IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CRIMINAL APPEAL NO. 48 OF 2010

From Original Criminal Case No. 9/2007 in the District Court of Iringa at Iringa

CHRISTOPHER KABWA AND ANOTHER .....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

MKUYE,J

This is a first appeal from the judgment of the District Court of Iringa at Iringa, where the appellants Christopher Kabwa and Idd Kiyeyeu, were convicted on two counts (i.e. 1st and 5th counts) of an offence of armed robbery c/s 285 and 286 (sic) 2287 A of the Penal Code Cap. 16 R.E. 2002 and were sentenced to thirty (30) years imprisonment. The appellants together with other person, one Julius Jackson, who was found not guilty at the trial were charged with 9 counts of offences of armed robbery c/s 285 and 286 (sic) 287A of the Penal Code.

The appellants upon being dissatisfied with the decision of the trial court, they have preferred this appeal to this court. While first appellant was enjoying the representation of Mr.

Mkwata, learned Advocate, the second appellant appeared in person unrepresented and the respondent Republic was represented by Mr. Matitu, learned State Attorney. The instant appeal was argued by way of written submissions following the order of this court, dated 12th October 2011.

The first appellant listed 3 grounds of appeal essentially challenging the identification of the appellants at the scene of crime. The 1st ground is that, the trial magistrate erred in law when he relied on visual identification evidence of PW2, PW3, PW4 and PW5 to convict the appellant with the offence charged which was, however, weak and incredible. The 2nd ground is that, the trial magistrate erred in law when he relied on identification parade evidence which, however was conducted improperly and which was not proceeded by any descriptive evidence from witnesses. The 3rd ground is that, the trial magistrate erred in law when he failed to hold that the offence charged in the 1st and 5th counts were not proved beyond reasonable doubt. The 2nd appellant on his part raised 7 grounds of appeal which essentially centered on the same issues as those raised by the 1st appellant.

Briefly the background of this appeal is as follows: PW2 Gaitani Lutumo, on 9th March 2007 at about 03.00hrs at Jones Corner Guest house in which PW2 worked as an attendant was invaded by a group of assailants. PW2 allegedly managed to identify the appellant in his case by the aid of the light, as the people amongst those three assailants. The bandits were armed

and took Tshs. 20,000/=. from his pocket and ordered him to show the rooms of some people who had rented in rooms 1 and 2 they robbed them.

While he was ordered to lay down with his body facing down on the floor, the appellants robbed those other customers and took some items from them. On 14/8/2007 PW2 participated in identification parade which was conducted at the Mafinga Police Station and managed to identify the appellants from the people who were in that identification parade, as the people who invaded them on the alleged incident date. PW2 alleged he was able to identify them because the incident took about half an hour and there was enough electricity light sufficient to identify the appellants. Their faces were visible throughout the whole incident. According to PW2 the 2nd appellant held a club.

PW3, Ernest Daniel Mwaitebere, on the other hand, who was present when the alleged incident took place testified to the effect that the bandits flashed him with torch light on his eyes and ordered him to lay on the bed while facing downward. He then managed to identify all the appellants by the aid of the tube light which were on after he was taken outside that guest house. He had identified them by their faces and physical appearances. They took from him, a mobile phone NOKIA 2100 and Tshs. 11,000/=. The 2nd appellant was the person who held a club. There was no light in his room, but there was a light outside the room.

PW4, Mohamed Fundikira also testified to the effect that he identified the appellants by the aid of electricity light. 2nd appellant held a club while 1st appellant held a pistol. The distance between him and 1st appellant was about one pace. PW4 said further when he went to Vodacom Offices at Mbeya for purpose of retrieving his phone number as his mobile phone was taken by robberers, he was told that his money in the phone was transferred to account named Christopher G. Kabwa. PW4 did not participate on the identification parade.

PW5, Amana Mohamed Fundikira, testified amongst other things that the appellant held a pistol while the 2nd appellant held a club. She had managed to identify them with the aid of enough light.

PW6, Pilot Mwangala had participated in the identification parade and the appellants were pointed by their "relatives" identifiers.

On his part the learned State Attorney supported the appeal in that it has merits. Arguing for the 1st appellants' 1st ground of appeal the counsel for appellant argued that, PW2, Gaitan Lutumo being a guest house attendant, did not know the 1st appellant. He testified that at about 03.00 am he saw 3 people entering through the gate and PW2 said he was able to identify them because there was a light. On cross examination he said, he identified the assailants after they had gained entrance inside the building where there was enough light. The learned counsel argued further that this witness did not dare to give the

description of the assailants he alleged to have identified. He did not also describe the intensity of the light and the extent of its illumination. His evidence was therefore bare assertion that he identified the 1st appellant and that there was light at the scene of the crime. The evidence of this witness was also exaggerative and false.

The learned counsel for 1st appellant wondered, how could he have managed to see the assailants searching his customers while he was laying facing down? Again how he managed to know what took place in room No. 1 while according to him he was left in room No. 2?

The Counsel for 1st appellant also challenged PW2's evidence in that though he made statement at the Police Station on 9//3/2007 which was tendered in Court and admitted as **Exh. "F"** for the defence, he did not in that statement give description of the people he had seen on that night. He stressed that his allegation in Court that he identified the appellant at the scene of crime is therefore inconsistent with what he had previously recorded in his statement.

The advocate further contented that, no any explaination, let alone an acceptable one, was given by this witness for this inconsistence. His evidence ought not to have been acted on and accordingly should be discounted. The case of **Kibwana Salehe Vs R (1968) HCD No. 391** was cited in support where the court held as follows:

appearance nor their attire. No any explanation was offered for this inconsistency and therefore in light of the authority in **Kibwana Salehe's case** the credibility of this witness is completely zero. It should be discounted.

On the testimony of PW4 Mohamed Fundikira, he gave a bare assertion that he had identified the appellant together with other assailants by aid of electric light during the fateful night. He did not give any description of his assailants nor the intensity of the electric light. Moreover this witness stated that immediately after the assailants had entered into his room at a gun point he was ordered to lay facing down. He could not therefore be able to properly identify his assailants in that state. Furthermore this witness had also recorded his statement at the Police Station which was tendered in Court and admitted as Exh. "D" for defence. In his statement he had not given any description of his assailants and therefore what he testified in court was nothing but lies. His evidence should also be discounted.

Coming to PW5 Amana Mohamed, her testimony was contradictory. She testified that the assailants entered into the room which she was occupying with PW4, " *she did not turn to see who were the persons*" (See page 34 of the typed proceedings), yet when it came to identification she said she identified the assailants as there was enough light and that the appellant had put on a hat. How did she manage to identify the appellant when she did not turn to see him? Moreover she did not even describe the source of light and its intensity thus

rendering her alleged visual identification to be a mere assertion which is not sufficient to eventuate a conviction. Furthermore this witness had also recorded her statement at the Police station which was tendered in court and admitted as **Exh "E"** for defence. In her statement she did not give any description of the assailants and therefore what she attempted to describe in court was manufactured evidence which ought not to have been acted on and accordingly should be discounted. Several cases were cited to support what has been said above these are; **Mohamed Alhui Vs Rex (1942) 2 EACA 72, Waziri Amani Vs R (1980) TLR 250, Ludovico Kashuku Vs R (1967) HCD No. 194, Eliya & Others Vs R HCD n. 101, Meda Mgazi Vs R (1972) HCD n. 206, Maloda William & Anor Vs R Criminal Appeal No. 256 of 2006** (Unreported), **Lubeleje Marina and Another Vs R,** Criminal Appeal No. 172 of 2006, **Issa Mgara @ Shuka V R,** Cr. Appeal No. 37 of 2005 (Unreported).

The 2nd appellant regarding the 2nd ground of appeal argued that, the fact that the alleged incident took place during night, the trial magistrate did not consider the possibility of witness to make honest mistaken identification. The testimonies of PW2, PW3, PW4 and PW5 are to the effect that, they were under gun point. They were under state of confusion. How then could they make a correct identification. There was no any first report given by prosecution witnesses concerning identification of appellant prior to the appellant's arrest. All descriptions were just given at the trial. There was no any report of identification of 2nd appellant by prosecution witnesses given at the police station when reporting the incident. The following cases were

cited to support the above arguments: **Athuman Shaban Vs R (1976) TLR No. 15, Raymond Francis Vs R (1994) TLR No. 100, Augustin Kante Vs R (1982) TLR No. 1 page 122, Joseph Shangambe Vs R (1982) TLR No. 147, R Vs Mohamed Bin Ally (1942) 19 EACA No. 72.**

The respondent Republic in reply argued that it is undisputed that the incident took place at night hours. Thus the issue of identification of the assailants was required to be established by prosecutions so as to leave no doubt. Looking at the evidence, no single witness dared to clarify the light which was at the scene, the source, the distance of the said bulb or tube light from where it was to where they stood and/or the colour of the said tube light or bulb. He argued, this is the requirement of the law as it was laid in the case of **Issa Mgara @ Shuka V.R. Cr. Appeal No. 37 of 2005.**

The witnesses testified that they had ample opportunity and time to observe the accused persons at the scene and thus they identified them by face and appearance. Still none of the witnesses gave any description of the accused persons at the Police Station when their statements were taken, instead they gave the description of the accused person (who are now appellants) at the time when they testified in court. This makes the respondent to be in total agreement with what submitted by the appellants. In the case of **Bushiri Amiri V .R. [1992] TLR 65** the court when dealing with the issue of identification held that:

"(ii) in every case in which there is question as to the identity of the accused the fact of there having been a description given and the terms of that description given are matter of the highest importance of which evidence ought always to be given, first of all, of course, by the person or persons who give the description and purports to identify the accused and then by the person or persons to whom the description was given"

Thus the evidence adduced by the prosecution witnesses to wit: PW2, PW4 and PW5 did not meet the above laid principle of the law thus cast doubts on whether the witnesses managed to identify their assailants on the fateful night.

On the second ground, Mr. Mkwata, for the 1st appellant submitted that, identification was not properly conducted. Because for it to have value the witness who identifies the culprit must have initially given the description of that culprit before he picks him from the identification parade. This is because the value of the identification parades is to back up eye identifications. The case of **Godfrey Richard Vs. R Cr. Appeal No. 365 of 2008 CAT (Unreported)** was cited to cement the argument. He went further to submit that in this case no prior description of the 1st appellant was given by PW2 who incidentally is the only witness who testified in court to have attended the identification parade and picked the 1st appellant from the parade. Mr. Mkwata further contented that the

identification that the identification parade itself was improperly conducted as it contravened some rules enshrined in the Police General Orders No. 231, the case of **Ezekiel Peter Vs. R (1972) HCD n. 165** and the case of **Rex Vs Mwango Manaa (1936) EACA 29.**

Under the rules, he said, the officer in charge of the case, although he may be present, is not required to carry out the identification. Also at the termination of the parade or during the parade the officer is required to ask the accused if he is satisfied that the parade is being conducted in fair manner and make a note of his reply. In this case the officer in charge of the case was the one who carried out the identification parade and the accused person was not asked as per the requirements of the law. Then identification parade has no value in this case.

The 2nd appellant on the other side contended that, there was no any prior report which was given by the prosecution witnesses concerning identification of the 2nd appellant to the police station before he was apprehended. All descriptions were just give at the trial court. The 2nd appellant invited this court to look a the defence exhibits C, D, E and F. He cited the case of **Joseph Shangambe Vs. R (1982) No. 147** to support his contention.

The 2nd appellant went on to argue that the identification parade was not fair due to that fact that he was not given all of his rights concerning the parade. He was different from others

as he was seriously injured hence he was distinguishable from the others.

The respondent Republic on the other side replied that, the identification parade was improperly conducted this is due to the fact that, the 2nd appellant was wounded while paraded, the fact which also is corroborated by the testimony of PW6, the prosecution witness. The 2nd appellant also complained that one of identifying witness saw him before he paraded for identification parade. These two scenarios makes the identification parade against the 2nd appellant to be meaningless and thus carry no weight on his identification. With regard to the 1st appellant, the respondent is in total agreement with the argument of the 1st appellant's counsel.

On the 3rd ground of appeal, all the parties to this appeal are of the contended argument that the 1st and 5th counts were not proved against the all appellants because the alleged stolen properties were not produced before the court as part of exhibits and there was no evidence as to the ownership of alleged items.

In dealing with the instant appeal I have to admit on the following: that the conviction of the appellants rest solely on the question of identification of the appellants. I am aware of unbroken chain of authorities regarding visual identification, that in criminal cases where determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance, and there are certain principles set by the superior court on determining issues of

visual identification. But these principles were not meant to be exhaustive, the court is under obligation to consider the circumstances of each case and make its own determination as justice of each case demands. **(See Raymond Francis V R (1994)** TLR 103, **Emmanuel Luka and Two Others V R Criminal Appeal No. 326 of 2010 (Unreported)** and the case of **Waziri Aman (1980) TLR 250).**

As noted above, this case revolves around the question of identification of the people who had committed the alleged offence, alongside the above issue is the question whether the identification parade was properly conducted and whether the 1st and 5th counts were proved beyond all reasonable doubts.

In dealing with the 2nd ground of appeal, it is true that the identification parade was improperly conducted this is due to the fact that, the 2nd appellant was paraded while wounded. This facts was corroborated by the testimony of PW6, the prosecution witness. The 2nd appellant also complained that one of identifying witness saw him before he was taken to the parade for identification parade. Thus it is undisputedly that the 2nd appellant was distinguishable from the rest of the people who had participated in the identification parade. Looking at the identification parade register (Exh. PEX-1), it shows it was conducted by SP E. Urio who as testified by himself was a head of investigation department at Mafinga Police Station. It means under rule 2 of Police General No. 231 he was not required to carry out the identification parade. It vitiated the value of identification parade. But again the identification Parade

mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight and the following factors have to be taken into consideration: *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 (whether it was dark, if so was there moonlight or hurricane lamp etc, and whether the witness knew or had seen the accused before or not.* (**See Amani Waziri V R (1980) TLR 250).**

Also in very case in which there is a question as to the identity of the accused, the fact of there having a description given and terms of that description given are matters of highest importance which evidence ought always to be given; **firstly** by the persons who gave the description and who purport to identify the accused and secondly, by the person or persons to whom the description was given. **See Mohamed Alhui V Rex(1942) 2 EA CA72; Bushiri Amiri V R (Supra).** Evidence of visual identification is of weakest kind and so, bare assertions of identification of a culprit would not suffice to ground a conviction unless it is accompanied by details of description of the person allegedly identified. (**See Mwalim Ally and Another V R CAT DSM, Criminal Appeal No. 39 of 1991 (Unreported), Mohamed Alhui VS. Rex (1942) 2 EACA 72 and Waziri Amani case (supra).**

The prosecution witnesses testified that they had ample opportunity and time to observe the accused persons(appellants) at the scene and thus they identified them by face and

appearance. Still there was none of the witnesses who give any description of the accused persons at the Police Station when their statements were taken instead they gave the description of the accused person (who are now appellants) at the time when they testified in court.

PW2, Gaitan Lutumo, who was an attendant at the Johns' Corner Guest House, claimed that, on 9th March 2007 at about 03.00 hrs while at his working place, the said guest house in which he was working was invaded by group of bandits and he managed to identify the appellants in this case by the aid of the light, as the people amongst those three assailants. He said further the assailants were armed and took Tshs. 20,000/= from his pocket and ordered him to show the rooms of some guys who rented in the same guest house. The appellants robbed those other people who had rented room 1 and room 2.

PW2 further testified that while he laid down by the stomach as ordered by the bandits the appellants robbed those other customers and took some items from them. PW2 said he identified the appellants in identification parade which was conducted on 14th August 2007 at the Mafinga Police Station. He said the incident took about half an hour and there was enough electricity light sufficient to identify the appellants. Their faces were not visible throughout the whole incident. It was the 2nd appellant who held a club.

Looking at the whole evidence adduced before the trial court, the issue of the electricity light came from PW2 during re-

examination. Throughout the trial he maintained that he had identified the appellants with the aid of enough light without specifying the source of that light. This witness failed to testify as to the intensity of that light. There is no evidence that this witness described the appellants to any one before he picked the appellants from the identification parade, the only description which can be found in defence **exhibit "F"** is that the tallest assailant held a pistol while the other one was shorter. These description (which were insufficient) were made as additional statements after the identification parade was conducted. This aspect is important in cases of identification as per the authorities cited above. (**See Mohamed Alhui (Supra**). Moreover PW3 had testified in Court that the assailants had flashed torch light on his face. Since the assailants were aided by torch light to see him then it casts reasonable doubts as to whether the conditions were favourable for correct identification or whether there was a sufficient light for that purpose. If there was sufficient light, why did the assailants had to use/flash their torch?

Looking at the prosecution evidence, no single witness dared to clarify the light which was at the scene of crime the source, the distance of the said bulb or tube light from where it was to where they were stood, and what colour of the said tube light or bulb. This is the requirement of the law as it was laid in the case of **Issa Mgara @ Shuka V .R. Cr. Appeal No. 37 of 2005**.

The other witnesses were only called in court, that means, they did not participate in the identification parade, so their testimonies depended on whether the identification of the appellants was properly made by PW2. Failure of PW2 to give the description of the assailants, the intensity of the light and the fact that the appellants were not found in possession of the alleged stolen properties or produced in court and the fact that the identification parade was not properly conducted as I have found above, brings me to the conclusion that the identification of the appellants was not established beyond reasonable doubts. In final analysis I find the case against the appellants was not proved beyond reasonable doubts and the appeal is therefore allowed, the conviction is quashed and the sentence is set aside.

I further order that the appellants to be released forthwith unless held for other lawful reasons.

Ordered accordingly.

R.K.MKUYE

JUDGE

18/7/2012