IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MUNUO, J.A., KILEO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 308 OF 2009

AMOS PAULO AND ANOTHER..... APPELLANT
VERSUS
THE D.P.P..... RESPONDENT

(Appeal from the Judgment of the High Courtof Tanzania at Arusha)

(K.M.M.SAMBO, J.)

dated the 2Ist day of August, 2009
in
Criminal Appeal No. 121 of 2007

JUDGMENT OF THE COURT

28th February & 02nd March, 2012

KILEO, J.A.:

The appellants, Amos s/o Paulo and Odian s/o Elias were, along with two others, charged with the offence of Armed Robbery contrary to section 285 and 286 of the Penal Code Cap 16 as amended by Act No.10 of 1989 in the District Court of Hanang at Katesh. The appellants appeared as the first and second accused persons respectively, at the trial. The trial magistrate found, after the prosecution case had been closed, that there was no case to answer for the third and fourth accused persons. The appellants were convicted and sentenced to serve

30 years in prison. Their appeal to the High Court was unsuccessful hence this second appeal.

Facts as briefly adduced at the trial show that on 8th February, 2002 at about 2.30 a.m. at Mara village, within Hanang' District) four persons armed with *panga, machete* and clubs broke into the dwelling house of the complainant one Mary d/o Marco (PW1) where she was sleeping with her children. They threatened the complainant with *Panga*, hit her on her right knee using a club and managed to steal a variety of items including cash money, radio cassettes and clothes. The appellants' conviction was based on identification evidence.

The appellants' petition of appeal contains five grounds which can conveniently be paraphrased into two main grounds:

> ***That the courts below erred in basing conviction on evidence of identification which was not sufficient in the pertaining circumstances.***
>
> ***That as a whole, the prosecution did not prove its case beyond reasonable doubt.***

The appellants appeared before us unrepresented. The respondent Republic was represented by Ms. Veritas Mlay, learned Principal Attorney.

Submitting before us in addition to their grounds of appeal the first appellant argued that his behavior the morning after the night of the crime negated all possibilities of his involvement in the crime. Moreover, the victims did not mention them as their assailants at the earliest possible opportunity he argued. The appellant also pointed out that his defence witnesses cemented his defence of non- involvement in the crime. The second appellant on the other hand argued that he was not sufficiently identified but he was merely arraigned because there had been some misunderstandings with the complainant over remuneration of work they had done for her earlier on.

Ms Veritas supported the conviction on the ground that PW1 and PW2 properly identified the appellants as they were known to them before and that there was a lantern lamp burning at the scene of crime.

This appeal centers mainly on whether the prosecution discharged its burden of proving its case beyond reasonable doubt. The appellants have complained that there was not even proof that robbery was

committed at all. They argue that a police officer should have visited the scene to ascertain the break in and the stone (fatuma) used to break the door should have been tendered in evidence.

The circumstances of this case are similar to **Vita Quambaday vs. Republic**- Cr. Appeal No 28 of 2008 (unreported). In that case the complainant's room was broken into at 2.00 am by bandits whom the complainant, her son and sister in law (PW1, PW2 and PW3 respectively) alleged to have recognized through light from a lantern lamp which had a bright light. The complainant claimed that she especially recognized the appellant because he was known to her before. She even mentioned his nickname and described his attire at the time of commission of the crime. In discussing the matter before it the Court noted that *there was no evidence from the police to substantiate the evidence of PW1, PW2 and PW3 that the offence was committed, reported to the police, and to whom the name of the appellant was mentioned as being the one who committed the offence.* The fact that there was no evidence from the police to show how the offence was committed and the fact that there was no evidence to show to whom the appellant was named as a culprit were found to be deficiencies which made identification of the culprit questionable.

We are mindful of section 143 of the Evidence Act which provides that *no particular number of witnesses shall in any case be required for the proof of any fact*. However in the circumstances of the present case one would have expected that the prosecution would have at least tendered evidence to show when the witnesses reported the matter to the police and how the appellants were arrested. We have made this observation bearing in mind the fact that there is nothing on record to show that the victims made an immediate mention of the appellants as the ones who robbed them. This means that the witnesses made dock identification. Moreover, there was no evidence that the appellants were ever searched to find out if they possessed the stolen property which would have easily linked them to the crime. This is a criminal case; normally where a complainant claims that some properties were stolen from her the first thing to be expected is for the suspects to be searched.

In view of the above considerations we are settled in our minds that the identification of the appellants at the scene of crime was not sufficient to sustain a conviction.

We have also noted, and Ms. Mlay conceded that much, that the trial magistrate did not address himself to the defence that was raised

by the appellants. The first appellant gave evidence which suggested that he could not have been at the scene of crime at the time the crime was committed. He called a witness (DW3) who testified to have been with him the whole night on the day of the incident. Another witness, a fellow teacher at the school where the complainant taught (DW4) gave evidence that the first appellant accompanied them as they went to the complainant's house after they had heard what befell her. When they got there, PW2 who was present never mentioned the appellant as having been one of the robbers. Even later when he met the complainant she never mentioned to him that the first appellant who was the complainant's neighbor and one time pupil was among those who robbed her. The second appellant claimed that he was joined in the case due to grudges that existed between her and the complainant over some payment for work done. **In Alfeo Valentino vs. The Republic** – Cr. Appeal No.92 of 2006 (unreported) the Court had this to say in regard to a trial court's failure to fully consider the defence of *alibi*:

> *'As this Court succinctly stated in* ***Charles Samson v. R****, Criminal Appeal No. 29 of 1990, as in many other cases, failure by a trial court to fully consider the defence of alibi, and we may add without fear of being contradicted, the defence case as a whole, is a serious error. We*

are of the settled mind, therefore, that the trial court fatally erred in not considering the entire defence evidence before finding the appellant guilty. Unfortunately, even the first appellate court did not address itself on this omission.'

In **Hussein Idd and Another vs. Republic** (1986) TLR 166 the first appellant together with another person were convicted of murder. The trial court dealt with the prosecution evidence implicating the first appellant and reached the conclusion without considering the defence evidence. The Court held:

'It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence'

In the case at hand if the courts below had properly addressed themselves to the whole case they would probably have found that the defence raised by the appellants was highly probable. The first appellant in his address before us said that it would be most unlikely that he, a long time neighbor of the complainant would have been so foolish as to

go to the complainant's house without even masking his face. His argument is sound. In **Salum Petro Ngalawa vs. The Republic** – Criminal appeal No. 85 of 2004 (unreported) this Court made the following observation after a witness had claimed to have identified the culprits through a vehicle's head lights:

> *'We start with the identification of the appellant by PWs 2 and 3. It was their evidence that they were able to identify the appellant because of the head lamps of the vehicle. But we ask ourselves how the bandits could have been so foolish as to come out in front of such a glare of the head lights of the vehicle. According to PWs 2 and 3 those people had taken cover and only emerged after the vehicle stopped and tried to reverse. It is highly improbable that they would have done so.'*

The first appellant's contention that it would be most unlikely, being very well known to the complainant, to have gone to rob her without concealing his identity makes sense.

In the light of the above considerations we find the appeal by Amos Paulo and Odian Elias to have been filed with sufficient cause for

quashed and sentences imposed are set aside. The appellants are to be released from custody forthwith unless held for some other lawful cause.

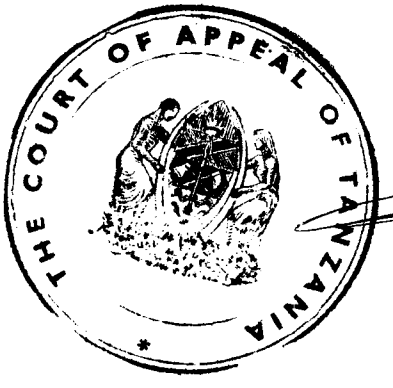
DATED at **ARUSHA** this 29th Day of February, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
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