

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

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 48 OF 2009

**1. NGOSHA BUJIKU
2. JUMANNE HUSSEIN
3. JUMANNE RAMADHANI**

}**APPELLANTS**
VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Tabora)**

(Kaduri, J.)

dated the 26th day of November, 2008

in

(D) Criminal Appeals Nos. 119, 124,127,128 and 129 of 2004

JUDGMENT OF THE COURT

24th & 27th November, 2015

LUANDA, J.A.:

The appellants NGOSHA BUJIKU, JUMANNE HESSEIN, JUMANNE RAMADHANI (hereinafter referred to as the 1st, 2nd and 3rd appellants respectively) with three others, were jointly charged in the District Court of Nzega sitting at Nzega with armed robbery. The appellants with those three were convicted as charged and each was sentenced to 30yrs imprisonment and 12 strokes of the cane. In addition all were ordered to pay Tshs. 350,000/= as compensation to the victim of the offence for unrecovered properties.

All six were aggrieved by the decision of the District Court, they appealed to the High Court (Tabora Registry). Those other three were successful; whereas the appellants were not. The appellants have come to this Court on appeal.

The Republic/respondent, through Mr. Miraji Kajiru, learned State Attorney, did not resist the appeal lodged by the appellants and rightly so. Each appellant has filed a separate memorandum of appeal, each consisting three grounds. The grounds raised are similar but the major one is about visual identification.

The prosecution case was that on the fateful day around 01.00 hrs while Robert Nziku (PW1) was at his homestead, a group of about six people forced open the door and entered. The bandits shot in the air with the view to scaring would be rescuers to remain where they were. PW1 could not put any resistance, he ran away through a back door. And while running he raised an alarm seeking assistance.

After sometime (not indicated in the evidence) in the company of some village mates to whom not only he reported the incident but also mentioned some bandits as the 1st appellant, 3rd appellant and Maganga Mhoja who was set free by the High Court returned to his house. The bandits had already gone. On checking he discovered a number of items stolen.

As to how he managed to identify the three appellants, PW1 said it was through the torches the bandits had in possession. But he did not disclose its number, who were holding and no evidence was shown as to the intensity of the light it illuminated. The appellants denied to have committed the offence.

In supporting the appeal Mr. Kajiru said the conviction of the appellants rests solely on visual identification. It is his submission that the conditions prevailing were not conducive for correct visual identification as stated in **Waziri Amani VR** [1980] TLR. 250 where the Court said where the evidence relied upon to convict is that of visual identification, then the Courts should not act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely water tight. For instance Mr. Kajiru said PW1 did not state the brightness of the light of the torches it illuminated. Indeed that is one of the factors that ought to have been taken into consideration when visual identification during night time is involved. In **Issa Mgara @ Shuka VR.**, Criminal Appeal No. 37 of 2005 CAT (unreported) the Court said:-

"It is not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details of the source of light and its intensity"

Mr. Kajiru went further to say that PW1 did not state the time spent in observing the bandits, the distance from the place he positioned himself *vis-a-vis* the bandits.

We have carefully gone through the record. It is true to a large extent that the prosecution case depends on visual identification. In upholding the finding of the trial District Court, the High Court said the following:-

*"I wish to begin with the issue of identification. The prosecution had a single witnesses (sic) of identification who is PW1 the victim of the robbery. The identification was by torch light the bandits had on their possession. In his evidence, PW1 stated that **in the course of searching for***

items to steal the torch beam fell on some of the bandits hence enabling him to identified (sic) them. This is different from saying that the light was directed to him. The case of said (sic) Chaly Scania VR Cr. App. No. 69.2005 is distinguishable. The appellants identified at the scene were familiar to PW1."
[Underscoring ours]

The above passage is not supported by the evidence of PW1. When testifying PW1 said:-

*"Then the bandits entered and broke the second door of my bed room which fell on my bed. **They torched me** and I possessed an axe. Then they were afraid and turned back and went outside and started planning to shoot me and the 1st accused."*[Emphasis Ours]

The evidence of PW1 as recorded by the trial District Court does not indicate PW1 to have identified the appellants in the course of searching for items to steal and in the process the torch light fell on some unspecified bandits who were identified as stated by the High Court! Rather PW1 claimed to have identified the bandits after a torch light was shone most probably on his face. If we go along with this scenario, then it is highly doubtful for any person to identify his assailants when a torch light is directed to him. This is because such light would have a temporary blinding effect of his eyes.

In our case it is possible that PW1 was dazzled that is why he did not say the number of torches the bandits had in possession. Further he did not also mention among the bandits who were in possession of the torches. This further

shows that the conditions prevailing were not conducive for correct visual identification. It is doubtful whether PW1 really identified the appellants. That evidence was weak to ground conviction.

We entirely agree with the Mr. Kajiru that the appeal has merits. We allow the appeal and quash the conviction. We set aside both the sentence and compensation order. The appellants are to be released from prison forthwith unless they are detained in connection with another matter.

It is so ordered.

DATED at TABORA this 26th day of November, 2015.

B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL



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

A handwritten signature in black ink, appearing to be 'P.W. Bampikya'.

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL