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RAYMOND FRANCIS v REPUBLIC

COURT OF APPEAL OF TANZANIA

(Omar, Mnzavas and Lubuva, JJA)

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CRIMINAL APPEAL NO 162 OF 1993

February 14, 1994 – DAR ES SALAAM

(From the decision of the High Court of Tanzania at Dar es
C Salaam, Mapigano, J)

Evidence – Identification of accused person – Conditions favouring a correct identification.

Evidence – Identification of accused person – Witnesses saw appellant
D *for the first time during the incident – Need to describe identity in detail.*

Criminal Practice and Procedure – Sentences – Sentence for robbery with violence – Arm used during commission of offence – Accused sentenced as if charged with armed robbery.

E

On being convicted of the offence of robbery with violence by the District Court the appellant was sentenced to thirty years imprisonment as if he had been charged with armed robbery under Act 10 of 1989. The conviction of the appellant was based on evidence of identification. The trial
F court was satisfied that the appellant was adequately identified by five witnesses all of whom had seen the appellant for the first time during the incident. None of the witnesses was able to describe in detail the identity of the appellant. The appellant was also identified in an identification parade in which requisite procedures were not followed. The High Court of Tanzania dismissed the appellant's appeal. On a further appeal to the
G Court of Appeal of Tanzania.

Held:

(i) It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance;

H (ii) As the identification of the appellant was the crux of the matter, and having regard to the fact that the robbery took place at 8.00 pm when it was dark, we are satisfied that the conditions were not favourable for a correct identification of the appellant;

(iii) Since all the witnesses admitted seeing the appellant for the first time during the incident that day it was necessary in their evidence of
I identity to describe in detail the identity of the appellant when they saw him at the time of the incident;

(iv) The identification parade was not carried out properly in terms of the applicable procedure; as such it was of little value as evidence against the appellant;

(v) After the passing of Act 10 of 1989 the offence of armed robbery is distinct from, though cognate to, robbery with violence; it should be clearly spelt out in the charge;

(vi) The omission to particularize the offence of armed robbery in the statement of offence can only be cured if the charge in the particulars of offence clearly spells out the use of arms.

Appeal allowed.

Cases referred to to:
(1) *Mohamed Alhui v Rex* [1942] 9 EACA 72.
(2) *Rex v Mwango s/o Manaa* [1939] 3 EACA 29.

Kakoti, for the appellant.
Sengwaji, for the respondent.

Lubuva, JA. delivered the following considered judgment of the court:

In the District Court of Ilala District at Kivukoni, the appellant was charged with and convicted of the offence of robbery with violence contrary to ss 285 and 286 of the Penal Code. He was sentenced to imprisonment for thirty years and twelve strokes. On appeal to the High Court, (Mapigano J) his appeal was dismissed. Dissatisfied with the decision of the High Court, he has appealed to this Court.

The facts of the case which emerge from the evidence were briefly as follows: That on 11 December 1989 at about 8 pm the house of one Athumani Rajabu was invaded by a group of bandits one of whom had a firearm. In the process of this robbery, various household items (including cash money, Shs 500,000/=) the total value of which was Shs 530,000/= were stolen. The group of bandits, comprised four people. It was only the appellant who was arrested and duly charged for the offence of robbery with violence. The rest of the bandits vanished and could not be traced for their arrest and trial.

At the time of filing the memorandum for this appeal, it would appear that the appellant had not briefed Counsel for arguing his appeal. The memorandum of appeal was therefore processed and filed by the appellant himself with the usual assistance of the prison officials. However, at the hearing of the appeal before us, Mr *Kakoti*, learned advocate, appeared for the appellant. Arguing the appeal before us, Mr *Kakoti*, based the appellant's defence on the following grounds:

1. That both the two courts below erred in basing the conviction of the appellant on the evidence in which there was no proper and sufficient evidence of identification.
2. That the identification parade was of no evidential value as it was not properly conducted.
3. That as the appellant was charged with the offence of robbery with violence and not armed robbery, he was wrongly sentenced to 30 years imprisonment.

On the basis of these grounds, Mr *Kakoti*, in a very persuasive manner, assailed the learned judge's decision in upholding the conviction against the appellant. It was a case which, in his submission, wholly depended on the evidence on identification. The evidence adduced by the prosecution on the identity of the appellant at the time was too scanty to found a conviction. He contended that even though it is common ground that matters of assessing the demeanor of the witnesses is the responsibility of the trial court, in the instant case, the very evidence of the witnesses PW1, PW2, PW3, PW4, PW5 and PW6 which was believed and accepted by the Trial Magistrate, was not reliable. According to him, from their evidence, they had seen the appellant for the first time on the day of the incident. That was 11 December 1989. For this reason, he submitted that, having seen the appellant for the first time that day and the offence having taken place at night, it was necessary for these witnesses to describe how they identified the appellant. As such details were missing from the evidence of these witnesses, it was unsafe to sustain a conviction based on this evidence Mr *Kakoti* contended. For this contention, he relied on the decision of the Court of Appeal for Eastern Africa in the case of *Mohamed Alhui v Rex* (1).

Secondly, Mr *Kakoti*, learned advocate submitted that the learned judge erred in law by not subjecting the evidence on the identity of the appellant to a close scrutiny. He argued that as the evidence on the identity of the appellant was highly unsatisfactory, it was necessary to have it re-evaluated by the first appellate Court. In his view, PW1, PW2, PW3, PW4, PW5 and PW6 in their evidence do not describe in any way how they identified the appellant at the time of the robbery. He said that no description has been given in regard to the lighting condition, the type of clothing the appellant was wearing or his physique etc. It was his submission that this evidence was of little evidentiary value as it was lacking in details on identity. Mr *Sengwaji*, learned Principal State Attorney who appeared for the

Republic supported the conviction. He conceded that except for PW2, the rest of the witnesses had seen the appellant for the first time that day when the incident took place. Furthermore, while also conceding to a number of issues raised by Mr *Kakoti*, learned Counsel for the appellant, Mr *Sengwaji* maintained that the decision of the learned judge on first appeal and the Trial Magistrate was proper. He argued that despite the discrepancies in the evidence of the prosecution, the appellant was properly identified. He further observed that as there was light at the time which was later switched off on the instruction of one of the bandits, the witnesses had the opportunity of seeing and identifying the appellant.

As regards the identification of the appellant we are with respect, in agreement with the learned Counsel for the appellant, Mr *Kakoti* that this is a case where determination wholly depends on the evidence on the identity of the appellant. In our view, it is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance. In the instant case, except for PW4 who, apart from having seen the appellant earlier that day at 4 pm but did not actually directly see what happened at 8 pm during the incident, all the other witnesses either in examination in chief or in cross examination admit seeing the appellant for the first time during the incident that day. For that reason, we think it was necessary in their evidence on identity to describe in detail the identity of the appellant when they saw him the time of the incident. Here, this was not the case with the evidence of either of these PW1, PW2, PW3, PW5 and PW6. In our view, their evidence, regrettably, is of a generalised nature on the identity of the appellant. It is mere assertion that they saw the appellant.

In his defence, the appellant among others, advanced the argument that Athumani Rajabu, the owner of the raided house owed him (appellant) money and that there was bad blood between the appellant and the family of Athumani Rajabu. He claimed he was known and familiar with most of the prosecution witnesses. In the first place, we note, this issue was never raised at the time the witnesses were testifying. Nonetheless, in our view, even if this theory is accepted, it makes it even much easier in practice for them to describe the appellant in more particulars in regard to the identification than it is to a stranger. Here, these witnesses deny knowing the appellant before the incident. None of the witnesses (PW1, PW2, PW3, PW4, PW5 and PW6) as well as the police officers involved in the investigation of the case or the identification par-

A ade, (PW7 and PW8) given any description in their evidence as to how the appellant was identified.

The importance of proper and correct identification in cases whose determination hinges on identification was reiterated by the Court of Appeal for Eastern Africa way back in 1942. In the case of
B *Mohamed Alhui v Rex* (1) it was held that:

> '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 given are matters of the highest importance
C of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given'.

On the basis of this well enunciated principle, in criminal cases,
D we are convinced that the offence having taken place at night, the condition prevailing at the time can hardly be said to be favourable for a correct identification of the appellant. Granted the appellant was seen at the scene earlier in the day at about 4 pm as the evidence of PW2 shows, the crucial moment for identification was at the time
E when the offence was committed at 8 pm when it was dark. The evidence on this, in our view, still left much to be desired.

Mr *Kakoti*, learned counsel for the appellant also took issue with the manner in which the identification parade was conducted. He submitted that the identification parade having been conducted in
F such an unsatisfactory manner, it was of little value as evidence against the appellant. He referred to the case of *Rex v Mwango s/o Manana* (2) in which the rules for guiding identification parades were fully set out and approved by the Court. It was his submission that proper procedure was not followed in conducting the identifi-
G cation parade. From the evidence on record, it is evident that even though PW7 in cross examination says that he conducted the identification parade, in actual fact, it was PW8 who was involved in the identification parade. For the identification parade, PW8 included 9 other people and the appellant. The evidence does not show how the
H identifying witness (PW2) had identified the appellant eg by touching etc. It is also not indicated if PW2 was given the option to indicate if he wanted to see those taking part in the parade walk; or hear them talk etc. On the other hand, Hassan Jumbo (PW2) the witness who was supposed to identify the appellant at the identifi-
I cation parade does not say anything at all about the identification parade and how he did it. Furthermore, from the evidence of PW8

and PW2, it is not clear if the appellant was asked if he was satisfied that the parade was conducted in a fair manner. In those circumstances, it appears to us that the identification parade was not carried out properly in terms of the applicable procedure as set out in the cited case of Mwango (supra).

Thirdly, Mr *Kakoti*, learned Counsel complained about the investigation and the arrest of the appellant. He contended that it was curious that the offence took place on 11 December 1989, but it took so long for the appellant to be arrested, on 5 April 1990. According to him this is the day when the appellant had gone to the house of the complainant. Mr *Kakoti* further contended that such lapse of time without explanation raises doubts against the prosecution case.

We have examined this matter clearly. From the evidence of Hassani Jumbo (PW2) it is clear that after the house had been invaded, he (PW2) ran to the house next door to inform the neighbours and the owner of the house Athumani Rajabu who in turn went to inform the police. If the police were informed of this serious incident of robbery, it is not shown what time the police came to the scene of crime. The record is completely silent on this vital aspect. The investigating officer, Stanley (PW7) only talks of 5 April 1990 when he arrested the appellant at the complainant's house (Athumani).

Another Police Officer, Inspector Patric Byatao (PW8) in his evidence also comes into the picture from 21 May 1990 when he conducted the identification parade. In this state of affairs, we think, the investigation was, with respect, poorly conducted. The end result is that it is not certain when the incident was reported to the police; who reported and why it took so long before the appellant was apprehended on 5 April 1990. If the explanation is that the appellant disappeared after the incident, in our view, it is equally unlikely that the appellant would present himself at the very house, the scene of crime risking himself the arrest which he had been avoiding.

All in all therefore, as the identification of the appellant was the crux of the matter, and having regard to the fact that the robbery took place at 8 pm when it was dark, we are satisfied that the conditions were not favourable for a correct identification of the appellant. In these circumstances, proof of the identity of the appellant was in our considered opinion, such that the possibility of mistaken identity could not be eliminated. Furthermore, from the evidence as already explained, we are convinced that the identifica-

A tion parade was conducted in an unsatisfactory manner. Above all, it is also clear to us that the manner in which the investigation of the case was conducted by the police was such that it leaves much to be desired, it was poor to say the least. It leaves a lot of loose ends untied. With respect, these are matters which apparently were not
B addressed to by both the courts below. Had they been considered, the decision would, in our opinion, have been different.

There remains the question of the sentence and the charge on which both Mr *Kakoti*, learned Counsel and Mr *Sengwaji*, learned Principal State Attorney briefly addressed us. Mr *Sengwaji* con-
C ceded that it was wrong to indicate Athumani Rajabu as the victim of the robbery. With respect, we agree with Mr *Sengwaji*. On record, Athumani Rajabu was not present at the time when the incident took place. It was therefore, an error to show him in the charge as the victim. However, an error though it was, we think it was
D such that it was curable under s 388 of the Criminal Procedure Act, 1985.

As regards the sentence imposed, Mr *Kakoti*, learned Counsel for the appellant submitted that as the appellant was charged with the offence of robbery with violence contrary to ss 285 and 286 of the
E Penal Code, for which the penalty provided for under s 286 of the Penal Code is twenty years imprisonment, the provisions of Act 10 of 1989 which could not apply in this case. According to Mr *Kakoti*, the penalty of thirty years is for a graver offence than that preferred against the appellant. With respect, this Court has held in a number
F of cases that after the enactment of Act 10 of 1989 the offence of armed robbery is distinct though cognate to robbery with violence. It should be clearly spelled out in the charge. Otherwise, the omission to particularize such an offence in the statement of offence can only be cured if the charge in the particulars of offence, clearly spells
G out the use of arms as was the case in the present case.

Consequently for the reasons stated, we allow the appeal, quash the conviction and set aside the sentence and order that the appellant be released from prison forthwith unless he is otherwise lawfully held.

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