IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 39 OF 2000

BETWEEN

MASUMBUKO CHARLES..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Ihema, J.)

dated the 29th day of November, 1999
in
H/Court Criminal Appeal No. 37 of 1999

JUDGMENT OF THE COURT

MSOFFE, J.A.:

In the District Court of Ilala, Malekela PDM, the appellant was convicted of Armed Robbery and sentenced to the statutory thirty years term of imprisonment. He appealed to the High Court at Dar-es-Salaam. In a judgment delivered on 29/11/99 the High Court, Ihema, J. dismissed the appeal. He is still dissatisfied, hence this appeal.

The facts of the case, in so far as they are relevant to this appeal, may briefly be stated. On 11/8/98 at around midnight, PW1 Charles James, PW2 Mwashamba Saidi, and PW3 Mwanaisha Mohamed, were asleep in a house owned by PW1. PW1 and PW2 are a husband and wife respectively.

PW3 is PW1's sister. While asleep, they were ambushed by a group of nine armed robbers wielding machetes. The said robbers attacked PW1 and then stole a number of items and money from the house valued at a total sum of Shs. 1,400,500/=. Among these prosecution witnesses only PW3 testified and stated that she identified the appellant on that fateful night.

Admittedly the decision of the case depended heavily on identification. In their concurrent findings of fact the two courts below were satisfied that the appellant was sufficiently identified. The crucial issue in this appeal is whether or not there was enough evidence of identification.

At the hearing of the appeal the appellant told the Court that he was relying on the point canvassed under ground one of the memorandum of appeal. The complaint in the first ground is that the evidence of identification was not watertight. Having said so, he went on to add that this was a case in which an identification parade was necessary. In the absence of such parade, he urged, the case against him was not proved beyond reasonable doubt.

On the other hand, Mr. Massara, learned State Attorney, appeared on behalf of the respondent Republic. In his brief submission, he was of the view that the appeal has merit.

According to him, the evidence of PW3 was not enough to ground a conviction. He went on to submit that PW3 did not lead evidence as to how he identified the appellant. Like the appellant, Mr. Massara was also of the view that an identification parade was called for in the circumstances of this case. Thus, he went on to conclude, the Director of Public Prosecutions was not supporting the conviction.

In the case of **Raymond Francis v. R Criminal Appeal No. 162/93** (unreported) this Court, citing the case of **Mohamed Alhui v. Rex (1942) 9 EACA 72,** and speaking through Lubuva, J.A., stated:-

> "----- 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."

Also in the celebrated case **of Waziri Amani v. R (1980) TLR 250** this Court stated that visual identification is the weakest kind of evidence and the most unreliable, and that a Court should not act on it unless all the possibilities of mistaken identity are eliminated.

In the testimony of PW3, the material night was moonlit. While inside the house, she could not, however, identify the robbers outside the house because the moonlight was not enough to allow for proper identification. She identified the appellant after he, and the others, entered the house. According to her, she identified the appellant because there was **light.** She did not, however, elaborate on the nature of the light in question. In other words, she did not say whether the light came from a wick lamp, a candle, a lamp, a fluorescent tubelight or a bulb. She did not also say whether the light was bright enough to enable her identify the appellant properly.

Likewise, she did not say **how** she identified the appellant. For instance, she could have led evidence on whether she identified him by his voice, his distinctive clothing etc.

In the same vein, she did not say whether she stood close enough to the appellant to be able to identify him with ease.

Needless to say, the incident took place at night. The incident also involved a group of nine armed robbers. In the circumstances, more positive evidence of identification along the above suggested lines was called for in order to pin down the appellant to the offence in question, if he really committed it. Apparently no such evidence was forthcoming.

We also agree with both the appellant and Mr. Massara that an identification parade was called for in the circumstances of the case. An identification parade would have been an appropriate opportunity for PW3 to identify the appellant if she really saw him on that fateful night.

It is for the above reasons that we are of the strong view that in the absence of positive evidence of identification the appellant was entitled to the benefit of doubt.

We are aware that this is essentially an appeal against the concurrent findings of fact by the two lower Courts. The principle has always been that in an appeal against findings of fact this Court will be hesitant to disturb those findings. The Court will disturb the findings if they are unreasonable or where it is evident that some material points or circumstances were not considered. This principle was well stated in the case of **R v. Gokaldas Karia and Another (1949) 16 EACA 116** where it was held:-

> "Where a case is essentially one of fact, in the absence of any indication that the learned trial judge had failed to take some material point or circumstance into account it would be impossible and

> improper for a Court of Appeal to say that he had come to an erroneous conclusion as to the respective credibility he attached to the evidence of crown witnesses and that given by the appellants."

And in the case of **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa (1981) TLR 149** at page 153, this Court,
speaking through Nyalali, C.J. stated:-

> "In cases where there are misdirections or non directions on the evidence, a Court of second appeal is entitled to look at the relevant evidence and make its own findings of fact."

It occurs to us that in the instant case the two courts below did not address themselves properly on the issue of identification, as we have tried to demonstrate above. It is for this reason that we will disturb their concurrent findings of fact on identification of the appellant.

We accordingly allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released

from prison unless otherwise lawfully held therein.

DATED at DAR ES SALAAM this 11th day of February, 2005.

D. Z. LUBUVA
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

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

S. A. N. WAMBURA
SENIOR DEPUTY REGISTRAR