IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 164 OF 2008

JUMA SENGE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Masanche, J.)

dated the 22nd day of October, 2007
in
Criminal Appeal No. 7 of 2007

JUDGMENT OF THE COURT

12 & 18 March 2010

ORIYO, J.A.:

In Criminal Case No. 270 of 2005, in the District Court of Singida District at Singida, the appellant and another person were convicted of armed robbery contrary to Section 287A of the Penal Code, Cap 16, R.E. 2002. They were sentenced to 30 years imprisonment each.

The facts briefly stated are that on 11th September 2005 at around midnight, at Mtipa Village, Singida, one **Pili Issa,** PW1, who was the complainant in the trial, was invaded by a group of people allegedly including the appellant, and two others. It was alleged that they stole her cellphone, an assortment of clothings and Shs. 180,000/= in cash. The total value of the stolen properties and cash amounted to Shs. 880,000/=. Immediately before such stealing they threatened and actually assaulted PW1 with an iron bar **"nondo"** and knife/**"Sime".** They also threatened/intimidated and ordered her to hide her face **('funika uso')**, etc. otherwise they would kill her. PW1 was sharing the bedroom with a girl by the name of **Habiba Hassan,** PW3, while PW1's mother, (PW2), **Asha Ally** was sleeping in a separate room. The invaders also visited PW2's room before they fled.

At the trial, as expected, the two accuseds pleaded their innocence. However the third invader was not charged because he was at large.

The accused persons were aggrieved by the trial court's decision and preferred an appeal in the High Court at Dodoma. The appeal of the second appellant, Japhary Shabani was allowed while that of the first appellant, Juma Senge, was dismissed; hence this second appeal.

The appellant lodged a memorandum of appeal with nine grounds of appeal in this Court. However, the substance of them is that the courts below erred in finding him guilty as charged on the basis of very weak visual identification evidence of PW1, PW2 and PW3 who were family members.

When the appeal came up for hearing the appellant was as before unrepresented. The respondent Republic was represented by Mr. Faraja Nchimbi, learned State Attorney.

On his part, the learned State Attorney supported the conviction of the appellant and urged us to dismiss the appeal in its entirety as the evidence adduced at the trial proved the offence

beyond reasonable doubt. Submitting in support of identification evidence of the appellant at the scene, the learned State Attorney said that there was sufficient identification evidence from PW1, PW2 and PW3. To elaborate, he stated that the appellant was easily identified at the scene, he was previously known to the prosecution witnesses and he resided in the same village with the prosecution witnesses and that the appellant did not controvert that he was previously known to the witnesses. Mr. Nchimbi further urged us to take into consideration the totality and the intensity of the amount of light available at the scene which was coming from the 3 torches of the invaders with additional light from PW1's cellphone when the invaders switched it on. Another factor that we were urged to take into consideration was the length of time taken by the invaders to demand more money and sort out what to steal. The learned State Attorney submitted that this provided the prosecution witnesses with ample time to observe the invaders. His further submission was that when the matter was reported to the police, the appellant was immediately arrested on the next day after the night of the incident. The learned State Attorney concluded that in view of what has been

stated above, the legal principles stipulated in the case of **WAZIRI AMANI vs R** (1980) TLR 250 were met.

Mr. Nchimbi did not end there. He referred us to previous decisions of the Court which discourage reliance on a light from a torch to identify in unfavourable conditions as in the present case. He attempted to distinguish this case from the others because there was light from 3 torches at the scene. Learned counsel cited the case of **Juma Ntandu and Another vs R** (Dodoma), Criminal Appeal No. 84 of 2007 (C.A. unreported) where the light used came from two torches to identify the appellants at the scene. He urged us to draw some inspiration from that decision.

With regard to the ground of appeal that all prosecution witnesses were relatives, Mr. Nchimbi's brief response was that what is important is the credibility of the witnesses. Their being related is immaterial. He referred us to this Court's decision in the case of **Alll Abdallah Rajabu Vs Saada Abdallah Rajabu and Others vs R** [1994] TLR 132.

It is our finding that going by the admissible evidence on record, none of the appellants were found in possession of any of the stolen properties. However, the most crucial issue for us now is whether the evidence of identification of the appellant on record is free from doubts and watertight to meet the legal principles set out in the case of **Waziri Amani vs R** (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."

Our view of the evidence as a whole has, with respect, left us with doubts whether the appellant was sufficiently identified at the scene of crime. There is no gainsaying that the appellant and the prosecution witnesses lived in the same village of Mtipa. It is the prosecution testimony that they raised alarm only after the invaders had left and many villagers responded to the alarm. Under normal circumstances it would have been expected that the prosecution witnesses would have given the names of the invaders to those who responded to the alarm. However, that did not happen. According to the testimony of PW1, in response to the alarm –

> "--- people gathered and **started to make a follow up to know the accused.** There were marks which ended to one Hamesi Shabani who is still at large, the other marks ended around where 1st accused (the appellant herein) used to stay." (emphasis supplied)

This piece of evidence coming from PW1 raises grave doubts that she identified her assailants at the scene. Had PW1 named the appellant

as among the robbers, the neighbours would not need to do a follow up to know who the accused was. Another problem with this piece of evidence is the footmarks that were followed. That was hearsay evidence because PW1 did not participate in tracing the footmarks; she got the information from the other villagers who were not called as witnesses.

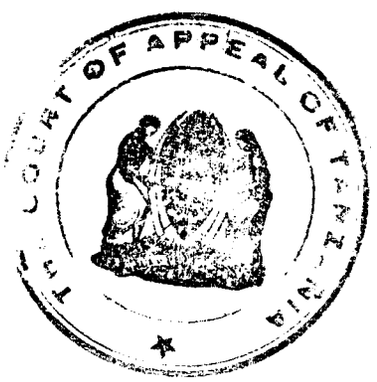
This piece of evidence takes us back to the visual identification of the appellant at the scene with the aid of light from the invaders' three torches. As the learned State Attorney rightly submitted, there is a chain of the Court's decisions on the unreliable nature of light from a torch as an aid in visual identification in unfavourable conditions; and the inherent dangers of relying on such evidence to convict. However, he urged us to draw inspiration from the Court's decision in **Juma Ntandu & Another vs R** (supra) where visual identification was done with assistance of light from two torches.

With respect, **Juma Ntandu,** is distinguishable from the instant case in various aspects. One, is that the appellants were

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