IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: KILEO, J.A., BWANA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 86 OF 2007

1. EMMANUEL MDENDEMI
2. PAULO MGAYA.....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of High Court
of Tanzania at Mbeya)

(Lukelelwa, J.)

Dated 27th day of November, 2006
in
(DC) Criminal Appeal NO. 114 OF 2005

JUDGMENT OF THE COURT

8 September 2009

BWANA, J.A.:

Three accused persons were charged with Robbery with Violence contrary to sections 285 and 286 of the Penal Code. The trial Court – The Njombe District Court – convicted all the three, sentencing each one of them to a prison term of 35 years plus 12 strokes of the cane. They were also ordered jointly to refund the complaint, the sum of Tshs. 1,297,000/= for property stolen.

Aggrieved by that decision of the trial Court, all the three appealed against both conviction and sentence. In its judgment delivered on 27 November, 2006, the first Appellate Court (the High Court of Tanzania at Mbeya) allowed the appeal of the third appellant, one **Goodluck Wageni @ Mgusa**. The first two and who are the present appellants' appeals were dismissed – hence this second appeal.

Both appellants were unrepresented before this Court. In their respective Memorandum of Appeal, they raise in essence two grounds namely-

1. That the identification did not meet the required legal standards;

2. That the recording and production of their cautioned statements were made in contravention of laid down procedure.

Miss Arafa Msafiri, learned State Attorney, did support the appeal ostensibly agreeing with the appellants' grounds of appeal.

The facts of the case may be restated briefly as follows. On 13th December, 2004 at about 3:00 a.m. the complainant, PW2 was awakened by cries of her children who were sleeping in an adjacent room. She found out that both the door to her bedroom and the main door to her house had been forced open. She lit up a kerosene lantern and raised an alarm. As she did so, three men, who she claimed to know, burst into her bedroom. One of the three (i.e the third accused at the trial stage) dragged her to the rear compound of the premises while beating her and demanding money from her. However, the present second appellant is on record as asking the third accused not to beat the complaint, PW2.

From the rear compound, they dragged her to the shop – which she jointly managed, with her husband, PW3. From that shop, it was averred, the bandits took bundles of cigarettes valued at Tshs. 28,000/= and two mobile phones valued at Tshs. 130,000/=. They then dragged PW2 into her bedroom from where they took away shs. 1,375,000/=.

According to PW2, she identified her assailants as living in the same village (of Uwemba) with her. She even could recognize their voices. One

of the assailants and the present second appellant had worked for her for six months as a house servant.

The matter was reported to the police and the suspects were subsequently arrested and charged. Before being arraigned however, PW4 recorded a cautioned statement of the first appellant in which he confessed committing the offence in the company of the other two.

During the trial, all the three accused person entered a plea of not guilty. As part of his grounds of appeal to the High Court, the first appellant raised the issue of identification made by PW2, claiming that it did not meet the standard laid down in the cases of **Waziri Amani vs Republic** [1980] TLR 250; and in the case of **Augustine Kente vs Republic** (1982) TLR 122. He has raised the same argument before us.

The second appellant argued before the High Court that since the incident occurred around 3:00 a.m., there was a possibility of making mistaken identity even if PW2 knew him well. He repeats the same argument before us.

The first appellate Court dismissed their appeals, hence this second appeal. On a second appeal, as was stated by this Court in the case of **Edwin Mhando vs Republic** (1993) TLR 170,174:

> ..."we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If, as in this case, both Courts completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction this Court must, in the interest of justice, intervene."

We will shortly show the relevancy of the foregoing quotation to the instant appeal.

We start by considering the issue of identification, particulary Visual Identification. The crime with which the appellants were charged took place around 3:00 a.m. The prosecution relies mainly on the evidence of PW2, the house lady who was awakened by the cries of her children. She

lit a lantern lamp and claims to have managed to indentify three intruders, including the two appellants. The appellants now claim that the light was not favourable for identification. The Respondent herein is of similar views.

In the case of **Anthony Kigodi vs Republic**, (Crim. Appeal No. 64 Of 2005 – unreported) this Court had occasion to restate the principle governing favourable identification. It stated:

> "We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of East Africa in **Abdalla bin Wendo and Another vs Rex (1953) 20 EACA 116** and followed by this Court in the much celebrated case of **Waziri Amani vs Republic (1980) TLR 250** regarding evidence of visual identification. The principle laid down in these cases **is that in a case involving evidence of visual identification, no Court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight.**" (Emphasis provided).

That cardinal principle has been applied by this Court in other decisions. See **Raymond Francis vs Republic (1994) TRL 100; Musa Abdallah vs Republic (Criminal Appeal No. 36 of 2005); Rizali Rajabu vs Republic (Criminal Appeal No. 110 of 2006); Pascal Christopher and others vs Republic (Criminal Appeal No. 106 of 2006).**

The views expressed by this Court in the Raymond case (supra) are very relevant to this appeal. It was stated therein thus:

> ..."it is elementary that in a criminal case where determination depends on identification, evidence on conditions favouring a correct identification is of the utmost importance..."

In other words, the identification must be watertight. It is said to be so when it leads to the exclusion of all possibilities of mistaken identity. In the case of Paschal Christopher and others (supra), this Court held that exclusion all other factors occurs when the following is evident.

First, the trial Court had addressed itself to the issue of time – how long did the witness had the accused under his/her observation.

Second, what was the estimated distance between the two.

Third, if it were at night (as in the instant case) which kind of light did exist.

Fourth, had the witness seen the accused persons before – if so, when, where and how often.

Fifth, if the whole evidence before the Court is considered, are there material impediments or discrepancies affecting the correct identification of the accused by the witness.

Sixth, in the course of observation of the accused by the witness, was there any obstruction experienced by the witness, obstructions which may have interrupted the latter's concentration.

The factual evidence on record suggest that the attack against PW2 was sudden. After lighting the lantern, the bandits rushed into the

bedroom and drugged her out to the court yard and only later back to her room. It may be argued that all this was ample time and close enough for favourable identification. A word of caution however. There is no evidence showing where the lantern was positioned. Was it in PW2's bedroom? If so, then her being dragged to the backyard means she was dragged into darkness. What was the intensity of the light produced by that lantern? How long did the whole saga last? There is no evidence suggestion time frame – from the start of the attack to its conclusion. PW2 may have know the bandits as she claims that they are neighbours, living at Uwembe village. That per se, in our considered opinion, does not establish identity of the bandits to the exclusion of all chances of mistaken identity especially at that time of the night. Therefore all these factors tend to show that the identification of the assailants was not free from difficulty. The above considered in light of the principles enunciated in the Paschal Christopher case, (supra) we are of the settled view that the quality of identification was not watertight. Rather, it was poor.

The issue of voice recognition was also raised. This Court had occasion to consider the same – see **Stuart Erasto Yakobo vs The**

Republic (Criminal Appeal No. 2002 of 2004 – unreported); **Badwin Komba @ Ballo vs Republic** (Criminal Appeal No. 56 of 2003 – unreported); **Kanganja Alli and Juma Ally vs Republic** (1980) TLR 270. It is settled, by virtue of the foregoing authorities, that voice identification is one of the weakest king of evidence thus requiring great caution before acting on it. As was conceded by the State Attorney in this appeal, there is always a possibility of one imitating the voice of another person.

Voice identification may be helpful in situations where a witness is very familiar with the voice in question. In the instant appeal it is on record that the second appellant had worked for PW2 for six months as her house servant. We are convinced that under normal circumstance, she could identify the voice of the said appellant. But, how about that of the other bandits? Therefore, we are of the view that since both the visual and voice identification were made under unfavourable conditions, the possibility of mistaken identity cannot be ignored.

The other issue raised by the appellants is the manner the cautioned statement was recorded and subsequently tendered in Court during the trial. The record of the trial Court leaves much to be desired in so far as this issue is concerned. The first appellate Court did not seriously address its mind to the issue. The key point for our consideration here is whether or not the appellants were accorded an opportunity to raise objection – if any – before PW4 tendered the said statement as an exhibit. From the record, it is apparent that the cautioned statement was admitted in evidence as Exh. P2 without the appellants being asked whether they had any objection or not.

It is evident that the trial Court relied partly on the said Exh. P2 to convict the appellants. It is a well settled principle of law that any confession must be free from compulsion, inducement, promises or threats. If the contrary is the case, then such a statement should not be admitted in evidence.

Going by the record, it is apparent that the appellants were not accorded the opportunity to raise any objections on the statement before

the same being admitted. The trial magistrate should have informed the appellants of their right on the subject. That should have been recorded as well as the appellants' response on the issue. This Court had an opportunity to consider this subject in the case of **Twaha Ali and 5 others vs the Republic** (Criminal Appeal No. 78 of 2004) (unreported) and stated thus:

> ..."We wish to emphasize the importance and necessity for trial Courts not only to inform accused persons of this right ... but also to remind the Courts the duty they have to record faithfully what an accused person says in response ... accused person's procedural rights are there to be strictly observed not only for their benefit but also to ensure that justice is done in the case. **The omission committed by the trial court was, in our view, a fundamental and incurable irregularity and it greatly prejudiced the appellants ... we are accordingly constrained to discount the confession evidence of the appellants**..." (Emphasis provided)

We subscribe to the above views.

Once the alleged confession of the appellant is rejected and our earlier views on identification taken on board, it leaves the prosecution case in a very weak and precarious position, not supportive of the long held principle of proof beyond reasonable doubts.

We therefore allow the appeals, quash the appellants' convictions and set aside the sentences of imprisonment imposed on each one of them. We do order that unless the appellants (or any one of them) are otherwise lawfully held, they should be set free forthwith.

DATED at MBEYA this 9th day of September, 2009.

E. A. KILEO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

J. S. MGETTA
DEPUTY REGISTRAR