IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 74 OF 2000

1. HANGI SAID MWINJUMA
2. MUSSA SAID MWINJUMA @ ZUNGU ..... APPELLANTS
3. MOHAMED ABDALLAH

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Chilonji, PRM/Extended Jurisdiction)

dated the 27th day of June, 1997
in
HC. Criminal Appeal No. 34 of 1996

JUDGMENT OF THE COURT

LUBUVA, J.A.:

This is an appeal against the decision of Principal Resident Magistrate (Chilonji, PRM) in exercise of extended jurisdiction dismissing the appeal of the appellants.

In the District Court, Ilala, the appellants, Hangi Said, Musa Said and Mohamed Abdallah together with four others who are not subject of this appeal were charged with and convicted of armed robbery contrary to sections 285 and 286 of the Penal Code.

At the trial, the prosecution alleged that on 5.9.1994, at about

2.00 a.m. at Ukonga, within the outskirts of Dar-es-Salaam, the house of Ruth Mwagamba (PW1) was raided by a group of thieves armed with a gun, knife and iron bar. In the course of the raid, various items, the property of PW1, were stolen. It was alleged that the appellants were the robbers. Upon consideration of the case, the trial magistrate was satisfied that the appellants were sufficiently identified and that the case against them had been proved conclusively. They were convicted and sentenced to 30 years imprisonment.

The appellants appealed against conviction and sentence. The Principal Resident Magistrate (Extended Jurisdiction) allowed the appeal against the other co-accused who, at the trial were referred to as the 1st, 5th, 6th and 7th accused persons. According to the Principal Resident Magistrate, (Extended Jurisdiction), the evidence of PW4 and PW5 against these accused persons was contradictory. So, they were given the benefit of doubt. With regard to the appellants, the appeal was dismissed. From the decision of the Principal Resident Magistrate, this appeal has been preferred.

In this appeal, the appellant appeared in person while on the other hand, Miss C. Maganga, learned State Attorney, represented the respondent Republic. On their part, the appellants had filed a fourteen ground memorandum of appeal. At the hearing of the appeal, the appellants did not have anything to add to the grounds filed.

In her submission, Miss C. Maganga, learned State Attorney, did

not support the conviction against the appellants. First, she said the identification of the appellants was crucial for the determination of the case, all the more so as the incident took place at night. From the evidence, the State Attorney further submitted that PW1 and PW5 said they identified the appellants by aid of light. However, as the type of light was not indicated, it was unsafe to uphold the conviction against the appellants. Second, because PW1 and PW5 had not known the appellants before the incident, it was doubtful that their evidence on the identification of the appellants at the time of incident was reliable. The evidence was such that the possibility of mistaken identity could not be ruled out, the State Attorney urged. The Court was referred to its decision in **Musa Omari v. The Republic,** Criminal Appeal No. 83 of 2000. As said before, she urged the Court to allow the appeal.

The robbery incident having taken place at night, at about 2.00 a.m. we agree with Miss Maganga, learned State Attorney, that it was absolutely necessary for the trial court to satisfy itself that the evidence on identification was watertight. First, in order to establish the identification of the appellants, it is imperative to show the source of light which enabled the witnesses to see and identify the appellants. On this, the evidence of Ruth Mwagamba (PW1) and Ruth Mapinga (PW4) is relevant. While PW1 states that she identified the appellants, she does not however show what type of light it was that enabled her to identify the appellants. In her own words she said:

I identified them after the leader put on the lights.

Similarly, PW4 when cross examined also said:

> When a group of people came, there were some light so I saw you .....

When cross examined, PW5 said the light was on.

From this extract, it is clear that these witnesses do not show what type of light it was that enabled them to identify the appellant at that time of the night. Without establishing the type and source of the light, it is difficult to assess the intensity of the light in order for the court to satisfy itself whether the appellants could, in the circumstances, be identified satisfactorily.

Where the incident takes place at night and the witnesses do not specify the type of light which enables them to identify the bandits, this Court had the occasion to observe that it is not enough for the witnesses to say there was light. The description of the light is material in order to determine whether or not the conditions for proper identification were favourable. The Court held this view in the case of **Musa Omari v. Republic,** (supra).

In **Waziri Amani v. Republic,** (1980) TLR 250, the Court also underscored the need for the trial court to satisfy itself first that the evidence on the identification of the accused is watertight. The Court

inter alia held:

> ------ evidence of visual identification is of the weakest kind and most unreliable; no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is absolutely watertight.

In the instant case, where the light was not specified, it is, doubtful that the evidence on the identification of the appellant can be said to be watertight. In our view, the circumstances were such that it can hardly be said that all possibilities of mistaken identity of the appellants were eliminated. So, the submission by the learned State Attorney that the case against the appellants had not been proved beyond reasonable doubt was well founded.

There is yet another disquieting feature in this case. Dealing with the appeal, the Principal Resident Magistrate (Ext. Jurisdiction) allowed the appeal in respect of the 7th appellant on first appeal because in his view PW4 and PW5 contradicted each other in their evidence regarding the light. It is curious that the magistrate used the contradiction in the evidence of PW4 and PW5 to allow the appeal and quash the conviction against the 7th appellant on first appeal but used the same evidence to uphold the conviction against the appellants.

This, to say the least, amounts to double standard. If indeed there was contradiction in the evidence of PW4 and PW5 regarding the light which was the basis for the identification of the appellants, the same standard should have applied to all the accused persons including the appellants. As happened in this case, it raises doubt on the reliability of such evidence. Such doubt, in criminal matters should have been resolved in favour of the appellants as well.

Finally, we wish to observe on one aspect which in our view, is a misdirection on the part of the Principal Resident Magistrate (Ext. Jurisdiction) regarding trial within a trial. From the record, it is apparent that the first appellant in the first appeal whose appeal was allowed and is not subject of this appeal, raised the issue that he was tortured by the police. Addressing this matter, the Principal Resident Magistrate among other things, observed:

> The trial magistrate was supposed to conduct a trial within a trial the moment the accused before her had made the claims (sic) of being beaten up by the police -----

There can be no doubt that this was a misdirection on the part of the magistrate regarding the applicable procedure in holding a trial within a trial. It is common knowledge that trial within a trial is conducted in trials before the High Court and not in the District Court.

For the foregoing reasons, we are in agreement with Miss Maganga, learned State Attorney, that the conviction against the appellants could not be sustained on the evidence.

Accordingly, we allow the appeal, quash conviction and set aside the sentence. The appellants are to be set free forthwith unless otherwise lawfully held.

DATED at DAR ES SALAAM this 1st day of March, 2005.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR

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dated the 27th day of June, 1997
in
HC. Criminal Appeal No. 34 of 1996
Between

The Republic ..... Prosecutor
Versus
1. Hangi Said Mwinjuma
2. Mussa Said Mwinjuma @ Zungu ..... Accused
3. Mohamed Abdallah

In Court this 1st day of March, 2006

Before: The Honourable Mr. Justice D.Z. Lubuva, Justice of Appeal
The Honourable Mr. Justice J.A. Mroso, Justice of Appeal
And The Honourable Mr. Justice H.R. Nsekela, Justice of appeal

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THIS APPEAL coming for hearing on the 16th day of February, 2006 in the presence of the Appellants AND UPON HEARING the Appellants and Miss C.S. Maganga, State Attorney, for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day:-

IT IS ORDERED that the appeal be and is hereby allowed, conviction is quashed and the sentence is set aside. The Appellants are to be set free forthwith unless they are otherwise lawfully held.

Dated this 1st day of March, 2006.

Extracted on the 1st day of March, 2006.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR