

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

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

CRIMINAL APPEAL NO.124 OF 2009

**MOHAMED RASHIDI SIMBA
AND FOUR (4) OTHERS APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

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

(Mipawa, J.)

**dated the 3rd day of April, 2009
in**

Consolidated Criminal Appeal Nos.176-180 of 2007.

JUDGMENT OF THE COURT

5 & 6 October, 2011.

MUNUO, J.A.

The five appellants, namely:-

1. Mohamed Rashid Simba,
2. Juma Makuka Ngongono,
3. Mshana Abdallah Ngongono,
4. Mohamed Abdallah Kamtande, and
5. Feruzi Hemed Feruzi Mashada;

were convicted of robbery with violence c/s 285 and 286 of the Penal Code, Cap.16 R.E. 2002 in Criminal Case No. 168 of 2006 in the District Court of Kilwa at Kilwa Masoko. They were each sentenced to 30 years imprisonment.

Aggrieved, the appellant lodged Consolidated Criminal Appeals Nos.176-180 of 2007 in the High Court of Tanzania at Mtwara. Mipawa, J. dismissed the appeals. The appellants then preferred this second appeal to challenge the conviction and sentence.

On the night of the 18th August, 2006 bandits stormed into the house of the complainant, PW2 Zuhura Ngalanga by using a large boulder commonly known as *fatuma*. PW2's husband was away; he had travelled to Dar-es-salaam. PW2 deposed that her *safari* lamp was burning so the room was well lit and visibility good. She stated that when the door was broken open, three bandits namely Accused No.3 Juma Makuka Ngongono (now the 2nd appellant), Accused No.4 Msham Abdallah Ngongono (now the 3rd appellant), and accused No.6 Feruzi Hemed Feruzi Mashada (now the 5th appellant) invaded the house demanding

money, money, money. PW2 told the bandits she did not have money because her brother in law, PW3 Mshamu Ally Mtindi who keeps the shop also keeps the proceeds of the shop sales. The three bandits who were demanding money then told PW2 to take them to the residence of PW3 to get the money.

PW2 complied. She led the bandits to the residence of PW3. When PW2 stepped out of her house, she found two other bandits namely Accused No.1 Mohamed Rashid Simba (now 1st appellant) and Accused No. 5 Mohamed Abdallah Kamtende (now 4th appellant) outside the house.

PW2 stated that she had her *safari* lamp and there was moonlight so he had no difficulty identifying the 1st appellant who was standing outside her house, armed with a gun. The 4th appellant, PW2 noted, was not armed. Furthermore, PW2 stated that she identified the 5 bandits by her *safari* lamp light and by the bright moonlight. She said the bandits lived in a neighbouring Village, they sometimes visited Kibe, her area, so they were not strangers to her. As she led the bandits to the

house of PW3, the 1st appellant who was armed with a gun walked by her left side.

The bandits ordered PW2 to knock and call out PW3 from his window. She complied. PW3 woke up and opened the window only to see the 1st appellant armed with a gun. PW3 stated that his lamp was burning in the house and there was moonlight outside so he saw the bandits and realized that bandits had come to his house. He raised an alarm and climbed into the upper chamber of his house which is commonly known as *darini*. PW3 hid in the *dari* but because the lamp was on in the lower chamber of his house, he monitored the movements of the bandits and he saw Msham Ngongono and Juma Ngongono ransack the room and seize shs.200,000/= under his mattress.

Meanwhile, PW4 Abdallah Ally Mtindi, the brother of PW3 who responded to the thief alarm the latter raised, rushed to the scene of crime wielding a bush knife. When he appeared, the 1st appellant shot him in the right hand causing him to fall. PW4

painfully crept to a nearby bush where hid and continued to watch the bandits thirteen yards away.

Another neighbour, PW4 Saidi Ally Matamba, approached the scene of crime but stood at a distance because the shooting scared him. Unfortunately, 1st appellant Mohamed Rashid Simba, spotted and shot him into his left hand. PW2, PW3, PW4 and PW5 identified the appellants by the bright moonlight. They knew them because they lived in a neighbouring Village. After the bandits vacated the scene, PW6, the Ward Executive Officer telephoned the police and also took the wounded PW4 and PW5 to the dispensary for treatment and the next day to the District hospital for further treatment. PW6 deposed that PW2 listed the suspects who had invaded her house and later PW3's house demanding money and in the process shot two victims.

The robbery occurred at night. In the morning, that is, on the 19/8/2006, PW 8 E4054 PC Abinuru of Police Kilwa Masoko visited the scene of crime. He picked up some bullet shells which

he tendered as Exhibit P4, P5 and P6. As the eye witnesses had identified the bandits, they were traced and accordingly charged.

The 1st appellant gave a sworn defence of alibi saying he had travelled from Iringa to Dar-es-salaam per his bus tickets, Exhibits D1 and D2. The trial court rejected the bus tickets because the 1st appellant had, during the preliminary hearing on the 23/1/2007 indicated that he would tender Upendo bus tickets to show that he travelled from Iringa to Dar-es-salaam on the 18/8/2006 so he could not have been involved in the robbery at PW2's house. The 1st appellant tendered bus tickets from Hood and Sumry buses instead, which the trial magistrate rightly held, was indication that the alibi was fabricated, it was a mere lie and therefore not plausible.

Denying the offence, the 2nd appellant, Juma Abdallah Makuka denied being involved in the robbery at the houses of PW2 and PW3. He said that he was arrested on the 3rd September, 2006 and told he had robbed the victims which he denied.

The 3rd appellant Msham Abdallah Ngongono narrated how villagers arrested him on the 03rd September, 2006 at Ingirito but he denied being a party to the charged robbery.

The 4th appellant Mohamed Abdallah Kamtende denied the charge. He stated that he was arrested on the 02/09/2006 at Njianne Village in Kilwa. He denied being a party in the robbery and pleaded that he was in prison so the witnesses mistook his identity. He said that he had been in prison since 05/9/2006 for another case, i.e. Criminal Case No. 168/2006 in which he was charged with grievous harm c/s225 of the Penal Code. It is important to note here that the alleged robbery was committed on the 18/8/2006, some weeks before the 5/9/2006 when the 4th appellant said that he was in prison for a grievous harm matter. The 4th appellant tendered a bus ticket to show that he travelled from Dar-es-salaam to Kilwa on the 20/8/2006, which implied that he could not have been a party to the charge on the 18/8/2006. In this regard, we think, it also means the 4th appellant was not in prison at that time. He alleged that PW2

owes him sh.30,000/= costs for building a house so she complained against him to silence him and get away with the debt.

Feruzi Hemedi Feruzi gave a sworn defence denying the robbery charge. He stated that he travelled to Dar-es-salaam in August to see his sick brother and was not involved in the robbery.

In the grounds of appeal and additional grounds of appeal, the appellants jointly and severally denied the charge. They criticized the courts below for not finding their defences of alibi probable. The appellants admitted that the prosecution witnesses know them but they argued that their identification was mistaken because the robbery was committed during the night when conditions of identification were difficult so the witness mistook their identities. They further complained that the eye witnesses were family members so their evidence is partial.

Mr. Prudens Rweyongeza, learned Senior State Attorney, supported the conviction and sentence and urged us to do the same. He contended that the appellants were known to the eye witnesses before the robbery so they were not strangers on the fateful night. Moreover, the scene of crime was lit with a lamp and there was bright moonlight on the material night so the conditions of identification were favourable and visibility good. The identification of the appellants by the complainant was fully corroborated by PW3, PW4 and PW5. The defences of alibi were not probable and the trial court rightly rejected the denials of the appellant in view of the strong prosecution evidence against them, the learned Senior State Attorney contended.

The learned Senior State Attorney cited the case of **Kalugendo Dominik and Another versus Republic Criminal Appeal No.91 of 2005** (CA) at Tabora (unreported) at pages 10 and 11 where the court held that where the witnesses identified the appellants by *koroboi* light and by moonlight outside, the said eye witnesses had no difficulty recognizing the appellants who

were their co-villagers. In that situation, visibility was favourable for proper identification, the Court held.

Mr. Rweyongeza further contended that possibility of mistaken identity was ruled out because the 4 eye witnesses knew the appellants and had the police trace and arrest them with the help of the villagers which was why there was no need for the eye witnesses to give the descriptions of the appellants. There was also no need to conduct an identification parade in those circumstances. On this Mr. Rweyongeza cited the case of **Doriki Kaguza versus R Criminal Appeal No.174 of 2004** (CA at Mwanza) (unreported) at pages 8 and 9. In that case the Court held and we quote from page 9 of the judgment:

“.....We also agree with the appellant that the identification parade held was absolutely unnecessary, but for a different reason. As correctly argued by Mr. Rweyongeza, where the identifying witness or witnesses knew the suspect or suspects before the incident it is superfluous and a waste of resource to

conduct such a parade.it is unnecessary and waste of time".

Because the witnesses already know the suspects as is the case, identification parade was superfluous.

The important issue is the identification of each of the appellants in this case.

We are satisfied that PW2, PW3, PW4 and PW5 knew the appellants before the robbery. In the case of **Waziri Amani vs The Republic** (1980) TLR 250, the Court considered visual identification and observed that:-

".....the time the witness had with 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 poor lighting at the scene; and further whether the witnesses knew or had seen the accused before or not....."

In this case PW2 saw the bandits at her house when they demanded money from her. Because she had no money, the bandits ordered her to take them to the house of PW3 where the money was. PW2 led the bandits to the house of PW3, her brother in law. She had her *safari* lamp with her and there was moonlight. The bandits, as we have seen, were persons she knew before. In those circumstances, PW2 had ample time to properly identify the bandits. Although PW3 climbed in the *dari*, the lower chamber of his house was lit with a lamp therefore from the *dari* PW3 monitored the bandits and saw the 2nd and 3rd appellants, Juma Makuka Ngongono and Msham Abdallah Ngongono respectively, ransack and seize sh.200,000/= from under his mattress.

The eye witnesses are family members because the robbery occurred in their family, they were the victims and they directly saw the appellants terrorize them in search for money, money, money. The 1st appellant was armed with a gun. He shot PW4 into the left hand and when he spotted PW5 observing them, he

shot him into the right hand. The wounded victims were taken to the hospital by the Ward Secretary who deposed as PW6.

All in all, we find no merit in this appeal. We accordingly dismiss the appeal.

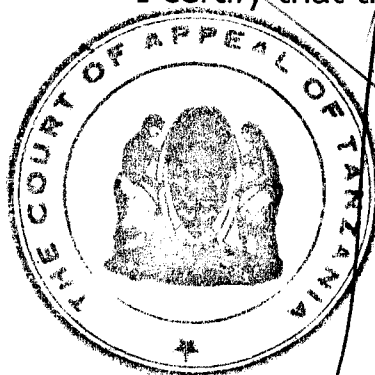
DATED at MTWARA this 6th day of October, 2011.

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