

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

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 16 OF 2008

EDWIN DANIEL..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Tabora)**

(Chinguwile, J.)

dated the 24th day of October, 2007

in

Criminal Appeal No. 96 of 2001

JUDGMENT OF THE COURT

15th & 21st June, 2010

MBAROUK, J.A.

In the District Court of Kigoma at Kigoma, the appellant and five others were charged with three counts of armed robbery contrary to sections 285 and 286 of the Penal Code. The robbery was committed to three different persons. While the trial was going on before the trial court, one of the accused persons (the 6th

accused) was reported dead, hence five accused persons continued with the trial. At the end of the trial the 4th accused was acquitted and the remaining accused were convicted and sentenced to thirty (30) years imprisonment and twelve (12) strokes of the cane each. The appellant appealed to the High Court (Chinguwile, J.) and his appeal was dismissed. Undaunted, the appellant wants to prove his innocence, hence this second appeal.

Briefly, the evidence upon which the conviction of the appellant was founded was that, on 6.4.1998 at about 17.30 hours, a passenger vehicle, mini bus (Hiace) owned by Silas Ndeleka (PW5) driven by Mikidadi Rutaha (PW1) left Kigoma bus stand near NBC going to Manyovu. Among the passengers, there were Tagato Lazaro (PW2), Naftari Zacharia (PW3) and Nehemia Naibuha (PW4). Around 19.30 hours, the said passenger vehicle arrived at Mbulanya where PW1 (the driver) was ordered to stop by bandits who shot in the air to scare the driver. Having stopped, the bandits ordered all the passengers to disembark and leave everything in the bus. Cash money amounting to Tshs.9,045,000/= was stolen from PW2, PW3

and PW4. PW3 and PW5 were familiar with the appellant. PW3 told the trial court that, he knew the appellant as they were all residents of Manyovu and knew him by face and name. PW1 testified that, at the time of the incident, the sun had not set, hence, they could clearly see the bandits. According to PW1 he was ordered to stop by two youths, one of them blew a whistle. He described them as one being short and black and the other one tall and slim. PW2 further added that he identified the appellant as short and black and as the one who blew the whistle.

In his defence, the appellant who gave his evidence under oath denied to have committed the alleged offence.

In this appeal, the appellant appeared in person unrepresented, whereas the respondent/Republic was represented by Mr. Prudens Rweyongeza, the learned Senior State Attorney.

The appellant filed five grounds of appeal which can conveniently be reduced into three substantive grounds. The **first**

one is the complaint of identification, to which as we shall see later is the main ground in this appeal. The **second** ground is on the complaint of a repudiated cautioned statement where no trial within trial was conducted. The **third** one is on the complaint that PW6 and PW7 are among those who were arrested before, hence had their own interests to serve, therefore not credible witnesses.

At the hearing, the appellant opted not to elaborate his grounds of appeal. On his part Mr. Rweyongeza, supported the conviction and the sentence imposed on the appellant by the trial court and confirmed by the High Court. He then opted to argue the grounds of appeal jointly.

As to identification, Mr. Rweyongeza was of the firm view that the appellant was sufficiently identified among the bandits who attacked the bus at the scene of the crime. He mentioned PW1, PW3 and PW5 as the prosecution witnesses who identified the appellant at the scene of the crime. Mr. Rweyongeza said, PW1 testified to the effect that he identified the appellant by face and features. He

added that, PW1 gave the appellant's description as black and short and as the one who blew the whistle. As to PW3, Mr. Rweyengoza submitted that, he identified the appellant at the scene of the crime and he knew him before for a long time. He further submitted that, even in his statement at the police station on the same day, PW3 mentioned the appellant as one among the bandits who attacked the bus on that day. He then relied on PW5 who testified to the effect that he identified the appellant at the scene of the crime by face and name, as he was not a stranger to him.

Mr. Rweyongeza further submitted that even the 4th accused (co-accused) who was a taxi driver who carried the bandits identified the appellant as one of his passengers on that day. He identified him by face and appearance, said Mr. Rweyongeza.

On the issue of light, Mr. Rweyongeza mentioned PW1, PW2, PW4 and PW5 as the prosecution witnesses who testified that the incident occurred at the time when the sun light was still there. Hence, he said, it was established by all those witnesses that there

was enough light at the scene of the crime to enable them to identify the appellant. As to the visibility at the site, Mr. Rweyongeza mentioned E. 1419 D/SGT CHARLES (PW10) as having testified that, on that day both sides of the road were cleared and that enabled the road to be clearly viewed, so visibility was clear.

In addition to what he has submitted on how sufficiently the appellant was identified by the prosecution witnesses at the scene of the crime, Mr. Rweyongeza said that, even the appellant's conduct implicated the appellant in connection to the offence charged against him. He submitted that PW6 testified to the effect that, when the appellant saw the police at PW6's residence he ran away. Mr. Rweyongeza reasoned if the appellant viewed himself as an innocent person why did he have to run away from the police. Secondly, he said, Bakuza Danile (PW7) testified to the effect that the appellant sent him to take his luggage which was contained in a basket and take it to Manyovu. However, Mr. Rweyongeza said, the way the money was kept in that basket and how it was hidden, raised suspicion. Then, Mr. Rweyongeza urged us to find that the appellant

was sufficiently identified at the crime scene and was fully involved in the robbery committed on that day.

However, Mr. Rweyongeza conceded to the complaint touching on the issue of repudiated cautioned statement and that concerning PW6 and PW7 having their own interests to serve.

In his re-joinder submission, the appellant categorically denied to have been identified at the crime scene. He just said that, all the identifying witnesses failed to state the type of clothes he wore. He then denied that he was identified by his co-accused (the 4th accused) and said, it is not true that he was one of his passengers. He maintained that he was not identified.

The appellant further claimed that he was denied his right to be represented by his advocate at the trial court. He gave the example that when PW4, 5 and 6 testified, he had prayed for an adjournment because his advocate was absent but the trial court opted to proceed. He strongly urged us not to consider the testimonies of

those witnesses, having been deprived of his right to be represented. He added that, his failure to cross – examine those witnesses was due to the absence of his advocate, and that had affected his right to be defended. He thus urged us to expunge the evidence submitted by PW4, PW5 and PW6.

We think it pertinent that we first deal with the issue of the appellant being deprived of his right to be defended and by so doing, we shall strike the iron while it is still hot. We are of the view that, the trial court ought to have considered that the appellant was all along being represented by Mr. Boaz, the learned advocate since the trial was set for hearing on 3.11.1998. When PW4, PW5 and PW6 were testifying, the appellant's counsel was absent and the appellant prayed for adjournment. The trial court refused his prayer. We think that, in such circumstances the trial court should have adjourned the hearing and advise the appellant to look for another advocate. Failure to do so surely prejudiced the appellant. In the event, we are constrained to expunge the evidence of PW4, PW5 and PW6.

Having expunged that evidence, let us now direct our minds on the issue of identification. Mr. Rweyongeza relied on PW1, PW3, PW5 and the co-accused (4thaccused) in establishing that the appellant was sufficiently identified. Now that, PW5 is taken off from the list, we are left with PW1 and PW3. We fully agree with Mr. Rweyongeza on the basis of the evidence of PW1, PW3 and that of the 4th accused (DW4) who was a taxi driver carrying the appellant did sufficiently prove that the appellant was identified at the scene of the crime. Starting with PW1, the driver of the passenger bus, the record clearly shows that, he gave the description of the appellant by stating that:-

"I did stop about 6 paces, they didn't wear any mask to cover their faces. I did mark them as sun lights were on and then they ordered me to go out and open doors for my passengers. Thus I did mark and identify them by faces and features. The youths one

was tall and slim, the other was short and black."

When PW1 was cross-examined by Mr. Boaz, the appellant's advocate, he clearly mentioned the appellant as the one who was black and short and as the one who blew the whistle. We see that is a clear description of the appellant.

Another witness is PW3. He was one among the victims in the attacked bus who testified that he identified the appellant. said:

*"At about 19.30 hrs we were at Mbulanya when we were about to reach at the drift we heard a whistle and it was blewed by two people who were standing at the chair. **I did peep I saw two people one of them is a person who I know as we reside together I did know him by face and***

***name and it is Edwin, the other one I didn't**
know him. (Emphasis added).*

Having analysed on how the appellant was identified by those prosecution witnesses, we are mindful of the fact that being a second appellate Court, we are entitled to interfere with the concurrent findings of fact by the courts below only if there is misdirection or non-direction. See, for instance, **DPP V Jafari Mfaume Kawawa** (1981) TLR 149. We see no reason to disturb the two concurrent findings of fact on the issue of identification based on the evidence adduced by PW1 and PW3, because, the lower court properly directed themselves on this matter.

We also agree with Mr. Rweyongeza that another important piece of evidence is that of the 4th accused (the taxi driver) who was the co-accused of the appellant. The record shows that he identified the appellant as one of his passengers. When he was cross examined, by the appellant, the 4th accused replied:

*"I don't remember the clothes the 2nd accused was wearing but I did mark his face and appearance. The 2nd accused came with his colleague after 5th accused had hired my motor vehicle. **I didn't mix the 2nd accused with any other person. It is the 2nd accused.**" (Emphasis added).*

The evidence adduced by the 4th accused corroborates the evidence of PW1 and PW3 on the identification of the appellant at the crime scene. So, we are increasingly of the view that the prosecution has proved beyond any reasonable doubt that the appellant was sufficiently identified.

We also agree with Mr. Rweyongeza that, the conduct of the appellant also adds weight to the evidence of identification. The record shows that, when PW10 arrived at PW6's house, the appellant ran away. We agree that, the act of the appellant running away after sighting of the police shows his guilty mind. PW10 said:-

"then we required that girl to take us to the place Edwin was she took us and we found the accused sitting outside the house on seeing us he fled, we chased him and we caught him, thus I believed that the money was stolen that is why he tried to run away."

The conduct of running from PW10 being a policeman without any plausible reason, we think raises concern as to the guilty mind of the appellant.

As we are satisfied that the appellant was sufficiently identified, we are of the view that there is no need to examine the other grounds of appeal which Mr. Rweyongeza has conceded which and with we agree.

In the event, and for the reasons stated herein above, we dismiss the appeal.

DATED at TABORA this 17th day of June, 2010.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL