IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.

CRIMINAL APPEAL NO. 118 0F 2015

SHABANI BAKARI .....APPELLANT
VERSUS

THE REPUBLIC..... ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania At Dodoma)

(Makuru, J.)

Dated 14th day of August, 2010
in
Criminal Appeal No. 115 of 2010

JUDGMENT OF THE COURT

27th & 29th May, 2015

MBAROUK, J.A.:

Before the District Court of Manyoni at Manyoni, the appellant, Shabani Bakari Mumbili and another were charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code cap. 16 R.E. 2002 as amended by section 287A of (Miscellaneous Amendments) Act No. 4 of 2004. It was the appellant alone who was found guilty of the offence and hence convicted and sentenced to thirty (30) years term of imprisonment and payment of

compensation of Tshs. 150,000/=.Aggrieved by that decision, the appellant unsuccessfully appealed to the High Court of Tanzania at Dodoma, hence, he has now preferred this second appeal.

Briefly stated, the prosecution's case as found at the trial court is that, on 14-08-2009 at about 01:00 a.m. Jumanne Elias (PW1) while sleeping at his house he was invaded by bandits. He initially heard a person walking outside his house but when he went outside he found no one. When he returned inside his house after five minutes, his door was knocked and broken. PW1 then went outside the house again to see what was going on. While he was outside the house, he found a person standing at one of the corners of the house. PW1 followed that person but he ran at the back side of the house. Thereafter, that person followed PW1 so as to beat him and faced each other. This was a time when PW1 testified to have identified the appellant by the help of a moon light as it was during night time. Thereafter,

two other persons came from the back of PW1's house and surrounded him. When PW1 shouted for help, the appellant with his colleagues went inside PW1's house and took a bag and cash money T.shs.40,000/=. According to PW1, the bandits took one mobile phone and went away with all those items. PW1 further testified not to have identified the others except the appellant as he knew him to have stayed at the same village. Thereafter, PW1 testified to have reported the matter at Mgandu Police Station next day and that led the appellant to be arrested at 2:00 p.m.

Shida Bena (PW2), the wife of PW1 also testified on the issue of identification. Her testimony was mainly based on the point that, the appellant had a torch which he flashed it to PW1 and that there was fire outside the house which enabled PW1 to identify the appellant.

At the trial court, the appellant categorically denied to have committed the offence charged against him. He testified that, on 14-08-2009 at 2:00 p.m. he remembered to be in

company with his neighbour called Nesi. Thereafter, he was approached by three youths who told him to report at police station and when he reported, he was locked up until 16-08-2009 when his statement was taken and then sent to Manyoni Police Station. On 21-08-2009, he was then sent to court to answer the charges against him.

In this appeal, the appellant appeared in person, un-presented. Whereas, Ms. Rosemary Shio, learned Principal State Attorney represented the respondent/Republic. The appellant preferred a memorandum of appeal containing ten grounds of appeal, but in essence we have found that, the major complaint is centred on the issue of identification.

At the hearing, the appellant had nothing to submit but requested the learned Principal State Attorney to submit first and wished to respond thereafter.

From the outset, the learned Principal State Attorney indicated to support the appeal. She started by submitting

that, taking into account that the incident happened at 01:00 a.m. at night, the condition at the scene of crime was not favourable for correct identification of the appellant. She said, the record shows that PW1 failed to give description of the intensity of the moonlight as a source of a light which enabled him to identify the appellant. The learned Principal State Attorney further contended that, PW2 merely stated that, it was with the aid of a torch light flashed on PW1 and the fire outside the house as the sources of light which enabled PW1 to identify the appellant. However, she wondered how someone can see a person who flashed a torch on his face. Apart from that, she further submitted that, neither the intensity of that torch light nor that of the fire outside the house was disclosed. As for PW3, the learned Principal State Attorney submitted that, the record shows that she (PW3) merely stated that *"there was light inside"* the house which enabled her to identify the appellant. However, Ms. Shio submitted that, PW3 failed to mention the

actual source of light and its intensity which enabled her to identify the appellant.

All in all, Ms. Shio urged us to find that, in the absence of the description of the intensity of the sources of light mentioned by the prosecution witnesses it won't be safe to find that the appellant was correctly identified.

This Court has held in a number of cases that, when a court of law is to rely on the evidence of a witness on visual identification, it has to consider some guidelines so as to avoid mistaken identity of a suspect. The said guidelines are as follows:-

1. *If the witness is relying on some light as an aid of visual identification he must describe the source and intensity of that light.*
2. *The witness should explain how close he was to the culprit (s) and the time spent on the encounter.*
3. *The witness should describe the culprit or culprits in terms of body build, complexion,*

size, attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence.

4. *Ideally, upon receiving the description of the suspect(s) the police should mount an identification parade to test the witness's and then at the trial the witness should be led to identify him again.*

For instance, see the decisions of this Court in the case of **Waziri Amani v Republic** (1980) TLR 250, **Raymond Francis v. Republic** (1994) TLR 100, **Yohana Msigwa v. Republic** (1990) TLR 148, **Omari Iddi Mbezi and Three Others v. Republic,** Criminal Appeal No. 227 of 2009 (unreported) to name a few. In emphasing the reliance on the guidelines to avoid mistaken identity, this Court in the case of **Raymond Francis** (supra), held as follows:-

".....its elementary that in a Criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the outmost importance."

There is no dispute that, in the instant case its determination depended mainly on visual identification of the appellant at the scene of crime by the prosecution witnesses i.e. PW1, PW2 and PW3. As pointed out by the learned Principal State Attorney, no one among those prosecution witnesses described the intensity of the sources of light which they claimed to have enabled them to identify the appellant at the scene of crime. There is no doubt that each source of light has its own degree of intensity, hence it is vital in a case which depends on a visual identification at night time to state clearly among other things the intensity of light which enabled him/her to identity the appellant.

In the instant case, the prosecution witnesses have failed to state the intensity of light and in some instances

even failed to state the source of light which enabled them to correctly identify the appellant. That raises doubt as to whether the appellant was correctly identified at the scene of crime.

We are very much aware that an appellate court should not disturb the concurrent findings of fact by the lower court, unless it is evident that there are misdirections or non-directions on the evidence (See: The **DPP V. Jaffari Mfaume Kawawa** (1981) TLR 149). However, as pointed out earlier, in the circumstances of this case, we are forced to fault the findings of the two courts below for their failure to consider the crucial aspect of the intensity of light which enabled the prosecution witnesses to identify the appellant at the scene of crime. We are of the view that, if the two courts below had considered that the incident occurred at night and it was necessary for the prosecution witnesses to state clearly the source of light and its intensity they would have arrived at a different conclusion.

For the foregoing reasons, we are constrained to allow the appeal. In the event, we quash the appellant's conviction and set aside the sentence. Hence, we order the appellant to be released forthwith from prison unless he is held for some other lawful cause.

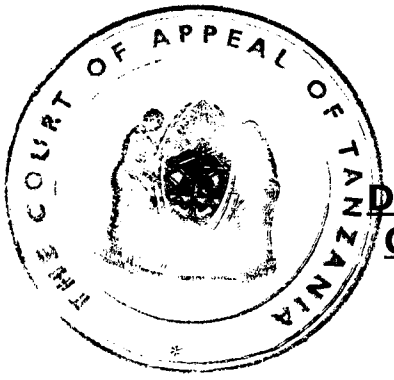
DATED at **DODOMA** this 28th day of May, 2015.

E.A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
DEPUTY REGISTRAR
COURT OF APPEAL