IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL N0. 505 OF 2017

1. **OSCAR MKONDYA**
2. **OSCAR MGALA** ..... **APPELLANTS**
3. **FRENK MGALA**

VERSUS

D.P.P ..... **RESPONDENT**

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

(Levira, J.)

dated the 10th day of July, 2017
in
Criminal Appeal No. 67 of 2016

.....

JUDGMENT OF THE COURT

8th & 25th February, 2021

LILA, J.A.:

In the District Court of Mbozi at Vwawa, the appellants, Oscar Mkondya, Oscar Mgala and Frenk Mgala (henceforth the 1st, 2nd and 3rd appellants, respectively) were charged and convicted of two counts; armed robbery contrary to section 287A and grievous harm contrary to section 225 of the Penal Code, Cap 16, Revised Edition, 2002. In the first count it was alleged that on 1/11/2015 at about 23:00hrs at Ibembwa village in Mbozi District and Mbeya Region, the appellants invaded the house of Ayubu Laison Myala and made away with a motorcycle make T-

Better Registration No. MC 343 AJM valued at TZs 1,700,000.00 and cash TZs 3,000,000.00, all total valued at TZs 4,7000,000.00 the property of Ayubu Laison Myala and that they assaulted Ayubu Laison Myala in order to obtain the said properties. It was also, in the second count, alleged that the appellants assaulted Yusta Mwampashe by cutting her on the head thereby causing grievous harm to her by using a bush knife. They were accordingly sentenced to serve thirty years imprisonment for the first count and seven years imprisonment for the second count each. The sentences were ordered to run concurrently. Their joint appeal to the High Court was dismissed. They have preferred the present appeal challenging both their convictions and sentences.

It is worth noting at the outset that the first appellant could not survive the outcome of his appeal, for he passed away on 10/3/2018. Since his appeal did not involve an appeal against the sentence of fine, compensation or forfeiture, in terms of Rule 78(1) of the Tanzania Court of Appeal Rules, we proceeded to mark his appeal to have abated. The appeal under our consideration is, therefore, in respect of the 2nd and 3rd appellants only.

The facts of the case may be stated briefly as follows; on 01/11/2015 at about 23:00hrs Ayubu Laison Myala (PW1) who engaged

himself in motorcycle transport business famously known as "bodaboda", his wife Yusta Mwampashe (PW2) and their son Gustava Ayubu Myala (PW3) were in the house. PW1 and PW2 were yet to fall asleep. PW3 was still at the sitting room. The room was lit by an electricity lamp described as "taa ya kichina" (a chinese lamp). Suddenly, a group of bandits armed with iron bars and bush knives stormed into the house after breaking the door. Each of the bandits also put on a torch on the forehead. Assisted by light from the chinese lamp and the torches, PW1, PW2 and PW3 claimed to have seen and identified the appellants who they said they knew well before because they lived in the same area although the 1st appellant later shifted to Tunduma in 2015. The bandits claimed to be given money. Upon failure by PW1 and PW2 to heed to the demands, they were beaten such that they fell unconscious only to recover while at Mbozi Hospital. PW1 was first to be attacked by the bandits. PW2 was warned not to cry for help. The bandits took a motorcycle, money amounting to TZs 3,000,000.00 and four cell phones and disappeared. At the hospital, PW1 and PW2 were attended by William Kibona (PW4) who also filled a PF3 (exhibits P1) which indicated that they sustained multiple cut wounds on the head and face. A policeman, E. 8287 D/CPL Thadeus (PW5) conducted investigation which led to the arrest of the appellants.

The 2nd and 3rd appellants, in their respective defences, admitted that they knew PW1 and PW2 as they lived in the same village. Even the 1st appellant admitted living in the same village and knowing PW1 and PW2 before he left to Tunduma and that ever since 8/8/2015 he has not returned back. They, however, distanced themselves from the commission of the alleged offences and, in particular, being properly identified. The 1st appellant stated that he was arrested at Vwawa on 22/1/2015 and joined in the charge with the 2nd and 3rd appellants who were strangers to him. The 2nd appellant stated that he was arrested on 13/1/2016 and on the incident date he was at home with his mother. On his part, the 3rd appellant stated that he was arrested in connection with the offences and joined in the charge with the 1st and 2nd appellants, persons who he knew.

Based on the uncontroverted evidence that the appellants were not strangers to the prosecution witnesses and on exhibit P1, the learned trial magistrate was satisfied that the appellants were properly identified at the scene and had committed the charged offences. He convicted and sentenced them as hinted above.

Central to the appellants' joint appeal to the High Court was the issue of identification and that the prosecution failed to prove the charge

beyond reasonable doubt. They contended that they were convicted on insufficient evidence of identification. The High Court (Levira, J. as she then was.), concurred with the findings of the trial court and dismissed the appeal.

Undaunted, the appellants lodged separate memoranda of appeal to this Court. As was the case at the High Court they have, in their relatively long and detailed sets of memoranda of appeal, brought to the fore the issue of identification as their main complaint; that they were not positively identified.

During the hearing of the appeal, the 2nd and 3rd appellants were linked with the Court from Ruanda Prison through video facilities and were unrepresented. Mr. Innocent Njau, learned Senior State Attorney, represented the respondent Republic. Both appellants adopted their grounds of appeal and opted to hear the respondent's responses to their appeal so that they may make a rejoinder in the event they find it necessary.

Initially, relying on the testimonies of PW1, PW2 and PW3 who stated that, assisted by a chinese lamp and torches, they were able to positively identify the appellants at the scene of crime, Mr. Njau contended that the appellants' involvement in the commission of the

crime was proved beyond reasonable doubt. However, upon being engaged by the Court whether the trio being familiar with the appellants, first, named the appellants as their assailants to anyone and, secondly, whether their arrest was a result of such information, Mr. Njau made a U-turn and conceded that neither of them revealed that vital information. He argued that the appellants' arrest was a result of the investigation made by PW5 who, he however argued that cannot be relied on for failure to explain what led him to conclude that the appellants were involved in the commission of the charged offences. He further argued that had the trio seen and identified the appellants as claimed, they would have had named the appellants at the earliest opportunity either to those who immediately turned up to the scene of crime or to the police. This, he argued, accounts for the unexplained delay in the appellants' arrest.

Responding in respect of the bandits' use of torches if there was sufficient light from the chinese lamp in the house as was stated by PW1, PW2 and PW3, the learned Senior State Attorney argued that such evidence suggested that light from the chinese lamp was insufficient. In addition, he argued, it is a fact that light from a torch illuminates on the person on whom it is flushed against and in the absence of evidence that

the bandits turned around and flashed on either of them, as is the case herein, it is unacceptable that light from the torches assisted the trio to see and identify the appellants. All these circumstances considered, the learned Senior State Attorney was inclined to agree with the appellants that the identification evidence was insufficient hence their guilt was not established to the hilt.

The responses from the State Counsel which shed light on the possible positive outcome of the appeal, no doubt, made it unnecessary for the appellants to rejoin. They wholly agreed with the learned Senior State Attorney and urged the Court to allow the appeal and set them free.

On the evidence on record, we entertain no scintilla of doubt that the robbery incident occurred on the alleged date and time and the items itemized in the charge were stolen. PW1, PW2 and PW3 were very clear in their respective testimonies on that and exhibit P1 is supportive of that fact.

The crucial issue for our determination is whether the appellants were involved in the commission of the offences.

In our deliberation, we first note that the offence was committed at night and the evidence relied on by the prosecution was that of visual

identification by PW1, PW2 and PW3. The law on visual identification is well settled. This Court has consistently stated that such evidence should not be relied and acted on to found a conviction unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely water tight [See: **Waziri Aman v. The Republic,** [1980] TLR 250, **Raymond Francis v. Republic** [1994] TLR 100; **Emmanuel Luka and Others v. Republic**, Criminal Appeal No. 325 of 2010; **Ramadhani Vincent v. Republic**, Criminal Appeal No. 240 of 2009**; Emmanuel Mdendemi v. Republic,** Criminal Appeal No. 16 of 2007 (all unreported)]. In the former case, the Court laid down some guidelines to be considered so as to establish whether the evidence of identification is impeccable. They include the time the witness had the appellant under observation, the distance at which he made the observation, the time the offence was committed and in the event it was night time, if the lighting was sufficient for a positive identification and lastly, whether the witness knew or had seen the accused before the incident or not. The same guidelines apply in cases of recognition.

In the present case, PW1, PW2 and PW3 were very clear that the incident took place at night. According to them, the bandits gained entry through the door and met them at the veranda, assaulted them using the bush knives and pieces of iron bars and made away with money, mobile

phones and a motorcycle. They claimed that there was light from the chinese lamp. They also gave evidence to the effect that they knew the appellants prior to the incident date as they lived in the same village. This piece of evidence was not controverted by the appellants. Instead, they readily admitted being familiar with PW1, PW2 and PW3 too as they lived in the same village. We, therefore find as an established fact that PW1 and PW2 were familiar with the appellants. Unfortunately, however, they were never forthcoming on the time the appellants were under their observation or rather how long the incident took place.

Now the main issue before us is whether the appellants were positively identified.

Whether or not a certain witness was able to make a positive identification is a factual issue. That being the case, this Court is barred from disturbing the concurrent findings of facts unless it can be shown that the findings were arrived at in total misapprehension of the substance, nature and quality of the evidence or there was a violation of some principle of law or procedure that occasioned injustice (See **Amratlal Danodar Maltase and Another t/a Zanzibar Silk Stores vs A. H. Juriwala t/a Zanzibar Hotel** [1980] TLR 31 and **Mohamed Musero vs R.** [1993] TLR 290).

In the present case, PW1, PW2 and PW3 told the trial court that they knew the appellants before the robbery incident. Therefore the issue for determination is essentially whether the appellants were recognized. Evidence of recognition is considered to be more reliable than identification of a stranger, but the Court has in several occasions warned of the possibilities that mistakes in recognition of even close relatives and friends may sometimes be made. In **Shamir John vs Republic**, Criminal Appeal No. 166 of 2004 (unreported) the Court observed that:-

> *"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."*

For the above reasons, courts are enjoined to consider whether the quality of the evidence of identification or recognition is good so as to satisfy itself that the appellants were positively recognized. For this reason, therefore, consideration of the issue whether the conditions for a proper and unmistaken identification were proper, becomes very relevant. On this we are guided by our decisions in **Waziri Amani Vs. Republic** (supra) where the Court stated:

> *"...in a case involving evidence of visual identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and*

that the court is satisfied that the evidence before it is absolutely watertight."

On the similar note, in **Raymond Francis vs Republic** (supra) the Court held that:

> *"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."*

The court re-stated the principles in the above cases in **Jaribu Abdalla v. Republic**, Criminal Appeal No. 220 of 1994, **Issa Mgare @ Shuka v. Repubic,** Criminal Appeal No. 37 of 2005, **Said Chally Scania v. Republic**, Criminal Appeal No. 69 of 2005 **Kulwa Mwakajape v. Republic**, Criminal Appeal No. 35 of 2005 (all unreported). In for instance, **Jaribu Abdalla's** case (supra) the Court held:

> *".....in matters of identification it is not enough merely to look at the factors favoring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence...."*

As hinted above, PW1, PW2 and PW3 claimed, aided by the chinese lamp and torches put on by the appellants, they were able to see and correctly recognize the appellants at the scene of crime. Going by the

record of appeal, that raises a lot of reasonable doubts. We shall demonstrate. **First**, Much as the trio told the trial court that the light from the chinese lamp gave enough light, we were not told the size of the room, for, the bigger the room the lesser the intensity and vice versa; **second**; the doubt on the intensity of light is further demonstrated by the assertions by the trio that light from the torches put up by the appellants assisted them in seeing and identifying the appellants. That is to say, they assisted in illuminating the room. It therefore does not occur to us that if the chinese lamp gave enough light as stated by PW1, PW2 and PW3, then why compliment it with the torches' light? That, as rightly argued by the learned State Attorney, casts doubt on the intensity of light in the room before the bandits gained entry. We are reinforced in that position by our observation in the case of **Juma Hamad vs. The Republic**, Criminal Appeal No. 141 of 2014 where it was held that:

> *"When it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable identifying witness to see and positively identify the accused persons. Bare assertions that "there was light" would not suffice."*

Third; it is a fact that torch light assists the holder of it to see the place and persons flushed against unless it is established that he had an

occasion to flush the torch onto him. Faced with an akin situation, in the unreported case of **Michael Godwin and Another vs Republic**, Criminal Appeal No. 66 of 2002, the Court stated that:-

> *"...Second what is more, it is inconceivable that PW1 or PW2 were able to identify the bandits when the bandits were flushing the torch light at them (PW1 and PW2).* ***It is common knowledge that it is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed. In this case, it seems to us that with the torch light flushed at them, (PW1 and PW2), they were more likely dazzled by the light. They could therefore not identify the bandits properly.*** *In that case, as Mr. Mbago, correctly conceded, the possibility of mistaken identity could not be ruled out."* (emphasis added)

We entirely subscribe to the above proposition. In the instant case there was no evidence by the trio that at any moment the bandits turned around and flushed their torches onto each other. In the circumstances, the claim that the torch light assisted the trio to positively recognize the appellants is inconceivable.

Fourth, much as we appreciate that PW1 and PW2 were beaten to the extent of being unconscious and recovered while in hospital, our doubts are

reinforced by the fact that neither of them named or mentioned the appellants to the police. Worse still, PW3 who was not assaulted did not mention the appellants' names to the police when they went to the scene. To the contrary, the appellants' arrest was a result of PW5's investigation. His evidence, as rightly argued by the learned State Attorney, is unreliable for want of source of information or explanation on how he arrived at the conclusion that the appellants were involved in the commission of the offence. It does not occur to us that PW1, PW2 and PW3 would have failed to mention the appellants to the police or anyone on that incident night or immediately upon regaining consciousness. This accounts for the appellants' unexplained delay in being arrested. They were arrested while in the same village. According to the charge sheet and prosecution witnesses the offence was committed on 1/11/2015 whereas PW5 said the appellants were arrested on 13/1/2016. In addition, there was no indication that the appellants escaped from the village and were outside the village in between those dates. Such failure to name the appellants as the bandits, render the evidence of identification by PW1, PW2 and PW3 unreliable. In **Marwa Wangiti Mwita and Another v. Republic,** Criminal Appeal No. 6 of 1995 (unreported) the Court had this to say:

> *"The ability of a 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 to inquiry."

Failure by PW1, PW2 and PW3 to immediately name the appellants to the police or other attendants to the scene of crime further re-enforced our doubts on the prosecution case against the appellants.

The above shortcomings amount to violation of the principles guiding the courts in the determination of the issue whether the accused were positively identified. We are thereby entitled to interfere with the concurrent findings of both courts below on the sufficiency of the identification evidence. Had the courts below directed their minds on the above deficiencies, they would have, definitely not relied on the testimonies of PW, PW2 and PW3 to found the appellants' conviction. The deficiencies are very basic and they render the evidence of recognition by PW1, PW2 and PW3 highly suspect, hence unreliable.

The mere general assertion by PW1, PW2 and PW3 that they knew the appellants before the incident does not assist the prosecution case any further as there was no cogent evidence that at the time the appellants were alleged to be in the house of PW1, they were properly identified. Generalized assertion that PW1, PW2 and PW3 knew the appellants is not enough.

In the circumstances, having regard to the circumstances of the case as a whole, we are satisfied that the conditions at the time of the incident were not favourable for the proper identification of the appellants. We think the condition was such that possibilities of mistaken identity could not be ruled out. The evidence on the identification of the appellants cannot, in the circumstances, be said to be watertight.

In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellants are to be set free forthwith unless otherwise lawfully held.

DATED at **MBEYA** this 24th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 25th day of February, 2021 in the presence of the 2nd and 3rd Appellants in person, unrepresented through video conference and Mr. Baraka Mgaya, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL