IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM : NSEKELA, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 115 OF 2008

KASSIM IDD MBAGA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Khaday,PRM, Ext.Jur.)

dated the 21st day of December, 2007
in
Criminal Appeal No. 41 of 2007

JUDGMENT OF THE COURT

21st September & 5th October,2011

MJASIRI, J.A.

This is a second appeal from the judgment of the District Court of Moshi. The appellant Kassim Idd Mbaga @ Komandoo was charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code as amended by Act No.4 of 2004. He was sentenced to thirty years imprisonment. He was aggrieved by this decision and unsuccessfully

appealed to the High Court. Still dissatisfied with the decision of the High Court, the appellant has preferred this appeal to this Court.

At the hearing of the appeal, the appellant appeared in person and was unrepresented and the Respondent Republic was represented by Mr. Zakaria Elisaria, learned State Attorney.

In the night of August 24, 1997 all was not well at Kiyungi Village. The house and shop of PW2 Neema Kisavuli were raided around 2.00hurs. The appellant who was a close relative of PW2 was implicated in the robbery. He was accompanied by other people who were not known to PW2 and her children. It was the prosecution case that the appellant broke into the house of PW2 and stole the following items. Sh. 700,000, three cartons of sportsman cigarettes valued at sh. 645,000; one radio cassette Panasonic double deck valued shs. 70,000, one radio cassette Panasonic single deck valued at sh. 55,000/=. All the stolen properties were worth shs. 1,542,000/= the properties of one Musa Hussein PW3 who was the son of PW2. It was alleged by the prosecution that the appellant

used a fiream immediately before stealing in order to obtain the stolen properties.

The prosecution called seven (7) witnesses. PW2 and PW3 testified that they identified, the appellant using the light of a lamp. They stated that they knew the appellant well as he was their relative. According to them the appellant came to live with them when he came out of prison. The appellant denied any involvement in the robbery which took place on the material date.

The appellant filed seven (7) grounds of appeal which are summarized as follows:-

1. *There was non-compliance with section 99(1) of the Criminal Procedure Act. As D/SSGT Raphael was below the rank of Inspector, he was not competent to prosecute the case.*
2. *There was non-compliance with section 192(3) of the Criminal Procedure Act as the preliminary hearing was not conducted.*
3. *The appellant was not properly identified by PW2 and PW3.*

4. The conviction of the appellant was against the weight of the evidence.

Mr. Elisaria opposed the appeal. In relation to ground No.1, that is the non- compliance with section 99(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (hereinafter "the Act") he submitted that the fact that Detective Sergent (D/SSGT) Raphael did not have the rank of a police inspector did not prejudice the appellant in any way.

With regard to ground No.2 on the non-compliance with section 192(3) of the Act, on the failure to conduct a preliminary hearing, Mr. Elisaria submitted that this caused no injustice to the appellant. He relied on the case of **Joseph Munene and Another v.R** Criminal Appeal No. 109 of 2002.

On the issue of identification raised in ground No.3, Mr. Elisaria submitted that the appellant was properly identified. According to him the appellant was well known by PW2 and PW3 being a relative. He also stated that there was sufficient light. He argued that the legal principles

laid down in the case of **Waziri Amani v. R** (1980) TLR 250 were not applicable to this case. He concluded that the case against the appellant was proved beyond reasonable doubt.

The appellant in reply to the submissions raised by the learned State Attorney submitted that the circumstances leading to his identification were not favourable. The prosecution relied on the light of a lantern and a small lamp. This was not a reliable source of light.

This is a second appeal. It is settled law that very rarely does a higher appellate court interfere with concurrent findings of facts by the courts below unless there are misdirections or non directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice. See **Pandya v R** [1957] EA 336 and the **Director of Public Prosecutions v Jaffari Mfaume Kawawa** [1981] T.L.R. 149.

After reviewing the evidence on record and the submissions by the learned State Attorney and the appellant, we would like to make the

conclusion that failure to do so does not vitiate the proceedings. See **Joseph Munene and Another versus Republic**, Criminal Appeal No. 109 of 2002 C.A. (unreported).

In relation to ground No. 3 on the issue of identification, the pivotal point for consideration and decision in this case is whether the appellant was sufficiently identified as being the person who committed the robbery.

The issue of identification is very crucial in this case. The crime which the appellant was convicted of took place at 02.00hours. the premises had a kerosene lantern and lamp. The prosecution relied on the evidence of PW2 and PW3 for identifying the appellant. We need to establish whether the condition was favourable for adequate and correct identification. PW2, Neema Kisavuli and PW3 Mussa Mrisho testified that the appellant was their relative. They knew the appellant very well. The appellant had even lived with them when he came out of prison. The appellant spent quite some time at PW2's house in the course of conducting the robbery. According to the evidence of PW2 and PW3, the appellant was the one giving instructions to his accomplices. They were

found to be credible witnesses by the trial court. No cause has been shown that PW2 and PW3 have given false evidence against the appellant.

Therefore the conditions for identification in this case as gathered from the evidence on record were favourable. See **Samweli Silanga v R** [1993] T.L.R. 149 and **Rajabu Katumbo v R** 1994 T.L.R. 129.

We therefore entirely agree with the learned State Attorney that the appellant was sufficiently identified. We are fully aware that the evidence of visual identification is of the weakest kind and most unreliable. See **Waziri Amani v Republic** [1980] T.L.R. 250 and **Raymond Francis v. R** [1994] T.L.R.100.

In this case the evidence was such that there was no possibility of mistaken identity. The principles laid down in the case of **Waziri Aman v R** 1980 T.L.R. 250 are not applicable in this case.

In the event there is no reason to fault the decision of the first appellate court. The appeal is hereby dismissed in its entirety.

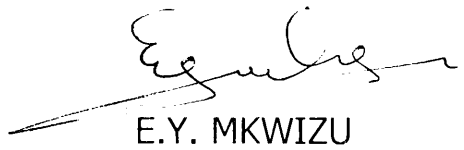
DATED at **ARUSHA** this 4th day of October, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

S.MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL