IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 258 OF 2017

PETER MARCO @JOHN .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tabora)

(Mallaba, J)

dated the 29th day of March, 2017
in
Criminal Appeal No. 290 of 2016

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JUDGMENT OF THE COURT

29th March & 11th August, 2022

MWANDAMBO, J.A.:

The appellant Peter Marco @John was charged jointly with two other accused persons before the District Court of Igunga with the offence of armed robbery contrary to section 287A of the Penal Code. The particulars of the charge alleged that on 07/08/2016, at 23.45 hours at Mwanzugi Village, the appellant and his co- accused did steal several items all valued at TZS 720,000.00 the property of Sister Aline D/o Nicette and immediately before and after the said stealing, they used a panga in order to obtain and retain such properties.

The facts resulting into the case before the trial court from which the appeal has arisen were to the effect that on the night of 07/08/2016, armed robbers invaded a compound of Roman Catholic Church Hospital at Mwanzugi village in Igunga District, Tabora Region. Having gained access to the compound, the robbers forced their entry into a bed room occupied by Sister Aline D/o Nicette, grabbed from her cash money in the sum of TZS 120,000.00, one digital camera and a mobile phone, Samsung make. Three culprits, the appellant included were arrested a few days later and charged of the offence of armed robbery to which they pleaded not guilty.

The prosecution sought to prove the case against them through the testimonies of four witnesses namely; Sister Aline D/o Nicette (PW1), Francisca D/o Francis (PW2), William S/o Shaban (PW3) and E. 11433 D/CPL Thomas (PW4). However, since the offence was claimed to have occurred at night, the case for the prosecution rested on the evidence of visual identification of the culprits and this came largely from PW1 and PW3. Whereas PW2's testimony was too general and without any evidential value, PW4's evidence was limited to recording a cautioned statement from the appellant.

Following the trial court's ruling that the appellant and his colleagues had a case to answer requiring them to defend, they all gave evidence on oath distancing themselves from the scene of crime on the material night. In particular, although he did not deny that he had been an employee as a night guard at the hospital where the offence was committed, the appellant stated that he was at a fishing site on 07/08/2016 only to be followed by Mwanzugi Village Government leadership the following day who took him to the scene of the crime for interrogation.

In its judgment, the trial court believed the evidence of PW1 who stated that she recognised and identified the appellant with the aid of electricity light in her room even though he had covered his head with a hat because he was familiar to her, having been an employee of the hospital. The trial court took the view that PW1's evidence was sufficiently corroborated by PW3; a night watchman who told the trial court that he was invaded by armed bandits who shot him with a gun leaving him unconscious. PW3 stated that since there was an electricity light at the scene, he managed to identify the appellant who was armed with a panga and a gun. Finally, the trial court relied on the cautioned statement recorded from the appellant and tendered by PW4.

On the strength of the above stated evidence, the trial court found the appellant guilty as charged, convicted him and sentenced him to 30 years' imprisonment. The two co accused person were acquitted for want of cogent evidence linking them with the charged offence.

The appellant's appeal to the High Court sitting at Tabora was unsuccessful. The first appellate court (Mallaba, J) dealt with four grounds of appeal faulting the trial court for convicting the appellant on the evidence which was not credible and hence unsatisfactory for a positive identification. The appellant also faulted his conviction based on the cautioned statement (exhibit P1) for being irregularly admitted.

The first appellate court found no merit in any of the grounds of appeal resulting into the dismissal of the appeal. Against that decision, the appellant has preferred the present appeal predicated upon six grounds of appeal. He faults the first appellate court for sustaining his conviction on the grounds that; **firstly**, the cautioned statement was illegally admitted; **second**, the evidence of visual identification through PW1 and PW3 was questionable; **third**, his grounds of appeal were not considered by the first appellate court; **fourth**, the evidence of PW3 on the possibility of one person holding a panga and gun at the same time was doubtful; **fifth,** the testimonies of PW1 and PW3 on the number of

bandits who allegedly invaded the place was contradictory and **lastly**, the case against him was not proved beyond reasonable doubt.

The appellant who was unrepresented, appeared in person during the hearing of the appeal. He adopted his grounds of appeal before he let Mr. Tito Ambangile Mwakalinga, learned State Attorney for the respondent Republic to reply in opposition to the appeal.

After the learned State Attorney had rested his submissions, the appellant rose to re-join. Generally, he contended that the case against him was too weak because, he was not positively identified at the scene of crime considering that he was sick on the material date only to be arrested the following day in connection with the offence he had not committed. He prayed that his appeal be allowed.

Although the learned State Attorney had initially submitted in favour of admission of the cautioned statement, he abandoned his argument midway having realised that its contents were read before it was cleared for admission. We respectfully agree with him on the strength of our decision in **Robinson Mwanjisi & 3 Others v. R** [2003] TLR 218. It is glaringly clear from the record that what the trial court did was to put the cart before the horse, so to speak. That was irregular and indeed prejudicial to the appellant who had no legal representation. Regrettably,

this aspect eluded the first appellate court's attention. Without further ado, we allow ground one of appeal and, as urged by the learned State Attorney, we expunge the cautioned statement from the record.

We shall next deal with the appellant's complaint in ground three faulting the first appellate court for failure to consider his grounds of appeal in its judgment. The appellant's complaint is that the first appellate court only considered the State Attorney's submissions. Be it as it may, we agree with Mr. Mwakalinga that this ground is bereft of merit. The first appellate court considered the grounds in the petition of appeal without any reference to the respondent's arguments advanced during the hearing of the appeal. There was no suggestion that the first appellate court omitted to consider any of the appellant's ground of appeal. This ground is dismissed.

The appellant's complaint in ground four is premised on the credibility of PW3's evidence that he saw him holding a panga and a gun during the material night. It is the appellant's contention that it could not have been practically possible for the same person to hold two weapons at the same time. The learned State Attorney argued that this ground was not raised and determined before the first appellate court and we respectfully agree with him. As this ground does not involve any point of

law for determination in a second appeal, the Court has no jurisdiction to determine it on the authority of section 6(7) (a) of the Appellate Jurisdiction Act. In any case, that would only be a remote possibility which could not have necessarily dented the case for the prosecution. This ground is rejected.

The fifth ground is dedicated to contradictions in the evidence of PW1 and PW3 on the number of bandits who invaded the place. Mr. Mwakalinga downplayed the complaint and argued that there was no such contradictions in the testimonies of PW1 and PW3 because each gave evidence from a specific perspective. We agree with him. According to PW3 who was a watchman at the hospital, he saw eight bandits, who stormed into the premises out of them, four were armed and very close to him. PW1's version was that, the four-armed robbers stormed into her bedroom and attacked her demanding to be given money lest, she was killed. We have seen no contradiction in the testimonies of PW1 and PW3 who testified on the basis of what each saw at the place he was. This ground is likewise devoid of merit and is dismissed.

We shall now revert to the second ground in which the appellant alleges that the evidence of identification through PW1 and PW3 was too insufficient to place the appellant at the scene of crime. Despite the

precautions against acting on evidence of visual identification, Mr. Mwakalinga impressed upon us that the appellant who was familiar to the two identifying witnesses was positively identified through electricity light illuminating the place considering the distance at which the identifying witnesses were in relation to the robbers. Besides, the learned State Attorney drew our attention to PW1's evidence showing that apart from being in close encounter with the assailants in her bed room, she spent ten minutes with them.

It is common cause that in convicting the appellant, the trial court relied not only on the evidence of PW1 and PW3, it also relied upon exhibit P1. The first appellate court concurred with the trial court on that finding. However, as exhibit P1 has been expunged, the respondent's case on identification rests on the evidence of PW1 and PW3 only. It is equally common cause that from the record, the evidence is one of recognition rather than visual identification per se. It is trite that the conditions for a watertight evidence of visual identification set out in **Waziri Amani v. R** [1980] TLR 250 and other subsequent cases must all be met in cases where the evidence is solely dependent on identification. As we held in **Omari Iddi Mbezi and 3 Others v. R,** Criminal Appeal No. 227 of 2009 (unreported) and other cases, satisfactory evidence of visual identification entails the prosecution meeting all the conditions including, particulars of

the culprit and the source of light facilitating unmistaken identification. Besides, there must be evidence that the identifying witness identified the culprit at an identification parade to distinguish it from dock identification. These criteria are missing in this appeal which explains the reliance on identification by recognition.

Even though the evidence of identification by recognition by an identifying witness who is familiar with the culprit might appear ideal in comparison with visual identification by a total stranger, the Court has held that that evidence should not be treated in isolation from the conditions for a favourable identification. In **Kulwa S/o Mwakajape and Two Others v. R,** Criminal Appeal No. 35 of 2005 (unreported) the Court underscored that the evidence of identification by recognition of a person known to the witness before should not derogate from the prerequisite requirement that conditions for the proper identification of the suspect are favourable. In **Said Chally Scania v. R,** Criminal Appeal No. 69 of 2005 (unreported) the Court stated:-

> "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."

Mindful of the above principle, it is not in dispute in this appeal that the appellant was once an employee of the hospital where the armed robbery took place on the material night. He was familiar to both PW1 and PW3. Scanty as it is, the evidence by PW1 depicts that at the time the bandits stormed into her bedroom, the electricity light was on illuminating it. It is equally in evidence that the armed bandits did not cover their faces and PW1 spent 10 minutes with them during which they demanded to be given money or else they would kill her. There is no doubt that the bandits were at a close range and upon PW1 surrendering money in the sum of TZS 120,000.00, a digital camera and a mobile phone, they left.

On the other hand, PW3's evidence was that eight bandits invaded the place four of whom were armed with pangas. PW3's further evidence was that as the appellant was familiar to him, he managed to identify him and saw him holding a panga and a gun. He told the trial court that he was able to recognise the appellant through electricity light illuminating the place. According to him, the bandits were close enough to him such that even after suffering injury following a gunshot leaving him unconscious, he was able to remember the appellant as one of them.

Indeed, the appellant was arrested the following day in connection with the offence before being arraigned in court together with the two co-accused.

The totality of the above reveals that all precautions against acting on recognition evidence were taken into account and the appellant was singled out as one of the bandits who committed armed robbery on the material night. Like the first appellate court, we have found nothing to disturb the findings of the trial court on the evidence of the identification on the basis of which he was convicted and sentenced.

In view of our holding in ground two, we are satisfied that the evidence proved the case against the appellant beyond reasonable doubt; a standard of proof applicable in criminal cases.

Before penning off, we have found it compelling to say something on the issue raised in the course of hearing concerning the charge sheet. Mr. Mwakalinga conceded that the charge sheet did not disclose the person against whom the threat was directed as an essential ingredient of the offence of armed robbery under section 287A of the Penal Code. However, he pointed out that the defect was curable under section 388 of the Criminal Procedure Act supplemented by our decision in **Jamali Ally @ Salum v. R**, Criminal Appeal No. 52 of 2017 (unreported). We

are mindful of the statutory requirements on the need for charge sheets to be properly drawn. All the same, we agree with the learned State Attorney that in view of the fact that the evidence clearly shows that it was directed to PW1, the omission was innocuous as it did not cause any prejudice to the appellant's trial.

That said, we find no merit in the appeal and dismiss it.

DATED at **DAR ES SALAAM** this 2nd day of August, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The judgment delivered this 11th day of August, 2022 in the presence of the appellant appeared in person and Mr. Omari Kibwana, learned State Attorney for the respondent/Republic both appeared via video link from High Court Tabora, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL