IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA,J.A. KEREFU, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 529 OF 2019

ABDUL ALLY CHANDE .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mgonya, J.)

dated 28th day of October, 2019.
in
HC. Criminal Appeal No. 33 of 2019.
.....

JUDGMENT OF THE COURT

27th September & 21st October, 2021

LILA, JA:

This is a second appeal. The appellant has exercised his right of appeal to impugn a decision of the High Court that sustained a conviction over armed robbery and a sentence of thirty (30) years imprisonment. Robbery incident took place on 18/9/2017 at about 20:00hrs when Salum Seif (PW1) was invaded by five (5) bandits who cut him with a machete thereby causing him sustain cut injuries at his palm.

The background of the matter was explained in detail by PW1. He claimed that on 18/9/2017 while heading back to his home from his

work place, he met the appellant who was with four other persons at Charambe kwa Mbiku. He claimed to have managed to identify the appellant and one Ally King'ambe using light from nearby shops that illuminated the area. He also said prior to the incident, the gangsters went closer to him and asked for TZS. 200.00 which he claimed he did not have. He was then invaded and robbed his mobile phone make sumsung worth TZS. 120,000.00, wallet with TZS. 80,000.00 and voters Registration Card. Explaining further, he said the incident lasted for about 15 minutes, the appellant had put on a football jersey which was yellow in colour and prior to being cut with the machete, he told the appellant "*Abdul hata mimi ndugu yako unanifanyia hayo*" and his fellows turned to him saying "*kumbe unamjua huyo*". The bandits disappeared leaving the appellant helpless and bleeding. People who were at the shops turned up for help and took him to hospital. While at the hospital he claimed to have named the appellant and Ally King'ambe to his father one Sefu Said (PW3). The latter confirmed so during his testimony. PW1 claimed that he knew the appellant prior to that day as he was his neighbour and he used to go with Ally King'ambe to Mbiku area where he lived. Although F. 9129 DC Ayubu (PW4) claimed to have interrogated the appellant and the appellant confessed committing the offence, only a certificate of seizure and a machete was tendered as

exhibits P2 and P3, respectively. Nothing was said as to why the appellant's cautioned statement was not recorded and produced in court during trial. While the offence was committed on 18/9/2017 the appellant was arrested on 13/10/2017, about a month later. At the hospital, PW1 was attended to by Abdul Ahman Malifedha (PW2), a Clinical Officer, who reduced his finding that two fingers were cut off on a PF3 which was admitted as exhibit P1.

In defence, the appellant flatly denied knowing anything concerning the offence he was charged with and claimed that he was arrested while on the way back from his work place at Mbiku Area Machinjioni. He was with other six people who were later released on bail by police. He could not be bailed out because his relatives were far away. He claimed that PW1 and PW3 were strangers to him and he first saw them in court.

Upon scrutiny of the evidence by both sides, the trial court was convinced that the charge was proved beyond reasonable doubt and proceeded to convict and sentence the appellant to serve thirty years imprisonment.

In his first appeal to the High Court, among the complaints he presented was that the trial court wrongly relied on the incredible visual

identification of PW1 to convict him. Addressing that issue to which she held in the negative hence sustaining the conviction and sentence, the learned judge reasoned that:-

> *"On the 1st ground of appeal on identification, the identification of the appellant by PW1 falls in all four requirements of identification being; the time as to which the event took place was a span of 15 minutes as testified by PW1 within which it was possible to identify the appellant for he was also known by the victim for he was a close person to the victim, the distance within which the appellant was a close range as per the facts availed by the victim and therefore it also necessitated identification of the appellant, the means light that was used to assist PW1 in visual identification was the light from the frames of shops and that it was enough light to identify the appellant, lastly the PW1 was even able to identify the attire of the appellant as he was dressed in a yellow in colour jersey that had number 15 on it. In the case of* ***MUSSA RAMADHAN @ KAYUMBA VS REPUBLIC, Criminal Appeal No. 487/2017 CAT,*** *the above four guidelines were observed with reference to the famous case of* ***WAZIRI AMANI VS REPUBLIC [1980]TLR 250."***

That finding still aggrieved the appellant who believed that identification evidence was insufficient to ground his conviction and to

prove so, like in his first appeal, he appealed to this Court and fronted that complaint as his first ground in his memorandum of appeal. We are aware that the appellant also lodged a supplementary memorandum of appeal. The grounds are repetitive but they substantially grumble about, **one**; variance between the charge and evidence whether it was grievous harm or armed robbery, **two**; there was contradictions in the evidence between witnesses, **three**; the charge was not established, **four**; the judgment lacked points for determination and critical analysis of the evidence, **five**; PW3's evidence was hearsay and **six**; chain of custody of the machete (exhibit P3) was not maintained. The appellant also lodged written arguments in support of the appeal in terms of Rule 74(1) of the Tanzania Court of Appeal Rules, 2009.

As it was before both courts below, the appellant appeared in person before us and was unrepresented. He adopted the grounds of appeal and the written arguments as part of his submission and prayed his appeal to be allowed with an ultimate result that he be released from prison. The respondent Republic, on the other side, had full representation through Sabina Ndunguru and Salome Assey, both learned State Attorneys. They stoutly resisted the appeal.

In view of the evidence on record, we are convinced that the robbery incident occurred at night and the items listed in the charge were stolen and PW1 sustained the injuries in the due course of the incident as shown on exhibit P1. The crucial issue here is who committed the offence. Identification of the appellant is a decisive issue in this appeal for if he is not placed at the scene of crime, discussion of other grounds of appeal will be quite unnecessary. On that account, we shall give it a priority in our deliberation of this appeal. Reference to the parties' arguments shall be made in the due course of this appeal as and when we shall find it befitting.

Looking at the evidence on record, there cannot be any dispute that the offence was committed at night time as both the charge and PW1 are clear on this fact. The prosecution relied on the sole visual identification by PW1 as he was the only witness and victim of that occurrence as, though he said there were other persons at the nearby shops who witnessed, no one volunteered to testify in court. He claimed to have known the appellant earlier before the incident, hence was not a stranger. In what seems to be an attempt to lend assurance on his identification, apart from meeting and exchanging words with the appellant and the incident taking about 15 minutes, he went further to tell the attire of the appellant. Based on this evidence and

notwithstanding PW1's failure to tell the source and intensity of light, Ms. Ndunguru was firm that the evidence relied on was recognition aided by light from nearby shops and that the appellant was positively identified at the scene of crime as being among the five robbers who invaded him and was the one who cut him with machete. The Court's decision in the case of **Chacha Jeremiah Murimi and Three Others vs Republic**, Criminal Appeal No. 551 of 2015 (unreported) was cited to us in bolstering her argument.

We entirely agree with the learned State Attorney that the nature of identification relied on is recognition. Such evidence is considered to be more reliable than identification of a stranger, but we are alive that the Court has occasionally 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."*

We also take note that both courts below were of a concurrent decision that the appellant was positively identified. We need not cite any authority to establish that identification is a factual issue. That being the case, as a second appellate court, we are restrained from disturbing the findings of both courts below save for a situation where we are satisfied that there was a 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. We pronounced so in a chain of decisions to name but few, are in **Mohamed Musero vs R** [1993] TLR 290 and **Amratlal danodar Maltase and Another t/a Zanzibar Silk Stores vs A. H. Juriwala t/a Zanzibar Hotel** [1980] TLR 31.

While taking cognizant of the aforesaid restricted mandate of the Court, it is essential that principles governing visual identification are laid bare for guidance of the Court in the deliberation of the issue of identification. On this we too agree with the learned State Attorney that in **Waziri Amani vs R**, (supra) the Court outlined factors to be considered when the issue of identification comes to picture. The factors were also cited in the case of **Ally Miraji Mkumbi vs Republic**, Criminal Appeal No. 311 of 2018 (unreported) that the trial court should consider the time the culprit was under observation, witness's proximity

to the culprit when the observation was made, the duration the offence was committed, if the offence was committed in the night time, sufficiency of the lighting to facilitate positive identification and whether the witness knew the culprit before the incident and description of the culprit's peculiar features. In **Waziri Amani vs R** case (supra) the Court went further to caution that:-

> *"... in a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight."*

Much as we agree with the Ms. Ndunguru that PW1 led evidence on the duration of time the incident took, the incident took place at night time, the appellant was familiar to him, gave details of the attire he had put on and according to Ms. Ndunguru that they were close that is why the appellant managed to cut PW1, yet the question we still have to ask ourselves is whether the possibilities of PW1 making a mistaken identity was eliminated. Ms. Ndunguru was of the view that no chances of a mistaken identity existed. Taken wholesome, one may very easily be so moved. But, we think, there was something more she had to

consider before she arrived at that conclusion. No wonder that a witness may be able to tell all that PW1 was able to tell but a crucial issue is whether the conditions for a proper identification were favourable. On that we are advantaged to find guidance from the Court's decision in **Raymond Francis vs Republic** [1994] TLR 100 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."*

Alive of that principle of law, we wanted to satisfy ourselves from the learned State Attorney whether the evidence on sufficiency of light was satisfactory. Ms Ndunguru was quick to respond that since PW1 met and had a talk with the appellant and was also able to explain the attire the appellant had put on, then there was no doubt that there was sufficient light at the area which PW1 said came from the business frames where people were doing business. The Court has occasionally insisted that evidence on the sufficiency of light at the scene of crime is of paramount importance for enabling a witness to see and identify properly a person under observation. To cement that stance, in the case

of **Juma Hamad vs Republic**, Criminal Appeal No.141 of 2014 (unreported), with lucidity, the Court observed 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."*

We would let the record speak itself as to what was PW1's testimony as reflected at page 15 of the record on the issue of light at the scene of crime and how he managed to identify the appellant as being among his assailants. He said:-

> *"I know the accused before this court as he is my neighbours and he used to come with Ally King'ambe at Mbiku area where I live. I managed to identify them because before they invaded me they came close to me and great me. In that area where they robbed me is a centre place with* ***business frames which has light*** *and people were doing business in their shops."*
> (Emphasis added)

At any rate, this was nothing but a bare assertion by PW1 that there was light which is insufficient. It is wanting in explanation of its

brightness and source for; various sources emit various extents or intensities of light (**Juma Hamad vs. The Republic**, (supra). That said, doubt shrouds on the sufficiency of light which, in terms of the cardinal principles of criminal justice, is resolved in favour of the appellant.

It is further on evidence that PW1 was invaded by about five persons and according to him he met them at 20:00hrs while going home. On this he said:-

> *"They stopped me, and asked me to give them Tshs 200/= I told them I don't have. Then they invaded me and started to beat me..."*

It is evident that the robbery incident occurred at night time and under terror such that PW1 was beaten and bruised. It does not occur to us that under such circumstances of terror, havoc and panic PW1 could be able to concentrate and see who was attacking him other than struggling to save his life. The call for courts to consider such situations was made long past in **Wamalwa and Another vs Republic** [1999] 2 EA 358 cited in the Court decision in **Baya Lusana vs Republic**, Criminal Appeal No. 593 of 2017 (unreported) where it was held that:

"The Court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of an offence fleetingly and under stressful circumstances."

So, the conditions that obtained at the crime scene cannot be said to have been favourable for a proper and unmistaken identification.

Lastly, it cannot be domineered that PW1's evidence was free from doubt hence undermining his credibility. Even where the conditions are favourable for identification, courts are presaged to satisfy themselves that the witnesses are truthful. As human beings, they are prone to being weak. Cognizant of this fact, the Court pronounced itself in **Jaribu Abdalla vs Republ**ic, Criminal Appeal No. 220 of 1994 (unreported) that:-

"...in matters of identification it is not enough merely to look at the factors favouring accurate identification, equally important is the credibility of witness. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence..."

Both courts below seem to have believed PW1 as a witness of truth. They were justified to think so as every witness is entitled to credence (See **Goodluck Kyando vs R** [2006] TLR 363) unless there are cogent reasons to find otherwise. As for the trial court, it had

opportunity to observe the demeanour of PW1 at the dock hence its determination of credibility based on demeanour was within its exclusive mandate and monopoly. But credibility can also be assessed by a second appellate court by looking at the coherence and consistence of the testimony of the witness (see **Sokoine Range @ Chacha and Another vs Republic**, Criminal Appeal No. 198 of 2010 (unreported).

In the instant matter, after having closely followed the testimony of PW1, with respect, we are unable to come in the same conclusion reached by both courts below that he was a credible and reliable witness. His testimony was inconsistent. As an elaboration, at the beginning of his testimony, he is recorded to have specifically told the trial court that the robbery incident occurred on 18/09/2017 at 20:00hrs. Surprisingly, when he was subjected to cross-examination by the appellant on that material fact, he said the incident took place on the date which he did not remember because a long time had passed. Therefore, PW1 could not safely be said to have been credible enough to be relied upon in grounding a conviction. We therefore dismiss his assertion that he saw and recognized the appellant at the scene of crime as being one of the five bandits who invaded and robbed him.

For the foregoing reasons, we find no convincing evidence that placed the appellant at the scene of crime. That finding renders discussion of other complaints obviously unwarranted as they will not be able to change the outcome of the appeal.

The appeal has merit and we accordingly allow it with an order that the conviction is quashed and sentence set aside. Ultimately, the appellant has to be released from prison forthwith unless incarcerated therein for another lawful cause.

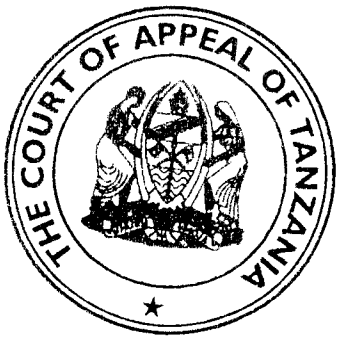
DATED at **DAR ES SALAAM** this 11th day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 21st day of October, 2021 in the presence of the appellant in person linked via-video from Ukonga Prison, and Ms. Ester Kyara, Senior learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL