IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., MBAROUK, J. A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 244 OF 2010

NICHOLAUS JAMES URIO ....APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Mzuna, J.)

dated the 13th day of May , 2010
in
Criminal Appeal No. 40 of 2006

JUDGMENT OF THE COURT

3rd & 7th September, 2012

KILEO, J.A.:

On 31st October 1996, the appellant Nicholaus James Urio appeared before the District Court of Rombo at Mkuu to answer to a charge of armed robbery contrary to sections 285 and 286 of the Penal Code as amended by Misc. Amendments Act No. 10 of 1989. He was convicted by the District Court and sentenced to 30 years imprisonment and six strokes of the cane.

He appealed unsuccessfully to the High Court and has come to this Court on further appeal.

The appellant who appeared before us in person had filed a memorandum of appeal comprising of four grounds. These grounds relate to (1) identification of the appellant at the residence of the complainant Joseph Abraham on the day of the robbery, (2) identification of property found in the appellant's premises as being those which were stolen from the complainant, (3) failure by the prosecution to call as its witness the appellant's wife whom the prosecution claimed had identified the shoe picked up by PW2 as belonging to the appellant and (4) failure by the courts below to find that the evidence of the appellant raised serious doubts on the case for the prosecution.

The respondent Republic which resisted the appeal was represented by Ms. Javelin Rugaihuruza, learned Senior State Attorney. While conceding to the first ground of appeal relating to identification the learned Senior State Attorney submitted however that apart from the evidence of identification there was other evidence sufficiently linking the appellant

with the commission of the crime. She pointed out that the appellant was found with the stolen property just a short time after the robbery was committed and that therefore the doctrine of recent possession was properly applied in the circumstances of the case.

This appeal centres on two main issues. **One**, whether the appellant was sufficiently identified at the scene of crime and **Two**, whether the appellant was found with the property that was looted from the complainant's house on the night of the robbery.

Both the appellant and the learned Senior State Attorney urged us to find that the conditions pertaining at the scene of crime were not conducive for watertight identification.

The evidence adduced at the trial show that at about 2:00 am on 12/8/1996, PW1's (complainant's) house was broken into and about six armed bandits got into his bedroom. He was roughed up and his properties including cash and two radio cassettes were stolen from his house. He testified that he was able to recognize the appellant as one among the

bandits with the aid of electric light that was shining in his room. The appellant was known to him since childhood as he was his brother's son. His fellow villagers including PW2 and PW4 who were members of the local vigilante (Sungu Sungu) responded to his call for help. PW2 testified that he heard cries of "thief, thief" coming from PW1's house. As he went towards the house in answer to the alarm he saw the appellant emerge from the complainant's house while running and also shouting, "Thief, thief." PW2 claimed to have identified the appellant who was a relative and a fellow villager through light from a 'torch' that he had carried. He asked the appellant who was carrying a plastic bag to stop but he did not and he kept on running. PW2 chased him but was unable to catch up with him and he ended up picking up one shoe that was believed to have fallen out of the appellant's foot as he ran away. PW2, PW4 (who was among those who had responded to the alarm raised by PW1) and a ten cell leader (PW3) surrounded the appellant's house but he is said to have escaped them before they had put him under arrest. A search of the appellant's house revealed a plastic bag containing two radio cassettes hidden under the bed. The radio cassettes were subsequently identified by the complainant as being those stolen in the course of the raid at his house.

Starting with the question of identification of the appellant at the scene of crime we are mindful of the fact that visual identification is of the weakest kind and before it is taken as a basis for a conviction it must be absolutely watertight. In the celebrated case of **Waziri Amani v. R.** (1980) TLR 250 this Court held:

> *"(i) evidence of visual identification is of the weakest kind and most unreliable;*
>
> *(ii) no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

The Court went further and enumerated a number of factors to be taken into account by a court in order to satisfy itself on whether or not such evidence is watertight. These factors include: the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, whether it was day or night- time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before.

In the present case the complainant was very familiar with the appellant as they were close relatives as well as being members of the same village. There was electricity light in the complainant's house at the time of the intrusion. Through this light the complainant was able to identify the appellant and was in fact even able to describe the attire that the appellant was donned in. The complainant stated that the appellant was putting on a black jacket and had not masked his face. Evidence of identification did not only come from the complainant. PW2 saw the appellant abruptly emerge, while running from the complainant's house carrying a bag that was subsequently found under a bed in the appellant's house. The bag contained properties that were identified by the complainant as being part of his stolen property. PW2 had a torch with him which enabled him to identify the appellant as well as the parcel he was carrying which he described as a plastic bag like the ones used to contain coffee pesticide known as "blue copper." The appellant was PW2's fellow villager and clansman.

Having given due consideration to the conditions pertaining at the scene of crime, we are satisfied that the evidence of identification was

watertight and there was no possibility of mistaken identity. Further to that, the basis for the appellant's conviction was not solely on identification. Property that was stolen from the complainant's house was found hidden in the appellant's house a very short time after the robbery. The appellant argued that the property found in his house was not adequately identified by the complainant. We however find this argument to be wanting in merit as the complainant is on record as describing peculiar marks of his stolen radio cassettes. He stated that one of them had something like a bandage with strong glue while the other one had one of its buttons missing. He also said that he had had the radio cassettes with him for over ten years. Having been found with property belonging to the complainant within a few moments after the robbery in which the properties were stolen leads us to no other conclusion but that the appellant participated in the robbery. We are settled in our minds that the doctrine of recent possession was properly applied in this case.

On the third ground the appellant complained that the courts below erred to base conviction on the shoe that was said to have been left behind by the appellant as he fled without having summoned his wife as a witness

to show that indeed the shoe belonged to him. Even if we were to take it that it was not proved that the shoe that was tendered at the trial belonged to the appellant, there was, as we have shown above other incriminating evidence against the appellant.

On the fourth ground the appellant complained that the courts below erred to find that his defence was weak and did not raise reasonable doubt as to the prosecution case. We agree with the learned Senior State Attorney that the appellant was not convicted on the weakness of his defence but rather on the strength of the prosecution case which established beyond reasonable doubt that the appellant took part in the robbery.

In the result we find the appellant's appeal to have been filed without sufficient cause for complaint. We find no reason therefore, to upset the decision of the High Court and we accordingly dismiss the appeal in its entirety.

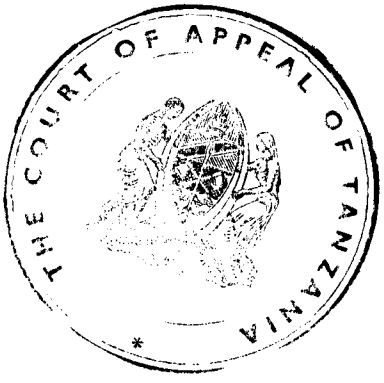
DATED at **ARUSHA** this 4th Day of September 2012.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL