

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

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

CRIMINAL APPEAL NO. 462 OF 2007

**HUSSEIN ALLY @ FUNDUMU APPELLANT
VERSUS
THE REPUBLIC RESPONDENT**

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

(Chinguwile, J.)

**dated the 31st day of August, 2007
in
Criminal Appeal No. 75 of 2005**

JUDGMENT OF THE COURT

15 & 20 June, 2011

MANDIA, J.A.:

On 1/8/2004 two persons shining torches broke the front door of the house belonging to PW2 Issa Khalfani, cut him with a knife and beat him into unconsciousness. According to the PF3 issued to PW3 Issa Khalfani, Exhibit P5, he sustained cut injuries on the right shoulder, chest and left ear. The beatings were administered in the presence of PW1 Asha Said who is the wife of PW2 Issa Khalfani. According to PW1 Asha Said the two raiders took from her bedroom an old mattress on which blood from her husband PW2 Issa Khalfani

had spurted when he was cut (Exhibit P1), various male clothes (Exhibit P2) and a bag (Exhibit P3). As the two raiders moved around the room collecting things using the shone torches PW1 managed to identify one of them as the appellant Hussein who is a carpenter living at Kiloleni. After collecting the various household items the raiders fired in the air and left.

The sound of gunfire made by the raiders attracted the attention of PW3 Juma Kalunga who went to the scene and found PW1 Asha Said and PW2 Issa Khalfani wounded.

PW1 Asha Said mentioned one of the assailants as the appellant who she described by the name of Hussein and that he was a carpenter living at Kiloleni. After this description PW3 Juma Kalunga took PW1 and PW2 to hospital. At 8 a.m, six hours from the robbery, PW1 Asha Said and PW3 Juma Kalunga reported the robbery to PW4 Inspector Yahaya Adam Mdogo of Tabora Police Station. During the report to the Police PW1 Asha Said repeated the identity of the appellant she first gave to PW3 Juma Kalunga soon after the robbery.

At 1 p.m, eleven hours after the robbery, PW1 Asha Said led PW4 Inspector Yahaya Adam Mdogo and PW3 Juma Kalinga to the house of the appellant. The appellant was not at home but his wife and children. As PW4 Inspector Yahaya Adam Mdogo arranged to secure the attendance of a ten cell leader for a search, the appellant appeared on the scene. When the appellant saw PW3 Juma Kalinga and the Police Officer PW4 Inspector Yahaya Adam Mdogo he bolted but was caught and brought to his house. A search was conducted in which PW1 Asha Said identified a mattress with blood stains (Exhibit P1), trousers and two shirts (Exhibit P2) and a bag (Exhibit P3) as the property stolen from their bedroom during the raid eleven hours previously. When the blood stained mattress was tendered in evidence the appellant is on record as saying:-

"Accused: I object. It is not mine."

As for the clothes, the appellant is on record, at page 10 of the record of appeal as making the following remark when the clothes were tendered:-

"I admit that the clothes were found at my home but I bought them from one person,"

PW3 Juma Kalunga also gave evidence that the appellant claimed ownership of the things seized from him

In his defence the appellant claimed ownership of all the property tendered in evidence as Exhibits P1, P2, P3 respectively, that is, the mattress, clothes and bag. He fielded one witness DW2 Omari Mohamed Luziga who testified that the mattress, clothes and bag were the properties of the appellant and that he DW2 Omari Mohamed Luziga was an eye witness when the appellant bought the items from some unknown person.

At the end of the trial the court of first instance found the appellant guilty, convicted him and sentenced him to thirty years imprisonment with corporal punishment. The finding of the trial court was largely based on the doctrine of recent possession after dismissing, at page 37 of the record, the defence story of the

appellant buying the clothes from an unknown person as an unbelievable cook-up.

On appeal the High Court upheld the conviction and sentence based on positive visual identification and the doctrine of recent possession. The appellate High Court dismissed the appeal preferred by the appellant. This made the appellant file a second appeal in this Court.

The appellant filed a memorandum of appeal containing five grounds. Being a self-help job, the memorandum is repetitive but raises two substantive grounds, namely:-

1. That the first appellate court erred in relying on faulty visual identification to uphold the conviction of the appellant in the trial court.
2. That the appellate High Court erred in relying on the doctrine of recent possession in circumstances where the identification of the property by the prosecution witnesses was weak

because no receipts were tendered proving ownership and no peculiar marks were identified in articles which were common.

The appellant appeared in person, while the respondent/Republic was represented by Ms. Lilian itemba, learned State Attorney.

Arguing the appeal, Ms. Lilian Itemba, learned State Attorney conceded that case law has shown that evidence of visual identification by torch light is weak, but in the case at hand there is uncontroverted evidence that the victim of the robbery PW1 Asha Said mentioned the identity of one of the raiders as the appellant at 2 a.m. soon after the raiders left. Six hours later, at 8 a.m, PW1 mentioned the appellant as one of the raiders to PW4 Inspector Yahaya Adam Mdogo. At 1 P.M. PW1 Asha Said was at the appellant's house and identified a mattress Exhibit P2, as one taken from her house eleven hours earlier. She gave identifying marks known only to her, namely destruction made by rats and bloodstains made by her husband's blood which was spilled into the mattress when her husband was cut by the raiders eleven hours earlier during the

robbery. When PW1 Asha Said identified the mattress the appellant was physically there, and he disowned the mattress. He repeated the disowning of the mattress in court. It was only while defending himself in court on 17/3/2005, a little bit over seven months later, that the appellant laid claim to the mattress as part of the items he bought from the undisclosed seller, a claim which the two courts below dismissed as concocted.

On the issue of visual identification by torchlight, we join issue with the appellant that the two courts below erred in finding that evidence of visual identification by torch light is strong enough to found a conviction. Our previous decisions confirm this view namely:-

1. **Mohamed Musero vs. R.**, (1993) TLR 290
2. **Juma Marwa v.R** Criminal Appeal No. 71 of 2001 (Mwanza Unreported)
3. **Michael Godwin and Another v.R** Criminal Appeal No. 66/2002 (MZA) Unreported.

We therefore allow the ground relating to visual identification .

Apart from visual identification, there is evidence that the complainant mentioned the appellant at the earliest opportunity, and continued naming him wherever the need arose. In **Marwa Wangiti Mwita and Another v Republic**, Criminal Appeal No. 6 of 1995 (unreported) we had this to say:-

"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."

The story of Asha Said (PW1) on who robbed her and cut up her husband starts soon after the robbery and is consistent throughout. It was also Asha who led the Police to the appellant's house where the bloodied mattress was recovered. The peculiar identifying marks namely, damage made by rats and bloodstains, made by the victim of the robbery removed the mattress from a common item and associated it with the complainant only. The fact

that the appellant first disowned the mattress during recovery and laid claim to it seven months later was rightly used to make a finding of fact that the appellant is the one who stole the mattress on 1/8/2004 after the armed robbery. The evidence justifies this finding. We are satisfied that the doctrine of recent possession was correctly applied in this case – see **BALTAZAR WAMBURA v R**, Criminal Criminal Appeal No. 24 of 2001 (unreported). We are satisfied that the appeal has no merit and we dismiss it in its entirety.

DATED at **TABORA** this 18th 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.

A handwritten signature in black ink, appearing to read "E.Y. Mkwizu", is written over a horizontal line.

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL