

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

**(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 511 OF 2015**

**SEMENI KOMUNDA  
FADISON ISACK  
YORAND ISACK**

..... **APPELLANTS**

**VERSUS**

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

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

**(Matogolo, J.)**

**Dated the 20<sup>th</sup> day of October, 2015  
in  
Criminal Appeal No. 71 & 72 of 2014**

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**JUDGMENT OF THE COURT**

12<sup>th</sup> & 17<sup>th</sup> February, 2016

**MJASIRI, J.A.:**

This appeal arises from the decision of the District Court of Karagwe at Kayanga in Kagera Region. The appellants Semeni Komunda, Fadison Isack, and Yoranda Isack together with two others were charged with the offence of armed robbery contrary to section 287 A of the Penal Code Cap 16, R.E. 2002. They were convicted as charged and were sentenced to thirty (30) years imprisonment. The other two accused persons were

acquitted by the District Court. Being aggrieved by the decision of the District Court, they appealed to the High Court. Their appeal to the High Court was unsuccessful. The appellants have now come to this Court for a second appeal.

The background to this case is as follows:- It was the prosecution case that on the 17<sup>th</sup> day of January 2014 at about 20.00 hours at Kashanda, Nyakahanga Village within Karagwe District the appellants who were armed with a panga stole one Nokia mobile phone and Shs 300,000 cash from one Karist Nikodemu (PW1) and threatened and assaulted him in the cause of the robbery. The appellants denied the charge.

The appellants have filed a five – point memorandum of appeal which is reproduced as under:-

- 1. That the Hon. trial Judge erred by acting on suspicion, i.e. appellants were present at the scene of crime.*
- 2. That Hon. first appellate Judge erred by relying on an unfavourable and or inconclusive criteria of identification.*

- 3. The Hon. trial Judge erred and acted on an incredible evidence of PW1 (complainant) following his unconsciousness.*
- 4. That the Hon. trial judge erred when he ignored the contradictions.*
- 5. That the Hon. first appellate court erred by failing to conclude that the appellants were not named at the earliest opportunity.*

However the main ground of appeal centres on whether or not the appellants were properly identified.

At the hearing of the appeal the appellants were unrepresented and without benefit of any legal counsel. The respondent Republic was represented by Mr. Hashim Ngole, learned Principal State Attorney. The appellants being unrepresented did not have much to say at the commencement of hearing. All of them opted to let the learned Principal State Attorney submit first.

Mr. Ngole did not support the conviction on the following grounds:-  
In relation to the identification of the appellants he submitted that the appellants were not properly identified. On the issue of the source of light

and the intensity of light, PW1 provided a different account in his examination in chief and while being cross examined. Whereas he stated that the source of light was moonlight and the light from the neighbour's house in his main testimony, he stated at a later stage that the source of light was that from a motor bike in cross examination. According to Mr. Ngole both the High Court and District Court reached their conclusion based on the light from the motor-bike. He also contended that the first appellate court in its judgment on page 74 of the record came to a conclusion not drawn from the evidence on record.

*"PW1 in his testimony said he identified his assailants by the aid of moonlight **which was shining brightly.** He also **spotted them by the motorcycle head lamp.**"*

He contended that the basic part of the evidence originates from cross examination and not examination in chief which is the main evidence. He made reference to the evidence of PW1 AND PW2. Mr. Ngole also submitted that PW1 testified that he was invaded by four people, while PW2 and the rest of the witnesses mentioned two people, the first and second accused person (the second and third appellants). He submitted

that if correct information was received the appellants would have been arrested immediately. He concluded that the prosecution witnesses were not reliable.

Mr. Ngole submitted further that all the prosecution witnesses did not state the source of light from the neighbor. He also stated the no description was given by the prosecution witnesses on the intensity of light. He was of the firm view that the evidence of identification was weak. The two courts below failed to consider all possibilities of mistaken identity. He made reference to the case of **Abdallah Ramadhani V. The DPP**, Criminal Appeal No. 219 of 2009 CAT (unreported).

He also submitted that all the prosecution witnesses did not state the intensity of light, neither the moonlight, nor the light from the neighbour's house. The intensity of the light from the motor-bike was also not stated. He relied on the case of **James Revilian Ntungilwage and Another V. Republic**, Criminal Appeal No. 128 of 1999 CAT (unreported).

Mr. Ngole contended that the appellants were not named at the earliest opportunity. According to the evidence of PW1, PW2, PW3, PW4 &

PW5 the second and third appellants were identified and were found at the scene carrying matchetes and that the third appellant took some people to the scene of crime. He argued that if these people were seen and identified on January 7, 2014 why did it take the police up to January 22, 2014 to arrest them? He stated that the identification of the appellants was weak. He made reference to the case of **Marwa Wangiti Mwita** (2002) TLR 43.

The appellants on their part did not have much to say in reply to the submissions made by the learned Principal State Attorney. They all stated that they fully agreed with his submissions.

We on our part, after a careful review and analysis of the evidence on record, are compelled to agree with the learned Principal State Attorney. It is evident from the record that the appellant's identification was not watertight. There are contradictions as to how many bandits invaded the house of PW1. There are also outright contradictions on the source of light relied upon by the prosecution witnesses. In addition to that, the evidence on the source of light did not originate from the main evidence but on cross – examination. See **Abdallah Ramadhani** (supra).

In **RV Mohamed bin Alui (1942)** 9 E.A.C.A and **Ibrahim Songoro V Republic**, Criminal Appeal No. 298 of 1993 CAT (unreported) It was held thus:-

*" Where a suspect has been identified, the name, attire or description of the suspect should be made at the earliest opportunity. In this case had the complainant identified the bandits she would have deposed the same in her examination in chief instead of glossing over the same during cross examination."*

In **Waziri Amani V. Republic** (1980) TLR 250 at page 252, the Court stated thus:-

*" Although no hard and fast rules can be led down to the manner a trial judge should determine questions of disputed identity, it seemed clear that the issue of identification would not be properly resolved unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried ... for example questions such as the following .... **The time the witness had the accused under observations; the conditions in which such observation, occurred for instance, whether it was day or night time; whether there was good or poor lighting at the scene***

***and further whether the witness knew or had seen the accused before or not.”***

(Emphasis provided).

In the present case there is hardly any identification evidence on record to connect the appellants with the offence charged. The prosecution witnesses failed to name the suspects at the earliest opportunity. This unexplained delay negates their reliability. See **Marwa Wangiti Mwita V Republic** (supra).

In **Waziri Amani V. Republic** it was stated thus:-

*"Evidence of visual identification is of the weakest and most unreliable. No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."*

In this case it is doubtful that all possibilities of mistaken identity were eliminated. With poor and unspecified conditions of light, from the neighbour's house and intensity of the moon light and light from the motor bike, the visual identification of PW1 and PW2 was unreliable.



In the light of what has been stated herein above we find that there is merit in this appeal. We accordingly allow the appeal. We quash the conviction and set aside the sentence. We order the appellants to be released from prison custody forthwith unless they are detained for other lawful purpose.


**DATED** at **BUKOB**A this 16<sup>th</sup> day of February, 2016.

E. A. KILEO  
**JUSTICE OF APPEAL**

S. MJASIRI  
**JUSTICE OF APPEAL**

B.M. MMILLA  
**JUSTICE OF APPEAL**

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

  
E.F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**