IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., KAIJAGE, J.A., AND MUSSA, J.A.)

CRIMINAL APPEAL NO. 141 OF 2014

JUMA HAMAD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mushi, J.)

dated the 5th day of May, 2011
in
Criminal Appeal No. 74 of 2009

JUDGEMENT OF THE COURT

3rd Nov. & 10th Dec. 2015

KAIJAGE, J.A.:

In the Resident Magistrates' Court of Dar es Salaam at Kisutu, the appellant and another person stood jointly charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002. Following a full trial, the appellant's co-accused was acquitted. The appellant was found guilty, convicted as charged and sentenced to serve a term of thirty (30) years imprisonment. His appeal to the High Court against both such conviction and sentence was unsuccessful, hence this second appeal.

Before addressing the grounds of appeal, we have found it necessary to start with a brief account of the evidence which led to the appellant's conviction.

From a total of three (3) witnesses, the prosecution led evidence to the effect that on the fateful night of 5/4/2008, PW1 Juma Maulidi and his wife PW2 Zainabu Hussein were asleep in their dwelling house situated at Salasala 'A' within Kinondoni District in Dar es Salaam city. They were awakened at around 1.00 am by a group of armed bandits who stormed into their house. Upon their forcible entry, the bandits physically assaulted PW1 whilst demanding to be shown where the money was. All the same, the bandits dispossessed their victims of their hard earned cash to the tune of Tshs. 1, 600,000/= and two mobile phones.

Soon after the bandits had departed from the scene of the undisputed robbery incident, PW1 and PW2 raised an alarm to which their neighbours responded. The neighbours are said to have assisted in escorting the said victims of robbery to Wazo Hill police station and, thereafter, in taking PW1 to hospital for treatment of the injuries he had sustained in the course of robbery.

Testifying on who were the perpetrators of robbery, both PW1 and PW2 told the trial court that a group of four (4) bandits was involved, but they managed to recognize the appellant who was, apparently, their neighbour and well known to them. In regard to how the appellant was identified, the said identifying prosecution witnesses further told the trial court that of the four bandits who made forcible entry into their house, the appellant was the tallest and that the light which emanated from a small burning lamp (koroboi) facilitated easy recognition.

If the evidence of PW3 No. E 1737 Cpl. Evance is anything to go by, there can be no doubt that the incident in question was reported to the police on the very day of its occurrence, on 5/4/2008. It is also clear that the appellant was arrested on 18/5/2008, over a month ahead of the robbery incident. Again, while responding to a question asked by the trial court, PW3 was quick to concede that the victims of robbery did not name the appellant when they firstly reported the incident to the police.

In his defence, the appellant flatly denied having been involved in the robbery incident stating, in addition, that the incriminating evidence adduced against him was fabricated by PW1 with whom he had a quarrel

over ownership of a vendor stall at a venue of their common small businesses.

Relying heavily on the visual identification evidence of PW1 and PW2, both courts below made concurrent findings of fact that the appellant was unmistakably identified at the scene of crime.

The appellant lodged a fourteen (14) points memorandum of appeal which boil down to the following two (2) substantive grounds of complain:-

i. *That, the purported evidence of PW2 taken without affirmation should not have formed the basis of the appellant's conviction.*

ii. *That, the first appellate court erred in law and fact by affirming the appellant's conviction on the strength of weak and unreliable visual identification evidence of PW1 and PW2.*

Before us, the appellant appeared in person, fending for himself. He had nothing to say in elaboration of his grounds of appeal. He nevertheless reserved his right to respond to the learned State Attorney's submission. The respondent Republic had the service of Mr. Patrick Mwita, learned Senior State Attorney who did not resist the appeal.

Addressing the first ground of appeal, the learned Senior State Attorney submitted, correctly in our view, that the purported evidence of PW2 taken without affirmation was violative of section 198(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA) which provides:

> *"S. 198(1)* ***Every witness in a criminal cause or matter shall, subject to the provisions of any written law to the contrary, be examined upon oath or affirmation*** *in accordance with the provisions of the Oaths and Statutory Declarations Act." [Emphasis supplied]*

Section 127(2) of the Evidence Act, Cap 6 R.E. 2002 contains such explicit contrary provision. It sanctions the reception of unsworn evidence from children of tender ages under certain specified circumstances made thereunder. In this case, since PW2 was a moslem and an adult, her evidence ought to have been taken and received in conformity with the provision of s. 198(1) of the CPA hereinabove quoted. Upon being satisfied that PW2 was not sworn or affirmed before testifying, we are in agreement with the learned Senior State Attorney that her purported evidence should be expunged from the record, as we hereby do.

Having expunged the evidence of PW2 from the record, the only outstanding visual identification evidence which tend to link the appellant with the robbery incident under consideration came from PW1.

Arguing the second ground of appeal, the learned Senior State Attorney emphatically submitted that the remaining visual identification evidence of PW1 is inherently weak, unreliable and does not meet the tests and guidelines enunciated in **WAZIRI AMANI V. R;** (1980) TLR 250. Elaborating on this, he contended, first, that the said identifying witness relied on light emanating from a small burning lamp (koroboi), but the evidence on record is silent on the intensity of that light and the positioning of that lamp *vis a vis* the robbers on one hand and PW1 on the other hand.

Secondly, he maintained that a total failure by the said single identifying witness to name the appellant at the earliest opportunity to the neighbours who had gathered at the scene of crime in response to the alarm and to Kawe police station where the robbery incident was firstly reported, dented his credibility and reliability as a witness. Against these glaring unsatisfactory features attending the case for the prosecution, the learned Senior State Attorney urged us to allow the present appeal.

On our part, we are, with respect, in full agreement with the learned Senior State Attorney's submission on the second ground of appeal, as well as his conclusion. We are equally compelled to state, at this stage, that the nature and quality of the evidence relied upon by the first appellate court in upholding the appellant's conviction merit our intervention in this second appeal. This is in line with the guiding principle stated thus in **EDWIN MHANDO V. R;** [1993] TLR, 170:-

> *"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premise that the finding of facts are based on correct appreciation of the evidence. If, as in this case, both courts below completely misapprehended the substance, nature and quality of evidence, resulting in an unfair conviction, this Court must, in the interest of justice, intervene."*

Admittedly, the undisputed robbery incident in this case took place in the dead of the night. In his evidence in–chief, PW1 made a bare assertion, without more, that there was light emanating from a small kerosene lamp (koroboi) which facilitated easy recognition of the appellant. Evidence on the intensity of that light was not forthcoming from him.

On the immediate foregoing aspect of the case, we had occasions to pronounce ourselves that when it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable identifying witness to see and positively identify the accused persons. Bare assertions that "there was light" would not suffice. (See; the unreported cases of **MANGWISHA MZEE AND ANOTHER V. R;** Criminal Appeal No. 465 of 2007 and **KASSIM SAID AND TWO OTHERS V. R;** Criminal Appeal No. 208 of 2013).

The need for witnesses to give clear evidence on the intensity of light was underscored thus in the unreported case of **KULWA s/o MKWAJAPE AND TWO OTHERS V. R;** Criminal Appeal No. 35 of 2005:-

> *"... the intensity and illumination of a lamp is important so that a clear picture is given of the condition in which the appellant was identified."*

The observation in KULWA's case (supra) was amplified thus by this Court in another unreported case of **ISSA MGARA @ SHUKA V. R;** Criminal Appeal No. 37 of 2005:-

"It is not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details on the source of light and its intensity."

In this case, the effect of non-disclosure of the intensity of light that was emitted from a burning small kerosene lamp is compounded by a conspicuous absence of evidence on, for instance, the time duration that the robbers, particularly the appellant was put under PW1's observation and at what distance from the vantage point. As correctly submitted by the learned Senior State Attorney, the record of evidence is also silent on the positioning of the said small kerosene lamp (koroboi) and the size of the room/house it illuminated.

Upon the foregoing unsatisfactory features, we are satisfied that the conditions that attended the scene of crime on the night material to the incident in question could not have provided a sure opportunity and convincing ability for PW1, a single identifying witness, to impeccably identify the appellant.

That apart, there is no gain saying that the robbery incident took place on the night of **5/4/2008** and that the appellant who was,

apparently, a neighbour of PW1 was arrested on **13/5/2009**. Curiously, PW1 did not name the appellant to the neighbours who had gathered at his premises in response to the alarm and to the police station at Wazo Hill where the robbery incident was firstly reported. In the course of trial, evidence was not forthcoming from PW1 to explain away such dilatoriness on his part in naming the appellant at the earliest opportunity. On this aspect of the case, this Court in the unreported case of **EVANCE NUBA AND TEGEMEO PAUL V. R;** Criminal Appeal No. 425 of 2013 had this to say:-

> *"... this Court has persistently held that failure on the part of the witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable."*

In this case, we are satisfied that failure on the part of PW1 an identifying witness, to name the appellant to his neighbours and to the police at the earliest opportunity, dented his credibility and reliability as a witness.

The above considered, we hasten to hold that such an incredible and unreliable visual identification evidence of PW1 could not have placed the

appellant at the scene of crime on the night of 5/4/2008. Accordingly, we allow this appeal. The conviction of the appellant for armed robbery as well as the prison sentence imposed on him are, respectively, hereby quashed and set aside. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

It is so ordered.

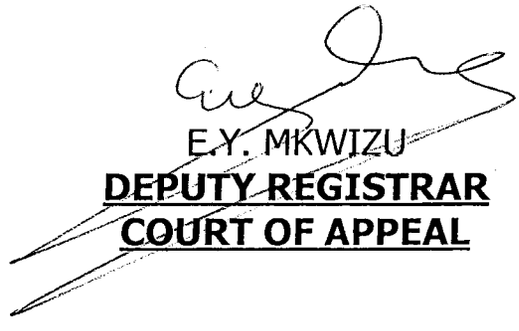
DATED at DAR ES SALAAM this 17th day of November, 2015.

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
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