

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA**

CRIMINAL APPEAL NO 189 OF 2020

**CHACHA WAMBURA YUSUPH..... APPELLANT
VERSUS
THE REPUBLICRESPONDENT**

JUDGMENT

19th April & 28th July, 2021

Kahyoza, J

On the 22nd day of September, 2019 at night robbers invaded Joseph Ikwabe Muniko, injured and robbed him Tzs. 1,000,000/=. Some of the suspects, Chacha Wambura Yusuph (the appellant) and Mtatiro Otieno were arrested, and arraigned with the offence of armed robbery. After a full trial, the district court found Chacha Wambura guilty convicted and sentenced him to serve an imprisonment of 30yrs. Aggrieved, Chacha appealed to this Court.

The appellant raised eight grounds of appeal. Seven grounds of appeal challenged the decision of the trial court on the ground that the appellant was not properly identified, as the offence was committed at night and that at that particular time he was at his home sleeping. The eight and last ground of appeal challenges the prosecution's evidence that it did not prove the appellant's guilt beyond all reasonable doubt.

The appellant did not argue his appeal. He relied on the grounds of appeal discusses above.

The respondent's state attorney, Mr. Temba, opposed the appeal. His position was that appellant was properly identified and that the prosecution proved the case beyond all reasonable doubt.

It is certain from the appellant's grounds of appeal and the respondent's reply that there are two points for determination; **One**, whether the appellant was properly identify; and **two**, generally whether the prosecution proved the appellant's guilt beyond reasonable doubt.

A brief background is that on the 22/9/2019 five bandits invaded Joseph Ikwabe (**Pw1**) and his wife. It is at around 20:00hrs, the couple were having dinner with their children. The bandits had machetes and one had a stick.

The bandits attacked and injured Joseph Ikwabe (**Pw1**) and his wife Rosemary Joseph (**Pw2**). They managed to rob Tzs. 1,000,000/=. Joseph Ikwabe (**Pw1**) and Rosemary Joseph (**Pw2**) identified the bandits. They mentioned the bandits as Wambura Charles, Chacha Wambura, Garani Mtatiro, Ng'weina Gucha and Mtatiro Otaigo.

After the bandits left Joseph Ikwabe (**Pw1**) raised an alarm people responded. Joseph Ikwabe (**Pw1**) and Rosemary Joseph (**Pw2**) went for treatment. In the morning, the traditional leaders decided to search for the culprits. They went to the Mtatiro Otaigo's home in search of the robbers who were mentioned.

The police managed to arrest two suspects and charged them. After a full trial, the court found Chacha Wambura guilty and convicted him and acquitted Mtatiro Otaigo.

Was the appellant properly identified?

It is beyond all reasonable doubt that Joseph Ikwabe (**Pw1**) was robbed at night and the robbers used force against Joseph Ikwabe (**Pw1**) and his wife, Rosemary Ikwabe (**Pw2**). Joseph Ikwabe (**Pw1**) deposed that the robbers entered their house at around 20:00hrs, lights were on and they were having their dinner. Joseph Ikwabe (**Pw1**) captured one of the robbers, to rescue their fellow robbers, one of them cut Joseph Ikwabe with a machete. Rosemary Ikwabe (**Pw2**) supported Joseph Ikwabe (**Pw1**)'s evidence. Joseph Ikwabe (**Pw1**) identified the person he apprehended during the scuffle as Chacha Wambura. He deposed that he knew Chacha Wambura before as he is his nephew and the lights were on.

It was during the scuffle that one robbers put off the lights. He also added that he saw Mtatiro Otaigo face by face. Mtatiro Otaigo held a stick. Joseph Ikwabe (**Pw1**) saw all that from the lamp's light. He deposed that one of the bandits directed his fellow bandits to kill them "*chinja chinja*". When he heard that order, Joseph Ikwabe (**Pw1**) instructed Rosemary (**Pw2**) to give the bandits money. Rosemary (**Pw2**) obeyed. She went to their bed room and Wambura Charles, one of the bandits, escorted her. She took money under the matters and gave it to Wambura Charles. Joseph Ikwabe (**Pw1**) identified the person who injured him as Wambura Charles. Rosemary Ikwabe (**Pw2**)'s identification evidence corroborated

Joseph Ikwabe's evidence. She deposed that she identified the appellant by held of light from the lamp and solar lamp. She knew the culprits before the indent. The appellant was a son of Rosemary Ikwabe (**Pw2**)'s sister-in law. The question is whether identification evidence was watertight not capable of mistaken identity.

It is clear and settled as to what factors the trial court should consider to determine whether the prosecution witness(es) clearly identified the accused at night. The trial court covered the factors favouring identification lucidly and in detail. There are a number of authorities providing the guidelines, a few among them are the following; **Waziri Amani V.R.** (1980) T.L.R. 250); **Igola Iguna and Noni@Dindai Mabina V.R.**, Criminal Appeal No. 34 of 2001 (CAT, unreported)) **Chacha Jeremiah Murimi and 3 Others v R, cited above, Joseph Melkiory Shirima @ Temba Vs. Republic**, Criminal Appeal No. 261 of 2014 CAT(unreported), **Charles Sichaine @ Isaroche v. R** Criminal Appeal No. 549/2015. The Court stated the guidelines in **Waziri Amani's** case as follows:

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of identity, it seems clear 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 the surrounding circumstances of the crime being tried We would, for example, expect to find in the 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 light at the scene; and further whether the witness knew or had seen the accused before or not".

The Court of Appeal in **Joseph Melkiory Shirima @ Temba** cited above, warns trial courts to carefully consider evidence of visual identification before it convicts. It stated-

"...evidence of visual identification is of the weakest kind and most unreliable. As such, no court should act on such kind of evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that it is absolutely watertight."

Both witnesses Joseph Ikwabe (Pw1) and Rosemary Joseph (Pw2) knew the appellant before the incidence. The undisputed evidence is that the appellant was Joseph Ikwabe's nephew. They identified him by help of lights. Joseph Ikwabe deposed that there were electricity lights (from TANESCO) and lights from Solar lamps. Not only that Joseph Ikwabe (Pw1) knew the appellant before but also, he held him tight during the scuffle, thus, the appellant was too close to him. He had an opportunity to identify him. Rosemary Ikwabe (Pw2) corroborated the evidence of Joseph Ikwabe. Rosemary Ikwabe (Pw2) knew the appellant before. The appellant was son of her sister-in-law. She recognized him by help of lights.

Like the trial court, I find that the circumstances of identification were favourable. Joseph Ikwabe (PW1) and Rosemary Ikwabe (PW2) did properly identify or say recognize the appellant as one of the bandits. They knew him before the incident. There was enough light. Joseph Ikwabe (PW1) deposed that there was light from the electricity lights and solar lamps. Rosemary Ikwabe (PW2) deposed that the lights were on. Both gave evidence that they were invaded at the time they were having dinner lights being on. Like the trial court, I find that there was sufficient light. Rosemary Ikwabe (PW2) deposed that the fracas took five minutes.

There is evidence that Joseph Ikwabe (PW1) immediately named the bandits as according to Matende Marwa Senso (PW3) in the following morning people pursued the robbers. They went to Mtatiro Otaigo to arrest him. They were armed and wanted to take the law in their own hands. Matende Marwa Senso (PW3) and the village executive officer went to Mtatiro Otaigo's homestead asked people not to take the law in their own hands. Matende Marwa Senso (PW3) added that at the time people surrounded Mtatiro Otaigo's compound Joseph Ikwabe (PW1) and his wife, Rosemary Ikwabe (PW2), were not at that place as they went for treatment. During cross-examination Matende Marwa Senso (PW3) deposed that they searched in vain for Mtatiro's son. This evidence confirms the position that Joseph (PW1) and Rosemary (PW2) identified their assailants and reported them or mentioned them. It is trite law that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability. See **Marwa Wangiti Mwita and Another v R.**, (2002) TLR 39 and **Chacha Jeremiah Murimi and 3**

Others v R., Cr. App. No. 551/2015 (CAT unreported) a few to mention. In the latter, the Court of Appeal stated that-

"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor". (Emphasis provided)

I have no scanty doubts that Joseph Ikwabe (PW1) and Rosemary Ikwabe (Pw2) did properly recognize the appellant. Joseph Ikwabe (PW1) and Rosemary Ikwabe (Pw2) were related to the appellant. They had no reason to persecute him. It is on record that the appellant was Joseph Ikwabe (PW1)'s nephew. The appellant sought to discredit the evidence of Joseph Ikwabe (PW1) and Rosemary Ikwabe (Pw2) because they married couples as a result it was easy to fabricate the evidence. The fact that witnesses are married couples is not a ground to discredit their evidence. See the case of **Mustapha Ramadhani Kihyo V R.**, [2006] TLR 323. The appellant ought to have laid down foundation for discarding Joseph (Pw1) and Rosemary (Pw2) and not because they were married couples.

It is trite law that the evidence of the related witness is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited, unless of course there is ground for doing so. The Court

of Appeal in **P.Taray V.R.**, Cr.App.No.216 of 1994 (CAT) (Unreported) held that-

*"We wish to say at the outset that it is of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them. **The veracity of their story must be considered and gauged judiciously just like the evidence of non-relatives.** It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative."* (**Emphasis is added**)

I have no reason to hold that Joseph (PW1) and Rosemary (Pw2) had any reason to lie against the appellant. I therefore, find that the appellant was properly identified.

Did the prosecution prove the case beyond all reasonable doubt?

That done, I will now answer the issue whether the prosecution proved the case beyond reasonable doubt. The answer is yes. The prosecution was required to prove that Joseph (pw1)'s Tzs. 1,000,000/=

was robbed. I find ample evidence from Joseph (**Pw1**) and Rosemary (**Pw2**) that people who invaded them stole Tzs. 1,000,000/=. Rosemary (**Pw2**) deposed that she went into their bedroom and took money under the mattress and handed it to Wambura Charles, one of the robbers. I have no reason to doubt that testimony.

The prosecution was required to prove that the thieves use force to steal and retain the stolen property. In this case, there is evidence from Joseph (Pw1) who deposed that he held the appellant in a struggle to protect his family. One bandit cut him using a machete. He deposed that it was Wambura Chacha who cut him.

Rosemary (**Pw2**) deposed that the bandits injured her. Mkama Bedson Mkama (**Pw4**), a clinical officer corroborated the evidence of Joseph (**Pw1**) and Rosemary(**Pw2**) that they were injured. Mkama Bedson Mkama (**Pw4**) attended Joseph (**Pw1**) who was injured on his shoulder. He attended him after he had been given first aid. He examined him and confirmed the treatment. He examined Rosemary (**Pw2**) and found her palm injured as the small ring finger was injured. Mkama (pw4) tendered the PF3 without objection from the appellant and his co-accused persons.

The appellant's defence was total denial. He contended that he did not commit the offence. He deposed that Joseph (**Pw1**) and Rosemary (**Pw2**) were married couples. He contended that Mkama (**Pw4**) was not the one who committed the offence. He concluded that he was arrested on the 3/12/2019. The accused's evidence did not punch holes in the

prosecution's evidence of identification or on the evidence that they were robbed.

I therefore answer the second issue that the prosecution proved beyond reasonable doubt to appellant robbed Joseph (**Pw1**) and threatened Joseph (**Pw1**) and Rosemary (**Pw2**) to steal and retain the stolen money.

In the end, I dismiss the appeal in its entirety and uphold the conviction and sentence.

It is ordered accordingly.



J.R. Kahyoza
JUDGE
28/7/2021

Court: Judgment delivered in the presence of Mr. Temba, the State Attorney virtually and in the absence of the appellant as we could not connect with Tarime prison. B/C Makunja present.



J. R. Kahyoza
JUDGE
28/7/2021