**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: LILA, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)**

**CRIMINAL APPEAL NO. 77 OF 2019**

**FRED MGAYA.....APPELLANT**

**VERSUS**

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

**(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)**

**(Matuma, J.)**

**Dated the 18th day of March, 2019**
**in**
**Criminal Appeal No. 140 of 2018**

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## JUDGMENT OF THE COURT

3rd & 12th May, 2021.

**KEREFU, J.A.:**

The appeal emanates from the decision of the High Court sitting at Dar es Salaam on an appeal from the District Court of Kilombero at Ifakara where FREDY MGAYA, the appellant, was charged with and convicted of armed robbery contrary to section 287A of the Penal Code, [Cap 16 of the R.E. 2002] (the Penal Code). It was alleged that on 21st February, 2017 at about 16:45 hours at Kibaoni Health Centre within Kilombero District in Morogoro Region, the appellant stole cash money TZS 125,000.00 the property of Dina Lister and immediately before the stealing he used a piece of iron bar to threaten her in order to obtain and

retain the stolen property. After a full trial, the appellant was convicted and sentenced to thirty years imprisonment. Aggrieved, the appellant unsuccessfully challenged his conviction and sentence before the High Court. Undaunted, the appellant is now before the Court on a second appeal. The appellant has lodged two separate memoranda of appeal raising a total of nine grounds together with one additional ground he added during the hearing of the appeal. However, we shall not recite the said grounds of appeal for reasons which will be apparent at a later stage of this judgement.

In a nutshell, the prosecution case found on the record of appeal is to the effect that, on 21st February, 2017 at around 16:40 hours the appellant went to Dina Lister (PW1)'s office, at Kibaoni Health Centre, for ultrasound services. Since, at that time, PW1 was alone in the office, she requested him to come back on the next day. The appellant started to leave the office but when he approached the door he came back and took out an iron bar and a knife and ordered PW1 to surrender the box of money. PW1 jumped to the other side and fell down. It was the PW1's evidence that she fought with the appellant and hit him on his private parts and the appellant left. A moment later, the appellant reappeared and got hold of PW1 and folded her right hand while insisting that she should give him the box of money. PW1 raised an alarm. Thereafter, the

appellant took PW1's hand bag, torn the window's wire mesh, jumped off and disappeared with PW1's hand bag. PW1 stated that, the said hand bag had TZS 125,000.00 and other documents. While PW1 was still at the scene of crime, some people came and took PW1 to the hospital. The medical examination was conducted by Dr. Peter Charles Mlase (PW3) who found that PW1 had bruises on her neck and her right shoulder bone was dislocated. PW3 tendered a PF3 which was admitted in evidence as exhibit P1.

PW1 stated further that on a certain day when she went to the police station for her routine activities, she saw the appellant inside the lock up and identified him. PW1 stated that she informed a detective officer that the appellant is the one who had attacked her.

Among the people who responded to PW1's alarm was Stephen Simba John (PW2) who testified that while going towards the direction where he heard someone crying, he saw the appellant running away. PW2 recalled that prior to the incident, at around 10:00 hours, he saw the appellant sitting at the sonography office where PW2 thought he was waiting for services.

E. 7183 D/CPL Charles (PW4), the investigation officer testified that he was involved in the investigation of the incident. PW4 stated that in June, 2017 the appellant was arrested on other criminal allegations and

taken to the police station. He said that when PW1 was making a follow up on her case, she accidentally saw the appellant in the police corridor and identified him.

In his defence, the appellant denied any involvement in the alleged offence. However, after a full trial, the trial court believed the evidence of PW1 who alleged to have seen and identified the appellant at the scene of crime and in the police lock up. It found that the evidence of PW1 was corroborated by PW2 and PW4. As such, the appellant was found guilty, convicted and sentenced as indicated above.

When the appeal was placed before us for hearing, the appellant appeared in person without legal representation whereas the respondent Republic was represented by Mr. Adolf Festo Kissima, learned State Attorney.

Upon being given an opportunity to amplify on the grounds of appeal, the appellant adopted the grounds of appeal and urged us to consider the same, allow the appeal and set him free.

Mr. Kissima expressed his stance at the outset that he was supporting the appeal on the second and third grounds in the substantive memorandum of appeal to the effect that the visual identification of the appellant was not watertight. He argued that despite the fact that the incident happened during the day, the appellant was not properly

identified by PW1 to avoid any mistaken identity. He referred us to pages 10 to 13 of the record of appeal and argued that PW1, the only prosecution's eye witness at the scene of crime did not give proper descriptions of the appellant, such as his attire, physique and any special marks or symbols which enabled her to identify him later in the police lock up. He added that, since the appellant was not known to PW1 prior to the incident, she was expected to give further descriptions on how she managed to identify him to avoid any possibility of mistaken identity. It was his further argument that there was no identification parade conducted to corroborate PW1's claim relegating her identification to mere dock identification. He thus emphasized that the evidence of visual identification given by PW1 cannot be said to be absolutely watertight.

Mr. Kissima argued further that there are contradictions between the evidence of PW1 and PW4 on how the appellant was identified by PW1 at the police station. He argued that, while PW1 claimed that she identified the appellant at the police station inside the lock up, PW4 testified that the appellant was identified by PW1 in the police corridor when PW1 was making follow-up on her case. Mr. Kissima wondered how could PW1 make a follow up on her case when there was no detail given on whether she actually reported the matter to the police and if so, whether she named and described the suspect to the police. He added that there was no evidence on how and when the appellant was arrested

making it difficult to link the evidence of identification with the arrest. To bolster his proposition, he cited the case of **Muhidini Mohamed Lila @ Emolo and 3 Others v. Republic**, Criminal Appeal No. 443 of 2015 (unreported). He then concluded that, since the testimony of PW1 the only prosecution eye witness was weak on the visual identification of the appellant, the remaining evidence on record could not have any weight to corroborate it. On the basis of his submission, Mr. Kissima urged us to allow the appeal, quash the conviction and set aside the sentence imposed against the appellant and release him from the prison.

In his brief rejoinder, the appellant did not have much to say other than supporting what was submitted by Mr. Kissima and urged us to allow the appeal and set him at liberty.

We should start at the onset of our determination by stating that this being a second appeal, the Court will rarely interfere with the concurrent findings of fact made by the courts below. The exception to the rule is when the findings are perverse or demonstrably wrong: See, for example, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda v. The Republic**, [2006] TLR 387 and **Omary Lugiko Ndaki v. The Republic**, Criminal Appeal No. 544 of 2015 (unreported). We shall be guided by this rule in our determination of the appeal.

We have considered the submissions made by the parties in the light of the record of appeal before us and the grounds of complaints. The main issue for our determination is whether the appellant was properly identified at the scene of crime.

On the basis of the stance taken by the respondent, the determination of the appeal turns on the second and third grounds of appeal in the substantive memorandum of appeal as argued by Mr. Kissima. We think it is pertinent that we refer to the guidelines on visual identification as stated in the famous case of **Waziri Amani v. Republic** [1980] TLR 250 where the Court stated that: -

> *"...evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that 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."*** *[Emphasis added].*

In addition, in **Raymond Francis v. Republic** [1994] TLR 100 the Court, among others, emphasized that: -

> *"Since all the* ***witnesses admitted seeing the appellant for the first time during the incident that day, it was necessary in their evidence of identification to describe in detail the identity of***

***the appellant when they saw him at the time of incident."*** *[Emphasis added].*

Applying the above guidelines to the instant case, we hasten to remark that we agree with Mr. Kissima that the evidence of PW1, the sole prosecution eye witness at the scene of crime was abysmally weak and contradictory with that of PW4 who claimed to have conducted investigation on the matter. As correctly submitted by Mr. Kissima, the incident happened during the day but PW1 who was at the scene of crime gave a very general description of the suspect. It is also significant that the appellant was a complete stranger to PW1, however in her testimony PW1 did not describe his physique, attire and/or any special marks or symbols which enabled her to identify him. As such, the appellant was not properly identified by PW1 at the scene of crime to rule out a possibility of mistaken identity.

The prosecution case is further weakened by the absence of any evidence on record to suggest the date on which PW1 reported the matter to the police and on how/when the appellant was arrested in relation to this case. In this aspect, we also agree with Mr. Kissima that, since PW1 claimed to have seen the appellant at the scene of crime for the first time, an identification parade could have been conducted if at all she had given to the police a detailed description of the suspects. Had the

parade been conducted, it would have served as corroboration of the dock identification of the appellant in terms of section 166 of the Evidence Act, [Cap. 6 R.E 2019]. In the circumstances, PW1's dock identification of the appellant without any corroboration by identification parade evidence was worthless – See cases of **Mussa Elias & Three Others v. Republic**, Criminal Appeal No. 172 of 1993; **Thaday Rajabu @ Kokomiti v. Republic**, Criminal Appeal No. 58 of 2013 and **Said Lubinza & Four Others v. Republic,** Criminal Appeal Nos. 24, 25, 26, 27 and 28 of 2012 (all unreported).

On the basis of the reasons stated above, we are of the settled view that had the trial court and the first appellate court properly scrutinized the evidence of PW1 which was the only evidence of identification of the appellant, would have found that such evidence was not watertight. In the circumstances, we agree with the appellant that his conviction was based on insufficient evidence of visual identification. As such, we find merit in the second and third grounds of appeal.

Since the findings on these grounds suffice to dispose of the appeal, the need for considering the other remaining grounds of appeal does not arise.

In the event we allow the appeal. The conviction of the appellant is hereby quashed and the sentence imposed on him by the trial court and

upheld by the High Court is hereby set aside. Consequently, we order for immediate release of the appellant from prison unless he is being held for some other lawful causes.

**DATED** at **DAR ES SALAAM** this 11th day of May, 2021.

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

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Judgment delivered this 12th day of May, 2021 in the presence of the appellant in person and Ms Daisy Makakala, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

D. R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**