IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 243 OF 2020

NYABOHE NYAGWISI NYAGWISI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Galeba, J.)

dated the 22nd day of May, 2020
in
Criminal Appeal No. 25 of 2020

.....

JUDGMENT OF THE COURT

7th & 14th June, 2022

MAKUNGU, J.A.:

In the District Court of Tarime at Tarime, Nyabohe s/o Nyagwisi @ Nyagwisi the appellant along with three others who are not subject of this appeal, were charged with armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002. After a full trial the appellant was convicted and sentenced to a term of thirty years imprisonment.

Aggrieved, the appellant appealed to the High Court of Tanzania, Musoma Registry where he was not successful. Still dissatisfied, he has come to this Court on appeal.

In his memorandum of appeal, the appellant has raised six grounds touching on the questions of identification and credibility.

In this appeal, the appellant who was unrepresented fended for himself; while the respondent Republic was represented by Mr. Tawabu Yahaya Issa and Mr. Nico Malekela, both learned State Attorneys. Mr. Issa did resist the appeal.

Briefly the prosecution case from a total of nine witnesses is to this effect:- on the fateful day around 23:00 hrs, when Mgaya Matiaga (PW1) and Justina Mgaya (PW4) husband and wife respectively, were sleeping, a group of armed robbers invaded their house. He opened the door and suddenly he was shot by a firearm on his left ribs whereupon he raised alarm to get assistance from neighbours. The invaders went to the cowshed and stole cows. It is the evidence of PW1 that the appellant was holding a gun and a machete. And it is further the evidence of PW1 that the appellant was the one who injured him on his left ribs. They failed to comprehend. Whatever the situation, the bandits managed to take a number of cows.

As to how he was able to identify the appellant and others, PW1 said he was able to do so with aid of a solar tube light. He adduced that he saw and recognized the appellant among the invaders and that the

appellant was a familiar face because they are neighbours living in the same village. PW4 gave almost similar evidence and also claimed to have recognized the appellant and raised an alarm but no one responded as the appellant had fired gun shot at PW1 and also to scare would be rescuers.

PW1 was taken to hospital by his younger brother Otaigo where he was admitted until the following morning. In the morning when he was discharged, and then he heard about the arrest of some suspects in connection with the robbery committed at his homestead. He went to Tarime Police and gave his statement and told them among the group he recognized was Nyabohe and that his 35 cows were stolen. PW2 D 9518 SGT Ally and PW7 did not mention when the appellant was arrested.

Be that as it may, the appellant on the other hand denied to have committed the offence. He, however, admitted to have been at the scene after the alarm was raised from a neighbouring house. He reached the place and gathered with other people who came and followed the footprints.

Both lower courts were satisfied that the conditions prevailing were conducive for correct identification that the appellant was among the robbers.

Arguing against the appeal, Mr. Issa submitted, as observed earlier on, that the main ground in this appeal is the question of identification. Basically, he said the offence was committed during night time; involving a group of people, it was sudden and above all the light which came from a solar tube illuminated the scene and the appellant was a familiar face to PW1 and PW4 is enough for correct identification. In other words, the evidence of identification is watertight to ground a conviction. He urged us to dismiss the appeal.

This is the second appeal. We are alive to the well known principle that generally this Court, being a second appellate court, is precluded from interfering with the concurrent findings of fact of the courts below unless it is shown that there is misdirection or non-directions on the evidence or that the said courts completely misapprehended the substance, nature and quality of the evidence. (See **DPP v. Jaffar Mfaume Kawawa** [1981] TLR 149 and **Salum Mhando v. R** [1993] TLR 170).

Having that principle in mind let us see whether the concurrent findings of the courts below were correct. There is no doubt at all as found out by the lower courts that the house of PW1 was invaded by robbers who stole a number of cows and in the process PW1 was injured.

The crux of the matter in this appeal is:- Was the appellant one amongst the robbers who invaded PW1's house?

It is in the evidence that the offence was committed during night time. So, the question is, were the prevailing conditions favourable for correct identification? The trial court properly addressed itself that the case solely depends on the question of identification. It cited three cases *inter alia*, the celebrated case of **Waziri Amani v. R** [1980] TLR 250, **Raymond Francis v. R**, Criminal Appeal No. 162 of 1993 (unreported) and **Mohamed Achui v. Rex** (1942) 9 EACA 72.

Our first concern in this appeal is whether it had really been established that the circumstances of identification of the appellant were favourable for proper identification. Evaluating the evidence on record, we are respectfully of the view that the conditions of identification cannot be said to have been ideal as we shall explain. Unlike the first appellate court, we are further unable to assert, that when the offender and PW1 know each other chances of mistaken identity becomes minimal. We are of the considered opinion, however, that we cannot safely discount the very real possibility of mistaken identity even where the victim and the assailant are familiar to each other as long as circumstances surrounding the identification are not favourable for proper identification. There is

large body of case law in this area. In the case of **Philipo Rukaiza @ Kicheche Mbogo v. Republic**, Criminal Appeal No. 25 of 1994 (unreported) we state that:

> *"The evidence in every case where visual identification is what is relied on must be subject to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances there was really sure opportunity and convicting ability to identify the person correctly and that every reasonable possibility of error had dispelled. There could be mistake in identification notwithstanding the honest belief of an identifying witness."*

Clearly, the law is perfectly settled that evidence of visual identification is the weakest kind and unreliable and the court should not rely on such evidence without warning itself of its fallibility. In **Felician Joseph V. Republic,** Criminal Appeal No. 152 of 2011 (unreported) the Court emphasized that:

> *"... visual and aural identification evidence, be that of a stranger or a previously known person, particularly one done under unfavourable conditions, such as at night, is of the weakest kind and unreliable. Such evidence should be approached with utmost circumspection. No court should act on such evidence unless all possibilities*

of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."

Thus, as observed above, reliance on such evidence to convict an accused person should only be where all likelihood of mistaken identity is eliminated and when the court is satisfied that the evidence before it, is absolutely watertight. See for instance, **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported).

In the landmark case of **Waziri Amani v. Republic** (supra), the Court outlined factors that have to be considered when courts deliberate on identification evidence. These factors are such as; **one**, the time the witness had the accused under observation. **Two**, the distance at which the witness had the accused under observation. **Three**, if there was any light, then the source and intensity of such light; and **Four**, whether the witness knew the accused prior to the incident.

Corresponding observations were made in the decisions of this Court in **Africa Mwambogo v. Republic** [1984] TLR 240, **Raymond Francis v. Republic** (supra), **August Mahiyo v. Republic** [1993] TLR 117, **Mohamed Musero v. Republic,** [1993] TLR 290, **Nyigoso Masolwa v. Republic** [1994] TLR 186 and **Marwa Wang'iti Mwita and Another v. Republic**, Criminal Appeal No. 6 of 1995 (unreported).

It is not insignificant to say that, reading the evidence on record in particular the evidence of PW1 and PW4 the identifying witnesses, we are of the view that the conditions for proper identification undoubtedly were not favourable. The trial court found that the identification of the appellant by those witnesses was proper in the circumstances of the case. However, looking at the record of appeal at pages 8-10 PW1 story was that on 10th August, 2017 at around 23:00 hours, the appellant and many others invaded his home and stole cows and that he was shot with bullets on his left ribs. He went on to say that, he identified the appellant through space from the door and the light outside was on. According to PW1, he further identified the appellant because he was familiar to him as he was his neighbour often seen in the street.

The circumstances surrounding the identification as explained above leaves no room suggestive of the fact that PW1 favourably identified the appellant at the scene of the crime and this is particularly so when the question of the type of light and its intensity is concerned as these were not explained by PW1. The totality of these facts persuades us to hold that the identification of the appellant was not watertight to warrant the appellant's conviction. We are settled in our minds that matters at the trial court and the first appellate court were not as neatly tied up as they

should have been otherwise, they would not have come to the conclusions they arrived. In the circumstances, we find the 2nd ground to have merit.

The above would have sufficed to dispose the appeal but, we are however, obliged to consider, albeit briefly, the 4th 5th and 6th grounds of appeal that the prosecution did not prove the case beyond reasonable doubt. In **Woodmington v. DPP** (1935) AC 462, it was held *inter alia* that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it. In the case of **Magendo Paul & Another v. Republic** (1993) TLR 219 the Court held that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

We hasten to state at this point that, in seeking to answer the question on whether the prosecution in the instant appeal proved the case beyond reasonable doubt, we think this should not detain us much and the answer is not far-fetched. We have already discussed at considerable length the weaknesses in the prosecution's case. The learned State

Attorney was not right to argue that the prosecution did prove the case beyond reasonable doubt. This is particularly clear from the evidence on record which revealed in no uncertain terms that PW1's identification of the appellant was watertight and furthermore, there was proof of offence.

The issue of identity and how the appellant was arrested is clouded by doubt due to the fact that two witnesses from the police who testified at the trial court never mentioned the date of arrest. We observed that, at the trial court the case was prosecuted by W.P. 4381 D/SSGT Mwani and A/Insp. Kazeni. This throws in some questions on the arrest of the appellant and the involvement of the police in investigation of the alleged crime. It is also not clear from the record whether PW1 was injured when he opened the door to face the bandits as stated by himself or he was shot when he was inside the house as stated by PW4. It is clear that the evidence of PW1 and PW4 contradicted on material facts.

For all the foregoing reasons, we are satisfied that the two courts below misapprehended the evidence. We thus find that the appellant's conviction cannot be supported by the evidence on record. We therefore think that the ground on failure of PW1 and PW2 to identify the appellant, suffices to dispose of the appeal. All in all, we are satisfied that the prosecution did not prove the case against the appellant to the required

standard. Accordingly, we allow the appeal, quash the conviction and set aside the 30 years prison sentence. We order the appellant's immediate release from prison unless he is otherwise lawfully detained.

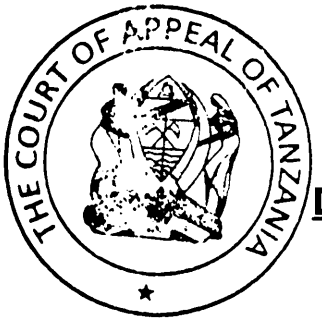
DATED at **MUSOMA** this 13th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2022 in the presence of the Appellant in person and Mr. Isihaka Ibrahim, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL