IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 556 OF 2016

1. MADUHU NG'HABI
2. WILLIAM JULIUS ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania, at Shinyanga)

(Ruhangisa, J.)

dated the 21st day of October, 2016
in
DC. Criminal Appeal No. 82 of 2016

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JUDGMENT OF THE COURT

11th & 24th August, 2020

MWARIJA, J.A.:

The appellants, Maduhu Ng'habi and William Julius (the 1st and 2nd appellants respectively) were charged in the District Court of Bariadi with the offence of armed robbery contrary to s. 287A of the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). It was alleged that on 6/6/2015 at Sunzula village in Itilima District within Simiyu Region, the appellants stole

one motorcycle make Sanlag with Reg. No. T. 955 CYJ valued at TZS 2,100,000.00 the properly of Mashita Walwa and immediately before or after such stealing used a machete and clubs in order to obtain and retain the said property.

The appellants denied the charge. However, after a full trial, they were convicted and sentenced to 30 years imprisonment. Their appeal to the High Court was unsuccessful hence this second appeal.

The facts giving rise to the arraignment and the resultant conviction of the appellants can be briefly stated as follows. The victim of the offence, Mashita Walwa was a commercial motorcycle (bodaboda) rider. On the material date at about 05:15 p.m., he got a passenger whom he transported from Luguru to Maembe village. When he was riding back and after he had arrived at Sunzula village at about 9:00 p.m., he saw a group of people standing on the road. As he rode closer to them, he noticed that they had machetes and clubs. As the group remained standing on the road, he had no other option but to stop the motorcycle. When he did so, they started attacking him with machetes and clubs on various parts of his body. He jumped off the motorcycle and ran away raising an alarm. He

however, shortly thereafter, lost consciousness as a result of bleeding from the injuries he sustained from the attack. Later on, when he regained consciousness, he noticed that he was at Sunzula Hospital where the people who respondent to the alarm took him for treatment. From Sunzula Hospital, he was referred to Somanda Hospital where he was admitted for about a week. Following the incident, the appellants were arrested and charged as shown above.

To prove its case, the prosecution relied on the evidence of three witnesses including the victim, Mashita Walwa who testified as PW1. It was his evidence that he identified the appellants to be some of the persons who waylaid and attacked him at Sunzula village on the date of the incident and robbed him of his motorcycle and TZS 150,000.00. He testified further that he identified the appellants by aid of the light from the head lamp of the motorcycle which he was riding. He added that, he was able to identify the appellants because, being his village mates, had known them prior to the incident. On the conditions of identification, he stated that, although there was light rain, it did not prevent him from identifying the appellants.

The two other witnesses were police officers No. F. 7038 D/C Andrew (PW2) and No. H. 4406 PC Abuu (PW3). PW3 who was on duty at Itilima Police Station on the material date of the incident testified that, at about 10:00 a.m., PW1 was taken there while bleeding and in a critical health condition. He attended him by issuing him with a PF3 and escorted him to Somanda Hospital, Bariadi. At the said Hospital, PW1 was examined by Dr. Nkankira who posted the report of his examination in the PF3. That medical report was tendered by PW3 and admitted in evidence as exhibit P1.

On his part, PW2 who investigated the case, testified that he recorded the statement of PW1 on 8/6/2015 and after visiting the scene of crime, filed the charge against the appellants.

In his defence, the 1st appellant (DW1) testified that on 7/6/2015, he went to charge his mobile phone at Luguru area. While there at about 12:30 p.m., a group of motorcycle riders approached him and in the company of other persons, apprehended him. He was informed that he was identified at the scene of crime as one of the persons who waylaid and robbed PW1 of his motorcycle after assaulting him. Despite denying the

allegation, he said, the police were informed of his being apprehended as a suspect and upon their arrival, they arrested him. It was his evidence that the charge against him was framed-up out of existing grudges between him and PW1. He went on to testify that, prior to his arrest, PW1 caught one Evodi Membe committing adultery with the former's wife and as a result of that incident, PW1 developed hatred against him. In another incident, he said, he fought with PW1 over a woman.

On his part, the 2nd appellant (DW2) testified that on 7/6/2015, while at home, he heard an alarm being raised and decided to go to where people had gathered. He heard DW1 being called to stand at the middle of the crowd. Shortly thereafter, he was also called upon to follow suit. He heeded and went to stand as directed. They were then required to show where they had hidden the motorcycle which was allegedly stolen from PW1. Like the 1st appellant, DW2 denied any involvement in the commission of the offence. Despite his denial, he said, the group notified the police who arrived and arrested them.

The trial court was satisfied that the prosecution evidence had proved the case against the appellants beyond reasonable doubt. It

dismissed the appellants' defence holding the view that the same did not raise any reasonable doubt against the prosecution case. It found that the conditions for identification at the scene of crime were favourable although it was drizzling at the time of the incident. It found further that, since PW1 was attacked at a close distance, he properly identified the appellants as some of his assailants.

As stated above, the appellants' appeal to the High Court was unsuccessful. The learned 1st appellate Judge was of the view that, although the appellants' conviction was based on the evidence of a single witness of identification, his evidence was properly acted upon to found the conviction.

At the hearing of the appeal, which was conducted through video conferencing (linked to Shinyanga Prison), the appellants appeared in person, unrepresented while the respondent Republic was represented by Mr. Tumaini Kweka, learned Principal State Attorney assisted by Mses. Wampumbulya Shani and Caroline Mushi, both learned State Attorneys.

In the appeal, the appellants have raised eight identical grounds in their respective memoranda of appeal. The same as paraphrased are as follows:-

1. THAT, the ownership of the alleged stolen motorcycle make SANLG with registration number T.955 CYJ was not established.
2. THAT, visual identification evidence against the appellants was not watertight because, from the circumstances where there was rain at the scene of crime, the light alleged to be illuminated from the motorcycle was not sufficient for proper identification of the suspects.
3. THAT, the evidence of recognition of appellants by PW1 was insufficient as neither was such information given to the first person who attended the complainant nor did it come from any witness who testified in court.
4. THAT, the evidence on the appellant's identification is not credible because it does not show that a report was made at the earliest opportunity to any law enforcement organ.
5. THAT, the prosecution case lacked proof as none of the persons who arrested the appellants was called to testify on how the arrest was made.
6. THAT, there was variance between the charge sheet and the facts which were adduced at the preliminary hearing as regards registration number of the alleged stolen motorcycle and date and time when the crime was committed or reported to the police .

7. THAT, the appellants were wrongly convicted because their defence raised reasonable doubt against the prosecution's case.
8. THAT, the trial was defective on account that the appellants were detained at the police station for a long period contrary to the law, and because the case against them was not proved beyond reasonable doubt.

In their response to the appeal, the learned State Attorneys contended that grounds 1, 4, 5 and 6 raise matters which were not canvassed in the High Court and therefore, urged us to find that those grounds are not worth consideration by this Court. We respectfully agree that these ground are new as they were not raised in the High Court. It is trite position that, unless it involves a point of law, a matter which was not raised and determined by the courts below cannot be entertained by this Court on second appeal. - See for instance, the cases of **Nasib Ramadhani v. Republic**; Criminal Appeal No. 310 of 2017 and **Geofrey Wilson v. Republic;** Criminal Appeal No. 168 of 2018 (both unreported), cited to us by Mr. Kweka. In our earlier decision in the case of **Hassani Bundala Swaga v. Republic;** Criminal Appeal No. 385 of 2015 (unreported) we stated that principle in the following words:-

"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; not matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

The 1st, 4th, 5th and 6th grounds are therefore, hereby discarded.

With regard to the remaining grounds, after having gone through their contents, we find that the same boil down to the following three grounds:-

1. That, the learned first appellate Judge erred in law in upholding the conviction of the appellants which was based on insufficient evidence of a single witness of identification.
2. That, the learned first appellate Judge erred in law in failing to find that the appellants' defence raised reasonable doubt in the prosecution case.
3. That, the learned High Court Judge erred in law in upholding the decision of the trial court while the prosecution did not prove its case beyond reasonable doubt.

When they were called upon to argue their appeal, the appellants opted to hear first, the respondent's reply to their grounds of appeal and thereafter, make a rejoinder if the need to do so would arise.

Submitting in response to the complaint in the 1st ground of appeal, that the 1st appellate court erred in finding that the appellants were identified at the scene of crime, Ms. Tuka started by opposing that contention. She argued that, although at the time when PW1 arrived at the place where he was waylaid and assaulted there was light rain, such weather condition did not hinder PW1 from identifying the appellants. Citing the case of **Waziri Amani v. Republic** [1980] TLR 250, the learned State Attorney argued that, from the evidence of PW1, the conditions stated in that case were met thus enabling PW1 to properly identify the appellants.

According to the learned State Attorney, in the first place, PW1 had known the appellants before the date of the incident and was able to properly identify them by aid of the light from the motorcycle's lamp. Secondly, Ms. Tuka went on to argue, PW1 was attacked by use of machetes and clubs hence at a very close distance thereby making it

possible for him to identify the appellants who were among his assailants. Relying further on the case of **Lazaro Felix v. Republic**, Criminal Appeal No. 41 of 2003 and **Charles Nanati v. Republic**, Criminal Appeal No. 286 of 2017 (both unreported) in which the Court upheld the conviction based on the identification by aid of torchlight, the learned State Attorney argued that in the present case, the light from the motorcycle's lamp was equally sufficient to enable proper identification.

With regard to the appellants' submission that the evidence of PW1 should not have been accorded credence because the prosecution failed to call the first person to whom PW1 mentioned the appellants as the persons he identified at the scene of crime, Ms. Tuka argued that the contention is without merit because the prosecution called PW2 who testified to that effect.

On the complaint that the case was not proved beyond reasonable doubt, in their submission, both Mr. Kweka and Ms. Mushi opposed that assertion. Ms. Mushi submitted that the findings by both the trial court and the High Court to the effect that the 1st appellant's defence did not raise any reasonable doubt against the prosecution case is correct. She argued

that the trial court, which was better placed to decide on the credibility of the witnesses, found that the defence by the 1st appellant that the case was framed-up as a result of existing grudges between him and PW1, was not plausible. She went on to argue that, this being a second appeal, in principle, the Court cannot interfere with that finding unless there are compelling reasons to do so. To bolster her argument, the learned State Attorney cited *inter alia,* the case of **Bashiru Salum Sudi v. Republic**, Criminal Appeal No. 379 of 2018 (unreported).

In his rejoinder, the 1st appellant merely reiterated his complaint that the case was framed-up by PW1 because he had grudges with him. He stressed the assertion made in the 1st ground of appeal, arguing that the evidence alleging that he was identified at the scene of crime was wrongly acted upon to convict him because the same was not watertight.

On his part, the 2nd appellant challenged the probative value of the prosecution evidence arguing that it did not prove the offence against him because, first, existence of the motorcycle alleged to have been stolen was not established by production of its registration card and secondly, he said, neither the first person to whom PW1 reported the incident nor his father

and brother as well as the street chairperson were called to testify on whether or not they knew anything about the incident. He submitted further that the prosecution's failure to tender the statement of PW1 which was recorded at the police station weakened its case.

To begin with the 1st ground of appeal, from the parties' submissions, the crucial matter for our consideration is sufficiency or otherwise of the evidence of identification acted upon by the trial court to convict the appellants. It is not disputed that in convicting the appellants, the trial court relied mostly on the evidence of a single witness of identification. The identification was made at night during which there was light rain and therefore, under difficult conditions.

It is trite law that for evidence of identification made under unfavourable conditions to be acted upon to found conviction, such evidence must be watertight. In the case of **Waziri Amani** (supra) cited by Ms. Tuka, the Court laid down important factors which must be established before such evidence is acted upon to found an accused person's conviction. The factors which must be positively determined so as to make such evidence reliable are:-

(a) The time the witness had the accused under observation.

(b) The distance at which he observed him.

(c) The conditions in which such observation occurred; for instance, whether it was day or night-time, whether there was good or poor lighting at the scene.

(d) Whether the witness knew or had seen the accused person before or not.

Furthermore, as a rule of practice, evidence of a single witness of identification made under difficult conditions requires corroboration. - See for instance, the case of **Hassan Juma Kanenyera v. Republic** [1992] TLR 100 in which the Court observed as follows:

> *"It is a rule of practice, not of law, that corroboration is required of the single witness of identification of the accused made under unfavourable condition; but the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth."*

Having stated the position of the law as regards validation of evidence of identification made under unfavourable conditions, we now

turn to consider the credibility or otherwise of PW1's evidence. Admittedly, this being a second appeal, the Court is not required to interfere with concurrent findings of the two courts below on matters of fact unless there are misdirections or non-directions by those courts. - See the cases of **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149; **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 and **Masumbuko Charles v. Republic**, Criminal Appeal No. 39 of 2000 (both unreported).

As stated above, the High Court upheld the findings of the trial court based on the evidence of PW1 that the appellants were identified at the scene of crime. According to his evidence, PW1 testified that he managed to identify the appellants by aid of the light from his motorcycle's head lamp. He did not however, describe the intensity of that light. Failure by an identifying witness to describe the intensity of light which aided him to make identification raises doubt on the credibility of his evidence. In the case of **Hassan Said v. Republic**, Criminal Appeal No. 264 of 2015 (unreported), the Court observed as follows:-

> *"It is however, now settled, that if a witness is relying on some source of light as an aid to visual identification such witness must describe the source*

and intensity of such light in details. The Court has repeatedly in its various decisions in this respect, emphasized on the importance of describing the ***source*** *and the* ***intensity*** *of the light which facilitated a correct identification of the appellants at the scene of crimes. See* ***Waziri Amani v. Republic*** *(supra),* ***Richard Mawoko and Another v. Republic****, Criminal Appeal No. 318 of 2010 (CAT) at Mwanza and* ***Gwisu Nkonoli and 3 others v. Republic****, Criminal Appeal No. 359 of 2014 (CAT) at Dodoma (both unreported)."*

Description of intensity of light was a vital requirement in this case in which, identification was not only made at night-time but at the time when it was drizzling.

The uncertainty of intensity of the light from the motorcycle's lamp is not the only shortfall as regards the probative value of PW1's evidence. As argued by Ms. Tuka, PW1 identified the appellants from a distance at which his assailants attacked him, and therefore, at a very close distance. That was at the time when he had stopped the motorcycle. In such a situation, even if the light from the motorcycle lamp would have been bright, such brightness should have possibly been diminished. We are

supported in that view by the Kenyan case of **Joash Juma Bonyo and 2 others v. Republic** [2014] eKLR, the facts of which are similar to that of the case at hand. In that case, the Court of Appeal of Kenya stated the following position to which we subscribe:-

> *"It is plain therefore, that the attack happened at a corner and after Wasonga [the victim] had stopped. It is, in the circumstances, doubtful whether the light from the motorcycle head lamp was intense or bright as it would have been if Wasonga was in motion."*

It is clear therefore that, although PW1 contended that he had known the appellants before the date of the incident, under the circumstances in which the identification was made, it cannot be said with certainty that the possibility of a mistaken identity was eliminated. As held in the case of **Shamir s/o John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported):-

> *"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Court should always be aware that*

mistakes in recognition of close relative and friends are sometimes made."

Furthermore, as contended by the appellants, the evidence does not show that they were mentioned by PW1 at the earliest possible opportunity to be the persons he identified at the scene of crime. Ms. Tuka submitted that PW1 mentioned the appellants to PW2. With due respect to the learned State Attorney, in his evidence, PW1 did not state that he mentioned to PW1 or any one, the persons who attacked him. It was expected that PW1 would have done so after he had regained consciousness at Sunzula Hospital. He should have named his assailants to the persons who took him there and assisted him to inform his father about the incident. None of those persons including PW1's father was called to testify. PW2 did not, as well, state that PW1 mentioned the appellants as the persons he identified at the scene of crime. He merely stated as follows:-

"The victim told me that in Sunzula village he was invaded by four bandits whereby he identified ***two bandits*** *by using motorcycle lamp light."*
[Emphasis added].

Nowhere in his evidence did PW2 say that the appellants were named by PW1. As stated in the case of **Marwa Wangiti Mwita and another v. Republic** [2002] TLR 39:-

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry."*

On the basis of the reasons stated above, we are of the settled view that had the High Court properly scrutinized the evidence of PW1 which was the only evidence of identification, it would have found that such evidence was not watertight. In the circumstances, we agree with the appellants that their conviction was based on insufficient evidence of identification. As a consequence, we find merit in the 1st ground of appeal.

Since the finding on that ground of appeal suffices to dispose of the appeal, the need for considering the other grounds of appeal does not arise.

In the event we allow the appeal. The conviction of the appellants is hereby quashed and the sentence imposed on them by the trial court and

upheld by the High Court is hereby set aside. They should be released from prison forthwith unless they are held therein for some other lawful cause.

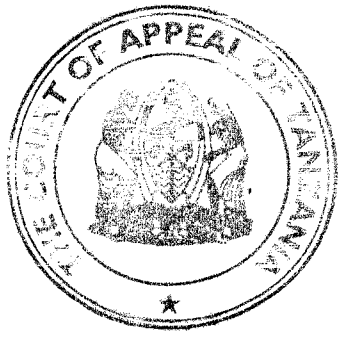
DATED at **SHINYANGA** this 24th day of August, 2020.

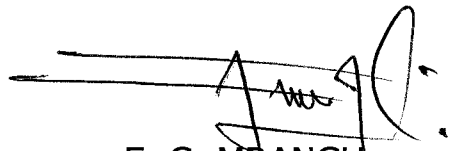
A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 24th day of August 2020, in the Presence of the Appellants in person via video link and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.





E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL