IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 64 OF 2021

JOHN S/O RENATUS @ MLELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Mpanda at Mpanda)
(G. B. Luoga, RM)
Dated 15th day of November 2019
In
Criminal Case No. 77 of 2019

JUDGMENT

18/05 & 15/06/2022

NKWABI, J.:

During the night of 28th December, 2018, Lucy Modest, had not only unwelcome but also a hostile visitor. She woke up from slumber just to see a person hassling to enter her bed room by climbing the wall between the sitting room and her bed room. That unwelcome visitor had a club and a knife as weapons. Helpless as she was, she raised an alarm calling her young sister (Veronica) for assistance. The appellant assaulted her (Lucy) with the club three times on her head and demanded for some money. He was given T.shs 7,000/=. After some confrontations, the bandit made away with

properties including the T.shs. 7,000/= which all totaled T.shs 24,000/= in value.

The culprit wore a black coat and black pair of trousers and his head was in '*rasters.*' PW1 Lucy was able to identify the culprit due to solar light one in the bedroom and another in the sitting room. She ran away and got assistance to and went to the police to report the matter where she was given the PF3 (exhibit P1). She managed to identify the culprit at the check point after a period of about two months.

During the armed robbery incidence the unwelcome guest spent a long time searching in PW1's room. PW2 Veronica corroborated the evidence of PW1. The appellant asked her (PW2) even about teachers who are not married. She identified the appellant at the check point and the appellant admitted invading them. PW3 Charles too corroborated the evidence about the incidence. PW4 Tafnez attended to PW1 and filled in the PF3.

The appellant was charged with armed robbery and grievous harm offences and sentenced to 30 years imprisonment and seven years imprisonment for the respective offences. The sentences were ordered to run concurrently.

Aggrieved with both convictions and sentences, he is now appealing against both convictions and the sentences. He tabled six grounds of appeal. The main ground of appeal among them is that the case was not proved beyond reasonable doubt.

When the appeal came up for hearing, which was conducted through oral submissions, the appellant appeared in person without legal representation while the respondent was represented by Ms. Marietha Maguta, learned State Attorney.

To further justify his appeal the appellant claimed that the trial court erred in convicting him while there was no adequate identification, there was poor light for identification. Also, he ventured that the trial court based its decision on hearsay evidence. No caution statement or police officer testified, he pointed out. He otherwise prayed this court to adopt the grounds of appeal as his submissions.

Answering the grounds of appeal, Ms. Maguta insisted that they resist the appeal. In the circumstances they support convictions and sentences. She argued the 1st ground of appeal which, she observed would also covers all

the other grounds of appeal, meaning that they did not prove the case beyond reasonable doubt.

She also suggested that the evidence of victims PW1 and PW2 Veronica that they were invaded, they said there was solar light. The appellant too had a torch. Further it took sometimes, and he had dreads on his hair, Ms. Maguta pointed out.

The appellant was armed so they could not immediately raise an alarm. The victim was hit on her various parts of her body, Ms. Maguta added. Submitting while citing **section 143 of the Evidence Act**, she argued, there is no need of calling witnesses more than one. So, it is irrelevant to tender caution statement and police officer though the appellant was wearing mask but they were able to identify him. The identification is water tight, Ms. Maguta stressed.

As to the claim that some of the witnesses PW4 and PW5 to be hearsay evidence PW4's evidence was of person who examined. There was direct evidence of PW1 and PW2 so, she prayed the ground be dismissed. She

added that the defence of the appellant was considered at the three pages from the last page of the judgment. For those reasons, she prayed that this appeal be dismissed. She insisted that they proved the offences beyond reasonable doubt.

To beef-up his appeal, the appellant prayed the court to consider his grounds of appeal and allow it.

I have had ample time going through the proceedings and judgment of the trial court. I have also closely examined the submissions of both parties. In the end, I am of the considered opinion that this appeal has merits. This position of mine is not without reason. The main reason is that I concur with the appellant that the circumstances did not warrant correct identification and there is somewhat contradiction in the testimony of PW1 as to where she reported the matter first (to which security guards). In deciding on whether identification was ideal or not, I have made reference to the decision of the Court of Appeal of Tanzania in **Nyagoso Masokwa vs. Republic** [1994] TLR 186 where the Court had these to say about identification of culprits:

"Circumstances prevailing in the room at the time of the attack were not favourable for proper identification of attackers and the witness never reported having identified the attackers to the ten-cell-leader nor to the people who gathered at the scene.

- *There were two torches.*
- *One was beamed to the victim and the other occasionally to one of the culprits. Witness wife of victim identified the culprit who was beamed at."*

The Court of Appeal did not end there, in **Swaleh Kalonga and Another v. Republic,** Criminal Appeal No. 46 of 2001 (Unreported) it stressed the position in the following authoritative statement:

"..... With regard to the clothes, it is also our view that PW1's evidence that she identified the appellants by the black clothes is hardly enough. No particular description or identifying marks of the clothes were given. So, we think this evidence would not serve any useful purpose in identifying the appellants.

.... for the foregoing reasons we allow the appeal."

It is, therefore, clear in this case, that since the appellant had a torch and weapons in his hands and was not known to the victims of the offence, it is difficult to establish that the witnesses identified him correctly. It seems is thus they did not mention him or describe him at the earliest opportunity.

The later identification at the check point is marred with irregularity which damage the evidential value of such identification. Instead of sending the suspect to the police, the arresters called the victims of the offence to identify the culprit. In the eyes of a lay person that was perfect, but to the eyes of the lawyer, that situation contravened the law stated in **Omary Issa v. Republic,** Criminal Appeal No. 11 of 1989 (Unreported) (CAT) (MWANZA) as to the need of identification parades. The Court had these to say:

> *"PW1 and 2 stated that before the incident they knew the appellants only by appearance, not by names... In these circumstances therefore the proper thing to do was for the police to conduct an identification parade where PW1 and PW2 would identify the culprits. But it is clear from the evidence that no such parade was held in respect of the appellants. PW1 and PW2*

identified those appellants only in police custody at the police station in dock during the trial. That was most unsatisfactory to say the least.

.... It follows, therefore, that the purported identification of the appellants by PW1 and 2 merely amounted to dock identification or identification in police custody at the police station. It is obvious that such identification was of little or no value.

See also, **Ntakko Aivan Ntipasubile and 3 Others v. Republic,** Criminal Appeal No. 90 of 1993 (Unreported) (CAT) (MWANZA).

During the trial the appellant defended himself that he was from the mine (migodini) when he was arrested at the checkpoint where he dropped to buy a cigarette. It was prior eating the food he had ordered for. He denied to have committed the armed robbery offence. He admitted that the victim identified him due to hair style "*Rasters*". Much of what was said and done by PW1 and PW2 regarding this case merely cast grave suspicion on the appellant which, however, in my view, cannot support conviction as per **G. Ntinda v. Republic Criminal Appeal No. 17 of 1991** (Unreported) (CAT) (MBEYA):

"There was, we agree, a lot of suspicion against the appellant as the person who killed the deceased, but, as the trial judge will no doubt agree with us on reflection, suspicion no matter how grave cannot be the basis of a conviction in a criminal charge."

With the above discussion and deliberation, it is apparent that the prosecution failed to prove the case to the required standard against the appellant. The evidence of the prosecution is weak to support the convictions.

The culmination of the above deliberation, I allow the appeal as it has merits. I agree with the appellant that in the circumstance of this case, convictions have to be quashed and sentences set aside, I proceed to do so. The appellant has to be set free from prison unless he is otherwise held therein for other lawful cause(s).

It is so ordered.

DATED at **SUMBAWANGA** this 15th day of June 2022.

J. F. NKWABI

JUDGE