IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRIC REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 180 OF 2020

MASANA SABAI @ MAIRO ..... 1ST APPELLANT

TITO YOHANA MASAKU @ MGOGO..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Tarime at Tarime in Criminal Case No. 514 of 2019)

JUDGMENT

21th and 28th April, 2021

KISANYA, J.:

The above named appellants together with Bhoke Nyabasola Marwa and Mwita Manyerere Kitemba (who are not party in this appeal), were charged before the District Court of Tarime with three counts of the armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E 2002] as amended. After a full trial, the appellants were found guilty as charged and other accused found not guilty. Consequently, the appellants were convicted and sentenced to 30 years imprisonment.

The appellants being aggrieved have appealed to this Court with ten (10) grounds of appeal. All grounds are to the effect the prosecution case, evidence on visual identification in particular, was not proved beyond all reasonable doubts.

At the trial the prosecution had adduced evidence to the effect that, PW2 Tabu Jumapili Masana is the house maid of PW1 Yokabeth Koheta Muhere. On 21/10/2019 around 2200 hours, PW1, PW2 and PW's child were heading home from PW1's working place. They used *bodaboda* transport. Since the road to their house was slippery, they were dropped at Rhebu Secondary area within Tarime Township. As they started walking, they met a group people which stole their mobile phones and hand bag. It was the prosecution case that, immediately before and after such stealing, the said persons used a machete to threaten PW1 and PW2.

The evidence reveals further that, cash money (Tshs. 105,000) and mobile phone, make Tecno worth Tshs. 300,000 were stolen from PW1; and two mobile phones were stolen from PW2. PW1 and PW2 deposed that they identified the appellants and other accused with aid of electricity light which was illuminating from a nearby house. They testified further that the appellant were known to them before the incident. According to PW1, the matter was reported to a nearby local authority and the police. The appellants and other accused were then arrested and charged with armed robbery.

In their defence, the appellants denied to have committed the charge levelled against them. They deposed that PW1 and PW2 did not identify them and that the evidence on visual identification was not watertight. However, at the end the day, they were convicted and sentenced as stated herein thereby leading to the appeal at hand.

Before me the appellants appeared in person to argue the appeal. On the other side, the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney.

When the appellants were invited to argue in support of the appeal, they just prayed to adopt all grounds of appeal and urged the Court to allow the appeal

Responding to the petition of appeal, Mr. Byamungu readily supported the appeal on the ground that the evidence of identification was not watertight. He submitted that much as evidence of PW1 and PW2 shows that the offence was committed during the night, their evidence is premised on visual identification which is one of the weakest kind of evidence. The learned State Attorney called upon the Court to consider the case of **Raymond Francis vs Republic,** (1994) TLR 100 on that matter. He argued further that, the evidence of PW1 and PW2 could be used to convict the appellant if there was no possibility of mistaken identity.

The learned State Attorney went on to submit that PW1 and PW2 did not state the intensity of light and the distance from the scene of crime to a nearby house where the electricity was illuminating. He was of the view that such omission raised doubt on the intensity of light on the material night. Mr. Byamungu averred further that PW1's evidence that she identified the 1st appellant by voice is weak. He cited the case of **Nuhu Seleman vs Republic**

(1984) TLR 93 to support his position. For the foresaid reasons, the learned State Attorney moved me allow the appeal.

The appellants had nothing to rejoin after hearing the respondent's submissions.

I have carefully considered the evidence on record, the petition of appeal and the submissions by the learned State Attorney. I agree with Mr. Byamungu, this appeal can be disposed of by addressing the issue whether the appellants were properly identified by PW1 and PW2.

It is not disputed that the offence was committed during the night around 2200 hours. In terms of evidence of PW1 and PW2, there was darkness. This is supported by their evidence that they were using a torch to light their way. Therefore, this case is based on evidence on visual identification. It is trite law that evidence on visual identification is unreliable and one of the weakest kind and unreliable evidence. In that regard, the trial court is required to convict an accused person basing on such evidence after being satisfied that there was no any possibility of mistaken identity. This position was stated by the Court of Appeal in the landmark case of **Waziri Amani vs R** (1980) TLR 250 where it was held that:

> *"(i) Evidence on visual identification is of weakest kind and most unreliable;*

(ii) No court should act on evidence on 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."

In order to determine whether the evidence on visual identification is watertight, the Court consider different factors established by case law. This include the distance at which the witnessed observed the accused, the source and intensity of light and whether the accused person was known to the witnesses before the incident. These factors were also stated in **Waziri Amani** (supra) when the Court of Appeal held:

> *"....Although there are no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems dear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such ' 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 witness before."* (Emphasize supplied).

See also the case of **Chacha Jeremia Mrimi and 3 Others vs R**, Criminal Appeal No. 53 of 2015 (unreported) where the Court of Appeal stated:

"To guard against that possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? ***What was the source and intensity of the light if it was at night?*** *Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance?* ***Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it.*** *" (Emphasize supplied).*

In view of the above cited authorities, the means of light used to identify the accused and its intensity are vital factors to be considered by the trial court. The trial court was satisfied that the appellants were properly identified by PW1 and PW2. This is reflected at page 8 and 9 of the judgement when the trial magistrate stated:

*"**PW1 and PW2** managed to identify the first accused by his name, Masana Sabai Mairo, and the fourth accused by his name and alias, Tito Mgogo because* ***there was enough electricity light from neighboring houses on each side of the road and that they knew them before.*** *They added that, those*

people passed them, and torched (sic) PW1, when PW2 turned her head back, he saw Masana and Mgogo...." (Emphasize supplied).

I have gone through evidence of PW1 and PW2. As rightly argued by Mr. Byamungu, PW1 and PW2 did not testify on the intensity of electricity which aided them to identify the appellants. In her evidence in chief, PW1 told the trial court as follows:

"Masana was with someone he is not here, others were behind. That place were (sic) enough light of tube light since the centre of residence house.

I identified Mgogo was there...I saw him that day using the tube light of the residential house surrounding the area."

Likewise, PW2 she testified as follows:

"There was enough electricity light that were (sic) on near neighbouring houses."

In the light of the above, it is apparent that PW1 and PW2 did not state that the electricity light was on each side of the road as held by the trial court. Further to that, while PW1 told the trial court that the tube light was illuminating from the residential house, PW2 evidence is to the effect that the source of light was from more than one house. However, none of them stated the distance from the scene of crime to the nearby house. In any case, the fact that PW1 and PW2 were using torch light before meeting the persons who stole their properties implies that there was no sufficient light at the scene of crime.

Furthermore, although PW1 and PW2 adduced that the whole incident took about 15 minutes, none of them testified on the exact time under which PW1 and PW2 remained under their observation.

As stated earlier, another factors considered in resolving the issue of identification whether the witness named or described the accused to the next person. It is also necessary that person be called to give evidence and confirm that fact. The ability to name the accused at the earliest possible time assures reliability on the evidence of identifying witness. In the instant case, PW1 and PW2 stated that the appellants were known to them before the incident. Did they name them immediately after the commission of offence? I find it pertinent to reproduce what was deposed by PW1 on that issue:

> *"...they disappeared and we went to knock the other for assistance. They open it and we asked for assist we called Issa (Mjumbe) he came and called the police officer who then took us in town..."*

On the other hand, PW2 did not tell the trial court whether the matter was reported to the local authority as stated by PW1. Since the appellants were known to PW1 and PW2, it was expected for the said witnesses to name them immediately after the commission of the offence. PW1 did not state whether she named the appellants to the local authority when she reported the matter. Also, the said Issa (mjumbe) and police officer who were alleged have assisted PW1 and PW2 on the material night were not called to give evidence and confirm that matter. Failure to bring them in the witness box raises doubts

whether the appellants were named at the earliest possible time. The said omission affects reliability on evidence adduced by PW1 and PW2.

The trial court considered that the appellants were named on the next day (22/10/2019) to PW3 G.8195 DC Dismas. As stated herein, PW1 and PW2 did not depose whether they named the appellants to the police. Also, the date of reporting the matter was not stated.

As regard PW1's evidence that the 1st appellant was also identified by voice, the law is settled that voice identification by itself is not very reliable. See the case of **Nuhu Seleman** (supra). Therefore, such evidence cannot by itself be the basis of convicting the accused. The primary consideration is whether there was no possibility of mistaken identity of the said voice. That was not analyzed in the case at hand.

In the final analysis, I am constrained to agree with the appellants and the learned State Attorney that, the evidence on identification of the appellants at the scene of crime was not watertight to warrant conviction and sentence. In that regard, I allow the appeal, quash conviction and set aside the sentence of 30 years imprisonment. I accordingly direct that the appellants be released from custody unless they are held for other lawful cause.

DATED at MUSOMA this 28th day of April, 2021.

E.S. Kisanya
JUDGE

Court: Judgment delivered through video link on the 28th day of April, 2021 in appearance of the appellants and Mr. Nimrod Byamungu, learned State Attorney.

E. S. Kisanya
JUDGE
28/04/2021