IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And MBAROUK, J.A.)
CRIMINAL APPEAL NO. 36 OF 2005
MUSSA ABDALLAH …….APPELLANT
VERSUS
THE REPUBLIC ,……RESPONDENT
(Appeal from the judgment of the High
Court of Tanzania at Mwanza)
(Mihayo, J.)
Dated the 24th day of May, 2004
In
Criminal appeal No. 41 of 2002

REASONS FOR THE JUDGMENT OF THE COURT

17 & 14 April 2008

MBAROUK, J.A.:

When the appeal was called on for hearing, we allowed the appeal, quashed the conviction and set aside the sentence. We further ordered for the appellant's release from prison forthwith unless lawfully held therein. We reserved our reasons which we now give.

The appellant with five others were charged with the offence of armed robbery contrary to Sections 285 and 286 of the Penal Code before the time of stealing a gun was short in order to obtain and retain the properties owned by the complainant (PW1).

In this appeal, the appellant appeared in person, while Mr. Edwin Kakolaki, learned State Attorney, represented the respondent Republic. The appellant filed four grounds of appeal in which he is basically claiming that his identification by PW1 and PW3 was not water-tight.

Mr. Kakolaki, learned State Attorney, did not support the conviction. He based his submission on two main points, namely, that the evidence concerning the identification of the appellant was not water-tight, and that the prosecution evidence contained contradictions which created doubts that the as we as not proved beyond reasonable doubt.

On the issue of identification, the learned State Attorney contended that there as

no proper identification of the appellant. He further submitted that the record shows that on the fateful day the incident happened at night when PW1 and PW3 were asleep. A door was opened by a big stone and around eight people entered into PW1'S house. PW1 shouted for help, but he was clubbed and forced to cover himself with a bed-sheet. PW1 said he managed to identity the appellant. However Mr. Kakolaki doubted whether a person covered with a bed-sheet could identify another person in room. The learned State Attorney added that, the record shows pW1 stated that one of the torches was flashed on him and he was able to identify one of the accused person in the dock. He was of the view that usually when torch light is flashed on one's face it is very difficult to identify the person flashing the torch. Hence he submitted that the possibility of PW1 to have identified the appellant was very doubtful. Even if PW1 contended that he used to see the appellant at Mlimani Park Bar area, hence that he identified him at night on the fateful day, still Mr. Kakolaki went on to submit, that was not enough to establish that the witness identified the appellant.

Furthermore, Mr. Kakolaki observed that there are various contradictions there are various contradictions in the evidence of PW1- the husband and PW3 – the wife. Whereas PW3 said that it was her husband (PW1) who lit his torch, PW1 himself stated that one of the bandits flashed the torch on him, and furthermore he did not say that he had a torch. The learned State Attorney added that, when PW3 was cross-0examined by the appellant she is recorded to have said that when the appellant entered the house **there was light** and the appellant took away a torch from her husband (PW1). However, PW 1 said that **it was dark inside his room.**

Another contradiction is on whether or not PW1 was admitted to the Hospital. Whereas PW1 said that **he was hospitalized for one week and then discharged,** PW3 said that his husband (PW1) **was not admitted in the hospital at all,** he was treated and went at home.

From those contradictions, Mr. Kakolaki, was of the view that the credibility of PW1 and PW3 was doubtful.

The court in the case of **Raymond Francis v. Republic** [1994] TLR 100 it was held that:

> "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."

In the instant case, the issue of identification was of paramount importance in proving the prosecution case. However, as correctly stated by Mr. Kakolaki, the prosecution relied upon the evidence of PW1 and PW3, whose evidence was weak on the aspect of identification. As stated by Mr. Kakolaki, it was uncertain whether there as enough light to allow for correct identification. Furthermore,

the contradictions in the evidence of these two witnesses left much to be desired.

Bearing in mind that the incident took place at night there was a need for proper identification of the appellant. This Court in the case of **Waziri Amani V. Republic** [1980] TLR 250 at page 252 gave guidelines to which courts should direct themselves on the issue of visual identification. The following aspects are to be considered:

> "The time the witness had the accused under observation; the distance at which he observed him; the conditions iun which such observation occurred, for instance, **whether it as day or night time, whether there as good or poor lighting at the scene;** and further whether the witness knew or had seen the accused before or not."
> (Emphasis added).

As shown earlier, the alleged armed a robbery took place at night and there are contradictory statements as to whether there was good or poor light at the scene. While PW1 said it was dark inside the room, pw3 said there as light. Even if we presume that there as light inside PW1's room, PW1 himself testified to the effect that he as covered with a bed-sheet. It is doubtful whether a person covered with a bed-sheet can identify a person in front of him. This creates doubt on the identification of the appellant.

Furthermore, the inconsistencies and contradictions among the prosecution witnesses – PW1 and PW3 left questions unanswered, thus creating doubts as to whether the prosecution side proved its case beyond reasonable doubt. We think those lingering doubts on the case for prosecution have to be resolved in favour of the appellant.

It was for the reasons stated above that e were of the opinion that the appellant's conviction was bad in law, hence we allowed the appeal.

DATED at MWANZA this 21st day of April, 2008

J. H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRA