IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J.A. And ORIYO, J.A.)

CRIMINAL APPEAL NO. 288 OF 2007

OMARY MAJID.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Principal Resident Magistrate Court at Moshi)

(Mgaya, PRM, Ext. J.)

dated the 10th day of April, 2007
in
Criminal Appeal No. 13 of 2007

JUDGMENT OF THE COURT

17 & 25 August, 2010

ORIYO, J.A.:

In the District court of Moshi, the appellant Omary Majid was charged with and convicted of Armed Robbery contrary to sections 285 and 286 of the Penal Code. He was sentenced to thirty years (30) imprisonment. His appeal to the High Court which was transferred to the RM's Court with Extended Jurisdiction pursuant to Section 45(2) of the Magistrates Courts Act, Cap 11, R.E 2002, was unsuccessful. Still believing in his innocence, he has preferred the second appeal against the decision of Ms Frederica Mgaya, PRM (Extended Jurisdiction) as she then was.

When the appeal came up for hearing, the appellant was unrepresented, he appeared in person. For the respondent Republic, Mr. Juma Ramadhani, learned Senior State Attorney, appeared on its behalf.

Though the memorandum of appeal listed seven grounds of appeal; in effect there were only six grounds of appeal as grounds 2 and 6 were both on identification. The appellant's complaint in grounds 2 and 6 was that there was no identification parade to identify him and the visual identification at the scene of the incident was not watertight. His complaints in the other grounds of appeal were that he was convicted on insufficient evidence; PF 3 was admitted without complying with section 240(3) of the Criminal Procedure Act, Cap 20, RE 2002; PW4, one Detective Alifa, was not listed among prosecution witnesses during Preliminary Hearing; some important witnesses were not summoned; and lastly was failure of the trial court to hold trial within trial before admitting the appellant's confession.

At the hearing of the appeal, the appellant had nothing useful to add besides adopting the grounds of appeal listed above.

In his opening remarks, Mr. Juma Ramadhani, learned Senior State Attorney informed us that the respondent Republic supports the conviction and sentence of the appellant. Starting with ground 5 of appeal, he submitted that in terms of section 143 of the Evidence Act, Cap 6, RE 2002, there is no legal requirement that a particular number of witnesses have to testify to prove any fact and that what matters is the credibility of the witnesses. He referred us to two decisions of this Court in support of his submission. These are the cases of **SHEHE HAMZA vs R** Criminal Appeal No. 114 of 2004 (unreported) and **YOHANNIS MSIGWA vs R** [1990] TLR 148.

On ground 7 of appeal that the appellant's statement was admitted without conducting a *"trial within a trial,"* the learned Senior State Attorney stated that there is no such procedure in District Courts but an Enquiry can be held in appropriate circumstances; but such circumstances did not exist in the instant case.

With regard to ground 3 of appeal, the learned Senior State Attorney readily conceded that the provisions of Section 240(3) of the Criminal Procedure Act were not complied with before PW3's PF 3 was admitted as an exhibit. However the learned Senior State Attorney submitted that the omission does not affect the prosecution case because there is other evidence on record sufficient to uphold the appellant's conviction. He referred us to this Court's decision in the case of **SELEMANI MAKUMBA vs R** Criminal Appeal No. 94 of 1999 (unreported), where a similar problem arose; and the Court was satisfied that even in the absence of the testimony of PF 3 there was sufficient evidence on record to convict.

As for the complaint in ground 4 of appeal that PW 4 testified while his name was not among those listed at the Preliminary Hearing as one of the intended witnesses, the learned Senior State Attorney contended that there is no equivalent of Section 289 of the Criminal Procedure Act applicable in subordinate courts.

On the visual identification of the appellant at the scene of crime complained of in grounds 2 and 6 of appeal, the learned Senior State Attorney submitted that the conditions at the scene were conducive for a positive identification of the appellant. He described the conditions as including the incident happening in broad daylight at 11 am; there was ample time spent by the prosecution witnesses with the robbers and at close range. Further submission was that the prosecution evidence was corroborated by the testimonies of DW2 and DW3. In support of his submissions the learned Senior State Attorney referred to the Court's decision in the case of **CHRISTIAN KALE & ANOTHER Vs R** [1992] TLR 302 at 304. Also cited was the case of **BENSON KIBASO NYANKONDA vs R** [1998] TLR 40 at 41 in support of his submission that the value of an identification parade is merely corroborative in nature and not otherwise.

In concluding his submissions, the learned Senior State Attorney, invited us to dismiss the appeal for lack of merit.

Before we discuss the issues raised in the memorandum of appeal, we will briefly give an account of the case before the trial court.

On 1 May 2004 at about 11 am, PW3, **Heri Anaseli Kuwero,** was working in his farm. Together with him were his grandson, **Erieri Daniel,** PW2 and **Mikidadi Shabani,** PW1 and some casual labourers. While working on the farm, they were invaded by a group of four youths including the appellant. Some asked for jobs but there were none available. Others took the labourers hoes and did some farmwork in return for money. Meanwhile the appellant snatched a radio from PW2 and disappeared with it. When PW2 tried to recover it the appellant threatened him with a **panga.** PW1 and PW2 followed the youths outside the farm crying for help. Once outside, the youths started throwing stones at PW1 and PW2 who were rescued by neighbours. On return to the farm they found PW3 lying helplessly on the ground, naked, having been severely assaulted, injured and robbed by the youths of his clothes, cash money, mobile phone siemens C. 25, watch, Panga, etc. When neighbours arrived at the scene, the youths ran away and someone

within the farm gave PW3 the names of the youths. Subsequently, PW3 reported the incident to the Police and gave the names of the four youths which included that of the appellant.

With the above facts, the issue before us is whether in the circumstances of the case, the appellant was positively identified.

It is trite law that evidence of visual identification is of the weakest character and most unreliable and should be acted upon cautiously when the court is satisfied that the evidence before it is watertight and all possibilities of mistaken identity are eliminated; See the Court's decisions in the cases of **WAZIRI AMANI vs R (1980)** TLR 250, **MAGWISHA MZEE & ANOTHER vs R**; Criminal Appeal 465 and 467 of 2007 (unreported).

We have taken into consideration the fact that the assailants' visit to the farm of PW3 was at around 11 am; in broad daylight. As stated earlier the appellant and his colleagues took time talking to the prosecution witnesses and the labourers on availability of jobs for them on the farm. Some of the assailants took hoes from

the labourers and tried to work on the land in return for payment. This engagement between the prosecution witnesses (PWs), labourers and the assailants must have provided PWs with ample time to observe the assailants at close range. This, in our view, must have been long enough for PWs to ascertain without any doubt the identity of the appellant. Further, someone within the farm had given to PW3 the names of the four youths which included that of the appellant. And that is why when PW3 reported the incident to the Police he named the appellant as one of the assailants.

In addition to PW's identification of the appellant, there was corroboration of the prosecution evidence on the identification of the appellant by the defence. DW2, Josephina Joseph and DW3, Catherine Saba, testified that 2 days after the incident; on 3/5/2004, the appellant gave to DW2 a mobile phone, Siemens C.25 as a bond for shs 20,000/= loan advanced to him by DW2. This mobile phone was the one stolen from PW3 who had made marks of "H" at various parts of the phone. We think, in the

identity.

On the failure by the trial court to hold an identification parade, it was unnecessary in view of the abundance of other watertight evidence on the identification of the appellant. And as this Court stated in the case of **BENSON KIBASO NYANKONDA @ OLEMBE PATROBA APIYO vs R** 1998 TLR 40 at 41:-

> *"Identification parade proceedings are merely investigatory in nature; their outcome has no independent probative value but can only corroborate the evidence given in court by the identifying witness."*

We are therefore in agreement with the learned Senior State Attorney that the evidence of identification of the appellant was watertight; and the test laid down in the case of **WAZIRI AMANI** *(supra)* was met. We are satisfied that the appellant was positively identified as one of the bandits who invaded PW3's farm and committed the offences he was charged with and convicted of.

We have decided affirmatively on the issue of identification of the appellant. We shall now go through the rest of the remaining grounds albeit, briefly.

The complaint in ground 3 of appeal is that the evidence of PF 3 was admitted as Exh "P1" without informing the appellant of his right to summon the author for cross-examination in terms of Section 240(3) of the Criminal Procedure Act. As stated above, the learned Senior State Attorney conceded that the provisions of Section 240(3) were not complied with. With respect, we agree with the learned Senior State Attorney that even if the evidence of PF 3 was expunged from the record, the remaining testimony on record in particular on the crucial issue of identification, is sufficient to uphold conviction.

We now come to the complaint in ground 4 that PW 4, Detective Alifa was not included as a witness during the Preliminary hearing. With respect, we are in agreement with Mr. Juma Ramadhani that there is no equivalent of Section 289 of the Criminal Procedure Act applicable in subordinate courts. For ease of

reference section 289 which is applicable to proceedings in the High Court provides as follows:-

> "289(1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."

As for the complaint on failure to summon some witnesses, in terms of section 143 of the Evidence Act, no particular number of witnesses is required to prove any fact. It states as follows:-

> "143. **Subject to the provisions of any other written law,** ***no particular number of witnesses shall in any case be required for proof of*** **any fact."** (emphasis added).

And this Court, making reference to Section 143 above in the case of **YOHANNIS MSIGWA vs R,** [1990] TLR 148 at page 148 held as hereunder:-

> *"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for proof of any fact. What is important*

claimed to have seen, and his/her credibility."

This ground also lacks merit.

In view of the above considerations, in particular on the crucial evidence of identification, there is nothing to fault the courts below. In the result the appeal has no merit. We hereby dismiss it.

DATED at **ARUSHA** this 23rd day of August, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

(E. Y. MKWIZU)
DEPUTY REGISTRAR
COURT OF APPEAL