IN THE HIGH COURT OF TANZANIA

AT IRINGA

APPELLATE JURISDICTION

(Iringa Registry)

(DC) CRIMINAL APPEAL NO. 35 OF 2013

(Originating from Criminal Case No. 155 of 1999
of the District Court of Iringa District
at Iringa)

ACQUINO S/O MBUNGU ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

22/10/2014 & 5/12/2014

JUDGEMENT

MADAM SHANGALI, J.

In the District Court of Iringa, the appellant (*the 8th accused person before trial Court*) together with other 8 accused persons were charged with the offence of armed robbery contrary to Sections 285 and 286 of the Penal Code Cap. 16 R.E. 2002. He was found guilty and convicted together with other 3 accused persons being the 1st, 6th and 7th and were each sentenced to 30 years imprisonment with corporal

punishment of twelve strokes. The first accused who had jumped bail during trial was convicted and sentenced in absentia.

Later on, the 6th and 7th accused persons filed an appeal to this court namely DC Criminal Appeal No. 17 of 2005. They were successful and on 8th February, 2006 their appeal was allowed and set free. The appellant who was equally aggrieved with the decision of the trial District Court was late to file his appeal but later managed to fight back hence this appeal to challenge that decision of the trial District Court against him.

It was alleged that on 27th February, 1999, at about 00:30 hours at Ukumbi village within the District and Region of Iringa, the appellant together with other 8 accused persons (*co-accuseds*) did steal properties of total value of Tshs. 750,000/= the properties of one Jostan Mwakonya and before such stealing, they used actual violence against one Mekodi Kalolo, (PW5) to wit, they threatened to shoot him by using a gun in order to obtain the said items.

The prosecution side summoned seven witnesses and in summary the evidence during trial was as follows; Jostan Mwakonya (PW1) the owner of the shop that was invaded, testified that on the 27th February, 1999 at about 00:30 hours while asleep at his home at Ukumbi village, he was awakened

by Jackson Nzigwa and Mekodi Kalolo (PW5). He was informed about the alleged invasion to his shop. He decided to visit the scene and confirmed the incident. Mekodi Kalolo (PW5) who was the employee of PW1 told him that he managed to identify two of the accused persons the 1st and 8th accused persons. Robert Mdota (PW3) testified that, on 27th February, 1999 while he was at Mgama village at about 11:00 hours, managed to apprehend the 1st accused who named Titus Ngasi (*7th accused*) and Acquino Mbungu, the appellant to be the people who sent him to collect a bicycle to be used to ferry goods from that village (*Mgama*). Gaspari Lusasi (PW4), the Village Chairperson of Mgama, testified that on 27th February, 1999 managed to apprehend the young man who mentioned Titus Ngasi (*7th accused*), Acquino Mbungu, the appellant and Godfrey Segesela as the people who sent him to collect a bicycle that could ferry goods. When the said young man tried to run away he was then apprehended and sent to Tanangozi. The said young man was never seen after that. Mekodi Kalolo (PW5) testified to have identified the three bandits on the fateful date (*26th February, 1999*) at about 00:00 hours when invaded. The identification was aided by the light which he had put on after he was forced to do so by the bandits. He managed to identify the 1st, 7th and 8th accused persons. The 1st and 8th accuseds were familiar to him because they had been visiting him at the shop severally. C. 8647 detective Station Sergeant Nicolus, (*PW6*) who was assigned to investigate the case testified that at the time he was assigned

the case the 1st accused was already arrested. In interrogation the 1st accused mentioned the 8th, 7th and 6th accused persons as his accomplices. On 28th February, 1999 the 1st accused lead them to the house of the 8th accused. Though they did not find the 8th accused but they had managed to find the stone commonly known as "*Fatuma*" that was used in the incident, to break the shop. The 1st accused said that the said "F*atuma*" belonged to the 4th accused. The 5th and 8th accuseds were arrested on 7th April, 1999 as a result of information he had received. He tendered the caution statements of 1st, 4th, 7th, 8th and 9th accused persons.

During the trial, each accused person made his individual defence in which, they did not incriminate others and they denied the charge. On the defence of the 8th accused now the appellant (*DW7*) was to the effect that, on 23rd February, 1999 while at Ukumbi village where he lives, he got information to the effect that his father was sick at Bomalang'ombe. On the 24th February, 1999 he went to Bomalang'ombe to attend his sick father. It was later revealed to him that his sick father had been sent to Usokami mission hospital. On 25th February 1999 he did travel to Usokami where he remained there until 30th March, 1999 when his father passed away. They went to burry him at Bomalang'ombe on the 02nd April, 1999. On the 05th April, 1999 he was required by his uncle to go and relay the information of death to the 5th accused who resides at

Mgela village. He went to 5th accused's place and on 07th April was arrested while at 5th accused's place. While at the police station he denied his involvement in the alleged incident and in court he refuted the caution statement that was alleged to have been given by him to the police.

As I have pointed above the trial Magistrate was convinced with that evidence and convicted the appellant along with two others who were later released.

In this appeal the appellant appeared in person and unrepresented while Ms. Blandina Manyanda, learned State Attorney appeared for the respondent, the Republic. The appellant filed 6 grounds in his appeal, but they all intends to mean that the offence against him was not proved beyond reasonable doubts and in accordance with the standard required of proving criminal cases. In short on the first and second grounds the appellant complain that the identification evidence was not proper and sufficient. On third ground he complains that the caution statements which were used to base his conviction were improperly admitted in court. On ground four he claimed that the prosecution evidence was contradictory while on ground five he avers that the defence case was not given proper weight or consideration and on ground six, the prosecution failed to prove the case to the required standard.

On 22nd October. 2014 when the instant appeal came for hearing before this Court parties had these to argue. Starting with the appellant; he contended that the fact that the incident took place during night thus the conditions for favourable identification were not conducive. The fact that PW.5 was ordered to switch on the light mean that the room was dark. However there is no evidence to establish the size of the house or room in which the incident took place, the type of the alleged light and its intensity or any other description of the alleged light.

He further contended that it was wrong for the trial court to rely on the caution statement of the 1st accused (*Kaizari Mbungu*) in convicting him because he was not given a chance to cross-examine the first accused who had jumped bail. He further argued that the trial court was equally wrong for basing his conviction on the caution statement of 6th and 7th accused persons because their caution statements were wrongly admitted in court and that both were later acquitted by this court on the ground that the prosecution case was not proved to the required standard.

On the issue of contradictions of prosecution witnesses the appellant stated that some witnesses claimed that the alleged incident occurred on 26th and others on 27th February 1999, while there was disparity on the time of his arrest. He

contended that the prosecution witnesses were not sure of their testimonies and as a result the prosecution case was not proved to the standard required.

Ms. Blandina Manyanda, in support of the appeal highlighted the shortcomings that will not leave the decision of the trial Court against the appellant to stand. On the issue of light the learned State Attorney submitted that there was no evidence to show that PW5 after being ordered to switch on the light had managed to identify the appellant. The type and intensity of the light was not identified or clear. This cast doubts on the identification of the appellant, submitted the learned State Attorney.

On the issue of caution statements the learned State Attorney submitted to the effect that they were wrongly admitted in Court as they were objected by the accused persons and an inquiry ought to have been conducted to establish its voluntarity. Ms. Manyanda argued that admitting them without conducting an inquiry is legally wrong. The learned State Attorney also supported the complaint by the appellant that the appellant defence was not properly considered by the trial court. Submitting on the duty of the trial court to consider both evidence of the prosecution and defence evidence before making a verdict, the learned State Attorney referred this court to the case of **Magabe Vs. The**

Rep. (2010) TLR 78 where it was held that it is fatal to ignore one side of the case and base conviction on only one side.

At this juncture it is clear from the record of the proceedings of the trial court and submission made by the learned State Attorney that there was a misdirection and non direction on the part of the trial court to the extent that it misapprehended the substance, nature and quality of the evidence placed before it. That gives this court a mandate to interfere with its decision as stated in the cases of **Peter Vs. Sunday Post Ltd. (19858) EA 424** and **Deeney Daati and 2 others Vs. The Republic** Criminal Appeal No. 80 of 1994 Arusha Registry (*unreported*).

In convicting the appellant at page 13 of the typed judgement the trial court found that "*the accused is further mentioned in the caution statement of the other accused as the one who led them to the scene of the incident.*" In my view, it was unsafe to convict the appellant basing on the uncorroborated evidence of the co-accused. The evidence of a co-accused is on the same footing as that of an accomplice, that is, it is admissible but must be treated with caution and, as a matter of prudence, would require corroboration. At the same time the evidence which requires corroboration could not itself corroborate accomplice evidence. See the cases of **Ally Msutu Vs. R. (1980) TLR 1** and **Bushiri Amiri Vs. Republic**

(1992) TLR 65 and also Section 33 (1) and (2) of the Evidence Act, Cap. 6, R.E. 2002.

This Court, however, in DC Criminal Appeal No. 17 of 2005 (*Supra*) had decided that the caution statements which implicated the accused persons and which were objected by the accused person were both rejected and expunged from the record because no inquiry was conducted to establish its voluntariness before admitting them. This court observed that to be a fatal irregularity. That is exactly what Ms. Manyanda stated of which I agree. The same was also echoed in the cases of **Selemani Abdallah and 2 others Vs. Republic** Criminal Appeal No. 384 of 2008 Dar Es Salaam Registry (*unreported*), **N. V. Lakhani Vs. R. (1962) E.A. 644**. Thus in essence the appellant complaint in this matter has merit.

Under the circumstances the remaining evidence is, as to whether the appellant was correctly identified during the alleged incident. It is common and ruled out in a number of occasions that, there is always the need for testing with greatest care the evidence of a single witness in respect of identification because the evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, that 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 water. tight. See the case of **Issa Ngwali Vs. The Republic**,