IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CORAM: KILEO, J. A, ORIYO, J.A., And MMILLA, J.A.

CRIMINAL APPEAL NO. 261 OF 2014

JOSEPH MELKIOR SHIRIMA @ TEMBA..APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Jundu, J.)

dated the 23rd March, 2007
in
DC Criminal Appeal No. 161 2004

....

JUDGMENT OF THE COURT

5th & 11th September, 2014

MMILLA, J.A.:

Joseph Melkior Shirima @ Temba (the appellant) and Proches Maite James @ Kikaangwa who did not appeal to this Court, were together charged in the District Court of Rombo in Kilimanjaro Region, with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code Cap 16 of the Revised Edition, 2002. Upon conviction, they were each sentenced to fifteen (15) years imprisonment. They unsuccessfully appealed to the High Court at Moshi, hence this second appeal by the appellant which is against both conviction and sentence.

The facts of the case as were perceived by the trial court were briefly that on 2.11.2003 at around 9.00 pm (21 hours), PW4 Dismas Didas and his wife, PW1 Joyce Dismas Kavishe were asleep at their home at Msinga village within Rombo district. Around that time, the two were awakened from sleep by a bang which resulted after the bandits had smashed the main door of their house with a heavy object. On waking up, PW1 and PW4 saw three armed persons in their house of whom they managed to identify only two; the appellant and that other person whom we have said did not appeal to this Court. According to those two witnesses, while the appellant was armed with a club, the second accused before the trial court and that other person who was not charged were each armed with a panga. In addition to that, the appellant and the unidentified person had each a torch. PW1 and PW4 testified further that at the time the bandits stormed into their house, there was light therein which was sourced from a hurricane lamp with the aid of which they managed to identify two of their attackers. After surprising the couple, the bandits gained control of the situation and ordered them to lie down after which the robbers covered them with a blanket amid threats to kill them in case they raised alarm. The victims of the attack obliged. Seizing that opportunity, the bandits ransacked the victims' house and took away with them ten (10) cushions valued at T.shs 75,000/=, one radio transmitter

valued at T.sh 30,000/=, one mattress valued at T.shs 25,000/= and a pair of bed sheets valued at T.shs 10,000/=, all properties valued at T.shs 140,000/=. PW1 and PW4 rose from where they were made to lie down after they were certain that their attackers had left the place. It was then that they raised alarm which attracted neighbours to rush to the scene of crime.

The case was investigated by PW2 No. C 9706 D/Sgt Benjamin who testified that PW1 informed him that their house was invaded by three persons of whom they identified only two namely, the appellant and Kikaangwa. He was also the one who arrested the two on 11.01.2004 at the house of the appellant. PW2 interrogated both of them, and that they allegedly admitted involvement in the commission of the said crime and disclosed that they were in the company of one person known as Gabriel Kiroboto. He recorded the cautioned statement of appellant who was depicted to have made a confession. That statement was retracted during trial but was admitted without any inquiry having been made. The appellant and his colleague were subsequently charged before the trial court with the said offence of robbery with violence.

The appellant's defence was very brief. He was explicit that he did not commit the charged offence.

The trial magistrate rejected the appellant's defence and held that he was satisfied that he had been properly identified by PW1 and PW4 who knew him before the incident. He justified his finding that PW1 and PW4 were able to identify the appellant because there was light sourced from a hurricane lamp and, as already pointed out he convicted and subsequently sentenced him as it were.

In sustaining conviction and sentence, the learned first appellate judge was satisfied that the appellant had been properly identified, thus he dismissed the appeal.

Before us, the appellant appeared in person and was not represented while the respondent Republic was represented by Ms Angelina Chacha, learned State Attorney who hastened to declare her stand that she was supporting the appeal.

The appellant's memorandum of appeal raised four grounds; **one** that he was not sufficiently identified; **two** that the trial court erred in finding, and the first appellate court erred in upholding the finding that the prosecution witnesses were credible; **three** that the cautioned statement constituted in exhibit P1 was improperly received and relied upon; and **lastly** that the prosecution did not prove the case against him beyond all reasonable doubt.

Ms Chacha tackled the first and second grounds of appeal together. She observed in the first place that the evidence on visual identification came from

PW1 and PW4 both of whom testified in common that they identified the appellant and one of his colleagues with the aid of light from two sources; firstly a hurricane lamp which was in the house and secondly from the torches in the possession of two of the bandits. She was quick to add however, that both eye witnesses did not explain the intensity of the said light, a fact which she said also shed doubts on the credibility of those two witnesses. In her opinion, given such a situation, it could not be said that the conditions at the scene of crime were favourable for unmistaken identity, notwithstanding the assertion that they had known the appellant before on account that they were living in the same locality. She relied on the cases of **Waziri Amani v. Republic** [1980] T.L.R. 250 and **Ally Fumito v. Republic**, Criminal Appeal No. 36 of 2008, CAT (unreported).

On his part, while subscribing to the view of the learned State Attorney on the point, the appellant added that it could not have taken his accusers a month long to arrest him if at all PW1 and PW4 were certain that he was the culprit behind the charged offence. He referred the Court to the case of **Galous Faustine Stanslaus v. Republic,** Criminal Appeal No. 2 of 2009, CAT (unreported).

Like the learned State Attorney, we propose to discuss the first and second grounds of appeal together. We wish to begin by restating the principle of law in relation to evidence of visual identification.

As this Court recently restated in **Moris Jacob @ Ombee & another v. Republic,** Criminal Appeal No 220 of 2012, CAT (unreported), 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 – See **Waziri Amani v. Republic** (supra). It is also significant to emphasize that in weighing such evidence, the courts have to remain focused on whether or not the conditions at the scene of crime favoured correct identification as was expressed in **Raymond Francis v. Republic (supra)** and **Rajabu s/o Issa Ngure v. Republic,** Criminal Appeal No. 164 of 2013, CAT (unreported).

In the present case, the identification of the appellant depended on the evidence of PW1 and PW4 who were husband and wife and occupants of the invaded house. The begging question is whether those two witnesses properly identified the appellant at the scene of crime.

As already pointed out above, PW1 and PW4 told the trial court that at the

time the bandits stormed into their house, there was light in the house which was sourced from a hurricane lamp. Those witnesses however, did not explain the intensity and illumination of the said hurricane lamp. This ought to have been explained so that a clear picture could have been gotten of the condition in which he was identified. This is especially so when we take note that normally, when people go to sleep, the intensity of the light sourced from, say a hurricane lamp, is reduced by lowering the wick. Similar, it was not explained why the bandits had to switch on their torches if at all there was sufficient light in the room.

In a situation similar to the instant case in **Kulwa Makwajape & 2 others v. Republic**, Criminal Appeal No.35 of 2005, CAT (unreported) the Court observed that:-

> " ... *even if it is accepted that the kerosene lamp was left on, it stands to reason that ordinarily when people go to bed leaving a lamp still on in the room, the wick of the lamp is left burning at a low illumination. In that situation it would appear to us that it is possible that when the bandits broke into the room of PW1 and PW.2 the intensity of the light from the lamps was low. It would not facilitate an easy identification of the appellants. All the more so when PW1 and PW2 were suddenly roused from sleep confronted by armed bandits, who had torches. In these*

circumstances, it seems that the complaint that the conditions for proper identification of the appellants at the time were not favourable may well be founded. It is doubtful that the appellants were properly identified as alleged by the appellants in this ground of appeal."

We are alive that PW1 and PW4 said that they had known the appellant before the incident because he was living in the same locality. We also hasten to appreciate that evidence of prior knowledge of the suspect(s) is a relevant factor that makes easy the identification of the suspect. However, this should not be considered in isolation from the pre-requisite requirement that conditions for perfect identification of the suspect are favourable. The rationale to this was expressed in the case of **Issa Ngara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005, CAT (unreported) where it was stressed that:-

"... even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source 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 in recognition of close relatives and friends are often made."

With great respect, we subscribe to this view. See also **Phillipo Rukandiza @ Kichechembogo v. Republic**, Criminal Appeal No. 215 of 1994, CAT and **Jaribu Abdalla v. Republic**, Criminal Appeal No. 220 of 1994, CAT (both unreported).

As we have said above, since the intensity of the light was not explained in the present case, we cannot positively say that conditions for correct identification of the appellant were favourable.

Equally important is the query by the appellant relating to delay in arresting him, an aspect which he said, cast doubts on the credibility of PW1 and PW4.

While we appreciate, as was underscored by this Court in, among others, the cases of **Kulwa Makwajape & 2 others v. Republic** (supra) and **Marwa Mwita v. Republic,** Criminal Appeal No. 6 of 1995, CAT (unreported) that the fact that a witness names a suspect at the earliest opportunity is an assurance of his veracity; we nevertheless heed to the emphasis this Court gave in **Aziz Athumani @ Buyogera v. Republic**, Criminal Appeal No. 222 of 1994 (unreported) that unexplained delay in arresting a suspect casts doubt on the credibility of a witness as stoutly contended by the appellant and supported by the learned State Attorney.

In our present case, if actually PW1 and PW4 correctly identified the appellant at the scene of crime and had named him to the police, why was the appellant not pursued and arrested soonest at his home? In our view, it could not have taken a month for them to arrest him if he was really identified, a fact which raises doubt that he was positively identified – See **Galous Faustine Stanslaus v. Republic** (supra). It is on this basis that we agree with the appellant and Ms Chacha that the delay in arresting the appellant in the circumstances of the present case casts doubts on the credibility of PW1 and PW4.

For reasons we have assigned, we are increasingly of the view that had the trial court and subsequently the first appellate court analyzed and addressed these aspects, we think with respect, they would have come to the conclusion that it was doubtful that appellant's identity had been proved beyond reasonable doubt. It being a criminal charge, the doubt should be resolved in his favour. In the premises, we find merit in the first and second grounds of appeal which we accordingly allow.

To follow is the third ground of appeal relating to acceptability and reliability on the cautioned statement of the appellant.

The cautioned statement under consideration was allegedly offered by the appellant to PW2. In the course of tendering it as evidence in court on 22.4.2004,

the appellant said that he was forced to make that statement. Notwithstanding the protestation, the trial court went ahead to admit it without conducting any inquiry as he was duty bound to do. We think that was improper. We seek to be guided by what this Court stated in **Twaha s/o Ali and 5 others v. Republic**, Criminal Appeal No. 78 of 2004 where it said:-

> *"If the objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

Since the trial court in the present case did not proceed to hold an inquiry after an objection to that effect was raised, that was a serious omission entitling this Court to expunge the said statement as we are accordingly minded to do. Thus, we find merit in this ground too and we allow it.

In the upshot, given these pitfalls, we agree with both the appellant and Ms Chacha that the prosecution did not prove the case against the former beyond reasonable doubt and we allow the appeal. Consequently, we quash the

conviction and set aside the sentence. The appellant is to be released from prison forthwith unless otherwise lawfully held.

DATED at **ARUSHA** this 9th day of September, 2014.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL