IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KITUSI, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 116 OF 2019

MRONI MTWENA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Bukuku, J.)

dated the 3rd day of November, 2014
in
Criminal Appeal No. 110 of 2013

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JUDGMENT OF THE COURT

28th November & 2nd December, 2022

NDIKA, J.A.:

The High Court of Tanzania sitting at Mwanza (Bukuku, J.) dismissed an appeal by the appellant, Mroni Mtwena, from the judgment of the District Court of Bunda. In effect, the High Court affirmed the appellant's conviction for armed robbery and the corresponding sentence of thirty years' imprisonment. Bemused by the decision, the appellant now appeals on six grounds questioning the cogency and reliability of the prosecution evidence that he was seen and identified at the scene of the crime.

The prosecution alleged at the trial that on 9th September, 2011 at or about 05:00 hours at Mihingo village within Bunda District in Mara Region, the appellant stole TZS. 500,000.00 in cash and one Nokia cellular phone valued at TZS. 40,000.00 both valued at TZS. 540,000.00, the properties of Magebo Mesere and immediately before such stealing, he used a machete cutting the said person on his right hand to obtain the said properties.

The mainstay of the prosecution case was the evidence of the complainant, Magebo Mesere (PW1). He testified that he set off before dawn around 5:00 hours on 9th September, 2011 for Mikomariro. On the way, he bumped into the appellant, his neighbour, with whom he had a short exchange. As he was walking away, the appellant confronted and attacked him with a machete and a club. We interpose to remark here that in his evidence in chief, PW1 did not mention what exactly aided his alleged identification of the appellant. However, in response to cross-examination, he adduced that he saw and identified him at the scene with the aid of moonlight.

The incident left the complainant with a cut wound on his right hand and had three teeth knocked off. The appellant, he said, relieved him of a handphone and TZS. 500,000.00 in cash before he disappeared from the

scene. PW1 recalled having raised an alarm to which several people, including his elder brother Otaigo Mesere (PW2) and a neighbour called Chacha Meki (PW3), responded. He told them what had befallen him at the hands of the appellant. A formal report on the incident was subsequently made at Mugeta Police Post and the complainant was taken to the Bunda District Designated Hospital for treatment.

It appears that PW2 was the first to arrive at the scene. He recalled that on the way to the scene in response to the alarm, he came across the appellant, armed with a machete and a club, claiming to be searching for a lost cellphone. He proceeded to the scene where he found his younger brother lying on the ground severely injured, lamenting that he had been attacked and robbed by the appellant. A few moments later, PW3 came to the scene. According to him, he, too, saw the appellant running away from the scene. PW3 also stated that PW1 pointed an accusing finger at the appellant before he and PW2 took him to the police post to report the incident.

Apart from rebuffing the charge flat out, the appellant blamed his travails on a dispute between his father and both PW1 and PW2 over ownership of a piece of land. He recounted that he was summoned to the

village office on 12th April, 2012 and, to his surprise, he was arrested on arrival on suspicion that he had attacked and robbed PW1, who he acknowledged was his neighbour. On 17th April, 2012 he was arraigned in the trial court for armed robbery, which, he maintained, he did not commit.

In convicting the appellant, the trial court (Hon. S.H. Simfukwe, RM) mainly relied on PW1's testimony that he saw and identified the appellant at the scene. The court found that evidence corroborated by the testimonies of PW2 and PW3 who, at different times, saw the appellant running away from the scene a few moments after the incident. The appellant's defence did not find favour with the learned trial Magistrate.

As hinted earlier, the learned appellate Judge sustained the conviction and the resultant sentence. She supported the trial court's findings as anchored upon soundly and properly evaluated visual identification evidence in line with the guidelines expressed in our seminal decision in **Waziri Amani v. Republic** [1980] T.L.R. 250. She also gave credence to the evidence that PW1 promptly named the appellant as the perpetrator of the crime to PW2 and PW3 who rushed to the scene in response to his call of distress. Moreover, she discounted the appellant's complaint over the

unexplained delay of about seven months in arresting him, reasoning that it did not introduce any doubt to the prosecution case.

At the hearing of the appeal, the appellant, who was self-represented, pressed six grounds of appeal as follows: **One**, that the inexplicable delay of his arrest for over seven months renders the prosecution case doubtful. **Two**, that PW1 did not report the incident to the police promptly implying his alleged identification of the appellant as the robber an afterthought. **Three**, that the visual identification evidence was unreliable due to the failure by the identifying witnesses to give descriptions of the appellant. **Four**, that the learned appellate Judge's reasoning that the appellant might have gone into hiding to avoid arrest was an extraneous matter. **Five**, that the evidence of PW2 and PW3 was unreliable, if not outright hearsay. **Finally**, that the investigator of the case was a material witness who should have been produced at the trial. Without expounding the said grounds, the appellant urged us to allow his appeal.

Evidently, the common thread in the above grounds, as pointed out earlier, is that they assail the cogency and reliability of the prosecution evidence that the appellant was seen and identified at the scene of the crime as the robber who raided and mugged the complainant.

The respondent had the services of Ms. Revina Tibilengwa, learned Principal State Attorney, who was accompanied by Ms. Maryasinta Sebukoto, learned Senior State Attorney, and Mr. Peter Ilole, learned State Attorney.

Arguing the appeal on behalf of the respondent, Ms. Sebukoto declined from the very beginning to support the impugned conviction and sentence. Starting off with Grounds 1, 2, 3 and 4, she contended, in essence, that the visual identification evidence was not watertight. She argued that PW1, who claimed in cross-examination, to have seen and identified the appellant with the aid of moonlight, said nothing about its intensity. She added that PW1's testimony did not elaborate on the duration of the encounter between him and the appellant as well as the proximity between them. The learned Senior State Attorney acknowledged that the unexplained delay of seven months, in arresting the appellant who lived in the same neighborhood with the complainant, rendered doubtful the claim that he was identified at the scene.

Turning to the fifth ground, Ms. Sebukoto conceded that PW2 and PW3 were neither credible nor reliable, partly because none of them mentioned the source of the light that aided their view and identification of the appellant. She submitted further that their testimonies revealed a serious incongruity: that while PW2, who was the first to arrive at the scene in

response to the alarm, claimed to have come across the appellant before he arrived at the scene, PW3, who supposedly arrived at the scene much later, maintained that he found the appellant running from the scene.

Rounding off with the seventh ground, Ms. Sebukoto admitted that the investigator of the case was a material witness that should have testified to explain why the appellant was not arrested promptly. She stressed that since there was no evidence on record that the appellant fled his home after the fateful incident, the investigator or the arresting officer should have shed light on the delay.

Having carefully examined the record of appeal in the light of the submissions made, we propose to deal with the grounds of appeal generally but without losing focus on the main issue whether the appellant was positively identified at the scene of the crime as the perpetrator of the crime in issue.

To begin with, it is scarcely necessary to stress the settled position that proper identification of an accused person is crucial in proving an offence committed in unfavourable circumstances particularly at night. This is so because visual identification is of the weakest kind and most unreliable. Our

jurisprudence instructs that such evidence will be acted upon if the possibilities of mistaken identity are eliminated and that the evidence is watertight. On that basis, the Court has set out guiding principles for determining the reliability of such evidence – see, for instance, **Waziri Amani** (*supra*); and **Said Chaly Scania v. Republic**, Criminal Appeal No. 69 of 2005 (unreported). In the latter case, we stated that:

> *"We think that where a witness is testifying about identifying another person in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger".*

Certainly, in the instant case the appellant was known to all the three witnesses who happened to be his neighbours. All of them said they saw him but did not describe his identity. The appellant, as mentioned earlier, took issue with this omission on description. As held by the Court in **Raymond Francis v. Republic** [1994] T.L.R. 100, it is not in every situation that a

detailed description on the identity of the suspect is necessary. Where the suspect, as the appellant in the instant appeal, was known to the identifying witnesses before the incident, the details of description could well be missing without necessarily affecting the core and cogency of the evidence of such witnesses.

Nonetheless, we are cognizant that familiarity between the identifying witnesses and the suspect does not in itself eliminate the possibility of mistaken identity. In **Boniface s/o Siwingwa v. Republic**, Criminal Appeal No. 421 of 2007 (unreported), the Court underlined that:

> *"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, as is in this case, that the conditions for identification are not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give detailed explanation as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken."*

It is common ground that the incident at issue occurred before dawn and that while PW1 mentioned that the scene was illuminated by moonlight

he did not give any details on its intensity, nor did he address the trial court on the duration of the encounter and his proximity with the appellant. Although he claimed to have conversed briefly with the appellant before he attacked him, he did not suggest that he recognized him by his voice. The evidence given by PW2 and PW3, claiming to have seen and identified the appellant at or near the scene, is, as submitted by Ms. Sebukoto, seriously deficient because none of them explained the source of the light that aided their view and identification. In our considered view, their evidence was too weak to corroborate PW1's alleged identification of the appellant.

Turning to the complaint over the unexplained delay of the appellant's arrest, we agree with the learned Senior State Attorney that there is merit in it. If as shown in the evidence on record that the robbery was reported to the relevant authorities at the earliest opportunity and it came to be known in the village that the appellant was involved in a serious offence that left the complainant severely injured and his properties robbed, it is incomprehensible that he was not apprehended promptly. The arrest occurred on 12th April, 2012, which was seven months after the incident, but no explanation was given. Rather oddly, the prosecution did not produce the investigator of the case or any other police officer who arrested the appellant

to explain whether they looked for the appellant soon after the robbery but that they could not apprehend him because he had fled his home. As rightly contended by Ms. Sebukoto, the failure to explain the delay coupled with the omission to call the investigator or arresting police officer raise doubt on the veracity of the evidence of the three identifying witnesses. For in the ordinary course of things, there ought to have been a nexus between the report made to the police by the witnesses naming the appellant as the suspect and his arrest, which should have occurred promptly. In these circumstances, it is reasonably inferable that the arrest could not be made promptly because the perpetrator of the crime was most probably not named after the incident had occurred.

In **Juma Shabani @ Juma v. Republic**, Criminal Appeal No. 168 of 2004 (unreported), the Court dealt with an analogous situation involving an arrest of an accused person that took over a year after the incident. In that case, the Court followed its previous decision in **Ibrahim Shabani & Another v. Republic**, Criminal Appeal No. 110 of 2002 (unreported) where it held, as regards the arrest of the appellants therein that took twenty-four days after the incident, that:

"It is our opinion that, the slackness in arresting the appellants was not due to inefficiency but to lack of information as to who they were to arrest."

See also **Marwa Mwita v. Republic**, Criminal Appeal No. 6 of 1995; **Chakwe Lekuchela v. Republic**, Criminal Appeal No. 204 of 2004; **Yohana Chibwingu v. Republic**, Criminal Appeal No. 177 of 2015; and **Issa Reji Mafita v. Republic**, Criminal Appeal No. 337B of 2020 (all unreported).

In the present case, the question of unexplained delay in arresting the appellant passed without notice by the learned trial Magistrate and so, the appellant rightly raised it on first appeal. In dealing with it, the learned appellate Judge held as follows:

"I think this ground need not delay me. The fundamental issue is whether or not the appellant committed the offence and not when he was arrested. There are many fugitives who, after the commission of a crime, go into hiding for some days even for months. That does not absolve one from being apprehended when seen and identified. It might be that ***the appellant also went into hiding, otherwise being a neighbour of the***

complainant, he could have been easily arrested."[Emphasis added]

The above holding is, with respect, plainly erroneous for, at least, two reasons: first, without the delay being fully explained it is quite illogical, if the appellant was named swiftly as the culprit and that he was living in the same neighbourhood with the three identifying witnesses, that it took over seven months for him to be arrested. Unless it was shown in the evidence that he was on the run, it was highly improbable for a suspect of such a serious crime to remain at large for such a long time. One would naturally question, in the first place, whether the alleged culprit was seen and identified at the scene and later named to the authorities. Secondly, the learned appellate Judge had no basis to suggest that the appellant might have gone into hiding to avoid arrest because the prosecution led no such evidence. We would, therefore, agree with Ms. Sebukoto that the learned Judge's conjecture was premised on an extraneous matter.

Given the above circumstances, we are of the considered view that, on the totality of the evidence on record, it is doubtful that the appellant was positively identified by PW1, PW2 and PW3. His conviction was, therefore, unsafe and cannot be left to stand along with the attendant sentence.

Consequently, we allow the appeal and proceed to quash the conviction and set aside the sentence. The appellant, Mroni Mtwena, is to be released from prison forthwith unless he is otherwise lawfully held.

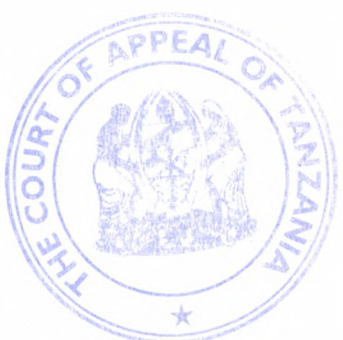
DATED at **MWANZA** this 1st day of December, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered on 2nd day of December, 2022 in the presence of the appellant in person through video conference facility and Mr. Deogratias Richard Rumanyika, learned counsel for the respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL