

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

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

CRIMINAL APPEAL NO. 112 OF 2013

NURDIN MOHAMED @ MKULAAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court
of Tanzania at Songea)**

(Kalombola, J.)

dated the 29th day of August , 2012

in

Criminal Appeal No. 48 of 2011

JUDGMENT OF THE COURT

14th & 26th July, 2013

MJASIRI, J.A.:

In the District Court of Tunduru District, the appellant, Nurdin Mohamed @ Mkula was charged with the offences of armed robbery contrary to sections 285 and 286 and rape contrary to section 130 (1) (2) and 131 of the Penal Code Cap 16 R .E. 2002. and was convicted and sentenced to a mandatory term of 30 years imprisonment on the first count of robbery and 30 years imprisonment and twelve (12) strokes on the second count of rape. Aggrieved by the decision of the district court, he appealed to the High Court against both conviction and

sentence. The appellant's appeal was partially successful in the High Court. He was found not guilty of the offence of rape. Still aggrieved the appellant has filed this second appeal to this Court.

The appellant has presented six grounds of appeal in his memorandum of appeal. However, the main grounds of appeal can be summarised as under:-

- (1) The trial judge erred in fact and law in relying on the evidence of voice identification.
- (2) The trial judge erred in fact and law in holding that the appellant was properly identified.
- (3) The conviction of the appellant was against the weight of the evidence.

The background to this case is as follows. The appellant was once the fiancée of one of the complainant's daughters, Tisiamu (PW4). The two lived together. PW4 returned to her parent's home after a misunderstanding with the appellant. Tisiamu received the sum of Shillings Six Hundred and Forty thousand (640,000/=) from the estate of her late father. She gave the money to her mother (PW1) for safe keeping. The appellant came to know about the inheritance when he was living with PW4. Before collecting the cheque in the sum of shs.

640,000/= from the Bank, PW4 had to collect her voter identification card from the appellant's house. When she did so, the appellant asked her whether the inheritance money has been paid. PW4 did not confirm the payment but the appellant nevertheless followed up the matter and learnt that the inheritance money was paid. Therefore, it was alleged in the trial court, on the 21st day of August 2007, at 3.30 hours the appellant went to the complainant's house in Majengo area in Tunduru District stole shs. 640,000/= from PW1 and immediately before and after stealing the money, he threatened the complainant and her family with a gun.

It was also alleged by the prosecution that on the same day and time when the appellant invaded the complainant's house he raped Aisha Ally (PW3) who was PW1's daughter and PW4's sister. The appellant it was claimed, entered PW1's house accompanied by PW3 and they also left together after he stole the money. Almost all the members of PW1's family testified that the appellant's face was covered when he came into the house. However they could identify him by his voice and physical features.

In his defence the appellant completely denied any involvement in the robbery and/or rape.

At the hearing of the appeal the appellant appeared in person and was unrepresented and the respondent Republic, had the services of Mr. Maurice Mwamwenda, learned Senior State Attorney.

The appellant being a layman did not have much to say and simply asked the Court to adopt his memorandum of appeal as part of his submission.

Mr. Mwamwenda on his part, did not support the conviction. He focused his submissions on ground No. 8 of the memorandum of appeal, namely that the charge against the appellant was not proved beyond reasonable doubt. He submitted that there was no evidence on record to establish the offence of armed robbery. According to him, the conviction of the appellant was solely based on the evidence of voice identification. The appellant had covered his face and could not be seen. The witnesses claimed that as the appellant was known to them they could identify his voice. He stated that no evidence was led by the prosecution that there was light and how intense the light was for the witnesses to establish that the appellant was carrying a gun and that they could clearly see his physical features, how he was dressed, and

the type of gun he had. One of the witnesses testified that the gun was a long one (PW3) and one (PW2) stated it was a short one.

Mr. Mwamwenda made reference to the case of **Stuart Erasto Yakobo v Republic**, Criminal Appeal No. 202 of 2004 CAT (unreported). He concluded his submissions by arguing that evidence on voice identification is unacceptable and unreliable under the circumstances of this case.

The main issue for consideration is whether or not the appellant was properly identified. Once this is established it can be determined whether it was the appellant who committed the robbery.

We, on our part, after carefully analysing the evidence on record and the memorandum of appeal entirely agree with the submissions made by the learned Senior State Attorney. The incident occurred at night at around 3.30 hours and the circumstances surrounding the identification of the appellant were not conducive to positive identification. The only evidence linking the appellant with the armed robbery is that of voice identification.

We are fully aware that this is a second appeal. We are therefore supposed to deal with questions of law only. We can only interfere

where there was a misapprehension of the substance, nature or quality of evidence. See **Salum Mhando v Republic** [1993] T.L.R 170.

In **Kenedy Ivan v Republic**, Criminal Appeal No. 128 of 2007 CAT (unreported) it was stated thus:-

"That voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it. This is so because there is always a possibility of a person imitating another person's voice. For voice identification to be relied upon it must be shown that the witness is familiar with the voice as being the same voice of a person of the scene of crime."

See also, the decisions of this court in **Badwin Komba @ Baloo v Republic**, Criminal Appeal No. 56 of 2003 CAT (unreported) **Erasto Yakobo v Republic**, Criminal Appeal No. 202 of 2004 CAT (unreported) and **Kaganja Ally and Juma Ally v Republic** [1980] TLR 270.

The Courts in Kenya and Uganda have taken a similar approach. In **Libambula v Republic**, Criminal Appeal No. 140 of 2003, CAK (unreported) it was stated as follows:-

"In receiving evidence of voice identification, care would be necessary to ensure that it was the accused

person's voice the witness was familiar with it and recognized it and that the conditions obtaining at that time it was made were such that there was no mistake in testifying to that which was said and who had said it".

In **Shama and Another v Uganda** (2002) EA 589 (SCU) it was held as under:-

"Identification becomes a crucial issue if the identifying witness is unable to physically see the speaker whose voice she claims to identify and therefore it is necessary for the trial court to consider with greatest care and caution. There is a possibility of mistaken identity by voice where it is claimed that the person identifying has never had face to face discussion with the person he identified".

Given the circumstances surrounding the voice identification of the appellant, it is not safe to rely on the evidence of PW1, PW2, PW3, and PW5. The familiarity of the appellant's voice to the said witnesses cannot be established with certainty. In relying on identification by voice the Court has to be satisfied that the complainant's identification of the appellant's voice was free from any possibility of error.

The law on the evidence of visual identification is settled. This evidence is one of the weakest kind and should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. The principles are clearly set out in the case **of Waziri Amani v Republic** 1980 TLR 150. Even though some of the witnesses indicated that they could identify the appellant by his physical features, the prevailing circumstances were not conducive to a proper identification.

In **Raymond Francis v Republic** 1994 TLR 100 this Court stated thus:-

"It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance".

There is no evidence to establish that the appellant was sufficiently identified by the prosecution witnesses. The incident took place at 3.30 hours and there was no indication that there was light and how intense the light was. Therefore it cannot be concluded that the identification of the appellant was correct and unmistakable, especially given the fact that his face was covered.

We would like to mention in passing that we found it rather strange that the same evidence which was discarded in respect of the offence of rape was found sufficient to convict the appellant with the offence of armed robbery.

In view of what we have stated hereinabove, we are satisfied that the appellant's appeal has merit. We hereby allow the appeal, quash the conviction of armed robbery and set aside the sentence of 30 years imprisonment and twelve (12) strokes. The appellant should be released from custody forthwith, unless otherwise lawfully held.

DATED at **IRINGA** this day 25th July, 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