IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MWAMBEGELE, J.A, KEREFU, J.A. And, KENTE, J.A.)

CRIMINAL APPEAL NO. 308 OF 2019

1. **ELIAS GERVAS**
2. **HASSAN BENEDICTO**
3. **TABULA JOHN @ OMARY**
4. **SAID JOHN**
5. **RWEKAZA JOVIN**
6. **SAMADU PETRO**
7. **JOVITHA RICHARD**

..... APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Conviction and Judgment of the High Court of Tanzania at Bukoba)

(Kairo, J.)

dated the 3rd day of August, 2017
in
Criminal Appeal No. 12 of 2016

JUDGMENT OF THE COURT

16th & 24th August, 2021

KENTE, J.A.:

This is a second appeal. It has its genesis in a Criminal case which was decided on by the District Court of Karagwe (the trial court) in Kagera Region. The appellants namely Elias Gervas, Hassan Benedicto, Tabula John @ Omary, Said John, Rwekaza Jovin, Samadu Petro and Jovitha

Richard (henceforth the first, second, third, fourth, fifth, sixth and seventh appellants respectively), were charged before the trial Court with arson c/s 319(a) of the Penal Code, Cap 16 R.E 2002. They were convicted and sentenced to life imprisonment each. They unsuccessfully appealed to the High Court at Bukoba (Kairo, J. as she then was), hence this appeal.

At the hearing of the appeal, the appellants appeared in person unrepresented while the respondent Republic was represented by Mr. Adolf Maganda, learned Senior State Attorney together with Mr. Amani Kilua, learned State Attorney. The appellants had filed a joint memorandum of appeal containing nine grounds of complaint.

Taken as a whole, the main complaint in the grounds of appeal is essentially that, **first,** that in upholding the conviction and sentence, the learned Judge of the High Court relied on the particulars of the offence contained in the charge sheet which was substituted immediately before the commencement of hearing in the trial court and **second,** that, all in all, the case against them was not proved beyond reasonable doubt to warrant the conviction and sentence. It is the stance of the appellants that they

were opposed to their conviction and sentence which were upheld by the first appellate court despite the unsatisfactory evidence of identification.

While we entirely agree with the appellants that indeed the learned Judge of the first appellate court appears to have inadvertently relied on the charge sheet which was substituted at the commencement of the hearing before the trial court, it appears to us that, that was a simple oversight which did not go to the root of the matter. In our view, the only ground that is most telling and deserving our attention in this appeal, is the identification of the appellants at the scene of the crime.

When the appeal came up for hearing, the appellants, being laypersons and fending for themselves, informed the Court that, though some of them had something to say in elaboration of the grounds of appeal, they would prefer the learned State Attorney to set the ball rolling so as to pave the way for their response. The learned State Attorney had no qualms about the appellants' request and therefore we invited Mr. Kilua to take the floor.

In opposing the appeal, Mr. Kilua submitted, in the first place that, the appellants were properly and correctly identified by Sophia Thadeo

(PW1), John Bosco Laurian (PW4) and Murshid John (PW5) at the scene. The learned State Attorney maintained that, according to the evidence of PW1, there was enough light from the burning houses which enabled her to identify the appellants who she knew very well as they were her fellow villagers. With regard to the visual identification evidence of PW4, Mr. Kilua submitted that (PW4) was able to identify the appellants relying on the light from his burning motorcycle which was burned along with three houses in the arson incident. Going forward, the learned State Attorney referred us to the evidence of Murshid John (PW5) who told the trial court that on 1/9/2015 at about 8:00 pm, he saw the appellants gathering dry grasses which they used to set fire to the motorcycle and thereafter the third and sixth appellants set fire to the first two houses. Refering to page 39 of the record of appeal, he maintained that, the light from the burning houses and the motorcycle was sufficient enough to illuminate the area and enable the prosecution witnesses to identify the appellants. Given the above identification evidence, it was the learned State Attorney's submission that the benchmarks which we laid down in the most celebrated case of **Waziri Amani v. R,** [1980] TLR 250 were attained by the prosecution side in this case. Under the circumstances, Mr. Kilua was

of the view that, the case against the appellants was proved beyond reasonable doubt and to that end, he urged us to dismiss the appeal for want of merit.

In their rejoinder submissions, the first and fourth appellants who spoke for themselves and were supported their fellows maintained that, the identification evidence given by the prosecution witnesses in this case was doubtful and that, PW1 had not mentioned the source of the light which enabled her to identify them. With regard to the illumination of the area by the light from the burning motorcycle and the houses, the appellants maintained that, that was not enough for the eye witnesses to identify them. The first appellant went further to express his worry as to why did the witnesses not identify a person called Julius Kahoza who is said to have readily admitted having been involved in the arson incident and thereafter at some unknown date, to have made an apology to the complainant. It was the overall contention of the appellants that, in their concurrent finding of fact that indeed, they were properly and correctly identified by the prosecution witnesses, the two courts below failed to direct themselves fully and correctly on the evidence on record. They

implored us to find that there is merit in the appeal, allow it, and set them free.

Quite clearly, the outcome of this appeal or the guilt or innocence of the appellants in this case, depends entirely on the evidence of visual identification by the prosecution witnesses. As stated above, the two courts below were of the concurrent view that the evidence of visual identification in this case was flawless. The law is very clear and we are mindful that, we cannot interfere with such a concurrent finding save for some reasons. (see for instance **Mohamed Juma Mpakama v. R,** Criminal Appeal No. 385 of 2017 (unreported). We have had the opportunity to go through the evidence on the record as led by the prosecution side during the trial, and we think, with respect, as contended by the appellants, the same was wanting. We will demonstrate this by making reference to the conditions and circumstances then obtaining at the scene of the crime when the appellants were allegedly seen and identified by PW1, PW4 and PW5. However, before we delve deep into that evidential aspect, we have found it apt at this point in time, to revisit albeit very briefly, the jurisprudence on visual identification evidence as evolved and developed through various judicial decisions.

As the matters stand today, it is trite law that, the evidence of visual identification should not be acted upon by any court unless it is satisfied that such evidence is watertight and all possibilities of mistaken identity are eliminated. That is what we said in **Waziri Amani v. R** (supra) and we have all along followed the imperishable benchmarks which we laid down in there on how to evaluate visual identification evidence. (see for instance **Omari Iddi Mbezi & 3 Others v. R,** Criminal Appeal No. 227 of 2009 and **Taiko Lengei v. R,** Criminal Appeal No. 131 of 2014 (both unreported). In this connection, in **Raymond Fransis v. R** [1994] TLR 100, we drew the attention of the courts, in all cases whose determination depends essentially on the evidence of visual identification such as the one now under consideration, and we consequently observed thus:-

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

Notably, we had earlier on, in **Waziri Amani** (supra), set out some of the questions which should be posed and resolved by the trial Judge or Magistrate in an endeavor to determine if the conditions at the scene of

the crime were ideal for a correct and impeccable identification of the accused. For ease of reference, we said, *inter alia*, that:-

> *"We would for example, expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor lightning at the scene; and further whether the witness knew or had seen the accused before or not."*

Bearing in mind the above exposition of the law, can it be said in the instant case, that the identification of the appellants by PW1, PW4 and PW5 at the scene of the crime, was so ideal and that their evidence was watertight enough to eliminate all possibilities of mistaken identity? With respect, unlike the trial and the first appellate court, we are unable to resolve the above-posed question in the affirmative. As it will be appreciated from the evidence on the record, the arson incident occurred during the night time at about 8:00 P.M the trial court was not told whether or not there was moonlight but, going by the evidence on the record, we can infer that there was darkness as evidence was not forth

coming form the prosecution side showing the existence of moonlight at the time of the commission of the offence of which the appellants were convicted. In other words, the only sources of light were the burning houses and the motorcycle. Notably, PW1 had told the trial court that it is the third appellant who pulled her from the house which was immediately thereafter set on fire. She said that after being taken outside, the first, third and sixth appellants started beating her while the first (sic) and seventh appellants poured out petrol onto the houses. PW1 went on telling the trial court that after the houses were engulfed in flames, she managed to see and identify the appellants because, **one,** they were her neighbours, and **two,** the appellants were making their lives difficult as before the arson incident, they had beaten up her husband as they pressed him to cross the floor from CCM and join CHADEMA. The evidence of PW4 was briefly to the effect that, he managed to identify the second third, fourth, fifth, sixth and seventh appellants but he did not go further to disclose the intensity of the light which he said was coming from the burning motorcycle making it possible for him to identify them. For his part, PW5 told the trial court that he saw the appellants gathering some

grasses which they used to set fire to the motorcycle and thereafter the third and sixth appellants set fire on the houses.

Gauging the quality of the evidence of identification by PW1, PW4 and PW5, it is certainly clear that, by any standards, the same cannot be said to have been obtained under favourable conditions. For, it is not in dispute that the arson incident occurred during the night time. What is more is that the trial court was not told the average distances at which PW1, PW4 and PW5 observed the appellants, and the time the observation lasted. We also have in mind the fact that, in such a situation the appellants would not have the courage to stand at one place close to the burning houses for fear of being burned. Another thing to note here is the fact that, the apparent agitation on the face of PW1, PW4 and PW5 due to the traumatic arson incident and, the seemingly fleeting glances which they had at the appellants, would not allow them to enjoy a faultless observation and identification. We are saying this because we reasonably believe that the appellants were presumably moving around during the burning of the houses. For, as we have said, given the conditions obtaining at the scene, they could not remain at a standstill. With regard to the evidence that the appellants were well known to PW1 as they were

her neighbours, indeed that is undisputed. However, our only reservation about this evidence is that, it was obtained under very unfavorable conditions which cannot be said to have been ideal as we have amply demonstrated hereinabove. Moreover, as we observed in **Boniface Siwingwa v. R,** Criminal Appeal No. 421 of 2007 and **Mabula Makoye and Another V. R,** Criminal Appeal No. 227 of 2017 (both of which are unreported);

> *"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 that the conditions for identification were 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 the crime as the witness might be honest but mistaken."*

For the reasons that we have given, we are of the final opinion that, the two courts below were not entitled to accept as true the evidence given by PW1, PW4 and PW5 and to have based the appellants' conviction thereon. We think that, in the circumstances of this case, the said evidence was not by itself, absolutely watertight to support the conviction.

We accordingly allow the appeal in its entirety, quash the appellants' conviction and set aside the sentence of life imprisonment which was imposed on them. We order for their immediate release from prison if they are not otherwise held for some other lawful cause.

DATED at **BUKOBA** this 23rd day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2021 in the presence of the Appellants in person and Mr. Amani Kilua, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL