IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 81 OF 2021

(Appeal from the Criminal Case No. 104 of 2020 in the District Court of Sengerema at Sengerema (Kyamba, RM) dated 15th of December, 2020.)

EMMANUEL S/O MADATA & 2 OTHERS ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

19th, & 26th July, 2021

ISMAIL, J.

The Appellant, along with two other assailants, were charged with an offence of armed robbery, contrary to **section 287A** of the Penal Code, Cap.16 R.E. 2019. The incident allegedly occurred at about 19:50 hours on 4th October, 2019, at Buyagu village within Sengerema District in Mwanza. TZS. 200,000/- in cash sum and a mobile phone handset, Tecno W5, valued TZS. 250,000/-, the property of Manka Sawe, were allegedly stolen. Further allegation has it that the three assailants, two of whom wore masks to veil

their identity, were armed with machetes and used them to threaten the victim before, during and after the incident.

After hearing the testimony of both sides, the District Court of Sengerema in which the appellants were arraigned, found them guilty. Consequently, they were convicted and sentenced to a custodial sentence of thirty years. This verdict bemused the appellant, hence his decision to institute the instant appeal. The appeal has five grounds of appeal, paraphrased as follows:

1. *That the trial court's failure to cast doubts on contradictory testimony between the testimony of PW1 and PW2 on the time of occurrence of the alleged incident ought to be construed in the appellant's favour and declare them innocent.*

2. *That the trial court's failure to cast doubt on the contradictory, incredible, untruthful, untrustworthy and uncorroborated evidence of PW1 on the existence of a previous case against the appellant without proof of such existence rendered the testimony incredible and unreliable thereby vitiating the whole case.*

3. *That the testimony on the circumstances that led to the appellant's identification with the aid of an electric lamp was unacceptable, inadmissible and resulted to a miscarriage of justice.*

4. *That the appellant was convicted under a wrong provision of the law.*

5. *That the trial court erred in law in admitting PW2's testimony without taking an oath thereby contravening the law.*

Hearing of the matter pitted the appellant who fended for himself, unrepresented, against Ms. Jovina Kinabo, learned State Attorney who represented the respondent. At the appellant's request, hearing of the matter began with the respondent's counsel, who chose to argue grounds one and three of the appeal, believing that the same were enough to dispose of the appeal.

With respect to ground one, Ms. Kinabo conceded that there was a confusion on the time of the alleged commission of the robbery incident. While the charge sheet shows that the alleged incident occurred at 19:50 hours, the testimony of PW1 shows that the incident occurred at 17:50 hours. This is in contradiction with the testimony of PW3 who said that he was informed of the occurrence of the incident at 17:45 hours, while PW4 testified that he was informed of the incident at 19:45 hours. Ms. Kinabo submitted, however, that the contradictions were minor and having no effect to the central story. She argued that, the fact that PW1 was aided by a lamp to identify the assailants means that the offence occurred at

night, as there would be no need of using a lamp if the offence was committed at 17:50 hours. The learned attorney added that this fact is fortified by PW1's testimony at p. 11 of the typed proceedings, in which she was recorded as saying that there was a person who was coming their way and was flashing a torch. It was the counsel's contention that the difference in time is immaterial as far as armed robbery is concerned. She referred me to the decision of the Court of Appeal in ***Abbas Makono v. Republic***, CAT-Criminal Appeal No. 537 of 2016 (unreported). She contended that this ground of appeal is baseless.

With respect to ground three, the learned attorney's submission is that the ground is meritorious and supportable. She argued that the law requires that visual identification of the suspected offender must be watertight and sufficient. This is in terms of the reasoning in ***Waziri Amani v. Republic*** [1980] TLR 250; and ***Mabula Makoye & Another v. Republic***, CAT-Criminal Appeal No. 227 of 2017. Ms. Kinabo submitted that, while the source of the light was stated by PW1, the intensity of such light was not stated. This, she argued, casts a doubt if the intensity of the light was sufficient to allow an unmistaken identity, and if the criteria cited in the sadi cases were met.

Ms. Kinabo was also in doubt if PW1 named the assailants immediately after the incident, it being a requirement of the law. In the absence of any testimony to this effect, the counsel contended, the requirements of the law were not met.

Overall, Ms. Kinabo held the view that visual identification that formed the basis for conviction in this case fell short of the required threshold, rendering the conviction unsupportable. She urged the Court to support the appeal.

The appellant's submission was all in support of the respondent's counsel with respect to ground three. He urged the Court to allow the appeal and set him free.

It is settled that an accused person may be convicted solely on the basis of the evidence of visual identification. The condition precedent, of course, is that the said testimony must be watertight and free from possible errors. This position was accentuated in the landmark case of ***Waziri Amani*** (supra) cited by Ms. Kinabo. While this is the position, a caution has been thrown to the effect that courts should be wary of placing its total reliance on this testimony. This is in view of the fact that this kind of testimony is prone to serious mistakes. This, therefore, makes it acquire the label of being

the weakest of the testimonies. Thus, in ***Demeritus John @ Kajuli & Others v. Republic***, CAT-Criminal Appeal No. 155 of 2013 (unreported), the Court of Appeal held:

> *"In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight (See,* ***Waziri Amani v. R.*** *(1980) TLR 250;* ***Raymond Francis v. R.*** *(1994) T.L.R. 100;* ***R.V. Eria Sebatwo*** *(1960) EA 174;* ***Igola Iguna and Noni @ Dindai Mabina v. R.,*** *Criminal Appeal No. 34 of 2001, (CAT, unreported). Eye witness identification, even when wholly honest, may lead to the conviction of the innocent (****R. v. Forbes****, (2001) 1 ALL ER 686).* ***It is most essential for the court to examine closely whether or not the conditions of identification are favourable and to exclude all possibilities of mistaken identification."*** [Emphasis is added]

The view expressed in the foregoing reasoning mirrors the comment made by ***Elizabeth F. Loftus***, an American legal pundit and author of the Eyewitness Testimony 19 (1979), who remarked as follows:

> *"... 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!"* [Emphasis added]

In the instant case, the incident is alleged to have occurred at night and that the purported identification was aided by an electric lamp that lit in and out of the room. As Ms. Kinabo submitted, while there may be no qualms on the existence of the lamps that illuminated in and outside the scene of the crime, what is glaringly missing is the evidence on the intensity of such light, and whether such intensity can be described as sufficiently of the degree that may allow positive and unmistakable identification of the accused person. In other words, since the alleged identification was done at night, then utmost care ought to have been observed. This is in line with the holding in ***Ally Mohamed Mkupa v. Republic***, CAT-Criminal Appeal No. 2 of 2008 (unreported), wherein the superior Bench held that *"where one claims to have identified a person at night there must be evidence not only that there was light,* ***but also the source and intensity of that light.***

This is so even if the witness purports to recognize the suspect" [Emphasis is added].

See also ***Kulwa s/o Mwakajape & 2 Others v. Republic***, CAT-Criminal Appeal No. 35 of 2005 (unreported).

In the absence of such testimony in the instant case, I can hardly be persuaded that the visual identification testimony adduced by PW1 passed the test of an impeccable testimony which would ground a conviction against the appellant. This is irrespective of PW1's contention that she knew the appellant prior to the fateful day.

Ms. Kinabo has introduced one more crucial thing. This relates to the identification, and it touches on the duty that the victim has, of naming the accused person at the earliest opportunity. Such naming serves as an assurance of the witness's reliability, a prerequisite which was accentuated in ***Marwa Wangiti Mwita & Another v. Republic***, CAT-Criminal Appeal No. 6 of 1995 (unreported), wherein the Court of Appeal held:

> *"The ability of a witness to name a suspect's name at the earliest opportunity is an all-important assurance of his reliability".*

From the totality of all this, it is my considered view that the appellant's conviction was done without any warning of the frailties of the eyewitness identification. Such conviction was predicated on a shaky foundation and I

subscribe to the respondent's view that the same must be vacated. Accordingly, I set it aside as I do for the sentence. I order that the appellant be immediately set free, unless held for some other lawful reasons.

Order accordingly.

DATED at **MWANZA** this 26th day of July, 2021.

M.K. ISMAIL

JUDGE

Date: 26/07/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present

Respondent: Ms. Jovina Kinabo, State Attorney

B/C: P. Alphonce

Court:

Judgment delivered in chamber, in the presence of the appellant and Ms. Kinabo, State Attorney, this 26th day of July, 2021.

M. K. Ismail

JUDGE

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

At Mwanza

26th July, 2021