IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J. A., LEVIRA, J.A And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 115 OF 2019

WAMBURA MARWA WAMBURA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mgeyekwa, J.)

dated the 13th day of February, 2019

in

(DC) Criminal Appeal No. 386 of 2017

.....

JUDGMENT OF THE COURT

6th & 14th July, 2022

LEVIRA, J.A.:

In the District Court of Tarime at Tarime (the trial court), the appellant Wambura Marwa Wambura was charged with the offence of armed robbery contrary to section 287A of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). The particulars of the offence were to the effect that, on the 1st day of March, 2015 at about 20:15 hours at Kitagasembe Village within Tarime District in Mara Region, the appellant did steal cash TZS. 515,000.00 and one cellular phone make Nokia valued at TZS. 45,000.00 both valued at TZS. 560,000.00 the property of one Mwita Chandi and immediately, before and after stealing he used a machete to threaten him in order to obtain and

retain the stolen properties. He pleaded not guilty to the charge and thus the prosecution had to call two witnesses to prove the charge against him.

Mwita Chandi who was the victim testified as PW1. It was his testimony that on the fateful night while on his way to the shop to buy some items, he met with the appellant who was in company with another person whom he did not recognize. The appellant ordered PW1 to sit down but he was puzzled thinking that the appellant was joking because he knew him as they lived in the same suburb, so he asked him what he wanted. The appellant beat him in his back by using flat part of the machete. The appellant's fellow came closer to him, he obeyed the order and sat down. Thereafter, the appellant placed the machete at PW1's neck threatening to kill him. PW1 shouted only once as he was threatened to be killed had he repeated to shout. He thus kept quiet. Then, the appellant dipped his hand into PW1's trousers' pocket, took TZS. 515,000.00 and one mobile phone make Nokia.

PW1 testified further that, while he was being robbed Marwa Gimngáya from Kitegasembe Village arrived at the scene of crime and asked the appellant what was going on but the appellant did not reply, instead, he and his colleague ran away. Soon thereafter, Joseph Keira Daniel (PW2) arrived at the scene of crime in response to PW1's alarm and he told PW1 that while on his way to the scene, he had met the appellant running. The appellant was traced in vain before PW1 reported the incident to the Sirari Police Station.

In his testimony, PW2 confirmed to have met the appellant whom he knew for a long time running and that he tried to inquire from him about what was happening as he was running from the scene of crime, but the appellant did not reply. It was also the testimony of PW2 that a lot of people joined them in tracing the appellant but could not succeed to arrest him because he ran into the forest.

The appellant (DW1) raised a defence of alibi to the effect that on the material date and time, he was not at the scene of crime as he was sick at home. Later, he felt that he needed assistance and thus he went to the house of a lady called Diana whom they had four children together, who also happened to be PW1's sister.

Upon a full trial, the trial court was satisfied that the prosecution case was proved beyond reasonable doubt. It convicted and sentenced the appellant to thirty (30) years imprisonment. Aggrieved by both the conviction and sentence, the appellant unsuccessfully appealed to the High Court, hence the present appeal.

The appellant has presented before us a memorandum of appeal comprising five grounds which in essence fall under the following three complaints:

1. *That, the trial and first appellate courts had overlooked in both the law and facts to consider that there was unexplained delay in arresting the appellant and that the appellant's charge was rather an afterthought.*
2. *That, the trial and first appellate courts had overlooked to consider that the prosecution did not call the investigator of the case as a witness and thus the charge against the appellant was bound to crumble, as a result, the appellant was erroneously convicted and sentenced.*
3. *That, the trial and first appellate courts erred in law and facts to rely on unfavourable visual identification as the sole basis to convict the appellant.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent Republic had the services of Ms. Mwamini Yoram Fyeregete, learned Senior State Attorney. It was Ms. Fyeregete who first submitted in reply to the above complaints as the appellant only preferred to make a rejoinder thereafter. She indicated at the out set that the respondent opposes the appeal.

Replying on the first complaint regarding unexplained delay to arrest and arraign the appellant before the trial court, Ms. Fyeregete conceded that the appellant was arrested after a year from the date of the incident, however she

said, the reason for the delay was mainly because the appellant disappeared after the incident. She referred us to page 7 of the record of appeal where PW1 stated that he shouted while at the scene of crime and the appellant ran away. Thereafter, he reported the incident to the police station and was given Report Book (RB) number. She added that, the fact that the appellant escaped after the incident was confirmed by PW2 who met the appellant running from the scene of crime. Therefore, she contended that, the delay in arresting the appellant immediately after the incident was because he escaped. She urged us to dismiss this complaint.

Regarding the second complaint, Ms. Fyeregete as well conceded that the investigator was not called as a witness. Nonetheless, she submitted that, PW1 and PW2 were the key witnesses and their evidence was sufficient to prove the case against the appellant to the required standard. It was her contention that, failure to call the investigator does not mean that the appellant did not commit the alleged offence; after all she said, in terms of section 143 of the Evidence Act [Cap 6 R.E. 2022] (the Evidence Act) there is no specific number of witnesses which is required to prove a case. Therefore, she urged us to find this complaint without merits.

Submitting on the third complaint regarding identification, Ms. Fyeregete submitted that the appellant was properly identified at the scene of crime by PW1 and PW2 while he was running. Besides, she added, both PW1 and PW2

knew the appellant even before the incident. To clarify on this point, she referred us to pages 6 – 8 of the record of appeal, particularly at page 7 of the record where PW1 stated that the appellant ordered him to sit down and he sat after being beaten with flat part of the machete. According to her, the time spent in conversation between PW1 and the appellant was sufficient for PW1 to identify the appellant. In addition, she said, PW1 stated during cross-examination that there was moonlight which aided him to recognize the appellant to the extent of describing even the colours of his clothes (red T-shirt with black cloth and red cap) he wore on that fateful night. Moreover, PW1 was able to mention the appellant to be the robber to PW2, immediately, upon PW2's arrival at the scene of crime.

Ms. Fyeregete went on to submit that the evidence of PW1 was corroborated by the testimony of PW2 who met the appellant and his accomplice running from the scene of crime and upon arriving there, PW1 told him that he was robbed by the appellant. Therefore, it was Ms. Fyeregete's further submission that the moonlight was sufficient for PW1 to properly recognize the appellant whom he knew for three years prior to the incident. To support her proposition, she cited the case of **Kennedy Ivan v. Republic,** Criminal Appeal No. 178 of 2007 (unreported) in which the Court considered familiarity, presence of lamp and moonlight to be sufficient for proper identification.

Ms. Fyeregete also relied on the same case of **Kennedy Ivan** (supra) to cement on the ability of a witness to name the suspect at the earliest possible opportune time and voice identification as it was in the present case, where PW1 named the appellant to PW2 and he identified him (the appellant) by voice. She concluded that the appellant was properly identified and the prosecution proved its case against him beyond reasonable doubt. She urged us to dismiss the appeal and sustain the appellant's conviction and sentence.

While responding to the question posed on her by the Court, Ms. Fyeregete stated that the evidence on record does not show as to how, when and where the appellant was arrested. Regarding whether PW1 mentioned and described the appellant at the police station he allegedly went to report, Ms. Fyeregete responded that there is nothing on the record of appeal to that effect except that, he reported and was given the RB. As regards reliability of voice identification, Ms. Fyeregete submitted that it is the weakest evidence of identification though in certain circumstances where the victim knows the culprit, it can be relied upon in recognition as stated in the case of **Kennedy Ivan** (supra).

In rejoinder, the appellant stated that his complaints are merited. **First,** he was arrested after lapse of one year and fifteen days without any justifiable explanation. He claimed that he was in his village for the whole time and he did not escape as the respondent's counsel would wish the Court to believe.

He wondered that even the learned Senior State Attorney did not know how he was arrested. **Second,** he vehemently argued that failure of the prosecution to call the investigator of the case to testify is clear evidence that the incident did not happen as alleged. **Third,** he was not identified at the scene of crime as alleged because the prosecution witnesses did not describe the intensity of the moonlight on the fateful night. Finally, he prayed for the appeal to be allowed and the Court to set him free.

We have carefully considered submissions by both sides, record of appeal and the appellant's complaints. We agree with both parties that the appeal raises three main issues regarding unexplained delay in arresting of the appellant, failure to call the investigator as a witness and identification of the appellant at the scene of crime. We shall dispose of those issues in the order they were presented before us.

Starting with the first issue which falls under the first complaint, whether there was unexplained delay in arresting the appellant, the record of appeal is so clear that the offence was committed on 1st March, 2015 but the appellant was arraigned before the trial court on 18th March, 2016, more than a year later. It is settled position that unexplained delay to arrest a suspect cast doubt on the veracity of the witnesses' – see: **Juma Shabani @ Juma v. Republic,** Criminal Appeal No. 168 of 2004; **Chakwe Lekuchela v. Republic,** Criminal

Appeal No. 204 of 2006 and **Samuel Thomas v. Republic**, Criminal Appeal No. 23 of 2011 (all unreported).

In the present case, Ms. Fyeregete contended that the reason for the delay to arrest the appellant immediately after the incident was because he disappeared from the scene of crime, justifying it with the RB issued to PW1 when he reported the incident to the police. However, we have thoroughly gone through the record of appeal, but could not find a clear explanation as to why it took the prosecution more than a year to arrest the appellant. We say so because the record of appeal is silent concerning the appellant's whereabouts after the incident except that he was arraigned before the trial court on 18th March, 2016. Upon probing Ms. Fyeregete as to how, where and when the appellant was arrested, she could not refer us to any part of the record. We note that the appellant raised a concern before the High Court which we think was valid, that if indeed he disappeared from the village, why then the prosecution did not call the village leader to testify to that effect?

With respect, we do not share views with Ms. Fyeregete that a mere fact that PW1 was issued with the RB when he reported the incident to the police is sufficient to prove that the appellant escaped from the village for the whole year and above until when he was arraigned before the trial court. There is nothing on the record of appeal indicating as to where the appellant was arrested, we think, such evidence could shade more light on the reason(s) of

his delayed arrest; but as stated above, there is nothing to that effect. We are of the settled opinion that unexplained delay to arrest the appellant in the current case cast doubt on the prosecution case.

In **Chakwe Lekuchela v. Republic** (supra) while dealing with almost similar issue, the Court had this to say:

> *"On the other hand, we still have found no answer to the appellant's additional ground of appeal as to why there was unexplained delay in arresting him. Still, there is no convincing answer as to why the alleged robbery happened on 2/1/2003 but the appellant who was the neighbour of PW1 in the village was not arrested immediately, it took three weeks to arrest him. He was arrested on 25/1/2003. Worst enough, the matter was reported to the police station, which means the police had that information that the appellant was a suspect... This unexplained delay raises serious doubt as to why there was such a delay in arresting the appellant while he was in the same village with PW1."*

The Court went on quoting what was stated in its decision in the case of **Juma Shabani @ Juma v. Republic** (supra) thus:

> *"... the issue pertaining to the unexplained delay in arresting the appellant was not addressed by the trial magistrate and the learned Judge on appeal as well.* ***It is an important aspect which if not resolved casts doubt on the veracity of the witnesses."*** *[Emphasis Added].*

In the light of the above decisions, we take note that PW1 testified that he reported the incident to the police station but the record is silent whether or not the appellant was arrested by the police, and if so, it is not stated why his arrest was so delayed. In the circumstances, we find the prosecution case doubtful in that aspect; hence, merit in the first complaint.

We now move to consider the second complaint which raises pertinent issue as to whether the prosecution was bound to call the investigator as a witness in this case. The law requires the prosecution to call material witness(s) to prove the case against an accused person, failure of which, entitles the court to draw an inference adverse to the prosecution – see: **Azizi Abdallah v. Republic** [1991] T.L.R. 71 it was stated that:

> *"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

In the present case, Ms. Fyeregete argued that PW1 and PW2 were the key witnesses who proved the case to the required stand and therefore, that there was no need to call the investigator as a witness. She made reference

to section 143 of the Evidence Act to fortify her argument while insisting that there is no specific number of witnesses required to prove a certain fact.

We agree with the stated position of the law by Ms. Fyeregete, that under section 143 of the Evidence Act, there is no particular number of witnesses required to prove a fact. However, we wish to state that whether or not to call a certain person as a witness depends on the circumstances of each case and the relevance of the evidence of such witness to a case. Therefore, in our considered opinion, section 143 of the Evidence Act was not intended and cannot be applied as a readymade answer to every question regarding failure to call a witness(s).

Having so remarked, we think, in the circumstances of this case where PW1 claimed that he reported to the police station immediately after the incident, it was necessary for the investigator to be called as a witness as rightly in our view, submitted by the appellant. We say so because we think the investigator was a material witness who could tell the court a number of things which remained unattended by the prosecution. For instance, it was expected that the investigator could explain out very crucial questions raised by the appellant in the first complaint; **one**, when, where and who arrested the appellant; **two,** why delay in arresting the appellant; **three,** whether indeed the appellant moved and stayed out of the village until the time when he was arrested; and **four,** whether PW1 named the culprit and or described

him at the police station when he went to report the incident. We think, answers to all those questions could not only explain the reasons for delay in arresting the appellant but also whether he was properly identified at the scene of crime which is the appellant's complaint in the next issue to be determined. We entertain no doubt that in the circumstances of the present case, the investigator was a material witness and the prosecution was duty bound to call him as a witness. In the case of **Baya Lusana v. Republic,** Criminal Appeal No.593 of 2017 (unreported), when the Court was dealing with almost an akin situation in the case of attempted murder where the investigator was not called to testify, it had the following to say:

> *"Furthermore, it really taxed our mind as to why the investigator was not called to testify on such a serious offence which posed a threat to the life of PW1. It is the investigator who would have shed light as to what precipitated the appellant's arrest because while the appellant was charged with attempted murder the evidence on record shows that he was arrested for stealing cattle but on interrogation he confessed to have assaulted PW1. .... Failure to call material witness entitles this Court to draw an inference adverse to the prosecution – See –* ***AZIZ ABDALLAH vs. REPUBLIC*** *[1991] T.L.R. 71."*

Being guided by the position above and as we have already stated that the investigator was a material witness in the present case, with respect, we are unable to agree with Ms. Fyeregete and the first appellate court that section

143 of the Evidence Act will rescue the situation at hand. We are inclined to find that failure to call the investigator as a witness leaves us with no option but to draw an inference adverse to the prosecution as we accordingly do. The appellant's second complaint is thus meritorious.

We now revert to consider the third issue as to whether the appellant was properly identified at the scene of crime as presented under the third complaint.

It is trite law that no court should act on the evidence of visual identification, unless, all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is watertight – see **Waziri Amani v. Republic** (1980) T.L.R. 250; **Stuart Erasto Yakobo v. Republic,** Criminal Appeal No. 202 of 2004 and **Richard Otieno @ Gullo v. Republic,** Criminal Appeal No. 367 of 2018 (both unreported)

In the instant case, the appellant's main complaint as far as identification is concerned was that he was not identified at the scene of crime and the alleged moonlight by PW1 was not conducive for proper identification. In countering the appellant's arguments, Ms. Fyeregete just as the first appellate court relied on familiarity between the appellant and both PW1 and PW2; the conversation between the appellant and PW1; moonlight and voice recognition.

We shall start with visual identification where PW1 and PW2 stated that they were able to identify the appellant as there was moonlight. We take note that both witnesses did not state the source of light which enabled them to identify the appellant in examination in chief. They only disclosed it when they were cross-examined by the appellant. At page 7 of the record of appeal, PW1 stated that the moonlight enabled him to identify the face of the appellant and the red T-shirt with black colour and red cap. On his part, PW2 stated that he saw the appellant running from the scene of crime and he was wearing a black T-shirt and red cap and he had TZS. 515,000.00 and mobile phone.

Notwithstanding the stage of disclosing the source of light by the identifying witnesses, the pertinent question to be considered is whether the said moonlight was so bright to the extent of eliminating possibilities of mistaken identity? The answer to this question is not farfetched. The record of appeal bears no evidence as far as the intensity of the said moonlight is concerned. It is so doubtful whether indeed the prosecution witnesses were able to properly identify the appellant at the scene of crime. Their account is doubtful following a varied description of the colour of clothes the appellant allegedly wore on the fateful night. While PW1 testified to have seen red Tshirt with black cloth and red cap, on the other hand PW2 testified that he was wearing black T-shirt and a red cap and had TZS. 515,000.00 and a mobile phone.

Ms. Fyeregete convinced us to believe that the light from the moon and the time spent at the scene were sufficient for proper identification taking into consideration that PW1 and the appellant knew each other before the incident. With respect, we are not convinced that in the absence of clear description of the intensity of the light illuminated from the moon it can certainly be said that the appellant was properly identified. It is common knowledge that brightness of moonlight is not standard light all the time. It varies according to the seasons and other factors. Therefore, in the circumstances where the intensity of the moon light at the scene of crime is not stated, the possibilities of mistaken identity cannot be ruled out. We are surprised that the undescribed intensity of the moonlight enabled PW2 to identify the appellant, the amount of money and the mobile phone which were robbed by the appellant while running from the scene of crime; we say no more. In **Osca Mkondya v. D.P.P,** Criminal No. 505 of 2017, the Court was guided by its previous decision in **Juma Hamad v. Republic,** Criminal Appeal No. 141 of 2014 (both unreported) where it stated:

> *"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".*

In her submission, Ms. Fyeregete urged us to consider the fact that the appellant and both PW1 and PW2 knew each other even before the incident, together with time which PW1 and the appellant spent at the scene of crime. It is so unfortunate that PW1 did not state the time he spent with the appellant at the scene of crime. Moreover, our decisions do not base on speculations but established facts and law. Therefore, we are not prepared to hold that the time spent by the two with the aid of undescribed intensity of moonlight enabled them to properly identify the appellant at the scene of crime. As regards the claim that PW1 and PW2 knew the appellant prior to the incident and thus it was easy to recognize him at the scene of crime, we are equally unable to agree with such assertion because, prior knowledge of an accused person is not an automatic guarantee of his/her identification in an unfavourable condition(s) like in the current case where the offence was committed at night and the undescribed moonlight is said to be the only source of light.

In **Elias Yobwa @ Mkalagale v. Republic,** Criminal Appeal No. 405 of 2015 when the Court was resolving an issue regarding recognition by the identifying witness as in the present case, it cited the case of **Said Chally Scania v. Republic,** Criminal No. 89 of 2005 (both unreported) and stated that:

"We wish to stress that even in recognition cases, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, ***even when a witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."***

[Emphasis added].

Having considered circumstances of the present case, we find that it is not safe to conclude that the appellant was properly recognized by PW1 and PW2 at the scene of crime while the intensity of moonlight was not stated.

Another type of recognition which was made by PW1 at the scene of crime according to Ms. Fyeregete is through voice of the appellant whom he knew for almost three years. The law is equally settled as far as voice identification is concerned. It is as well one of the weakest kind of evidence as it was stated in **Stuart Erast Yakobo v. Republic**, Criminal Appeal No. 202 of 2004 (unreported) thus:

"As for voice identification it will be recalled that PW1 and PW2 said that, besides the firelight, they also identified him by voice. The issue is whether voice identification is reliable in law. In our considered opinion, voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it. We say so because there is always a possibility that a person may imitate another

person's voice. ***For voice identification to be relied upon it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime."*** *[Emphasis added].*

In the present case besides the fact that PW1 and the appellant were living in the same village, there is no other evidence in the record of appeal which establishes the relationship between them and how often the appellant and PW1 had occasions of meeting and or making conversation. The only occasion which is revealed in the record of appeal is on the fateful night where PW1 at page 7 of the record of appeal stated as follows:

"Wambura ***told me to sit down****..... I thought he was just joking as he is a person, I know.... Marwa took his panga and kept in my neck while* ***saying he will kill me,*** *I shouted only ones* ***he told me repeat and see****.... I identified Marwa by that time as we reside in the same suburb." [Emphasis added].*

The above excerpt clearly indicates that there was no conversation, so to speak, between PW1 and the appellant. It was only three sentences allegedly coming from the appellant, to wit, *"sit down, I will kill you and repeat and see".* Without clear evidence on the relationship and familiarity between PW1 and the appellant, we think, the possibility of mistaken voice identification cannot be ruled out.

Having paid regard to all we have endeavoured to discuss above in relation to the appellant's identification at the scene of crime, with respect, we cautiously reverse the concurrent findings of both courts bellow in respect of the identification of the appellant. We find and hold that the appellant was not properly identified at the scene of crime be it visually and or through voice. We as well find merit in the complaint in respect of identification.

In totality, we find that the prosecution failed to prove its case against the appellant beyond reasonable doubt. As a result, all evidential gaps identified are resolved in favour of the appellant. Consequently, we allow the appeal, quash conviction and set aside the sentence. The appellant is to be released from custody forthwith unless otherwise lawfully held.

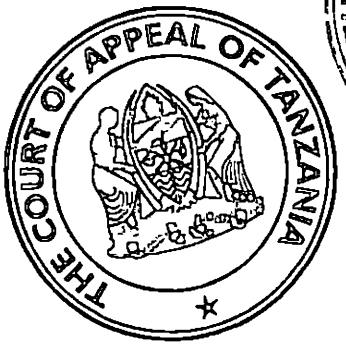
DATED at **MWANZA** this 14th day of July, 2022.

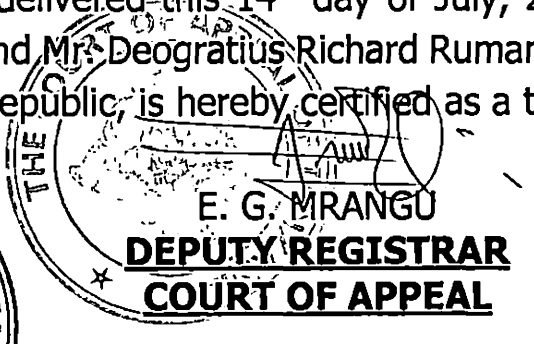
M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

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





E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL