IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., MBAROUK, J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 28 OF 2006

1. KUDA ABUBAKARI
2. SAIDI ISSA } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 31st day of October, 2005
in
Criminal Appeal Nos. 67 and 68 of 2004

JUDGMENT OF THE COURT

10 & 12 May, 2010

MSOFFE, J.A.:

Before the District Court of Mwanza the appellants and another were charged with two counts of armed robbery and gang rape contrary to **Sections 285 and 286**; and **130** and **131 (A) (1)**; respectively; of the Penal Code. After a full trial the other accused person was acquitted. The appellants were convicted of armed robbery. As for gang rape, the appellants and the other person were

acquitted of the offence. However, the second appellant was convicted of rape contrary to **Sections 130 (1)** and **131 (1)** of the Penal Code as amended by the relevant provisions of **Act No. 4** of **1998**. For the armed robbery count both appellants were each sentenced to a term of thirty years imprisonment. On the rape offence the second appellant was sentenced to twenty years imprisonment and corporal punishment of twelve strokes of the cane. The appellants unsuccessfully appealed to the High Court, hence this second appeal.

In their respective memoranda of appeal the appellants are essentially attacking the courts below in their concurrent findings of fact that they were duly identified on the material day and time. According to them, both the evidence of visual identification and that of the identification parade did not establish the prosecution case against them beyond reasonable doubt. In their respective oral submissions before us they reiterated the same thing and urged us to hold that the evidence against them did not prove that they were guilty.

On the basis of the evidence on record Mr. David Zacharia Kakwaya, learned State Attorney representing and appearing on behalf of the respondent Republic, did not seek to support the conviction(s). He therefore submitted in support of the appeal and invited us to allow the appeal and set the appellants free.

There is one thing we wish to mention from the outset which apparently escaped the attention of both the trial District Magistrate and the Judge on first appeal. The alleged offences were committed on 3/1/2002. This was after the enactment of the **Sexual Offences Special Provisions Act No. 4 of 1998**. If so, under **Section 131 (1)** of the Penal Code, as amended by **Act No. 4 of 1998**; the second appellant, having been convicted of rape, ought to have been sentenced to thirty years imprisonment instead of the twenty year term of imprisonment.

The facts are simple and straight forward. At 10.00 p.m. on the fateful night members of a family who included PW2 Neema Wilson, PW3 Mushi Patrick and PW4 Isaya Wilson were having dinner. Suddenly bandits broke in and ordered them to lie down. It was said

that the bandits were about nine. The first bandit to enter had a machete and a club. Electric light was on. PW2, PW3 and PW4 identified the first and second appellants. According to Neema she had gone to school with the first appellant. Neema also said that the second appellant was often seen at Mesa Hotel which was in their neighbourhood. The witnesses also identified the appellants at an identification parade.

This Court in a number of cases during and subsequent to the decision in the celebrated case of **Waziri Amani v Republic** (1980) TLR 250 has always reiterated that visual identification is one of the weakest kind of evidence and all possibilities of mistaken identity have to be eliminated before a conviction can safely lie.

We will be very brief in our discussion of the pertinent issue of visual identification. In our analysis, evaluation and appreciation of the evidence we are of the settled view that the appellants were not identified on the night in question. As correctly submitted before us by Mr. Kakwaya, the incident was sudden and took place at night under unfavourable conditions. After the bandits had broken into the house

they immediately ordered the witnesses to wrap up their faces with cushions and plastic bags and enter into a small room. In the evidence of PW2, even at the time of the alleged rape her face was still wrapped up with the cushions and a piece of plastic bag. It is also in evidence that the witnesses opened their faces after the bandits had left. It is also significant to observe here that the witnesses said that they alarmed and woke up neighbours and narrated the incident to them; yet they did not name the appellants to them. If the witnesses had truly seen and identified the appellants at the material time we think that prudence demanded that they mention their names, at that early opportunity, to the neighbours who had assembled in answer to the alarm. Failure to do so did, in our view, cast doubt in the veracity of their evidence of visual identification.

On the whole, we think, it is unsafe to sustain the conviction(s) entered by the trial District Court and upheld by the High Court on first appeal. The appellants were entitled to be given the benefit of doubt and thereby earn an acquittal.

We hereby allow the appeal, quash the conviction(s) and set aside the sentence(s). The appellants are to be released from prison unless lawfully held.

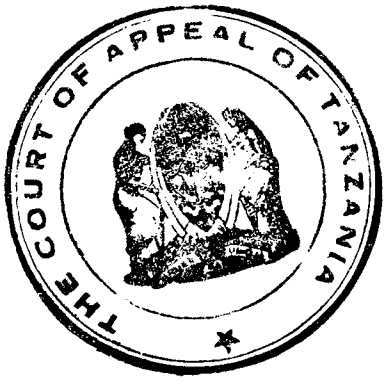
DATED at MWANZA this 11th day of May, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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



(J. S. MGETTA)
DEPUTY REGISTRAR