**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MBEYA)**

**AT MBEYA**

**CRIMINAL APPEAL NO. 126 OF 2018**

*(Appeal from the judgment of the Resident Magistrate's Court of Mbeya at Mbeya, V. J. Mlingi, RM in Criminal Case No. 25 of 2017)*

**ANGULILE JACKSON @ KASONYA.....APPELLANT**

**VERSUS**

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

**JUDGEMENT**

*Hearing date: 02/04/2019*
*Judgement date: 10/04/2019*

**MONGELLA, J.**

In the Resident Magistrate's Court of Mbeya at Mbeya, Angulile Jackson @ Kasonya, the appellant herein, was charged and convicted of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002]. Consequently, the appellant was sentenced to serve thirty (30) years imprisonment. The facts that led to the conviction and sentence of the appellant are as follows. On 10th August 2016, at Mwamfupe area within the City and Region of Mbeya, the appellant did steal T.shs. 6,000/-,

Mgella.

property of one Andrew Adam @ Mwakatobe. That immediately before and after such stealing the appellant used a dangerous and offensive instrument to wit, a sharp object, in order to steal and retain the said sum of money.

The accused pleaded not guilty to the charge and the prosecution brought four witnesses to prove the case. The said witnesses were: PW1 one Nicholous Chaula, a medical doctor at Mbeya Referral Hospital in the Eye Department who testified that he had to remove the victim's right eye through operation because of the damage caused; PW2 one Andrew Adam @ Mwakatobe, who was the victim in this incident and claimed to have been attacked and robbed by the appellant; PW3 one Joyce Ifwani who is PW2's mother and testified to have been told by PW2 that it was the appellant who attacked and robbed him; and lastly PW4 one Atupakisye Adam Mwakatobe who is the sister of PW2 who testified to have taken PW2 to the police station to obtain PF3 and then to Mbeya Referral Hospital for treatment.

The appellant did not call any witnesses for his defence, but raised the defence of alibi claiming to have been in remand prison in respect of PI

No.28/2017. The records however, show that the appellant contradicted himself during cross examination whereby he stated that he was arrested on 14th August 2016 and sent to remand prison on 5th September 2016 something which shows he was not in remand prison as claimed when the crime of armed robbery was committed on 10th August 2016. Unsatisfied with the conviction and sentence of the trial court, the appellant has appealed to this Court.

In this appeal, the appellant appeared in person while the respondent was represented by Miss Kawse Kilonzo, learned State Attorney. The appellant raised nine grounds of appeal and prayed for the court to adopt them as part of his submission. However, looking at the grounds of appeal, I find that they can conveniently be reduced into six grounds and consequently I directed the learned State Attorney to address the court on the same. The grounds are:

1. *That the visual identification of the appellant was not proper;*
2. *That the weapon claimed to have been used was not tendered in court as exhibit;*
3. *That the trial court relied on hearsay evidence of PW1, PW2, and PW4;*

4. *That the case was not investigated and no investigator was called to testify in court;*
5. *That the prosecution did not prove its case beyond reasonable doubt; and*
6. *That the trial court did not give reasons for its conviction.*

On the first ground (which merges ground 1, 2, and 3 on the petition of appeal), the appellant argued that the learned trial magistrate erred in convicting the appellant basing on the visual identification of PW2. That the incident was alleged to have occurred at 22hours and at a place which had red lights which could not produce enough light for PW2 to identify the person who attacked him. He claimed that PW2 could not even give any description of him including mentioning the type of clothes he wore on that fateful date. In the petition of appeal, he prayed for the Court to apply the principles set out in the case of ***Augustine Kente vs. Republic (1982) TLR 122***; ***Waziri Amani vs. Republic (1980) TLR 250***; ***Abdullah bin Wendo vs. Republic (1953) 20 EACA 166*** and ***Mohamed bin Alhui vs. Rex (1942) 9 EACA 72***. In all these cases, the Courts insist on handling evidence of visual identification with care so as not to miscarry justice against the accused person. The Courts put the

requirement of detailed description of the accused by the witnesses for the court to rely on such evidence.

In **Augustine Kente (supra)** for instance, the Court held that "***it is unsafe to support the conviction of an accused where the eye witness identification is not accompanied by details***." In **Waziri Amani (supra)** the CAT observed as follows:

> *"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 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 is fully satisfied that the evidence before it is absolutely watertight."*

Responding to this ground, Ms. Kilonzo who strongly opposed the appeal, argued that the issue of visual identification as claimed by the appellant is not tenable. That PW2 in his testimony, at page 11 of the proceedings, clearly explained how he managed to identify the

appellant. That even though the crime occurred at night there were enough electric lights at the front of the shops which enabled PW2 to identify the appellant. She further argued that PW2 testified to have known the appellant before the commission of the crime, was familiar to him and thus his identification cannot be doubted. That the two spent about ten minutes before PW2 was attacked and he first pushed the appellant before he was attacked. After the incident PW2 managed to name the suspect at the earliest stage, he showed the place where they could get the appellant and indeed the appellant was arrested at the said area. All this makes the identification done by PW2 to be proper. In support of her arguments Ms. Kilonzo cited the case of ***Jumapili Msyete vs. Republic, Criminal Appeal no. 110 of 2014 where the CAT at page 14 & 15*** stated:

> *"Thus, in recognition cases, the foundational evidence would be how the victim came to know the suspect. Assistive evidence would include, the time of the day the incident happened, the type and intensity of the light etc. which enabled the victim to ascertain the identity of the suspect. Corroborative would consist of say, the suspect being found in*

*possession of the victim's property stolen in the course of theft; or naming the suspect at the earliest."*

Ms. Kilonzo submitted that, basing on the principles set out in this case, there was no mistaken identity. She also cited the case of ***Nebson Tete vs. The Republic, Criminal Appeal no. 419 of 2013***, whereby the CAT at page 5 stated:

*"The situation is different where the evidence of identification is by recognition, which has been held by courts to be more reliable than an identification of a stranger, but caution should as well be observed in that, when the witness is purporting to have recognized someone known from before, mistakes cannot be ruled out."*

She also referred to the case of ***Marwa Wangiti Boniface Matiku Mgendi vs. Republic, Criminal Appeal no.6 of 1995 (unreported)*** which was cited by the CAT in ***Nebson Tete (supra)***. The CAT in this case observed that:

*"The ability to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as*

*unexplained delay or complete failure to do so should put a prudent court to inquiry."*

Taking into account the above cited cases, Ms. Kilonzo insisted that the identification was proper and prayed for this ground of appeal to be dismissed.

In my view the question of identification has to be addressed with caution. The court has to ascertain the type of identification evidence that is presented before it, that is, whether it is visual identification, identification by recognition or voice identification. I have taken into account all the cases that the appellant prayed for this court to consider, that is, ***Augustine Kente vs. Republic***; ***Waziri Amani vs. Republic***; ***Abdullah bin Wendo vs. Republic*** and ***Mohamed bin Alhui vs. Rex (1942) 9 EACA 72*** (supra) and noted that all these cases address the question of visual identification. Like I stated earlier, all these cases insist on detailed identification by the victim/witness of the suspect. They require the victim to provide details such as time, light, clothing, physique, complexion, etc.

However, where a witness/victim claims to have known the suspect prior to the commission of a crime, then the identification thereof falls under identification by recognition and not visual identification which is applicable on strangers, see, ***Jumapili Msyete, (Supra)***. In this case the Court of Appeal has given guidelines on the kind of evidence needed to prove the identification by recognition being: foundational, assistive and corroborative evidence. The CAT stated that, in foundational evidence, the victim must explain how he came to know the suspect. In assistive evidence the victim must explain, among other things, the time of the day the incident happened, the type and intensity of the light which enabled the victim to ascertain the identity of the suspect. In collaborative evidence, facts like the suspect being found in possession of the victim's property claimed to have been stolen in the course of theft, or naming the suspect at the earliest would be material.

In the case at hand, the victim, PW2, gave foundational evidence by stating that he knew the appellant before the incident happened. That the appellant was a "*mpiga debe*" at Mwanjelwa and Kabwe bus stand and that he knew him by his name, that is, "Angulile." Even during cross examination PW2 further explained how familiar he knew the appellant.

He stated that the two have been in the street for most of their lifetime and that they used to meet at a grocery called "Mama Wambi."

In assistive evidence, PW2 stated that the incident occurred on 10/08/2016 at 22hours at Mafiati-Makaburini area. He stated that there was enough lightening from the red bulbs at the shops around which enabled him to see the appellant clearly. He also stated that he and the appellant had a conversation of about ten minutes whereby the appellant was demanding to be given money and the two were very close looking at each other during that conversation. That he also pushed the appellant to get way. In collaborative evidence, PW2 named the suspect at the earliest whereby he told his mother in the morning and was thereafter taken to Mwanjelwa police station and to Mbeya Referral Hospital.

Although identification by recognition is taken to be the most reliable among the three identification types, still cases of mistaken identity can happen and thus caution has to be exercised by the court. (See, ***Jumapili Msyete at page 15 and Nebson Tete at page 5-6*** (supra). In the case at hand I am of the view that since PW2 and the appellant had a

face to face conversation of about 10 minutes before he was attacked and his Tshs. 6,000/- stolen, the question of possibility of a mistaken identity is ruled out. I therefore agree with the argument of the learned State Attorney on this ground and consequently dismiss it.

On ground number two (ground number 4 on the petition of appeal), the appellant claims that the learned trial magistrate erred in law and fact by convicting the appellant on a charge of armed robbery while the weapon claimed to have been used was never tendered in court as exhibit to prove the case by the prosecution. Responding to this ground, Ms. Kilonzo agreed that the said weapon was never tendered in court. However, she argued that the non-tendering of the weapon does not negate the fact that the offence was proved in court. She further argued that the evidence adduced in court by PW2, the victim and PW1, the medical doctor was enough to prove the case.

On this ground, I am of the view that the act of not tendering the weapon in court does not amount to failure on the prosecution side to prove the case of armed robbery. The prosecution can still be able to prove a case of armed robbery even without tendering the

weapon used in court, especially where the weapon is nowhere to be found, but there is some other evidence connecting the accused to the crime charged. In the case of ***Michael Joseph vs. Republic(1995) TLR 278*** the CAT stated:

> "...it is clear that if a dangerous or offensive weapon or instrument is used in the cause of a robbery, such constitutes 'armed robbery'..."

Therefore, basing on this decision, the prosecution has to prove that a dangerous or offensive weapon or instrument was used and it is not necessary that the said weapon must be available to be brought to court as evidence. If the weapon is found it shall be brought to court as evidence and if it is not found the prosecution will use some other evidence to prove the commission of the offence charged. The prosecution also has to show to whom the offensive weapon was used (See, ***Ally Idd v. The Republic, Criminal Sessions no. 88 of 2014 and Tayai Miseyeki vs. Republic, Criminal Appeal no. 60 of 2013, (both unreported***). In the case before this court, PW2 testified to have been pierced in the right eye by the appellant using a sharp object and PW1 testified to have received and treated PW2 at the hospital where

he works. He stated that PW2's eye ball was ruptured and he had to remove it through operation. I as well find this ground to be devoid of merits and therefore dismiss it.

On ground number three (ground number 5 in the petition of appeal), the appellant claims that the trial magistrate erred in law and fact by convicting him basing on hearsay evidence of PW1, PW2 and PW4 contrary to section 62(1)(b) of the Evidence Act, Cap 6 R.E. 2002. Responding to this ground, Ms. Kilonzo argued that the evidence of PW1 and PW2 is not hearsay but direct evidence as the said witnesses explained what exactly transpired before their eyes. PW2 explained how he was attacked and PW1 explained how he medically observed and treated PW2. With regard to PW4, Ms. Kilonzo admitted that her evidence was hearsay as she never witnessed the crime happening, but her testimony was and should be treated as collaborative evidence. I in fact agree with the submission by the learned State Attorney on this ground. PW1 and PW2 are purely direct witnesses on what they testified in the trial court. The evidence of PW4 could be hearsay only on the aspect of naming the appellant as

culprit and should be treated as corroborative. However, the rest of her testimony, that is, she was the one who took PW2 to police station for PF3 and to hospital, does not amount to hearsay but direct evidence as she testified on what exactly she did.

On ground number four (ground number 6 in the petition of appeal), the appellant claims that the learned trial magistrate erred in law and in fact in convicting the appellant on a charge of armed robbery without taking into account that the said offence was never investigated and no investigator was summoned to testify in court. responding to this ground, Ms. Kilonzo conceded that the investigator was not called to testify in court, however, she argued that the testimonies of PW1, PW2, PW3 and PW4 were sufficient to prove the commission of the offence and there was no necessity of calling the investigator. Ms. Kilonzo further submitted that the prosecution has the duty to bring witnesses to prove the case, but the Law of Evidence Act under section 143 does not oblige for a particular number of witnesses to be brought to court to testify. The prosecution brought witnesses which it deemed sufficient to prove the case. She also cited

the case of ***Tumaini Mtayomba vs. The Republic, Criminal Appeal no. 217 of 2012***, where an investigator of the case was not summoned to testify in court and the CAT stated:

> *"As for the complaint by the appellant that there was omission by the prosecution to call some of the witnesses, we agree with the learned State Attorney that the prosecution had the duty to prove the case against the appellant and the discretion was on them to call the witnesses they considered relevant for proving the case against the appellant. The choice was not that of the appellant but the prosecution. In any event the role of the appellant in his defence was to cast doubt on the prosecution case."*

I in fact agree with the learned State Attorney's submission on this ground. The appellant could have used the omission in calling witnesses to his advantage by casting doubts into the prosecution case. The omission to call a witness can only be fatal if a key witness is not called. ***(***See, ***Shida Lwanda Aidan @ Kaka v. The Republic, Criminal Appeal no. 447 of 2015.)*** In the case at hand I find that, PW2 was the

key witness and his testimony was corroborated by that of PW1, PW3 and PW4, thus the omission to call the investigating and arresting police officer was not detrimental to the prosecution case. I find this ground devoid of merit.

On ground number five (merged ground number 7 and 8 in the petition of appeal) the appellant argued that the case was not proved beyond reasonable doubt and the trial magistrate was biased on the side of the prosecution as he did not consider the doubts, he casted on the prosecution case during trial. Responding to this ground Ms. Kilonzo argued that the case was proved beyond reasonable doubt through the testimony of PW1, PW2, PW3 and PW4. She did not want to dwell on the issue of biasness, instead she wanted the appellant to explain that issue to the court as the records show that the court heard both parties and considered arguments of both sides in its judgement. In rejoinder the appellant argued that the trial court did not do justice to him. PW2 and him knew each other but there is no evidence that he committed the offence. That the time of crime alleged is a time when a lot of people are still in the shops, but there

is no single witness who saw the crime being committed. That PW2 went home after being injured and told his mother after a while. That there were contradictions between PW3 and PW2 on the time of commission of the crime, while PW2 claimed the crime to have been committed at 22hours, PW3 stated that the crime was committed at 19hours. That the court was biased on the prosecution as there were no other witnesses apart from family members of PW2.

The concerns raised by the appellant would have been relevant if they were raised during the trial. The records of the trial do not indicate such concerns being raised either during cross examination of witnesses or during defence. Raising such concerns at an appellate stage becomes an afterthought. If facts are not cross examined, they are taken to have been admitted. See, ***Alex Wilfred vs. The Republic, Criminal Appeal no. 44 of 2015 and Cyprian Kibogoyo vs. Republic, Criminal Appeal no. 88 of 1992.*** The records as well do not indicate any doubts casted by the defence during trial of which the trial court would have been obliged to address. I as well find that the argument by the appellant that the trial court was biased on the prosecution

side has no base. There is no any reflection of biasness in the court records. This ground is dismissed as well.

On ground number six (ground number 9 in the petition of appeal) the appellant argues that the trial magistrate did not give reasons for its conviction. Responding to this ground, Ms. Kilonzo argued that this ground is devoid of merits as the trial court gave reasons for its decision. She referred this Court to pages 8, 9, 10, 11 and 12 of the trial court judgement and argued that in those pages the trial court explained clearly the offence the appellant was charged with, the evidence adduced by both sides and the reasons for its decision. I agree with the argument of the learned State Attorney, the trial court in fact gave reasons for his conviction and sentence where he took into consideration both prosecution and defence cases.

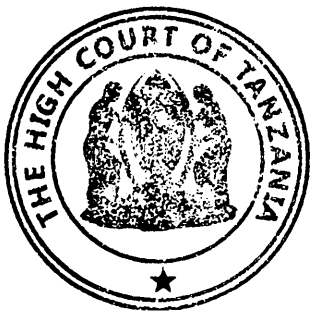
From the foregoing, I find the appeal by the appellant devoid of merits and thus dismiss it in its entirety. I uphold the conviction and sentence of the trial court.

Dated at Mbeya this 10th day of April 2019

**L. M. MONGELLA**
**JUDGE**
**10/04/2019**

**Court:** Delivered at Mbeya in Chambers on this 10th day of April 2019 in the presence of the Appellant and Mr. Kihaka, State Attorney for the Respondent.

Right of Appeal to the Court of Appeal has been explained.




**L. M. MONGELLA**
**JUDGE**
**10/04/2019**