IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO 593 OF 2017

BAYA S/O LUSANA..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Matupa, J.)

Dated the 16th day of November, 2014
in
Criminal Session Case No. 126 of 2014

JUDGMENT OF THE COURT

9th & 15th February, 2021.

MUGASHA, J.A.:

The appellant was charged with the offence of Attempted Murder contrary to section 211 of the Penal Code [CAP 16 R.E. 2002]. The particulars on the information alleged that, on 5/1/2004 at Bugembe Village within Kwimba District in Mwanza region, the appellant did attempt to murder one Paulo s/o Juma.

When the charge was read over to the appellant, he did not plead guilty subsequent to which in order to prove its case, the prosecution paraded three prosecution witnesses and tendered one documentary

evidence namely PF3 which was admitted in the evidence as Exhibit P1. The prosecution account was to the effect that, Paulo Juma (PW1) and the complainant was on the fateful day sleeping at his residence together with one of his wives. At around midnight, he heard a bang on the door and upon it, saw a flashlight and two bandits already had entered inside his residence. One of them held a bush knife and the other one held a torch. Then, another bandit surfaced with a bush knife and unsuccessfully attempted to strike PW1 who pressed him on the wall. As PW1 attempted to escape he was pursued by the assailants and while outside he saw another person standing at the gate. He opted to return to his residence to face the assailants head on, struck one of the bandits and then escaped through the backdoor to hide in the bush. PW1 surfaced later after hearing her parents who also resided within the vicinity.

Then PW1 became unconscious and he was admitted at Ngudu Hospital. According to the testimony of Donald Mugassa (PW3) a medical Doctor who examined PW1, the victim had deep cut wounds on the head and was admitted on 6/1/2004 and discharged on 20/1/2004. During cross-examination, PW3 told the trial court that PW1 regained consciousness two days after being admitted in the hospital. That apart, PW1 testified that, in

the fateful incident which lasted for about one hour with the aid of light from the fallen torch and the moon he managed to recognize and identify the appellant a resident in a neigbouring village of Bugembe who was not a stranger to him. He added that, upon recovery he mentioned the names of the assailants to his parents.

According to the testimonial account of Marceli Luhende (PW2) a sungusungu Commander, who arrested the appellant on 24/1/2004, he told the trial court that the appellant was accused of having stolen cattle. However, in the course of interrogation, the appellant admitted to have assaulted PW1 at Bugembe village upon being hired by one Mahenda who had promised to give the appellant TZS. 200,000/=. This made PW2 to hand over the appellant to one Mazinzi the Ward Executive Officer of Nyamilama Ward where Bugembe village is situate. He added that the appellant was never taken to the Police in relation to the assault incident.

In his defence, the appellant denied each and every detail of the prosecution account. He told the trial court that, on the fateful day while at his residence, heard alarm raised by sungusungu and he was among many people who assembled at the residence of PW1 only to be told by the sungusungu commander that those who had assaulted PW1 were not

recognized. Then, the appellant retired to his residence up to 24/1/2004 when he was summoned by the Ward Executive Officer (WEO) and later handed over to the police on accusation of having assaulted PW1. He denied the accusation and was arraigned in court with the charge of attempted murder.

After a full trial, the learned High Court Judge conducted a summing up to the assessors who all returned a unanimous verdict of guilt and the appellant was subsequently convicted and sentenced to life imprisonment. Unamused, the appellant has preferred an appeal to the Court. Initially, on 15/4/2019, the appellant lodged a five-point Memorandum of Appeal and later through his advocate, on 27/1/2021 he lodged a Memorandum of Appeal with the following sole ground of complaint namely:

1. That there is no sufficient evidence on record to ground conviction for the offence of attempted murder.

Subsequently, on 5/2/2021, the appellant's advocate lodged a supplementary memorandum of appeal on the following ground:

1. That the life sentence imposed on the appellant was excessive.

Before the hearing, the appellant's counsel informed the Court that he had agreed with the appellant that the initial Memorandum of Appeal be abandoned and the appeal be argued in respect of the memoranda filed by the learned counsel adding that the ground of appeal in the supplementary memorandum will be argued in the alternative.

At the hearing of the appeal, the appellant was represented by Mr. Anthony Nassimire, learned counsel whereas the respondent Republic had the services of Mr. Hemed Halidi Halfani, learned Senior State Attorney.

In addressing the ground of appeal, Mr. Nasiimire faulted the trial court in relying on weak prosecution account to convict the appellant. He submitted that, since the fateful incident is alleged to have occurred at night in the dark in a terrifying situation, it was not proved beyond doubt that the appellant was properly identified at the scene of crime. On this, he argued that the sole account of PW1's evidence on identification of the appellant did not eliminate the possibility of mistaken identification because the torch which is alleged to have been held by the appellant and later fell down could not in the circumstances aid the proper identification as could not beam upwards but what was on the floor and besides, the intensity of moonlight was not stated. Moreover, he argued that in the absence of the evidence

that the appellant was at large, the delayed arrest cast doubt on the alleged visual identification of the appellant. He as well, challenged the prosecution's failure to parade material witnesses who either happened to be at the scene of crime of the fateful day or were told by the appellant the names of the assailants after he had recovered. As such, he invited the Court to draw an inference adverse to the prosecution for failure to parade material witnesses and find that the prosecution case was not proved beyond reasonable doubt.

In the alternative ground of appeal, the learned counsel submitted that, since the maximum sentence is life imprisonment for one found guilty of the offence of attempted murder, the learned trial Judge erred in not considering the mitigation factors in imposing the sentence. He urged the Court, in case it finds the appeal not merited, to consider the mitigating circumstances and reduce the term of imprisonment. He concluded his submission by urging the Court to allow the appeal and set the appellant free.

On the other hand, the learned Senior State Attorney save for the alternative ground, he conceded to the appeal on account that the charge was not proved at the required standard. Apart from supporting the submission by the appellant's counsel, he added that it was highly unsafe

for the trial court to rely on the sole evidence of PW1 on visual identification, to ground the conviction considering that the appellant was arrested for the offence of stock theft and was unaware of the assault charges. As to the imposed sentence of life imprisonment, he was of the view that the same is valid because it is the statutory punishment.

After a careful consideration of the grounds of appeal, the record of appeal and submission of the parties, we agree with learned counsel that the charge against the appellant was not proved at the required standard and we shall give our reasons.

As the alleged incident occurred during nighttime it is crucial to determine if the appellant was properly identified at the scene of crime. Before that, we wish to restate the principles guiding visual identification which have been emphasized in various decisions of the Court.

The law on the evidence of visual identification is well settled as the court is warned not to act on such evidence unless all the possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely water tight. In that regard, the trial court must consider the following guidelines: **One,** the time the witness had the accused under observation; **two,** the distance at which he observed him; **three**, the

conditions in which the observation occurred, for instance whether it was day time or night time; **four,** whether there was good or poor lighting and **five,** Whether the witness knew or had seen the accused before or not. See: **WAZIRI AMANI VS REPUBLIC** [1980] T.L R 250, **RAYMOND FRANCIS VS REPUBLIC** [1994] T.L.R 100 and **CHOKERA MWITA VS REPUBLIC,** Criminal Appeal No. 17 of 2010 (unreported). Similarly, the Court drew an inspiration from the case of **WAZIRI AMANI** (*supra*) in the case of **SAID CHALLY SCANIA VS REPUBLIC**, Criminal Appeal No. 69 of 2005 (unreported) having underscored the following:

> *"We think that where a witness is testifying about another in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistaken identification like proximity to the person being identified,* ***the source of light, its intensity,*** *the length of time the person being identified was within view and also whether the person is familiar or a stranger."*

In **ISSA S/O MGARA @ SHUKA VS REPUBLIC**, Criminal Appeal No. 37 of 2005 (unreported), the Court was confronted with a situation whereby

witnesses claimed to have identified the appellant as he was not a stranger. Having relied on the case of **SAID CHALLY SCANIA** (*supra*) the Court said:

> *"We wish to stress that even in recognition cases where 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 whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*
>
> [Emphasis supplied].

It is also a general rule that, evidence on visual identification during night to perpetrators of an offence made by a single witness is unsafe to be acted upon unless there is other corroborative account. See - **HASSAN KANENYERA AND OTHERS VS REPUBLIC** [1992] T.L.R 100 and **SHAMIR JOHN VS REPUBLIC,** Criminal Appeal No.166 of 2004 (unreported).

With the above considerations in mind, we are increasingly of the view that the evidence on record did not justify the conclusion that the appellant was positively identified at the scene of crime considering that, it is not sufficient to make bare assertions that there was light at the scene of the

crime and in addition, the intensity of the light and the area illuminated must be clearly stated. We are fortified in that account because PW1 fell short of stating the intensity of the moonlight and the size of the area illuminated by the torch which had fallen down on the floor. In this regard, we found the learned trial Judge's conclusion at pages 50 to 51 of the record of appeal that PW1 had explained the intensity of the light which was able to light the whole room and that the moonlight was bright enough to enable PW1 to see the appellant not supported by the evidence on the record. With respect, this was a misapprehension of the evidence warranting the intervention by the Court. Moreover, since it is on record that PW1 was throughout engaged in a fight with the armed bandits, we seriously doubt if under such horrifying and stressful situation, PW1 was in a position of making unmistaken identification of the appellant. On this we draw an inspiration on the warning given by the Court of Appeal of Kenya in the case of **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."*

Another disturbing feature which render the alleged visual identification questionable is the unexplained delay in arresting the appellant after the commission of the offence because the record is silent if the appellant was at large and in his uncontroverted account, he testified to have been at his residence until his arrest on 24/1/2004 which was almost three weeks from the date when PW1 was assaulted. We are fortified in that account in the light the holding in the case of **WANGITI MARWA MWITA AND OTHERS VS REPUBLIC** [2002] T.L.R 39 where we stated:

> *"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."*

Another equally disturbing feature is the failure by the prosecution to parade material witnesses who would have shed light on what transpired at the scene of crime and after the victim had regained consciousness. Those include: **firstly,** the victim's wife who was together with PWI's at the homestead on the fateful incident. **Secondly**, PW1's parents to who the appellant after recovering did mention names of the assailants. **Thirdly**, the WEO who according to PW2 was handed over the appellant following his

confession that he had assaulted PW1. However, the WEO was not paraded as a witness to shed light on the offence which precipitated the arrest of the appellant. Furthermore, it really taxed our mind as to why the investigator was not called to testify on such a serious offence which posed a threat to the life of PW1. It is the investigator who would have shed light as to what precipitated the appellant's arrest because while the appellant was charged with attempted murder the evidence on record shows that he was arrested for stealing cattle but on interrogation he confessed to have assaulted PW1. However, it is the prosecution account that the appellant has never been taken to the Police station. In this regard, with respect, the learned trial Judge had no justification to convict the appellant relying on the confession that never was because it is glaring on the record that the appellant was never taken to the police station nor to the Justice of the Peace.

In the absence of any evidence that those witnesses were not within reach or could not be found, the prosecution was duty bound to call those witnesses who, from their connection with matter at hand were able to testify on material facts. Failure to call the material witnesses entitles this Court to draw an inference averse to the prosecution - See- **AZIZ ABDALLAH VS REPUBLIC** [1991] TLR 71.

In view of pointed out doubts surrounding the prosecution case, we find the case against the appellant was not proved to the hilt and thus the initial ground of appeal is meritorious. In the circumstances, we shall not make any determination on the alternative ground of complaint on excessive sentence imposed on the appellant. All said and done, we allow the appeal and order the immediate release of the appellant unless if he is held for another lawful cause.

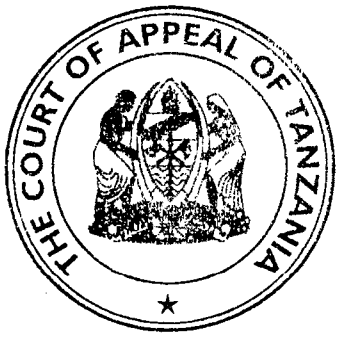
DATED at **MWANZA** this 12th day of February, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered this 15th day of February, 2021 in the presence of Mr. Anthony Nasirime, learned counsel for the Appellant and Ms. Georgina Kinabo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL