

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: BWANA, J.A., MJASIRI, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 182 OF 2010

**1. BIRAHY NYANKONGO }
2. KIJILI ISIAGA } APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Mwanza)**

(Rweyemamu, J.)

**dated the 15th day of August, 2010
in
Criminal Appeal No. 4 of 2005**

JUDGMENT OF THE COURT

18th & 19th September, 2012

MANDIA, JA.:

The two appellants appeared before the District Court of Tarime at Tarime on a charge sheet containing three counts, one of Armed Robbery and two counts of Unlawful Wounding. They were convicted and sentenced each to thirty years imprisonment for the count of Armed Robbery and twelve months imprisonment each for the two respective counts of

Unlawful wounding, all sentences to run concurrently. They were dissatisfied with the convictions and sentences and preferred a joint appeal to the High Court of Tanzania at Mwanza. Their appeal was found without merit and was dismissed in its entirety. They were dissatisfied with the dismissal of the appeal in the High Court and had filed this second appeal. They have filed a memorandum of appeal containing two grounds on 27/6/2012, and on 22/8/2012 they filed a supplementary memorandum containing four grounds. They appeared in person, unrepresented, to argue their appeal while the respondent Republic was represented by Juma Sarige, learned State Attorney. The grounds of appeal raised in the memorandum of appeal filed by the appellants are:-

- (a) conflicting dates shown on which the alleged crime was committed.*
- (b) failure of the prosecution witness to name suspects before their arrest.*
- (c) mistaken identification.*
- (d) application of the doctrine of recent possession in circumstances where it was not applicable.*

(e) exhibits tendered by the wrong person.

(f) The investigator not being called to testify.

We propose to argue the appeal generally, the same way as the learned State Attorney representing the respondent Republic did.

Evidence adduced in the trial court tended to show that on 4/4/2004 at 8. p.m. PW1 Rhobi w/o Wambura was at home preparing the evening meal. With her were her children PW2 Rhobi w/o Chacha and PW3 Chacha Boniface. The hurricane lamp (taa ya chemli) was burning. The three prosecution witnesses saw three persons bursting into their house. All three identified the invaders as their neighbour Birahi Nyankongo and another person called Kijiji Isyaga who was from Kikomori but regularly visited their village. Both these two carried pangas. There was a third person, who was not identified by any of the three witnesses, who stood at the front door holding a gun with its barrel sawn off and the butt cut, leaving about one foot of the gun. Once inside the neighbour Birahi Nyankongo cut PW2 thrice on the back and once on the chest, and Kijiji Isyaga cut PW3 under the right ear and behind the right hand. One of the

two panga-wielding robbers cut up PW1 and then the two asked PW1 to show them and give them money. The unidentified robber standing at the front door fired a shell from the sawn off shot gun. This act frightened PW1 and she led the way to her bedroom where she gave the two robbers cash sh. 1,000,000/= (one million shillings) which was part of the pension paid to her husband who had recently died. All three witnesses testified that the two panga-wielding robbers went to the hurricane lamp and stood by it while counting the currency notes they had just robbed. After counting the money the robbers took two bags full of clothes from PW1's bedroom and made off into the night. When the robbers had left PW1, PW2 and PW3 raised the alarm. A neighbour PW4 Yusuf Bwiru testified that he heard the gunshot but did not go out for fear of being harmed. He waited until it was safe and then went to the scene of the robbery when he heard the victims crying out. At the scene he found many people gathered, and all the victims mentioned their assailants as their neighbour Birahi Nyankongo and Kijiji Isyaga of Kikomori village. He found PW1, PW2 and PW3 with cut wounds. He took these to the local Sungu Sungu commander PW5 Anthony Michack who took the injured to Kiongera Dispensary and from there to Korotambe Police Station. PW5 Anthony Michack testified that the three

victims all mentioned Birahi Nyankongo and Kijiji Isyaga as the persons who robbed them and cut them up. On 6/4/2004 Birahi Nyankongo led PW5 to a hill where he showed them a bag of clothes which PW3 Chacha Wambura identified as belonging to them.

In his defence the second appellant testified on his arrest only on 7/4/2004 and denied any knowledge of the events of 6/4/2004. On his part the first appellant testified that he was arrested on 6/4/2004 at 11 p.m. He was searched but nothing found on him and on 9/4/2004 the sungu sungu commander showed him a bag of clothes and claimed he had stolen it .

When the appeal came up for hearing Mr. Juma Sarige, learned State Attorney who argued the appeal on behalf of the respondent Republic supported the conviction and sentence. This was after each one of the two appellants informed the court that they had nothing to add to the memorandum of appeal filed.

The learned State Attorney argued the appeal generally, and we will do likewise.

Addressing the complaint of differences in dates of arrest in the evidence given by PW1, PW2 and PW3 respectively, Mr. Juma Sarige argued that the witnesses gave different dates because they were informed of the arrest by other persons. None of them was the arresting officer. The arresting officer was PW5 Anthony Michack who gave the date of arrest as 7/4/2004 and that none of the appellants disputed this date. We agree, and add that the complaint about differing dates of arrest was not raised during the hearing of the first appeal so it is an afterthought not worthy of consideration by this Court.

There is a complaint raised by the first appellant that Exhibits P2 and Exhibit P4 were tendered in evidence by the wrong persons. Exhibit P2 is a spent shot gun cartridge picked at the scene of the robbery, and Exhibit P4 is the bag containing the clothing items which the first appellant allegedly went to point out at the hiding place. When the Exhibit was put in both the appellants said they had no objection to the witness tendering the exhibit. Addressing this complaint, Mr. Juma Sarige argued that there is no hard and fast rule on tendering of Exhibits as pointed out in **Majid John Vicent @ Mlindangabo and Another v Republic**, Criminal Appeal No.

264 of 2006 (unreported), and that Pw2 was not prohibited from tendering the Exhibit. We agree. When the exhibits were tendered in evidence the trial court record shows that both appellants had no objection. Secondly, there was no rival claim of ownership from any of the appellants. The spent cartridge was fired at the scene and was picked up by a witness who was at the scene when it was fired. There is therefore no reason why he should not tender it. As for the bag of clothes, the evidence of the person who tendered it shows she is a family member and was inside the house and saw the bag being carted out. The absence of a rival claim and no objection to the tendering of the exhibit proper. The complaint has no basis.

A query has been raised by the appellants that the prosecution witnesses were all relatives, and this should make the court suspect their evidence. Mr. Juma Sarige countered this argument by saying that the prosecution witnesses are related because they are family members who were invaded inside their house and robbed, so no body could come from outside the family and testify on the robbery except them. We also agree. The witnesses gave eye witness accounts of what they saw and heard. The mere fact that they were family members does not make their

evidence lose credibility. Loss of credibility by witnesses who are family members comes about if the witness has an interest to serve his/her evidence is credible just like any other evidence of a competent witness. In **P. Taray vs. Republic**. Criminal Appeal No. 216 of 1994 this Court observed thus:-

"We wish to say at the outset that it is of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them. The veracity of their story must be considered and gauged judiciously just like the evidence of non-relatives. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of

relatives having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative.”

The appellants also raised a complaint that the prosecution witnesses did not name them before their arrest. The evidence on record does not support them. The evidence of Pw1, Pw2 and Pw3 shows that they named their assailants as the appellants Birahi Nyankongo and Kijiji Isiaga to Pw4 Yusuf Bwiru, a neighbour who rushed to the scene to help after hearing cries for distress. The names of the appellants were also given to Pw5 Anthony Michack, the local “Sungusungu” commander. This underscored the reliability of the witnesses, in line with **Thomas Mlambivu v The Republic**, Criminal Appeal No. 134 of 2009 (unreported).

Lastly, the appellant raised a complaint about identification. They claim that in the circumstances of this case they were not properly identified because the witnesses did not describe the type of clothes they wore and whether they were tall or short. On the other hand, Mr. Juma

Sarige argued that circumstances at the scene argued for positive and unmistakable identification. He pointed out the factors aiding positive identification as:-

1. there was a hurricane lamp which the family was using to prepare the evening meal. Pw3 described the intensity of the illumination at page 6 of the record thus:-

“The light of the burning lamp filled the whole room.”

2. the robbers walked from the sitting room to the bedroom carrying the hurricane lamp with them. Inside the bedroom Pw1 gave them sh. 1,000,000/= (one million) after which the robbers and Pw1 went back to the sitting room. At the sitting room the robbers took time counting the cash. At the end of the counting the robbers took two bags full of clothes from the house and made away with them.

3. the first appellant is a neighbour to the victims of the robbery. The second appellant is a nephew of the first

appellant and he used to visit the first appellant frequently from his village called Kikomori.

4. the robbery took place on 4/4/2004 the first appellant led Pw5 Anthony Michack the local "Sungusungu" commander to a place where he had hidden the stolen bag containing male and female clothing items. Pw3 Chacha identified and laid claim to the bag Exhibit P4 and none of the appellants laid any claim to the exhibit. The first appellant claimed the exhibit was planted on him but when it was tendered he did not raise any objection.

5. the appellants did not cover their faces during the robbery.

The totality of evidence adduced by the prosecution shows that the two appellants were positively identified by three different prosecution witnesses. In addition to this, the first appellant facilitated the discovery of stolen items two days after the robbery and theft. We are satisfied that the appeal was filed with no shred of merit. The same is dismissed in its entirety.

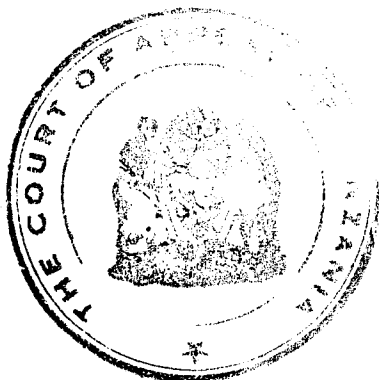
DATED at MWANZA this 19th day of September, 2012.

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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




Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL