IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 460 OF 2007

NJAMBA KULAMIWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Chinguwile, J.)

Dated the 20th day of July, 2007
in
Criminal Appeal No. 114 of 2003

JUDGMENT OF THE COURT

10 & 15 JUNE, 2010

MASSATI, J.A.:

Before the District Court of Nzega, in Tabora Region the appellant was charged and convicted of the offences of burglary and armed robbery contrary to sections 294 (1) and 285 and 286 of the Penal Code respectively. He was sentenced to 5 years imprisonment for the first count of burglary, and 30 years imprisonment and 12 strokes of the cane for the

second. His appeal to the High Court was dismissed. Still protesting his innocence, he has now come to this Court on a second appeal.

The facts are fairly and mostly uncontroverted. On the night of 24/1/2003 at 2 a.m., **PW1 MHOJA MACHIBYA** and **PW2 SANA MACHIBYA** where in their house. PW1 was asleep, but PW2 had woken up to administer some medicine on a child. They were interrupted by a loud bang. A horde of bandits invaded the house and immediately started demanding money from PW2. PW1 had gone out to raise an alarm. Before their neghbours, including PW3, could gather, the bandits had made away with the family's bicycle, clothes and shillings 3,000/= in cash, which PW2 was made to part with after receiving a severe beating that was vindicated by a PF3, exh P1. PW2 was able to see one of the assailants, and she was positive, it was the appellant. She went further to mention him and describe his attire to the neighbours. She also boasted of knowing the appellant from before, since they were neighbours. That same night the appellant was traced to his house. Although a search on his house bore no fruits, PW3 who was a ten cell leader in their area, said they found the appellant in the same attire described by PW1 and PW2. The appellant

was accordingly arrested and charged. In his defence, the appellant just denied generally to have committed the offence, arguing that he was not found with any stolen property.

Before this Court, the appellant, like in the lower courts, fended for himself, whereas Mr. Edgar Luoga, learned Senior State Attorney appeared for the Respondent/Republic.

Although the appellant had filed a three ground memorandum of appeal, his complaints boil down to the issue of identification. His argument was that the evidence of visual identification was weak as PW2 did not disclose the type and intensity of the light emitted from the lamp, which PW2 claimed, aided her in identifying the appellant. He referred to several cases on this point including the leading one of **WAZIRI AMANI v. R** (1980) TLR 250 and **ANDREA v. R** (1971) HCD. No. 111. With these, the appellant prayed that his appeal be allowed.

Mr. Luoga, learned Senior State Attorney supported the conviction. It was his view that given the fact that PW2 was already awake

administering medicine to a child when the robbers invaded her room, the time she spent arguing with the appellant who was demanding money and finally gave it to him from her blouse, her knowledge of the appellant from before, and as a neighbour were all the conditions favourable to positive identification. Plus, the fact that the appellant was found in the same clothes that were described by PW2 and PW1. It was his further view that although the appellant was found with no stolen item, it did not cast any doubt on the prosecution case, as PW2's evidence was found to be credible by the two courts below and it was corroborated by PW3. He acknowledged the position of the law that although it was dangerous to convict on the evidence of a single witness on identification, the court could convict if it was satisfied that there could not have been a mistaken identity. He also referred us to the decision of this Court in **EVA SALINGO, MT PTE PETER MAGOTI AND MT 62218 PASCAL MGAE v. R** (1995) TLR, 224.

We think that the law on visual identification is now fairly settled. It was stated by this Court in **WAZIRI AMANI v. R** (supra) that:

"No court should act on evidence of visual identification unless, all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight. The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so was there moonlight or hurricane lamp etc) whether the witness knew or has seen the accused before or not."

As is clear, from the above passage **WAZIRI AMANI's** case just gave broad guidelines, and it is for the trial court, in each case to assess and apply those guidelines, in the light of the circumstances of each case. However, those principles were developed against the backdrop of an old and cherished principle that generally, it was dangerous to convict on the evidence of a single witness of identification where the conditions for such identification were unfourauble. Let we be misunderstood, we do not mean to whittle down these guidelines

It is common ground in the present case, that the offences with which the appellant was charged and convicted of, were committed at

night and that upon arrest and search of his house nothing was found that could be associated with any of the stolen properties alleged to have been stolen from PW1 and PW2. There was also no dispute that in the course of the robbery, PW2 was beaten and bruised; and that a gun must have been used, because a gun shot was heard. As seen by the two courts below, the real issue in controversy, is whether the appellant was identified, so sufficiently as to warrant his conviction.

It is true that the offences were committed at midnight, but that in itself does not make it always impossible to identify assailants. As this Court said in **PHILIP RUKAZA v R** Criminal Appeal No 215 of 1994 (Mwanza) (unreported):-

> *"We wish to say that it is not always impossible to identify assailants at night and even where victims are terrorized and terrified. The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person*

correctly and that every reasonable possibility of error has been dispelled."

In the present case, PW1 and PW2 testified that they recognized the appellant, who is known to them from before as he was born in the same village and were in fact neighbours. This was not disputed. Although, the fact that the two witnesses were known to the appellant alone would itself not necessarily be sufficient as it does not eliminate mistaken identification (See, **SWELU MARAMOJA v. R** Criminal Appeal No. 43 of 1991 (unreported) PW1 and PW2 went further and gave a detailed description of the appellant and the type of clothes he wore that night to those neighbours who responded to the alarm. As was succinctly stated by the Court of Appeal for Eastern Africa in **R v. MOHAMED bin ALLUI** (1947) 9 EACA 72.

"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given, first of all, of course by the person or persons who gave the description and purport to identify the accused, and

then by the person or persons to whom the description was given."

In this case PW1 and PW2, said they gave the description to those who assembled in response to the alarm. And PW3 who was among the latter persons confirmed so. Part of his evidence is this:

"I heard alarm, and then we gathered and went to the house of PW1. I saw PW2 who immediately mentioned Njamba (accused) as the person he identified among the bandits. She PW2 also told us that the accused had put on a black T shirt short sleeved. We traced the accused the same night and we arrested him in his house and he still wore the very black T shirt."

The appellant argued before us that, the failure by the prosecution to produce the alleged black T shirt was fatal. In our view, this only goes to the weight and not to the admissibility of the testimony concerning or relating to it. Here, the appellant never challenged PW3 on his testimony

that he wore the same T shirt on the night of his arrest. We think, failure to cross examine on this crucial point only solidified the prosecution case.

It is true that according to PW2 she was able to identify the appellant with the aid of a lamp. The appellant has attacked this piece of evidence saying that the evidence did not disclose the type and intensity of the light emitted from the said lamp. We agree that the type of lamp was not disclosed by PW1. We are also aware that this Court has time and again emphasized that it was not sufficient for the evidence to allude that there was merely light or a lamp at the scene of crime with which a witness was aided to identify a suspect. Thus, in **KULWA s/o MAKWAJAPE & TWO OTHERS v R** Criminal Appeal No. 35 of 2005 (unreported) it was held:-

> *"... the intensity and illumination of the lamp is important so that a clear picture is given of the condition in which the appellants were identified."*

And in **ISSA s/o MGARA @ SHUKA v. R** Criminal Appeal No. 37 of 2005 (unreported) the Court said:-

"... even in recognition cases where such evidence may be more reliable that identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance ...."

However, we have taken into consideration that at that time PW1 had woken up to administer medicine to a child. The lamp must have given enough light to enable her see where the medicines were. When the appellant forced his way into her room, the two took sometime arguing before eventually PW1 parted with her money. This in our view must have been long enough and the assailant must have been near enough for PW1 to ascertain who was the assailant. Besides, PW1 and PW2 did describe the appellant and PW3 assured the court that the appellant was arrested that same night in the same attire, which was not challenged. So, notwithstanding that the type of lamp was not disclosed, we think in the peculiar circumstance, of this particular case, there was no possibility of mistaken identity.

We are therefore satisfied that, the appellant was identified by PW1 and PW2 as one of the bandits who invaded their house and committed the

alleged attrocity. This appeal is therefore without substance, and we accordingly dismiss it.

Order accordingly.

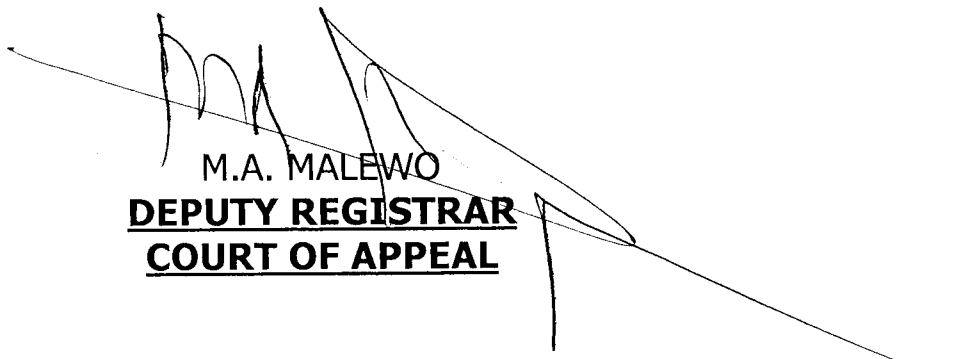
DATED at TABORA this 14th day of June, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL