IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUGASHA, J.A., LILA, J.A And NDIKA, J.A.)

CRIMINAL APPEAL NO. 426 & 427 OF 2015

1. CHARLES S/O BONIFACE MIYEYE
2. SHIJA SOSPETER.....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Kaduri, J.)

dated the 11th October, 2010
in
Criminal Appeal No. 120 of 2009

JUDGMENT OF THE COURT

29th October & 4th November, 2019

LILA, J.A.:

In the District Court of Kahama in Shinyanga Region, the appellants Shija Sospeter and Charles Boniface (1st and 2nd appellants, respectively) were charged with two offences. In the first count they were charged with burglary contrary to section 294(a)(b) and in the second count they were charged with armed robbery contrary to section 287A, both of the Penal Code Cap. 16 R. E. 2002 (the Penal Code). It was alleged by the prosecution that the two appellants, on 29/2/2008 at about 033:00hrs at

Nyahogo within Kahama District in Shinyanga region, broke and entered into the dwelling house of one Esther Peter and stole therefrom one radio cassette make rising with CD, 5 dozen of smearing oil, a wall clock, and TZS. 80,000/= all valued at TZS. 269,000/= the properties of Esther Peter and that immediately before or after stealing they used a bush knife to threaten her in order to obtain or retain the said stolen properties. The appellants totally denied the charges. The trial ensued and at the end the trial court found that the prosecution evidence was sufficient to ground a conviction on the said counts. They were convicted as charged and each sentenced to serve 15 years in respect of the first count and 30 years imprisonment in respect of the second count. The sentences were ordered to run concurrently.

Being aggrieved by the decision of the trial court, the appellants preferred separate appeals to the High Court. The first appellant's appeal was christened Criminal Appeal No. 99 of 2009 whereas the second appellant's appeal was registered as Criminal Appeal No. 120 of 2009. Both appeals were dismissed (Kaduri, J.).

Undaunted, they, again, preferred separate memoranda of appeals to this Court. On 26/7/2017 both appellants filed separate memoranda which

were followed by a joint supplementary memorandum of appeal which was lodged on 12/2/2018. As if that was not enough, the 2nd appellant lodged another memorandum of appeal on 24/12/2018. All the same, the said memoranda of appeal although not formally consolidated, were lumped together and two separate appeals were registered as Criminal Appeals Nos. 426 & 427 of 2015 each bearing the names of both appellants. Since both appeals originated from the same proceedings, for the sake convenience, we dealt with them in the manner they were registered, that is, as one appeal.

Before we indulge ourselves into the determination of the appeal, we find it apposite to narrate a brief account which will bring to light the facts leading to the present appeal. According to Esther Peter (PW1), the only eye witness to the incident, on 29/2/2008, at 03:00hrs, she was asleep in the room with a kerosine lamp illuminating the room, the door was broken by a heavy stone and three bandits stormed into the room, beat her and made away with a radio, bed sheet, wall clock, smearing jelly and cash TZS. 30,000/= while warning her not to shout. Having accomplished their mission, they shut the door from outside and vanished. After a while, she cried for help and neighbours turned out for help. She claimed to have had identified Miyeye (1st appellant) and Shija (2nd appellant) and that it was

the latter who led the team and was the one who took things from inside and handed them to the former. She said the two were familiar to her as she used to see them before the incident as they used to take local liquor at a nearby local liquor grocery. In respect of the 1st appellant, she said they had earlier on transacted in a plot sale. However when she was cross-examined by 2nd appellant (then 1st accused) she said that he (2nd accused) was mentioned by the 1st appellant (then 2nd accused). Similarly, when she was cross-examined by the 1st appellant (then 2nd accused), she said that he (1st appellant) was mentioned by the 2nd appellant (then 1st accused). Mussa Ramadhani (PW2), a mtaa chairman, on his part, said he was informed by PW1 of the incident and PW1 said she heard that the culprits were the appellants and one James who was not charged. Dotto Kibela (PW3), who is PW1's spouse, said he was informed of the incident by PW1 and they mounted a hot search for the appellants and that the 2nd appellant was arrested at Masumbwe and upon being interrogated he admitted committing the offence and said he had sold the stolen properties to one James (PW4). He further said that they went with police to one James where he identified the petroleum jelly (exhibit A) as being among the stolen items. PW4 told the trial court that he bought ½ dozen of

smearing jelly from the 2nd appellant who told him that he had closed his shop business. DC Herbert (PW5), the investigator of the case said after noting that the suspects were the appellants, he managed to arrest Shija Sospeter (2nd appellant) at Kahama hospital and the 2nd appellant was also arrested at Kamata after he was convicted of committing another offence.

Both appellants distanced themselves from the complicity in the commission of the two offences in their sworn evidence. Shija Sospeter (2nd appellant) had it that he was arrested at a milling machine together with other persons on accusations of fighting and were taken to Kahama police station where he met other persons he did not know with whom he was later charged. He denied being familiar with PW1, PW2 and PW3 and that PW4 did not tender any proof that he sold him the smearing jelly. On his part, Charles Boniface (2nd appellant), apart from conceding that he sold a plot to PW1, strongly denied committing the offence stating that he was not at the scene of crime as claimed by PW1 as on the said date he was in prison. He also discounted the testimonies by PW2, PW3 and PW4 because they were just told by PW1.

In his judgment, the learned trial magistrate found both appellants guilty, convicted them and sentenced them as explained above. In his verdict, the trial magistrate stated:-

> *"I do agree with the prosecution side that the witness (PW1) mentioned the suspects at the early stage and I am of the opinion that since the complainant (PW1) know the accused persons before the incident, there is no need of an identification parade.*
>
> *In this case the testimony of PW4 James Robert, leaves no doubt that the 1st accused sold goods to him the allegation which the 1st accused failed to justify as to where he got the same. He just denied that he did not see them while in fact without him police officers will not have known that James Robert (PW4) had the goods."*

The appellants' complaints to the High Court were turned down for similar reasons. The first appellate Judge (Kaduri, J.) was convinced of the guilt of the appellants on the reasons that they were properly identified by PW1 by means of light from the kerosene lamp and that the 1st appellant sold petroleum jelly to PW4 who was found to be a credible witness. He

accordingly sustained the trial court's verdict. The appellants were, again, aggrieved, hence this second appeal.

At the hearing of the appeal the appellants appeared in person and unrepresented while the respondent Republic was represented by Mr. Tumaini Pius, learned State Attorney.

The appellants adopted their grounds of appeal contained in their separate memoranda of appeal they lodged on 26/7/2017 and the supplementary memorandum of appeal and then opted to let the learned State Attorney argue the appeal first while reserving their right to make their rejoinder.

Having seriously examined the nature of the grounds of appeal, we found it convenient that they be canvassed generally. We accordingly asked the learned State Attorney to address us on the general issue whether the charge against the appellants was proved beyond reasonable doubt.

Initially, arguing in support of the appellants' convictions, Mr. Pius submitted that the appellants were properly identified at the scene of crime by PW1 because, **firstly**; she knew them before the incident since she used to see them even at the local liquor grocery, **secondly**; although the

offence was committed at night, there was sufficient light from the kerosene lamp, **thirdly**; that she named the culprits to PW3 just upon arrival from work who reported the matter to police station and the appellants were arrested on a search mounted thereafter, **fourthly**; she was able to tell that it was the 2nd appellant who was taking goods from the house and gave them to 1st appellant and **fifthly**; that the 1st appellant admitted selling a plot to them. He further submitted that the appellants' convictions were mostly based on the evidence of visual identification by PW1 who witnessed the incident. However, we found ourselves constrained to ask the learned State Attorney to address us on the soundness of his arguments on account of the responses made by PW1 during cross-examinations by the appellants which were, on the face of them, patently inconsistent with what she had stated during examination-in-chief. We referred him to pages 12 and 13 of the record of appeal where PW1 stated clearly that the two appellants named each other to have participated in the commission of the offences which suggested that their arrest and involvement was not based on her identification. Mr. Pius was forthright that in view of those responses PW1's identification of the appellant was doubtful and unreliable.

Upon our further prompting whether the intensity of light in the room was explained and the goods recovered from PW4 were sufficiently identified by PW2 to have been the ones stolen from PW1's house, Mr. Pius did not mince words as he readily conceded that the intensity of light was not explained and also that the assortment of petrolium jelly were not positively identified by any special and peculiar marks they being very common items and readily available. He, finally, considering that the appellants' convictions were predicated on those two factors, retreated and was of the view that the appellants' conviction was not well founded and hence he supported the appeal.

We, on our part, entirely agree with the learned State Attorney that the damning evidence in the instant case came from PW1, the only eye witness to the incident. Since she claimed to have known the appellants before the incident then her evidence was that of recognition. Such evidence is considered to be more reliable than the identification of a stranger but courts have been warned to be aware that such evidence is not free from mistakes even where it involves identification of a close relative or friend (see **Shamir John vs Republic**, Criminal Appeal No. 166 of 2004 (unreported). We also agree with him that the appellants' convictions were

grounded on visual identification evidence of PW1 of the appellants and circumstantial evidence that they sold the stolen items to PW4.

There are firmly established principles guiding the court on various considerations to be met before finding conviction basing on visual identification of a single witness. In the first place, such evidence is considered to be of the weakest kind and so as to rely on it such evidence must be absolutely watertight so as to remove the possibility of not only mistaken identity but also possibility that some witnesses may be untruthful and the conditions favouring correct identification is of utmost importance (see **Raymond Francis vs. Republic** [1994] TLR 100 and **Waziri Amani vs Republic** [1980] TLR 250. Elaborating with lucidity those conditions, the Court, in the case of **Said Chaly Scania vs. Republic**, Criminal Appeal No. 69 of 2005 (unreported), the Court stated that:

> *"We think that where a witness is testifying about identifying another person in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to mistaken identification like proximity to the person being identified,* ***the source of light, its intensity****, the length*

of time the person being identified was within view and also whether the person is familiar or a stranger." (Emphasis added).

As already demonstrated above, the offence was committed at night time and the only identifying witness in this case was PW1 who explained that at the time of the incident there was a kerosene lamp which was illuminating the room that enabled her to see and identify the appellants. She, however, as was rightly argued by the learned State Attorney, failed to describe its intensity. The incident having happened at night, we cannot be certain that there was enough light that would have enabled her see and properly identify the bandits who stormed into her room.

Further, as correctly submitted by the learned State Attorney, PW1 was not a reliable witness. While she seemed to be consistent that she was able to identify the appellants at the scene crime during her examination-in-chief, her evidence was crushed down by the appellants during cross-examination when she changed route and stated that the appellants complicity with the commission of the offence came about upon each of them naming the other when they were arrested. We find ourselves obliged to reiterate that it is trite law that there is also need for the court to consider

the credibility of the identifying witness before relying on his evidence to found conviction as we lucidly stated in the case of **Jaribu Abdallah vs Republic**, Criminal appeal No. 220 of 1994 that:

> *"...in matters of identification it is not enough merely to look at the factors favouring accurate identification. Equally important is the credibility of witness. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence..." (Emphasis added)*

It is surprising that PW1 gave two different and contradicting versions on what led to the appellants' arrest. They contradicted each other. That is pertinent contradiction going to the root of the case hence could not be easily disregarded [see **Dickson Elia Nsamba Shapwata & Another vs Republic**, Criminal Appeal No. 92 of 2007(unreported)]. It cannot, in the circumstances, be said with certainty that the appellants' arrests were a result of their being identified by PW1 at the scene of crime. Had both courts below directed their attention to such pertinent contradiction which cast doubt on the prosecution case, they could have adopted the version favourable to the appellants other than relying on the evidence of PW1 to ground the appellants' convictions.

The High Court and the trial court, in convicting the appellants, also relied on PW2's identification evidence of half-dozen of petroleum jelly (Exh. A) found in possession of PW4 who alleged that they were sold to him by the 2nd appellant to hold that they were the same ones stolen from PW1. In this respect, we also wholly associate ourselves with the learned State Attorney that identification of exhibit A by PW3 was manifestly inadequate and unacceptable. He simply said he "can remember the stolen oil if shown to me". That cannot be said to be positive identification of the stolen items, for, the procedure requires the identifying witness to give peculiar and special marks distinguishing them from other similar items. It is instructive to reiterate what the Court said in the case of **Ally Zuberi Mabukusela vs Republic**, Criminal Appeal No. 242 of 2011 (unreported) that:-

> *"In all such cases, the claimant should make a description of special marks on an item before it is shown to him and allowed to be tendered as an exhibit. That way, an identification of the item can be established to the court beyond doubt."*

We are certain that had both courts below properly evaluated the prosecution evidence they would have realized the above disquieting

deficiencies and desisted from convicting the appellants. It was highly unsafe to convict the appellants on such highly wanting evidence.

For the foregoing reasons, we allow the appeal, quash the convictions and set aside the sentences. Unless held behind bars for any other lawful cause, the appellants should immediately be released from prison.

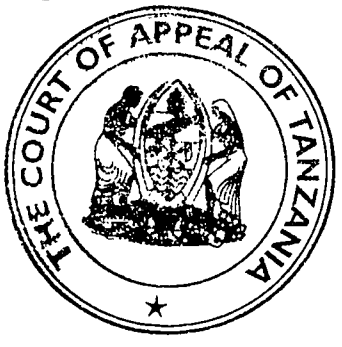
DATED at TABORA this 1st day of November, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2019 in the presence of Mr. Tumain Pius, learned State Attorney for the respondent/Republic and Appellants appeared in person, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL