

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

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

CRIMINAL APPEAL NO. 102 OF 2010

JAMAL MSITIRI @ CHAIJABA APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mussa, J.)

dated the 8th day of October, 2010

in

Criminal Appeal No. 23 of 2019

JUDGMENT OF THE COURT

2nd July, & 9th July, 2012

MANDIA, J. A.:

The appellant was charged with Armed Robbery c/s 287A of the Penal code in the District Court of Lushoto at Lushoto. He was found guilty, convicted and sentenced to thirty years imprisonment with twelve strokes of the cane. In addition he was ordered to pay sh. 800,000/= compensation to the victim of the crime. He was dissatisfied with the conviction, sentence and order for compensation and he preferred an appeal to the High Court of Tanzania at Tanga. His appeal was dismissed in its entirety. He has preferred a second appeal to this Court.

In the trial court evidence was adduced to show that the appellant is a niece to PW1 Nassoro Salum who is a coffee farmer at Baga in Lushoto District and also runs a shop as well as operating a milling machine. PW1

also testified that whenever he returned from shopping trips he used the appellant to unload the shop goods. On 13/3/2008 at 7.30 p.m. the appellant visited PW1's shop as a customer and asked for cigarettes. The appellant paid with a sh. 5000/= note and was given sh. 4,400/= as change. The two, uncle and nephew, then talked in the shop, but we are not told how long the talk took. PW1 testified that the shop room was illuminated by a pressure lamp and the walls are painted white so there was enough illumination. After the talk between uncle and nephew, the appellant bade PW1 farewell. When the appellant reached the door he called other persons who were outside the shop. These entered. The appellant then took a panga and iron bar he had left at the door when he went inside the shop. The appellant then cut PW1 on the left hand and hit him with the iron bar. PW1 ran out trying to escape but he was ordered to lie down. Accordingly to PW1 there was moonlight outside so as he lay down he saw the appellant taking money from the shop till. The appellant took sh. 600,000/= which was shop sale for three days and sh. 100,000/= which were proceeds from the milling machine operation.

Apparently PW1 cried out when he was invaded by the appellant. His cries alerted his son PW2 Ramadhani Nassoro who is also a neighbour. At the scene PW2 saw two youths running away from the scene. The appellant was still at the scene and PW2 asked the appellant, who was still carrying the panga and iron bar, why he was doing what he was doing i.e. robbing his father. The appellant threatened to cut PW2 with the panga and PW2 let the appellant go. PW2 then reported the incident to the village chairman and to a local militiaman PW3 Abushehe Rashid. At 9

p.m., barely one and a half hours after the robbery, PW3 went out in search for the appellant at his (i.e. appellant's) home. The appellant was not at home so PW3 went for the appellant at 5 a.m. on the next morning 14/3/2008, arrested him and took him to Soni Police Station.

The appellant gave his defence on affirmation and all he said in his own defence is that he admits he was arrested but the evidence against him is false.

The appellant has filed a memorandum of appeal containing seven grounds. The substantive grounds raised in the memorandum are:-

- 1) That the appellant was not properly identified given the prevailing circumstances at the scene of the crime.
- 2) That the credibility of PW2 as a corroborating witness is doubtful.
- 3) That the lower courts erred in relying on the testimony of PW1 and PW2 who are family members.
- 4) That the failure to call the village chairman as a witness is fatal to the prosecution case.

The appellant appeared in person, unrepresented, to argue his appeal, while the respondent is represented by Mr. Victor Kahangwa, learned Principal State Attorney assisted by Mr. Saraji Iboru, learned State Attorney. Mr. Saraji Iboru argued the appeal on behalf of the respondent Republic.

The respondent Republic supported the conviction, sentence and orders for compensation. The learned State Attorney argued that the

lighting at the scene was good, the parties are uncle and nephew and talked to each other before the appellant went to the door and called other unnamed confederates who came in to help invade PW1. We tend to agree with the learned State Attorney. We take particular note of the description of the lighting at the scene which is described by PW1 as a shop whose walls were painted white and were lit by a pressure lamp. It is in these circumstances that the appellant entered the shop as a customer to buy cigarettes and then stayed behind to talk with his uncle. We also take note of the fact that PW1 revealed that the appellant occasionally helped in off-loading shop goods brought to the shop for sale.

Another point in favour of positive identification is the fact that a son of PW1, PW2 Ramadhani Nassoro also identified the appellant, who is his cousin, and asked him what he thought he was doing. In answer to that question the appellant reportedly tried to attack his cousin. We are of the settled view that this is more of a case of recognition, rather than identification. In **Shamir s/o John v Republic**, Criminal appeal No.166 of 2004 (unreported) this Court had this to say:-

"recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone when he knows, the court should always be aware that mistakes in recognition of close relations and friends are sometimes made."

The learned first appellate judge dealt adequately with this point when he remarked, at P. 44, thus:-

"Quite apart, there was more to his testimony, in that, he heard his father yelling "Jamali unaniua" and Ramadhani knew exactly who this Jamali was. Indeed, attending the scene, Ramadhani had confronted Jamal, the appellant that is ...?"

Like the first appellate court, we find the question of identification is beyond dispute and we dismiss the ground on the same.

The appellant also raised issue with the credibility of PW1 Nassoro Salimu and PW2 Ramadhani Nassoro who are father and son. His argument is that these two witnesses should not be believable because they come from the same family. In our opinion, this is a non-issue in view of the clear provisions of section 127 (1) of the Evidence Act, chapter 20 R.E. of the laws. We have exemplified this position in the case of **Iddi**

Salimu v. R, Criminal appeal No. 29 of 2009 (unreported), where we held this:-

"We wish to start with the appellant's attempt to dent the evidence of PW1 and PW2 because they are family members. Both witnesses are competent witnesses under the provisions of Section 127 (1) of the Evidence Act, Cap 6 R.E 2002."

We would therefore dismiss this ground of complaint.

Lastly, the appellant railed against the fact that the village chairman was not called as a witness. This is an issue of fact which the first appellate court dealt with adequately at page 38 of the record when discussing the appellant's arrest by PW3 Abushehe Rashid, the militiaman. We are satisfied, like the first appellate court, that the evidence of the militiaman who received a first hand report of the commission of the offence by PW2 Ramadhani Nassoro and then effected the arrest of the appellant bridged the gap created by the absence of the village chairman. We would also dismiss this ground of complaint.

In the upshot, we are of the opinion that the appeal before us is devoid of merit. The same is dismissed in its entirety.

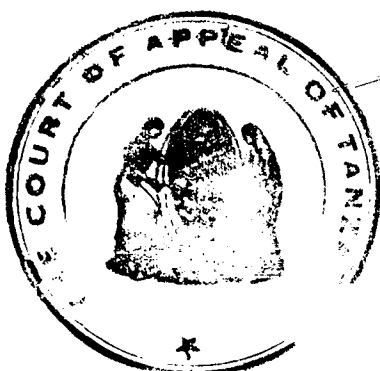
DATED at **TANGA** this 6th day of July, 2012.


E.M.K. RUTAKANGWA
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