IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 142 OF 2007

MARTIN SEBASTIAN NYONI @ FIFTY ... ... APPELLANT

- Versus –

THE REPUBLIC ... ... RESPONDENT

(Appeal from the decision of the District Court of Arusha)

(F. A. KAHAMBA - RM)

Dated the 24th day of July, 2007

In

Criminal Case No. 719 of 2005

JUDGMENT OF THE COURT

21st July & 30th July, 2008

BEFORE: B. M. MMILLA, J.;

The appellant, Martin Sebastian Nyoni @ Fifty was among the five persons who were charged in the District Court of Arusha with five counts of armed robbery. While all his colleagues were acquitted on all the counts, the appellant was found guilty on all of them, convicted and sentenced to a twenty five (25) years' imprisonment term. The appeal is against conviction and sentence. He is appearing in person while the Republic is being represented by Mr. Zakaria, learned state attorney who declined to support convictions, hence the sentence which was imposed on account of insufficiency of evidence to sustain the said convictions.

The appellant's memorandum of appeal has raised three grounds which converge on one broad point that he was not properly identified as having been the culprit behind the charged crimes, consequently that the prosecution did not prove the case against him beyond reasonable doubt. His oral submission in court focused on nothing else but this point. He concluded therefore, that the totality of the prosecution evidence was not cogent, a view shared by the learned state attorney Mr. Zakaria. I hasten to say that I agree with them.

The strength of this appeal depends on whether or not the evidence of identification in that regard was water tight. Should it be found that the appellant was not properly identification, I have no doubt that it will fall, the reason being that he was convicted solely on the evidence of PW4 who purported that he identified him.

As was observed by the Court of Appeal in the case of **Waziri s/o Amani v. Republic (1980) T.L.R. 250**, evidence of visual identification is of the weakest kind and most unreliable. In view of this, that court stated in the last paragraph of page 251 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."

The above court's expression was based on the cases of **R. v. Eria Sebwato (1960) E.A. 174, Lejor Teper v. The Queen (1952) E.A. 480, Abdalla Bin**

Wendo and Another v. R (1953) 20 E. A. C. A. 166, R. v. Kabigo wa Nangungu (1948) 23 K. L. R. and Mugo v. R. (1966) E. A. 124 (K).

In our instant case, the charged crime was allegedly committed at night, which means the condition of identification was unfavourable. As properly submitted by both the appellant and the learned state attorney Mr. Zakaria, of all the prosecution witnesses only PW4 claimed that he managed to identify the appellant on account that he battled with him for about 45 minutes. The other witnesses, PW1 Ayubu s/o Kibiki and PW3 Grace d/o Christopher Kitundu told the trial court that they did not identify any of the culprits, including the appellant. I share the views of the learned state attorney Mr. Zakaria that the evidence of PW4 on the point was insufficient because he did not know him before nor did he offer any description of the appellant. Relying on the case of **Walter Domini @ Omondi & Tumaini s/o Luther v. Republic, Criminal Appeal No. 15 of 2005, CAT, Arusha Registry (unreported),** Mr. Zakaria submitted that although PW4 said there was light at the scene of crime, that assertion was inadequate because he did not explain the source of the alleged light. That is indeed the case. This fact stabilizes the view that the condition of identification was not favourable.

As to what may amount to a favourable identification, the Court of Appeal said it all in the already cited case of **Waziri Amani** when it stated:-

> "Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed

identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would for example, expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred; for instance, whether it was day or night time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few ... to which the trial judge should direct his mind before coming to one definite conclusion on the issue of identity."

It will be appreciated that the trial court magistrate in the present case did not vouch such facts as a result of which he cannot be said he eliminated the danger of mistaken identity. It is on this basis that I said right from the beginning that I share their view that the issue of identity was not properly resolved. In the circumstances, this ground has merits and succeeds.

Before I may conclude, I have one observation to make regarding the sentence which was imposed by the trial court. As I said at the beginning, the appellant was convicted on all the 5 counts with which he

was faced. When it came to sentencing however, that court said that, I quote:-

> "The 3rd Accused Martin s/o Sebastian Nyoni @ Fifty is hereby sentenced to serve imprisonment term of twenty five (25) years."

This sentence did not refer to any specific count, nor can it be said it reflected on all the counts. I cannot avoid saying that in the circumstances of this case it was omnibus.

The cases of **Burton Mwakipesile v. Republic (1965) E.A. 407** and **Nathanael Nkulikiye v. Republic (1982) T.L.R. 129** provide vital guidance regarding omnibus sentences. In the latter case of **Nathanael Nkulikiye,** the court passed a single sentence among the 8 counts which were charged. Relying on the former case of **Burton Mwakipesile,** that court said that:-

> "The second question is the omnibus sentence imposed on counts 1 to 8. The general principle is that an omnibus sentence is unlawful when it is unrelated to each conviction on each count. In other words for each conviction there must be imposed a separate sentence..."

In view of the above, the trial court magistrate was duty bound, or ought to have passed a sentence in each of the counts on which it convicted him. However, this was not a fundamental irregularity. In a fit case, I would have resorted to the provisions of section 388 of the Criminal Procedure Act Cap .20 of the Revised Edition: 2002 and cured it by passing the

appropriate sentences in each count. However, in view of what I have said in this judgment as a whole, I find that there is no need to do so and I refrain.

With all that said, and for reasons I have endeavoured to give in this judgment, I allow the appeal, quash the convictions and set aside the sentence which was awarded. It is hereby ordered that the appellant be released from jail forthwith unless he is being otherwise continually held for some other lawful cause.

(Sgd)

Mmilla, B. M.

Judge

22. 7. 2008

30th July, 2008

Coram: B. M. K. Mmilla, J.

For the Appellant: Absent.

For the Respondent: Ms. Nchalla, State Attorney.

B/c: S. M.

Court: Judgment delivered this 30th day of July, 2008 in the presence of Ms. Nchalla for the Republic but in the absence of the appellant.

AT ARUSHA

(Sgd)

Mmilla, B.M.

Judge

30/7/2008

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

E. S. K. MUTUNGI

DISTRICT REGISTRAR

ARUSHA

7/8/08

RMM/jn.