IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 355 OF 2016

1. MBWANA S/O SALEHE ..... 1ST APPELLANT

2. HAMIS S/O ALLY ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the District Court of Temeke)

JUDGMENT

13.06.2018

A.Z. MGEYEKWA, J

In the District Court of Temeke, Mr. Mbwana Salehe and Mr. Hamisi Ally, the appellants were convicted of Armed Robbery s/c 287 'A' of the Penal Code Cap.16 [R.E. 2002] and sentenced to the statutory thirty years term of imprisonment. The appellants are still dissatisfied, hence this appeal.

The facts of the case, in so far as they are relevant to this appeal, may briefly be stated. On 13.08.2009 at about 22:00 hrs at Mbanda area within Temeke Municipality in Dar es Salaam jointly and together the appellants, Mbwana Salehe and Hamisi Ally were charged with offence of armed robbery

contrary to S.287 A of the Penal Code Cap. 16. The appellants did steal two mobile phones make Nokia value at Tshs. 115,000/= cash Money Tshs. 780,000/=, one bag with different cloth properties of PW1 Elidadi Hambije and before such stealing they cut PW1 with a knife on the left hand and shoulder in order to obtain the stolen properties.

At the trial, Elidadi Hambije testified as PW1. He told the trial court that on 03.08.2009 at around 22:00 hrs the accused and their fellows invaded his house and he was injured by a bush knife and forced his young brother PW3 to give them money where they stole 780,000/= and two mobile phones. PW1 testified that the act was committed in front of his wife Uziad Edward (PW2) and there were enough light to identify the accused person as they are potters in their area and PW1 used to hire them picking his luggage. PW2 stated that on 03.08.2009 during the accused invasion they threatened her with a bush knife and she tendered a PF3, which was received by the court as exhibit P1.

PW3 Ndize Edward stated that on 03.08.2009 at about 22:00hrs while he was at his premises the accused person and their fellows invaded them. He was in bathroom and the accused person took him naked to show them where the money was hidden. He showed them and the accused stole Tshs. 750,000/= and two mobile phones and the accused hit

him on his head with a bush knife, he tendered PF3 which was received as exhibit PF3 and form part of the prosecution evidence. PW3 further testified that he knew the accused person before as they were potters at their area and he identified them at the scene as there was enough light.

PW4 G340 DC Deogratius testified that he is the investigator of this case and on 04.11.2009 while he was given the file the accused were already arrested and they were known at Mbande as potters.

In his brief defense at the trial court, the 1st appellant (DW1), denied the charges and stated that on 12 of August without mentioning a year, he was on his daily routine while he was at the bus stop the police Motor vehicle came and he was ordered to board in the car and taken to Police station and he was told to give a statement of grievous harm which he did not have any knowledge of it then he was charged with this offence.

In his brief defense at the trial court, the 2nd appellant (DW2) denied the charges and stated that on 12 August at about 08:00 hrs while he was on the road he was arrested by the Police and taken to Maturubai Police station where he gave his statement.

The appellants were not satisfied with the decision of the lower court and hence have come to this Court to challenge the appeal.

In this appeal, the appellants filed a Petition of Appeal containing four grounds namely: -

1. That, your Lordship the learned trial magistrate grossly erred in law and fact by convicting both appellants based on in-credible and un-reliable visual identification evidence of PW1, PW2 and PW3 at the LOOSINQ at the intensity of light or the duration of time that was under their observation was not disclosed.
2. That, the learned trial magistrate by convicting birth appellants in a case where the prosecution failed to tender statements of the victims to corroborate their testimonies nor did any of the police officer (s) to whom the offence was first reported summoned to testify on some material facts.
3. That the learned magistrate erred in law an in fact convicting both appellant in a case whose proof was below the required standard as prosecution failed to lead investigatory evidence as to how they were arrested to ascertain whether their apprehension emanated from the crime at hand.

4. That, the learned trial magistrate grossly erred in law and in fact by convicting both appellants in a case where the prosecution failed to prove their guilt beyond any shadow of doubt as charged.

At the hearing of this appeal the appellants appeared in person and had nothing to submit from their grounds of appeal. On her part, Ms. Immelda Mushi, learned State Attorney appearing for the respondent Republic at the outset supported the appeal for three main reasons. **One**, the trial court failed to prove how the accused were arrested and connected to the offences. **Two** the trial court failed to prove the grounds of identification of the accused. **Three**, the trial court failed to address the witnesses' contradictory statements when adducing evidence.

The learned State Attorney submitted that the prosecution side failed to prove how the accused were arrested as there is no evidence on their arrest. All witnesses; PW1, PW2, PW3 and PW4 did not explain how the accused were arrested and how they were connected to the offence of armed robbery. The learned State Attorney cited the case of **Yassin Hamis Ally @ Big v R Crim. Appeal No. 254 of 2013.**

Ms. Mushi also stated that the lower court failed to prove the grounds of visual identification. She stated that PW1

testified that he identified the first appellant due to the light but PW1 did not elaborate kind of light, since the offence was committed at night 22:00 hrs. She cited the case of **Waziri Amani v R of 1980** to contend that the visual identification evidence of PW1 was on material aspect unsatisfactory and not watertight. In this case the Court stated that visual identification is the weakest kind of evidence and the most unreliable, and that a Court should not act on it unless all the possibilities of mistaken identity are eliminated.

The State Attorney also submitted that PW1 did not mention the distance between PW1 and the accused, whether he stood close enough to the appellant to be able to identify him. Further, PW1 did not explain the physical appearance of the accused he only mentioned that the accused left his cap at their premises but he did not show proof if the cap belonged to the accused. She referred the testimony of PW1 when he was cross examined by the second appellant, he said that he knew the second appellant by name Kibela but as per court proceedings the second appellant was named as Hamisi Ally and throughout the proceeding the second appellant was named as Hamisi Ally. Therefore, the imperfections by the lower court on identification cannot be used as a ground for conviction.

In relation to contradictions in adducing evidence, the learned State Attorney submitted that PW1 and PW2 adduced contradictory evidence. PW1 stated that both appellants attacked him but PW2 said that many people attacked him and he could not identify them. Their testimonies are doubtful thus cannot be used as a ground for conviction. She cited the decision of the Court of Appeal in the case of **Yassin Hamis Ally @ Big v R Crim. Appeal No. 254 of 2013** similarly she referred to the case of **Leornard Sedekia Marati v R Crim. case No. 86 of 2005 (unreported).**

Having gone through the fact of the case, the evidence stated by witnesses, the reasons for decision of the lower court and the submissions by the learned State Attorney. I concur with the learned State Attorney arguments in supporting the appeal.

The issues to be determined in regard to ground one of appeal is *whether the learned Magistrate erred in law convicting the appellants based on in-credible and un-reliable visual identification evidence*. In answering this issue I am guided by the long settled principle of law which was enunciated in the case of **Waziri Amani v R (1980) TLR 250** the court decisively held that;

" The first point we wish to make is an elementary one and this is that evidence of visual identification, as courts in East Africa and England have warned in a number of cases, is the weakest kind of evidence and the most unreliable and that a court should not act on it unless all the possibilities of mistaken identity are eliminated an the court is fully satisfied that the evidence before it is absolutely watertight."

The lower court failed to establish the issue of visual identification. PW1 testified that he was able to identify the appellants because there was light, but he did not specify whether the light was bright enough to enable her identify the appellants. PW1 also did not elaborate on the nature of the light in question. He did not mentioned whether the light came from a wick lamp, a candle and fluorescent tube light a reference is made to the case of **Waziri Amani v R (1980) TLR No. 250**.

Similarly the court has discussed the principle of visual Identification in the case of **Riziki Method Myumbo v R 2007** the first appellant judge said that: –

"Visual identification is a class of evidence that is vulnerable to mistake particular in the conditions of darkness. Courts must as a rule of prudence exercise

caution in relying on such evidence. It may result in a substantial miscarriage of justice."

I have carefully considered the circumstances surrounding the identification of the appellant and I am in no doubt that the evidence was watertight to convict the appellants. I am referring my argument to the case of In **Riziki Method Myumbo v R** (supra) where the trial judge stated that:-

" Visual identification evidence is one of the weakest character and most unreliable. It must be approached with great judicial circumspection, although it is usual to base a conviction on the basis of evidence of the single identifying witness."

It is vivid that the evidence of identification in this case is not watertight. In order to avoid mistaken identity of the accused, the identification parade was necessary. In the absence of such parade, the case against the accused is proved beyond reasonable doubt.

Further PW1 failed to mention the distance between him and the appellants. The question is *whether there was corroborative evidence to the identification of the accused.* PW1 by failing to provide a brief description of the scene or estimate the distance between himself and the first appellant

shows that PW1 was not able to identify the first appellant. It should be noted that errors in distance judgment is substantial when it come to the issue of identification. Thus, the testimony of PW1 creates doubts and suspicious on whether the identification of the accused was correct. A suspicious *entitles an accused person to an acquittal on a benefit of doubt* as it was held in the case of **Aidan Mwalulenga v R** Crim. Appeal No. 207 of 2006. It was held that:-

> *"Suspicion cannot sustain a conviction. It entitles an accused person to an acquittal on a benefit of doubt."*

Furthermore, PW1 failed to describe the appearance of PW1. Accordingly to PW1 he stated that he identified the appellant because there was light. If there were light how could PW1 failed to describe the appearance of the accused? This statement disqualifies his former statement.

PW1 stated that he knew the first appellant by name Kibela but the second appellant as per court proceeding was known as Hamisi Ally. In the case of **Marwa Wangai and another v R (2002) TLR No. 39** the court hold that the ability of a witness to name a suspect at the earliest opportunity is an all 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. It is a settled principle of law in cases

depending on visual identification such evidence must be absolutely watertight to convict even if it be that of the recognition. In this case at hand, PW1 failed to identify the second appellant by his name, this testimony creates doubt if PW1 truly knew the appellant.

Also PW1 and PW2 issued contradictory statement when adducing evidence. PW1 testified that both appellant attacked him while PW2 testified that many people attacked him and the court could not identify them. The contradictory statement made in court signifies that the person making such statement has been untruthful. Contradictory statements of PW1 and PW2 lead to confusion in determination of this case. In the case of **Leornard Zedekia Maratu v R Crim.Appeal No. 37 of 2004 the Court of Appeal** stated that:-

> *"The magistrate did not subject the evidence to close scrutiny. If he had, he would have found some glaring contradictions in the evidence for the prosecution."*

On ground three of the appeal the appellants stated that the prosecution failed to lead investigatory evidence as to how they were arrested to ascertain whether their apprehension emanated from the crime at hand. In the prosecution case the procedure for arrest was not exposed and there was no record. The police officer was required to report apprehension of arrest.

The trial magistrate has failed to exemplify how the appellants were arrested and connected to the offence. In the case of **Ibrahim Shabani Ally Kalulu V. R; Criminal Appeal No. 110 of 2002** (unreported) the court made the following pertinent observation:-

> "It is our opinion that the slackness in arresting the appellants was not due to inefficiency; but to lack of information as to who they were to arrest."

In my view the evidence of PW1 and PW2 were unsatisfactory in some respects. It was the essence of the lower court to determine *whether the evidence adduced by PW1 and PW2 were clear and true to convict the appellants.* It is clear from what is set out above that there were some shortcomings in the witnesses' evidence, which diminish their credibility as witnesses' thus their convictions are not on merit. The lower court fell into error of making a finding that they were credible witnesses' without taking into account all these shortcomings. See the case of **Abdullah Bin Wendo v R (1953) 20 EACA 166.**

I therefore allow the appeal. The convictions are quashed and the sentences set aside. I order that the appellants be released forthwith from prison, unless they are otherwise lawfully held.

It is so ordered.

DATED at Dar es Salaam this 13th day of June, 2018.

A.Z Mgeyekwa

JUDGE

13.06.2018

Judgment Delivered in Court Chambers in the presence of the appellant and in presence of Ms. Immelda Mushi, the learned State Attorney this date 13.06.2018.

A.Z Mgeyekwa

JUDGE

13.06.2018