IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 168 OF 2013

1. **AMOSI SHANI**
2. **PETER KIULA.....APPELLANTS**

VERSUS

JUMANNE JUMA..... RESPONDENT

(Appeal from the decision of the High Court at Dodoma)

(Masanche J.)

Dated 14th day of June, 2006
in
Criminal Appeal No. 9 of 2004

JUDGMENT OF THE COURT

10th &11th June, 2015

MBAROUK, J.A.:

When the appeal was called on for hearing, the respondent failed to enter appearance. However, we have noted that the order of substituted service by way of publication issued by this Court on 18th September, 2013 was complied with by publishing in the "Mwananchi" newspaper dated 18th May, 2015 by the notice which informed the parties to enter appearance on 10th June, 2015. We are of the opinion that, such a notice suffices to

make the parties to appear at the hearing. Rule 80(6) of the Court of Appeal Rules, 2009 (the Rules) states as follows:

> *80 (6) " **if on the day fixed for the hearing of an appeal the respondent does not appear in person or by advocate, the appeal shall proceed,** unless the Court sees fit to adjourn the hearing."*
>
> (Emphasis Added)

As pointed above, the respondent has failed to enter appearance, hence we were constrained to invoke Rule 80 (6) and proceeded with the hearing of the appeal.

The record shows that, the case started at Iramba Primary Court where the appellant and another (not in this appeal) were charged with the offence of robbery with violence contrary to sections 285 and 286 of Cap.16 of the Penal Code. They were convicted and sentenced to five (5) years imprisonment and payment of the compensation of 1,235,900/=. The appellant then successfully appealed before the District Court of Iramba at Kiomboi where he was released from custody. Dissatisfied, the respondent, Jumanne Juma

and two others appealed to the High Court (Masanche, J) where their appeal was allowed and the appellant and another (not subject to this appeal) were sentenced to fifteen years imprisonment. Being the third appeal, the appellant successfully met the requirement of acquiring a certificate as shown in the Ruling of the High Court (Kwariko, J) dated 20-08-2008. Aggrieved by the conviction and sentence of fifteen years imprisonment, the appellant has preferred this appeal.

Briefly stated, the facts of the case as found at the trial court were as follows: That on 26-0-2003 at 1:00a.m. bandits struck at the house of the respondent which had a shop. The bandits ambushed the respondent and instructed him to lie down and cover his face. The respondent went down on the floor. One of the bandits guarded the respondent and others started to ransack the house. The respondent testified to have identified the appellant, Peter and Salum by torch as they beamed the torch light through each other.

In his defence, the appellant denied any involvement in the commission of the offence. He said, when he heard the

alarm of robbery he attended the alarm. The following day he went to church and nobody questioned him. It was after he had come from the Church that he was informed that the police were looking for him.

In this appeal, the appellant has lodged a six grounds memorandum of appeal, but we think they can be condensed to the following four main grounds of complaint:-

(1) That, the identification was not watertight.

(2) That, PW1 and PW2 were husband and wife, hence their evidence required corroboration which there was none.

(3) That, no stolen property was found, hence, the case was based on suspicion alone.

(4) That, the appellant's defence was ignored.

At the hearing, the appellant appeared in person, unrepresented. He simply prayed for his appeal to be allowed claiming that this was a mere fabricated case.

Having gone through the record, we have found that, among the four grounds of appeal the 1st ground concerning the weakness of identification can dispose of the appeal as a whole. There is a string of the decisions of this Court which have emphasized the necessity of the compliance with the guidelines kept to avoid mistaken identity of a suspect when a court is to rely upon the evidence of a witness on visual identification. For example, See **Waziri Amani v. Republic** (1980) TLR 250, **Raymond Francis V. Republic** (1994) TLR 100 to name a few. The said guidelines are as follows:

(i) *If the witness is relying on some light as an aid of visual identification he must describe the source and intensity of that light.*

(ii) *The witness should explain how close he was to the culprit (s) and the time spent on the encounter.*

(iii) *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.

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

We are increasingly of the view that none of those guidelines were considered by the trial court and in the second appeal. Taking into account the circumstances pertaining at the scene of crime where the respondent used a torch light from other persons, it was unsafe to come to a conclusion that the appellant was correctly identified at the scene of crime. Furthermore, the evidence has shown that the respondent was instructed to cover himself when the bandits attacked him at his house and there is no evidence on record which is to the contrary that he uncovered himself at a certain time when the bandits were in action. All the above factors created doubts as to whether the appellant was correctly identified at the scene of crime.

We are of the view that, that ground alone can disposes of the appeal in the appellant's favour. For that reason, we allow the appeal, quash his conviction, and set aside the sentence. We further order that the appellant be released from prison forthwith unless he is held for any other lawful cause.

DATED at **DODOMA** this 11th day of June, 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
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL