IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 22 OF 2010

SIASA BERNARD @ KASENGA .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Rwakibarila, J.)

dated 20th day of February, 2009
in
Criminal Appeal No. 44 of 2008

JUDGMENT OF THE COURT

23rd & 24 July ,2013

MSOFFE, J.A.:

The appellant and others were charged with, *inter alia*, armed robbery before the District Court of Geita. After a full trial they were convicted as charged and sentenced to the statutory thirty years term of imprisonment. Aggrieved, they appealed to the High Court of Tanzania at Mwanza where Rwakibarila, J. allowed the appeal(s) in respect of the others and dismissed the appellant's appeal. Still aggrieved, the appellant has preferred this second appeal.

The appellant has filed a memorandum of appeal and an "additional" memorandum of appeal. In both documents, a number of points have been canvassed. Very briefly, they all crystallize on one major ground of complaint. That the identification evidence in the case did not establish the prosecution case against him beyond reasonable doubt.

In a nutshell, the prosecution evidence that led to the appellant's conviction and sentence went as follows. On 9/10/2005 PW1 E 8648 PC Said and PW2 E8353 PC Athumani, both police detectives at Katoro Police Post in Geita, were ordered to travel to Msalani settlement to oversee peace and harmony during the Vice President's tour to the area. They stayed at Msalani till 10/10/2005 in the evening when they commenced their journey back to Katoro. On the way, at Samina forest, they saw a lorry parked on the road. A group of about eight bandits appeared from the forest wielding a gun and machetes. One of the bandits fired in the air. In the ensuring process, the bandits stole a number of items from PW1 and PW2 and also from the other passengers in a lorry in which both PW1 and PW2 were also travelling in. After seizing the properties the bandits escaped from the scene. At around sunset on the same day both PW1 and PW2 secured another means of transport and went to the police

station and reported the incident. Eventually the appellant and others were arrested and charged as aforesaid.

Admittedly, the prosecution case was to stand or fall on the crucial aspect of evidence of identification. Mr. Athumani Matuma, learned State Attorney for the respondent Republic, agreed that much in his oral submission before us and in the process he was of the view that the evidence on record did not establish conclusively that the appellant was identified. With respect, we agree with him.

It is common ground that the incident did not take place in broad daylight. Both the charge sheet and the evidence of PW1 and PW2 show that at the time of the incident there was darkness. The conditions favouring a correct identification were therefore unfaourable. It is also not in dispute that the prosecution witnesses and the appellant were known to each other prior to the date of the incident. Notwithstanding this familiarity, the underlying consideration is still whether or not on the basis of the evidence on record we can safely say that there was enough evidence of identification.

As correctly submitted by Mr. Matuma, the starting point is the evidence of visual identification. On this, there was the general assertion by PW1 and PW2 that they identified the appellant. With respect, it was not enough to make this general statement without stating exactly **how** they identified the appellant. It was important for these witnesses to be more forthcoming and state exactly how they identified the appellant the more so because this was an incident that took place under unfavourable conditions. In the absence of such evidence, it seems to us that there was no cogent evidence of visual identification by these witnesses on the fateful day and time. At any rate, according to PW1, at the time of the ordeal he *"was underneath of the motor vehicle."* If so, chances are that he did not identify the appellant.

This brings us to the identification parade. As stated above, the witnesses and the appellant were familiar to each other. If so, strictly speaking, there was no need for an identification parade. An identification parade is normally held or conducted where the suspect or person sought to be identified is not known to the witnesses. In this case, since the appellant was known to the witnesses the identification parade was

uncalled for, so to speak, because in effect the witnesses would naturally and obviously pick up the appellant in the circumstances.

In conclusion, once the evidence of the identification parade is discounted it follows that the only other evidence is that of visual identification which has its own shortcomings, as shown above. As it is, there is no evidence upon which we could safely sustain the conviction.

For the foregoing reasons, there is merit in the appeal. We hereby allow it, quash the conviction and set aside the sentence. The appellant is to be released from prison unless he is held therein in connection with a lawful cause.

DATED at MWANZA this 23rd day of July 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