IN THE HIGH COURT OF TANZANIA

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 269 OF 2012

SADIKI KISHERI @ WEGERO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

BUKUKU, J.:

The appellant was charged with and tried for the offence of armed Robbery c/s 287A of the Penal Code Cap 16 R.E. 2002 before the District Court of Musoma at Musoma. The appellant was convicted as charged and sentenced to thirty (30) years imprisonment. Aggrieved by the conviction and sentence, he has lodged this appeal claiming his innocence.

In his memorandum of appeal the appellant fronted five grounds of grievances cum submissions. Basically, the centre of his grievance is that, he was wrongly convicted on the basis of very weak prosecution visual identification evidence and secondly that, since the prosecution evidence

came from people of the same family, it ought to have been corroborated before being accepted by the trial court.

For the respondent Republic in this appeal, Mr. Obadiah Kajungu supported the appeal for almost similar reasons of weak identification. He emphasized that, the evidence of the prosecution was not water tight, and it was full of contradictions. For that matter he prayed the appeal to be allowed.

The prosecution case against the appellant was built on the evidence of three witnesses. These were Mugala Eliasifu **(PW1)** Nyamizi Daudi **(PW2)** and D. 6122 D/Sgt. Obeid **(PW3).**

PW1 told the trial court that on 7th November, 2012 at around 20 hours while cooking outside her house, the appellant went to her kiosk where her daughter **(PW2)** was, and requested to be given cigarette on credit. According to **PW1, PW2** refused to give the appellant credit and that the appellant told **PW2** *"unakatalia sigara unafikiri nikiziiji azitanishinda?".* He then left.

Narrating further, **PW1** told the court that, at around 22:30 hours she heard people murmuring behind her house, and when she peeped through, the window, she saw people who lit torches and thereafter, a group of about seven bandits invaded her house. According to **PW1,** earlier, the bandits introduced themselves as policemen and that they wanted to search **PW1's** house because they suspected someone who they were chasing had entered inside **PW1's** house. **PW1** refused them entry, unless they came with a ten cell leader. They refused to do so and suddenly, they pushed **PW1** aside and entered inside the house while ordering **PW1** to lie down on her stomach. When **PW1** refused, she was assaulted with a club on the head and also with a panga on her two fingers. She then complied.

PW1 further testified that, while inside, the bandits took various items including phones, money, weighing machine, rice, wheat flour, lotion and other stuff all totaling T.shs. 463,500.00/-. The bandits asked **PW2** to show them money to which she did and after the loot, the bandits disappeared. One thing that **PW1** told the court was that, while all was

happening, she did not identify any person because all the time she was lying down on her stomach.

As far as **PW2** is concerned, having passed the voire dire test, she told the court almost a similar story like **PW1** on how the appellant went to the kiosk on that day, asked for credit and was refused and how later on they were invaded. Save that, according to **PW2,** unlike **PW1,** she told the court that, when the bandits invaded them, both **PW1** and herself were outside their house, frying buns. **PW2** told the court that, she managed to identify the appellant by face and the clothes he wore, because first, he is their neighbor, second that there was tube light from their closest neighbor and also that inside their house there was a kerosene light.

Finally, **PW3** also testified. He was brief in his testimony. He told the court that, on 9th November, 2012, he received the case file about the robbery that took place at **PW1's** house. He testified further that, on 11th November, 2012, the appellant was arrested and that he interrogated the appellant but denied to have been involved in the commission of the offence charged with.

In his sworn defence, the appellant **(DW1)** denied any involvement in the alleged offence. **DW2,** who is **DW1's** father told the court that, on the fateful day, his son was at home sleeping and thus is surprised to hear that his son was involved in the case.

In convicting the appellant, the learned trial Senior Resident Magistrate found **PW2** to be a credible and reliable witness who recognized the appellant at the scene of the crime. He relied on the assertion of **PW2** that it was not **PW2's** first time to see the appellant. He went on to hold thus:-

> *"Though the incident took place at night; **PW2** Nyamisi Daudi was able to identify the accused person at the time he was entering their house and that visual identification was done under favourable tube light which was at their neighbour's house of which the victim's house is facing it....."*

The complaint by the appellant was the credibility of **PW1** and **PW2,** especially that of **PW2** which, the trial magistrate relied heavily on her evidence.

It is trite that, in order to convict the appellant for armed robbery, the prosecution must prove that:-

(i) That there was an armed robbery; and

(ii) That, it was the appellant who committed the robbery.

In this particular case, there was no dispute at the trial, that, the robbery incident took place at the **PW1's** house on the stated time and date. The crucial question is, whether the prosecution evidence established beyond reasonable doubt that the appellant was the robber.

The first point for consideration and decision in this case is whether theappellant was sufficiently identified as being amongst the bandits. I think the issue of identification is very crucial here. The crime which the appellant was convicted of, took place at around 22:30 hours. The premises had tube light from a neighbour's house and a kerosene lamp inside the house where the robbery took place.

The prosecution case relied heavily on the evidence of **PW2** for identifying the appellant. I need to establish whether the conditions were favourable for adequate and correct identification. It is trite that, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the court should warn themselves of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

Normally, the courts should closely examine the circumstances in which the identification by each witness was made, especially in a case entirely depending on the evidence of a single identifying witness. Such evidence must be absolutely water tight to justify a conviction. See for instance, **Yohanis Msigwa V.R [1990] TLR 148** and **Masudi Amlima V.R [1989] TLR 25.** The guidelines to be followed by the courts were stated with sufficient lucidity by the court in **Waziri Amani V.R [1980] TLR 250**. The same principle applies even to cases of recognition evidence as in this case. Even recognizing witnesses often make mistakes or deliberately lie.

Now, was the evidence of **PW2** in this case absolutely water tight? I think it was not for the following main reasons. **First,** is the evidence of the light, which I consider to be questionable. Both **PW1** and **PW2** told the court that, the place was lit with a tube light from a neighbour's house. We are all aware that, different lamps produce light of different intensities. Light from a bulb is incomparable to that from a tube light. Even the light from a tube light also differs depending on the watts of the tube light itself. Therefore, it is my conviction that, there was an overriding need to describe the intensity of the light which would have enabled **PW2** to correctly recognize the appellant out of the many invaders. This was not done. It raises a lot of reasonable doubt on the bare assertion of **PW2** that she recognized the appellant. If at all the light was that illuminating, why did the appellant and his accomplice use a torch in the first place?

Second, the fact that **PW2** might not have seen and recognized the appellant is reinforced by the fact that, she never mentioned the appellant's name to the neighbours (as she claimed a few responded to the alarm call) or to the police. In this case, the failure by **PW2** to mention the appellant at the earliest opportunity was also significant in giving assurance

that she was a reliable witness. In **Marwa Wangiti Mwita and Another V.R, Criminal Appeal No. 6 of 1995 (unreported**) the Court of Appeal held as follows:-

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his liability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

PW2 did not name the appellant to either the neighbours or the police though she claimed in her testimony that she identified the appellant. If at all she was afraid to name the appellant on that same night, she could have done so to the police the first thing in the following morning. **PW3** who testified, never told the court that **PW2** named the appellant at the police station.

Third, in their testimonies, both **PW1** and **PW2** told the court that, when they were put under arrest by the bandits, they were ordered to lie down on their bellies. It is also on record that, the bandits tied the hands of both **PW1** and **PW2.** Now, if at all **PW2** was lying face down, what are

the chances of her identifying the appellant without any doubt. I am saying so because, if both **PW1,** and **PW2** were outside when they were ambushed, logic demands that, the two were to be in front of the bandits when entering the house, rather than behind as **PW2** wanted this court to believe. In her testimony, **PW2** told the court as follows:-

> *"I managed to identify the accused who was the last to enter in our house with thugs".*

If at all both **PW1** and **PW2** were forced to get into the house, and immediately ordered to lie down on their stomachs, definitely, one wonders how one can identify someone in such a position. All this goes to show that, the identification was not water tight.

The next point for consideration is on the inconsistencies and contradictions obtaining in the prosecution case as raised by Mr. Kajungu. The pertinent question I need to ask myself is whether the discrepancies in the testimonies of **PW1** and **PW2** are so material to render their evidence unreliable. This point need not detain me. There were, indeed a number of contradictions in this case.

To start with, while **PW1** told the court that when the bandits invaded them she was outside while **PW2** inside the house, in sharp contrast to the evidence of **PW1, PW2** told the court that, when they were invaded, they were all outside frying buns and were forced to go into the house. **Second,** while **PW1** told the court that much as they raised an alarm, neighbours did not turn out but came in the following morning, **PW2** told the court that, upon raising an alarm, few neighbours turned out except the appellant and his family who did not show up. **Third,** while **PW1** told the court that the bandits were armed with a gun, **PW2** told the court that the bandits were armed with a matchet.

Surely, if the witnesses were describing an incident relating to the same event it was not expected that they would differ so much on important areas of the case. In my considered view, if the witnesses contradicted themselves so much, it was likely that even their evidence is not truthful and reliable. For that matter, I am of the considered view that, the inconsistencies and contradictions among the prosecution witnesses, **PW1** and **PW2** left questions unanswered, thus creating doubt as to whether the prosecution side proved its case beyond reasonable doubt.

(See: Mohamed Said Matula [1995] TLR3 and **John Gilikola V.R Criminal Appeal No. 31 of 1999 (CA)(unreported)**. I think that these lingering doubts in the prosecution case should be resolved in favour of the appellant.

I am therefore, inclined to agreewith Mr. Kajungu, Learned State Attorney that, the inconsistencies and contradictions went to the root of the matter. Therefore, the evidence of **PW1** and **PW2** cannot be relied upon.

All what I can gather is that, the evidence coming from **PW2,** whose credibility is not beyond reproach, as already demonstrated, leaves me with no lurking doubt in my mind that it is patently lacking in cogency. It is my finding, therefore, that even if the offence of armed robbery had been proved, I would not have failed to hold that it was not proved that the appellant had been impeccably identified as the robber. The evidence was not absolutely water tight at all.

All said and done, I allow this appeal in its entirety. The conviction of the appellant is hereby quashed and set aside as well as the imposed

sentence of thirty years imprisonment. The appellant is to be released forthwith from prison, unless he is otherwise lawfully held.

Ordered accordingly.

A.E. BUKUKU

JUDGE

Delivered at Mwanza

This 8th December, 2014