IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 122 OF 2013

ALLY HUSSEIN DUGANGE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Kihio, J.)

Dated 30th day of November, 2011
in
DC. Criminal Appeal No. 33 of 2010

JUDGMENT OF THE COURT

5th & 6th August, 2013

MJASIRI, J.A.:

Before the Njombe District Court, the appellant Ally Hussein Dugange was arraigned for the offence of armed robbery contrary to section 287A of the Penal Code. He was found guilty as charged and was sentenced to a jail term of thirty years.

It was alleged by the prosecution that on 5th day of December, 2007 at about 5:30 hours at Posta Street Songea Road the appellant grabbed

the handbag of Graciana Ndonde (PW1) which had various items which had a total value of Tshs. 117,000/= and immediately before stealing did threaten the victim with a panga and used actual violence in order to obtain and retain the said property. The appellant was with two other persons who ran away. The appellant was allegedly arrested at the scene. The appellant was not known to PW1. The prosecution relied on the evidence of PW1, PW2 and PW3. PW2 alleged to have witnessed the incident and came to the aid of PW1. PW3 was said to arrive at the scene later. He testified that it was dark and the people who attacked PW1 covered their faces with a sweater. He stated that he had to use light from neighbouring houses to identify the appellant. PW3 testified that he knew the appellant well.

At the hearing of the appeal the appellant appeared in person and fended for himself. The respondent Republic had the services of Mr. Okoka Mgavilenzi, learned State Attorney.

The appellant filed in Court a nine (9) point memorandum of appeal. However, the said grounds of appeal can be crystalised as follows:-

1. *The High Court wrongly relied on the evidence of PW1, PW2 and PW3.*
2. *The High Court Judge erred in fact and law in holding that the appellant was properly identified.*
3. *The evidence on record was not sufficient to support the conviction of the appellant.*

The appellant being a layman did not have much to say in support of his appeal. He simply requested the Court to adopt his memorandum of appeal as part of his submissions.

Mr. Okoka on his part did not support the conviction. He did not do so for the following reasons. There were major contradictions and inconsistencies in the testimonies of PW1 Graciana Ndonde, PW2, Humphrey Milinga and PW3 Eliezer Mwakipesile which touched on their credibility.

He submitted that whereas PW1 testified that PW2 arrived at the scene first after hearing an alarm, PW2 in his testimony stated that he was just passing. PW3's testimony was that he was doing exercises, heard an alarm and responded. He saw two people running away, and PW1 lying

down, and while he was there PW2 arrived. It is not clear who arrived first. PW4 in his testimony stated that it was dark and he could only see with the help of light from the neighbouring houses. All the same he stated that he saw one Ally Konzo running away even though he had covered his face with a long jacket/sweater. He relied on the case of **Zakaria Japhet @ Jumanne and two others v. Republic,** Criminal Appeal No. 37 of 2003 C.A.T. (unreported).

In relation to the identification of the appellant, Mr. Okoka submitted that the circumstances surrounding identification were not favourable. It was 5:30 hours in the morning, PW3 stated that it was dark. He testified that he identified the appellant by using a light from the neighbouring houses. He did not state the source of light, and the intensity. PW3 on the other hand testified that he could see two people running and PW1 lying down but did not mention the source of light.

The main issues for consideration in this appeal are as follows:

1) *Whether or not the appellant was properly identified.*
2) *Whether or not the evidence on record was sufficient to ground a conviction against the appellant.*

The prosecution relied on the evidence of PW1, PW2 and PW3. Their testimonies were full of inconsistencies and contradictions in every aspect. It has not been clearly established in evidence who arrived at the scene first, whether it was PW2 or PW3. It is also not evident whether PW3 saw two people running away or whether PW2 was attacked by the appellant.

We are therefore inclined to agree with the learned State Attorney that the contradictions and inconsistencies in the prosecution evidence were major and went to the root of the matter. See, **Mohamed Matula v. Republic,** 1995 TLR 3 and **John Gilikola v. Republic,** Criminal Appeal No. 31 of 1999 C.A.T. (unreported).

In relation to the identification of the appellant none of the witnesses testified as to the source of light and or the intensity of the light. PW3 stated it was dark and had to use the light from neighbouring houses, while simultaneously stating he saw two persons running away.

The law on visual identification is settled. There are numerous decisions made by this Court underscoring that the evidence of visual identification is of the weakest kind and no court should act on such evidence unless all possibilities of mistaken identity are eliminated and the

Court is fully satisfied that the evidence before it is absolutely water tight. See **Waziri Amani v. Republic,** [1980] TLR 250 and **Raymond Francis v. Republic,** [1994] TLR 100.

This is a second appeal. The appeal is therefore on a point of law. This Court can only fault the concurrent findings of facts by two courts below when there is a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law. (See for instance: **D.P.P. v. Jaffari Mfaume Kawawa,** [1981] TLR 149 and **Paschal Christopher v. D.P.P.,** Criminal Appeal No. 106 of 2006 CAT (unreported).

After carefully reviewing the evidence on record, the memorandum of appeal and the submissions made by Mr. Okoka, State Attorney we are increasingly of the view that, in this case we have found a compelling reason to interfere with the finding of the High Court.

Under these circumstances of this case we cannot state with certainty that the conditions were favourable for a correct identification.

The burden of proof is always on the prosecution to prove the case against the accused person beyond reasonable doubt. The burden never shift.

Given the totality of the evidence, we are satisfied that the case against the appellant has not been proved beyond reasonable doubt.

In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released forthwith from prison unless otherwise lawfully held therein.

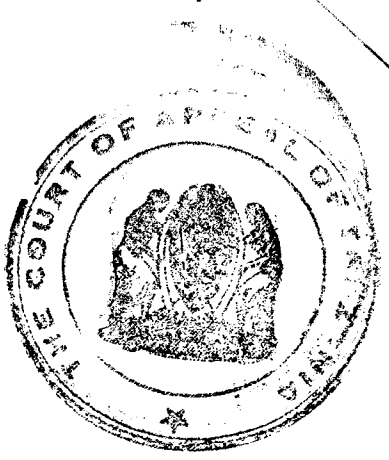
DATED at **IRINGA** this 5th day of August, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL