

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

**(CORAM: OTHMAN, C.J., BWANA, J.A. And ORIYO, J.A)**

**CRIMINAL APPEAL NO. 9 OF 2011**

**MATHAYO ILANDA.....1<sup>ST</sup> APPELLANT**  
**ANTHONY ALPHONCE.....2<sup>ND</sup> APPELLANT**  
**OMARY ABRAHAMANI @ NYERERE.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

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

**(Masanche,J)**

**dated 17<sup>th</sup> day of October, 2007**

**in**

**Criminal Appeal No. 58 of 2005**

.....

**JUDGMENT OF THE COURT**

23<sup>rd</sup> & 28<sup>th</sup> March, 2011

**ORIYO, J.A.:**

In the District Court of Singida at Singida, the appellants and others not parties in this appeal were charged with two counts. On the first count they were charged with the offence of robbery with violence contrary to Sections 285 and 286 of the Penal Code, Cap 16, R.E. 2002. On the second count they were charged with rape, contrary to sections 130 and 131 of the Penal Code. They were duly convicted on both counts and were sentenced to fifteen and thirty

year's imprisonment, respectively. The sentences were to run concurrently. Aggrieved, they unsuccessfully appealed to the High Court, hence this second appeal.

Before the Court, the first and second appellants appeared in person. However, for the third appellant, Omary Abrahamani @ Nyerere, he was brought to court on a stretcher, mute. According to the Prison Officer, who accompanied the appellants; the third appellant has been bed-ridden for most of the time he has been at the Isanga Prison, though medically, the cause of his ill-health is still unknown. He did not produce any medical document in court to support his oral report. For the respondent Republic, Mr. Angaza Mwipopo, learned State Attorney, appeared. Mr. Mwipopo shed further light on the condition of the third appellant in that he was also absent at the hearing of the appeal in the High Court as the record shows that he was reported to be terminally ill at Isanga Prison.

In the circumstances it was ordered that the hearing of the appeal of the third appellant be adjourned to another date to be fixed. The hearing of the appeals by Mathayo Ilanda, the first

appellant and Anthony Alphonse, the second appellant, proceeded as scheduled.

In the trial court, the brief facts upon which the prosecution and convictions of the appellants were based were as follows:-

On 19<sup>th</sup> May, 2000, at about 01:00 hours, while PW1 Swalehe Shabani and his wife Zainabu Ramadhani, PW2, were sleeping at their home, they were invaded by a gang of armed bandits who went straight to their bedroom. They demanded and took away money together with various other items from the bedroom and from the shop; all valued at Shs. 426, 540/= . In the process of robbing the couple, they cut PW1's left arm with a knife and tied PW1 and PW2 with ropes. Satisfied with their loot but before leaving the premises the robbers ordered the couple to get out of bed and they took away their mattress as well. And as if that was not enough, some of the robbers took time and raped PW2 in turns.

All the prosecution witnesses testified that during the incident, there was a lamp light in the room which assisted PW1 and PW2 to easily identify the appellants, some of who resided in the

same ward and were known to the witnesses, PW1 and PW2, prior to the incident. Due to their prior knowledge of their attackers, PW1 was able to testify which of the bandits did what at the scene, their behaviour and mannerisms during the incident. For example, he identified the bandit who cut him at his left hand, who roped him; etc. Similarly for PW2 she even testified on the order in which the robbers took turns to rape her.

In their defence, both appellants denied any involvement in the robbery and rape incidents at the home of PW1 and PW2 on the night of 19<sup>th</sup> May, 2000.

In the appeal before us, the appellants filed separate but identical Memoranda of Appeal, each with six grounds of appeal. The main issue here is the question of the appellants' identification at the scene of incident. They complained that the alleged source of lamp light at the scene was insufficient to accurately identify the appellants without stating the intensity of the light from the lamp, size of the room lit, the distance between the robbers and the victims, the time taken, etc. The appellants referred us to the leading case on this

point in **Waziri Amani vs R** (1980) TLR 250. On this ground the appellants prayed that their appeals be allowed.

Mr. Mwipopo, the learned State Attorney, supported the conviction of the appellants. It was his view that the evidence of identification by PW1 and PW2 left no doubts on the identity of the appellants. He pointed out some of the factors which made it easy for PW1 and PW2 to identify the appellants. **One**, PW1 and PW2 knew the appellants prior to the incident as they were residents of the same ward as the appellants. **Two**, the appellants took a long time to demand money, carry away the stolen properties and took turns to rape PW2. The learned State Attorney stated that although the incident took place in the night, inside a bedroom where there was a lamp light, this made the space to be lit by the lamp light small in size and the distance between the bandits and the owners of the room was minimized for easy identification. He further submitted that under the pertaining conditions, PW1 and PW2 had no difficulty to identify the robbers. On the time PW1 and PW2 had to observe the appellants, the learned, State Attorney submitted that the incident took a long time as the appellants took time to tear apart the

mosquito net over the couple's bed, cut PW1 on the arm, ransack the room and the shop for various properties and the time it took them to rape PW2 in turns; was long enough for the witnesses to observe the appellants at a close range.

We think the law on visual identification in our jurisdiction is well settled. This court set out broad guidelines on visual identification in **WAZIRI AMANI'S** case (supra):-

*"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 is watertight. The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so was there moonlight or hurricane lamp, etc.), whether the witness knew or has seen the accused before or not".*

With these guidelines, it is the duty of a trial court to assess their application depending on the circumstances of each case.

In the instant case the offences with which the appellants were charged and convicted of were committed at night time. However, that in itself does not always make it impossible to identify the assailants, as it was stated by this Court in the case of **Philip Rukaza vs R**, Criminal Appeal No. 215 of 1994(unreported):-

*"We wish to say that it is not always impossible to identify assailants at night and even where victims are terrorized and terrified. The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled".*

On our part, we have taken into consideration the fact that the appellants and the victims knew each other prior to the incident.

It was this prior familiarity and the length of time taken which made it easy for the victims to identify the appellants.

Therefore, notwithstanding that the intensity of the light from the lamp was not disclosed and the incident took place at night, we are of the considered view that, in the circumstances of this case, there was no possibility of mistaken identity of the appellants.

Having upheld the prosecution evidence of identification of the appellants at the scene of incident as watertight, we think we need not consider the remaining ground of appeal on the evidence of PF3 as there will be no useful purpose served.

We find the appeals lacking in merit and are accordingly dismissed.

As for the third appellant whose appeal has been adjourned, the Registrar is instructed to write to the Officer-in-charge Isanga Prison and ask him to submit a comprehensive medical report of the third appellant, Omary Abrahamani @ Nyerere within two weeks.

This will enable the Registrar to fix another hearing date of the appeal.



DATED at DODOMA this 25<sup>th</sup> day of March, 2011

M.C. OTHMAN  
**CHIEF JUSTICE**

S.J. BWANA  
**JUSTICE OF APPEAL**

K.K. ORIYO  
**JUSTICE OF APPEAL**

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



M. A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**