IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 44 OF 2002

1. HASSANI SAIDI]
2. SEMENI ALLY] ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ihema, J.)

dated the 25th day of September, 2001
in
HC. Criminal Appeal No. 5 of 2000

JUDGMENT OF THE COURT

21 June & 10 July 2006

LUBUVA, J.A.:

The appellants, Hassan Saidi and Semeni Ally, together with others who are not subject of this appeal, were charged in the District Court of Ilala with and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code. The trial District Court sentenced the appellants to fifteen years (15) term of imprisonment. The first appeal to the High Court was dismissed. However, the sentence was substituted thereof to thirty years imprisonment. Dismissing the appeal, the High Court, (Ihema, J.), like the trial magistrate held that the evidence on the identification of the

appellant was watertight. From the decision of the High Court, this appeal has been preferred.

The facts as found at the trial were that on 24.8.1996 at about 2.00 a.m., at Vingunguti area, within the outskirts of Dar-es-Salaam, the house of the complainant, Mpalange Shaibu (PW1), was invaded by a gang of thieves. The door was forced open and a group of about 20 people entered armed with pangas, matchet, iron bars and sticks. PW1 managed to get out of the house and raised an alarm. In the process, the thieves made away with an assortment of household items, the property of PW1. Seif Mpalange (PW2) and Zuberi Mpalange (PW3), family members of PW1 as well as PW1 claimed in their evidence that they identified the appellants.

In their defence at the trial, the appellants denied involvement in the commission of the offence. The trial magistrate was satisfied that on the evidence, the case for the prosecution had been proved beyond any reasonable doubt. He made a specific finding that the first appellant, Hassani Saidi, who was referred to at the trial as the 5th accused, among other accused persons was identified. However, with regard to the second appellant (second accused at the trial) no finding was made. Nonetheless, at the end of the trial, both the first and second appellants were convicted as charged.

In this appeal, the main issue is whether the conditions were

favourable for a proper identification of the appellants. Mrs. Mutaki, learned State Attorney for the respondent Republic, took the view that at the time of the incident, the conditions were not favourable. For this reason, she did not support the conviction. First, she said as the incident took place at night when it was dark, it was important to establish that the conditions were such that there was no possibility of mistaken identity. n this case, the State Attorney went on in her submission, the evidence of PW1, PW2 and PW3 does not show how these witnesses were able to identify the appellants. For instance, Mrs. Mutaki said, the intensity and illumination of the light was not indicated and secondly, if, according to the evidence of some of these witnesses, the electric bulb was broken when the thieves invaded the house of PW1, the scene of crime, it is not clear how the appellants were identified. That is, if the electric bulb, the source of light was broken upon the entry of the thieves into the house, then the incident took place in darkness, the State Attorney submitted. In that situation, she maintained that the possibility of mistaken identity of the appellants could not be ruled out. As the evidence of visual identification was not watertight, it was unsafe to sustain the conviction, Mrs. Mutaki urged.

It is common ground that the identification of the appellants at the time of the incident was primarily based on the visual identification of PW1, PW2 and PW3. These were the only witnesses who saw and identified the appellants at the scene of crime. It is trite principle of law that evidence of visual identification is of the weakest kind and

most unreliable which should only be acted upon cautiously when the court is satisfied that the evidence is watertight and that all possibilities of mistaken identity are eliminated. This principle was enunciated by this Court in **Amani Waziri v R** (1980) TLR 250.

In this case, it is undisputed that the house of Mpalange Shaibu (PW1) was invaded by a gang of thieves at night time at about 2 a.m. when PW1, PW2 and PW3 were awoken from sleep. In such circumstances, as correctly submitted by Mrs. Mutaki, learned State Attorney, the evidence of PW1, PW2 and PW3 has to be treated with great caution in order to ensure that such evidence is watertight. From the evidence of PW1, it is apparent that soon after the thieves had invaded his house, he managed to get out of the house. So, for sometime, the thieves were inside the house when PW1 was outside. In that situation, it is not clear how he was able to identify the appellant from among the group of thieves. Furthermore, PW1 does not show the intensity of the light from the electric light which enabled him (PW1) to identify the appellants. Likewise, in the case of PW2, the position is not clear either. If, according to PW2, the electric bulb, the source of the light, was broken when the thieves forced their way into the house, it would mean that the incident took place in darkness. In that light, it is doubtful that PW2 was in a position to identify the appellants properly. Zuhura Mpalange (PW3), the daughter of PW1, also testified. She said that she knew the appellants who lived in the same area at Vingunguti. On the day of incident at about 2.00 a.m. she was awoken from sleep in a room within the house of PW1.

Although she stated that she identified the appellants from what is described as security light, there is no clarification on what kind of light it was that enabled her (PW3) to identify the appellants.

On such evidence, the incident having taken place at night, we are in agreement with Mrs. Mutaki, learned State Attorney, that the evidence of visual identification of the appellants was not watertight. As this Court observed in **Waziri Amani** (supra), the incident took place under such circumstances that from the evidence of visual identification it can hardly be said that all possibilities of mistaken identity were eliminated. With such doubts unresolved, it would be unsafe to sustain the conviction.

In conclusion, we also wish to make brief observation on the following aspect. As observed earlier, at the trial, in the judgment the trial magistrate made a specific finding that the other co-accused persons not subject of this appeal together with the 1st Appellant, Hassani Saidi, were identified by the witnesses for the prosecution. However, no such finding was made in respect of the second appellant, Semeni Ally. In the absence of specific finding by the trial court on the identification of the second appellant the basis of the conviction against the second appellant (2nd accused at the trial) is questionable as well. Having taken the view of the matter along the line indicated above, we need not pursue this aspect any further.

For the foregoing reasons, we allow the appeal, quash conviction and set aside the sentence. The appellants are to be released forthwith unless otherwise lawfully held.

DATED at DAR ES SALAAM this 29th day of June, 2006.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
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

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(Ihema, J.)

dated the 25th day of September, 2001
in
HC. Criminal Appeal No. 5 of 2000
Between

The Republic ..... Prosecutor
Versus
1. Hassani Saidi]
2. Semeni Ally]..... Accused

In Court this 29th day of June, 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 J.H. Msoffe, Justice of Appeal

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THIS APPEAL coming for hearing on the 21st day of June, 2006 in the presence of both appellants AND UPON HEARING both appellants and Mrs. Mutaki, 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 sentence is set aside. Both appellants to be released forthwith from prison unless forthwith unless they are otherwise lawfully held.

Dated this 29th day of June, 2006.

(S.A.N. WAMBURA)

SENIOR DEPUTY REGISTRAR

Extracted on the 29th day of June, 2006.