IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 159 OF 2008

1. JUMA MALAYA
2. ALBINI MOTAA .... APPELLANTS
3. AMOS NDALU

VERSUS

THE REPUBLIC... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Masanche, J.)

dated the 12th day of December, 2007
in
Criminal Appeal No. 31 of 2007

JUDGMENT OF THE COURT

9 & 18 March 2010

ORIYO, J.A.:

In the District Court of Dodoma, the appellants were convicted of armed robbery, contrary to Sections 285 and 286 of the Penal Code, Cap 16, R.E. 2002. Each was sentenced to the minimum statutory sentence of 30 years imprisonment and twelve strokes of the cane.

The appellants were aggrieved by the decision of the District Court and filed an appeal in the High Court at Dodoma. The High Court dismissed the appeal in its entirety on 12 December 2007. Still aggrieved, they lodged this appeal preceded by a Notice of their Intention to Appeal lodged on 19 December 2007.

Unfortunately, the third appellant, Amos Ndalu passed away on 28 January 2008 in the Dodoma Regional Hospital. This information was received from the Office of the Officer in Charge, Isanga Central Prison, Dodoma, by a letter dated 25/2/2010 addressed to the Registrar, High Court, Dodoma.

When the appeal was called on for hearing, Mr. Faraja Nchimbi, learned State Attorney who appeared for the respondent Republic, urged us to mark the appeal by the 3rd appellant as abated in the circumstances. In terms of Rule 78 (1) of the Court of Appeal Rules, 2009 (old Rule 71 of the Court of Appeal Rules, 1979), the appeal by the 3rd appellant was accordingly marked as abated.

Before us, the remaining appellants, **Juma Malaya** and **Albini Motaa,** the 1st and second appellants respectively, raised a number of complaints in the Memoranda of Appeal against the lower courts' decisions. These included doubtful visual identification at the scene of crime, contradictory testimonies of the prosecution witnesses, failure to take defence testimonies into consideration and failure by the prosecution to prove its case beyond reasonable doubt; among others.

Mr. Nchimbi, learned State Attorney, did not support the conviction of the second appellant, Albin Motaa. However, he supported the conviction of the first appellant, Juma Malaya. He gave his reasons as follows. He stated that the incident took place in the night between 10 p.m. to 11 p.m., when visibility is usually of a poor quality and the issue of identification of the appellants at the scene of crime becomes crucial. He stated that PW1, **Simon Madeha,** the complainant and his wife, PW4, **Lucia Thomas,** were invaded while asleep in their bedroom. PW1 used a torch to identify the appellants as he knew them from before. For PW4, she identified

them with assistance of light from a **"kibatari"**. On the other hand there were the corroborative testimonies of PW3, Bibiana Malik (PW1's sister) and PW6 Anastazia Makwala (PW1's mother) on the happening of the incident. They identified the appellants assisted by light from a **big fire** which they were using to prepare some local brew **"ujimbi"**.

The learned State Attorney contended that the identification testimonies by the prosecution witnesses lacked details. For example, details like the length of time the witnesses spent to observe the assailants, the intensity of the light (from a torch or **"kibatari"**), etc., were not disclosed. In the circumstances, the learned State Attorney submitted that identification evidence of PW1 and PW4 in the bedroom cannot be said to be watertight. Similarly for the identification testimonies of PW3 and PW6. Their evidence on identification at the scene lacked details. The learned State Attorney concluded that the prosecution evidence on record on the identification of the appellants required some other independent, corroborative evidence to convict.

Regarding the first appellant, Juma Malaya, the learned State Attorney submitted that corroborative testimony to PW1's evidence can be found in the testimony of PW2, **Alubani Vitalis,** who responded to the alarm raised from PW1's residence at the time of the invasion. PW2 testified how himself and other villagers followed footmarks from the compound of PW1 in Mpinga Village to the house of the first appellant in the next village; Kikola Village and arrested the first appellant. PW2 further testified that Juma Malaya's footmarks showed that one leg had a shoe on while the other leg had none. When confronted on the whereabouts of his shoes because when he was arrested he had no shoes on, he was able to produce only one shoe which was similar to the footmarks and the one shoe found at PW1's house. He failed to account for the whereabouts of the second shoe. PW2 also testified that the first appellant was also found with a t-shirt which was stolen from PW1's house.

However the learned State Attorney admitted that he could not find such corroborative evidence against the second appellant.

Mr. Nchimbi urged us to allow the appeal by the second appellant and dismiss that of the first appellant.

With respect, we fully agree with the learned State Attorney that the prosecution witnesses testimonies on the identification of the appellants was insufficient to sustain a conviction. The evidence is not watertight to meet the principles laid down in the case of **WAZIRI AMANI vs REPUBLIC** (1980) TLR 250.

The guiding principles laid down by the Court in **Waziri Amani vs R** as to the manner a trial judge should determine issues of disputed identity are stated at page 252 to include:-

> "the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or proper lighting at the scene; and further whether the witness knew or had seen the accused before or not."

According to the record PW1 testified to have known the first appellant from before the incident, as they met at **"pombe"** clubs and at public auctions. On the date of the incident, he testified to have identified him by his **voice.** He also identified him by **sight** as PW1 had a torch with him. That was all. He did not testify on any other aspect such as his dress, who assaulted him with a "panga", how long the confrontation took, the strength of the light from his torch, etc. And on **Voice Identification** it has been held to be inherently unreliable (see case of **James Chilonji v R,** Criminal Appeal No. 101 of 2003, Court of Appeal, unreported).

Similarly for the testimony of PW4, the wife. She testified to have identified the appellants using the **"kibatari"** light in the bedroom, but does not reveal the intensity of the light. The first appellant was known to her from before. And like PW1 they often met at public auctions and **"pombe"** clubs. How long the appellants were under PW4's observation is not known, the distance between

herself and the appellants was not stated; and no further details were given.

However, with respect, we are unable to agree with the learned State Attorney that the testimony of PW2 corroborated that of PW1 on the identification of the first appellant as submitted above. With regard to the footmarks and the missing shoe which PW2 and others traced to the first appellant's house, there was no testimony before the trial court that the missing shoe found at PW1's house is the same as that found at the first appellant's house. Worse, the said shoes were not tendered as exhibits in court. Even the first appellant's wife who allegedly told PW2 and others that the first appellant had returned home without the second shoe was not called to testify on that. PW2 also testified that as they were taking the first appellant to the Police, they met the **"kitongoji"** chairman who inquired on their trip. PW2 testified that the first appellant **admitted** before the **"kitongoji"** chairman. Again the said chairman was not called to testify on what was admitted by the first appellant.

With regard to the evidence of identification of the second appellant at the scene, some of the prosecution witnesses denied to have identified him at the scene. Again here, we are at one with the learned State Attorney that the identification evidence of the second appellant was weak, doubtful and lacked the vital details.

With respect, in the circumstances, the testimony of PW2 did not corroborate that of PW1 on the evidence of identification of the appellants. The conditions under which the appellants identification was made were unfavourable, at night time when the source of light was unreliable especially after PW1 was attacked, fell down and rendered unconscious.

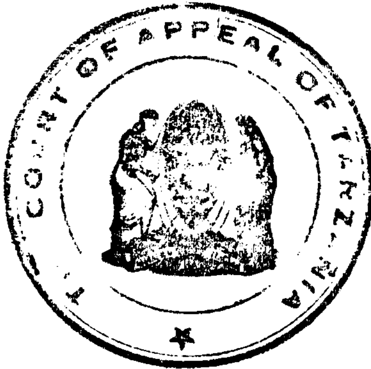
Unlike the two lower courts, we are quite clear in our minds that the evidence of identification at the scene was weak because the prosecution witnesses did not supply certain specific details and/or descriptions to meet the legal requirements stipulated in **WAZIRI AMANI v R** (supra).

On the evidence as a whole, there is no doubt that the circumstances are such as to raise serious suspicion against the first appellant. However, it is trite law that suspicion alone, however strong it may be is not sufficient to sustain a conviction in criminal cases where the standard of proof required is that of beyond all reasonable doubt.

For the foregoing reasons, we allow the appeal by the first and second appellants. Accordingly, we quash the convictions and set aside the sentences. The appellants are to be released forthwith from custody unless otherwise lawfully held.

DATED at DODOMA this 17th day of March, 2010.

E.A. KILEO
JUSTICE OF APPEAL



S.A.L. MASSATI
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