

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KILEO, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 349 OF 2009

1. ATHUMANI S/O HASSAN

2. YUSTIN S/O EMILIO @ LINGOFAPPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Shaidi, J.)

dated the 10th day of October, 2009

in

HC. Criminal Appeal No. 159 of 2004

JUDGMENT OF THE COURT

8th & 21st July, 2015

KILEO, J.A.:

On 16/09/2002, the appellants along with one Imamu Juma were arraigned before the District Court of Kilombero at Ifakara for the charge of armed robbery contrary to sections 285 and 286 of the Penal Code. While Imamu Juma who appeared as the first accused at the trial was acquitted the appellants who were the second and third accused respectively were convicted and sentenced to 30 years imprisonment. Evidence was led that

purported to show that in the early hours of 10th September 2002 the appellants being armed with a panga and a gun invaded the premises where PW1, PW2, PW3, PW4 and PW4 were residing. They threatened the witnesses, tied them with ropes and made away with a TV screen and some bags of clothes. (It is to be noted however that the charge sheet made no mention of a TV screen but rather what was mentioned was a Sony radio cassette. Moreover, no witness mentioned a radio cassette in their testimonies).PW1 testified to the effect that the first accused at the trial (Imamu Juma) and the third accused (appearing in this appeal as the second appellant)was familiar to them. PW5 also claimed that the second appellant was familiar to him and had taken dinner with them prior to the incident.

The appellants' appeal to the High Court was unsuccessful hence this second appeal.

The appellants who appeared before us in person and unrepresented had filed separate memoranda of appeal each of which basically centred on sufficiency of identification. Addressing us, the appellants apart from reiterating their grounds of appeal on the question of identification

wondered why Imamu Juma who was mentioned by name as being among the bandits was acquitted while they were convicted.

Ms Zawadi Mdegela, learned State Attorney appeared for the respondent Republic. She supported conviction and making reference to the celebrated case of **Waziri Amani versus Republic** [1980] TLR 250 asserted that the appellants were sufficiently identified as there was a lamp at the scene. She also opined that the time the appellants spent at the scene including the time to tie up the victims, enabled the witnesses to properly identify the appellants.

The incident in this case occurred in the dead of the night. Admittedly, conviction of the appellants rested only on visual identification. The question is therefore whether the circumstances pertaining at the scene of crime sufficed for watertight identification. Given the circumstances of this case credibility of witnesses should also have been considered.

It was stated in **Waziri Amani**(supra) that evidence of visual identification is 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 water tight.

On the source of light the witnesses claimed that there was a lamp burning at that time. However, no evidence was tendered to indicate the intensity of the light from the lamp which one of the witnesses described as a kerosene lamp. In **Said Chally Scania v. R.**, Criminal Appeal No. 69 of 2005 (unreported) the Court emphasized that when a witness is testifying about another in unfavorable circumstances, clear evidence mentioning all aids to unmistakable identification, like the source of the light and its intensity must be given. Also the Court in **Issa Mgara @ Shukav. R.** – Criminal Appeal No. 37 of 2005 (unreported) made the following statement:

"In our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in evidence sufficient details the intensity and size of the area illuminated. We wish to stress that even in recognition cases where such evidence may be more reliable than

identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."

In the present case the kerosene lamp referred to by the witnesses could be anything from a small oil lamp (kibatari) to a hurricane lamp.

There is no gainsaying that the light emanating from a small oil lamp is of less intensity than that emanating from a fluorescent or hurricane lamp. It was therefore necessary in the circumstances of the case to describe the intensity of the light which enabled the witnesses to positively identify the appellants.

On matters of identification *visa avis* credibility the Court held in **Jaribu Abdallah v. R.**, Criminal Appeal No.220 of 1994 (unreported) as follows:

"... in matters of identification, it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witness. The conditions might appear ideal but that is no guarantee against untruthful evidence."

The above legal proposition was reasserted by the Court in **Nyakango Olala James V. R.**, Criminal Appeal No. 32 of 2010 (unreported): -

"This principle of law is still very valid today as it was when it was first propounded. Therefore, eyewitness testimony ... can ... be devastating when false witness identification is made due to honest confusion or outright lying."

As we have stated earlier there was also an issue of credibility which ought to have been considered by the 1st appellate court particularly when the trial court had found the prosecution witnesses not to have been reliable in connection to their reference to Imamu Juma as being one of the invaders on the night of the incident. Indeed the appellant did wonder at the standard that was applied in acquitting Imamu Juma who was mentioned even by name by the witnesses while they, who were not mentioned by name, were convicted. We agree with the appellant that a double standard was applied by the trial court in assessing the credibility of the witnesses, a matter which ought to have been taken up by the 1st appellate court. In acquitting Imamu Juma the trial court stated:

"As to the first accused, the evidence from PW1, PW2, PW3 and PW5 is to the effect that he was seen at the crime having a gun. The evidence is not clear as to how they identified him and under what circumstances. He was outside whereas there was not light. There is no proved evidence proving that he was at the scene of crime. It is difficult for this court to believe the evidence of the prosecution side against the first accused. For that reason, it has failed to prove the charge against the first accused, he is acquitted."

Though the trial magistrate said that Imamu Juma was outside, there is no evidence to support such finding. At most PW1 said that the first accused (Imamu Juma) was standing at the door. Standing at the door and being outside are two different things. PW4 said, *"I was looking at them and identified the first accused who was talking to my sister. He had a gun."* It is not clear how the trial magistrate got the notion that Imamu Juma was standing outside. We think he seriously misapprehended the evidence that was adduced in court. Be it as it may, having found *"that it was difficult to believe the evidence of the prosecution side against the first accused"* the same disbelief should have applied to the other accused

persons for it is inconceivable that the evidence against some accused persons can be believed while the same evidence against other accused persons in the same case may be disbelieved. Where does one draw the line?

It is in view of the above considerations that we find the appeal to have been filed with good cause. In the result, we allow it. Conviction entered is quashed and sentence is set aside. The appellants are to be released from custody forthwith unless therein held for some lawful cause.

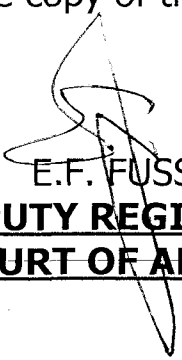
DATED at DAR ES SALAAM this 10th day of July, 2015.

E. A. KILEO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL