

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

(CORAM: MUNUO, J.A., MSOFFE, J.A., And KIMARO, J.A.)

CRIMINAL APPEAL NO.337 OF 2009

1. MT. 6947 AMOSI DANIEL @ NORIEGA
2. SALIM BAKARI@ BENJAMIN
3. IDDI RAMADHANI@ SHARIFU

}..... APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court

Of Tanzania at Tanga)

(Longway, J.)

dated 4th March 2003

In

Criminal Appeal No.46 of 2002

.....

JUDGMENT OF THE COURT

18th & 22nd March, 2010

KIMARO, J.A.:

The three appellants were charged with seven others in the Court of Resident Magistrate of Tanga at Tanga with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, CAP 16 R.E.2002.

They were the second, eighth and seventh accused respectively. They were alleged to have jointly and together stolen at gun point an assortment of items and cash money shillings 175,000/= from the house of Ally Nassoro on 15th October, 1998 at 00.01 hours at Songa Batini village in Muheza District. The complainant was also operating a shop in the same compound.

In the trial court it was not in dispute that the offence of armed robbery was committed. What was in dispute was the identity of the culprits who committed the offence. The evidence that was led on the identity of the appellants was that of Ally Nassoro (PW1), the complainant and his wife Asha Nassoro (PW2). The testimony of PW1 was that prior to the commission of the offence, on 3rd October, 1998, the 3rd appellant visited him at 12.00 am and they had a long conversation on matters not disclosed until 10.00 p.m. The 3rd appellant visited him again on 14th October, 1998. This time he inquired from PW1 when he was going to buy goods for his shop. PW1 said it was too soon to say when, because his business was small. He closed his shop at 8.00 p.m. and went to his house.

The 3rd appellant visited PW1 again at home on that day claiming that he bought a bulb which was not working and he asked PW1 to give him another one. As the 3rd appellant waited at the veranda, PW1 opened his shop and he took a bulb and gave it to him. Later at midnight while PW1 was with PW4 outside his house, he saw a motor vehicle approaching his house. It reversed and then parked. He took a torch from PW4 and went near the place where the motor vehicle parked. He saw group of people and he was able to identify the 3rd appellant because of moonlight which he said was shining brightly. The culprits went to his house. He heard gunshots twice and the door of his house being broken. He also heard when the goods that were stolen from his house were being loaded into the motor vehicle. Later he saw his wife (PW2) coming from the house crying and she was bleeding. As PW1 asked PW2 whether she identified any of the culprits, she said she identified the 1st appellant. PW2 was taken to hospital for treatment. Further testimony of PW1 was that on the next day when he was at the police station to report the incident, he happened to see the 3rd appellant there and he informed the police that he was among the persons who committed the armed robbery at his house. The witness insisted in cross-examination by the 3rd appellant that he knew

him very well. However he admitted that he did not mention his name to the neighbours who gathered at the scene of crime on that night, nor did he mention it to the police when he reported the incident on the next day. He only pointed at him when he saw him at the police station.

The evidence of PW2 was that on the date of the incident she was in the house sleeping. At midnight she heard a bang on the door. Then she heard a gunshot. She got up and sat on the bed. Then a group of people entered the bedroom carrying weapons; a gun, a "panga" and a club. As they demanded money from her, she was hit on the head by a club and she bled profusely. It was then that the thugs ransacked the house and the shop and collected what suited them and then went away. Of the people who entered the room, she was able to identify the 1st appellant. PW2 said she used to see him in the village and he used to pass at their house therefore she was acquainted to him. She also said she identified him in an identification parade.

PW3 the watchman, corroborated the evidence of PW1 on what took place prior to the armed robbery incident. He confirmed that PW1 took a torch from him and there were gun shots which scared him and he ran to

save his life. He said the culprits were about ten and he was not able to identify any of them.

The other piece of evidence before the trial court were the caution statements of the 1st and 3rd appellants in which they were alleged to have mentioned the 2nd appellant being also involved in the commission of the offence.

In their defence the appellants protested their innocence by challenging their identification which they said was not correct, and the caution statements, which they said were not voluntary.

The trial court was satisfied that the identification of the appellants was correct and the caution statements of the 1st and 3rd appellants were sufficient corroboration to hold all the three appellants responsible for the commission of the offence of armed robbery. The 5th accused in the case was also convicted, but in absentia. The rest of the accused were acquitted for lack of sufficient evidence. On appeal to the High Court, the appeal was dismissed but the sentence of corporal punishment was reduced to 12 strokes only, in the place of the 24 that were imposed by the trial court.

In this second appeal, the appellants have filed a number of grounds of appeal, but basically, the major complaint is on their identification which they claimed was not correct because the identifying circumstances do not show that they were favourable for a correct identification. They claim that they raise a doubt.

Before us the appellants appeared in persons. Mr. Tumaini Kweka, learned State Attorney, appeared for the respondent Republic. He supported the appeal. Traversing the evidence that was on record in respect of the identification of the appellants, the learned State Attorney said it was not reliable evidence for a correct identification. Starting with the evidence of PW1, the learned State Attorney said the witness said he identified the 3rd appellant because he knew him well before, and there was bright moonlight. Yet he had to ask PW4 to give him a torch when he saw the motor vehicle involved in the robbery approaching his house. At another point, contended the learned State Attorney, the same witness said he failed to report the incident to the police on the same night because it was dark. The witness also failed to mention the name of the 3rd appellant to their neighbours when they gathered at the scene of crime.

The same thing happened at the police station when PW1 reported the incident.

As regards PW2 the learned State Attorney said the incident occurred during the night and PW2 did not say what factors assisted her to identify the 1st appellant and she did not even mention his name. Citing the case of **Swale Kalonga @ Swale vs R.** Criminal Appeal No. 46 of 2001 (Unreported), the learned State Attorney said failure by the witnesses to immediately mention the names of the 1st and 3rd appellants to the neighbours and the police while the witnesses claimed to have known them very well before the commission of the offence, makes their evidence doubtful. Referring to the decisions of this Court on identification, the learned State Attorney said they have always insisted that the identifying witnesses should point out factors which assisted in the identification, such as the time taken to observe the accused, the distance of observation, familiarity with the accused, light and its intensity and others of the like, in order for the court to be certain that there was no mistaken identity of the accused person.

Commenting on the moonlight which PW1 said assisted him to identify the 3rd appellant, the learned State Attorney wondered why the witness had to ask for a torch from PW4. The evidence of PW1 and PW2, contended the learned State Attorney, did not satisfy conditions for a correct identification of the 1st and 3rd appellants. He asked the Court to allow the appeal. The appellants who chose to hear the views of the learned State Attorney first, were contented with his submission and they did not say anything in reply.

As stated earlier, the appellant's conviction was grounded on their identification and the caution statements of the 1st and 3rd appellants which were improperly admitted in evidence because the 1st and 3rd appellant retracted their statements that they were not made voluntarily. The trial court admitted them without making an enquiry on the voluntariness of the statements.

The main issue in this appeal is whether the appellants were correctly identified. For us, we do not think that we need to waste time on it. In this case the offence was committed at night. Although PW1 said he knew the 3rd appellant before, he did not mention his name to the neighbours

who gathered at the scene of crime nor did he mention it to the police when he reported the incident. Moreover, if there was sufficient moonlight why did PW1 ask for a torch from PW4? What about the contradiction in his evidence that he failed to report the incident on that night because it was dark? As for the evidence of PW2, apart from making a general statement that she was acquainted to the 1st appellant because of seeing him at the village, she did not point out the factors which assisted her to identify him on the night in issue.

Under such circumstances, we agree with the learned State Attorney that following the case of **Waziri Amani v R** (1980) T.L.R. 250 where the court set out the guidelines for determining the credibility of the identifying witnesses, the evidence of identification by PW1 and PW2 cannot be said to have left no doubt in the identification of the 1st and 3rd appellants in this case. We have given a detailed account of the evidence of PW1. We pointed out that if it was true that PW1 knew the 3rd appellant well and he identified him with an assistance of a bright moonlight, we did not see the rationale of asking for a torch from PW4. Equally of importance was the contradiction in his evidence that he failed to report the incident during the

same night because **it was dark**. Another factor for observation was his failure to mention the name of the 3rd appellant to the neighbours and to the police. See the case of **Swale Kalonga @ Swale** (supra). PW2 simply gave a general statement that she identified the 1st appellant because she used to see him in the village. She did not mention the factors which assisted her in identifying him. The appellants were entitled to be given a benefit of doubt and be acquitted. The offence was committed at midnight. There is no evidence to show what light assisted PW2 to see the 1st appellant. Since the 2nd appellant was convicted because of the caution statements by the 1st and 3rd appellants which we have said were improperly admitted in evidence, and we have discredited the evidence of the identification by PW1 and PW2, his conviction cannot be sustained.

Eventually, we find the appeal has merit and we allow it, quash the conviction, set aside the sentence and order their immediate release from prison unless they are held for any other lawful cause. It is accordingly ordered.

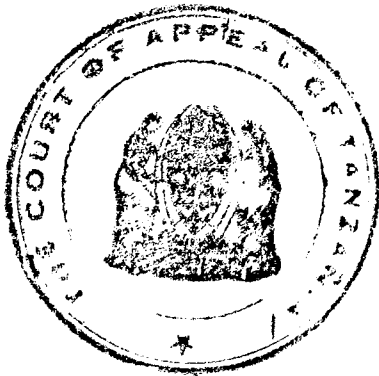
DATED at TANGA this 22nd day of March, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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




(N. N. CHUSI)
DEPUTY REGISTRAR