IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA,J.A.)

CRIMINAL APPEAL NO. 120 OF 2012

1. BRAITON SOSPETER @ MZEE
2. ANACLETH PAULO
3. TINKIGANYWA PIUS .... APPELLANTS

VERSUS

THE REBUBLIC...RESPONDENTS

(Appeal from the judgement of the High Court of Tanzania at Mwanza)

(Masanche, J.)

dated 17th June, 2003
in
Criminal Appeal No. 1 of 1998

....

JUDGMENT OF THE COURT

5th & 6th August, 2013.

KIMARO, J.A.:

This is a second appeal in which the appellants after being aggrieved by the decision of the High Court in their first appeal, are still protesting their innocence. In the District Court of Muleba at Muleba, the three appellants were convicted of armed robbery contrary to sections 285 and 286 of the Penal Code [CAP 16 R.E.2002]. They were each sentenced to thirty years imprisonment.

The evidence led by the prosecution in support of the charge against the appellants came from four witnesses. According to Benjamin Simon (PW1) and Mary Benjamini (PW2) who were spouses, on 28th July, 1997 at about 8.30 p.m. the couple were in their house taking their dinner. The door of their house was hit by a big stone hence giving the appellant access to the house. As PW1 tried to raise an alarm, he was hit on the head. The second appellant held PW1. In fear of losing his life, PW1 beseeched the appellants not to kill him. It was then the second appellant and other culprits pushed him into his room where he gave the appellants T. shillings 800, 000/=. He was then ordered to lie on his back. Other persons also held PW2 and forced her to give them clothes. She yielded to their demand. They also took a radio and other items. PW1 was specific that he identified the second and third appellants at the scene of crime. PW2 said she identified the first appellant as well because they were persons known to them before and the lamp was lit at the time the appellants gained access to the house and committed the offence.

Alexander Simon (PW3) was a neighbour to PW1 and PW2. He said on that day he heard gunshots at the house of PW1 and PW2. After the situation cooled down, he went to the house of PW1 where he found PW1 bleeding. He also found the coat of the second appellant at the

scene of crime. No. E 4087 PC Martin (PW4) testified that on that day at about 10.00 p.m. the OCS of Nshamba police post informed him of the theft that was committed at the house of PW1. As he was on the way to the house of PW1 he heard gunshots. He made a follow up of the gun shots and he landed at the house of the fourth appellant. There he found the first and second appellants. He said he arrested all the appellants as they were mentioned by PW1, PW2 and PW3 to have been the persons who committed the offence. PW3 said the second appellant left his coat at the house of PW1 and he identified that coat as being the property of the second appellant.

In their defences all appellants denied being involved in the commission of the offence. They gave the defence of alibi.

The trial court believed the evidence of the prosecution witnesses and disbelieved the appellants' alibi. The appellants were convicted and sentenced as indicated above. The High Court sustained the convictions and the sentences imposed on the appellants for the same reason.

Before us, each of the appellants filed three grounds of appeal, but basically they are complaining about two matters; their identification and that the evidence of the prosecution came from family members.

During the hearing of the appeal, the appellants appeared in person. They were not represented. Ms. Sakina Sinda, learned Senior State Attorney represented the respondent Republic.

In support of the appeal, the appellants prayed that their appeal be allowed because it has merit. They said the first appellate court erred in sustaining a conviction whose identification evidence was doubtful and the evidence came from family members.

On her part the learned Senior State Attorney supported the convictions and sentences. She said the offence was committed while PW1 and PW2 were having their dinner. PW1 and PW2 were married. They were the victims of the offence and saw how the offence was committed. The prosecution could not summon witnesses who did not see the commission of the offence to testify.

Responding to the ground of appeal on the identification of the appellants, the learned Senior State Attorney said the identifying circumstances in this case were favourable for a correct identification. She said the offence was committed at the time the spouses were having dinner. The lamp was on, the appellants were known to the

couple before, they mentioned their names immediately after the commission of the offence and they were arrested soon after the commission of the offence. She distinguished the case of **Mohamed Musero V R** [1993] T.L.R. cited by the appellants in support of their appeal. The learned Senior State Attorney said in that case the identification was done by torch light and the incident was not immediately reported to the police.

We think this is a case which need not detain us. The appellants and the learned Senior State Attorney pointed out correctly that the conviction of the appellants was grounded on their identification at the scene of crime and the key witnesses for the prosecution were spouses. Starting with the ground of complaint that the witnesses were family members, we note that the witnesses who were related were PW1 and PW2. They were the victims of crime. Under the circumstances it would have been absurd to expect the prosecution to summon witnesses unrelated to the commission of the offence to testify. Moreover, the law does not forbid related witnesses to testify. What matters is that the witnesses should be competent to testify on the commission of the offence at issue and the credibility to be attached to their evidence. The other witnesses were not related to PW1 and PW2. PW3 was their neighbour and PW4 was a policeman who arrested the appellants.

As for the identification of the appellants at the scene of crime, both PW1 and PW2 said the offence was committed at the time they were taking their dinner. There was lamp light. If the lamp light assisted the witnesses to take their dinner, we do not see the likelihood of the witnesses failing to see the appellants with the assistance of the same light. PW1 was specific that it was the second appellant who held him and forced him to part with his money. In that process he left leaving his coat behind which was identified by PW3. The wife of PW1 identified the other appellants as well. We have no reason to disbelieve her as she was not roughed up by the appellants as they did to her husband. They also mentioned the names of the appellants on the same day and all the appellants were arrested on the same day. Our considered opinion is that this is a case which satisfied good conditions of identification as laid down in the case of **Waziri Amani V R** [1980] T.L.R. 250.

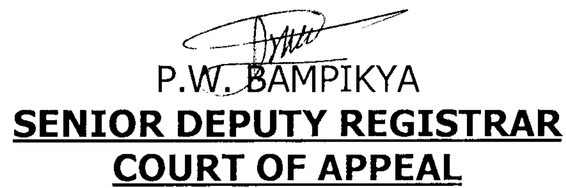
Given the circumstances under which the offence was committed and the appellants identified, this being a second appeal, we see no reason for interfering with the findings of fact by the lower courts. We dismiss the appeal for having no merit.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL