

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

(CORAM: OTHMAN, C.J., LUANDA, J.A., And ORIYO, J.A.

CRIMINAL APPEAL NO. 309 of 2008

**ALLY RAMADHANI.....APPELLANT
VERSUS**

THE REPUBLIC.....RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Arusha)**

(Msoffe, J.)

**Dated 11th day of December, 2002
in
Criminal Appeal No. 61 of 2001**

JUDGMENT OF THE COURT

3RD & 9TH NOVEMBER, 2011

OTHMAN, C.J.:

The appellant, Ally Ramadhani, was charged with and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, (Cap 16, R.E. 2002) by the Babati District Court on 21/6/2001. It sentenced him to the mandatory sentence of thirty (30) years imprisonment. On first appeal, High Court (Msoffe, J. as then he was) dismissed his appeal. Hence this second appeal.

At the hearing of the appeal on 3/11/2011, the Appellant, unrepresented, appeared in person. The Respondent Republic, which did not resist the appeal, was represented by Mr. Zakaria Elisaria, learned State Attorney.

Briefly, the facts giving rise to the case were as follows. On 27/5/2000 at 1 a.m, night time, five robbers broke into Nicodemu Lazaro's (PW1) house at Sigino Village. Then they broke the bedroom door and entered inside. PW1 took cover behind a pile of soda crates. Victoria Akonaay (PW2), PW1's wife was beaten. PW1 and PW2 claimed that their bedroom was full of lamplights that were lit. PW1 identified the appellant with the aid of the lamplights and by his voice and body structure. On her part, PW2 also claimed to have identified him by the lamplights, torch lights and his voice. Francis Nicodemu (PW3) i.e. PW's son, whose house was 5 spaces away from that of his father, claimed to have beamed a torch light from the window, to identify the appellant. PW1, PW2 and PW3 knew the appellant before the incident. Three identified robbers, including the appellant were said to have been immediately named by PW1 to Themotheo Bura (PW4) and Tsere s/o Qwaray (PW5), the village authorities.

The appellant denied involvement. He claimed to have been in the village during and after the event. He had sold a bicycle to PW1 on 29/5/2000, three days after the robbery.

Both the District Court and the High Court were fully satisfied with the identified evidence of PW1, PW2 and PW3.

The appellant's essential and main challenge in the appeal before us, is that the High Court had wrongly relied upon the evidence of identification in dismissing his appeal.

The appellant submitted that PW1 and PW2's evidence did not reveal the brightness of the lamplights as the incident took place at night. That the use of torches by the assailants showed that the illumination was poor. Moreover, their identification by voice was very scanty. The conditions laid down in **Waziri Amani V. R.** (1980) T.L.R. 250 had not been met.

For the Republic, Mr. Elisaria readily agreed with the appellant. He submitted that PW1 and PW2 were silent on the type of lamplights involved and their intensity. If there were sufficient lamplights, there was no reason, he convincingly submitted, for the robbers to have used torch lights. Moreover, there was no evidence at all to show that the appellant was

arrested because PW1 and PW2 had immediately named him to PW4 and PW5.

There is no controversy that the correctness or otherwise of the identification evidence is at the heart of this case.

In its Judgment the High Court found out:

"In my respectful opinion, given the prevailing circumstances at the time, I will go along with the trial Magistrate that the appellant was identified. While there is evidence that the identification was by voice, that the night was well lit by lamp and torch lights, witnesses were fellow villagers with the appellant and hence that they were not total strangers after all. Hence the possibility of mistaken identification should not arise".

Essentially, two pieces of connecting identification evidence are at issue in this appeal. Visual identification and voice recognition. It was undisputed that the armed robbery took place on 27/5/2000 at 1 a.m., night time. PW1, PW2 and PW3 knew the appellant, a fellow villager, before.

Turning, first, to visual identification, by a string of authorities the law is now well settled that the evidence of visual identification is of the weakest kind and in order to sustain a conviction it must be absolutely water-tight and must afford the guarantee of having eliminated all possibilities of mistaken identification, (see, **Waziri Amani V.R.** (1980) T.L.R. 250). In unfavorable conditions of identification, even a known person may be mistakenly identified by an identifier.

Having closely examined the record, we would agree with the Appellant and Mr. Elisaria that PW1, PW2 and PW3's visual identification evidence was unsatisfactory. **One**, PW1 and PW2 were silent on the type of lamp lights involved. It is not known whether the purported lamps were wick lamps, hurricane lamps or pressure lamps. **Two**, they also did not disclose the brightness or intensity of the lights. "Different lamps produce lights of different intensities" -**Maselo Mwita @ Masake and Another V. R.**, Criminal Appeal NO. 63 of 2005 (CAT) (unreported).

Three, we are unpersuaded that the lamp lights aided identification, because if at all they had sufficient intensity, why then did the robbers also use torch lights to search PW1 and PW2's bedroom. **Four**, with PW1 hiding behind the soda crates, the picture that emerges is that he may not have

been in a vantage position to have closely observed the robbers inside the bedroom. The duration they stayed in the room is not known. With these unsatisfactory features of the identification evidence at the scene of crime, with respect, it could not validly be held that the identification conditions were favourable and had eliminated all possibilities of mistaken identification of the appellant.

We deal next with the correctives and reliability of the voice recognition evidence. It is trite that evidence of voice recognition is inherently unreliable. In considering the reliability and probative value of voice recognition evidence, factors that matter include substantial prior familiarity with the voice identified; the distinctive qualities of the voice heard; the amount or volume of speech involved; the length of the speech or conversation; the words, phrases or sentences that were actually spoken and equally important the basis for comparison of the prior familiar voice and that recognized at the scene of the crime. PW1 and PW2 did not volunteer any evidence how they had become substantially familiar with the timbre of the appellant's voice before the incident or for how long he had conversed with them in the bedroom. It was also not revealed how they identified the voices of each of the three robbers they purported to

have identified by their voices. They offered no evidence on the manner each spoke and the length and sequence in which they did. As underscored by the Court in **Boldwin Kombe @ Ballo V. R.**, Criminal Appeal No. 56 of 2003:

“Voice identification is not very reliable. After all, it is not uncommon for people to imitate voices, more so when commission of a crime is involved in order to avoid detection by law enforcement agencies”.

When critically analysed, all the above unerringly points to the unreliability of the purported voice recognition evidence made by PW1 and PW2 under unfavourable conditions. In our respectful view, had the learned Judge considered all the relevant facts and circumstances and the two pieces of related identification evidence, he would no doubt have arrived at the same conclusion as we indeed have, that the evidence of PW1, PW2 and PW3 had not ruled out all possibilities of mistaken identification and was not water-tight in any sense of the requirement of the law. A conviction would not be safe on the whole evidence.

Accordingly, the appeal is allowed, the conviction quashed and sentence set aside. The appellant is to be released forthwith from prison unless otherwise lawfully held.

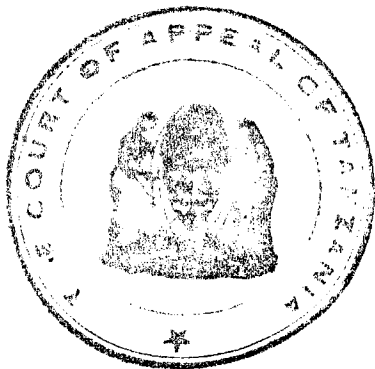
DATED at **ARUSHA** this 7th day of November, 2011.

M. C. OTHMAN
CHIEF JUSTICE

B. M. LUANDA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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




Z. A. Maruma
DEPUTY REGISTRAR