IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: OTHMAN, C.J., KILEO, J.A. And LUANDA, J.A.)

CRIMINAL APPEAL NO. 151 OF 2012

1. MUNZIRU AMRI MUJIBU
2. DIONIZI RWEHABURA KYAKAYLO } .....**APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Kibella, J.)

dated the 8th day of June, 2012
in
HC Criminal Appeal No. 51, 52 of 2011

JUDGMENT OF THE COURT

24th February 2014 &

KILEO, J.A.:

The two appellants were, along with one Gozibert s/o Mugisha, arraigned in the District Court of Muleba at Muleba for the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16. At the end of the trial they were found guilty, convicted and sentenced to thirty years imprisonment. Gozibert s/o Mugisha was released on appeal to the

High Court, while the appellants were unsuccessful in their appeal. Being aggrieved they have come to this Court on a second appeal.

The case for the prosecution at the trial was briefly to the following effect:

PW3 is the owner of a shop in Bumbire Island in Lake Victoria. His wife (PW9) was, at the time of the incident, (20.08.2008) a shopkeeper in that shop. Her daughter, PW2 a child aged about four years at the time had joined her. Round about 7.45 pm or thereabout they were invaded by a gang of armed bandits who made away with a number of items including Nokia and Motorola mobile phones, cigarettes, mobile vouchers and money in cash. In the course of the raid the attackers injured PW2 on her leg. Three of the bandits were lynched by villagers.

The High Court sustained the appellants' convictions mainly on the basis of identification, the learned first appellate judge having found the light from two hurricane lamps that were burning in the shop that night to have been sufficiently intense for watertight identification.

The appellants who appeared before us in person with no legal representation filed separate memoranda of appeal. The issue of identification runs through the two memoranda. The second appellant,

Dioniz Rweyabula Kyakayolo also filed a 'written submission for grounds of appeal' in addition to his memorandum of appeal. This written submission contains several complaints against the decisions of the courts below. Among these complaints is the failure by the lower courts to consider his defence of alibi and generally the way the trial was conducted which he claims was highly prejudicial to his case. When called upon to address the Court at the hearing of the appeal the appellants did not have much to say, instead they informed the Court that they would respond after the respondent Republic had made its submission.

Ms Jacqueline Mrema, learned State Attorney who was assisted by Mr. Aloyce Edward Mbunito, also learned State Attorney, represented the respondent Republic at the hearing of the appeal. She did not deem it fit to support the conviction and sentence. For a start, she conceded that both courts below erred not to address themselves to the defence of alibi which the second appellant raised from the very beginning. The learned State Attorney also submitted that there were several inconsistencies in the testimonies of the witnesses which ought to have been resolved in favour of the appellants. Ms Mrema further pointed out to the Court several disparities between the charge sheet and the evidence which was tendered

in court. For example, she submitted that the 1st appellant was found with a phone that was never the subject of the charge; also the amount of cash stolen from the shop as per charge sheet varied from the amount that was mentioned by the owner of the shop (PW3). PW3 said that cash stolen was shs. 1, 205, 5000/= while in the charge sheet it was stated that cash stolen was shs 650,000/=. Each witness was sort of proving his own charge while there were no different counts in the charge sheet, the learned State Attorney submitted. Ms Mrema conceded further that the charge was defective in that it did not specify against whom the violence was threatened in obtaining the stolen property.

We have given due consideration to the matter before us. We have to admit right away that in the course of our consideration and deliberations we have noted serious irregularities and are settled in our minds that the appellants had good reason to complain against the decision of the High Court which sustained their conviction.

We will begin with the charge which is couched as follows:

"OFFENCE SECTION AND LAW: Armed robbery c/s 287 (A) of the penal code cap 16 Revised edtion 2002.

PARTICULARS OF OFFENCE: That MUNZIRU s/o AMRI e' MUJIBU, GOZIBERT s/o MUGISHA and DIONIZ s/o RWEYABULA e' KYAKAYOLO are jointly and together charged on 20th day of August/2008 at about 19.45hrs at Ishenye Bumbire Island, within Muleba District in Kagera Region did steal two mobile phones make Nokia 6800 valued T/SHS. 120,000/= and Motorolla C. 115 valued T/SHS. 35,000/= cash money T/SHS. 650,000/= and mobile phone voucher valued at T/SHS. 20,000/= All stolen properties valued T/SHS. 1,325,000/= the properties of one WINCHSLAUS s/o Barong. An (sic) immediately before or after such stealing did discharge four bullets in order to obtain or retain the said stolen property".

It will be noted from the particulars above that the person against whom the violence was used was not mentioned as required by section 287A of the Penal Code which is the provision that creates the offence of armed robbery. In this case the charge merely mentioned the owner of the stolen property who as evidence subsequently showed was not even at the scene of crime. Section 287A of the Penal Code under which the appellants were charged provides as follows:

> **"Any person who steals anything and at or immediately after the time of staling is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and immediately before or immediately after the time of the stealing uses or threatens to use violence to any person, commits an offence termed "armed**

robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment"

This Court in **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011 (unreported) was faced with a similar situation. The appellant in that case had been charged with armed robbery contrary to section 285 and 286 of the Penal Code. The incident occurred in 1998 which was before the introduction of section 287A of the Penal Code which is now the specific provision on armed robbery. Section 285 under which he was charged stated as follows:

"285. Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of robbery."

One of the essential ingredients in both section 285 and 287A is the threat or use of violence against the person on whom the robbery was committed. The Court in the case cited above in addressing itself to the essential ingredients of armed robbery stated:

"Having carefully read the charge reproduced supra and the cited section, we are of the settled view that the charge is incurably defective. It is incurably defective because the essential ingredient of the offence of robbery is missing. Strictly speaking for a charge of any kind of robbery to be proper, it must contain or indicate actual personal violence or threat to a person on whom robbery was committed. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, the particulars of the offence of robbery must not only contain the violence or threat but also the person on whom the actual violence or threat was directed".

The Court went further and cited two cases; **Mussa Mwaikunda v. R.** [2006] TLR 387 where it was observed inter alia:

"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge disclosed the essential element of an offence."

and **Isidori Patrice v. Republic** - Criminal Appeal no. 224 of 2007 (unreported) where it was stated:

"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the ***actus reus*** *of the offence with the necessary* ***mens rea****. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law".*

The anomaly in the charge was not the only problem in the case. As a matter of fact the whole case is wrought with anomalies and irregularities. Take for example the question of the defence of alibi notice of which was given by the second appellant even before the hearing started. The proceedings of the trial court of 25. 10. 2009 which appear at page 19 of the Court Record read in part as hereunder:

"Notice of alibi for the 3rd accused person is hereby noted. However, the affidavit Supporting the said notice of Alibi is incomplete as it is

not duly sworn or endorsed by any commissioner for oaths. Also the deponent did not endorse to the affidavit.

Sgd: P.J. Matete – RM

25.09.2009"

The 2nd appellant's notice to rely on the defence of alibi was finally brushed aside on 30.10.2009. The proceedings of this day read:

> *"**3rd Acc.*** *You told me that the affidavit was not duly sworn I pray to file it as I have cured the defect.*
>
> ***Court:*** *The affidavit brought was also not sworn. The same is struck out with no leave to refile because the accused was given leave to file the cured affidavit but failed to comply with the court order. Order* accordingly."

We entirely agree with the learned State Attorney that the failure of both the trial court and the High Court to consider the 2nd appellant's notice of defence of alibi not only highly prejudiced the case for the appellant but also the case for the prosecution who did not have an opportunity of making necessary investigations with respect to the notice in order to enable the court to arrive at a just decision. It is not clear why the

trial magistrate required an affidavit in support of the notice of the defence of alibi. There is no such requirement under the law. An accused who intends to rely on the .defence of alibi need only to give a notice to that effect and does not have a duty to prove it by affidavit or otherwise. On the other hand it is the prosecution who have the duty to disprove the defence of alibi raised. (see **Chacha Pesa Mwikwabe versus the Republic**- Criminal Appeal No. 254 of 2010, unreported).

Section 194 (4) of the Criminal Procedure which is the relevant provision on the issue of alibi states:

> **"(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."**

The learned 1st appellate judge never addressed himself to the appellant's ground of appeal where he complained that the trial magistrate had erred in his failure to consider his defence of alibi. We are settled in our minds that the failure by the lower courts to consider the appellant's defence of alibi was fatal. At the trial the 2nd appellant apart from his oral evidence given in support of his notice of alibi he tendered in court various

documents including travel documents, a bus ticket and a hospital discharge card purporting to show that he could not have been at the scene of crime. All this was completely ignored, which we think was a grave error on the part of both the High Court and the trial court.

As mentioned earlier, the 1st appellate sustained the convictions of the two appellants mainly on the basis of identification which he found to be water tight. The crime was committed at night. The only source of light at the scene of crime was from two hurricane lamps that were burning in the shop. The learned 1st appellate judge found as recorded at page 259 of the Record of Appeal that '*the intensity of the light of two hurricane lamps that lit the shop was adequate in the circumstances of this case and the time spent by appellants in the shop under the observation enough to properly identify the accused as well as the distance between the PW9, 10 and 11, PW2 was enough to correct see each other.*' On the intensity of the light the learned State Attorney correctly pointed out that this was a figment of the learned judge's own imagination as not a single witness at the trial testified as to the intensity of light from the hurricane lamps. Further still, there was no identification parade which was conducted which could have corroborated the dock identification of the appellants that was

made by the witnesses. It cannot be gainsaid that visual identification is of the weakest kind and courts are enjoined to ensure that before entering a conviction on the basis of visual identification such identification is watertight. This Court in the celebrated case of **Waziri Amani v. R.** **(**1980) TLR 250 held:

> *"(i) evidence of visual identification is of the weakest kind and most unreliable;*
>
> *(ii) no court 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"*

A number of factors were enumerated in the above case which are to be taken into account by a court in order to satisfy itself on whether or not such evidence is watertight. These factors include: the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, 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.

There is no dearth of authorities restating the principles laid down in **Waziri Amani** on visual identification. These include **Raymond Francis vs Republic** (1994) TLR 100 **Jaribu Abdalla v. R.**, Criminal Appeal No. 220 of 1994, **Issa Mgare @ Shuka v. R.**, Criminal Appeal No. 37 of 2005 **Said Chally Scania v. R.**, Criminal Appeal No. 69 of 2005 **Kulwa Mwakajape v. R**, Criminal Appeal No. 35 of 2005 (all unreported)

In **Jaribu Abdalla** the Court stated:

> *".....in matters of identification it is not enough merely to look at the factors favoring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence...."*

In the present case credibility of the witnesses was highly suspect. There were several contradictions in the testimonies of the witnesses. For example while the key witness (PW9) said that the bandits entered her shop at 07.45 pm and left at 11pm another witness (PW11) testified that the whole incident took only 10 minutes. There was also a contradiction as to the 2nd appellant's attire between PW1 and PW9. PW9 said he was wearing a Kaunda suit while PW1 said he was wearing a long coat. PW9 gave evidence purportedly to show that she had ample time to identify the second appellant. She said that as between 12:00 noon and the time they

were invaded the 2nd appellant had been in and out of her shop six times. We found it difficult to buy her story. Firstly, she did not record in her statement to the police that she had identified the appellant at the scene of crime. Secondly, it was inconceivable that someone intending to commit such a serious crime as robbery would present himself to the victim several times as if to make sure that he is marked. As the witnesses were not credible conviction ought not to have been sustained.

The above considerations suffice to dispose of this appeal and there is no need for us to engage ourselves on the other complaints raised in the memoranda of appeal.

In the result, we find the appeal by Munziru Amri Mujibu and Dionizi Rwehabura Kyakayolo to have been filed with good cause. We accordingly allow it. Conviction entered against the two appellants is quashed and sentences imposed on them are set aside. The appellants are to be set at liberty forthwith unless otherwise held in connection to lawful cause.

DATED at **BUKOBA** this Day of February 2014.

M. C. OTHMAN
CHIEF JUSTICE

E. A. KILEO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL