IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 222 OF 2013

DADU SUMANO @ KILAGELA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Wambali, J.)

dated the 7th day of May, 2013

in

Criminal Appeal No. 80 of 2011

JUDGMENT OF THE COURT

19th & 23rd June, 2014

MASSATI, J.A.:

The appellant was charged with one count of armed robbery, contrary to sections 285 and 286 of the Penal Code. After hearing a total of three prosecution witnesses and the appellant's defence, the District Court of Kasulu, convicted him as charged and sentenced him to 30 years imprisonment, and ordered him to pay Tshs. 250,000/= as compensation. He unsuccessfully appealed to the High Court. He has now come to this Court on a second appeal.

The charge laid at the appellant's door, alleged that on the 31st day of March, 2007 at about 23.00 hours, at Shinguliba Village, Kasulu District, in Kigoma Region, the appellant fired one bullet in the air to instil fear in one Stephano s/o Selekwa in order to steal from him, cash, Tshs 80,000/=, one cellular phone (make Nokia) valued at Shs. 55,000/=, and a bicycle (make AVON) valued Tshs. 55,000/=, all valued at Tshs. 215,000/= in total.

The factual background is that, on that night and at that time STEPHANO s/o SELEKWA (PW1) was sitting on a bicycle at the yard of his house, while his wife LEVANA REUBEN (PW3) was preparing food in the house. Suddenly he saw a group of people who forcefully entered his compound. One of them had a gun. They took PW1 into the house and demanded Tshs. 400,000/= from him. But PW3 surrendered Tshs. 80,000/=. Together with a cell phone and PW1's bicycle, the hoodlums vanished into the darkness of the night.

At the trial court three witnesses testified. PW1 narrated as hinted above, and said that he and his wife were seriously beaten up by those thugs. Due to the bullet that was fired as the robbers went away, neighbours were afraid to come to their rescue immediately and when they

came PW1 was lying unconscious and had to be rushed to hospital. PW1 said that with the help of a hurricane lamp and in view of the proximity between him and the robbers, and by reason of his familiarity with the appellant as a witch doctor, he was able to identify him as one of the thugs; who also carried a gun. PW3 repeated what PW1 had said except for the amount of money that she gave to the robbers. According, to PW3 the money robbed was Tshs. 400,000/=.

Both said that a cell phone and a bicycle were stolen by the robbers apart from the money, and that it was the light of a hurricane lamp in the sitting room, the proximity and their familiarity with the appellant that enabled them to identify him. Both also told the trial court that they described the appellant immediately when they reported the matter to the police.

PW2 E 8212 DC WAGABONA confirmed that as an investigator assigned to the case, he was told by PW1 that he was able to identify the appellant as one of the robbers. He went to the appellant's house, and found that he had run away. However, the appellant was later arrested and charged with the offence.

In his defence, the appellant, who describes himself as a witchdoctor before testifying, told the trial court that he was arrested on 13th December, 2007 and charged with a charge of murder in Criminal Case No. 20 of 2007. Later, the charge was dropped, and he alone was charged with this offence. He denied to have committed the offence, and said that he disappeared from the village in fear of being implicated in a case of arson of a neighbour's house.

The trial court found that the witnesses, PW1 and PW2 were credible and the identification of the appellant was watertight, and so proceeded to convict him. The High Court found that the appellant was properly convicted by the District Court and so dismissed the appeal.

In this appeal, the appellant has appeared in person and adopted his memorandum of appeal comprising four grounds; which boil down to one:- identification, and that save for his right of reply after hearing the respondent/Republic, he prayed that his appeal be allowed.

On the other hand, Mr. Juma Masanja, learned State Attorney who appeared for the respondent/Republic was firmly of the view that the appellant was adequately identified, and that there was no mistaken

identity. Responding to the four grounds of appeal, Mr. Masanja submitted that firstly, the conditions of identification were favourable because, PW1 saw the bandits by aid of a moonlight and then by a hurricane lamp light that illuminated his sitting room, and in the course of arresting PW1, taking him into the house, searching for money, before beating PW1 and PW3 the witnesses had sufficient time and proximity to identify the witness. Secondly, the appellant was known to the appellant from before as he was a witchdoctor. The appellant did not dispute this. Thirdly, before the witnesses of identification (PW1 and PW3) were roughed up and hurt, the witnesses did not panic to the extent of failing to recognise the appellant and his cohorts. They were only beaten after the stealing. Lastly, though desirable in cases of unfavourable conditions of identification to seek for corroboration, there was no need in the present case as the conditions were favourable. In any case, corroboration could be found the witnesses' mentioning the appellant to the police (PW2) who immediately started looking for him, he argued.

So, the learned counsel prayed that the appeal be dismissed as it lacked merit.

In reply, the appellant, first challenged the authenticity of the record, which according to him, both courts below did not record exactly what he

had said. Secondly, he questioned why certain witnesses such as PW1's neighbours or the local street chairman were not called to testify. Thirdly, he queried the absence of an identification parade to identify him. Lastly, he continued to plead his innocence and prayed that his appeal be allowed. We must hasten to note that the appellant's first three complaints were not in his memorandum of appeal to this Court, and so not properly before the Court in terms of Rule 72 (2) of the Tanzania Court of Appeal Rules, 2009. So we cannot consider them.

This is a second appeal. As a matter of principle, we are only supposed to deal with questions of law. But his approach rests on the assumption that the lower courts have correctly appreciated the evidence. If the courts below completely misapprehended the substance, nature and quality of the evidence resulting in an unfair conviction, this Court must in the interests of justice, intervene. (See **SALUM MHANDO V R.** (1993) TLR 170; **DPP V JAFARI MFAUE KAWAWA V R.** (1981) TLR. 149). The rationale behind this principle is that in matters of findings of facts based on credibility and domeanour of the witnesses, the trial court is best placed to assess them as it has the advantage of seing and hearing them. (See

SEIF MOHAMED EL-ABADAN VS R., Criminal Appeal No. 320 of 2009 (unreported).

These is no dispute in this case that the offence of robbery was committed, and established by the evidence of PW1 and PW3. The only nagging issue is who committed it? According to PW1 and PW3, it was the appellant; but the appellant denied any wrong doing. That draws the issue whether the identification of the appellant by PW1 and PW3 was watertight as the two courts below have found?.

Admittedly, evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. To guard against that possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night?. Was the observation impeded in any way? Had the witness ever seen the accused before?. How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the

original observation and the subsequent identification to the police?. Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance?. Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it. (See **WAZIRI AMANI V R.** (1980) TLR 250; **RAYMOND FRANCIS V R.** (1994) TLR. 100; **AUGUSTINO MIHAYO V R.** (1993) TLR. 117; **MARWA WANGAI AND ANOTHER VS R.**, Criminal Appeal No. 6 of 1995, and **SHAMIR s/o JOHN V R.,** Criminal Appeal No. 166 of 2004 (both unreported). Finally, even in cases where witnesses have claimed to have recognised the accused, mistakes are sometimes made, although by any degree, evidence of recognition may be more reliable that identification of a stranger. (See **ISSA s/o NGARA @ SHUKA v R.,** Criminal Appeal No. 37 of 2005, and **MAGWISHA MZEE SHIJA PAULO V R.,** Criminal Appeal No. 465 and 467 of 2007 (both unreported).

In this case, PW1 and PW3 said that they were able to identify the appellant; first by recognition, as he is a famous witchdoctor, in the community; second by aid of a hurricane lamp which was on at the sitting room, third by proximity gained by the arrest of PW1, demand and receipt

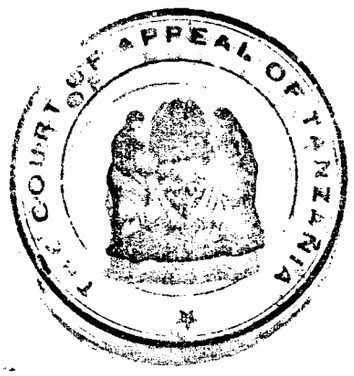
of the money by the bandits, and lastly by the fact that the appellant was carrying a gun with which he used to shoot in the air to scare away people, and by the description of his attire.

The trial and the first appellate courts were impressed by PW1 and PW3 as honest and truthful witnesses. In cross examination, those witnesses were not shaken. They were consistent that they recognised the appellant as one of the robbers. In his defence, the appellant only explained what happened on the day of his arrest on 13th December, 2007, but did not explain where he was on the night of 31st March, 2007 when the robbery was committed which was the subject of the charge he was facing. This silence could not have punched any reasonable doubts in the prosecution case. We are satisfied that on the ground of recognition, in addition to the light from the hurricane lamp, and the moonlight, the time taken and spent by the bandits to arrest PW1, drag him into his house, search his house for money and eventually receiving the money from PW3 in the course of which words were exchanged, PW1 and PW3 gained an unimpeded observation of the appellant. For that reason we are constrained to concur with the two courts below and Mr. Masanja, learned counsel that the quality of the identification was impeccable, and was not

shaken by the appellant's defence. We therefore find no justification to disturb the findings of the two courts below.

In fine, we entertain no doubts on the guilt of the appellant. He was righty convicted as charged. This appeal therefore lacks substance. It is accordingly dismissed in its entirety.

DATED at TABORA this 20th day of June, 2014.



M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL