

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 345 OF 2008**

**BENDERA S/O ATHUMANI.....APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania**

**at Tabora)**

**(Kaduri, J.)**

**dated the 27<sup>th</sup> day of August, 2008**

**in**

**Criminal Appeal No. 155 of 2007**

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**JUDGMENT OF THE COURT**

11 & 17 September, 2013

**MBAROUK, J.A.:**

In the District Court of Kigoma at Kigoma, the appellant, Bendera Athumani, was charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 of the Laws as amended by Act No. 10 of 1989 and No. 6 of 1994. He was convicted and sentenced to thirty (30) years

imprisonment. His appeal before the High Court of Tanzania at Tabora was dismissed in its entirety, hence this second appeal.

At the trial District Court, the conviction of the appellant was based on the following facts, that on the 25<sup>th</sup> June, 2003, at about 23:00 hrs. at Lyabusende Village within the District and Region of Kigoma, the house of Meshack Simon (PW1) was invaded by several bandits. PW1 stated that while he was asleep he heard his grandmother crying for help. When he opened the door, he was stopped by the appellant who carried a gun. PW1 and his grandmother were severely beaten and forced to lie down. PW1 was then asked by the bandits to give them three million shillings otherwise he would be killed. Thereafter, PW1 asked his wife, Safina Olela (PW2) who returned from hiding to give the bandits T.Shs. 1,000,000/=. The bandits demanded more money, hence PW1 asked his wife (PW2) to fetch more money from his trouser pockets, where she managed to get T.Shs. 615,000/=. Then PW1 was taken outside the house by the bandits who shot him in his arm before they ran away. When cross examined by the appellant, PW1 said that, he managed to identify the appellant with the help

of a wick lamp (Koroboi). He also claimed to have known the appellant as his fellow villager. On her part, PW2 testified that, she identified the appellant at the scene of crime with the help of a torch light held by one of the bandits. Whereas Laban Simon (PW3), testified to the effect that, he managed to identify the appellant with the help of the light from fishermen's boat.

In his defence, the appellant categorically denied any involvement concerning the offence charged against him.

Eight grounds of appeal were preferred by the appellant in this appeal, but in essence, we think, he is mainly challenging the evidence of identification. However, at the hearing, the appellant who appeared in person had nothing to say on the elaboration of his ground of appeal.

On his part, Mr. Hashim Ngole, learned Senior State Attorney who represented the respondent/Republic agreed that in essence what is being challenged by the appellant is the issue of identification at the scene of crime. The learned Senior State

Attorney submitted that the evidence of, PW1, PW2 and PW3 failed to prove beyond reasonable doubt that it was the appellant and no other person as the one who was identified at the scene of crime.

He started by discrediting the evidence of PW1 that, he failed to state the source of light which enabled him to identify the appellant all along in his examination in chief. Mr. Hashim said the record shows that it was only when he was cross - examined by the appellant, when he disclosed the source of light which enabled him to identify the appellant as from a wick lamp (Koroboi). To support his argument, the learned Senior State Attorney cited the decision of this Court in the case of **Abdallah Ramadhan v. The DPP**, Criminal Appeal No. 219 of 2009 (unreported). He then urged us to find that, it was a mere afterthought, when PW1 failed to disclose the source of light in his examination in chief and disclose it when he was cross-examined by the appellant. In addition to that, Mr. Hashim added that the intensity of the said wick-lamp was not given. He further submitted that even the distance from the said source of light to the place where the appellant was identified was not stated by PW1. In support of his

submission, he cited to us the decision of this Court in the case of **Alex Kapinga and three others v. The Republic**, Criminal Appeal No. 252 of 2005 (unreported).

As for the evidence of PW2, the learned Senior State Attorney, submitted that even PW2 did not disclosed the source of light which enabled her to identify the appellant in her examination in chief. He said, it was during cross-examination when PW2 said she identified the appellant by the help of a touch light held by one of the bandits, which contradict the statement of PW1 that he identified the appellant by the help of a wick lamp.

The learned Senior State Attorney further submitted that, Laban Simon (PW3) disclosed the source of light which enabled him to identify the appellant as the light from the fisherman boat parked presumably along the shores of the lake. However, he added that, the intensity of such light from the fisherman boat was not stated by PW3. He also said, even if PW3 further testified that he identified the voice of the appellant when he uttered the words "*who are you*". The learned Senior State Attorney submitted that,

even if PW3 knew the appellant before, but the utterance of only those two words cannot with certainty identify the voice of the appellant. He added that if there was sufficient light, then a voice identification could have landed support.

All in all, the learned Senior State Attorney urged us to find that the evidence adduced by PW1, PW2 and PW3 was not credible and sufficient enough to avoid mistaken identity of the appellant at the scene of crime. This is because, he said the record does not show that those prosecution witnesses disclosed the intensity of the sources of light which enabled them to identify the appellant. Also he said the distance from the source of light to the place where the appellant was allegedly identified has not been stated. He added that, even the time spent was not disclosed. For those reasons, he prayed for the appeal to be allowed.

As pointed out earlier, this appeal mainly relies only on the issue as to whether the appellant was identified at the scene of crime. The prosecution, relied on the evidence of PW1, PW2 and PW3 to prove the issue of identification. We think, just like the

learned Senior State Attorney that the identification evidence was weak, and has failed to eliminate the likelihood of mistaken identity of the appellant at the scene of crime.

Starting with the evidence of PW1, the record shows that he disclosed that he was able to identify the appellant by the help of a wick-lamp at the stage when he was cross-examined by the appellant. We think, just like the learned Senior State Attorney that not disclosing the source of light which enabled him to identify at the stage of examination in chief but disclosing it at the stage when he was cross-examined by the appellant is an afterthought. We are of the view that the issue of identification and source of light which enabled the prosecution witness to identify the accused at the scene of crime is a paramount issue to be given weight especially when the offence was committed during the night time. Being of paramount importance, the issue of a source of light should have been incorporated in the examination in chief not at the stage of cross-examination. This Court in the case of **Abdallah Ramadhan v. The Republic**, Criminal Appeal No. 219 of 2009 (unreported) stated as follows:

*"... had the complainant identified the bandits, she would have deposed the same in her examination in chief instead of glossing over the same during cross-examination."*

We also think that, even the evidence of PW2 lies in the same category as it disclosed the source of light during cross examination.

Furthermore, taking into account that PW1 identified the appellant with the help of the said wick-lamp Koroboi), we think, this Court, time and again has stressed the importance of **stating the intensity of the source of light which enable the witness to sufficiently identify the accused at the scene of crime, especially when the incident happened at night.** For example see the decision of this Court in the case of **Magwisha Mzee v. Republic**, Criminal Appeal No. 465 of 2007 (unreported) where it was stated that:-

*"...this Court has consistently held that when it comes to the issue of light clear evidence must be given by the prosecution*



*to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witness to see and positively identify the accused person... **bare assertion that there was light ... would not suffice...**"*

*(Emphasis added).*

In the celebrated case of **Waziri Amani v. The Republic** (1980) TLR 250, the guidelines have been stated to the effect that, the evidence of visual identification should only be relied upon when all possibilities of mistaken identity have been eliminated. In the instant case, we think, the evidence of PW1 was not sufficient enough to support the view that the light from the wick-lamp relied on by him was bright enough to avoid mistaken identity. The intensity and illumination of the said source of light which enable a witness to have identified the accused has to be clearly stated.

We are of the considered opinion that, even the evidence of PW2 which relied on the light from the torch was not enough to avoid mistaken identity. This is because, if the torch light was

directed to PW2, it would not be possible for her to identify a person using that torch. We subscribe to the view that a torch light mainly enables a person using it to see the object or person lit on and not the other way round. See the decision of this Court in the case of **James Chilonji v. Republic**, Criminal Appeal No. 101 of 2003 (unreported).

In the instant case, the record is silent on the intensity and illumination of the said torch light which enabled PW2 to identify the appellant at the scene of crime. Also the record is silent on the distance from a person holding that torch to a place where PW2 stayed. The accumulation of these anomalies create doubts that the appellant was sufficiently identified at the scene of crime.

Lastly, PW3 who testified that he was able to identify the appellant by light from the boat. His evidence also lacks the explanation on the intensity and illumination. The record is also silent on the distance from where the light from the boat was, to the place where PW3 enabled to see the appellant. All of those are doubts which lack clear answer from the evidence on record.

PW3 also claimed to have identified the appellant's voice when he uttered the words "*who are you*". We are increasingly of the view that great care and caution must be taken before acting on voice identification. This is because, there is a great possibility of imitating a voice of another person. For that reason, a court has to be extra careful and make sure that the witness is familiar enough with the voice of a person which he says he can identify his voice – See **Kenedy Ivan v. The Republic**, Criminal Appeal No. 178 of 2007, and **Badwin Komba @ Ballo v. Republic**, Criminal Appeal No. 56 of 2003 (both unreported).

All in all, we join hands with the learned Senior State Attorney that, the evidence of PW1, PW2 and PW3 on the issue of identification relied by the trial court and upheld by the High Court was not water-tight to avoid mistaken identity. Our evaluation of the evidence as a whole is to the effect that the prosecution has failed to prove their case beyond reasonable doubt. For that reason, we have no other option but to give the benefit of doubt to

the appellant. We think, had the two courts below considered those anomalies, they would have arrived at a different conclusion.

In the event, we quash the conviction, and set aside the sentence imposed on the appellant. The appellant to be released from prison forthwith unless otherwise lawfully held. It is so ordered.

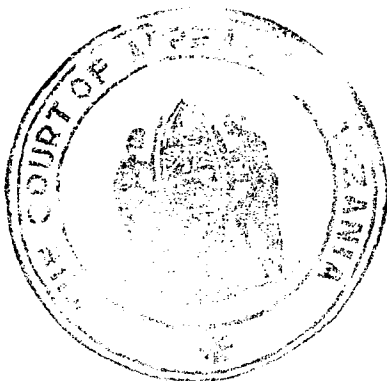
DATED at TABORA this 16<sup>th</sup> day of September, 2013.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

B. M. K. MMILLA  
**JUSTICE OF APPEAL**

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



  
Z. A. Maruma  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**