IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KITUSI, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 221 OF 2020

DANIEL AMOS MZIHO..... APPELLANT

VERSUS

THE DPP..... RESPONDENT

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

(Mongella, J.)

dated the 31st day of March, 2020

in

Criminal Appeal 35 of 2019

.....

JUDGMENT OF THE COURT

4th & 14th December, 2023.

MGONYA, J.A.:

The appellant Daniel Amos Mziho, and two others who are not part of this appeal, were arraigned before the District Court of Mbozi, at Vwawa for an offence of armed robbery contrary to section 287A of the Penal Code.

The particulars of the offence being: Daniel Amos Mziho and the two others on 16th February, 2017 at about 21:45 hours at Vwawa Town within Mbozi District, in Songwe Region, did steal money in the sum of

TZS. 95,000.00, 117,000.00 and 23,000.00, the properties of Robinson Siame, Neema Gidion Shega and Dickson Kapusi respectively, and immediately before such stealing, they threatened and injured the said persons by using bush knife. The accused pleaded not guilty to the charge.

The evidence before the trial court led by the prosecution was that: On 16th February, 2017 at about 21:45 hours, the appellant together with other five persons invaded the grocery of one Neema Gidion Shenga (PW1) armed with iron bars, sticks and machete. PW1 was at the grocery with her husband (PW2) and other customers. In the course of the raid, cash money and cellular phones were stollen whereby PW2 and PW3 were seriously injured as the bandits did cut them with a machete.

It was the testimony of PW1, PW2 and PW3 that, during the invasion, the bandits were dressed in long jackets and "mizura" except one bandit who was wearing what was referred to as a cap. However, they managed to identify them with the aid of the light from electric bulbs with 75 watts which were on.

Apart from that, PW1 and PW2 testified that, the appellant was a relative of PW2 and a village mate of PW3. Further, PW1 stated that, on

the date of incident, the appellant passed at her business during day time wearing the same clothes although during the raid he put on a long jacket. When re-examined, PW1 stated that, she managed to identify all accused persons by face and she also knew them before the incident as they used to be her customers.

PW2 on his part, stated that he was able to identify Moses, Fredy and Daniel as it was Moses who started to hit him with a stick while Daniel is the one who cut him with a machete on his neck. After taking their money and mobile phones, they wanted to administer poison so as to kill him. In order to save their lives, they raised an alarm which was responded to by some of their neighbours including Mohamed Simon Mwamlima (PW4).

On his part, PW4 testified to the effect that, on the night of the incident when he heard an alarm, he went at the crime scene where he saw six persons who carried iron bars and they were running away. Among those people he managed to identify two of them due to electric light from PW1's grocery and Mama Mwang'amba's house. Those who were identified were Daniel and Moses. PW4 testified further that, at the scene of crime, he saw the victims who were injured hence they took them to hospital.

Tulinao Simon Msinjiri (PW5), a doctor working at Vwawa Hospital was among the prosecution witnesses who testified that he treated the victim around 23:00 hours. According to him, the patients were bleeding as they had cut wounds on their faces and head. PW6, a police officer testified to the effect that he mounted an investigation which led to the arrest of the appellant and others.

In their defence, all the accused persons exonerated themselves from the charge. They all denied to commit the offence on the alleged date and place.

Having heard the witnesses from both sides, the trial magistrate was satisfied that the offence was proved beyond reasonable doubt and the accused persons were properly identified. Hence, they were convicted as charged and sentenced to serve 30 years' imprisonment in each count.

Disconsolate with the trial court's judgment, the appellant herein, preferred an appeal against conviction and sentence before the High Court fronting two grounds of complaint to wit; **One**; that he was not properly and sufficiently identified at the scene of crime and, **two**; the case was not proved against him beyond reasonable doubt.

The first appellate Judge like the trial magistrate, was of the view that the appellant and his fellow robbers were properly identified taking into account that the identification was by recognition. Hence, she dismissed the appeal.

Still aggrieved, the appellant filed the instant appeal before this Court to challenge the decision of the first appellate court faulting the decision on the following grounds:

1. *That the Judge erred in law and fact by confirming the judgment of the trial court while the appellant was not identified at the scene of crime;*
2. *That the appeal was dismissed while the appellant was convicted on hearsay evidence since he was not caught red-handed at the scene of crime;*
3. *That the appellant was not reminded the charge sheet before passing to the defence case;*
4. *That there was contradictory evidence on date of incident between PW3, PW1 and PW4;*
5. *That the Judge faulted in citing uncharged provision in the judgment delivered on 31/03/2020;*
6. *That the appeal was dismissed while the trial court failed to bring in court other witnesses alleged to be PW1's customers; and*
7. *No exhibits were tendered in connection to the charge.*

At the hearing of the appeal, the appellant appeared in person, unrepresented fending for himself whereas, Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Mr. Joseph Mwakasege State Attorney appeared for the respondent Republic.

Before embarking on determination of the grounds of appeal as indicated above, we wish to state that we are aware of the provisions of section 6(7)(a) of the Appellate Jurisdiction Act, Cap. 141 [R.E. 2019] which provides that:

> *"(7) Either party-*
> *(a) to proceedings under Part X of the Criminal Procedure Act may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact;"*

The above principle has been relentlessly reiterated by this Court in numerous decisions to mention a few; **Dadu Sumano @ Kilagela v. The Republic**, Criminal Appeal No. 222 of 2013, and **Nurdin Mohamed @ Mkula v. The Republic,** Criminal Appeal No. 112 of 2013 (both unreported). In the former, we stated that:

> *"This is a second appeal. As a matter of principle, we are only supposed to deal with questions of law."*

Parallel to that, the law is also settled that in a second appeal the Court deals with matters which came up in the lower courts and were decided and not on new matters which were not raised and decided. See our decisions in **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004; **Juma Manjano v. Republic**, Criminal Appeal No. 211 of 2009 and **Hasan Bundala @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013 (all unreported). In the event therefore, we are inclined to reject in determining grounds 2, 4, 6 and 7 which one new grounds.

Guided by the above position of the law, it follows that in determination of the instant appeal it is only the 1st , 3rd and 5th grounds of appeal which will be considered for being, based on points of law.

The appellant commenced his address by inviting the Court to consider the grounds of appeal especially on identification. He went on to submit that he was not identified at the scene. The basis of his argument was; **First**, the victims are his relatives and neighbours but they did not mention him at the police station immediately after the event. **Second,** he never moved away from where he was staying yet he was not arrested soon after the incident. To bolster his argument,

he referred us to our decision in **Marwa Wangiti Mwita & Another v. Republic**, [2002] T.L. R. 39.

Regarding the other grounds of appeal, the appellant had nothing useful to submit as his argument centred on the complaint that he was mistakenly identified.

In reply, Mr. Mwakasege at the very outset resisted the appeal. He contended that the trial court and the first appellate court rightly held that the appellant was positively identified. It was his stance that the circumstances of this case do not support any chance of mistaken identity. The basis of his contention was the fact that, the appellant and the complainants were relatives and the robbers talked to the complainants before raiding. To support his arguments, he referred the Court to the decisions we made in **Dadu Sumano @ Kilagela v. Republic**, Criminal Appeal No. 222 of 2013, **Jumapili Msyete v. The Republic,** Criminal Appeal No. 110 of 2014 and **Abeid Mponzi v. The Republic,** Criminal Appeal No. 476 of 2016 (all unreported).

On our side, having heard the parties and going through the record of appeal, we observed that PW1, PW2, PW3 and PW4 were the eye witnesses who testified to have seen the appellant at the scene of crime. It is also undisputed fact that PW1, PW2, PW3 and the

appellant knew each other as they are relatives and neighbours. That being the case, the identification claimed to be done on the night of the incident was by recognition. Therefore, the remaining issue for determination before us is whether the High Court erred in sustaining the appellant's conviction relying on identification by recognition.

It is settled that identification by 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. See: **Emmanuel Chigoji v. The Republic**, Criminal Appeal No. 355 of 2018, **Issa s/o Mgara @ Shuka v. The Republic,** Criminal Appeal No. 37 of 2005, **Jumapili Msyete v. The Republic** (supra) and **Hekima Madawa Mbunda & Another v. The Republic**, Criminal Appeal No. 566 of 2019 (all unreported). In the latter decision we stated that:

> *"Much as it was not disputed that the appellants were not strangers yet that is no guarantee that there could be no chances of a mistaken identification. Cognizant with that possibility the Court has consistently held that even in identification by recognition chances of a mistaken identity still obtains."*

Likewise, it is elementary law that in a case where the prosecution entirely depends on the evidence of visual identification, the court can only act on it upon satisfying itself that the conditions for a proper and unmistaken identification are favourable such that they eliminate the chances of a mistaken identity. See our often-cited case of **Waziri Amani v. Republic** [1980] TLR 250 where we stated:

> *"... evidence of visual identification... is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight".*

Further, in **Philimon Jumanne Agala @ J4 v. The Republic**, Criminal Appeal No. 187 of 2015 (unreported), the Court cautioned that:

> *"We have already sufficiently demonstrated that visual identification and/or recognition evidence should be cautiously acted upon as it is prone to fabrication or being based on honest mistakes. It has been repeatedly held that eyewitness testimony can be devastating when false witness identification is made due to honest confusion or outright lying: See, for instance* ***Mengi Paulo***

Samwel Lahana & Another v.R., *Criminal Appeal No. 222 of 2006 and* ***Nyakango Olala James v.R.***, *Criminal Appeal No. 32 of 2010 (both unreported)."*

With the foregoing, we now move to consider whether the appellant herein was properly identified at the scene of crime. As alluded to above, the witnesses in this appeal testified before the trial court that on the night of the incident, there was enough light generated from four bulbs with 75 watts. Also, it was testified that the assailants when invaded PW1's grocery, they wore "mizura" except one who had a cap. The appellant's stance was that if he was properly identified at the crime scene, the prosecution witnesses could have mentioned his name at the police station and possibly his arrest could be immediately after the incident. His argument was based on the undisputed fact that, he is a relative to the complainants hence they knew each other and that he never fled from his street and therefore, there was no reason for any delay in arresting him. In his view, the said facts reveal that he was not identified at the crime scene on the fateful date.

Having heard the parties' rival submission, we find merit in the appellant's line of argument. As it has been rightly argued by the

appellant, it is settled that failure of the prosecution witnesses to mention the culprit at the earliest time raises doubts if he was indeed identified.

In numerous decisions, this Court has reiterated that the, ability of the witness to name the culprit at the earliest opportunity adds credence to witnesses' evidence and assurance of his reliability. See: **Jaribu Abdallah v. Republic** [2003] T.L.R. 271, **Swalehe Kalonga and Another v. Republic**, Criminal Appeal No.45 of 2002, and **Fred Mathias Marwa v. The Republic,** Criminal Appeal No. 136 of 2020 (both unreported). In the latter we quoted our previous decision in **Marwa Wangiti Mwita & Another v. Republic** (supra), where we stated:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent Court to inquiry."*

In the instant appeal, it was not disputed that the incident occurred during night hours at 21:45 hours, where by PW1 and PW2 were enjoying the moment at PW1's grocery. Unexpectedly, six people dressed in "mizura", long Jacket while holding iron bars, machete and

sticks invaded them. Unfortunately, none of the prosecution eye witnesses testified that they immediately named the appellant to be one of the raiders when they went to report the incident at the police. An examination of who was the investigator, it appears that the appellant was mentioned during his investigation and not at the time when the incident was reported at the police station. This evidence supports the appellant's defence that he was arrested on 12/3/2017 almost three weeks after the incident while he was around at his place and he was well known to the complainants. We also find this to be proof that, the appellant was never mentioned immediately after the incident. Therefore, the identification evidence by recognition of the appellant was not reliable. In our view, it was a result of mistaken identity. Consequently, the first ground of appeal is meritorious and is allowed.

Since the issue of identification conclusively determines this appeal, we see no need labouring on determination of other grounds as the said exercise will save no purpose as it will not change the outcome of the appeal.

The above said and done, we allow the appeal. The conviction entered against the appellant is quashed and the sentence is set aside. We order the immediate release of the appellant from prison unless he is held for another lawful cause.

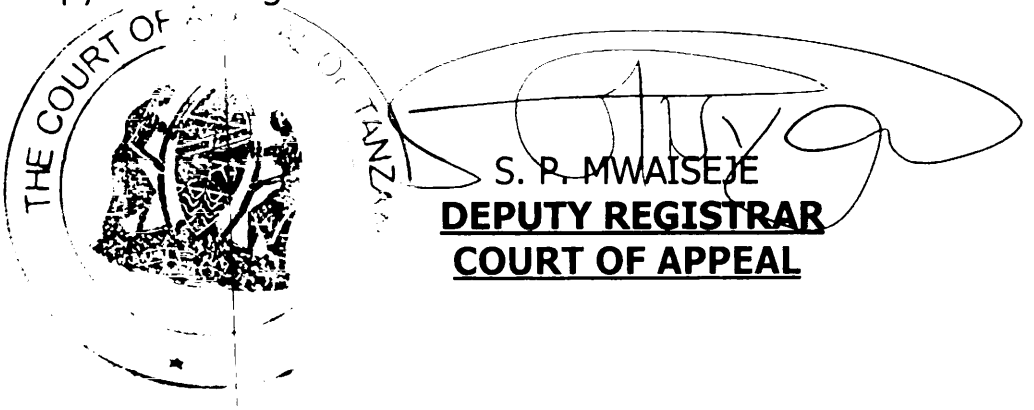
DATED at **MBEYA** this 13th day of December, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2023 in the presence of the Appellant in person and Mr. Augustino John Magessa learned State Attorney for the Respondent is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL