IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: RAMADHANI, C.J., MUNUO, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 50 OF 2005

HOROMBO ELIKARIA APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(LUKELELWA, J.)

Dated the 1st day of November, 2004

in

Criminal Appeal No. 31 of 2004

JUDGMENT OF THE COURT

November 23 & 27, 2009

MJASIRI, J.A.:

The appellant, Horombo Elikaria was charged and convicted of the offence of robbery with violence contrary to section 285 and 268 of the Penal Code Cap 16 R.E. 2002. He was sentenced to 30 years imprisonment. Being aggrieved with the decision of the District Court the appellant appealed to the High Court of Tanzania at Mtwara against both conviction and sentence. His appeal to the High Court was also unsuccessful. Hence the appeal to this Court.

The Appellant filed ten (10) grounds of appeal. The sum total of the said grounds of appeal is that that there was no sufficient evidence to base his conviction and that the prosecution evidence taken as a whole, did not prove the case against him beyond reasonable doubt.

At the hearing of the appeal, the appellant was unrepresented and the Respondent was represented by Ms Angela Kileo, learned State Attorney.

Briefly the facts of this case are as under:- On June 4, 2003 at 02.00 a.m. the complainant, PW1, was travelling to Dar es Salaam. On his way to the bus stand, he was accosted by the appellant and another person. The appellant had covered himself with a shirt. When he came towards PW1, he covered the complainant with the shirt. The bandits took Shs 2,200,000 from PW1 and ran off. PW1 could identify the culprits, one of them being the appellant because there was moonlight. The robbery was conducted very swiftly and then the parties ran off. PW1's attempt to raise an alarm was unsuccessful given that it was late in the night.

The Republic did not support the conviction. Ms Kileo submitted that the main issue in this appeal is identification. She argued that the appellant was not properly identified and given the circumstances of the case there was a great possibility of mistaken identity. She submitted that the trial magistrate did not address himself on the issue of identification. The only evidence linking the appellant with the offence is that of PW1. In view of the identification weakness there was no other evidence to support a conviction.

We are inclined to agree with the learned State Attorney that the circumstances were not favourable for adequate identification. The crime which the appellant was convicted with took place around 02.00 hours and the light relied upon was moonlight.

In the case of Anthony Kigodi v Republic, Criminal Appeal No. 94 of 2005 (unreported) this Court stated as under:-

> *"We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of Eastern Africa in Abdullah bin Wendo and another v REX (1953) 20 EACA 116 and followed by this Court in the celebrated case of Waziri Amani v Republic (1980) TLR 250 regarding evidence of visual identification, no Court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely water tight"*

This principle is reflected in other decisions of this Court. See **Raymond Francis v Republic** (1994) TLR 100; **Musa Abdallah v Republic,** Criminal Appeal No. 36 of 2005 (unreported); **Maselo Mwita and Another v R,** Criminal Appeal No. 63 of 2005 (unreported) and **Shamir John v Republic,** Criminal Appeal No. 166 of 2004 (unreported)

In issues involving identification the identification must be water tight. This means that the evidence should exclude any possibility of mistaken identity. In the case of Raymond Frances (supra) it was stated as follows:-

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

According to the evidence on record the attack by the robbers was sudden and swift. PW1 was covered with a shirt, there was no light at the scene save for the moonlight. The pivotal question is, is the evidence on record sufficient to uphold a conviction. The only evidence linking the appellant with the crime is that of PW1. As rightly pointed out by the learned State Attorney the incident occurred at night. The circumstances of the identification of the appellant were therefore not favourable. In Abdullah Bin Wendo v R (1953) 20 EACA 166 it was stated that there is always the need for testing with greatest care the evidence of a single witness in respect of identification. See Roria v Republic (1967) EACA; R v Turnbull 1977 QB 224; Mburu and another v R (2008) 1 KLR 1229.

In Waziri Amani v The Republic [1980] TLR 250 it was held by the Court that the evidence of visual identification is easily susceptible to error.

In criminal cases the prosecution is required to prove the case against the accused person beyond reasonable doubt. Given the evidence on record we have no doubt in our minds that the prosecution has failed to meet the standards required under the law.

Having said the foregoing, we are satisfied that there is no sufficient evidence to warrant the appellant's conviction. We therefore allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment. The appellant is to be released forthwith unless otherwise lawfully held.

DATED AT MTWARA this 27th day of November, 2009.

A.S.L. RAMADHANI
CHIEF JUSTICE

E.N. MUNUO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(KITUSI)
SENIOR DEPUTY - REGISTRY