IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 580 OF 2017

BARUANI HASSAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(De- Mello, J.)

Dated the 25th day of September, 2017
in
Criminal Appeal No. 76 of 2017

JUDGMENT OF THE COURT

15th & 25th February, 2021

WAMBALI, J.A.:

The District Court of Musoma presided over by the Senior District Magistrate convicted Mr. Baruani Hassan, the appellant of the offence of Armed Robbery contrary to the provisions of section 287A of the Penal Code, Cap 16 R.E. 2002. Consequently, he was sentenced to a term of imprisonment for thirty years and twenty four strokes of the cane.

The conviction and sentence followed allegation in the charge sheet that the appellant committed the respective offence. Specifically, it was laid in the charge that on 6th September, 2015 at Marshi

Secondary School area within the District and Municipality of Musoma in Mara region, the appellant stole one motorcycle with registration No. MC 760 AHM make Toyo the property of NAFTAR ISABUKI and immediately before or after such stealing, he used a bush knife to threaten MAGORI PEMA in order to retain the said property.

The prosecution case was supported by the testimonies of Magori Pema (PW1), Nestoli Isabuhi Yunus (PW2), G. 2707 DC Twaha (PW3) and Marwa James (PW4) together with two exhibits, namely, motor vehicle registration card No. 6185786 issued on 19th February, 2015 (P1) and the motorcycle with registration No. MC 760 AHM Toyo (P2). The substance of the prosecution evidence was to the effect that the appellant was fully identified at the scene of the crime and later was found lying down unconscious beside the stolen motorcycle at Mkiringo area where he was arrested and taken to the police station at Musoma.

On the other hand, in his sworn testimony at the trial, the appellant denied the allegation and maintained that he was not properly identified at the scene of the crime. More importantly, the appellant stated that in August 2015 he was travelling to Baruti area in Musoma whereby while on the way, he was knocked by the motorcycle which was in command of two youths who later ran away and he could not

identify them. He stated further that as a result of the accident he fell unconscious and when police were informed by a good Samaritan they went to the scene of the accident and took him to the central police station at Musoma. He added that at the police station they issued to him the PF3 and was taken to hospital for treatment. He testified further that when he recovered, he was surprised that he was charged with the offence of armed robbery in court and remanded in custody.

After the trial court considered the evidence of both sides, it believed the prosecution version and rejected that of the appellant. It thus convicted and sentenced him as alluded to above.

Dissatisfied, the appellant unsuccessfully appealed to the High Court as the trial court's decision was confirmed in its entirety.

The battle did not end there as the appellant lodged the present appeal to this Court to challenge the concurrent findings of both courts below. Notably, his memorandum of appeal contains seven grounds of appeal. However, before we commenced the hearing the learned Senior State Attorney for the respondent Republic submitted that grounds 5 and 6 were not raised at the High Court during hearing of the first appeal. Upon our thorough scrutiny of the said grounds, we struck

them out as we were convinced that they were raised for the first time before this Court [see **Samwel Sawe v. The Republic,** Criminal Appeal No. 135 of 2004 (unreported)].

On the other hand, having further scrutinized the remaining grounds, namely, 1,2,3,4 and 7, it was categorically established that they can be conveniently paraphrased and reduced into two grounds as follows:-

1. *That the learned first appellate judge erred in fact and law to hold that the appellant was properly identified at the scene of the crime.*
2. *That the learned first appellate judge erred in fact and law to uphold the trial court's finding that the prosecution proved the case against the appellant beyond reasonable doubts.*

To prosecute the appeal before us, the appellant appeared in person, unrepresented. Noteworthy, he did not wish to elaborate on his grounds of appeal, but simply urged us to consider them, allow the appeal and set him at liberty. On the adversary side, Mr. Hemedi Halid Halifani learned Senior State Attorney appeared for the respondent Republic.

Responding to the first ground of appeal, the learned Senior State Attorney firmly and spiritedly argued that the appeal has no merit as the appellant was conclusively identified at the scene of the crime. Elaborating, he submitted that PW1 told the trial court how he spent almost fifteen minutes with the appellant negotiating the fare of the journey from Kariakoo area to Marshi Secondary school area in Musoma. He added that PW1 indicated that at that area where he had parked there was light from tube lights all around the place.

In Mr. Halifani's opinion, though PW1 did not describe fully the intensity of the light at the place he had parked the motorcycle, for him, the words "... electricity tube lights on all around..." implied that the intensity of the light was sufficient for proper and unmistaken identification of the appellant by PW1.

When we inquired from Mr. Halifani whether PW1 described the appearance of the appellant to anybody after the robbery, he conceded that as per the record of appeal, there is no evidence to that effect.

Nevertheless, he adamantly argued that in the present case there was no need of complying with the requirement of describing the attacker (the appellant) by PW1. He insisted that most of the conditions

set out by the Court in **Waziri Amani v. The Republic, [1980] TLR 250 at page 252** which was referred by the Court in **Kenedy Ivan v. The Republic, Criminal Appeal No. 178 of 2007** (unreported) were complied with by PW1. Besides, Mr. Halifani argued that PW1 also identified the appellant at Mkiringo area where he was found lying down unconscious along the stolen motorcycle. He submitted further that the evidence of PW1 was supported by that of PW2 and PW3 who were together at that place and identified the appellant. More importantly, Mr. Halifani sought to impress on us that the appellant was fully identified at that place by the aid of moonlight as testified by PW2.

On the other hand, when we inquired from the learned Senior State Attorney as to whether the defence of the appellant was really considered to see whether it raised any doubt to the prosecution case, he maintained that both courts below considered it and in the end, it was concluded that the same was not worth of belief. Mr. Halifani concluded his submission in respect of ground one by urging us to dismiss it because the identification of the appellant was watertight.

With regard to the second ground of appeal, Mr. Halifani implored us to reject it as according to the evidence in the record of appeal, the case for the prosecution was proved beyond reasonable

doubt. Finally, he beseeched the Court to dismiss the appeal in its entirety.

The appellant did not have anything to add in rejoinder, rather he prayed as before that the appeal be allowed.

Having considered the parties' submissions and the evidence in the record of appeal, we have no doubt that since there is concurrent findings of facts by the two courts below, we need to appraise the evidence and come to the conclusion on the complaint as to whether the identification of the appellant was watertight.

However, this being the second appeal, we are mindful of the settled position of the law that the second appellate court rarely interfere with the concurrent findings of lower courts on the facts, unless it is shown that there has been a misapprehension of the evidence or a miscarriage of justice or violation of a principle of law or procedure [**see Isaya Mohamed Isack v. The Republic, Criminal Appeal No. 38 of 2008 and Seif Mohamed E. L Abadan v. The Republic, Criminal Appeal No. 320 of 2009** (both unreported), among many others].

Therefore, in the present appeal, being the second appellate court and having carefully gone through the evidence in the record of appeal, we must state that we are compelled to consider and determine the credibility of witnesses and come to the conclusion on the issue of identification. To this end, we are reinforced by the decision of the Court in **Shaban Daud v. The Republic, Criminal Appeal No. 28 of 2000** (unreported) where it was stated that:-

> *"...Credibility of a witness is the monopoly of the trial court only in so far as demeanor is concerned, the credibility of a witnesses can be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

We will, therefore, be guided by the said settled position of the law in considering the credibility of the witnesses in the present appeal.

There is no dispute as per the evidence in the record of appeal that on the fateful day, PW1 saw the attacker for the first time. Thus,

PW1 was required to give sufficient description of the attacker and explain how he managed to identify him at the scene. However, the only evidence which PW1 stated in this connection is that he spent almost fifteen minutes with the appellant and that there was enough light from electric tube lights which were all around the place. In our settled minds, we have no hesitation to state that as the attacker was a stranger to PW1, he was supposed to explain sufficiently the nature of the place he was invaded and how the said tube lights were placed and their intensity to enable him to properly identify the appellant. This is notwithstanding the testimony of PW1 that he spent almost fifteen minutes together negotiating the faire. To be precise, PW1 is on record to have stated as follows concerning the identification of the appellant at the scene of the crime:-

> *"...I did not know him before this robbery but I saw him as he came where I parked my motorcycle close to the electric tube lights on all around and I saw him well, and while negotiated the fare between me and him. It took almost 15 minutes."*

Upon close examination of the above reproduced extract of PW1's evidence, we respectfully disagree with the learned Senior State Attorney on the proposition that the words "... the electricity tube lights

on all around ..." implied that the intensity of the light was sufficient for proper identification of the appellant. We hold the view that PW1 was required to expressesly indicate in his testimony the intensity of the light at that place which favoured correct identification of the assailant. Unfortunately, as alluded to above, PW1 did not state whether in that place there were buildings where the said tube lights were mounted and distributed. Moreover, we are not at all told about the nature of the place which accommodated the alleged tube lights all around. It is in this regard that in **Raymond Francis v. The Republic** [1994] TLR 100 the Court emphasized the need for sufficient evidence on conditions favouring correct identification as follows:-

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

On the other hand, we ask ourselves why if PW1 sufficiently identified the appellant at the scene he did not describe him to those who first responded to the alarm to facilitate in tracing him. Similarly, it is not known why he did not tell the police whom he met at Karume Police Station Bweri area the description of the appellant to facilitate his

arrest. Indeed, to show that the police whom he met for the first time were not told of the descrition of the appellant, they simply told him that they have not seen any motorcycle passing in that place. Certainly, if the police were informed of the description of a robber, they could not have refrained to join him in tracing the culprit and the motorcycle immediately. Equally important, the police he met in the first place did not include PW3. According to PW3, before he went to Mkiringo area together with PW2 and PW3 he was in the usual patrol when he was informed of the alleged incident of the appellant being found lying down unconscious beside the stolen motorcycle.

Moreover, it is plain in the evidence that PW1 did not even give any description of the appellant to PW2, the owner of the stolen motorcycle when he met him to report the incident of robbery. PW2 thus went to Mkiringo area where the motorcycle and the appellant were found without knowing any descriptive features of the assilant who invaded and robbed PW1. Similarly, PW3 also went to Mkiringo area to arrest the appellant without being informed of his description.

It is important to appreciate that the evidence of PW1 and PW3 did not indicate the source of light which assisted them to identify the appellant together with the stolen motorcycle at Mkiringo area. It is

only PW2 who stated that there was moonlight which helped him to identify the appellant. In this regard, we wonder how PW2 could have sufficiently identified the appellant as the one who participated in the robbery at Marshi Secondary School area by the aid of moonlight while he saw him for the first time and did not have the advantage of any description of his appearance from PW1. The evidence of PW2 and PW3 could not therefore, corroborate that of PW1 on the identification of the appellant.

We wish at this juncture, to emphasize what the Court stated in **Swalehe Kalonga and Another v. The Republic, Criminal Appeal No. 45 of 2001** and later acknowledged in **Minani Evarist v. The Republic, Criminal Appeal No. 124 of 2007** (both unreported) that:-

> *"... the ability of the witness to name the suspect at the earliest possible opportunity is an all important assurance of his reliability."*

In the present case, we hold the firm view that the evidence of PW1, PW2 and PW3 on identification of the appellant at Mkiringo area is also suspect. According to their evidence in the record of appeal, the appellant was arrested on the same day of the robbery, that is, 6th

September, 2015 at Mkiringo area and taken to police station Musoma. If this is the case, we wonder why it took almost more than eight months before the appellant appeared at the trial court charged with the offence of armed robbery. The record of appeal speaks louder and clear that the appellant appeared before the trial court on 15th April, 2016 in Criminal Case No. 57 of 2016 while the charge sheet indicates that he committed the offence on 6th September, 2015. Unfortunately, even PW3 who was the investigator did not explain at the trial why it took a long period to align the appellant to face the charge of armed robbery. Indeed, although PW3 testified that the appellant was sent to hospital for treatment after being arrested and taken to police station, but he did not state whether he was hospitalized and for how long.

In this regard, the evidence of the appellant in his defence that he was taken by the police from the scene of the accident after information from a good Samaritan and sent to hospital for treatment until when he was discharged and later found himself charged with the offence of armed robbery; may seem plausible to raise doubt to the prosecution case as to whether he was really arrested in connection of the robbery. It is thus difficult to establish patently whether the appellant was arrested in connection of the armed robbery or was taken

to hospital by the police after he was knocked by the motorcycle which was in command of two youths. Besides, the appellant testified that the PF3 which he was given to go to the hospital was retained by the police and therefore, it is difficult to establish for how long he was admitted in hospital and the nature of his ailment.

We note that the trial Senior District Magistrate in his judgment acknowledged that the appellant's contention in his defence that he got an accident after he was knocked by two youths in command of the motorcycle who ran away might be true; yet he did not go further to adequately consider his defence as to whether it raised doubt to the prosecution case. On the contrary, the trial magistrate dealt to a great extent with the prosecution version of evidence without evaluating that of the defence and stated as follows:-

> *" I am inclined to accept and go by the testimony of PW1 who met the accused right from the beginning of the incidence, who has already indicated earlier on. I am also satisfied that he had no reason to lie against* the accused."

In our respectful opinion, had the trial magistrate considered the appellant's defence, he would have realized that it casted some doubt to the prosecution's case on whether the appellant was properly identified

at the scene of the crime at Marshi Secondary school area and Mkiringo area. Regrettably, the first appellate judge did not consider at all the complaint of the appellant in grounds three and four of the appeal concerning the failure of the trial court to consider his defence against the prosecution evidence.

At this juncture, we wish to remind both the trial and first appellate courts on the importance of considering the evidence of the defence before arriving at the proper verdict of the case. Indeed, it is instructive to reiterate what the Court stated in **Rajabu Abdallah @ Mselemu v. The Republic, Criminal Appeal No. 134 of 2014** (unreported) that:-

> *" As this Court has stated in different cases time and again, such omission constitutes a fatal error. To reiterate what has always been insisted in this regard, both courts below ought to have observed the weil established principle of law that in writing a judgment, a court has to consider not only the evidence in support of one party in a case and completely ignore the evidence for the other party, however worthless it may appear."*

[**See also Hussein Idd and Another v. The Republic** [1986] TLR 1660 and **James Bulolo & Others v. The Republic** [1981] TLR 283].

Moreover, in **Yusuph Nchira v. The Republic, Criminal Appeal No. 174 of 2007** (unreported) the Court stated that:-

> *" The appellant had only to raise doubts on his presence at the scene of crime and the prosecution had to prove its case beyond reasonable doubt. The appellant's story need not be believed. He had only to raise a reasonable doubt and not to prove anything."*

We entirely agree with that observation of the Court in view of the circumstances of this case.

On the other hand, our scrutiny of the evidence of PW4 leads us to the finding that both the trial court and first appellate court improperly believed his evidence that he identified the appellant at Mkiringo area. We hold this view because, first, his evidence in the record of appeal is clear that he did not identify the person who was lying down off the road beside the stolen motorcycle. In PW4's evidence, he only identified a red motorcycle and did not even identify its registration number. Second, it is not known why PW4 did not accompany PW1, PW2 and PW3 to Mkiringo area if he was really the one who informed them that he found the appellant at that place. According to PW4 he proceeded with his journey after he divulged the information. Three, according to

his testimony, PW4 was summoned at the police to record the statement after two days of the incident. Again, it is not known why after the arrest of the appellant he was not called at the police station Musoma immediately to identify him and the motorcycle he saw at Mkiringo area on the same day. The totality of PW4 evidence therefore casted doubt on his story about the incident.

In the circumstances, we find that the evidence of PW1 was suspect on whether he really identified the appellant at the scene of the crime at Marshi Secondary School area or at Mkiringo area. We, therefore, do not find any merit in the argument of the learned Senior State Attorney that in the present case, PW1 did not have the duty to give any description of the appellant which facilitated his identification. We also do not agree that PW1 evidence was corroborated by PW2, PW3 and PW4. As the evidence of PW1 is suspect, it cannot be corroborated by that of PW2, PW3 and PW4 (see **Aziz Abdallah v. The Republic** [1991] TLR 71 and **Ally Msutu v. The Republic** [1980] TLR 1).

Therefore, both courts below were supposed to sufficiently consider whether the evidence in the record disclosed that PW1 identified the appellant at the scene of crime conclusively.

In **Ayubu Zahoro v. The Republic, Criminal Appeal No. 177 of 2004** (unreported) the Court emphasized that: -

> *" In considering whether the conditions are favourable for correct identification, the Court has consistently held that in identifying an accused person, where a witness saw the accused for the first time, there is need for the witness to describe the identity of the accused in detail."*

On the contrary, in the present case, as we have amply demonstrated above, PW1 completely failed to describe the appellant to those he met after the commission of the offence.

Consequently, based on our evaluation of the evidence in the record of appeal, we cannot conclusively find that the identification of the appellant at the scene of the crime (Marshi Secondary School area) and later Mkiringo area was watertight to exclude any possibility of mistaken identity. To this end, we are settled that the doubt in the prosecution case must be resolved in favour of the appellant.

In the event, in the circumstances of this case, being the second appellate court, we are entitled to interfere with the concurrent findings of fact by the trial and first appellate court as we hereby do. We thus allow the first ground of appeal.

Moreover, as the decision of the case depends on the identification of the appellant, we accordingly hold that the prosecution failed to prove the case beyond reasonable doubts. The second ground of appeal is also allowed.

In the result, we allow the appeal in its entirety and order that the appellant be set at liberty immediately unless otherwise held for lawful cause.

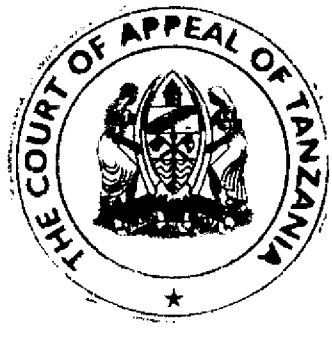
DATED at **MWANZA** this 25th day of February, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgement delivered this 25th day of February, 2021 in the presence of the appellant appeared in person, unrepresented and Mr. 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