IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., ORIYO, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 167 OF 2012

RICHARD WAMBURA.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

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

(Mruma, J.)

Dated 6th day of June, 2012
in
Criminal Appeal No. 91 of 2011

JUDGMENT OF THE COURT

16th & 19th September, 2013

RUTAKANGWA, J.A.:

For Shera Warioba and his wife Filomena, the 27th day of March, 2009 ended as happily as any other happy days in their past lives. When they retired to bed on the night of that day, both of them had every reason to expect that they would wake up the next morning in robust health and with each one's four limbs intact. Their reasonable expectations, unfortunately, were shattered by a single, almost tragic, event in the early hours of 28th March, 2009.

At around 00:50 hrs., the couple was rudely awakened from their slumber by unexpected intruders into their residence at Kuruya Village in Rorya District. A group of bandits stormed into their residence by breaking open its front door using a huge stone notoriously known as "fatuma." On gaining entry, they went straight to the couple's bedroom, broke its door and entered therein. By that time, Shera had already jumped out of bed and was standing near the door. The brute bandits had no time to lose or for negotiations. Confronted by Shera, they instantly resorted to unimagined violence. One of them, using a panga chopped off completely Shera's left arm. He fell onto the floor. They then went to Filomena, assaulted her, fracturing completely her mid-fibula and demanded to be given at once cash money. She gave them Tshs. 1,450,000/=. They were not satisfied. They wanted more, at least Tshs. 6,000,000/=. Filomena accounted to them the use of the extra money they were demanding. The bandits were satisfied.

The bandits then comfortably settled themselves on the couple's bed and began to count their loot. According to Shera and Filomena, when counting the money, the bandits had switched on the torches they had with them. Aided by the torchlight, the two victims managed to recognize

some of the bandits, who allegedly included the appellant and Magoti Mwese. Shera could not identify two other bandits, for he said they were four in number. After counting the money, the bandits left with the stone. However, while outside, the bandits were allegedly spotted by Robert Shera who was peeping through the window of his neighbouring house. As there was bright moonlight, Robert claimed to have identified Charles Nyakasara, Magoti Mwese, the appellant and Lumumba Sagonge. However, John Nyamarwa, another neighbour, who had been awakened by an alarm raised by Robert and had taken cover in the nearby bush, managed to identify Magoti Mwese, the appellant and Charles Nyakasara. None of the bandits was arrested at the scene of the crime.

After the departure of the bandits, both Shera and Filomena were taken to Tarime hospital following the severe bodily injuries they had sustained. The prosecution evidence does not show how, where and when the suspects were arrested, as neither the police, nor any member of the village government, testified in the case. All the same, the appellant Richard Wambura first appeared before the District Court of Tarime District (the trial court) alone in Criminal Case No. 177 of 2009 (which was dismissed on 2/9/2009) to answer a charge of Armed Robbery in

connection with the robbery of 28th March, 2009 at the home of Shera. He was recharged on 14/9/2009 and Magoti Mwese was joined in the case on 1st April, 2010.

Both accused persons denied the charge and a full trial followed. At the trial, Shera Warioba, Filomena Subira, Robert Shera and John Nyamarwa, testified as PW1, PW2, PW3 and PW4 respectively. In their evidence, these four witnesses told the trial court that they managed to easily recognize the appellant and Magoti Mwese as they knew them very well before the incident for they are all villagemates.

In his sworn evidence, the appellant denied complicity in the robbery at the home of PW1 Shera. He claimed that although he was a resident of Kuruya Village, he was arrested on 29th April, 2009 at Kyamwani Village while on his fishing business, by three youths from his village. They then took him to Utegi police station from where he was sent to the trial court to answer a charge of armed robbery, *vide* Criminal Case No. 177 of 2009. All the same, he said, that case was dismissed under section 225 (5) of the Criminal Procedure Act, Cap 20, Vol. 1 R.E. 2002 (the CPA). He called his wife, DW1 Ghati who provided an alibi for him in respect of the night of

28th March, 2009. She, too, claimed that her husband was arrested in April, 2009 while on his fishing business, at Kyamwani.

Magoti Mwese gave affirmed evidence also distancing himself from the armed robbery at the home of PW1 Shera. He claimed not to have left his residence on the night of 27th/28th March, 2009. When, on the following morning, he learnt of the robbery at the home of PW1 Shera, he went there to commiserate with them but the victims were not at home. Magoti further testified, and he was not belied on this, that on the third day, the son of PW1 Shera, arrested Chacha Ihare in connection with the robbery. Chacha was subsequently discharged, and instead the appellant was arrested in April, 2009 and he was himself arrested on 31/12/2009. Magoti was very emphatic that since the day of the robbery he was at the village and nobody had pointed an accusing finger at him.

In a one and a quarter-page judgment characterised mostly by its glaring lack of analysis, the learned trial Resident Magistrate for the purpose of convicting the appellant who was the 1st accused, found the four prosecution witnesses to be credible. But for the purposes of acquitting Magoti, he apparently doubted their credibility. In order to do full justice to him, we shall let him tell it himself. He said:-

"Having made a brief statement of the evidence on record iet me now determine the issue of the identification. There is no dispute that the accused persons are village mates of the prosecution witnesses, hence they know each other well. Looking at the evidence on the identification of the 1st accused, I found nothing to doubt. That is to say apart from the fact that the witnesses are not strangers to him, the circumstances at the time of the incident seems favourable for a proper identification. These circumstances are that first there was bright moonlight the fact which is not contradicted, and that the accused stayed in the room of the complainant for a long time. This fact was not contradicted in the cross-examination.

For the identification of the 2nd accused I have noted some doubt for the following reasons, firstly, PW3 said that he identified the 2nd accused by voice but did not mention or state the uniqueness of his

voice. PW4 did not give elaborate explanation, as to this identification. Secondly, I have seen that the incident is said to have taken place on 28/03/2009 but the 2nd accused got arrested on 31/12/2009 almost nine months later. I think if at all he had been identified properly it would not have taken that long to arrest him. There is no evidence that at any point after the incident the 2nd accused escaped arrest. For the foregoing therefore, I find the 1st accused guilty of the offence and find the 2nd accused not guilty of the offence and acquit him forthwith."

The appellant was then sentenced to thirty (30) years imprisonment.

This curious reasoning of the learned trial Resident Magistrate gave us very anxious moments. It has led us to doubt his partiality. We have a duty, being the highest court of the land, to protect the integrity of the institutions entrusted with the administration of justice. We have to ensure that the streams of justice are always kept pure at all stages. We are saying so not guardedly. This is because, as we have learned from the

evidence on record, the circumstances favourable for an impeccable identification applied to all the bandits who were known to the identifying witnesses. Magoti, as the learned trial Resident Magistrate conceded, was well known to all the identifying witnesses as was the appellant. The same bright moonlight which shone on the appellant, shone on Magoti as well at the same time. Going by the evidence of PW1 Shera and PW2 Filomena, Magoti stayed in their room as long as the appellant, that is to say, the two entered and left together. Why then were these double standards applied by the trial magistrate? Why was the evidence of PW1 Shera and PW2 Filomena not considered when the issue of Magoti's identification was under scrutiny? Why was it conveniently avoided by the learned trial Resident Magistrate? If PW4 John did not give "elaborate explanation" on the identification of Magoti, this shortcoming ought to have covered the appellant also. Justice must never be rationed at all.

If their evidence was strong enough to convict the appellant, it ought to have been strong enough to convict Magoti. The evidence of PW3 Robert and PW4 John who were not in the room, all things being equal, was indispensable in our firm opinion. We thought that the learned first appellate judge would have seen this patent monstrous injustice and at

least fleetingly commented on it in the appeal subsequently lodged by the appellant, which was even supported by the respondent Republic. Unfortunately, and definitely inadvertently, this skipped his attention. We believe that silence should not be the only option when things appear to be ill done in the due administration of justice. We have also not lost sight of the undisputed fact that even the appellant was arrested a month after the incident when there is no iota of evidence going to show that he had taken to flight to unknown destinations immediately after the robbery.

The appellant was aggrieved by the decision of the trial court and the sentence imposed on him. He accordingly preferred an appeal to the High Court. The High Court sitting at Mwanza, contrary to the contentions of the respondent Republic through Ms. Rehema, learned State Attorney, found the appeal seriously wanting in merit. The learned first appellate judge, differing with Ms. Rehema, found nothing on record to justify faulting the learned trial Resident Magistrate's finding of "PW1 and PW3 to be witnesses of truth", since the magistrate "had an opportunity of seeing and hearing them." He accordingly dismissed the appeal, hence this final appeal by the appellant.

The appellant's memorandum of appeal contains three distinct grounds of complaint against the judgment of the High Court and the conduct of his trial. Briefly stated, they are as follows:-

(i) That the two courts below erred in law in relying on exh. P1 (the PF3) which was received in evidence without the provisions of section 240 (3) of the C.P.A. being complied with;

(ii) That the two courts below erred in law in relying and acting on the evidence of PW2 Filomena which was received without the witness being sworn or affirmed; and

(iii) That the learned first appellate judge erred in law and fact in sustaining his conviction which was predicated on unreliable visual identification evidence.

The appellant appeared before us in person and undefended to prosecute his appeal. When the substance of his grounds of appeal was explained to him by the Court, he decided to adopt them and had nothing to say in elaboration thereof.

For the respondent Republic, Mr. Hemedi Halidi, learned State Attorney, appeared. The respondent Republic supported the appellant's

appeal as it had done in the High Court. Mr. Hemedi's first prayer was to request us to expunge from the record the so-called evidence of PW2 Filomena. Contrary to the mandatory requirements of s. 198 (1) of the C.P.A., she was not sworn/affirmed before testifying. To support his stance, he referred us to the decisions of this Court in **Godi Kesenegele v. R.,** Criminal Appeal No. 10 of 2008, **Minja Sigore @ Ogora v. R.,** Criminal Appeal No. 54 of 2008 and **Anthony Mwita & Two Others v. R.,** Criminal Appeal No. 264 of 2010 (all unreported). On being satisfied that PW2 Filomena was not sworn or affirmed before testifying, on the strength of the above authorities, we hereby expunge her so-called evidence from the record.

Mr. Hemedi attacked the recognition evidence of PW1 Shera because it was made under terrifying and unfavourable conditions. He was nearly fatally wounded before he could see any of the bandits and thereafter he was lying on the floor, he argued. There was no light in the bedroom and the source of light which allegedly aided him to identify the bandits and whose intensity was not described were the two torches, he said. Because of this, it was his contention that the light from the torches being flashed on him could only blind him and not aid him to identify or recognize the

bandits. On this we agree with him entirely: see, **James Chilonji v. R.,** (CAT) Criminal Appeal No. 101 of 2003 **Gerald Lucas v. R.** (CAT) Criminal Appeal No. 220 of 2005 and **Selemani Rashid @ Doha v. R.** (CAT) Criminal Appeal No. 190 of 2010 (all unreported), among others. The evidence of PW1 Shera, therefore, needed to be corroborated.

There is on record, of course, the purported visual identification evidence of PW3 Robert and PW4 John. These latter two claimed to have recognised the appellant and his colleagues being aided by bright moonlight outside. Like Mr. Hemedi and the appellant, we have found their evidence totally lacking in cogency. PW3 Robert testified that he managed to recognize the appellant and his co-bandits by peeping through a window. His evidence, however, is silent on the size and type of the said window and whether it was open or not. If it was closed or of opaque glass his visibility to the outside was definitely impeded. As for PW4 John, he unequivocally stated that he was hiding in a bush. While under cross-examination, he claimed that the bush was five meters away from the path the bandits used during their exit. However, he put the distance at 3 meters while being cross-examined by the appellant. All the same, it has occurred to us that he had no clear visibility of the people who went past

him, while he was hiding in the bushes, which had concealed him. The evidence of these witnesses, like that of PW1 Shera, in our respectful opinion needed corroboration, and that is why it was found wanting in cogency to secure the conviction of Magoti.

That these three witnesses never unmistakably identified the appellant among the robbers is confirmed beyond any reasonable doubt by one naked fact which, unfortunately, was never considered by the two courts below. If these witnesses had made no mistake in their identification of the appellant, they would have named him to the police when the robbery incident was reported. Going by the evidence on record, this was not done and that is why other persons like Chacha Ihare, were arrested immediately, and the appellant was arrested one month later and Magoti Mwese nearly nine months later. The unexplained delays in arresting both the appellant and Magoti go to prove that the three identifying witnesses never saw them among the robbers. The defence of alibi raised by the appellant was rejected without any justification at all, therefore. Indeed this assertion leads us to the following concluding remark.

In rejecting the appellant's defence of *alibi* the learned first appellate judge held thus:-

"The appellant in a style raised the defence of alibi saying that on ***29th March, 2009 he was at Nyamwani Village for his fishing activities.*** *The robbery incident occurred at Kuruya Village which is, according to the appellant's wife about one hour and a half walking distance from Nyamwani Village. This defence was rejected by the trial magistrate and, I, think rightly so ..."*

[Emphasis is ours].

We respectfully hold that the learned first appellate judge misapprehended the evidence of the appellant. He never testified that he was at Nyamwani Village fishing on **29th March 2009**. All he said was that he was arrested by his villagemates on **29th April, 2009** at Nyamwani Village while on his fishing business. Had the learned first appellate judge, in our humble and respectful opinion not misapprehended the appellant's evidence, he would not have rejected his defence of *alibi* out of hand. After all, it is established law that when an accused puts up a defence of *alibi*, he does not assume any duty of proving it. It will be sufficient to earn him an acquittal if it introduces a reasonable doubt when compared with the

prosecution evidence: See, **Leonard Aniseth v. R.** [1963] E.A. 206, **Ali S. Msutu v. R.,** [1980] T.L.R. 1, **Yusuph Nchira v. R.** (CAT) Criminal Appeal No. 174 of 2007 (unreported), **Siza Patrice v. R.** (*supra*), etc.

For the foregoing reasons, we hold without any demur that the uncorroborated visual identification evidence of the three prosecution witnesses totally failed to place the appellant at the scene of the crime. They might have been honest but mistaken. It is, therefore, our finding that like Magoti Mwese, he was entitled to an acquittal. We accordingly allow this appeal in its entirety. The conviction of the appellant for armed robbery as well the prison sentence imposed on him are hereby quashed and set aside. The appellant is to be released forthwith from prison, unless he is otherwise lawfully held.

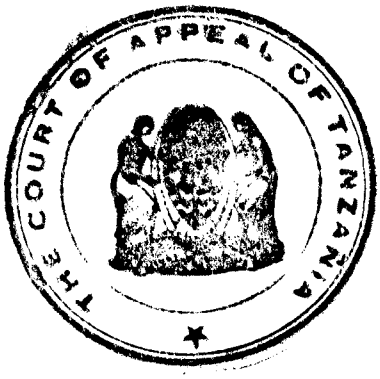
DATED at **MWANZA** this 19th day of September, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



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