IN THE HIGH COURT OF TANZANIA

AT IRINGA

ORIGINATING FROM IRINGA DISTRICT COURT

CRIMINAL CASE NO. 158/2007

LAMECK SIMON NYENZA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

MKUYE, J

The District court of Iringa at Iringa (Mwalusamba RM) being satisfied beyond reasonable doubt that Lameck Simon Nyenza had committed an offence of robbery with violence contrary to sections 285 and 286 of the Penal Code convicted him as charged. The trial court sentenced him to imprisonment for a term of 15 years. He has appealed against both conviction and sentence.

The facts constituting the appeal are as follows; that On 13/3/2007 at about 20.00 hrs the house of PW3 was invaded while Emiliana Mlowe (PW1), a housemaid was taking shower. One person who introduced himself to be a customer came and enquired whether "mama" was around. Emiliana denied that she was not around. That person directed her to call her. As Emiliana started to go down stairs

that person attacked and assaulted her. She raised alarm. That invader called another person and they stole shs. 400,000/= and two mobile handsets valued at shs. 250,000. PW1 lost consciousness and was after being issued with a PF 3 (Exh P1) treated at Pisalala Dispensary then later at the Government Hospital. PW1 was injured on her right eye and left leg. PW2, Menas Deulatije who responded to the alarm, saw some people hiding and on asking who were they, they chased him up to a certain point and then he allegedly turned and chased the appellant until he was arrested at Miyomboni Bus Stand. He was taken to the police station and then he was charged with the offence.

In his defence, the appellant denied involvement in the commission of the offence. He alleged he was arrested by a group of people at Miyomboni Bus Stand.

The appellant has lodged 6 grounds of appeal complaining that **one,** the identification evidence was not absolutely watertight to justify his conviction; **two** the trial magistrate failed to consider inconsistencies of witnesses which touched the root of the matter; **three**, no identification parade was conducted to identify the appellant; **four**, the trial magistrate relied on the repudiated caution statement in convicting the appellant; **five**, nothing stolen was found in the possession of appellant; and **six**, the trial magistrate did not consider the defence evidence. Looking at the grounds critically, I feel that essentially the appeal boil down into the issue of identification which I propose to begin with.

On 15/2/2010, when the appeal came up for mention the appellant applied for leave to argue the appeal by way of written

submission and on no objection from the Respondent, I granted him leave. Both the appellant and the respondent Republic have filed their submissions within the specified time.

Arguing for the ground relating to identification evidence the appellant submitted that though PW1 alleged to have identified the appellant through the light inside but the magnitude of such light was insufficient to enable her identify the appellant. He cited the case of Mohamed Musero V R (1993) TLR 290 in support. The appellant further argued that the conditions for identification at the scene of crime were unfavourable. He further assailed the identification evidence in that it contained a number of inconsistencies which in his opinion went to the root of the matter. He has pointed out that, while PW2 said he together with one Abihud Mwamlima whose caution statement was admitted as Ex. P3, went at PW3 house and found the appellant together with his fellow hidding, the said Abihud Mwamlima said in his statement tendered as Exh. P3 that they met with appellant together with his fellow on the way before approaching PW3's house. Then, they chased them up to Miyomboni Stand where they apprended the appellant.

The respondent Republic submitting through Ms Ngilangwa learned State Attorney sought not to support the conviction. It was Ms Ngilangwa's submission that though the appellant was convicted on the basis of identification evidence, such evidence was wanting. She assailed the evidence of identifying witnesses, that is PW1 and PW2 in that **one,** they were not able to give either in their statements before the police or in court clear evidence as to how they were able to identify the appellant and material time, particularly so, when the robbery occurred during night time. **Two**, PW2 for example, did not

tell how he unmistakely apprehended the appellant at Miyomboni Bus Stand when taking into account that there were more than one bandits and who at first chased him before he turned to be a chaser. **Three**, though PW2 claimed to know the appellant but he did not mention his name or tell how he came to know him before. **Four**, PW1 did not mention the name of the accused person nor did she state that she knew him before. **Five**, PW1 did not mention the kind of light which enabled her to identify the appellant and Ms Ngilangwa pointed out and quite rightly in my view that in matters of identification it is not merely to look at factors favouring identification but what is important also is the credibility of witnesses.

From the outset, I must make it clear that in my view the main issue in this appeal is identification of the appellant. I must also reiterate principles relating visual identification evidence in that such evidence cannot be acted upon unless all possibilities of mistaken identity are eliminated and the court has to satisfy itself that the evidence is watertight. (See Warizi Amani V R (1980) TLR 252). Further to that courts are required to ascertain this by considering or taking into account factors such as the time the witness spent in observing the accused; the distance between the two, if it was at night the kind of light which enabled identification; whether the witness had seen the accused before the incident, and if so, how often and whether there were inpidments affecting identification or obstruction that could interrupt the witnesses' concentration. (See Paschal Christopher V R The DPP Crim. App. No. 106 of 2006 CAT Arusha (Unreported) pg 18.

Again the law requires the witness, if the incident takes place at night, to give detained description of the accused to the person to whom he/she first reports the incident before the accused's arrest, by

describing the appearance, colour, height and any particular mark, if any, of identity. (See Bushiri Amani V R (1992). TLR 62 (HC).

Certainly, I am with respect in agreement with Ms Ngilangwa learned State Attorney that this is a case where its determination mainly depended on identification and to some extend the appellants' caution statement admitted as Exh. P4. It may not be unlawful to state at this juncture that the caution statement cannot be relied upon since, despite repudiation by the appellant, it was admitted without having conducted an inquiry to ascertain its correctness for purposes of its admissibility. As such it is expunged.

In this regard, the two purported principal identification witnesses were PW1 and PW2. Did these prosecution witnesses properly identify the appellant? I think, the answer is in the negative.

I have given much thought over the learned state attorney's submission and I think I entirely agree with her. I am so saying because, according to PW1's testimony, she identified the appellant with the help of light which illuminated from inside, while she was outside at the top of the stairs and the appellant at the bottom of the stairs. It was not explained as to what kind of light it was, whether tubelight, bulb, latent lamp, winking lamp etc. Neither was it's intensity disclosed. We are still left in darkness whether the light came from the window or door and if so, whether the same were shut or opened. The appellant argued that the magnitude of the light was insufficient to enable proper identification. He cited the case of Mohamed Mungare (Supra) in which in my view is not relevant as it talks about the light of torch which was not the case in this case. I think, however that his complaint is valid in view of what has been

explained above. There are still some questions nagging over the evidence of PW1.

With regard to PW1's evidence that she identified the appellant while she was at the top of stairs and the appellant at the bottom of the stairs, she did not explain the distance between herself and the appellant when she observed him. It was not stated whether the stairs were steep or gentle. It was not clear whether PW1 knew the appellant before the incident or not. In her evidence, however, she tended to show that she knew the appellant. But she did not, give details as to how she came to know him. The appellant, during his defence tendered the PW1's police statement and was admitted as Exh. D 1 in which PW1 was categorical that she did not identify any of the robberers. When PW1 was cross examined on the discrepancy between her evidence in court and her caution statement she said the court should believe what she was testifying in court. I find this to be ridiculous. PW1 did not recall identifying the appellant two hours after the incident on 13/3/2006. But she claimed to know the appellant on 27/6/2007, which was a period of 1 and 3 moths thereafter. I think, she did not identify him.

But again she did not state how she identified him say by mentioning his name. Since the offence was committed at night it was expected that she could have given a description of the appellant in terms of his physique, colour, height and any other identity mark, if any. Further to that, the fact that PW1 fell unconscious after the attack complicates the matter. She stated in her statement (Exh D1) that after being beaten she fell unconscious only to find herself at Pisalala Dispensary. PW2 also confirmed that he found her unconscious and took her to the dispensary. She said she did not

know what transpired. The question arises is this, that is, at what time did she identify the appellant? This, she did state.

I now turn to the evidence of PW2. PW2 on his part gave a very interesting story. This witness is on record that after being tipped about an attack at PW3's house, he together with 3 other people went there. On his arrival, he saw many people hidding. He asked them whom they were but suddenly one of them who held a hoe handle started chasing him. He feared, thus he ran. He said there was lighting thus he identified the appellant. PW2, however, did not state its' kind, intensity and where it illuminated from. PW2 said the robberers chased him and because he feared he ran away. He did not state how under such horrific situation was able to identify the appellant. This witness further said the robbereres chased him up to a certain junction where they departed and one ran towards the left side and they chased him until they apprehended him at Miyomboni Bus Stand. Ms Ngilangwa on this argued, quite rightly in my considered view, that PW2 did not state clearly how he was able to unmistakeny apprehend the appellant at Miyomboni Bus Stand bearing in mind that they were many robberers. Also, the fact that normally many people visit bus stand cannot be overruled. That not withstanding, this witness though in his testimony claimed that he knew the accused whom he saw on the material date for the first time, he did tell how he knew him. Neither did he describe how he came to know him before the incident. Also, I take note of the appellants' complaint of which I am in agreement that PW2 and PW6 gave different accounts regarding their encounter with the robberers and apprehension of the appellant.

Now, taking the totality of PW1 and PW2 evidence it is clear that none of them gave a detailed identity of the appellant. At most, I find that the evidence of the two witnesses regarding identification of the appellant to be of a generalized nature or mere assertion that they saw the appellant. Worse still, unfortunately no identification parade was conducted so as to ascertain the identity of the appellant particularly so when the two witnesses said they saw him for the first time. Had the trial magistrate directed herself properly on the circumstances of the case, I think she would not have arrived at the conclusion she arrived at. I therefore agree with both the appellant and respondent that the identification evidence was not watertight to sustain conviction.

Lastly, Ms Ngilangwa has raised an issue which she thought was an error in the court proceedings. She argued that the trial magistrate gave a ruling allowing the prosecution to reopen its case under S. 195 of CPA after it had closed it and the defence had not opened its case. Ms Ngilangwa contented that the section relied upon empowered the court to summon or recall witnesses who will be cross examined if need be by the prosecution, defence or their advocates. She said further that it was irregular to allow the prosecution side to call witnesses to tender documents in court. She asked the court to revisit the said ruling under section 388 of Criminal Procedure Act and the evidence thereof be ignored. With due respect, I think the point raised by the learned state attorney is misconceived. Section 195 of the Criminal Procedure Act provides:

> *"Any court may, at any stage of a trial or other proceeding under this Act, summon any person as a witness or examine any*

person in attendance, though not summoned as a witness, or recall any person already examined and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case" [*Emphasis added*]

The controlling words in this section are "Any Court", at "any stage during trial" "summon any person as a witness" and "the court shall summon and examine". From these quotations, the court is empowered to summon and examine any person, even if not called as a witness at any stage of the trial. What does the term "trial" means? According to Black's Law Dictionary, Eighth Edition, Bryan A. Garner at page 1542 the term "trial" means "a formal judicial examination of evidence and determination of legal claims in an adversary proceedings".

In my view, when the trial magistrate allowed the witnesses to be summoned and examined, following the application by the public prosecutor, it was still during trial. I agree that the trial magistrate allowed the summoning of the witnesses after the prosecution had closed its case and the case had come up for the defence for the 3rd time without commencing defence. There is no doubt that the witnesses allowed to be called were material as their evidence was crucial to the just decision. PW5, for example, had recorded the accuseds' caution statements. Leaving him could render statements not to be tendered in court.

But on the other hand, I think, it was the intention of the legislature to allow such material witnesses at any stage of the trial so

as to enable courts arrive at just decisions. Had it intended to allow such witnesses only before the prosecution case is closed, it could has said so. In the circumstances I find that the trial magistrate properly allowed the witness to be summoned to testify. Section 388 of CPA cannot apply in the circumstances.

Lastly, with the aforegoing discussion, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I also order that the appellant be released from custody forthwith unless held for other lawful reasons.

R.K.MKUYE

JUDGE

9/06/2010

Date: 14/7/2010

Coram: Hon. R.K.Mkuye, J

Appellant: Present

For Respondent: Mr. Mwandalama State attorney for Republic.

C/C: Nuru Abdallah

Delivered on this 14th day of July, 2010 in the presence of Lameck Nyenza, the appellant and Mr. Mwandalama learned State Attorney for the respondent Republic.

THE HIGH COURT OF TANZANIA

UHURU NA UMOJA

R.K.MKUYE

JUDGE

14/7/2010