

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., ORIYO, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 150 OF 2013

FRANK LUGANGIZA@ZUNGU.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mwanza)

(Mruma, J.)

dated the 15th day of May, 2013

in

Criminal Appeal No. 101 of 2012

JUDGEMENT OF THE COURT

13th & 15th October, 2014

MSOFFE, J.A.:

This appeal arises from the decision of the High Court (Mruma, J.) upholding the conviction of the Appellant for armed robbery and the sentence of thirty years imprisonment meted by the District Court of Nyamagana (Mwambapa, RM).

The courts below were satisfied that the evidence of PW1 Mariam Charles, the only eye witness to the incident, was credible. PW1 testified

and told the trial District Court of Nyamagana that in the early morning hours of 17/2/2010, that is at 5.30 a.m. to be exact, she was ambushed by four armed bandits including the Appellant who robbed her "discs", mobile phone and Shs. 8,000/=. She identified the Appellant because she knew him prior to the date of incident; there was bulb light from a nearby church illuminating the area; and that she stood at close range to the Appellant in a distance she estimated to be "from the witness box to the accused dock".

Another significant aspect of the evidence of PW1 was the fact that it was alleged that she mentioned the Appellant to the police at the earliest possible opportunity. She was allegedly supported that much by PW2 E6793 D/Constable Alfred who, it was claimed, confirmed to have received the report made to the police by PW1.

At the hearing, the Appellant appeared in person, unrepresented. The respondent Republic had the services of Mr. Castus Ndamugoba, learned State Attorney. Mr. Ndamugoba argued in support of the appeal. For reasons that will emerge hereunder he was justified in not supporting the conviction.

As correctly pointed out by Mr. Ndamugoba, the prosecution case was to stand or fall on the crucial evidence of identification. On this, the evidence of PW1 was crucial. The question that arises is whether the evidence given by PW1 conclusively established that she identified the Appellant on the fateful day and time. With respect, we are in agreement with Mr. Ndamugoba that no such positive evidence was forthcoming from PW1.

We have gone through the entire evidence given at the trial by PW1. There is nothing in her testimony to show that she positively identified the Appellant at the scene. At best, she said she heard the bandits saying "Zungu mmalize huyu". Also, that she testified to the effect that she knew the Appellant as a "Mtoto wa Magorofani". With respect, the above aspects of the evidence are neither here nor there because they don't help in lending assurance that the "Zungu" or the "Mtoto wa Magorofani" was the same person she identified at the scene on the date in question. There could have been another "Zungu" or "Mtoto wa Magorofani" at the scene on the said date and time and not necessarily the Appellant.

The other aspect of the prosecution case on the crucial aspect of identification was the allegation that there was bulb light from a nearby

church illuminating the area. With respect, it was quite probable or possible that there indeed was such light. However, the difficulty with this evidence is two - fold: - **One**, PW1 simply said that there was "church bulb on the fence", without more. She did not say that it was with the aid of the bulb light that she identified the Appellant. **Two**, the intensity of the bulb light was not disclosed. It was important for PW1 to lead evidence on whether the light was bright enough to allow for correct identification of the Appellant.

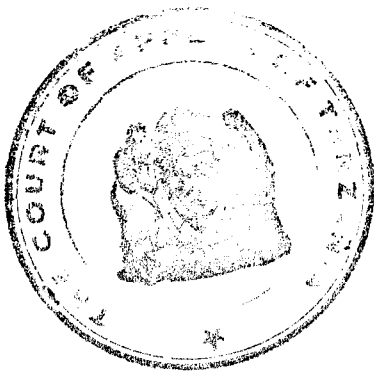
This brings us to the last feature of the prosecution case that the incident was reported to the police immediately after it had happened. Ideally under normal circumstances, and based on the decision of this Court in **Marwa Wangiti Mwita and Another v Republic** [2002] TLR 39 at page 43, the significance of this evidence would be to lend an all-important assurance that PW1 was reliable. However, in the justice of this matter, besides mentioning "Zungu" PW1 did not describe to the police whether the "Zungu" she mentioned was the same person as the Appellant in this case. Evidence of description of some sort was important in the case because this was a sudden encounter happening under difficult conditions, notwithstanding that PW1 said she knew the Appellant prior to

the date of incident. In the absence of evidence to the above effect, it meant in effect that the prosecution evidence on this aspect was inconclusive.

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 lawfully held.

DATED at MWANZA this 15th day of October, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL



K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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


Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL