

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TANGA**

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

**CRIMINAL APPEAL NO. 336 OF 2009**

**ALLY OMARY NYANGE .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania at Tanga)  
(Mussa, J.)**

**dated 31<sup>st</sup> July, 2009**

**in**

**Criminal Appeal No. 42 of 2004**

**JUDGMENT OF THE COURT**

**4<sup>th</sup> & 9<sup>th</sup> July, 2012**

**MANDIA, J.A.:**

The Appellant ALLY OMARY NYANGE was charged with Armed Robbery contrary to section 285 of the Penal code. The district Court of Tanga at Tanga which conducted the trial found him guilty, convicted him and sentenced him to thirty years imprisonment. In addition to the sentence of imprisonment the trial court ordered the appellant to pay Tshs. 500,000/= and Tshs. 300,000/= to two respective victims of the robbery as compensation for injuries suffered. The appellant was aggrieved by the conviction and sentence as well as the order for compensation so he preferred an appeal to the High Court of Tanzania at Tanga. His appeal was dismissed in its entirety and this made the appellant prefer the present appeal.

During the trial in the court of first instance it was in evidence that on 23/9/1999 at 2 p.m. in the afternoon, PW1 Ruth Urassa, a Loan Officer employed

by Pride Africa Limited, walked out of her office carrying a grey coloured brief case (Exhibit PE 1) in which she had put cash totalling Tshs. 1,408,600/= (Exhibit PE 3). Ruth Urassa was on her way to the National Microfinance Bank (NMB) Madaraka Branch where she was going to bank Exhibit PE3 using two bank pay-in slips which she tendered in court as Exhibit PE2. To travel to the Bank, Ruth Urassa had called for taxicab number 179 which was parked outside her office waiting for her. As soon as she got inside the taxicab two persons, each armed with a pistol, surrounded them and ordered her out of the taxicab. One stood on the driver's side and one alongside the passenger's seat. Ruth Urassa ran out of the taxicab into her office. Looking out of the window she saw four persons who pulled the driver of the taxicab outside. She said three of those persons were black in colour and one was "fair white." Ruth Urassa identified the appellant in court when testifying as the "fair white" person she saw on the date of the robbery, and testified that he was the person who drove away in the taxicab.

Taxicab Number 179 has registration number TZB 8139 and its driver was PW7 Andrea s/o George. Narrating the events of the day, PW7 testified that he was waiting to take his regular customer Ruth Urassa PW1 to the bank when three persons pounced on him. He struggled with the persons who threw him out of his taxicab to prevent them from driving off. The driver who was white in colour with a small face, ordered his colleagues to shoot him (PW7). He was shot in the neck and chest and lost consciousness. He spent two days at Bombo Hospital, was transferred to KCMC where he spent three months under treatment. In court he identified the appellant as the man who was white in colour with a small face and that he is the one who drove away the taxicab and ordered his colleagues to shoot him.

A security guard at the Pride Tanzania Limited officer, PW3 Ferdinand Kailamba narrated how he saw a person armed with a pistol opening the door of the taxicab in which Ruth Urassa (PW1) was, and how he jumped on that man in an attempt to disarm him. He testified that, he struggled with the armed man for four minutes, and stopped the struggle when he was hit by bullets on the left hand, shoulder and neck. PW3 Ferdinand Kailamba identified the appellant in court as the tall, thin white man he saw on the date of the robbery and the one who drove off in the taxicab.

At the scene of the crime, there was also present PW2 John Makanta, another Loans Officer for Pride Tanzania. He testified that he heard bullets being fired outside and on going out he saw a thin tall youth with white complexion struggling to pull out the taxicab driver from the taxi with the security guard Ferdinand Kailamba helping. He saw the security guard and the driver being shot and the taxicab driving off with the robbers inside it. He telephoned the police. Half an hour later the police went to his office and told him the bandits had been arrested. He went to the office of the Regional Police Commander where he was shown one of the robbers and the bag of money with the cash intact.

The rest of the prosecution evidence involves policemen PW4 B 9990 Station Sergeant Lameck, PW5 7802 Detective Corporal Omari and PW6 ASP Mrio. Of these, only the evidence of Detective Corporal Omari and ASP Mrio is relevant. The evidence of Station Sergeant Lameck is next to worthless as it contains mostly hearsay. Corporal Omari PW5 testified that he was at Street No. 5 in Tanga with other police officers when they heard the sound of gunshots. They followed the direction of the gunshots and saw a taxicab with registration

number TZB 8135 being driver at high speed. They gave chase but apparently abandoned the chase after seeing that those in the taxicab were armed. Instead they sought help from the 999 police. The witness proceeded to give a lot of evidence not connected with the charge. Finally he ended up saying:-

*"So we came back to Mabanda ya Papa and one informer showed us at the house where the briefcase with the money was kept on arrival we met one lady who told us that the briefcase was thrown there by these bandits and he kept it there with her. At that time we took the brief case and this accused to Chumbageni Police Station where this charge was instituted against the accused person as he stands charged."*

Further on, PW5 is on record as saying:-

*"That lady informed me that these bandits beat this briefcase on earth so that to open to get the money but they failed."*

On his part PW6 ASP Mrio, the officer in-charge CID Tanga District, testified that on receiving information of the robbery over the radio from Corporal Omari (PW5) he rushed to Mabanda ya Papa with other policemen. There he found taxicab number 179 which had been involved in an accident. ASP Mrio testified on how he shot the appellant in the leg when he tried to escape, but he did not tell the court, the circumstances leading to the appellant's arrest. He also testified that one informer told them the brief case containing

the money was hidden inside the store of a house and he went there and recovered the brief case.

On his part the appellant contended while defending himself that on 23/9/1999 he was at Mikanjuni area. He had just arrived from Dar es Salaam and was looking for the house of his relative who resides at Msambweni area. As he made effort to trace his relative's house he saw four persons appearing from his left side running. A police vehicle came around chasing the four unnamed persons and firing at the four men. The appellant alleged that he feared for his life and ran to hide in a nearby house. One policeman came, beat him up and told him to show where his colleagues were. He told them he knew nothing of colleagues. He was joined to another group of policeman which included the OC CID Mrio. The police kept forcing him to confess to the robbery which he denied, and at one point the OC CID shot him in the leg. He was taken to the Police Station and charged.

The appellant, who is represented by Mr. Dominic Kashumbugu, learned advocate, lodged a memorandum of appeal containing three grounds which the learned advocate argued generally. The first ground centres on identification, the second ground on improper tendering of a cautioned statement and the third ground is a summary-that the lower courts failed to evaluate the evidence on record properly. While arguing the appeal, Mr. Dominic Kashumbugu seems to have abandoned the second and third grounds because he only concentrated on the first ground on identification and then rested his case.

On the other side the respondent Republic was represented by Mr. Victor Kahangwa, learned Principal State Attorney.

The thread of argument by Mr. Dominic Kashumbugu is that the trial court and the first appellate court erred in founding the conviction of the appellant on identification which was not positive. He argued that the evidence of PW1, PW2, PW3, and PW7 is based on visual identification which has been held by case law to be the weakest kind of evidence. He further argues that though it was daytime, the circumstances of identification were weak. All the witnesses did not describe the attire of the appellant. Apart from saying the robber was a whitish thin man with a small face no further description was made on the identity of the robber. Mr. Dominic Kashumbugu also argued that the doubts on identification would have been cleared through an identification parade, which was not held. There was therefore no corroborating evidence on the evidence of identification given by the prosecution witnesses, Mr. Dominic Kashumbugu argues.

On his part, Mr. Victor Kahangwa, learned Principal State Attorney, supported the conviction and sentence and ancillary orders made by the two courts below. Mr. Kahangwa argues that the witnesses at the scene of the crime PW1 Ruth Urassa, PW2 John Makanta, PW3 Ferdinand Kailamba and PW7 Andrea George identified the appellant positively. He argues that PW1 looked through the window after she ran away from the taxicab, PW2 saw a tall, thin youth, PW5 arrested the appellant at the scene and PW6 shot the appellant as he was trying to escape. It is the argument of Mr. Kahangwa, that since the appellant was arrested after a chase soon after the incident there was no need for an identification parade, following **Silandu Abdalla v. R**, Criminal Appeal No.122 of 2008 (unreported). He distinguished the principle on identification as

laid down by the case **Waziri Amani v. R.**, (1980) T.L.R. 250 on the ground that the Waziri Amani case (supra) is about identification at night, not during daytime as in the present case.

As we pointed out earlier, Mr. Dominic Kashumbugu argued only ground one of the memorandum of appeal and left ground two in abeyance. The second ground is based on a cautioned statement which was discounted by the appellate High Court which may be the reason why Mr. Dominic Kashumbugu did not argue it. All in all, we are left with ground one to grapple with. Mr. Dominic Kashumbugu argues that evidence of positive identification is wanting while Mr. Victor Kahangwa argues that the evidence of PW1, PW2 PW3 and PW7 positively identifies the appellant at the scene. The trial court held at page 106, this:-

*"The appellant was implicated by Ruth, Andrea, Ferdinand and John, all of whom had visual memories of him being at the centre of the day-time robbery."*

We are confronted with a situation that two courts below have made concurrent findings of fact that the robbery took place during daytime, and that the visual identification of witnesses to the daytime robbery left no room for doubt. It is a settled principle of law that where courts below make concurrent findings of fact a second appellate court should not interfere with the concurrent findings as made by courts below – see **The Director of Public Prosecutions vs Jafari Mfaume Kawawa (1981)** TLR 149. Where however the findings of the courts below are based on misapprehension of the evidence leading to wrong conclusions of fact and therefore to miscarriage of justice, a second appellate court is entitled to interfere, take the position of the trial court and assess the evidence so as to arrive at a proper finding – see the Jafari Mfaume case (supra) and also **Auzobia Nyenzi v. Republic**, Criminal Appeal No. 336 of 2008 see also **Salim Mhanda v.R.** (1993) TLR 170.

We have said earlier that the case for the prosecution is based on the **visual** identification of the appellant. The record shows that PW1 saw two bandits when sat inside the taxicab ready to go to the bank. When guns were pointed at her and she ran back to her office, she saw four bandits through the window. According to PW1, three of the bandits were black, and one was "fair white" and is the appellant. On dress, PW1 said *"they were dressed in normal men dressing."* On his part PW2 saw a *"tall thin youth with white complexion."* PW3 saw a *"tall thin white man."* All the witnesses who saw the white man at the scene agree that the man escaped in the taxicab. All of them admit that there was no identification parade held to identify the person described as tall, thin and white. All the prosecution witnesses are in agreement that the alleged robbers got away with the briefcase containing the money which was supposed to be banked that day. PW1 and PW2 agreed that the briefcase containing the money was recovered by the police with the money intact and they identified the briefcase at the office of the Regional Police Commander.

Two witnesses, both police officers testified on the recovery of the briefcase. These are PW5 Det. Cpl. Omari and PW6 ASP Mrio. Detective Corporal Omari testified that an old lady at Mabanda ya papa gave them the briefcase which was allegedly thrown at her by the fleeing bandits. This old lady is not named, and was not called as a witness. More so the unidentified old lady did not link the appellant with the briefcase. On his part ASP Mrio PW6 testified that the briefcase was recovered from the store of a house which was pointed out by an informer. No attempt has been made to link the appellant with the recovery of the briefcase. Both courts below did not consider this point of recovery of the briefcase. They also did not consider the fact that the police



officers who testified were **not** in hot pursuit of the appellant. They arrived at the scene only to find an abandoned briefcase in a house whose owners they have shielded from the court process. The two courts below did not also consider the appellant's defence that he was caught in the crossfire between armed bandits and the police, and that he had just arrived in Tanga from Dar es Salaam. Given the circumstances of this case where there are unnamed actors, who the police did not disclose, who are linked with the recovery of the briefcase, the appellant's story remained to be disproved. Failure to consider the non-disclosure of those involved in keeping the briefcase and then handing it anonymously to the Police, and failure to give a specific description of the appellant apart from the witnesses seeing a "white thin man," and failure to hold an identification parade all are factors against positive identification of the appellant. The circumstances of the arrest of the appellant do not show that the police were in active pursuit and never lost sight of the appellant.

The circumstances also show that the subject matter of the crime, the briefcase, was recovered through person or persons whose identity the police have hidden. In these circumstances it was a misdirection for the lower courts to hold that the identity of the appellant was proven beyond doubt. This misdirection has led to a situation of possible miscarriage of justice. We feel we are entitled to intervene in such a situation. The conviction entered cannot be allowed to stand. We therefore quash the conviction, set aside the sentence and the orders for compensation. The appellant should be released from custody unless he is held on some other lawful cause.

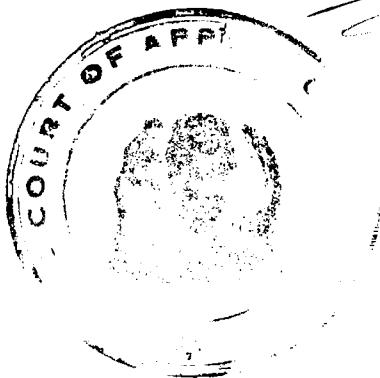
**DATED** at **TANGA** this 6<sup>th</sup> day of July, 2012.


**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**