

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 141 OF 1994

BETWEEN

1. SIMON KILIMBE }  
2. ERNEST MKUTANI } ..... APPELLANTS  
3. WAMI MKANJE }

AND

THE REPUBLIC ..... RESPONDENT

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

(Maina, J.)

dated the 14th day of October, 1991

in

Criminal Appeal No. 68 of 1990

JUDGEMENT OF THE COURT

KISANGA, Ag. C.J.:

A group of bandits broke into the house of the complainant (PW.1) at night and stole from there some money, a gun and other items of property. They also injured the complainant (PW.1) and his wife (PW.2). Some members of the gang moved to the house of the PW.1's mother (PW.3) which was nearby and, after breaking into her house, ordered her and her husband to go to the house of PW.1 where they were all to be killed. On arriving back at PW.1's house, the bandits repeated their demands for money. While they were doing so PW.1 managed to escape and raised an alarm whereupon the bandits ran away.

PW.1 and PW.2 said that out of this group of bandits they identified four persons including the 3 appellants. PW.3 said that she identified the first and second appellants. The 3 appellants and the other person

who were said to have been identified by PW.1 and PW.2 were charged in the District Court with the offence of robbery with violence. At the end of the trial the fourth accused was acquitted. The three appellants were convicted as charged and were each sentenced to 30 years' imprisonment. On appeal to the High Court (Maina, J.) the appeals against convictions were dismissed and the sentences were reduced to eight years' imprisonment for each appellant. The present appeal arises from that decision.

Before us the appellants were represented by Mr. D.C. Mbezi, learned advocate, while Mr. E. Kifunda, learned State Attorney, appeared for the respondent Republic. Mr. Mbezi filed and argued only one ground of appeal urging that there was no corroboration of the evidence of visual identification of the appellants by the witnesses.

We think that Mr. Mbezi's complaint is justified in relation to the third appellant, Wami Mkanje. This appellant and the fourth accused who was acquitted were said to have been identified by PW.1 and PW.2 only in circumstances which admittedly did not favour correct identification. There was no other evidence tending to support the visual identification of these two by PW.1 and PW.2. Once the trial court found that such identification was insufficient to sustain the conviction of the fourth accused, she could not properly have found such identification to be sufficient to sustain the conviction of the third appellant for the simple reason that the conditions under which both accused were identified were identical. The learned High Court Judge did not address his mind to this aspect of the matter, and had he done so we feel certain that he would have come to a different conclusion. Mr. Kifunda, the learned advocate for the Republic, rightly in our view, declined to support the conviction of this appellant.

The position, however, is different as regards the first and second appellants. There was the evidence of PW.6 to the effect that as he answered the alarm that night he came across the first appellant running in the opposite direction and carrying a gun. On asking him what was happening, the appellant threatened to harm him if he mentioned him. There was also evidence that the first appellant responded to the alarm late that night even though he did not live far from the scene.

Then there was the evidence of PW.3 to the effect that the first and second appellants were among the group of people who broke open the door of her house and forced her and her husband to march to the house of PW.1. The appellants are fellow villagers who were well known to her before the incident. She said that she recognised them through the torch light which they were flashing, through moonlight and through their voices when they spoke to her and to PW.1. However, we think the more reliable part of her evidence which can be taken to corroborate the evidence of identification by PW.1 and PW.2 is her identification of 1st and 2nd appellants through moonlight and their voices when they spoke to her and to PW.1.

Mr. Mbezi contended that the evidence of PW.6 and PW.3 did not adequately corroborate that of PW.1 and PW.2. However it should be born in mind that this is a second appeal where only points of law can be raised or entertained. Once both courts below found as they did that the evidence of PW.6 and, we may add that of PW.3, did support that of PW.1 and PW.2 on the identification of the first appellant, the question of sufficiency or otherwise of such supporting evidence is one of fact, and this Court will not entertain it even if we took the view that had we tried the case ourselves we might have come to a different conclusion.

Admittedly both courts below did not specifically consider whether the identification of the second appellant by PW.1 and PW.2 was supported by any other evidence. This was obviously a non-direction, bearing in mind that the conditions of the second appellant's identification by PW.1 and PW.2 did not favour correct identification. However, as shown above, the evidence of PW.3 did support that of PW.1 and PW.2 as to the identification of the second appellant, and had both courts below duly directed themselves on the matter, we are confident that they would have so found.

In the result, for the reasons set out above, we allow the appeal of the third appellant, Wami Mkanje. His conviction is quashed and the sentence passed on him is set aside. He is to be set free forthwith unless he is otherwise lawfully held in custody. The appeals of the first and second appellants, Simon Kilimbe and Ernest Ikutani, fail and they are dismissed in their entirety.

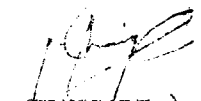
DATED AT DODOMA THIS 8TH DAY OF MAY, 1995.

R. H. KISANGA  
Ag. CHIEF JUSTICE

A.S.L. RAMA HANI  
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