IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 289 OF 2008

SAMADU RAMADHANI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Arusha)

(Mmilla, J.)

Dated the 30th day of July, 2008

in

Criminal Appeal No. 71 of 2007

JUDGEMENT OF THE COURT

4th & 10th October, 2011

MJASIRI, J.A.:

The appellant was charged in the District Court of Arusha with the offence of armed robbery contrary to **Section 287A** of the Penal Code Cap 16 RE 2002, and he was convicted and sentenced to thirty years imprisonment . His appeal to the High Court was dismissed.

The case for the prosecution in the trial was that on October 26, 2006 at about 13:00 hours at Magadirisho Village within Arurmeru District in Arusha Region, the appellant accosted Aisha Nutu, a secondary school student and stole from her Shs 61,000 and school documents and immediately before and after time of stealing the said property used a machete to threaten PW1 in order to obtain the said property.

The basis for the conviction by the trial Court was the identification of the appellant. The incident occured during the day. The prosecution called three (3) witnesses. The evidence linking the appellant with the offence was that of PW2. PW2 clearly recognized the appellant as he was well known to her. They lived in the same village. The appellant also stated in his defence that he knew the appellant's mother. PW1 witnessed the robbery incident but was unable to identify the appellant. The trial court was satisfied that the circumstances surrounding identification were favourable and there was no possibility of mistaken identity.

The appellant filed three grounds of appeal. He also sought leave of the Court to file an additional ground. His grounds revolved more or less on the evidence of PW2, the complainant in this case. These can be summarized as follows:-

1. *The appellant was convicted on the un-corroborated evidence of PW2.*

2. *The evidence of PW2 was wrongly considered while she was not listed as witness during the preliminary hearing.*

3. *The conviction of the appellant was against the weight of the evidence.*

In this appeal the appellant appeared in person while the respondent Republic had the services of Mr. Ponsiano Lukosi, learned Senior State Attorney.

At the hearing of the appeal, the appellant adopted his three (3) grounds of appeal, as contained in the memorandum of appeal and his written submissions without elaborating anything. He opted to make his submissions after the learned Senior State Attorney had addressed the Court.

Mr. Lukosi did not support the appeal. On ground No. 1, he argued that the evidence of PW1 did not need any corroboration. The incident happened during the day at around 01:00 hours. PW2 knew the appellant well. They lived in the same village. PW2 had no basis to frame the appellant. The trial court found PW2 to be a credible witness.

On grounds No. 2 and 3, Mr. Lukosi submitted that **Section 192 (3)** does not require that the names of witnesses should be given during the preliminary hearing. He relied on the case of **Yusuph Nchira versus DPP,** Criminal Appeal No. 174 of 2007 (unreported).

Both the Courts below considered and evaluated the evidence and accepted the evidence of the PW2. It is settled law that very rarely does a higher appellate Court interfere with concurrent findings of fact by the Courts below unless there are mis-directions or non directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice. (See **Amratlal D.M. trading as Zanzibar Silk Stores v A.H. Jariwalat/a Zanzibar Hotel 1980 TLR 31, Pandya vR** (1957) EA 336

and **Director of Public Prosecutions v Jaffari Mfaume Kawawa** (1981) and **Mussa Mwaikunda v R.,** Criminal Appeal No. 174 of 2006 CA, unreported).

The major complaint by the appellant is in relation to the credibility of PW2. In order to convict the appellant for armed robbery the prosecution must prove that:-

(1) There was an armed robbery.

(2) It was the appellant who committed the robbery.

In this case there was no dispute at the trial, and indeed in the first appeal for that matter, that the robbery incident took place on the stated date and time. The crucial question is, whether the prosecution evidence established beyond reasonable doubt that the appellant was the one who committed the robbery.

The first point for consideration and decision in this case is whether the appellant was sufficiently identified as being the culprit. The issue of identification is very crucial. The prosecution case relied on the evidence of PW2 for identifying the appellants. We need to establish whether the

conditions were favourable for adequate and correct identification. See **Saidi Chally Scania v R**, Criminal Appeal No. 69 of 2005, CA (unreported).

On our part, we entirely agree with the learned Senior State Attorney that the appellant was sufficiently identified. The incident happened during the day. The appellant was well known to the appellant. We are fully aware that the evidence of visual identification is one of the weakest kind and should only be relied upon when all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely watertight. (See for instance the cases of **Waziri Amani v. R 1980** TLR 250; **Anthony Kigodi v Republic**, Criminal Appeal No. 94 of 2005 CA (unreported);**Raymond Francis v Republic** (1994) TLR 100, **Shamir John v Republic**, Criminal Appeal No. 202 of 2004 CA (unreported) and **R v Turnbull** (1976) ALL ER 549).

In this case the conditions for identification were favourable. The complainant knew the appellant before, they lived in the same village and the incident took place during the day. Under the circumstances there was no room for mistaken identity. (See **Eva Salingo and Two Others v R**

1995 TLR 220; **Kenga Chea Thoya v R**, Criminal Appeal No 375 of 2006 CA, Kenya)(unreported) and **Anjonani v R** (1998) KLR 60).

In view of the foregoing reasons, we have no reason to fault the decision of the courts below. The appeal is hereby dismissed in its entirety. It is so ordered.

DATED at ARUSHA the 7th day of October, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL