

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

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

CRIMINAL APPEAL NO.60 OF 2009

**JUMA SALUMU MBIBO AND
MAVUNO TIPITIPI APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court
of Tanzania at Mtwara)**

(MANDIA, J.)

dated the 13th day of December 2009

in

Consolidated Criminal Appeal No.49-50 of 2009

JUDGMENT OF THE COURT

27 September & 5 October, 2011.

MUNUO, J.A.

The appellants and one Yusuf s/o Yustin Chaka who is not a party of this appeal were jointly charged in Criminal Case No.110 of 2001 in the District Court of Liwale at Liwale within Mtwara Region. In the said case, Yusuf Chaka was the 1st accused, Juma Salum Mbibo was the 2nd accused and Mavuno Tipitipi was 3rd

accused. All the three accused were charged with 3 counts, namely;

Count 1: Attempted Robbery c/s 287 of the Penal Code;

Count 2: Grievous harm c/s 225 of the Penal Code; and

Count 3: Personating a police officer c/s 100(2) of the Penal Code.

Yusuf Chaka faced a fourth count of unlawfully possessing service store c/s 312(3) and 35 of the Penal Code.

The trial District Court convicted the appellants of the charged offences in counts 1, 2 and 3. Aggrieved, they unsuccessfully appealed to High Court of Tanzania at Mtwara in Criminal Appeals Nos.49 and 50 of 2002, before Mandia, J. The learned judge consolidated the appeals and dismissed them for lack of merit. Still aggrieved, the appellants lodged the present appeal.

On the night of the 16 November, 2001, at about 9 p.m., PW 1 Halidi Alli Njunjilo, the Secretary of Minali Rural Primary Cooperative Society, Nanjegeja Branch in Liwale District was

resting at home with his family. PW 1 was the clerk of Minali Rural Primary Cooperative Society at the material time. At that time it was the cashewnut buying season.

On the fateful night, PW1 saw a vehicle coming to his house. The said vehicle reversed to face the direction it came from. That move made PW1 suspicious so he hid behind house from where he observed the events that followed. He saw three people knock on his door and they asked his wife if he was home. She told them he had gone to the godown. The suspicion PW1 had grew stronger. He quickly went to call his neighbour, PW2 Nassoro Kiruke who accompanied him to see the three strange visitors who were wearing police uniform. PW1 identified himself as the owner of the house while PW2 told them that he was the young the brother of PW1. The strangers told PW2 to leave because they only wanted PW1. PW2 pretended to leave but hang around.

The strangers, through their leader, Yusuf Chaka then told PW1 that they were on patrol and that PW1 should give them his

rubber stamps, book for buying cashewnuts and the safe key for a checkup. PW1 asked for leave to change his clothes and bring to them the articles they demanded. The discussion appeared to be outside PW1's house so with the leave of the purported police officers, he entered his house to get the rubber stamps, book for buying cashewnuts and the safe key. When he went into the house, he conferred with PW2 and their suspicion of the strangers in police uniform grew stronger because they parked their vehicle far away and reversed it ready to leave. With that suspicion in mind, PW1 stealthily went to the godown to alert the watchmen that PW1 would bring some policemen for a checkup of the books of account and safe.

The party reached the godown. The watchman was there but he told those policemen that he had no keys to the godown. The strangers were furious. They threatened to take PW1 to the police station because he was disturbing them. Before the police left, PW3 Halifa Hemedi Mgao who saw them taking PW1, asked PW1 where he was going and he told him the police had arrested him. PW3 and the watchman then lit their torches. The

purported policemen knocked PW3 down, another policeman cut PW3 with a bush knife he had hidden under his shirt. At the juncture, PW1, PW2 and the godown and managed to put Yusuf Chaka under arrest. PW1 raised an alarm.

Villagers converged at the scene of crime and found PW1 and PW2 guarding Yusuf Chaka. During the fracas the other two bandits escaped.

We wish to note here that when PW1 testified at the trial, accused No.1 Yusuf Chaka did not cross-examine him. Accused No.2, Juma Salum Mbibo asked PW1 how he identified him. The later told accused No.2 that he identified him by torch light and he recognized him because had previously seen him at a football match, watching football. Accused No. 3 Mavuno Tipitipi, like Accused No.1, did not cross-examine PW1.

The evidence of PW1 was fully corroborated by PW2 and PW3. They too identified the appellants by torchlight.

The investigating officer, PW4 E147 Detective Constable Mustapher of Liwale police, deposed that he visited the scene of crime where he found Yusuf Chaka under arrest at the Nanjegela godown, dressed in police uniform but seriously assaulted on the head. The captured Yusuf Chaka told PW4 that he got the police uniform he was wearing from the 2nd accused, Juma Mbibo and the third suspect was the 3rd accused, Mavuno Tipitipi. Subsequently the appellants and Yusuf Chaka who did not appeal were jointly charged with the present offences.

In his sworn defence, the 1st appellant raised a defence of alibi saying on the 16th November, 2001 he was at Kilwa Masoko celebrating *Amma* for his daughter so he was surprised to be charged with the present offence. He said that the police arrested him on the 24th November, 2001 and proceeded to search his house but found nothing suspicious.

The 2nd appellant also gave a defence of alibi saying on the material night he was at Kilwa Masoko celebrating *Amma* with the

1st Appellant so he did not go to Liwale or participate in the attempted robbery at Nanjege godown.

The appellants filed a joint memorandum of appeal reiterating their defences of alibi which either appellant was probable and ought to have been found plausible by the learned Judge and the trial magistrate. The respective appellants also challenged their identification by torchlight which they argued was mistaken because the conditions of identification at night were unfavourable which was why torches had to be used to identify the bandits.

The appellants cited the case of **Inchance Saidi versus Republic (1973) TLR n.216** in which Biron, J. held:

“.....where the prosecution side relies on the identification of the accused, the court should consider not only the credibility of the identifying witness but also the possibility of the witness having made a mistake.....”

In their memorandum of appeal cum written submission, the appellants also referred to the case of **Waziri Amani versus Republic (1980) TLR 250 at Pg.252** wherein the Court held;

“.....Evidence of visual identification is of the weakest kind and most unreliable and no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.”

Arguing that the defences of alibi they raised are probable and to have entitled to acquittal, the appellants insisted that on the material night they were engaged in Amma celebrations for the daughter of the 1st appellant at Kilwa Masoko in Kilwa District so they could not have been involved in the attempted robbery staged at Nanjegele godown in Liwale District. Had PW1 or any of the prosecution witness seen and identified them at the scene of crime, they would have given the descriptions at the earliest opportunity and recorded such descriptions in their statements. PW4, the investigating officer, tendered no statement reflecting

the descriptions of the bandit to prove that they were identified by the eye witnesses on the material night. Hence the appellants prayed that the appeal be allowed.

Mr. Ismail Manjoti, learned State Attorney supported the conviction and sentence and urged us to do the same. Conceding that the important issue in this appeal is whether the appellants were properly identified, Mr. Manjoti contended that PW1, PW2 and PW3 knew the appellants before and they recognized them at the scene of crime on the fateful night. However, the appellants managed to escape unlike Yusuf Chaka who was apprehended at the scene of crime and turned over to PW4, the investigating officer when he visited the scene of crime on the same night. Referring us to the decisions of the Court in the cases of:-

Pascal Kitigwa versus Republic (1994) TLR 65; and

Goodluck Kyando versus Republic, Criminal Appeal

No.118 of 2003 (CA) at Mbeya (unreported); the learned State Attorney submitted that this being a second appeal, the Court

should refrain from interfering with findings of fact by the courts below and dismiss the appeal for it is devoid of merit.

The issue before us is whether the identification of both appellants severally and jointly is watertight.

There is no doubt that bandits attempted to rob at Nanjegela godown on the material night. PW1 fully narrated how bandits drove to his home but reversed their vehicle and park it at a distance ready to drive or be driven off. The bandits were dressed in police uniforms and they purported to be police officers. The bandits failed to enter the godown because when PW1 took them to Nanjegela godown, his neighbor had already alerted the watchman that bandits had seized PW1 and they were proceeding to the godown for inspection. When the watchman was asked to open the godown he told them he did not have the godown keys which infuriated the bandits. In protest, the police uniformed bandits knocked down PW3 and cut him with a bush knife, sparking off a confrontation and fracas. In that fracas Yusuf Chaka was apprehended but the other two bandits

managed to escape in the gate away vehicle they had parked a distance from the home of PW1.

PW1, PW2 and PW3 stated that they identified the appellant by the torch light of the watchman and PW3 who was wounded by the bandits. In those circumstances can we safely uphold the conviction? We are of the considered view that if the prosecution identified the bandits allegedly because they allegedly knew him before, they would as the appellants observed have given their names and or descriptions to the investigating officer to facilitate their arrest. On this, we find support in the case of **Waziri Amani versus the Republic**, cited *supra*. Wherein it was held, among other things, that in watertight identification, the identifying witness must have given the descriptions of the suspects. Such description were not given by the prosecution witnesses.

Yusuf Chaka lost the battle when he was arrested at the scene of crime. He is reported to have implicated the appellants so they arrested and charged with the present offences.

The learned judge considered the defenes of alibi raised by either appellant and observed that:

“the trial court considered this defence and rejected it in view of the positive identification made at the scene. It can be added that the appellants visited the scene of the robbery at 9 p.m. while the celebrations ended at 2 p.m. There was seven hours between the end of the celebrations and the attempted robbery. Since the appellants travelled in a vehicle which was seen at the scene, there was enough time for them to travel for and commit the crime. The consolidated appeals have no merit and they are all dismissed in their entirety.”

With respect, the issue is not whether the appellants had opportunity to reach the Nanjegela godown on the fateful night or not. The issue, we hasten to say, is whether the appellants were identified by the eye witness namely PW1, PW2 and PW3. The said witnesses claimed that they knew the 1st Appellant because they had seen him at football match as a spectator. We note, however, the investigator tendered no statements he

recorded from the said witnesses to establish that the described the appellants by appearance, football match memories or by name.

The evidence on record shows that the bandits were identified by torch light. When PW3 lit his torch to identify the bandits they knocked him down and cut him with a bush knife. A fracas then ensued, Yusuf Chaka (accused No.1) was cut with a bush knife on the head. In the meantime, the co-bandits of Yusuf Chaka. Under such difficult and unfavourable conditions of identification, we hesitate to hold that the identification of the appellants was watertight. It appears that possibilities of mistaken identity existed because when PW3 lit his torch to identify the bandits, they struck him down and cut him with a bush knife. A skirmish broke out and fortunately the eye witnesses successfully apprehended the leader of the bandits, Yusuf Chaka.

All in all, we are satisfied that the identification of the appellant was not without doubt. Under the circumstances, we find merit in this appeal. We accordingly quash the conviction

and set aside the sentence imposed on either appellant. We order that the appellants be set free forthwith if they are not held for other lawful cause.

In the result, we allow the appeal.

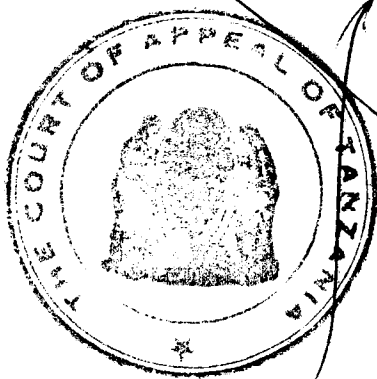
DATED at MTWARA this 3rd day of October, 2011.

E. N. MUNUO
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.




M. A. Malewo
DEPUTY REGISTRAR