

TANZANIA / JUDGMENT

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I IN THE COURT OF APPEAL OF TANZANIA I AT MWANZA (CORAM: KIMARO, J.A., LUANDA, J.A., And MANDIA, J.A. :) CRIMINAL APPEAL NO.123 OF 2007 WILLIAM MALABA@ BUTABWOTEMI APPELLANT . VERSUS I THE REPUBLIC ■■■■■■ ■ 111 ■■■ ■■■ ■■■■ ... I ■ RES PON DENT I (Appeal from the judgment of the High Court of Tanzania at Mwanza) (Masanche. J.) dated 1st September. 2003 I in Criminal Case No. 220 of 1997 I JUDGMENT OF THE COURT 2ih & sth October, 2010 KIMARO, I.A. The District Court of Magu at Magu convicted the appellant of I the offence of robbery with violence contrary to sections 285 and 286 of I the Penal Code. He was alleged to have by use of violence stolen an I assortment of items from the house of James Manzalamo (PW1) in the " I I ' early hours of 29th September, 1997. I The appellant was sentenced to fifteen years imprisonment. I I Being aggrieved by the conviction and the sentence, the I appellant lodged an appeal in the High Court of Tanzania at Mwanza. The I High Court sustained the conviction and enhanced the sentence to thirty I years imprisonment. Still aggrieved, the appellant has filed a second appeal in this Court. I i The appellant filed three grounds of appeal. At the hearing of the I appeal he added two more, but they boil down to the issue of identification. I Perhaps it is worthwhile, at this juncture, to give in brief the facts . I upon which the appellant's conviction was founded. From the evidence I that was adduced in the trial court , on the night of 29th September 1997 I at Shigela village, at about 01.00 hours, James Manzalemo (PW1) the ' complainant, was asleep in his house. He was with his wife Paulina Simon I (PW2), and their child Juma James (PW4). At that time PW1 heard some I people moving items in the house. The culprits approached PW1 and I demanded for money. When PW1 said he had no money, he was I assaulted by being cut with a "panga "on several parts of his body. A PF3 I 2 , I i I form to prove the extent of injuries suffered by PW1 was tendered in court as exhibit Pl. It shows that the complainant suffered multiple cut wounds I to the bones and he suffered dangerous harm. It was the testimony of PW1 that he was able to identify the appellant as being one, among the I four people who invaded his house. It was a shining lamp whose light I PW1 described as reasonable, that assi,sted him to see the appellant. The complainant said the appellant had put on a black shirt and blue trousers. I He was a person known to him before and they resided in the same village. I The wife of the appellant, Paulina Simon, (PW3) said in her evidence I that, on that day at 12.20 hours, she was awake nursing a sick child. Then I she heard the kitchen door being pullep and then suddenly their main door was broken by a big stone commonly known as "fatuma"and people entered into the house and started to demand for money, cutting PW1 with I a panga. According to the testimony of PW1, one

of the culprits she identified was the appellant and he was the one who cut her husband. PW3 said two culprits entered into their bedroom, among them being the appellant. Other culprits ransacked other rooms. Testifying on how she was able to identify the appellant, PW3 said there was lamp shine and the robbers had a torch. Describing the attire of the appellant on that day, the witness said the appellant had put on a black jacket and a green trouser. Like PW1, PW3 said the appellant was a person known to her as he lived in the same village. From the evidence, there was no dispute that the offence of robbery was committed. The only issue that the trial court had to determine was who committed the robbery. In his defence the appellant denied the commission of the offence. He said he responded to the alarm raised by PW1 and PW2 when their house was invaded, and he too, escorted PW1 to hospital for treatment. According to the appellant, PW3 said the persons she suspected to have been involved in the commission of the offence were his brothers in law; Thomas Sabu and Lugiko Sabu because they were at her house at 8.00 p.m and one of them pretended to sleep there. However, at 1.00 a.m. he asked for his bicycle and went away. Hardly two minutes passed before the house was invaded by the culprits. The appellant said he was among the people who responded to the alarm raised by PW3. However, PW3 did not mention him as being one of the persons who was involved in the commission of the crime. It was the assistant village officer who, after instructions were given to investigate on the persons who were involved in the commission of the offence, mentioned the appellant as being one of them. The appellant said he had to run away to save his skin because the villagers were angry and they wanted to kill him, and he went to report the matter to the police. In determining the issue of who was involved in the commission of the offence, the trial court was satisfied that it was the appellant who committed it. Relying on the case of *Waziri Amani Vs R* 1980 TLR 250 the trial court was satisfied that the appellant was sufficiently identified by PW1 and PW3 through the assistance of a kerosene lamp. According to the trial court, the fact that the thugs who were involved in the commission of the offence were four, but the two witnesses were able to pick on the appellant as being the person who wounded the complainant favoured the prosecution case. On the strength of that evidence, the trial court was satisfied that the evidence was water tight and convicted the appellant and sentenced him as aforesaid. In upholding the appellant's conviction, the first appellate court said: "The guideline in the prosecution case has been met. The appellant and the complainant hail from the same village. There was a lamp there. The bandits had a torch which must have assisted in illuminating the room. The complainant and his wife could even remember the type of clothes the appellant was wearing. The son Juma identified the appellant straight away. The son also witnessed the appellant hacking his father. The appellant says in his memorandum of appeal that the occupants must have been frightened to the extent that they could not be able to identify him. One who gets frightened may not necessarily be unable to identify, so to say." At the hearing of the appeal the appellant appeared in person. The respondent Republic was represented by Mr. Stephen Makwega, learned State Attorney. In arguing the appeal the appellant opted not to elaborate on his grounds of appeal without first hearing from what the Republic had to say about them. On his part, the learned State Attorney supported the conviction and the sentence. He agreed that although the appellant raised four grounds of appeal, the main complaint focuses on his identification. In his view, the evidence on record shows that the appellant was sufficiently

identified. He said both PW1 and PW3 were eye witnesses to the commission of the offence because the appellant was a person known to them before as they all resided in the same village. Furthermore, the learned State Attorney contended, at the time the offence took place, PW3 was awake, nursing a sick child. In the opinion of the learned State Attorney, the incident also took a long period, and the attack on the complainant was done at a close range because he (the complainant) was cut by a machete, a weapon that could only be used to harm a person who is within a short distance. It was his further submission that the room was illuminated by a kerosene lamp which was on throughout the period the incident took place. In his opinion all the identifying principles laid down in the case of Waziri Amani supra, were met. Mr. Makwega also referred us to the 7 ' ... cases of Rungu luma Vs Republic, [1994] TLR 176 and Samwel Msinga Vs Republic Criminal Appeal No. 143 of 2005. He prayed that I the appeal be dismissed. The appellant insisted that he was not sufficiently identified. He gave I a number of reasons. First, the identifying witnesses gave contradictory · ' I evidence on the attire of the appellant. I Second, the witnesses did not give I his description. Third, apart from mentioning specifically the type of the kerosene lamp that was lit at the time the offence was committed, the intensity of the light was not disclosed. 1 Four, he wondered why his name I was not mentioned to the people who gathered at the scene of crime in I I response to the alarm raised by PW3. I The appellant said he was among I them, and he too, escorted PW1 to hospital for treatment. Five, at the I scene of crime, PW3 said he was suspecting other persons and not the appellant. He prayed that the appeal be allowed. I This is a second appeal. The role of the Court in a second appeal is not to interfere with the findings of the courts below unless there has been I 1 a misapprehension of the evidence; a miscarriage of justice or violation of I a principle of law or practice. See DPP Vs laffari Mfaume Kawawa ' 8 .

[1981] T L R. 143, and Salum Mhando' Vs R [1993] TLR 170 among others. In this appeal the learned State Attorney pointed out, correctly, that I the main issue for the determination- by the Court is that of the I identification of the appellant. The question is whether the evidence of i the identification of the appellant was watertight. The identifying I witnesses in this case were PW1 the complainant, and his wife PW3. The offence was committed at night. Both witnesses said a lamp was lit but ' none of them spoke about the extent of the illumination. In Kulwa s/ o Makwajape & Two Others Vs R Criminal Appeal No. 35 of 2005(unreported) it was held that: " .. the intensity and illu·mination I of the lump is important so that a clear picture is given ' ' of the condition in which the appellants were identified." The description that PW1 gave ~as that there was reasonable light. He did not go further to explain what.' he meant by reasonable light. The evidence does not assist us in determining the extent of illumination. The 9 I I two witnesses also differed in their description of the attire of the appellant on that day. PW1 said the appellant wore blue trousers and a black shirt while PW3 said the appellant wore a black jacket and blue trousers. In the case of RVs Mohamed Allui (1947) 9 EACA 72 the Court held: "In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given, first of all, of course by the person or persons

who gave the description and purport to identify the accused and then by the person or persons to whom the description was given." 10 „ '• If there was sufficient illumination ~hy did the two witnesses give different versions on how the appellant was dressed? This casts doubt on I I the evidence of the two witnesses that there was sufficient light allowing for no mistake in the identification of the appellant. I Another matter which also raises doubt on the identification of the appellant was failure by PW3 to mention the name of the appellant to the people who gathered at the scene of crime to render assistance. The I I appellant said he joined the people who responded to the alarm raised by PW3 and also went to the hospital, yet PW3 did not mention him as being the person who committed the crime. According to the appellant it was • I the Assistant Village Officer who said he was involved in the commission of I the offence. I In the case of Waziri Amani (supra) the court said that the court I I should not act on evidence of visual identification unless all possibilities of mistaken identity are ruled out. Given I the critical deficiencies in the evidence of the identification of the appellant, it is not safe to rely on such • I evidence to sustain the conviction. For this reason, and with respect to the learned judge on first appeal, we differ'with I him and also with the learned State Attorney that the evidence of identification of the appellant that was • 11 I given by PW1 and PW3 was water tight. Their evidence is doubtful and hence unsafe to sustain the conviction. I i Another piece of evidence which wJrks I in favour of the appellant is I that when he feared that he might be s~bjected to mob justice when he i I was told that he was a suspect in the cqmmission of the offence went to I report the incident to the police. In our /considered opinion, if it was true I I that he committed the offence, we do not think that he would have elected I to report to the police. I I From what we have shown above/we agree with the appellant that ! I the appeal has merit. We allow it, quash the conviction, set aside the I I sentence and order his immediate releas~ from prison unless he is he'ld for I I i any other lawful purpose. It is ordered. I 12 DATED at MWANZA this 01 ST day of October 2010. N. P. KIMARO JUSTICE OF APPEAL B. M. LUANDA JUSTICE OF APPEAL W. S. MANDIA JUSTICE OF APPEAL I certify that this is a true copy of the original. ~ SENIOR DEPUTY REGISTRAR 13

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