IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: MUGASHA, J.A., KWARIKO, J.A. And KENTE, J.A.

CRIMINAL APPEAL NO. 17 OF 2020

AUSI MZEE HASSAN..... .....APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court at Kibaha)

(Mwaseba, SRM – Ext. J.)

dated 12th day of December, 2019
in
DC Criminal Appeal No. 39 of 2019

JUDGMENT OF THE COURT

1st & 11th November, 2021

KENTE, J.A.:

The appellant Ausi Mzee Hassan together, with two others who are not parties to this appeal, appeared before the Resident Magistrate's Court (at Kibaha) where they were charged jointly and together with three counts falling under the Penal Code, Cap 16 R.E. 2019. While under the first count they were charged with armed robbery c/s 287A as amended by section 10A of the Written Laws Misc. Amendments Act No. 3 of 2011, under the second count, they were charged with causing grievous harm contrary to section 225. The third count charged the appellant and his co-

accused with assault causing actual bodily harm contrary to section 240 and 241. They pleaded not guilty to the charge.

However, after a full trial, the appellant was found guilty and convicted as charged. He was respectively sentenced to thirty years, five years and two years imprisonment. The three custodial sentences were ordered to run concurrently. The appellant's co-accused were found not guilty and accordingly acquitted of all counts. Aggrieved by the convictions and sentences, the appellant appealed to the High Court where his appeal (after being transferred to the RM's Court of Kibaha presided over by one Mwaseba a Senior Resident Magistrate with-Extended Jurisdiction.), was partly allowed and partly dismissed.

While allowing the appeal, quashing the conviction and setting aside the sentence in respect of the second count, the SRM of the first appellate court was satisfied that the appellant was deservedly convicted and subsequently sentenced by the trial court and therefore his appeal to challenge both conviction and sentence in respect of the first and third counts was without merit. The appeal on the two counts was consequently dismissed in it entirety.

The appellant, still aggrieved by the said conviction and sentence which was given approval by the 1st appellate court has appealed to this Court to challenge the couple of the adverse fortunes which befell him. He lodged a memorandum of appeal containing six grounds of complaint five of which are closely imbricated. Put in an abridged form, the appellant's complaint against the decision of the two lower courts appears to be twofold, thus:

(i) In convicting him, the trial court should not have relied on and believed the identification evidence of PW1, PW3 and PW5 which was found to be wanting and not enough to ground a conviction of his co-accused.

(ii) The identification evidence led in support of the prosecution case did not attain the required legal threshold to support a conviction against him.

In this appeal, as was the case in the two lower courts, the appellant appeared in person fending for himself while the respondent Republic was ably represented by Mss. Gladness Mchami and Elizabeth Olomi both learned State Attorneys.

Briefly, the background to this appeal as can be gleaned from the evidence led by the prosecution before the trial court, was to the following effect. On 12th October, 2018 at about 7:30 pm, one Frank Mwita who testified as PW1 together with his wife namely Aziza Hamad who testified as PW5 were on the way to their home at Kidimu/Mkombozi village Kibaha District. That was immediately after they had closed their business of building hardware supplies. When they came close to their residence, they heard the children crying and screaming in an usual way. According to PW5, she then told her husband (PW1) to rush to the scene with a view to establishing what was happening. Without wasting time, PW1 hurriedly went straight to the kitchen-door where he allegedly met the appellant and one Shaaban. According to the evidence led by PW1 before the trial court, the appellant was then armed with a machete. Moreover, PW1 testified that, before he could overcome the sudden consternation which he suffered by seeing the panga-wielding intruder who, as it turned out, was a person with whom he was quite familiar, and, apparently, not knowing what was happening and what he could do in the circumstances, another person whose attire was the same as that of the members of the peoples' militia appeared and joined the appellant and Shaaban. Seemingly unaware

that there was something much more tragic in the offing, PW1 asked the appellant as to what was wrong. However, much to his chagrin, instead of getting a rational response to his simple question, the appellant and his colleagues immediately descended on PW1 hacking off his left hand palm which was eventually amputated when he was admitted to hospital. In the struggle that ensued, PW1 was severely beaten up until he lost consciousness. Upon being discharged from hospital where he spent almost one month, PW1 discovered that his property and money as particularised in the charge had been stolen.

Back to the scene of the crime, after PW1 was subdued as to fall unconscious due to the severe beatings and slashing of his palm, the assailants turned and set upon on his wife, PW5. However, when the appellant realised that she was the person they wanted to serve their needs given that they had already attacked her husband as to render him unconscious, he stopped his companions from further attacking PW5 saying that she was the one who would lead them to get the hidden money. Accordingly, they hauled her into the bedroom where they piled pressure on her demanding that she gives them money. Having been cowed into complete subserviency, PW5 obeyed the assailants' every word

and showed them a suit case containing TZS 9,300,000.00 which they took for their ownselves. Thereafter, they ransacked the entire house taking the items which were particularized in the charge sheet. Before they left the scene, they locked the bedroom from outside ostensibly to prevent PW5 and her son one Richard who testified as PW2 from seeking assistance promptly.

Notably, after PW1 lost consciousness, his neighbour one Karim Hassan who testified as PW3 heard the children crying. Obviously governed and living by the principles of good neighbourhood, PW3 hurriedly went to PW1's home to establish what was awry. Upon arrival, he met the appellant who was then wielding a panga. PW3 told the trial court that he was able to recognise the appellant relying on light from fluorescent tubes. Seeing that it was his neighbour whom he knew well who was unexpectedly causing trouble at the home of their other neighbour (PW1), PW3 asked the appellant as to what was amiss. However, in a ruthless and more odious move which must have further compounded the problem, the appellant allegedly slashed PW3's fingers ordering him to go away and threatening him to expect heavy-handed reprisals which would extend to cover the whole of his family members if once again he set foot at the

home of PW1. This explains in full why PW3 fled back to his home where he decided to ask his neighbours and friends to take him to hospital instead of going back to confront the appellant who had seemingly become a deadly monster.

Following this blood-curdling incident, the police were informed upon which a search for the robbers was mounted. Unlike his co-accused who were arrested much earlier, the appellant was arrested at Manzese Dar es Salaam on 1st December, 2018. According to Police Constable Sylvery who testified as PW8, initially, after he was informed by PW5 about the appellant's involvement in the heart-rending robbery incident, on 13/10/2018 at about 2:00 am, he vainly sought to arrest him at his home but the appellant managed to escape.

The above version of events was strongly denied by the appellant who told the trial court that he was arrested at Kibaha on 30th September, 2018 at about 1:30 pm upon allegations of being in possession of a counterfeit TZS 10,000.00 note. He said that, the charge against him was all a frame-up after he refused to give a bribe to the police who had

accused him with the possession of counterfeit money. All in ail, in a resolute manner, the appellant denied the allegations levelled against him.

As stated before, the two courts below did not believe in the appellant's embellished story. Both courts were convinced and they were of the synonymous view that, since the appellant was familiar with PW1, PW3 and PW5 before the robbery incident and as such, the scene of crime enjoyed sufficient fluorescent lightning, the three prosecution witnesses had the occasion to identify the appellant positively.

Going by the evidence on the record particularly the evidence of PW1 PW3 and PW5, it appears to us that in this case, the offence of armed robbery was well established. Likewise, is the offence of assault causing actual bodily harm. Therefore, as was the case in the two courts below, the crucial issue in this appeal is mainly, if not solely, on the identity of the assailants. Germane to the above-posed question which the two courts below asked themselves, is the question as to whether or not the appellant was properly identified as one of the robbers as found by the two courts below or he was mistakenly identified and subsequently framed-up by the police as he has all along maintained.

To recapitulate what was said earlier, the appellant's grievances with the prosecution case are inextricably bifold. Firstly, the appellant is complaining that in convicting him and dismissing the appeal, the two courts below should not have respectively relied on the evidence of identification by PW1, PW3 and PW5 which was found to be inadequate to ground a conviction against his co-accused. Integral to the above grievance is the complaint that, for all practical purposes, the said evidence was not sufficient to ground a conviction against him. While admitting that he was well known by PW1 PW3 and PW5, the appellant submitted that being known before the incident does not necessarily lead into being properly identified at the crime scene. He also challenged the intensity of the illumination claiming that there are various sources of solar energy with different capacities. All things considered, the appellant submitted that the charge against him was not proven to the required standard.

Submitting in opposition to the appeal, Ms. Mchami contended that the appellant was properly identified as there was sufficient light at the scene of the crime and the appellant was not a stranger to the identifying witnesses. Another reason why the appellant was identified according to Ms. Mchami is that, in the course of the robbery, he talked to PW3 and

PW5 and he was subsequently mentioned by PW5 to PW7 immediately after the opportunity to do so presented itself. The learned State Attorney further submitted that the appellant and identifying witnesses were close to each other and the robbery incident appears to have lasted for a relatively long time. According to Ms. Mchami, taken as a whole, all these factors ruled out the possibility of any mistaken identity. She referred us to three unreported cases of this Court namely **Godfrey Gabinus @ Ndimba and Two others v. Republic,** Criminal Appeal No. 273 of 2017, **Samson Samwel v. Republic,** Criminal Appeal No. 253 of 2017 and **Shamir John v. Republic,** Criminal Appeal No. 166 of 2004.

In this case, clearly for one to say that the appellant was not convicted on the sole evidence of visual identification would certainly fly in the face of the obvious. For, if it were not for the evidence of PW1, PW3 and PW5 the appellant would have undoubtedly got himself off-the-hook. While convicting the appellant, as expected, the learned trial magistrate relied on the principles enunciated by this Court in the most celebrated case of **Waziri Amani v. R.** [1980] TLR 250 requiring the court in any case of the present nature to consider four things, namely:

1. The time the witness had the accused under observation.
2. The distance at which he observed him.
3. The conditions in which such observation occurred for instance whether it was day or night (whether it was dark and if so, was there moonlight or hurricane lamp) and;
4. Whether or not the witness knew or had seen the accused before.

The trial magistrate noted that, there was bright light to enable the witnesses to identify the appellant whom they had known for quite long prior to the occurrence of the robbery incident. The learned magistrate went on observing that, both PW3 and PW5 had ample time to observe the appellant as he spent some few minutes attacking and threatening them. Relying on the case of **Raymond Francis v. R.** [1994] TLR 100, the trial magistrate, was left with no doubt that all the conditions favouring correct identification were met in this case.

Going along the same line of reasoning as that of the trial magistrate, the learned Senior Resident Magistrate-(Ext. Juris.) of the first appellate court observed that, the fact that the appellant was the neighbour of PW1 PW3 and PW5 accelerated (sic) the possibility of familiarity with him and

that it made a great sense to declare that there was no mistaken identification.

As to the appellant's complaint that it was the same evidence of recognition which was relied upon to convict him but simultaneously found to be wanting to prove the charge against his co-accused, the learned SRM, (Ext. Jur.) of the first appellate court was of the view and we think correctly so that, what matters here is whether the evidence was sufficient and watertight enough to ground the appellant's conviction.

In a case like the present one, we are mindful to what we said in **Shamir John** (supra) to which we were ably referred by Ms. Mchami. For ease of reference in that case we said that, whenever the case against an accused wholly or substantially depends on the correctness of one or more identifications of the accused which the defence allege to be mistaken, the courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

It will be noted in the instant case that, the appellant's conviction by the trial court and the subsequent dismissal of his appeal by the first

appellate court, was a consequence of the following evidential confluence. **One,** that as opposed to identification resulting from quick glances, considering that in the fateful incident PW1, PW3 and PW5 stayed with the appellant at least for a while and he even uttered some words to them, assaulted them and robbed money in the course. In these circumstances, it must be inferred that the appellant could not but let his gaze fall on the witnesses' faces and as such, he was un-mistakenly identified. **Two,** the observation by the identifying witnesses was not impeded in any way and it was at a very close distance. **Three,** there was good lightning. **Four,** the witnesses and the appellant were very familiar to each other and finally, the appellant was mentioned at the earliest opportunity as one of the robbers when PW5 met one Selemani Hassan Sako who testified as PW7 and who had gone to the victims' rescue right after the robbers had left. To us, all the above-mentioned facts had the cumulative effect of adding quality and credibility to the evidence of identification in this case.

The fact that the appellant and the identifying witnesses were very familiar to each other was not challenged by the appellant during cross examination and therefore we take it as an established fact. Similarly, are the facts which, though contested, they were sufficiently proven by the

evidence showing that there was sufficient lightning at the scene of the crime and as earlier stated that the appellant stayed with PW3 and PW5 for a couple of minutes as they talked to each other. In these circumstances and those alluded to herein-before, we are inclined to agree and subsequently concur with the two courts below that indeed, the quality of the identification was impeccable. What in effect we are saying here is that, the evidence of PW1, PW3 and PW5 retained the quality and status of credibility even after cross-examination and the appellant's defence version. It must be said in this case that, the identifying eye-witnesses told the trial court that they identified the appellant and they went on to explain how they were able to identify him un-mistakenly. The witnesses explained to the trial court the source of the light, how strong the light was and that they all came face to face with the appellant whom they knew very well before the occurrence of the incident. This explanation gave assurance to the court that indeed the witnesses had actually seen and identified the appellant.

For our part, like the two courts below, we are satisfied that the evidence of identification and recognition of the appellant at the scene of the crime as given by PW1, PW3 and PW5 had met the legal threshold

which was set out by this Court in the **Waziri Amani's** case. In our view, all possibilities of mistaken identity were eliminated and the evidence before the trial court in this case was indeed absolutely watertight.

This second appeal is therefore without merit and is accordingly dismissed in its entirety.

It is so ordered.

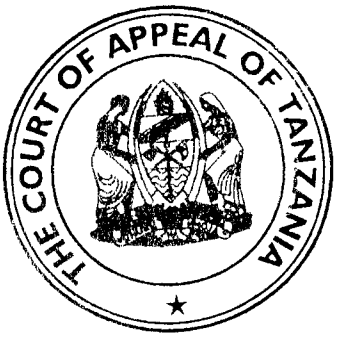
DATED at **DAR ES SALAAM** this 10th day of November, 2021.

S. A. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered this 11th day of November, 2021 in the presence of appellant in person and Ms. Esther Kyara, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
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