

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And MFALILA, J.A.)

CRIMINAL APPEAL NO. 47 OF 1994

BETWEEN

1. ITUNGI MDAA		
2. DAUDI MOSES		
3. HANGO MASENGA		..... APPELLANTS
4. MARTIN MESHACK		
5. ZAKAYO SAMWEL		

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the  
High Court of Tanzania at Dodoma)

(Mwalusanya, J.)

dated the 4th day of February, 1994

in

Criminal Appeal No. 144 of 1992

JUDGEMENT OF THE COURT

MFALILA, J.A.:

The five appellants were charged with and convicted of robbery for which they were sentenced to 15 years imprisonment. But as they were armed with offensive weapons at the time, they should have been sentenced to the minimum sentence of 30 years imprisonment. Unfortunately the High Court also over looked to correct these irregular sentences.

The appellants were originally charged in the district court at Singida. Upon their conviction and sentencing, they appealed to the High Court at Dodoma where Mwalusanya, J.

dismissed all the appeals. Against that decision they lodged these appeals. The appeal before us is therefore a second appeal, accordingly we can only entertain it on questions of law. The question whether or not an accused was properly and conclusively identified, is one of fact and this is the main point in this appeal. Did PW.1 and his wife PW.2 properly and conclusively identify the appellants to be the ones who invaded their home that night and robbed them of their money? Ordinarily this Court cannot entertain such a question, this Court can only entertain a question of fact on the rare occasion when both the lower courts overlooked an important point when determining the question of identification. We feel that this case calls for such rare intervention because both courts overlooked an important point when evaluating the evidence of identification by PW.1 and PW.2.

During the night on 22/1/91 a group of bandits broke into the house of Hussein Mtatuu who testified as PW.1. According to his evidence at the trial, PW.1 said that he identified all the bandits although he did not mention the 3rd accused who was subsequently acquitted. Because of his initial resistance to show them where he had hidden the money, the bandits assaulted him very seriously with a panga and hammer. This rendered him unconscious and he was taken to hospital in this state. He could hardly speak. PW.1 told the trial court that he identified the bandits because they are neighbours and that during

the entire proceedings the lamp was burning. In the meantime his wife, Zena Juma (PW.2) another identifying witness, said she was hiding in a nearby store when the bandits broke into the house. However she said she was able to see the bandits and identified them to be the present appellants. Both the trial court and the first appellate court held that the condition for proper and accurate identification was present and accepted as correct the identification of the appellants by PW.1 and PW.2.

We start with the identification of the appellants by PW.1. Although this witness was very categorical in court about his identification of the appellants, he even described in detail the role played by some of the bandits, yet in his police statement, he is recorded to have stated:

"Majambazi hao sikuweza kuwatambua  
ila walikuwa wanne".

If this is what he said to the investigating officers soon after the event, how did he suddenly recollect the identity of the bandits 10 months later? In fact this statement tallies with what DW.7 P.C. Hussein told the trial court that when he interrogated PW.1, he said that he did not identify the robbers, although PW.1 added that he could recall them after gaining consciousness. We do not know how he could do that when he did not identify them

in the first place. The trial court heavily relied on the evidence of PW.1 saying it was reliable as there has been a face to face confrontation between him and the robbers. The trial magistrate did not at all refer to the contradictory police statement and the evidence of PW.7. The High Court judge attempted to explain PW.1's inability to identify the bandits but said that the evidence of PW.2 was sufficient and wrongly thought that the trial court had determined the issues of identification solely on her evidence. Quite clearly then the evidence of PW.1 was not entirely reliable. In court he said that seven bandits broke into his house, but in the police statement he said that there were only four.

This leaves us with the evidence of PW.2. According to the arresting officer D/Sgt. Bakari, he arrested all the appellants and the 3rd accused who was acquitted on the report by PW.2. If this is so then she must have wrongly named the 3rd accused. In her evidence, she did not mention the 3rd accused at all. If the conditions for an accurate identification were good, and she wrongly mentioned 3rd accused who is her neighbour to have been in the group, then how reliable is her identification of the other appellants, taking into account the fact that she was all the time hidden in the store except for a brief period when she appeared in fear of her husband's life? The circumstances in which she identified the 3rd accused were exactly the same in respect of the others.

We do not know whether if the two courts below had considered these aspects, they would necessarily have arrived at the same conclusion that PW.1 and PW.2 had properly and accurately identified the robbers. This doubt must in accordance with the law be resolved in favour of the appellants.

Accordingly we allow the appeals of all the five appellants, quash their convictions and set aside the sentences. If they or any of them are not held lawfully on some other ground, they should be released from prison immediately.


DATED AT DODOMA THIS 21ST DAY OF AUGUST, 1995.

R. H. KISANGA  
JUSTICE OF APPEAL

A.S.L. RAMADHANI  
JUSTICE OF APPEAL

L. M. MFALILA  
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

  
( M.S. SHANGALI )  
DEPUTY REGISTRAR