IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO.246 OF 2007

NAIMAN RICHARD & 4 OTHERS.....APPELLANTS

AND

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court at Moshi
[Mgaya, PRM Extended Jurisdiction]
Dated the 13th day of April 2007
in Criminal Appeal No 21 of 2007)

JUDGMENT OF THE COURT

1st & 2nd September, 2010

KILEO, J. A.

The appellants Naiman Richard, Harson Wilbard, Simon Mariki, David Geofrey and Daniel Kavishe were arraigned before the District Court of Moshi in connection with armed robbery contrary to sections 285 and 286 of the Penal Code and causing grievous harm contrary to section 225 of the Penal Code. They were all convicted and sentenced to thirty years imprisonment on the charge of armed robbery and seven years imprisonment on the charge of causing grievous harm. Their appeal to the High Court was transferred to and heard by Mrs. Mgaya, PRM with Extended Jurisdiction (as she then was), pursuant to section 45 (2) of the

Magistrates Courts Act, Cap 11 R. E. 2002. The learned PRM with Extended Jurisdiction dismissed the appeals hence this second appeal.

Conviction of the appellants was based on the evidence of James Safari Ngowi (PW1) and Joseph Peter Kwayi (PW2). The evidence which transpired at the trial show that on the material date at around 8.00 pm when PW1 was at his grocery selling drinks with PW2 as one of the customers they were suddenly invaded by a group of about 10 armed bandits. PW1 was injured in the process. The two witnesses claimed to have identified the appellants through light from a tube light in the grocery.

Two main grounds are listed in the appellants' memorandum of appeal. The first ground is on sufficiency of identification and the second ground is on the manner in which the proceedings were conducted in the trial court.

The appellants appeared in person at the hearing of the appeal. They did not say much save to urge us to adopt their grounds of appeal.

Mr. Prosper Rwegerera, learned State Attorney who appeared on behalf of the respondent Republic did not support conviction. Referring to the celebrated case on identification- **Waziri Amani vs. Republic** (1980) TLR and **Josiah Ezekiel @ Belito vs. Republic** Criminal Appeal No. 11 of

2007 (unreported) the learned State Attorney submitted that the circumstances pertaining at the scene of crime were not favorable for watertight identification and that the possibility of mistaken identity in the circumstances of the case could not be ruled out.

On the manner the evidence of the witnesses was recorded, Mr. Rwegerera opined that the trial magistrate ought to have taken the evidence in the form of a narrative instead of taking it down in the form of a report as she did.

We have given due consideration to the matter at hand and we must say that we agree with both the appellants and the leaned State Attorney that the circumstances pertaining at the scene of crime were not favorable for watertight identification. In **Waziri Amani** case, *supra*, it was held:

> *"(i) evidence of visual identification is of the weakest kind and most unreliable;*
>
> *(ii) 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 before it is absolutely watertight."*

In resolving the question whether identification is watertight the Court listed a number of circumstances that must be examined. These include: the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, whether it was day or night- time, whether there was good or

poor lightening at the scene; and further whether the witness knew or had seen the accused before.

In the present case, as pointed out by the learned State Attorney, the invasion was so sudden and brief, there were many invaders, all said to have been dressed in black coats such that it would have been difficult for there to be watertight identification. We find, in the circumstances that the appellants' ground on insufficiency of identification has merit and for this reason alone we would allow the appeal.

The other complaint raised by the appellants concerns the manner in which the evidence was recorded. The record shows that the evidence was taken down in the form of a report. For example, at page 9 of the Record of Appeal the following recording appears after PW1 James Safari is sworn in to testify:

> *"Lives at mwika Uuwo, works as businessman at grocery selling drinks.....*
>
> *5/1/04 PW1, opened the grocery at 6.00 hrs.....*
>
> *PW1 was inside the grocery and door was not locked...*
>
> *3 accused tried to entered inside the grocery.....*
>
> *PW1 identified 3 accused who entered the grocery....."*

The above clearly manifests a contravention of section 210 of the Criminal Procedure Act which specifies the way a witness's evidence is to be recorded. The provision states:

"210. Manner of recording evidence before magistrate

(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner–

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; and

(b) the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative.

(2) The magistrate may, in his discretion, take down or cause to be taken down any particular question and answer.

(3) ....."

Addressing us on the effect of contravention of the above provision, Mr. Rwegerera suggested that the remedy would be in remitting the case to the trial court for it to comply with the law. We agree with him on that aspect; however it is to be noted that in the present case already the circumstances pertaining at the scene of crime did not lead to watertight identification. It would therefore be fruitless to order a re- trial.

All the above said, we find that there is merit in this appeal. Consequently we allow it. Conviction entered against all the appellants is quashed and sentences passed are set aside. The appellants are to be released from custody forthwith unless otherwise lawfully held.

It is ordered accordingly.

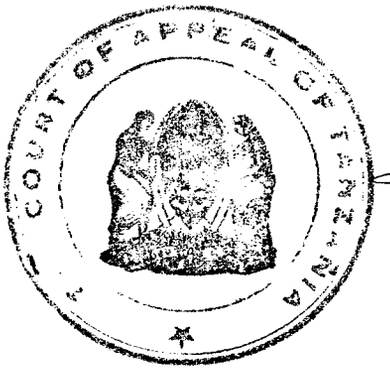
DATED at **ARUSHA** this 1st day of September, 2010.

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