

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

(CORAM: MUNUO, J.A., MSOFFE, J.A. AND KAJI, J.A.)

CRIMINAL APPEAL NO. 33 OF 2004

**JULIST ROBERT MWAIPOPO
AND TWO OTHERS
APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania at Tanga)**

(Longway, J.)

**dated the 4th day of March, 2003
in
Criminal Appeals No. 43, 33 and 45 of 2002**

JUDGMENT OF THE COURT

KAJI, J.A.:

Julist Robert Mwaipopo, Mathias Joseph Matiku Lukiko, and Bakari Salimu Katesa (who are hereinafter referred to as the 1st, 2nd and 3rd appellants respectively) together with two others, were jointly charged with the offence of attempted armed robbery contrary to Section 285 and 287 of the Penal code Cap. 16. They were also charged with an alternative count of grievous bodily harm contrary to Section 225 of the Penal Code Cap. 16.

It was alleged by the prosecution that, on 19th September, 1997, at about 00.30 hrs, at Monji Saruji Camp, within the Municipality of Tanga, the appellants jointly and together did attempt to rob at the house of Oscar Mbwambo whereby they discharged one round of ammunition from Rifle No. 4603; and beat one Andrew Makera on his left hand using a club.

Since the offence was alleged to have been committed at night it was necessary for the prosecution to prove whether the appellants were properly identified, and whether the appellants committed the offence charged. In discharging this burden, the prosecution called 4 witnesses. No. C.3541 D/Cpl Mathew (PW1) investigated the case and arrested the appellants. Andrew Makera (PW2) was the watchman of the house which was intended to be robbed. He testified how on the material day he was invaded by a group of bandits who were armed with a gun, a huge concrete block and clubs. They fired one gun shot apparently to scare those who might have come on their way. PW2 said, he identified Richard Somba Mahemba (first accused at the trial) who beat him on his left hand with a club. He also identified the 3rd appellant who had a huge concrete block. PW2 testified that he identified them further through electric light, and that he knew the 3rd appellant prior to the event.

David Mashokanya (PW3) was the owner of the house which PW2 was guarding. He testified how he heard a gun shot and switched on the light inside his house and the security light outside and saw and identified the 2nd appellant who was perched on a corner, armed with an iron bar. He said, he knew the 2nd appellant before the fateful day.

The last witness was Inspector Mussa (PW4). He testified how he worked jointly with PW1 in arresting the appellants in various places within the Municipality of Tanga, and how Richard Somba Mahemba (deceased) and the 1st appellant led him to Kange where the Rifle No. 4603 was found hidden in a pit.

In their defence, the appellants gave a total denial for committing the offence. The trial court convicted them and sentenced them to 15 years imprisonment and 6 strokes each. They were dissatisfied. Their appeal to the High Court at Tanga (Longway, J.) was dismissed. They still protested their innocence; hence this appeal. The 1st appellant preferred 5 grounds of appeal. The 2nd appellant 6 grounds of appeal. The 3rd appellant 7 grounds of appeal. All 18 grounds of appeal hinge on identification and the burden of

proof.

Before us, the 1st and 2nd appellants appeared in person(s). The 3rd appellant opted the appeal to be heard in his absence. Mrs. N. J. Ringo, learned State Attorney, represented the respondent Republic.

The 1st appellant reiterated what he had stated before the courts below, insisting that he was not identified at the scene of crime, and that, there was no exhibit to connect him with the offence. He denied to have led the police where the gun was hidden. He denied to be the son of Mama Matiti as alleged by one of the prosecution witnesses.

The 2nd appellant contended that, there was no exhibit or proper evidence that the offence of attempted robbery was committed. He challenged PW3 who alleged to have had identified him contending that, if he had covered his face with a hat as alleged by PW3, it was impossible for PW3 to identify him properly under the circumstances. The 2nd appellant pointed out that, PW1 testified that, when PW3 telephoned the police, he said he did not know the bandits. In that respect, it was the 2nd appellant's contention that, PW3 had not identified him at the scene. He argued that, had he really been at the scene, PW2 who knew him would

have identified him. The 2nd appellant further contended that, it was the 1st accused (deceased) who showed where the gun was, but that it was not connected with this case but another case.

On her part, Mrs. Ringo pointed out that, the 1st appellant was mentioned by his fellow accused, and that he was the one and the 1st accused (deceased) who showed where the gun was.

As far as the 2nd appellant is concerned, the learned State Attorney contended that, he was properly identified by PW3 through security electric light, and that PW3 knew him before. In that respect the learned State Attorney submitted that, he was properly identified by PW3 through electric light, and that PW3 knew him before the fateful day. As for the 3rd appellant the learned State Attorney submitted that he was properly identified by PW2 through electric light and that he knew him before.

On whether the appellants had intended to commit armed robbery, the learned State Attorney contended that, by firing a gun shot in the air, beating PW2, having an iron bar and a huge concrete block (Fatuma), together with the overall circumstances surrounding the event, it is obvious that the appellants had intended, and attempted to rob the

house of PW3.

The crucial issues in this case are two. **One** identification, that is, whether the appellants were properly identified. **Two** the burden of proof, that is, whether the prosecution proved the guilt of the appellants beyond all reasonable doubt.

The trial Magistrate considered at length the issue of identification and was satisfied that, under the circumstances of the case, the 2nd and 3rd appellants were properly identified. He cited the decision of this Court in **WAZIRI AMANI V. R.** (1980) TLR 250 to support the decision. For the 1st appellant the learned trial Magistrate relied on the principle on circumstantial evidence as set out in the case of **R. V. KIPKERING ARAP ROSKE AND ANOTHER** (1949) 16 EACA 135.

The learned Judge of the first appellate court concurred with the finding of the trial Magistrate on identification and cited the decision of this Court in **RAJAB KHALIFA KATUMBO AND THREE OTHERS V. R.** (1994) TLR 129, and **SIJALI JUMA KOCHO V. R.** (1994) TLR 206 and the **WAZIRI** case cited above. She also concurred with the trial court's

finding on the 1st appellant based on circumstantial evidence citing the decision of this Court in **P. J. KITOGOLE V. R.** (1992) TLR 51.

The learned Judge also concurred with the finding of the trial court that the prosecution evidence had left no colour of doubt on the guilt of the appellants.

On our part, after carefully considering the appellants' grounds of appeal, and their oral submissions before us, and the learned State Attorney's submission, together with the evidence on record, we have the following observations. We start with the 1st appellant. It is common ground that the 1st appellant was not identified at the scene of crime. He was only convicted on circumstantial evidence for being arrested in the circumstances described by PW4, and by accompanying the 1st accused (deceased) in leading the police to where the gun was. We have gone through the record and considered the circumstances under which he was arrested as described by PW4, and how the gun was recovered. We are satisfied that, the circumstances under which the 1st appellant was arrested, could have raised some suspicion in the mind of the court. But mere suspicion, however strong it may be, cannot be the basis to found a conviction. There was no cogent evidence that the

1st accused had mentioned the 1st appellant to be involved in hiding the gun. There was neither an Extra judicial Statement nor a cautioned statement to that effect. In that respect, it would be dangerous to uphold the conviction on him.

As far as the 2nd appellant is concerned, there is ample evidence by PW3 who saw him perched on a corner, facing the direction of the main house where PW3 was. He saw and identified him through the security light. Besides that, PW3 knew him before. Under the circumstances, we accept the finding of the courts below that the 2nd appellant was properly identified. The cases cited are relevant authorities in cases of this nature.

The 2nd appellant's allegation that PW3 had testified that the 2nd appellant had covered his face with a hat, has no merit, because it is on record that PW3 said the 2nd appellant was not wearing a hat, and that, at that time his head had been shaven.

The 2nd appellant also complained that, had he been at the scene of crime, PW2 who knew him very well, would have identified him. We take note of PW2's evidence that

the bandits divided among themselves into groups, and that the group which came his way was composed of the 1st accused (deceased) and the 3rd appellant. Under the circumstances, the 2nd appellant who was perched on a corner facing the main house, could probably not have been noticed by PW2. But PW3 identified him easily because he was facing where he was.

As far as the 3rd appellant is concerned, there is ample evidence by PW2 who saw and identified him through electric light. Besides that, PW2 knew him before the event. Under the circumstances, we accept the findings of the courts below that the circumstances were favourable for a proper identification, and free from danger of mistaken identity, and that the 3rd appellant was properly identified by PW2. The authorities cited are relevant in this case.

On the burden of proof, there is ample evidence that a gun shot was fired, the 1st accused (deceased) beat PW2 on his left hand with a club, the 2nd appellant had an iron bar and the 3rd appellant had a huge concrete block (Fatuma). All these happened at the house of PW3 where PW2 was guarding. All these show clearly that the appellants had intended and attempted to rob from the house of PW3. The

appellants' mere denial in the presence of such overwhelming prosecution evidence has no merit and was properly rejected by the courts below. The appellants' complaint that they were not involved in the recovery of the gun is of little value as long as one of them (1st accused) was involved. The sentence imposed is the minimum for the offence charged.

In the event, and for the reasons stated, we allow the appeal in respect of the 1st appellant Julist Robert Mwaipopo, quash the conviction and set aside the sentence. The 1st appellant is to be released from prison forthwith unless lawfully held. We dismiss the appeal by the 2nd appellant Mathias Joseph Lukiko and the 3rd appellant Bakari Salimu Katesa in its entirety.

DATED at TANGA this 3rd day of June, 2005

JUSTICE OF APPEAL

JUSTICE OF APPEAL

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

S. A. N. WAMBURA
SENIOR DEPUTY REGISTRAR

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(Longway, J.)

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**Julist Robert Mwaipopo
and two others Appellants
versus
The Republic Respondent
-----**

In Court this 3rd day of June, 2005

**Before: The Honourable Madame Justice E.N. Munuo, Justice
of Appeal
The Honourable Justice J. H. Msoffe, Justice of Appeal
And The Honourable Justice S. N. Kaji, Justice of Appeal
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THIS APPEAL coming for hearing on the 27th day of May, 2005 in the presence of the Appellant AND UPON HEARING the appellants and Mrs. N.J. Ringo, State Attorney for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for this day;

IT IS ORDERED that the appeal in respect of the 1st appellant, Julist Robert Mwaipopo, be and is hereby allowed, conviction is quashed and sentence is set aside. The 1st appellant is to be released from the prison forthwith unless lawfully held.

And the appeal in respect of the 2nd appellant Mathias Joseph Lukiko and the 3rd appellant Bakari Salumu Katesa be and is hereby dismissed in its entirety.

DATED this 3rd day of June, 2005.

Extracted on the 3rd day of June, 2005.

S. A. N. WAMBURA
SENIOR DEPUTY REGISTRAR