IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A, And KIHWELO, J.A)

CRIMINAL APPEAL NO. 430 OF 2017

FRANCISCO DAUDI.....1st APPELLANT

MASHAKA MABULA.....2nd APPELLANT

HELMAN JOEL.....3rd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(De-Mello, J.)

dated 23rd day of August, 2017

in

Criminal Appeal No. 111 of 2017

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JUDGMENT OF THE COURT

8th & 14th July, 2021.

FIKIRINI, J.A.:

The appellants, Francisco Daudi, Mashaka Mabula and Helman Joel were indicted for an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002 (now 2019), before the Geita District Court at Geita. They were tried convicted and subsequently sentenced to serve fifteen (15) years in prison.

At the trial it was the prosecution's case that, on 27th May, 2016 at around 20.30 hours, while PW1 (the victim) was on his way to Butundwe village to buy fish, the appellants attacked him at Mugusu forest area, within the District and Region of Geita, and stole from him cash money TZS. 530,000.00, and one mobile phone hand set make Itel worth TZS. 45,000.00, and immediately before or after they beat him with a club on his mouth in order to obtain and retain the said stolen items. It was revealed further that, the 1st appellant, Francisco Daudi was the one who hit the victim on the mouth using a club, which caused PW1 to fall down , and while he was down, the 2nd appellant, Mashaka Mabula and the 3rd appellant, Helman Joel demanded for money from him.

The 3rd appellant placed his foot on PW1's ribs and stole his cash money valued at TZS. 530,000.00 and one mobile phone hand set. PW1 identified his assailants with aid of the moonlight, the appellants being close to the victim during the altercation which lasted for about 30 minutes; and that all the appellants were well known to him as they were living in Mugusu village as was PW1, for the past three years. Out of the three appellants he identified the 1st appellant by describing his attire being of a black Tshirt with white spots.

While the appellants were fighting over their loot amongst themselves, PW1 fled and raised alarm calling for help. With the assistance of people from a nearby small mine, he was rescued and taken to Police station where he mentioned those who robbed him and was later taken to hospital.

PW2 a Police investigator's account was that he investigated the matter in which the appellants were arrested on 28th May, 2016, just a day after the incident. In course of his investigation, he learnt that PW1 was robbed TZS. 530,000.00 and one mobile phone handset valued at TZS. 45,000.00.

The appellants alleged to have been arrested on 3rd June, 2016, at different places, for a reason other than the alleged robbery. That the 1st and 3rd appellants were informed that their arrest was because they had not paid for fish from an unnamed person while the 2nd appellant was simply asked to go to the Police station, which he did. They however admitted knowing PW1 as their fellow villager but completely refuted the allegation that they robbed him.

As alluded to earlier, after the full trial the appellants were found guilty of a lesser offence convicted of robbery with violence contrary to section 285 and 286 of the Penal Code and sentenced to serve fifteen (15) years in prison.

Dissatisfied by the conviction and sentence, the appellants appealed to the High Court in Criminal Appeal No. 111 of 2017. They lost the appeal, after the High Court Judge affirmed the trial court's conviction and sentence. Hence this appeal.

When the appeal was called for hearing, all the appellants appeared via Video link from the Butimba Central Prison, unrepresented. Mr. Clemence Ruta Kato and Ms. Georgina Kinabo both learned State Attorneys represented the respondent.

In their resembling memoranda of appeal filed, the appellants essentially challenged the conviction and sentence based on: the 1st ground, that the prosecution failed to tender, the club allegedly used to hit PW1, the PF3 and the money alleged stolen; the 2nd ground, that there was no cogent evidence warranting the appellate Judge to uphold the appellants' conviction; 3rd ground, that the visual identification relied on

was not watertight; 4th ground, that PW1's evidence was weak, doubtful and hence needed corroboration; 5th ground, that failure by PW1 to procure attendance of those allegedly assisted him impacted the prosecution case; and 6th ground, that there was no strong evidence to uphold conviction.

The appellants addressed the Court first in arguing their appeal. They all prayed for the Court to adopt their grounds of appeal as filed by each appellant and urged the Court to allow their appeal, quash the conviction and set aside the sentence.

Mr. Kato, the learned State Attorney opposed the appeal and supported the conviction and sentence. At first, he indicated will opt to argue all the grounds together, however, during submission he expounded on them as follows:

On the 2nd and 6th grounds, it was his contention that based on PW1's evidence the appellants were properly identified. Aided by moonlight, he identified the appellants whom he knew before as his village mates. PW1 also testified that the incident took 30 minutes and the appellants were close, giving him an opportunity to identify them,

especially the 3rd appellant who was stated to have placed his foot on PW1's ribs, enabling him to describe the 3rd appellant's attire of a white Tshirt with black spots. Upon being taken to Police station was able to mention the appellants as the ones who robbed him.

The 4th and 5th grounds, on failure to secure as witnesses those who came to PW1's assistance, the learned State Attorney argued that under section 143 of the Tanzania Evidence Act, Cap. 6 R.E. 2002 [now R.E. 2019] and case laws, the evidence of a single witness can as well suffice to secure a conviction. He referred us to the case of **Geofrey Sichizya v R,** Criminal Appeal No. 176 of 2017 (unreported) p. 19 as well as the decision by the Court of Appeal of Nigeria **Abdulraheem Sakiru v The State** (2019) LCN/12771 (CA) maintained that PW1 can thus be believed as did the two lower courts.

The 3rd ground on weak visual identification and circumstantial evidence, Mr. Kato argued that PW1 using bright moonlight identified the appellants who were his village mates. He was equally able to describe 1st appellant's attire, and as the one who hit him with a club. Mr. Kato considered the circumstantial evidence aspect raised died after the appellants' visual identification was proved.

On the failure to tender the PF3, the club and the stolen money which was the 1st ground, Mr. Kato turned down the assertion with an argument that it did not affect the prosecution case. He closed his submission by urging the Court to dismiss the appeal.

In a brief rejoinder, the appellants reiterated their earlier submission refuting committing the offence. They urged the Court to allow their appeal, contending that PW1 never involved the leadership in the area, and thus the appellants urged the Court to conclude that the case against them was a fabrication, as even PW2 who was assigned the file to investigate, could not support PW1's evidence.

We have dispassionately considered the submissions by the appellants and Mr. Kato. Before we proceed, we have decided to deal with the concern on the 5th ground on number of witnesses. As submitted by Mr. Kato, pursuant to section 143 of the Evidence Act, and case laws the evidence of a single witness can suffice to secure conviction. It is indeed correct that no specific number of witnesses is required to prove a fact. We thus subscribe to the learned State Attorney's submission. There are a number of authorities on that: **See: Yohana Msigwa v R** [1990] T. L. R. 148 which was cited with approval in **Geofrey Sichizya** (supra) referred

by the learned State Attorney; **Separatus Theonest @ Alex v R,** Criminal Appeal No. 138 of 2015 and **Lubelejea Mavina & Another v R,** Criminal Appeal No. 172 of 2016 to mention a few. But it is equally the law that adverse inference may be made where the persons omitted to be called as witnesses are within reach, and not called without sufficient reason being shown by the prosecution. **See: Aziz Abdallah v R** [1991] T. L. R 71.

Turning to the appeal, it is evident that the trial court's conviction was purely based on visual identification which was made by a single witness, PW1. That being the case we have found it apposite to deal with this aspect alone as we think, will be sufficient to dispose of the entire appeal without indulging us to examine the remaining grounds of appeal.

It is trite law that no court should act on visual identification evidence unless all possibilities of mistaken identity are eliminated and the court is fully convinced that the evidence about to be relied is watertight. In the case of **Waziri Amani v R** [1980] T. L. R. 250, the Court laid down guidelines on factors to be established before the evidence adduced is relied on in convicting the accused person. The pointed out factors are:

(a) The time the witness had the accused under observation.

(b) The distance at which he observed him.

(c) 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.

(d) Whether the witness knew or had seen the accused person before or not.

In the case of **Christopher Ally v R,** Criminal Appeal No. 510 of 2017 (unreported), the Court stressed on the need to illustrate the intensity of light. Considering that lights have different intensity it is therefore important to describe the intensity of the light relied on in identifying the accused person. **See: Mgara Shuka v R,** Criminal Appeal No. 37 of 2005 (unreported).

Before us, PW1 is the sole witness who identified the appellants. And this is the piece of evidence we shall be evaluating. It was his account that it was at 20.30 hours when the incident occurred and he spent 30 minutes and at a close distance to identify the appellants who were his village mates aided with moonlight. He specifically described the 1st appellant the attire as to be a black Tshirt with spots. The trial court as indicated at p.

29-30 of the record of appeal, was convinced that visual identification made by PW1 was precise and concise and it grounded its conviction on that evidence. We do not contest the identification made by PW1, but question the identification made at night using the moonlight, if was watertight to rule out mistaken identity. We have asked ourselves, after being hit on the mouth with a club, which we assume must have been painful, the act which led PW1 to fall on the ground, if PW1 could still be able to properly identify his assailants.

Despite the claim that the appellants were under his observation for 30 minutes and at a close range, we find, 30 minutes is a long time spent to accomplish armed robbery especially under the circumstances of this case. And if indeed, that is what occurred then, PW1 would have been expected to identify all the appellants, bearing in mind these are his fellow villagers whom he knew for over three years. The only identification on record of appeal as shown at p.9 is that of the 1st appellant's attire. There was no description of the 2nd and 3rd appellants attire and nothing at all on the appellants' other description such as physique, complexion or any other distinct mark if any.

Crucially, the intensity of the moonlight which allegedly aided PW1 to identify the appellants, it's intensity was not explained. To say, it was a full moon with brightness is in our view not sufficient enough to conclude the identification made was without mistake. In the case of **Mabula Makoye & Another v R,** Criminal Appeal No. 227 of 2017 (unreported) in which the case of **Boniface Siwinga v R,** Criminal Appeal No. 421 of 2007 (unreported) was quoted, the Court held that:

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown, as in this case that conditions for identification are not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken."*

Furthermore, we have asked ourselves, as to why those people from the small mine who came to PW1's assistance and the Police officer before whom he claimed to have mentioned the appellants as the ones who robbed him did not come to testify as prosecution witnesses. The failure to

procure these witnesses, in our view, is a serious omission as those witnesses were important and they could have connected the appellants to the crime committed. This in our view leaves a lot to be desired as the omission has dented and weakened the prosecution case. **See: Aziz Abdallah v R** [1991] T. L. R. 71.

PW1's identification being that of a single witness and under unfavourable conditions, we find that it calls for corroborating evidence. Even though this is more of a practice rather than a legal requirement, but we think it was crucial. **See: Jaribu Abdallah v R,** Criminal Appeal No. 220 of 1994 (unreported).

The appellants in their defence, which was not controverted, was that none of them were arrested in connection with the alleged robbery alleged by PW1. Instead, it was their account that the 1st and 3rd appellants were arrested on the complaint that they had not paid for the fish while the 2nd appellant was arrested on the pretext he was needed at the Police station. This clearly shows that there is no evidence led shading light on the appellants' arrest related to the charge preferred against them.

The pointed out shortfalls made us find the conviction of the appellants unsafe. This ground is in our view sufficient to dispose of this appeal. We thus allow the appeal. The conviction is quashed, and sentence set aside.

We order the immediate release of the appellants from prison, unless held for some other lawful cause.

It is so ordered.

DATED at **MWANZA** this 13th day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Judgment delivered this 14th day of July, 2021, in the presence of the appellants in person- liked via video conference, at Butimba Prison and Mr. Hemedi Halidi Halifani, learned Senior State Attorney for the respondent/Republic is hereby certified as the true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL