IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 193 OF 2020

(Appeal from the Criminal Case No. 354 of 2012 in the District Court of Nyamagana at Mwanza (Ryoba, RM) dated 25th of September, 2020.)

YUSUPH REUBEN @ TUMBO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

8th, & 15th March, 2021

ISMAIL, J.

The Appellant, the first accused in the trial proceedings, was arraigned in the District Court of Nyamagana at Mwanza, facing two counts of armed robbery, contrary to **section 287A** of the Penal Code, Cap.16 R.E. 2002 (now R.E. 2019); and rape, contrary to section 130 (1) and (2) of the Penal Code (supra). It was alleged that on 28th March, 2012, at Nyamuge area within Nyamagana District in Mwanza Region, the appellant, along with his co-assailant, Isaya Mato @ Issa, stole the sum of TZS. 1,500,000/- and assorted items of different prices totaling TZS. 1,105,000/-

and that, immediately before and after the incident they used a weapon to threaten ABC (in pseudonym), the victim. With respect to the second count, the allegation is that on the same date and time, the appellant and his fellow assailant raped ABC, before they robbed her of money and assorted items.

Upon the accused's plea of guilty, the trial commenced. The proceedings saw the prosecution marshal attendance of six witnesses against two who were procured by the defence. In the end, the trial court convicted the accused persons of the first count while acquitting them of the second. With respect to the first count, each of the accused was handed a maximum custodial sentence of thirty (30) years.

Brief facts of what constituted the charged offence can be deduced with ease. They are as follows. In the middle of the night of the fateful day, ABC who was sleeping in his house was woken up by a big bang on the door of her house. As she was trying to find out what happened, she was dazzled by a torch light which was pointed at her. This was followed by an order from the bandits, silencing her. At the time of the invasion, her room was illumined by a wick lamp. Suddenly, she saw two men in the room, as the rest of the assailants whose number was not immediately established, kept vigil outside his house. The duo in the

room wielded a machete and a piece of iron bar. They ordered the victim to surrender the proceeds of the maize sale to which she heeded and parted with TZS. 1,000,000/-, together with a mobile phone handset. Feeling that they had not been given enough, the assailants hit the victim with the iron bar on the leg as they ordered ABC (PW1) to give them more money or they claim her life. Fearing for her life, the victim gave them another TZS. 500,000/- which was stashed in a hand bag. They then went ahead and took assorted household items and apparels. Just before they left, they ordered the victim, PW1, to undress and lean on the table and raped her, one after the other. When they were done, they left with the items they robbed.

According to PW1, two bandits who were in the room were identified as Yusuph, the appellant, and a Mr. Isaya, both of whom were well known to PW1. After they left, PW1 raised an alarm that gathered and she named the assailants as Yusuph, the appellant, and Issa. An immediate search of Yusuph proved futile as he was reportedly not at his home at the time. PW1 reported the matter to police where she was given a PF3 that enabled her to get medical treatment. A subsequent swoop succeeded in apprehending both of the assailants who, after interrogation, were arraigned in court, where the charges of armed

robbery and rape were read out. Upon conviction, both were sentenced to lengthy prison terms.

The conviction and sentence utterly aggrieved the appellant, hence his decision to prefer the instant appeal. Six grounds of appeal have been raised, as follows:

1. *That, the trial court erred evidence analysis when did not realize the fact that the appellants retrieval and arrest were not effected and witnessed by the victim, equally, it was wrongful to believe of their being described to PW2 and PW3 at the earliest possible chance basing on fraudulent and inconclusive identification sponsored by incredible light and its intensity.*

2. *That, the trial court erred in evidence analysis by failure to detect and positively resolved upon prosecutions delayment to arraign the confessed appellants if any soon after been arrested thus cast doubt on planting evidence and exhibits in favour of undeserved part.*

3. *That, the court erred in law and facts to convict the appellants basing on inconclusive confession/cautioned statement exh P1 collectively which were involuntarily obtained under coercive and tortured from the single interrogator (PW4) while out of the prescribed time limitation.*

4. *That, conviction and sentence was wrongly based on the charge of which was/is at variance to the exaggerated evidence*

regarding the total value, kind and quantity of the stolen properties including mobile phone make NOKIA, thus destroy witnesses credibility.

5. *That, was wrongly and erroneously for the trial court not considering the period the appellant had spent in custody pending their trials at several instances, the first conviction plus the first and second appeal stages when sentencing them.*

6. *That, the appellant conviction was wrongly based on the visual identification/recognition claims made under favourable circumstances whereby elementary factors were not sufficiently established.*

7. *That, the trial court's finding was wrongly based on uncorroborated prosecution evidence and that the doctrine of recent possession which is too shaky and unreliable as in contrast to defense contention.*

At the hearing of the appeal, the appellant fended for himself, unrepresented, while the Respondent enjoyed the usual services of Ms. Georgina Kinabo, learned State Attorney. Ms. Kinabo's laconic address to the Court was basically a concession and an unwavering support to the appeal. She narrowed down her submissions to grounds three and six of the appeal. With respect to ground three, the learned Attorney's contention is that the appellant's cautioned statement, tendered and admitted as Exhibit P1, was not read out to the appellant subsequent to

its admission. She submitted that such failure was a fatal anomaly and she urged this Court to expunge it from the record.

Ms. Kinabo delved into ground six of appeal, and her contention is that, after expunging Exhibit P1, the residual testimony is, by and large, that of identification. On this, she contended that the intensity of a wick lamp and a torch light which was allegedly used to identify the bandits was not described sufficiently, to provide assurance that identification would be possible and unmistakable. The learned Attorney invited this Court to be enjoined by the decision of the Court of Appeal in ***Michael Godwin & Another v. Republic***, CAT-Criminal Appeal No. 66 of 2002 (unreported). In the absence of any other testimony, the counsel contended, conviction of the appellant was insupportable. She prayed that the appeal be allowed and that the Court should be pleased to quash the conviction and set aside the sentence.

In a liner, the appellant supported the respondent's submission and urged the Court to set him free.

Given the decisive importance that it carries, my discussion will only dwell on ground six of the appeal. This ground queries the trial

magistrate's decision to convict the appellant based on visual identification which was not favourable.

As alluded to by Ms. Kinabo, conviction of the appellant in this case was predicated on the evidence of visual identification, as adduced by PW1. This decisive witness gave a blow by blow account on how the whole incident happened and the way she identified the bandits, especially the two who were in the house. These included the appellant. PW1 was quite emphatic that these two assailants were her neighbours who she knew very well. This made the identification easy. As eloquent as this testimony sounds, the law on visual identification is quite astute in our legal system. It is to the effect that conviction of an accused person can be grounded on visual identification evidence if such evidence is watertight and leaves no possibility of errors. This takes into consideration the fact that, for all the positive attributes that it has, this kind of testimony is prone to serious dangers that are bred by its unreliability. Owing to this serious undoing, courts have been warned against relying on the testimony unless all possibilities of mistaken identity are eliminated. This splendid position was accentuated in ***Galous Faustine v. Republic***, CAT-Criminal Appeal No. 2 of 2009 (unreported), wherein the Court of Appeal had the following observation:

"The law on visual identification, be it of a stranger or of a known person (i.e. recognition) is now well settled. It is trite law that such evidence is of the weakest type and Courts should not act on it unless all possibilities of mistaken identity are eliminated. Furthermore, the Courts must be fully satisfied that the evidence clearly shows the conditions favouring a correct identification and is accordingly watertight".

The warning shot sounded in numerous decisions of our courts is in sync with the astute reasoning postulated by ***Elizabeth F. Loftus***, a distinguished author of the Eyewitness Testimony 19 (1979). She guided as follows:

"The reasons as to why this kind of evidence has to be given great caution when the court intends to rely on, is that the basic foundation for eyewitness is a person's memory. And we often do not see things accurately in the first place, but even if we take in a reasonably accurate picture of some experience, does not necessarily stay perfectly intact in memory, sometimes the memory traces can actually undergo distortion with the passage of time, proper motivation interfering facts. *The memory traces seem sometimes to change or become transformed. These distortions can cause a human being to have memories of things that never happened. In* ***State***

***of Utah v. Deon Lomax Clopten**, 223 P 3d 1103 (2009) 2009 UT 84:*

*"the vagaries of eyewitness identification are well known; the annals of criminal law are rife with in instances of mistaken identification. Decades of study have established that eyewitnesses are prone to identifying the wrong person as the perpetrator of the crime where certain factors are present. **The most troubling dilemma regarding eyewitnesses stems from the possibility that an inaccurate identification may be just as convincing to a jury as an accurate one.** As one leading researcher said: "[T]here is almost nothing more convincing than alive human being who takes the stand, points a finger at the defendant, and says: That's the one!"*

The just quoted position is fortified by the commentaries made by Willian Polulos, a refined Barrister who argues that: *Because of the dangers inherent in eyewitness testimony, eyewitness identification evidence is inherently unreliable. The Inherent frailties of eyewitness identification evidence are well – established and can lead to wrongful convictions, even in cases where multiple witnesses have identified the same accused."*

As rightly contended by Ms. Kinabo, in this case, conditions in which the identification was allegedly done were far less than conducive for a

proper and unmistakable identification. They fell short of the required standard, and the trial court failed to appreciate the fact that such circumstances would not enable PW1 to make a correct identification. The fact that PW1 had to rely on the combined impact of the light from the wick lamp and the torch, is a testimony that the room was poorly lit and that one source of light alone, whose intensity has not been disclosed, would not meet the required threshold of intensity that would pass the test. PW1 is recorded as telling the trial court that the torch which was held by the assailants helped in improving the brightness and visibility of the appellants. PW1 has also testified that the torch was flashed against her by the holders i.e. assailants. If this version is taken to be correct, and in the absence of any testimony that the said torch was, at any point in time during the incident, flashed in the assailants' direction, it is inconceivable that the light of the said torch would be helpful in the identification of one or both of the assailants. This incontrovertible view is given credence by the Court of Appeal's fabulous reasoning in ***Michael Godwin & Another v. Republic***, CAT-Criminal Appeal No. 66 of 2002 (unreported), in which it was held:

> ***"It is common knowledge that it is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed.*** *In this*

case, it seems to us that with the torch light flushed at them, (PW1 and PW2), they were more likely dazzled by the light. They could therefore not identify the bandits properly. In that case, as Mr. Mbago, correctly conceded, the possibility of mistaken identity could not be ruled out." [Emphasis added].

The position in ***Michael Godwin*** (supra) was underscored in the subsequent decision in ***Bariki Kinyaiya, Jacob Hubert & Elioani Kinyaiya v. Republic***, CAT-Criminal Appeal No. 220 of 2007 (unreported), wherein it was held as follows:

"Ordinary human experience is that a person uses a torch, otherwise known as flashlight in American English to enable them to see an object or a person in front of the user but without the user being clearly seen by the person shone at because of the blinding effect of such light on that other person. It may be possible, however, for a person in front of the user of the torch who is not directly shone at to see and identify the person using the torch if the light from the torch is reflected by a shiny wall or object. *Otherwise, usually, it is not easy to identify reliably the user of the torch who directs the light from the torch to objects in front of or around them. In the case under discussion there was no evidence that the light from*

the torches was reflected by the walls of the room or by shiny objects in the room". [Emphasis supplied].

As I did in ***Isaya Mato @ Issa v. Republic***, HC-Criminal Appeal No. 173 of 2020 (MZA-unreported), I take the view that contention that the torch light would aid in the identification of the appellant and his co-assailant is, to say the least, trumpery and, therefore, unacceptable.

In view of the foregoing, and on this ground of appeal alone, I allow the appeal. Accordingly, I quash the conviction and set aside the sentence meted to the appellant, and order that he be set free, unless he is held in custody for some other lawful cause.

It is so ordered.

DATED at **MWANZA** this 15th day of March, 2021.

M.K. ISMAIL

JUDGE