IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

CONSOLIDATED DC. CRIMINAL APPEALS NO. 37 & 53 OF 2022

(Originating from Tabora District Court in Criminal Case No. 31/2021)

1. JOSEPH MUSHI

2. HAMIS ATHUMAN ..... APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of Last Order:20/07/2023

Date of Judgment: 21/07/2023

MATUMA, J.

The appellants together with one not subject to this appeal stood charged in the District Court of Tabora at Tabora for two counts namely; **Burglary** contrary to section 294 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019 and **Stealing** contrary to section 258 (1) and 265 of the same Code supra.

It was alleged that the appellants and their companion on the 27th April, 2021 during night hours did break and entered the dwelling house of one Aquilina d/o Mkilindi with intent to commit an offence therein.

It was further alleged that having entered in such dwelling house they stole1 flat screen 43" make Samsung valued at Tshs. 600,000/=, 1 subwoofer, 1 deck, 1 flash disk and 1 blender all valued at Tshs. 1,220,000/= the properties of such Aquilina Mkilindi.

After a full trial, the trial magistrate was satisfied that the prosecution case was proved beyond any reasonable doubts against the appellants. It thus convicted them in both counts and sentenced them to a jail term of twenty (20) years for the count of Burglary and seven (7) years for the count of Stealing.

The sentences were ordered to run concurrently, aggrieved with the convictions and sentences as stated supra, the first appellant Joseph Mushi lodged DC Criminal Appeal no. 37 of 2022 while the 2nd Appellant Hamis s/o Athuman lodged DC Criminal Appeal No. 53 of 2022.

On 13/02/2023 Hon. Justice Amour S. Khamis as he then was issued an order consolidating the two appeals hence this Consolidated DC Criminal Appeals no. 37 & 53 of 2022.

The 1st appellant had lodged the petition of appeal containing ten grounds while the second appellant had only eight grounds of appeal.

At the hearing of this appeal the appellants were present in person and the 1st appellant was represented by M/S Flavia Francis learned advocate.

The Respondent/Republic enjoyed the services of Robert Kumwembe, Eva Msandi and Aneth Makunja learned State Attorneys.

The learned advocate for the 1st appellant dropped all the grounds of appeal except grounds no. 1, 3 and 5 which she argued them into one major complaint to the effect that;

the prosecution case was not proved beyond reasonable doubts against the 1st appellant.

In arguing on such complaint, the learned advocate submitted that there was no watertight evidence relating to the identification of the assailants on the fateful night not only against the 1st appellant but against the appellants generally. She argued that only PW1 Aquilina Mkilindi and PW2 Ramadhani Shabani who were among the prosecution witnesses who gave the evidence relating to the identification of the appellants as they were the ones at the crime scene that material right.

The learned advocate argued that out of these two witnesses, PW2 made it clear on record that he did not identify any of the assailants only that PW1 told him to have identified one of them by name who is the first appellant Mr. Joseph Mushi.

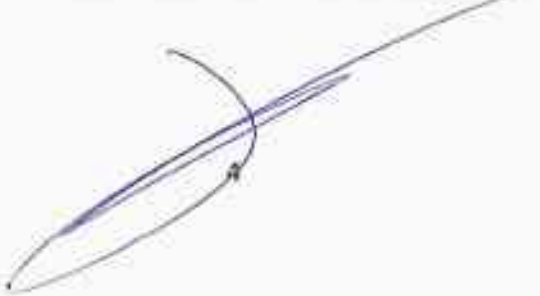
In regard to PW1's identification, the learned advocate argued that the evidence of such a witness is not clear as to whether the light of the bulb allegedly assisted in the identification was inside the house or outside. She doubted whether PW1 who was inside could have seen and identified the assailants while by the time she joined PW2, PW2 had already seen the last assailant fleeing away through the window. She cited to me the cases

of ***Waziri Amani versus Republic (1980) TLR 250*** and that of ***Shabani Bakari versus The Republic, Criminal Appeal No. 118 of 2015*** in which the Court of Appeal set out the factors to be considered for proper identification among them the source of light, proximity between the assailant and the identifying witness, earlier naming of the suspect and description of the suspect to the first responder and to police etc.

She argued that in the instant case, there is no witness who testified to the effect that PW1 disclosed the name of the 1st appellant as among the assailants she saw and identified on the material date. She also submitted that the identification parade was not conducted to authenticate the purported identification by PW1.

The learned advocate sailing this court to various pages of the trial court proceedings, submitted that the 1st appellant's co–accused persons were arrested for a different offence and it is them who are said to have mentioned the 1st appellant as their companion. Such naming is what instigated the arrest of the 1st appellant and not the purported identification by PW1.

The learned advocate further made a submission faulting the cautioned statements of the appellants and the learned State Attorneys conceded that indeed the cautioned statements were inadmissible in evidence for several shortcomings including that they were recorded out of time, not signed on every page and were not read to the appellants. In that respect, I agree with both learned counsels and proceed to expunge



the cautioned statements of the appellants herein to avoid unnecessary dealing with them in the due course.

When the 2nd appellant was invited to take the floor, he prayed to adopt the submission made by the learned advocate for the first appellant and ended there. I therefore take into consideration that the 2nd appellant has as well dropped out his grounds of appeal except for what was maintained and argued by Flavia Francis learned advocate.

The learned State Attorneys being led by Mr. Robert Kumwembe bitterly opposed this appeal.

They forcefully argued that PW1 made a proper identification as she explained the source of light, the distance she was at the time of identification which was only 2.5 meters, and that the appellants were not strangers.

The learned State attorneys maintained that the evidence of PW1 alone was enough to prove the identification of the assailants because in terms of section 143 of the Evidence Act, the evidence of a single witness is enough.

They disputed the arguments of Flavia Francis in respect of the identification parade arguing that since the witness was familiar to the appellants, there was no need of an identification parade.

Having heard the rival arguments of the parties, I find that we have only one issue to determine; ***whether PW1 properly identified the appellants on the crime scene on that fateful night.***

According to PW1 the crime was committed on 27/04/2021 at 23:45 hours when she was deep asleep. She was only awakened by PW2 who told her that there were thieves. On her waking up and joining PW2 she found that the outside light was turned off, she turned it on and managed to see and identify the first appellant Joseph Mushi, she identified him because he is a well-known vehicle mechanic who often repairs police vehicles and was at one time as a police officer assigned to take him to Primary Court where he was convicted.

In relation to the rest of the accused persons including the 2nd appellant, the witness PW1 made it clear on page 24 of the proceedings;

> *"I was also able to identify the other two thieves by* ***their face's appearance."***

In law as rightly submitted by Flavia Francis learned advocate, when the assailant is identified by physical appearance alone and not by name, the desired procedure for proper identification is for the witness to describe the assailant to the next person that he comes across and repeat such descriptions to police who would in turn testify in court to that effect to lend the credence of the identifying witness. See; ***Shabani Bakari versus The Republic, Criminal Appeal no. 118 of 2015*** (CAT) at page 6 to 7.

Also, in the case of ***Rashidi Ally Versus The Republic*** [1987] TZHC 32 (28, September 1987) Hon. Justice Chipeta as he then was held that;

"In a case which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of the highest importance of which evidence ought always to be given."

The descriptions made by the witness would eventually be confirmed at the identification parade.

In the instant matter as rightly argued by the learned advocate for the 1st appellant there is no evidence as to whether PW1 described the 2nd appellant to police. Further, there is no evidence on record as to whether the 2nd appellant was arrested following the description and mentioning by PW1 nor there was an Identification Parade for PW1 to identify the 2nd appellant so that prior descriptions are confirmed.

According to the evidence of PW3 G. 4848 D/CPL Ndadi who was the investigator of this case, the 2nd appellant and his fellow (not in this appeal) were arrested for a different offence (burglary at the saloon). During interrogation, it is when they confessed the offence and proceeded to name/mention the 1st appellant as their companion and went further to disclose that they were involved in the burglary at PW1's home.

In that respect, the 2nd appellant was not arrested following the identification by PW1 nor PW1 had made any prior description against him or identified him after his arrest.

I, therefore, find that the 2nd appellant was not identified at the crime scene and thus was wrongly convicted in the absence of any tangible evidence for his identification.

In respect of the 1st appellant, PW1 testified positively that he identified him by face and name Joseph Mushi and that they were familiar with each other. The 1st Appellant was a vehicle mechanic who often repaired the police vehicles and therefore PW1 as a Police officer had the privilege to interact with him very often.

Not only that but also PW1 testified that he had at times taken the 1st appellant to court as an accused.

At the time PW1 gave such evidence in court the 1st appellant had absconded by jumping his bail. He did not thus cross-examine PW1. In that respect, I have no doubts about the evidence of PW1 relating to the fact that she is very familiar to the 1st appellant in accordance with the given facts of such familiarity.

PW2 confirmed in evidence that PW1 informed him to have identified the first appellant by his name Joseph Mushi.

In ***Dorik Kagusa versus The Republic, Criminal Appeal no. 174 of 2004*** the Court of Appeal held that there is no need for the witness to describe the suspect who is very familiar to the witness. It suffices if the witness mentions the name of the known and familiar suspect.

In that respect, unlike the 2nd appellant who was purportedly identified by face alone, the 1st appellant was allegedly identified by his name due to familiarity and therefore there was no need for PW1 to describe him to anybody or even to the police. But as stated supra, it

would be sufficient if the witness would have named him to the police at the time of reporting the incident.

Likewise, there was no need for Identification Parade against a familiar suspect. See ***Shamir John versus Republic, Criminal Appeal no. 166 of 2004***.

The only question in respect of the first appellant's identification therefore, is whether the evidence of PW1 relating to the identification of the 1st appellant was credible and reliable.

In determining this question, I will be guided by the principles of credibility of witnesses. I start with the guiding principle in the case of ***Marwa Wangiti Mwita and Another Versus Republic (2002) TLR 39***. The principle herein is that the earliest naming of the suspect by the prosecution witness is an assurance of his or her credibility and reliability. The delay of the witness to name the suspect allegedly familiar to him or complete failure to name him has always been taken as a reasonable doubt in favour of the accused against the witness.

In the instant case, PW1 is alleged to have identified the 1st appellant and named him to PW2. Even though PW2 and PW1 were all victims of the crime. It is not the principle of the law that the witnesses who are victims would be naming the suspects to themselves. The principle laid down is to name the suspect to the person who comes across to the witness out of the crime scene and or to the police.

The naming of the 1st appellant by PW1 to PW2 would have been relevant had PW1 for one reason or another failed completely to talk or

report the matter to the police. In that respect, PW2 could have taken her position and reported that PW1 identified and named the 1st appellant to him.

But in this case, PW1 was able to talk and in the next day she reported the matter to the police on her own. It was expected that she would have named the 1st appellant to police and such evidence be given in court by the police officer who registered the report.

Not only that but also PW1 at page 24 testified that she raised an alarm that night. We are not told whether people responded to the alarm or not, and if they responded; if PW1 mentioned the 1st appellant to them. There is no evidence to that effect.

Apart from PW1, PW2 who purportedly was told by PW1 about the identification of the 1st appellant, did not by himself report such identification to anybody at the earliest opportunity.

Secondly, it was PW2 who firstly detected the burglary and awakened PW1. By the time he was awakening PW1 according to his own evidence, the last assailant was getting out of the house through the window and the outside light was switched off. PW1 having waked up, went to put the light on and it is when she alleges to have identified the 1st Appellant. She did not however explain whether she saw the 1st appellant at the window so did PW2 or somewhere else outside the house. She did not tell the court whether at the time she was viewing the 1st appellant such 1st appellant was facing her or he was running away from her and how she managed to contact his face for her recognition. It is on the strength of such

unanswered questions, I entertain the doubts raised by the learned advocate as to how then could PW1 have identified the first appellant while at the time she joined PW2 in the room, PW2 had already seen the last assailant fleeing away through the window.

Thirdly, it is on record that the 1st appellant was arrested on 01/05/2021 after having been mentioned by the 2nd appellant and his fellow. That is made clear by PW3 supra at page 32 of the proceedings;

> *"We started to search for the 1st accused (now the 1st appellant) after being mentioned by his fellow accused."*

Such evidence is an indication that prior to the arrest of the 2nd appellant and his fellow, the police were not informed of any involvement of the 1st appellant in the crime. Their search and arrest of the 1st appellant was instigated by his co–accused persons and not PW1 or PW2.

Since it was the first appellant alone who was purportedly identified at the crime scene, it was expected that he would have been the first to be traced and arrested. It is he who would have been expected to disclose his companions who were not identified at the crime scene. In the instant matter, things are in the opposite. Those who were not identified were the first to be arrested and it is them who disclosed the one who was identified!!! I am not better positioned to explain how such formular was reached by the prosecution.

Having said all this, I find that PW1 and PW2 have not passed the test of credibility and reliability. Their respective purporting identification against the 1st appellant is rejected by reason of credibility. I accordingly

find that the 1st appellant was as well not identified properly at the crime scene. He ought to have not been convicted as well.

I, therefore, allow the appellants' appeal, quash their respective convictions and set aside the sentences of twenty (20) years and seven (7) years respectively which were meted against them.

I order their immediate release from custody unless otherwise held for some other lawful cause.

Let me put it clear that this judgment is confined to the current appellants. It does not cover their fellow who is not involved in this appeal. Right of further appeal is hereby explained.

It is so ordered.

MATUMA

JUDGE

21/07/2023

COURT; Judgement delivered in chambers in the presence of M/S Aneth Makunja and M/S Suzan Barnabas learned State Attorneys for the Republic and M/S Flavia Francis learned advocate for the appellant and the appellant in person. Right of appeal explained.

MATUMA

JUDGE

21/07/2023