IN THE HIGH COURT OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 73 OF 2013

[Appeal from the judgment of the District Court of Mwanza, in Mwanza in Criminal Case No. 1313 of 2002, before Hon. L. Lugakingira-RM].

MSAFIRI EMMANUEL.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

BUKUKU, J.:

In the District Court of Nyamagana, the appellant and five others were arraigned for the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16. During the trial, the appellant stood as the first accused. At the end of the trial, of the six accused persons, only the appellant was convicted and sentenced to serve thirty (30) years in prison. Dissatisfied with the decision of the trial court, he appealed to this court against both conviction and sentence.

In his memorandum of appeal, the appellant has enlisted five points of grievance. Ahead of a consideration of his points of contention, I deem it

instructive to explore the factual setting giving rise to the arrest, arraignment and subsequent conviction of the appeal.

To begin with, from a total of three witnesses, the case for the prosecution was to the effect that, on 13th day of December, 2002, at Ghana area at Ilemela District, Mwanza Region, the appellant in the company of five others, stole the sum of T.shs. 63,000/= from the person of one Muhidin Shaban **(PW3).** Evidence was to the effect that, at around 01.30 hours on the fateful day, **PW3,** a taxi driver, was returning to his house from his working place. When he arrived near a bridge, he saw around 20 youths coming his way. When he reached at where the youths were, he was ordered to sit down to which he did. The Youths asked them (it seems **PW3** had with him another person), whether they were watchmen. According to **PW3,** while seated, the Youths started beating them and one of them searched him, found T.shs. 48,000/= and took it. In the process, they injured another person (who is not known and never testified). After that, the Youths took to their heels, clear of the scene.

When the coast was clear, the complainant continued with their journey and on the way they met with the police who were in a taxi. Upon being asked their whereabouts, they narrated their ordeal to the police

men on patrol, who after making a follow up, they located the appellant and his group. They then fired a gun which made the gang to disperse. **PW3** then proceeded to his home and on the following day he was interviewed and later identified the appellant. According to the complainant, the appellant had a weapon and a radio.

PW1 No. E.76 PC Steven who was on patrol on that day testified that, while in their normal routine of work, they met with **PW3** somewhere at Mbugani. **PW3** told them how he was attacked and robbed his money T.shs. 18,000/= and his mobile phone by a group of Youths. Having heard this information, they searched the area and located the group. They then fired a bullet in the air which made the Youths disperse. During the search, they located the appellant who was hiding in the grass. They arrested him, and upon searching him, they found he had a matched, one stabilizer and a radio cassette.

Aside from **PW1** and **PW3,** another witness, E.5487 D/Cpl. Danny **(PW2)** also testified on what happened on that fateful day. All what he said was that, while on patrol, they heard a shout "wezi, wezi". As they were rushing to where they heard the said cries, they met with **PW3**who told them that he had been invaded and the bandits took away his Tshs.

18,000/=. According to **PW2, PW3** saw the person amongst the 15 people who invaded him. **PW2** testified that, **PW1** fired a bullet in the air and the bandits ran away, and in the process, they managed to arrest the appellant who was hiding in a sugar cane field. When he was searched he was found with one radio cassette, a stabilizer and a matchet. When he was interrogated, he named his accomplices on that night.

Having been arrested, the appellant was arraigned in court. He and his accomplices denied the charge leveled against them. However, after considering the evidence of the three witnesses who testified, and the defence evidence, the trial District Magistrate was of the settled mind that, the prosecution had managed to prove its case to the required standard in respect of the appellant only. He was sentenced to thirty (30) years in jail.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic had the services of Mr. Kajungu Learned State Attorney who supported the appeal. Mr. Kajungu was of the affirmative view that, the evidence by the prosecution was wanting to support a conviction. It is Mr. Kajungu's submission that, the issue of identification of the appellant was not properly addressed.

As already intimated, the appellant herein has raised five grounds of appeal. All in all, his grievances are clear. The bottom line of his complaints against the decision of the trial court below is that:-

(a) He was not properly identified by the victim of the armed robbery, and so his conviction was unjustified by the evidence on record;

(b) He was not found in possession of any incriminating article.

(c) That the trial magistrate relied on contradictory evidence of prosecution witnesses.

I will start with the issue on identification.

The importance of proper and correct identification in cases whose determination hinges on identification was reiterated by the Court of Appeal for Eastern Africa way back in 1942. In the case of **Momahed Alhui V.Rex (1)** it was held that:

> *"In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description given, are matters of the highest importance of which evidence ought always to be given; first of all, of course by the*

persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."

Now, in this particular case, **PW3** who is the complainant herein told the court that he identified the appellant at the police station. According to **PW3,** the incident occurred at 01.30 am. Definitely it was in the dead of the night. Before the incident, **PW3** did not know the appellant. During cross examination by the appellant, **PW3** admitted that, theappellant was a stranger to him. **PW3** told the court that, he identified the appellant when he invaded him and that, there was light comingfrom an electric light and that, there was moonlight. Armed with the above, one wonders, was the appellant properly identified by **PW3** among the robbers as the trial court was so convinced or was he mistakenly identified, or is he a victim ofa frame up as he has persistently claimed?

In supporting the appeal on the aspect of identification, it was strongly contended by Mr. Kajungu, Learned State Attorney that there was failure of identity of the appellant, arguing that, there was no sufficient description of the light and **PW3** never gave prior description of the accused. I fully subscribe to what Mr. Kajungu has submitted.

In actual fact, to say the least, what is on record is a general statement that the witness identified the appellant with the assistance of electric light and the moon. Under such circumstances, without descriptions of the appellant either of his outlook or attire, the light and the moon notwithstanding, one cannot with certainty say that there was no mistaken in the identification of the appellant **(see: Karim Ramadhani and 2 Others V. The Republic, Criminal Appeal No. 113 of 2009 (unreported).**

In the case of **Shamir John V. The Republic, Criminal Appeal No.2004,** the Court of Appeal of Tanzania has held the following:-

> *"It is now trite law that courts should closely examine the circumstances in which the identification by each witness was made. These may be summarized as follows; how long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people. Had the witness ever seen the accused before? How often? If only occasionally, had he had any special reason for remembering the accused....."*

With the above, considering that **PW3** never gave any description of the appellant before he identified him, never knew him before since it was night time, whereby **PW3** did not describe the intensity of the light, I do not hesitate to conclude that, there were no conditions favouring a correct identification in this case. **(see: Galous Faustine Stanslaus V. The Republic, Criminal Appeal No. 2 of 2009 (unreported – CAT),**

The appellant herein maintained that he was arrested at around 6.00 am on 14/12/2002 at Mwaloni Kirumba. It is upon the prosecution to prove him wrong. Unfortunately, the evidence of **PW3** fell far short due to the fact that, the circumstances which he alleged to have identified the appellant were not favourable. In that regard, I find that the evidence of identification was not sufficient to implicate the appellant herein. As such this ground of appeal has merit. It is upheld.

This ground alone is sufficient to allow the appeal. That said however, I will canvass the other grounds. The next ground is that, the trial magistrate erred in admitting the sime as an Exhibit. I think this ground need not detain me. In their testimonies both **PW1** and **PW2** told the court that, when they found the appellant he had a masai matchet (sime), stabilizer and a radio cassette, and prayed to tender the sime,

which, somehow having been objected to, it found its way in court as Exhibit on allegations that the complainant said he was threatened with a sime, something which was not on record.

It is on record that, when **PW3** was cross examined by the appellant, he told the court that, he didn't see him with any weapon. Now if the complainant himself testified that the appellant didn't possess a weapon, where did the sime which was tendered in court came from? In fact, the said sime was not among the exhibits recorded to be tendered by the prosecution side. It might be that out of the 20 or so bandits who attacked **PW3** some had weapons but, going by what **PW3** himself saw, I think in all fairness, this ground of appeal also has merit. It is allowed.

The final ground of appeal is that, the trial magistrate erred in law and fact by convicting the appellant by relying on contradictory evidence of the prosecution witnesses. In their testimonies, both **PW1** and **PW2** told the court that, **PW3** was robbed cash money T.shs. 18,000/= and a mobile phone, and that, when he was arrested he was found with a radio cassette, stabilizer and a sime. On the other hand, it is **PW3's** testimony that, one young man searched him and took money T.shs. 48,000/=. During his examination in chief and during cross examination, **PW3** never

mentioned about being robbed his mobile phone. The issue is, how come **PW1** and **PW2** said **PW3's** mobile phone was also stolen by the appellant? That notwithstanding, if the appellant stole a mobile phone and cash money, why were these items not tendered in court. Still, it is not known how much money was stolen if any. While the charge sheet states Tshs. 63,000/=, both **PW1** and **PW2** told the court T.shs. 18,000/= was stolen and the complainant himself told the court that, T.shs. 48,000/= was stolen by a young man.

In this case, the cumulative strands of circumstances relied upon by the trial court do not, for reasons already given, clinch to the appellant's guilt. What is evident however, is the existence of circumstances of a strong suspicion, devoid of conclusive evidence, that the appellant was involved in the robbery incident under scrutiny under such circumstances, it is quite obvious that the trial magistrate erroneously concentrated her attention, not on the affirmative prosecution case, but rather on exhibiting the falsity of the appellant's account.

It is trite that, a criminal accusation ultimately stands or falls on the strength of the prosecution case. Where the prosecution case is itself weak, it cannot be salvaged from the tatters of the defence. It is quite

plain that, false statements made by the accused person, if at all, do not have substantive inculpatory effect and cannot be used as a make - weight to support an otherwise weak prosecution case. The fact that an accused person had not given a true account only becomes relevant, to lend assurance, in a situation where there already is sufficient prosecution material **(see: Pyaralal Malaram Bassen V.R [1960] EA 854.** That was certainly not the case here.

When all is said and done, this appeal succeeds and accordingly the conviction and sentence are, respectively, quashed and set aside. The appellant is to be released forthwith unless if he is held in prison custody for some other lawful cause.

Ordered accordingly.

A.E. BUKUKU

JUDGE

Delivered at Mwanza

This 4th day of June, 2014