

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 235 OF 2011

**1. MASOLWA SINDANO }
2. GERALD SINDANO }APPELLANTS**
VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the judgment of the High Court of
Tanzania at Mwanza)**

(Mwakipesile, J.)

dated the 5th day of September, 2011

in

Criminal Appeal No. 31 of 2011

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JUDGMENT OF THE COURT

2nd & 5th August, 2013

KIMARO, J.A.:

This is a second appeal in which Masolwa Sindano, 1st appellant and Gerald John @ Sindano, 2nd appellant who are blood brothers, are protesting their innocence. They were jointly charged with the offence of armed robbery contrary to sections 285 and 287A of the Penal Code [CAP 16 R.E.2002], convicted and sentenced to thirty years imprisonment each. The offence was alleged to have been committed on the early hours of 8th April, 2007 when an assortment of items were stolen from Aneth Gervas (PW1). Their first appeal to the High Court was not successful.

A memorandum of appeal jointly filed by the appellants contains several grounds of complaints against their conviction. These include inconsistencies in the evidence of the prosecution witnesses, admission of a PF3 in infringement of the appellants' right, failure of the complainant to mention the name of the suspect at the earliest opportunity and incorrect identification of the appellants by relying on familiarity and recognition of the appellants.

Briefly, the evidence upon which the appellants' conviction was based was that on the night of 7th April 2007 Anneth Gervas (PW1) was in her house alone, sleeping. Her husband was on safari. At about 1.00 hours her house was broken into using a big stone commonly known as "fatuma." The appellants forcefully entered her room. At that time a lump was lit. According to this witness, both appellants were persons known to her before as they hailed from the same village. She said they had on Mgambo uniform. PW1 said the appellants had a "panga" and they beat her and threatened to kill her. In that process they stole a bicycle, radio and other items. PW1 raised an alarm seeking for help. Apparently Maximilian Katage (PW3) a neighbour of the complainant, heard his dog barking but he could not assist the complainant because some of the culprits were at his house and he feared to respond to the alarm raised by the complainant because he was afraid of being slashed with a panga.

Philipo Tungaraza (PW3) was on that day at about at 0.45 hours returning home from the church, from Easter vigil, when he met the appellants on the way with a bicycle and radio. He corroborated the evidence of PW1 that the appellants were dressed in Mgambo uniform. But this witness ran away from the appellants. The witness said he

identified the appellants because of moonlight but he did not disclose the intensity of the moonlight.

Each of the appellants denied the commission of the offence and they raised the defence of alibi without giving notice as required by section 194(4) of the Criminal Procedure Act, [CAP 20 R.E.2002].

The trial court was satisfied that the offence against the appellants was proved beyond reasonable doubt and the appellants were convicted and sentenced as shown above.

Before us the appellants appeared in person. They were not represented. The respondent Republic was represented by Mr. Athumani Matuma, learned State Attorney. The learned State Attorney supported the appeal by the appellants. The appellants had nothing more to say in respect of the grounds of the appeal they filed. They requested the Court to allow their appeal.

In support of the appeal, the learned State Attorney said the main issue in the appeal is the identification of the appellants. He said the evidence of identification in this case did not eliminate the possibility of mistaken identity of the appellants. He said although the complainant said he identified the appellants because of the lamp which was lit at the time of the commission of the offence because they were from the same village, she had seen them before, and that they had on mgambo uniform, that was not sufficient to eliminate possibilities of making a mistake in their identification. This was because the complainant did not give the intensity of the lamp light. Even PW2 who said he identified the appellants because of moonlight did not say how bright was the moonlight. The learned State Attorney's opinion is that the witness had

to give the particular familiarity of the identification. He said since there is a shortfall in the prosecution evidence, the doubt created in the prosecution case should be resolved in favour of the appellants. He prayed that the appeal be allowed.

With respect, we agree with the learned State Attorney that the main issue in this appeal is the identification of the appellants. The offence was committed at night. The learned State Attorney pointed out correctly that the complainant did not disclose the intensity of the lamp light. She only made a general statement that in her room where the offence was committed, a lamp was lit. However she did not give the intensity of the light. We would also add that, even if the complainant and the appellants were living in the same village, that did not eliminate the likelihood of the complainant making a mistake in the identification of the appellants. The other identifying witness, PW2, said he identified the appellants through moonlight but he did not reveal the brightness of the moonlight. Moreover, he ran away from the appellants.

In the case of **Issa s/o Mgara@ Shuka V R** Criminal Appeal No.37 of 2005 (unreported) the Court held that:

"Clear evidence ought to have been given by the prosecution to establish beyond reasonable doubt that the lights relied upon by the witnesses was reasonably bright to enable the witnesses to see and positively identify the appellants."

In this appeal we do not see clear evidence of identification of the appellants. What is on record is only general statements by the identifying witnesses which do not eliminate the possibility of the witnesses mistaking the appellants. Given the shortfall in the identification of the appellants we allow the appeals by the appellants, quash the convictions and set aside the sentences imposed on them. We order their release from prison unless held there for lawful cause.


DATED at MWANZA this 3rd day of August, 2013.

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