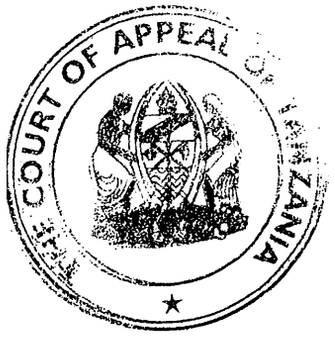
DATED at **MBEYA** this 9th day of June, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

The Judgment delivered 11th day of June, 2020 in the presence of appellant in person through video conference and Njoloyata Mwashubila, Senior State Attorney for the respondent is hereby certified as a true copy of the original.



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