IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

(PC) CRIMINAL APPEAL NO. 5621 OF 2024

(Originating from Criminal Appeal No. 3 of 2024 of Babati District Court and arising from Criminal Appeal No. 101 of 2023 in Bashnet Primary Court)

URBANO BASSO.....APPELLANT

VERSUS

1. **NICODEMUS ANTHONY.....**
2. **PHILIPO ANTHONY.....** **RESPONDENTS**

JUDGMENT

15th April and 30th May, 2024

MIRINDO, J.:

Before Bashnet Primary Court in Babati District, there was a charge of assault causing actual bodily harm on Urbano Basso contrary to section 241 of the Penal Code [Cap 16 RE 2022] against Nicodemus Athony and Philipo Athony.

The facts before the Primary Court were that on 26/9/2023 Urbano Basso went to look for old men for a family meeting scheduled to be held on 29/9/2023. Around ten o'clock at night, he was returning home with a relative and they saw, Philip Athony, the second respondent hiding in a bush. Urbano Basso and his relative continued walking until they reached a destination where

they parted ways. Urbano Basso walked towards his home. Suddenly, a person appeared from the bushes and hit him with a stick and he fell down. He recognized the person as Nicodemus Athony. Philipo also attacked him with a stick. It is not clear how Philipo Athony came to the scene. He shouted for help his family members came out and his attackers ran towards the South. His second witness, Urbano Elia was one of those persons who came to the scene and managed to recognise the respondents through torchlight. Later his neighbours came to the scene.

Urbano Basso also told the Primary Court that when Nicodemus Anthony heard that there would be a family meeting, he phoned his sister and told her that he will kill Urbano Basso before June.

The respondents denied the charge and raised the defence of alibi. The first respondent alluded to an existing land dispute between him and the appellant. The trial convicted them as charged, sentenced them to six months conditional discharge and ordered the respondents to compensate the appellant 50,000 Tanzanian Shillings. The respondents successfully appealed to Babati District Court.

Urbano Basso has appealed to this Court on three grounds of appeal. At the hearing of the appeal, the appellant appeared in person. In his first ground of appeal, he complains that he was denied the right to be heard. He explained

that when the appeal came for hearing on 17/1/2024, he asked to be afforded time to prepare for hearing of the appeal and he was given six days. The hearing of the appeal was adjourned and, on the day, fixed for hearing of the appeal, he appeared and responded to the appeal. He complains that the judgment was not read, he was merely told that the respondents have been set free.

Mr Abdallah Kilobwa, learned counsel, who represented the respondents, asked this Court to dismiss this ground of appeal. He argued that the appellant was accorded opportunity to be heard and that at the hearing of the appeal, the appellant stated that he had nothing to add.

From the records of the appellate District Court, the appellant filed a reply to the petition of the appeal. The appeal was called for hearing on 17/1/2024 but hearing was adjourned to 23/1/2024 as the appellant stated he had short notice of the appeal and requested for more time to prepare for hearing of the appeal. On the hearing date, the appellant stated that he had nothing to add to the respondents' submission. The District Court adjourned the appeal for judgment and the judgment was delivered on 29/1/2024. This ground has no merit and I dismiss it.

In the second ground of appeal, Urbano Basso complains that the District Court erred in allowing the appeal against conviction as the charge before the

Primary Court was proved beyond reasonable doubt. He argued that he gave sufficient evidence that was overlooked by the first appellate court.

Mr Kilobwa, learned counsel, contended that the evidence was insufficient to support conviction and there was contradiction between the appellant and his witness regarding the time in which the offence was committed and how it was committed. The learned counsel did not elaborate the contradiction but it is clear from the record that according to the appellant the offence was committed around ten o'clock at night. His witness, however, stated that it was about eleven o'clock at night.

The appellant's evidence was one of visual identification and the question before me is: were the perpetrators properly identified? The incident took place around ten o'clock at night and around the bushes. This means that the appellant's identification was made under unfavourable conditions. As was restated by the Court of Appeal in **Walter s/o Dominic alias Omundi and Another v R**, Criminal Appeal 15 of 2005:

> ...In numerous cases this Court has held that, where an offence is committed at night, the issue of identification is very crucial, and that no court should convict an accused person on mere visual identification unless all possibilities of mistaken identity are eliminated and that the court is fully satisfied that the evidence before it is absolutely watertight...

It is clear from the evidence that the appellant and the respondents are close relatives but the general principle is that familiarity or recognition alone does not guarantee that visual identification was watertight. In **Kulwa s/o Makwajape and Two Others v R**, Criminal Appeal No. 35 of 2005, Court of Appeal of Tanzania at Mwanza (2007), the appellants who were charged with robbery with violence were known to the victims of the house raided. On a further appeal to the Court of Appeal, it was held that the evidence of prior knowledge of the appellant was not conclusive evidence of identification:

> We are constrained to observe at once that we are alive to the assertion of PW.1 and PW.2 in their evidence that the appellants were known to PW.1 and PW.2 before the incident and that because of the proximity from where the raiders were PW.1 and PW.2 were able to see and describe what the appellants carried at the time. This may or may not be so. There is no gainsaying the fact that evidence of prior knowledge of the suspects is a relevant factor that facilitates the identification of the suspects, But this should not be considered in isolation from the pre-requisite requirement that conditions for the proper identification are favourable.

The weight of evidence of familiarity depends on existence of favourable conditions of identification. In **Walter s/o Dominic alias Omundi,** cited above, the Court of Appeal dismissed the respondent's argument that there was no possibility of mistaken identity because the victims knew the appellants before the event:

> ...where the source of light is not disclosed, a court cannot be fully satisfied that the light was sufficient for correct identification, free from all possibilities of mistaken identity, even if the identifying witnesses knew the suspects before, and the event took a long time.

In **Issa s/o Mgara alias Shuka v R**, Criminal Appeal 37 of 2005, one of the prosecution witnesses claimed that the accused was known to him before the incident of armed robbery but fumbled in recognizing the accused at the dock. As summed up by the Court of Appeal:

> ...PW5 was specific in his entire evidence that he saw and recognized the appellant among the robbers because he was well known to him. When asked by the Public Prosecutor to identify the appellant, he pointed at Mapambano Basandola, who was the seventh accused in the District Court. He insisted that he had always known Mapambano as Issa Mgara. That was a discrediting piece of evidence and proves that he never saw the appellant.

In allowing the appeal, the Court of Appeal held partly that:

> We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes of recognition of close relatives and friends are often made.

Where conditions for identification are unfavourable, evidence favouring correct identification is important to eliminate mistaken identification of the accused. One of the instructive in this regard is **Said Chaly Scania v R** [2007] TLR 100 at 103 where it was held that:

> We think that where a witness is testifying about identifying another person in unfavourable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger. We are not attempting to exhaust the circumstances for accurate identification but this Court has on many occasions emphasized on the need to consider with great caution evidence of visual identification.

In the instant appeal, the source of light that enabled the appellant to identify the respondents was not mentioned. The appellant's second witness claimed to have recognised the respondents through torchlight. While in recognition description of the accused person may not be necessary but the unfavourable conditions in the present appeal, demanded some sort of description. There was none.

Apart from issues of visual identification, there is some reason to doubt the truthfulness of the appellant's case. In his evidence in-chief, the appellant neither disclosed that he was related to the respondents nor revealed that he had ongoing land dispute with the respondents. It was upon being examined by the trial court that he disclosed the existence of the land dispute. He never stated that the respondents were his close relatives. Nor did his second witness reveal those facts in examination -in-chief. It was only in cross-examination that the second witness acknowledged that ongoing land conflict between the appellant and the respondents. It was the respondents who revealed their family relationship with the appellant. The respondents' evidence was that the appellant was unhappy because he was not involved when the first respondent purchased a plot from another family member. These facts cast doubt on the appellant's evidence. In its dictum in **Nyakango Olala James v R**, Criminal Appeal 32 of 2010, the Court of Appeal re-emphasized the importance of truthfulness of the witness of visual identification:

> It is common knowledge that visual identification evidence, be that of a stranger or a previously known person, particularly one done under unfavourable conditions, is of the weakest kind and most unreliable. It should not be approached casually but with utmost caution. Courts should be wary of not only honest but mistaken identifying witnesses but also of outright dishonest witnesses.

Given that the appellant admitted the ongoing land conflict with the respondents, there is some doubt about the charge brought by the appellant. In the instant appeal, the appellant's evidence suggests that he had some improper motive to serve and so he was an interested witness. The appellant's evidence is suspicious and needs corroboration as a matter of practice. This rule was reaffirmed by the Court of Appeal in **Matei Pius Senande v R, Criminal Appeal 76 of 1999:**

> ...Our courts have stated on diverse occasions that where it appears that a witness may have some purpose of his own in giving evidence, it is desirable as a matter of practice that the court should warn itself with regard to the danger of acting on his uncorroborated evidence...

There was no corroborative evidence. Other than the appellant's son, no relative testified in favour of the appellant's case. There is no evidence that any relative came to console the appellant when he was nursing the injuries he suffered.

Under the circumstances where a private prosecutor is also a star witness in his own case and has an improper motive to serve, the conclusion is that the prosecution is a concoction.

Having reached this conclusion, it is unnecessary to consider the third ground of appeal.

For the reasons I have given, this appeal stands dismissed.

DATED at BABATI this 27th day of May,2024

F.M. MIRINDO

JUDGE

Court: Judgment delivered this 30th day of May, 2024 in the presence of the appellant in person and in the presence of the second respondent and in the absence of the first respondent.

F.M. MIRINDO

JUDGE

30/5/2024