IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: JUMA, C.J., MWARIJA, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO 644 OF 2021

BANZI JOHN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from Judgment and Decree of the Resident Magistrate's Court of Morogoro at Morogoro)

(Hon. C.M. Kisongo, PRM-Extended Jurisdiction)

dated the 5th day of October, 2021
in

Extended Jurisdiction Criminal Appeal No. 25 of 2020

JUDGMENT OF THE COURT

24th & 27th April, 2023.

JUMA, C.J.:

Before us is a second appeal by the appellant, BANZI JOHN, he is appealing against the decision of the Resident Magistrate's Court of Morogoro on extended jurisdiction (Kisongo-PRM), which upheld the appellant's conviction and sentence of thirty (30) years imprisonment.

Earlier in the Criminal Case Number 176 of 2018, the District Court of Morogoro (Ringo-RM) had on 30/07/2019 found the appellant guilty of armed robbery contrary to section 287A of the Penal Code Cap. 16 R.E. 2002

(as amended by Act No. 3 of 2011) and sentenced him to prison for thirty (30) years. According to the particulars of the offence, on 22/06/2018, at Kisagila Village (Kasanga Ward) in Morogoro District, the appellant stole One Million Shillings, two solar panel batteries, two mobile phones (ITEL and TECNO), six sacks of rice, kitchen utensils and 30 hens all properties of NGOSO ALEX @ KIJOGOO (PW1) and ANISIA FABIAN (PW2). Further, immediately before such stealing, the appellant used a machete *(panga)* to assault and injure NGOSO ALEX @ KIJOGOO and ANISIA FABIAN on various parts of their bodies to obtain the stolen items and cash.

The background facts leading up to this appeal are as follows. Ngoso Alex (PW1) of Kisagula village was eighty-two years old when he testified on 11/10/2018. He recalled how earlier on 22/06/2018, around 20:00 hrs, he heard a knock at his door. Before he woke up, he saw the appellant Banzi John already inside the house. With solar light on, PW1 saw the appellant in the company of two people he identified as Moza Peter and Sili Costa. Using a bush knife, the two intruders began cutting his hand, at his ribs, neck, and head. During the attack, the assailants demanded money, searched the

house, and took one million shillings, two solar batteries, two mobile phones, six sacks of rice, and thirty hens.

Later around 05:00 hrs, after the bandits had left, a neighbour Mkude Makwiza passed by, and PW1 called him to assist. Soon after, other neighbours and village leaders helped PW1 and PW2 by carrying them on stretchers to a local dispensary. According to PW1, the medical officer at the dispensary gave them a referral letter sending them to Duthumi Hospital. The medical officer advised them they needed Police Form No 3 (PF3) before getting treatment. Their neighbours, who had accompanied them all along, escorted them to the police, where police gave them PF3, enabling them to return to Duthumi Hospital, which admitted PW1 and PW2 for treatment.

PW1's wife, Anisia Phabian (PW2) was sixty-three years old when she testified on 11/10/2018. She gave similar evidence about the armed robbery at their home. She heard a knock at the door, and before moving to the door, PW2 saw three people inside her bedroom who identified as Banzi John, Moza Peter, and Sili Costa. The three used a bush knife to cut PW2 and her husband. Another bandit who was outside, stopped PW2 from

shouting and continued to slash her. PW2's attempt to escape outside and seek help was short-lived.

In his defence, the appellant (DW1) denied he had any role in the armed robbery committed against PW1 and PW2. He explained how on 22/06/2018, around noon, he was at his home in Kasanga village when members of the village militias arrested and took him to Duthumi Police Station, accusing him of armed robbery. He faulted the evidence of PW1, which he described as contradictory. There were neither eyewitnesses nor independent witnesses, he argued.

In her decision, the learned trial magistrate (Ringo-RM) believed the evidence of the two victims, PW1 and PW2, who identified the appellant at the crime scene. In convicting the appellant, she concluded that the appellant and his colleagues who invaded PW1's house engaged their victims in close quarters. The solar bulb light enabled the victims to identify the appellant they knew.

On the first appeal, C.M. Kisongo, the Principal Resident Magistrate who heard the appeal on extended jurisdiction at the Resident Magistrate's Court of Morogoro, dismissed the appeal after finding no basis to interfere with the appellant's conviction and thirty-year sentence in prison.

In his memorandum of appeal, which he filed on 23/09/2022, the appellant raised five grounds of complaints against his conviction and sentence. The first ground faults the visual identification evidence by the two armed robbery victims (PW1 and PW2) who placed him at the crime scene around 20:00 hrs. He argues that visual identification was weak and not watertight to facilitate identification at night. In the second complaint, he questions why the two victims, PW1 and PW2, failed to name him as their assailant and perpetrator of the armed robbery at the earliest possible opportunity. In his third ground of appeal, the appellant wants the Court to consider that he and PW1 and PW2 did not live in the same village. In the fourth ground of appeal, the appellant blames the first appellate court for failing to consider the victims' entry in the medical examination reports (exhibits P1 and P2), which shows that it was the unknown assailants who assaulted PW1 and PW2. Finally, the appellant urged us to find that the

weight of the evidence of PW1 and PW2 is insufficient to support his conviction for armed robbery.

At the appeal hearing on 24/04/2023, the appellant appeared in person without the assistance of a learned counsel. Mr. Tumaini F. Kweka learned Principal State Attorney, and Ms. Neema Haule learned Senior State Attorney, represented the respondent Republic. To support his five grounds of appeal, the appellant relied on his Written Statement of Arguments which he presented under Rule 4(2) of the Tanzania Court of Appeal Rules, 2009.

In reply to the appellant's grounds of appeal and written arguments, Ms. Haule, the learned Senior State Attorney, supported the appellant's conviction and sentence of thirty years in prison. She submitted seriatim against the five grounds of appeal.

Opposing the first ground of appeal, where the appellant claimed that the visual identification evidence of PW1 and PW2 was insufficient to sustain a conviction against him, Ms. Haule submitted that PW1 and PW2 correctly identified the appellant, who was well-known to PW1 and PW2 before the incident of armed robbery. She added that solar light enabled PW1 and PW2 to identify the appellant. The learned Senior State Attorney said it was also

not the first time PW1 and PW2 met the appellant; they all reside in the same Kasanga village and occasionally meet for drinks.

To support her stance that the evidence of PW1 and PW2 was identification by recognition, Ms. Haule cited earlier decisions of this Court in **NGARU JOSEPH & MNENE KAPIKA V. R.,** CRIMINAL APPEAL NO. 172 OF 2019 and **JUMAPILI MSYETE V. R.,** CRIMINAL APPEAL NO. 110 OF 2014 (both unreported). In **NGARU JOSEPH & MNENE KAPIKA V. R** (supra), the appellants were convicted of armed robbery and gang rape based on the evidence of three witnesses (PW1, PW2, and PW3) who identified them. The appellants had contended that prosecution witnesses did not correctly identify them because the offences occurred at night, and the circumstances were not conducive to proper identification. In **JUMAPILI MSYETE V. R** (supra), the Court divided identification cases into three broad categories: visual identification, identification by recognition, and voice identification. In recognition cases, the victims claim that they are familiar with or know the suspects.

Adverting to the second ground of appeal, Ms. Haule referred to the evidence of the police officer, PW5, who was at a reception desk when the injured PW1 and PW2 arrived at the police station before they went to the

hospital for treatment. The learned State Attorney stated that PW1 and PW2 mentioned the appellant's name to PW5 as the assailant who robbed them. While citing the case of **MARWA WANGITI MWITA AND ANOTHER VS. R** [2002] TLR 39, Ms. Haule submitted that PW5 provided the victims of the armed robbery the earliest opportunity available for identifying the appellant as the person who committed the armed robbery.

The learned Senior State Attorney discounted the appellant's claim in the third ground of appeal that he, PW1, and PW2 did not reside in the same village of Kasanga. She referred to the memorandum of agreed facts showing the appellant as a Kasanga-Mvuha of Morogoro District resident. She further urged us to dismiss the appellant's fourth ground of appeal, claiming that the medical examination reports of PW1 and PW2 (exhibit PE1), which PW3 compiled, show that it was unknown people who attacked PW1 and PW2. Ms. Haule submitted that the appellant should have cross-examined PW3 on the medical examination report. The learned Senior State Attorney rounded up her submissions by asking us to dismiss the appellant's fifth ground of appeal and the entire appeal because PW1 and PW2 were credible witnesses whose evidence proved the offence of armed robbery against the appellant.

Next, Mr. Kweka, learned Principal State Attorney came in to address the salient issues of visual identification evidence, whether the appellant and the victims of the armed robbery all resided in Kasanga village, and the credibility of PW1 and PW2, which the appellant raised in his Statement of Arguments. He pointed out that solar lighting in a room is brighter than solar lighting in a larger hall. Mr. Kweka insisted that sufficient light from the solar bulb enabled PW1 and PW2 to identify the appellant. He urged us to find that the appellant entered a room where his victims could identify him.

On the credibility issue, Mr. Kweka submitted that the trial court, which saw and heard witnesses firsthand, was in a better position to assess their credibility. He urged that since the first appellate court did not interfere with the trial court's assessment of the credibility of PW1 and PW2, the second appellate court should not.

The learned Principal State Attorney urged us to dismiss the appeal against conviction and sentence.

In his brief reply, the appellant reiterated that there is merit in his appeal, and the prosecution did not prove the case beyond a reasonable

doubt. He urged us to set aside his conviction and sentence and set him at liberty.

We have considered the submissions of the appellant and the respondent concerning the five grounds of appeal. The main issue remaining for our consideration is the reliability of the identification evidence of PW1 and PW2, which placed the appellant at the crime scene.

It is not in dispute that on the night of 22/06/ 2018, PW1 and PW2 were invaded in their house by bandits who assaulted them, left them helpless, and parted with their properties. Their neighbours took them to a local dispensary, to a hospital and to a local police station. At the hospital, where medical officer Kasimili Subi (PW3) treated their wounds. PW3 confirmed that a sharp object caused the wounds which PW1 and PW2 suffered. Similarly, two police officers, PW4 and PW5, who handled PW1 and PW2, confirmed that the two victims had cut wounds on several parts of their bodies. The appellant did not dispute the extent of the injuries PW1 and PW2 suffered and their subsequent hospital admission.

On identification of the bandits behind the attack, the trial and the first appellate courts believed the prosecution evidence that PW1 and PW2

correctly identified the appellant as among the bandits who invaded the victim's house and assaulted them. The sole evidence linking the appellant with the alleged offence of armed robbery is the visual identification of the appellant by PW1 and PW2.

The trial magistrate found that the armed robbery occurred around 20:00 hrs. Because the solar light was on, the trial court accepted that PW1 and PW2 managed to identify the appellant and the other two armed robbers. Although the trial magistrate raised the pertinent question whether the solar light was sufficient to identify the three bandits, she did not describe the sufficiency of light, but went ahead to conclude that, *"there was enough light for PW1 to identify the accused person on material date/time."* The trial magistrate also found that the appellant was familiar with PW1 and PW2, who also identified the appellant by voice.

While dealing with the identification of the appellant at the crime scene, the first appellate court, on page 83 of the record of appeal, referred to several decisions of this Court which highlight the caution necessary before courts rely on identification evidence because of the possibility of mistaken identity. The first appellate court referred to the case of **WAZIRI AMANI V. R.** [1980] TLR 250, **RAYMOND FRANCIS V. R.** [1990] TLR 100,

YOHANA MSIGWA V. R. [1990] TLR 1482002, and **IDDI OMARI MBEZI & OTHERS V. R.,** CRIMINAL APPEAL NO. 227 OF 2009 (unreported)] and observed: *"It is now settled that when a court relies on visual identification, among the important aspects to be considered is the time and distance the witness had with the accused under observation, if there was any light, then the source and intensity of such light, and also whether the witness knew the accused before."*

From our vantage position as a second appellate court, we could appreciate the totality of evidence to ensure no misapprehension of evidence likely to occasion injustice. It is clear from the record of appeal; the trial and the first appellate courts merely restated the caution over identification evidence without relating that caution to the evidence on record of appeal. It is also not enough, for the courts to merely restate that caution articulated in such decisions as **WAZIRI AMANI V. R.** (supra). Courts must go further than restating settled principles. They must apply caution to the evidence on record.

Much as the trial and first appellate courts believed the identification evidence of PW1 and PW2, there was no evidence regarding the intensity of the solar light, which aided the victims in identifying the appellant and his

fellow robbers. It was also not enough for PW1 and PW2 to merely tell the trial court that they knew the appellant before the date of the incident as they were co-villagers without elaborating circumstances which brought them together.

The case of **NGARU JOSEPH & MNENE KAPIKA** (supra) which Ms. Haule cited, the trial and first appellate courts went beyond mere declaration of settled principles on identification by recognition. The two appellants were convicted of armed robbery and gang rape mainly on the basis of three identifying witnesses, PW1, PW2 and PW3. On page 12 of this decision, the evidence of PW1, PW2 and PW3 illustrated the conducive environment that enable them to identify the two appellants by recognition. There was bright solar powered light illuminating the whole house; while the two appellants were gang-raping PW2, PW3 was peeping from their room and identified them; and PW1, PW2 and PW3 had known the appellants before the incident as they once hired them to work on their paddy farm:

> *"...The witnesses also explained on how the appellants pushed PW2 to the sitting room where the 1st appellant raped her with the help of the 2nd appellant who held PW2's legs apart.* ***At the time PW2 was being raped PW3 was peeping from their room and identified them.***

> *When all this was happening, PW1 and PW2 were able to identify both appellants because of* ***the bright solar powered light illuminating the whole house****; and* ***they had known the appellants before the incident as they once hired them to work on their paddy farm****.* [Emphasis provided].

While the prosecution has discretion to decide which witness to call, we still wonder why PW1 and PW2 did not disclose whether they mentioned the appellant's name to one Mkude Makwiza, the first person who came to their assistance immediately after the armed robbery. The record of appeal is silent about this. PW1 testified how one Mkude Makwiza arrived to assist him and his wife and went out to inform their neighbours. The neighbours soon arrived at the scene together with village leaders.

Unfortunately, neither Mkude Makwiza nor the victims' neighbours and village leaders who took the victims to the dispensary, the hospital, and the police station, testified in court to fill in the evidential gaps and corroborate the identification evidence of PW1 and PW1 that mentioned the appellant as one of their assailants. The evidential gap creates doubt which should operate in the appellant's favour.

We again wonder why, PW4 and PW5, the two police officers who handled the case, did not follow up on the alleged bandits, Moza Peter and

Sili Costa, who allegedly accompanied the appellant. The absence of an explanation raises more doubt about whether the victims managed to identify their assailants. At the very least, PW4 who was the investigator of the case, should have said steps he took to pursue these two bandits.

In light of the gaps and doubts we have outlined; we cannot unhesitatingly say that the trial and first appellate courts eliminated all possibilities of mistaken identity of the appellant at the scene of the crime. As we insisted in our seminal decision in **WAZIRI AMANI v. R** (supra), we are not fully satisfied that the identification evidence against the appellant is watertight for us to sustain the appellant's conviction for armed robbery.

This Court has always insisted on great caution before acting on visual identification evidence to avoid the possibility of mistaken identification. In the circumstances of this appeal, the earliest mention of the appellant as the perpetrator of the armed robbery would have gone a long way to corroborate visual identification evidence of PW1 and PW2.

We do not think mentioning the appellant's name to PW5 was the earliest opportunity PW1 and PW2 had to identify the appellant as their attacker. The record of appeal shows that WP 7370 Grace (PW5) was a police

officer at the reception desk at Duthumi Police Station when on 23/06/2018, villagers escorted PW1 and PW2 to report the armed robbery incident. PW5 interrogated the victims. According to PW5, PW1 mentioned the name of one Ngoso Alex Kijogoo, and with the aid of solar light, PW1 also identified the appellant.

It is appropriate to point out that when PW1 and PW2 arrived before PW5, they already had earlier opportunities to mention the appellant's name as one of the armed robbers who invaded their home. Prosecution did not present witnesses who met the victims much earlier than PW5. PW1 recalled how their neighbours carried them on stretchers to a local dispensary. The dispensary assistant referred them to Duthumi Hospital. The medical officer at Duthumi Hospital refused to treat them without a PF3 document from the police. The neighbours accompanied them to the police station, where after securing a PF3, they returned to Duthumi Hospital for admission and treatment.

Evidence of PW2 shows several earlier opportunities for the victims to name the appellant. PW2 testified how the dispensary assistant found their case devious and referred them to the hospital. PW2 confirmed that medical

officers at the hospital demanded PF3, which they had to fetch from the police station.

We finally allow the appeal, quash the conviction, and set aside the sentence. The appellant shall immediately be released unless he is in custody for other lawful reasons.

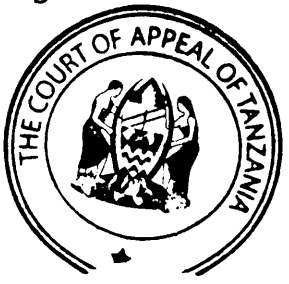
DATED at **MOROGORO** this 27th day of April, 2023.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 27th day of April, 2023 in the presence of Appellant in person and Mr. Shabani Abdallah Kabelwa, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.



S. J. Kainda
REGISTRAR
COURT OF APPEAL