IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 446 OF 2007

EDWARD S/O SABUNI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mujulizi, J.)

dated the 25th day of October, 2007
in
Criminal Sessions Case No. 5 of 2003

JUDGMENT OF THE COURT

14 & 16 June, 2011

MSOFFE, J.A.:

The High Court (Mujulizi, J.) sitting at Maswa convicted the appellant EDWARD SABUNI of the murder of DOTO JIBUNGE, SHINJE DOTTO and MKWIMBA DOTTO. The information filed against the appelalnt was that on 27/5/2001 at Buyubi village within Maswa District in Shinyanga Region the appellant murdered the above persons. Following the conviction the appellant was sentenced to death on the first count. He is aggrieved, hence this appeal. At the hearing of the appeal he had the services of Mr. Kamaliza Kayaga, learned advocate. On the other hand, the respondent Republic was represented by Mr. Jackson Bulashi, learned Senior State

Attorney. We wish to state here from the outset that Mr. Bulashi did not support the conviction and sentence. With respect, for reasons which we will demonstrate hereunder, he was justified in arguing in support of the appeal.

The prosecution evidence as it unfolded at the trial was simple and straightforward. The evidence consisted of the testimonies of four witnesses. The key witnesses, however, were PW1 Shila Jibunge and PW2 Leticia Dotto, a brother and sister respectively. PW1 testified and stated, *inter alia*, as follows: -

> *"Our homestead was invaded by bandits. It was at night. At around 11.00 p.m. I was sleeping in the house in the east. My elder brother was sleeping in the house to the west. I was asleep. I was awakened by noises. I went outside of the house. I went towards the house from which people were crying. As I approached the house, I saw a person standing near to the house on the corner of the house. I questioned him as to what was going on. He said to me "Pumbavu ondoka hapa". I identified him as a person I had seen before, but I did not know his name. I had seen him on several occasions. He used to come to our compound although I had never asked him his name. He used to come to spray (pesticides) the animals. I was still young. I was about ten years.*

I can identify him (He is pointing to the accused in the dock) the one over there.

Later on I went to the house of my late brother. I found that two children had died. They were; Shinje Dotto and Kwimba Dotto. My brother Dotto Jibunge was lying on his backs saying incollegible statements."

In similar vein, PW2 stated as follows: -

"...There came bandits, who invaded our house. It was at night. I was asleep. I had slept with my aunt – Ngolo Ngasa and Saada Kwingu. We had slept in the same house with my late father. I slept in a different room. They (bandits) fired gun shots. They light into our room with torch light. Others were digging the house from outside. Two of them came to our room. I identified one of them. He used to come to our home to spray (pesticides) the cattle. I identified him because of the torchlight. He had a torch in his hand. They were kicking us around. They then entered into father and mother's house. They started abusing father and mother. They were speaking in Kiswahili. I heard gunshots.

I knew the person I identified by his name. I had seen him on several occasions. I knew him as one Sabuni."

Admittedly, the prosecution case was to stand or fall on the crucial issue of identification. In a fairly long judgment, in which the trial judge

considered some other matters which were not necessarily central to the above pertinent issue, the said judge was satisfied that the evidence of PW1 and PW2 on the identification of the appellant was watertight. In other words, he held the view that the conditions obtaining on the night in question were conducive to proper identification of the appellant.

With respect, as correctly submitted by Mr. Kamaliza and Mr. Bulashi, the evidence of visual identificaiton by PW1 and PW2 was too weak to ground the conviction in issue.

To start with, the fact that they knew the appellant prior to the date of incident did not necessarily mean that he was the same person whom they saw and identified on that fateful night. The evidence on record shows that the incident involved a fairly big or large number of bandits. Also, the night was dark; to suggest that it was not moonlit. According to PW1 there was light on the day in issue. Yet he did not disclose the source of the light and whether it was bright enough to allow for correct identification of the appellant. When he was cross-examined he could not even remember any description about the appellant. In the circumstances of this case, a description of some sort was necessary in order to test the veracity of the evidence of PW1 on whether or not it was the appellant,

Apparently no such evidence was forthcoming in the case.

According to PW2 she identified the appellant because he had a torch in his hand. Yet when she was cross-examined she stated that there was no light in the room as the lamp had been extinguished and the bandits were pointing the torch light on them! At any rate, as this Court has held in a number of decisions, torch light flushed on a witness is not an effective means or mode of identification- See for instance, **Juma Marwa** v **Republic**, Criminal Appeal No. 71 of 2001 and **Michael Godwin and Another** v **Republic**, Criminal Appeal No. 66 of 2002 (both unreported), cited to us by Mr. Kayaga. In **Godwin's** case, in particular, this Court observed: -

> *"...It is common knowledge that it is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed. In this case, it seems to us that with the torch light flushed at them (PW1 and PW2), they were more likely dazzled by the light. They could therefore not therefore identify the bandits properly..."*

With respect, the reasoning in **Godwin** (*supra*) also applies in this case in respect of the evidence of PW2.

Further to the evidence of PW1 and PW2 on visual identification, there is one other feature in the case which we wish to address here. It is on record that a number of people assembled at the scene in answer to the alarm raised after the incident. Under normal circumstances, one would have expected PW1 and PW2 to name the appellant at that early opportunity. Yet none of them did so. We think that the failure by PW1 and PW2 to name the appellant at that early opportunity was not consistent with identification of the appellant. Indeed, as this Court stated in **Marwa Wangiti Mwita and Another** v **Republic**, Criminal Appeal No. 6 of 1995 (unreported):-

> *The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry.*

This Court's decision in **Swale Kalonga @ Swale and Another** v **Republic**, Criminal Appeal No. 46 of 2001 (unreported) underscores this same point.

For the above reasons, we are satisfied that there is merit in the appeal. We accordingly allow the appeal, quash the conviction and set

aside the sentence. The appellant is to be released from prison unless lawfully held.

DATED at **TABORA** this 15th day of June, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

(E. Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL