

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 92 OF 2008

(Originating from Arusha district Court Criminal Case No. 932 of 2007)

BABU SAMWELAPPLICANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Decision of Arusha District Court

(H. A. MNGURUTA, RM)

Dated 18th day of August, 2008

In

Criminal Case No. 932 of 2007

15/02/2010 and 29/03/2010

J U D G M E N T

SHAYO, J.

In the District Court of Arusha at Arusha the appellant, one, Babu Samwel, was charged and convicted of Armed Robbery c/s 287A of the Penal Code Cap. 16 R.E. 2002 as amended by Act No. 4 of 2004. He was thus sentenced to 30 years statutory term of imprisonment. He now appeals in this court against both his conviction and sentence.

The facts of the case can be intelligently summarised as hereunder contained. On 3/11/2007 at about 04.00 hrs, the complainant. Godfrey s/o Damian (PW 2) was attending to his shop when the appellant came there and bought a cigarette. He then went to sit on a nearby chair chewing "Mirungi". At

04.15 hours PW 2 went outside for a short call and as he retired back, he was ambushed by the appellant who was brandishing a knife. PW 2 tried to resist by pushing him but to no avail as he was threatened with the knife and warned not to shout. The appellant then entered into the shop pointing his knife to PW 2's neck. He pulled open the draw and took Tshs. 1 million and various vouchers and then disappeared into the vicinity.

After the appellant had dashed away with the loot PW 2 went outside and raised an alarm for help. PW 4 Rashid Iddi a guard at a nearby "Seven Up Restaurant" responded to the alarm. He went to the scene where PW 2 told him that the appellant – Babu G invaded him and PW 4 told him that he saw the appellant pass running speedily carrying a certain luggage and his shirt. Suddenly the appellant appeared and PW 2 told PW 4 he was the one who invaded him and then he run away. PW 4 chased the appellant to no avail. PW 2 then informed his employer Sigfrid Massawe – PW 3 and the following day they reported the incident to Police Station. PW 2 claimed to have identified the appellant as he had put on lights when he went out for a call of nature and he knew him well prior to the incident. The foregoing is what PW 2 testified before the trial court.

PW 1 James Gerald had this to tell the court. He testified that on the material date 3/11/2007 at 04.00 hrs. he was as a taxi driver hired to take a patient to Mount Meru Hospital. On his way to hospital he saw the appellant near the shop of one Sigfrid (His younger brother) seated chewing Mirungi. That

around 2.15 hrs PW 2 called him and informed him that the appellant invaded in his shop and took money and vouchers. He knew the appellant as a taxi driver who worked on night shifts.

PW 3 Sigfrid Massawe testified he knew the appellant who frequented his shop at Sakina and that he was a taxi driver. That on 3/11/2007 at 04.00 hrs, he was informed by PW 2 and PW 4 that his shop was invaded by the appellant and that there were vouchers and money/cash which were stolen. It was his further contention when cross examined that they reported to police the same night and that before they went home the appellant was around the shop alone.

On his part, PW 4 Rashid Iddi told the court that on 3/11/2007 at night, he was on duty guarding at Seven Up Restaurant. At around 2.15 hrs near the shop of PW 3 he saw the appellant he knew as Babu G passing carrying a parcel, speedy and suspicious heading towards the valley. He was able to recognize him for he knew him very well.

He went on to testify that PW 2 then came to him and told him that he was invaded whereof he went to the scene and found vouchers scattered and he assisted to collect the said money and vouchers. While there, he said, suddenly the appellant came, PW 2 raised an alarm and the appellant run away. He PW 4, chased him but he could not get hold of him. PW 4 thus returned to the scene and that they called the owner of the shop PW 3. They informed him and later on the same night PW 1 and PW 3 went to report to the police station and the following day PW 2 went to give his statement to police station. Cross-examined

by the appellant, PW 4 further testified that he was able to identify the appellant because the lights were on and he knew him very well for a long time since he used to give him clients as a taxi driver.

In his defence the appellant denied the charge and to have at all committed the alleged offence. He claimed that this was a pure frame up case by the prosecution witnesses that led to his arrest and none of them identified the suspect properly.

The trial court then relying on the above evidence, was no doubt satisfied that the prosecution witnesses were credible and reliable and that the offence of armed robbery was proved beyond reasonable doubt. The appellant was finally convicted and sentenced as aforesaid.

In his petition of appeal, the appellant raised six grounds of appeal which can conveniently be reduced to two. One, that the incident was not investigated into by the police for none testified in court and that, he was not even found with anything despite that he was arrested shortly after the incident. Two, that the evidence adduced before the court was contradictory and inconsistent such that it should have been resolved in his favour, as was so decided in the case of **Mohamed Said Matata (1995) T.L.R. 3.**

During the hearing of the appeal the appellant ventured to elaborate on his grounds of appeal by stating that there was no evidence of sufficient light that enabled the complainant to identify him; PW 2 and PW 4 never testified to that effect; PW 4 claimed to have seen the appellant at 02.15 hrs while PW 2

claimed it was 04.15 hrs. He referred us to the famous case of **Waziri Amani V. Rep. 1980) T.L.R. 250.**

The respondent Republic was in full support of both the conviction and sentence. The learned State Attorney Mr. Tesha submitted in response to the appellant's grounds of appeal and submission, that the appellant's grounds of appeal are baseless for the following reasons:

- the appellant was properly identified at the scene of crime by PW 2 the victim.
- the appellant was not a stranger to PW 2 as he was just staying nearby and had bought cigarette a shortwhile prior to the incident.
- PW 2 was supported by PW 1 a taxi driver who saw the appellant at PW 2's shop chewing "mirungi" prior to the incident.
- PW 4 also supported the evidence of PW 2 as he had seen the appellant whom he knew well running speedily from the shop of PW 2 towards the valley carrying a parcel in his hands
- that it is true the investigator never testified but the law does not provide who is to testify in court referring to section 143 of the Evidence Act.
- as to the issue of time, it would appear the trial court mixed 24 hour and 12 hrs time range.
- the prosecution witnesses never differed on time as claimed by the appellant

- as to the issue of light, they are of the view that there was electricity light such that there was no doubt about the appellant's identification.

It is a trite principle of law that no court of law 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 watertight **(See: Abdallah Bin. Wendo & another V. Rep. [1953] 20 E.A.C.A. 166 and Waziri Amani V. R. [1980] T.L.R. 250.** It is further necessary that where the accused person is identified, the fact of description and terms of description must be testified by the person purporting to identify the accused person. It is further a settled law that failure of a prosecution witness (victim/complainant) to name a suspect before or during the operation is not consistent with identification of the bandit. 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. **(See: Marwa Wangiti & Another V. Rep. Criminal Appeal No. 6 of 1995 – CAT)** (unreported).

Now, in our instant case can it be said very safely basing on the above mentioned principles of law, that the prosecution evidence of identification was absolutely watertight. With unfeigned respect to the learned State Attorney, I am afraid it was not. Let me hasten to say that the incident took place during the night, albeit that the time raises eye brows. As stated in **Waziri Amani's** case (supra) the trial magistrate was expected to have considered and

determined questions of the disputed identity of the appellant, such as: the time the witness had the accused under observations; the distance at which he observed him; the conditions in which such observation occurred e.g. 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.

The totality of the prosecution witnesses' testimonies is clearly contradictory and inconsistent such that one wonders whether they were at all creditable and reliable witnesses of truth. To me the whole scenario was more of a drama if not a frame up than reality. PW 2 the complainant was heard saying that the appellant who was a frequent customer at his shop ambushed him on 3/11/2007 at 04.15 hrs. Prior to that at 04.00 he alleged the appellant had been at his shop where he bought cigarettes and went to sit at a chair outside.

He said he had gone outside for a call of nature, lighted lights and he never saw anybody outside then. But no sooner had he retired to his shop that he was held by the appellant on pointing a knife to his neck and threatened not to shout. The appellant entered into his shop and despoiled him of Tshs 1 million and some vouchers and then dashed away. PW 2 then went outside and made an alarm. PW 4 came to the scene. PW 2 never said at what time PW 4 came to the scene but that he told him he was invaded by the appellant. He never said that he called PW 1 James Gerald to the scene as well, to whom he informed that the appellant ambushed him and stole his money and vouchers.

Again PW 2's narration of what was stolen conflicts with the particulars on the charge sheet.

The particulars of the charge sheet reads that 145 pieces of Vodacom Credit cards valued Tshs. 245,000/=, 115 pieces of Celtel credit cards valued Tshs. 225,000/=, 70 pieces of Tigo Credit cards valued Tshs. 140,000/= and Zantel Credit Cards valued Tshs. 90,000/= and cash Tshs. 1,800,000/= were stolen by the appellant. In his testimony PW 2 said that Tshs. 1 million and vouchers were stolen without even giving the type of vouchers and their value.

On the other hand, PW 1 James Gerald a taxi driver told the court he saw the appellant seated near the shop of PW 2 at 04.00 hrs. At around 02.15 hrs PW 2 called him and informed him that he was invaded by the appellant and he took money and vouchers. PW 3 the owner of the shop on his part said that PW 2 informed him on 3/11/2007 at 04.00 hrs that he was invaded by the appellant who stole money (cash) and vouchers. It would appear he was not told the amount of cash stolen and the vouchers.

PW 4 for his part told the court on 3/11/2007 at 02.15 hrs while on duty near the shop of PW 2 when he saw the appellant running away speedy from the shop of PW2 carrying a parcel. PW 2 then came to him and informed him that he was invaded. It would appear PW 2 did not tell him who invaded his shop. PW 4 went to the scene and found money and vouchers scattered. He helped PW 2 to collect the said money and vouchers. It also seems PW 2 never told PW 4 he was robbed his money and vouchers. PW 4 further said that suddenly the

appellant came to the scene and it was when PW 2 raised an alarm and the appellant run away. But according to PW 2 he raised an alarm after the appellant had taken his money and vouchers from the shop and run away. What a contradiction between the four prosecution witnesses.

It is therefore not clear looking at the evidence of PW 1, PW 2, PW 3 and PW 4 at what exact time did the incident take place and the appellant identified by PW 1, PW 2 and PW 4. If it was at 04.00 hrs or 04.15 hrs, it is inconceivable that PW 1 and PW4 were informed by PW 2 at 02.15 hrs that he was invaded by the appellant. The learned State Attorney wants us to take it that the trial magistrate was confusing or rather mixing up 24 hrs and 12 hrs – time range.

But then it is not possible at this stage of appeal for the court to step into the shoes of the trial magistrate to rectify the anomaly. Doing so would amount to speculation in trying to figure out what exact time the trial magistrate had in mind as testified by the prosecution witnesses. May be if the police witness who was short listed during preliminary hearing – D/C Lilian was called to testify in court, she might have saved the day. It is very absurd that the prosecution decided not to call her for reasons best known to them not knowing that their omission was detrimental to their case.

It would also appear none of the prosecution witnesses especially PW 1, PW 2 and PW 4 though they each claimed to know the appellant and to have seen him at the scene, could state the time they had him under observation, the distance they were when observing him and of course any descriptive special

features or marks showing how he appeared on that night. Moreover, although it is said there was light, none of the witnesses could tell what was the source of the light – whether electricity light, hurricane lamp, moonlight and so forth.

In this regard and as I have amply demonstrated above, had the trial court taken a careful and considered analysis of the surrounding circumstances in the alleged crime or rather incident, surely it would have resolved in favour of the appellant and acquit him. In the upshot the decision of the trial court cannot be left to stand.

The appellant's conviction is quashed and the sentence set aside. It is further ordered that he be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

Sgd. A. A. M. SHAYO

J U D G E

19/02/2010

Delivered in chambers this 29th March, 2010.

Sgd. A.A.M. SHAYO

J U D G E

29/03/2010

For Appellant: Present in person

For Respondent/Republic: - M/S Hyera – State Attorney.

I hereby certify this to be a true copy of original.

A handwritten signature in black ink, appearing to be 'H. Hyera', is written over a circular stamp. The stamp contains the date '15/04/10'.

DISTRICT REGISTRAR

ARUSHA.

AAMS/vm