IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUNUO, J.A., LUANDA, J.A., And MJASIRI, J.A.

CRIMINAL APPEAL NO. 421 OF 2007

BONIFACE S/O SIWINGWA.. ..... APPELLANT
VERSUS
THE REPUBLIC..... .....RESPONDENT

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

(Moshi, J.)

Dated the 26th day of July, 1999
in
(DC) Criminal Appeal No. 9 of 1998

JUDGMENT OF THE COURT

14TH & 21STJuly, 2010

LUANDA, J.A.:

This is a second appeal. The appellant and five others were charged in the District Court of Mbozi at Vwawa with armed robbery c/ss. 285 and 286 of the Penal Code, Cap. 16. The appellant and one Jacob Maleo, were convicted as charged and each was sentenced to the statutory minimum of thirty years imprisonment. The rest were acquitted.

The appellant was aggrieved by the finding of the trial District Court. He appealed to the High Court where he was unsuccessful, hence this appeal.

In his memorandum of appeal, the appellant has raised five grounds. In the said grounds of appeal, the appellant essentially said to this effect. One, the conditions prevailing during the commission of the offence were not conducive for the proper visual identification. Two, the witnesses for the prosecution who were at the scene of crime contradicted themselves. Three, almost the entire evidence on the prosecution side came from members of the same family. Such evidence required to be corroborated. Four, the oral evidence of the police officer who claimed, among other things, that he confessed and mentioned other accused persons ought not to be relied upon as the said police officer was required to take a cautioned statement. Five, the prosecution side did not prove the case to the standard required.

In this appeal, the appellant appeared in person: whereas the respondent Republic was represented by Ms Zainab Mango Learned State Attorney. Ms Zainab Mango supported the finding of the lower courts.

Briefly, the background to the case is as follows: On the night of 23/3/1997 around 9.00pm members of the family of Luchoma s/o Kungu (PW 7) namely, Nyungu s/o Luchoma (PW2), Masanja S/o Luchoma (PW3), Leonard s/o Taison (PW5) Suma s/o Luchoma (PW6) while these were taking supper outside their compound; Sai d/o Luchoma (PW4) was taking care of her sick child and Thelathin s/o Luchoma (PW1) had already retired to bed, a number of bandits armed with a gun, pangas and clubs emerged. Luchoma s/o Kungu (PW7) was not around. He is reported to have gone to a nearby village to attend funeral.

It is the evidence of PW1, PW2, PW3, PW5 and PW6 when the bandits appeared, they fired some shots in the air ostensibly to threaten them and scare would-be rescuers from coming to lend a helping hand. The bandits caused injuries to PW2, PW3 and PW6. They were cut by pangas. While that was going on some bandits broke a house and an

assortment of properties, of PW7 were stolen. They did not say which house. We are making that observation because the compound, according to the sketch plan, (Exhibit C) consists of four houses. Whatever the position, on completion of their mission, the bandits left. The incident was reported to the Village Executive Officer on the same night. However, it is not shown on record what actually was reported. The said Village Executive Officer was not summoned as a witness.

Be that as it may, it is the evidence in the prosecution case that the following day, without stating time, the appellant and Jacob Maleo who were residing in the same village were arrested. The two are said to be among the group of bandits who raided the homestead of PW7. The prosecution witnesses namely, PW1, PW2, PW4, PW5 and PW6 stated categorically that they saw the two by aid of moon-light. All claimed to have seen the appellant holding a gun; whereas Jacob Maleo was possessing a panga and club. The two were familiar persons to the family of PW7 as the appellant had worked as a herdman for quite a long time; whereas Jacob was a labourer in paddy farming.

In their defence the appellant and Jacob denied to commit the offence. They, however, admitted to have been arrested on 23/3/1997 around 3.00pm by militiamen at their respective homesteads.

As earlier said Ms Zainab supported the finding of the lower courts. Ms Zainab argued ground number 1 and 2 together. She then discussed grounds 3,4 and 5 separately.

In relation to grounds 1 and 2, Ms Zainab submitted that the witnesses managed to identify the appellant and Jacob as among the bandits through moon-light. To put it differently she said the conditions were favourable for accurate visual identification.

Turning to ground number 3, she submitted that there were no other witnesses around apart from the members of the family of PW7 when the bandits struck. By necessary implication she meant that the prosecution could have not failed to summon other witnesses other than those of PW7's family if they were around at the time of the incident. As regards ground 4, she first submitted that no cautioned statement of the appellant

was taken. In any case, she went on to say, the lower courts did not base their finding on the alleged confession of the appellant.

Lastly she submitted that taking the evidence as a whole, the prosecution had proved its case to the standard required.

The appellant on the other hand still protested his innocence.

We have carefully gone through the record. First, we wish to point out that we are satisfied as the courts below did that on 23/3/1997 around 9.00pm night time bandits invaded the homestead of PW7 and stole a number of items and in the process PW2, PW3 and PW6 were injured. Our concern which is the central issue in this appeal and which is the basis of the appellant's conviction which will also dispose the appeal, is whether the concurrent finding of fact of the lower courts that the appellant was actually identified was correct.

We are fully aware that generally a higher court is precluded from interfering with concurrent findings of fact by the courts below. However, if

it is shown that there are misdirections or non directions the higher court is entitled to interfere with such finding and make its own finding of fact (see **Peter V Sunday Post** (1958) EA. 424; **DPP V Jaffari Mfaume Kawawa** (1981)TLR 149) .

We have seen that the incident occurred at night time. So, it is important to ensure that any possibility of mistaken identity is eliminated before a conviction is grounded.

In the much celebrated case of **Waziri Amani VR** (1980) TLR 250 this Court observed:-

> "The first point we wish to make is an elementary one and this is that evidence of visual identification, as courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and is fully satisfied that the evidence before it is absolutely watertight."

Then the court set out some guiding principles in considering favourable conditions for identifying an accused person. The court stated, we reproduce:-

> "Although no hard and fast rules can be laid down as so the manner a trial judge (or magistrate) should determine questions of disputed identify, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would for example expect to find on record the following questions posed and resolved by him, the time the witness had the accused under observation, the distance at which he observed him; 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; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial judge (or magistrate) should direct his mind before coming to any definite conclusion on the issue of identity."

The trial learned Senior District Magistrate when convicting the Appellant and his colleague said, we quote:-

> "The two accused persons live nearer and at the same village and they frequently visited PW7 where they met his (PW7) children who are PW1, PW2, PW3, PW4, PW5 who also knows the accused person before the act. However, the act occurred just at 9.00pm night while the prosecution witnesses were eating food. This again proves that they were in a better position to identify them that night. However, such evidence is supposed to be accompanied by details as was said in **AUGUSTINE S/O KENTE VR** (1982) TLR 122. Where the court held "it is unsafe to support the conviction of an accused where the eye witness identification is not accompanied by details. That is the stand on acts that accused at night time. But in our case at discussion, I think there was no need for other details e.g Identification parade. This are reasons said above and the accused persons were arrested just the next day after robbery the thing which makes this court believe that they were identified that night."

In upholding the finding of the trial court, the learned High Court Judge said, we quote:-

> "The learned State Attorney, Mr. Boniface, declined to support the conviction of the appellant on the sole ground that the identification evidence lacked details such as the description of the appellant, his attire and so forth. The trial magistrate was fully aware of this aspect of the matter and cited this court's decision in **Augustine Kente VR (1982)** TLR 122, whereby it was held that it was unsafe to support the conviction of the accused where the eye witnesses' identification was not accompanied by details. In that case there was moonlight and illuminating fire and the identifying witness had seen the accused walking away from the scene of crime with his back side turned to them.
>
> The circumstances in this case were, however, different. There was **moonlight and glowing light**. The six identifying witnesses were very well known to the appellant with whom they had lived for a long time. The appellant was unmasked and the witnesses came face to face with him. Apparently the appellant was the leader of the group and he talked to the witnesses. Four of the identifying witnesses stayed with, and were under

> the custody of, the appellant at the scene of crime for a considerable time. In all the circumstances, therefore, the identifying witnesses had a good opportunity to properly identify the appellant."
>
> (Emphasis supplied)

It is the evidence of PW2, PW3, PW5 and PW6 that while they were taking their evening meal the bandits emerged. They claimed to have identified the appellant and Jacob, among the group, through the moonlight. It is the evidence of PW2 alone who added that there was also a lamp inside a house. But he did not say whether he managed to identify the appellant by the aid of the said lamp as suggested by the High Court. In any case we were not told the kind of the lamp and the light it illuminated.

The prosecution case is also silent as to the place where the food was taken in the compound of PW7, taking into account the fact that the place had four houses as per Exhibit C sketch plan. That apart, they did not say whether the moonlight was bright enough to allow for correct identification. Further, they did not say how long the fracas took place.

They did not also tell the trial court from which house the stolen properties were taken and it is not shown where each of the prosecution witnesses who said were around positioned themselves so as to enable the court assess and decide whether really they were able to identify the appellant. However, it is in the record that the appellant is familiar to the members of the family of PW7. We agree. But we do not think familiarity alone is enough. Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown, as in this case, that the condition for proper identification are not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give detailed explanation as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken.

In **No. 313/86 Philipo Rukaiza @Kitwechembogo V Republic**. Criminal Appeal No. 215 of 1994 CAT (unreported) this Court said, we quote:-

> "The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the

prevailing conditions ,
circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness."

With due respect to Ms Zainab learned State Attorney, we are unable to go along with her. It is our considered view that had the lower courts considered all the relevant facts discussed above, they would have found that the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 in support of the prosecution case was not absolutely water-tight.

We accordingly allow the appeal, quash the conviction of the appellant and set aside the sentence of 30 years imprisonment passed on him. The appellant is to be released from custody forthwith unless otherwise lawfully held.

Since the evidence implicating the appellant is exactly the same as that implicating Jacob, we find it proper, under the circumstances, to

invoke our revisional powers. Exercising those powers as they are provided under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 we also quash his conviction and set aside the sentence of 30 years imprisonment. We order that he be released from prison forthwith unless he is prevented by other lawful cause.

Order accordingly.

DATED at MBEYA this 20th day of July, 2010.

JUSTICE OF APPEAL

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

I. P. Kitusi
SENIOR DEPUTY REGISTRAR