

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CRIMINAL APPEAL NO. 52 OF 2003

**FADHILI GUMBO MALOTA & 3 OTHERS..... APPELLANTS
VERSUS
THE REPUBLIC..... RESPONDENT**

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

(Kimaro, J.)

**dated the 11th day of December, 2002
in
Criminal Sessions Case No. 8 of 1998**

JUDGMENT OF THE COURT

MSOFFE, J.A.:

On the night of 19th January 1997 PW1 Abdallah Ngeleza and PW2 Mwanahamisi Hashimu, a husband and a wife respectively, were at their house which is situated somewhere at Mvumi Village, Kimamba Division, Kilosa District, Morogoro Region. At around 10.00 p.m. they were ambushed by armed bandits. The bandits were wielding a gun, machetes and iron bars. As the bandits broke into the house PW1 attempted to confront and stop them but to no success. In the course of time he (PW1) decided to jump through a window and seek refuge at his father's house which was a short distance away. His father was Rashid Lekaningo, the deceased in this case. As he ran to his father's house some of the bandits followed and beat him. The deceased came out in an attempt at rescuing his son, PW1. The deceased asked the bandits if they wanted to kill PW1. Apparently the bandits were not

happy with the question asked by the deceased whereupon they left PW1, set out on the deceased, beat him up with the use of iron bars and machetes and eventually shot him to death. As the bandits left PW1 and began the assault on the deceased this was the time when PW1 identified Shaha, Malota, Salehe and Majuto, the appellants in this case. In the meantime, PW2 also identified Malota and Shaha when the invading bandits were following PW1 to the deceased's house. At the same time, PW3 Ngesse Elias, a neighbour, who was asleep at the time, was awoken by his grandmother and told of the incident at the house of PW1 and PW2. PW3, whose house was a short distance of only fifty paces away from that of PW1 and PW2, went out. He heard PW1 crying for help. As the bandits were firing gunshots he was scared and hid by a nearby mango tree. While there he saw PW1 being dragged to his father's house. As the dragging was going on he identified Shaha, Malota and Majuto.

The appellants were charged on the basis of the above evidence. In their respective defences they denied committing the offence. Indeed their defences were that of an alibi. The High Court, Kimaro, J. sitting at Dar-es-Salaam, rejected their defences and convicted them accordingly. They are dissatisfied, hence this appeal.

It was common ground at the trial, as it is here, that determination of the case depended on identification. Mr. Ndolezi, learned advocate for the appellants, urged at length, *inter alia*, that in the justice of the case it was important for the prosecution witnesses to describe how exactly they identified the appellants. In this regard, he

maintained the view that the witnesses ought to have described the appellants, say by their height, dresses etc. In support of this point he cited this Court's decision in the case of **Raymond v. R** (1994) TLR 100 where it was 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.”

Further to the above passage Mr. Ndolezi also referred us to the case of **Mohamed Alhui v. Rex** (1942) 9 EACA 72, which was also cited in **Raymond's** case, where it was held:-

“In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.”

On her part Ms. C.S. Maganga, learned State Attorney, maintained basically that the appellants were identified on that fateful night on account of three main aspects: the witnesses knew the appellants

before the date of incident, the night was moonlit, and there was torchlight.

We are in entire agreement with Mr. Ndolezi that in a fit case it is important for an identifying witness to give the terms of description of an accused person. In this vein, a witness would be expected to describe the accused person, his/her attire, height etc. In that context, the decision in **Raymond**, especially the passage quoted thereto from **Alhui**, would be relevant. However, in the facts and justice of this case we are settled in our minds that such description was not necessary. We say so for one main reason:- The witnesses identified the appellants by their names. We are not persuaded that identification by giving descriptions could have taken the place of identification by names.

Having said so, the issue is whether the appellants were identified on the day in question. Our answer to the issue is in the affirmative. We say so in view of the following aspects of the evidence:- **One;** the incident, specifically the identification process, had three stages. The first stage was when the bandits released PW1 and embarked on the deceased. This was the time when PW1 identified Shaha, Malota, Salehe and Matola. In the second stage the bandits were pursuing PW1 when he was running to the deceased's house for his safety. At this stage PW2 identified Shaha and Malota. The last stage was at that point in time when PW3 saw PW1 being dragged out by the bandits. This was the occasion when PW3 identified Shaha, Matola and Majuto. **Two;** in the three stages the witnesses stood, or rather were, close to

the appellants to allow for correct identification. **Three;** the prosecution witnesses were not contradicted that they knew the appellants before the date of incident. They were fellow villagers and knew each other quite well. **Four;** the witnesses were also not contradicted that the night was moonlit. Through the moonlight they identified the appellants. **Five;** it may also be significant to mention here that all the above three prosecution witnesses were consistent in their respective pieces of evidence that Malota was the one carrying the gun on that fateful night.

Surely in the light of the above aspects of the evidence, like the trial judge, we are satisfied that the identification of the appellants was watertight. In this regard, there will be nothing to fault the trial judge in her findings and conclusions on the evidence of identification. In the same vein, she was justified in rejecting the appellants' defences of alibi.

Before we conclude the judgment we wish to make the following point. A look at the evidence in its entirety will show that the murder in question was committed in the course of committing a felony. The evidence shows that the appellants, and their colleagues who were not arrested and brought to justice, were involved in a robbery. Indeed, in the evidence of PW2 a sum of money was actually stolen in the process, although she did not state or specify the exact or specific sum. In this regard, the law is clear that a person who uses violent measures in the commission of a felony involving personal violence does so at his/her own risk and is guilty of murder if these violent

measures result in the death of the victim. In other words, if death is caused by an unlawful act in the furtherance of an intention to commit an offence malice aforethought is deemed to be established in terms of S. 200 (c) of the Penal Code, Cap 16. (Also see **Olenja v. R** (1973) EA 546, **Sentali Lemandwa v. R** (1953) 20 EACA 230, and **Manazo Mandundu and Another v. R** (1990) TLR 92). In the instant case malice aforethought was established in that the death occurred in the course of committing the robbery in question.

In the event, we are satisfied that the appeal has no merit. It is dismissed accordingly.

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

E.N. MUNUO
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.M. RUMANYIKA)
DEPUTY REGISTRAR

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**(Appeal from the decision of the High Court
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Between

The Republic.....

Prosecutor

Versus

Fadhili Gumbo @ Malota & 3 Others.....

Accused (s)

In Court this 1st day of September, 2005

**Before: The Honourable Madame Justice E.N. Munuo, Justice
of Appeal**

The Honourable Mr. Justice H.R. Nsekela, Justice of

Appeal

And The Honourable Mr. Justice J.H. Msoffe, Justice of Appeal

THIS APPEAL coming for hearing on the 15th day of August, 2005 in the presence of the Appellant AND UPON HEARING Mr. H. Ndolezi, Counsel for the Appellant and Ms. 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 dismissed.

Dated this 1st day of September, 2005.

Extracted on the 1st day of September, 2005.

(S.M. RUMANYIKA)

DEPUTY REGISTRAR