IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

HIGH COURT CRIMINAL APPEAL NO.220 OF 1994
Original Criminal Case No.469 of 1993 of the
District Court of Ilala District At Kivukoni
Before Kipilimba, Esq., District Magistrate

1. JUMA MGAZA
2. KULWA NJAKO ..... APPELLANTS

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MATUI, PRM, EXT.JUR.

Nine accused persons appeared before the Ilala District Court sitting at Kivukoni. They were all charged with the serious offence of robbery with violence c/s 285 and 286 of the Penal Code. At the end of the trial the first, the third and the fourth accused were convicted. The first and the third accused were sentenced to the minimum term of 15 years imprisonment. The fourth accused who was found to be a minor was sentenced to suffer ten strokes of the cane. The others were acquitted. Being aggrieved by that sentence the first and the third accused, now the appellants have appealed to this Court against both conviction and sentence.

The evidence which was laid on the scales of Justice which the basis of the trial court's decision may be summarised, as follows: For the sake of convinience and clarity I shall refer to the accused persons as they appeared before the trial court, Juma Mgaza, the first appellant, as the first accused, Abdallah Salum as second accused, Kulwa Njako, the second appellant, as the third accused, Hiari Saidi as fourth accused, Edward John as fifth accused, Yusuph William as sixth accused, Twaha Juma as seventh accused, Ramadhani Juma as eith accused and Mohamed Juma as the nineth accused.

Tito Taimu (PW1) and Hamisi Taimu (PW2), street hawkers who used to sell vitenge to customers they meet in the streets, had a nasty experience on the 17th July, 1993. They were looking for possible customers in one of the narrow streets of Manzese. That was around 1.00 pm. Suddenly they were attacked by a gang of robbers who threw bricks at them and before the witnesses

could realize what was happening PW2 found himself bleeding on the face and both of them were empty handed. Their assailants took from them their fourteen pieces of pairs of vitenge they were selling and hard cash about shs.14,000/=. No body was around to assist them and the alarm they raised to call for help from good samaritans bore no fruits. The matter was then reported to the police. As a result of that report eleven suspects were rounded up, the nine accused persons inclusive. According to PW1 and PW2 the fourth accused was a familiar face to them even before that incidence while the others could be identified facially. On the 20th February,1993 at around 8.00 a.m. an identification parade was conducted at Magomeni police station, at that parade PW1 purported to have identified the first accused, the third accused and the fourth accused, while PW2 alleged to have identified the first accused, the second accused and the fourth accused. Finally the nine accused found the charge placed at their door steps.

In their defence all the nine accused protested their innocence and maintained that the Republic's finger had wrongly pointed at them as robbers. They were wrongly identified. While finding the rest not guilty of the offence, the trial court disbelieved whatever the first, the third and the fourth accused had said and proceeded to deal with them in the manner above described.

According to their memorandum of appeal the decision of the trial court is criticized on two grounds namely:

(a) That the learned trial magistrate erred in finding that the identification of the two appellants was proved to the standard required in Criminal trials.

(b) That the learned trial magistrate erred in law in his finding that the identification parade was properly conducted and that the appellants were correctly identified by the complainant.

The appellants who appeared personally to argue their appeals opted to adopt the contents of their memorandum of appeal. Mr. Mwongela (S.A.) appeared for the Republic.

In his address to the court the learned State Attorney supported the convictions and the resultant sentences. According to him the decision of the trial court was properly supported by the evidence laid on the scales of justice. He argued that since the offence was committed during the day, there was no

difficulty of the complainants identifying their assailants.

May I start off by saying that whenever a trial court, desireous to go very carefully through the correct path of justice, has to decide the fate of an accused before him, the right test is to ask itself whether the evidence laid on the scales of justice unequivocally pronounces the accused's guilt or not and whether the scales unfavourably tilt against the accused. If the answer be in the positive then the trial court can, very comfortably, proceed to convict the accused, but should there be any doubt nagging its wise mind as to the participation of the accused in the offence, then if such doubt be reasonable, it ought to be resolved in favour of the accused who should be entitled to an acquittal. It is the solemn duty of the trial court to evaluate, very carefully, every bit and piece of evidence for and against the accused and rule out anything that exculpates him before a decision to convict is arrived at. The evidence must irrestably point at the accused person as one of the participants in the established crime.

The convictions of the two appellants in this appeal hinge on the identification of the persons who robbed PW1 and PW2. The trial court, as well as the learned State Attorney were of the view that the identification was sufficient to arrive at a safe conviction of the appellants. After going carefully through the evidence of the said identification and after looking at the law applicable in such situation I am compelled not to share their views, I do that with respect of course, and the following are my reasons.

Where a trial court is to act on evidence of identification to convict an accused, it must first be satisfied that such identification is watertight and leaves no room for any conjecture other than the guilt of the accused person. This warning has been sounded by both, the Court of Appeal and by this Court on diverse ocasious. In the case of Waziri Amani v Rep [1980] TLR 250, paradoxically relied by the Republic in support of the conviction, the Court of Appeal warned:

> "The first point we wish to make is an elementary one and this is that evidence of visual identification, as Courts of East Africa and England have warned in a number of cases is of the weakest kind and most unreliable. It follows therefore, no court should act

> on evidence of visual identification unless all posibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely watertight."
> (Emphasis supplied)

Both the Court of Appeal and this court have given guidelines to be followed by a trial court facing a problem of whether to convict or not, acting solely on evidence of visual identification.

In the case of Mohamed Alhui v Rex [1942] EACA 72 quoted with approval in the case of Joseph Shagembe v R. [1982] TLR 147, the Court said:

> "In every case which there is question as to the identity of the accused the fact of there being a description given and the terms of that description are matters of highest importance of which evidence ought always be given, first of all of course, by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the descriptions were made."

Again in the case of Augustino Keute v Rep. [1982] TLR 122 a similar warning was resounded when it was said:

> "It is unsafe to support the conviction of an accused where the eye witnesses' identification is not accompanied with details."

My careful evaluation of the evidence laid on the scales of justice, has not persuaded me that the appellants were properly identified. According to PW1 and PW2 their assailants took them by surprise, it was a sudden attack. Much as it was day time one does not get easily convinced that in a situation of a sudden attack by a gang of robbers the victim of such a robbery can have time to concetrate on identifying the attacker rather than to save his dear life. It is my settled view that evidence of identification in such situation should have been cautiously evaluated. The trial court was duty bound to ask the witnesses what made them identify the appellants. The identification was required to be accompanied with details. Apart from saying that the appellants were identified facially no details were given and for that reason, I do not hesitate to say that the identification was ~~very~~ insufficient and that it was quite unsafe to act on it and convict ~~the~~ appellants.

There is evidence that the appellants were picked up from an identification parade. If that were so then one could perhaps say that that had salvaged the situation and strengthened the said evidence of identification of the appellants. My careful examination of the evidence on how the said parade was conducted leaves me with some doubt as to whether the appellants were properly picked up. Why do I say so? I shall give my reasons.

The case of R. v Mwango s/o Maua (1938) 3 EACA 29 lays down the procedure to be followed in conducting an identification parade. It is as follows:

1. The accused person should always be informed that he may have an advocate or relative at the time of conducting the parade.
2. The officer incharge of the case although he may be present should not carry out the parade.
3. The witnesses should not see the accused before the parade,
4. The accused should be placed among at least eight persons, not suspects of the case, as far as possible of similar age, height, general appearance and class of life as himself or herself,
5. The accused should be allowed to take any position he chooses, and he should be allowed to change his position after each identifying witness has left, if he so desire,
6. Care must be exercised to see that witnesses are not allowed to communicate with each other after they have been to the parade,
7. Every person who has no business at the parade should be excluded,
8. A careful note should be made after each witness leaves the parade, recording whether the witness identifies or other circumstances,
9. If the witness desires to see the accused walk, hear him speak, see him with his had on or off the person conducting the parade must see that this is done,
10. The witness must touch the person he identifies,

11. At the end of the parade or during the parade the accused be asked if he is satisfied that the parade has been conducted in a fair manner and make a note of his reply,
12. In introducing the witness the person conducting the parade should tell the witness that he will see a group of people who may or may not contain the suspected person. He should not be influenced in anyway whatever,
13. The person conducting the parade must act with scruplous fairness, otherwise the value of the identification will depreciate considerably.

The record must speak for itself that the laid down procedure was followed in conducting the parade. The record of this case does not reflect that this procedure was followed at all. In my considered view it was wrong for the trial court to hold that the appellants were properly identified in that parade.

For the foregoing reasons I find that it is very unsafe to uphold the decision of the trial court. I now therefore quash the conviction and set aside the resultant sentences. I further order that the appellants be released from prison henceforce unless otherwise lawfully held.

G. Matui, PRM
Ext. Jur.

Delivered in chambers this 19th day of June, 1995.

G. Matui, PRM
Ext. Jur.

I certify that this is a true copy of the original.

DISTRICT REGISTRAR