

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

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 221 OF 2014

**1.DAUDI S/O LUGUSI
2. KHALID S/O DOMBI
3. SHOMARI S/O MHEPELA** }**APPELLANTS**

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Ndunguru, SRM EXT Jurisdiction)

Dated the 26th day of May, 2014

in

PRM Criminal Appeal No. 2 of 2013

JUDGMENT OF THE COURT

27th & 29th day of July, 2016

JUMA, J.A.:

The three appellants DAUDI s/o LUGUSI (1st appellant), KHALID s/o DOMBI (2nd appellant), and SHOMALI s/o MHEPELA (3rd appellant) were convicted of armed robbery contrary to Section 287A of the Penal Code, Cap 16. Each was sentenced to serve thirty (30) years imprisonment. Aggrieved, they preferred an appeal which was heard in the Resident

Magistrate's Court of Iringa as SRM Criminal Appeal No. 2 of 2013 by D.B. NDUNGURU-SRM on extended jurisdiction. Their first appeal was on 20/5/2014 dismissed when the learned Senior Resident Magistrate found that the trial magistrate was justified to convict the three appellants.

Each appellant has preferred a separate memorandum of appeal containing eight grounds of appeal. These grounds of complaint are identical save for one ground. The main theme in common the three memoranda of appeal is to fault the identification evidence of Bartazar Ndomba (PW1) and his sister Joyce Lukindo (PW2)— the two main prosecution witnesses.

The background facts which led to the arrest, trial and conviction of the three appellants can be traced back to the evidence of the victim of the armed robbery (PW1) and his sister (PW2). It was around 19:30 in the evening and PW1 and PW2 were returning home after escorting their family guest. They stopped at a shop to buy some bread. This shop was operated by Wilson Kamanga (PW3). That evening, PW3's shop had finished its supplies of bread. As PW1 and PW2 were moving on to a nearby shop; three people armed with iron bars ordered them to sit down.

Somehow, his sister managed to escape. PW1 remained behind at the mercy of the assailants. According to PW1, it was not for the first time he was seeing the three men. When the 3rd appellant took PW1's mobile phone from his pocket, PW1 in dismay responded saying "*Mhepela ndiyo mnanifanyia hivyo (Transl. Mhepela what have you people done to me!)*". That is when the 2nd appellant raised the iron bar and hit PW1 on the head. He lost consciousness which he regained four days later whilst at Muhimbili National Hospital.

From his shop, PW3 heard the on-going noise and commotion as if there was a fight going on near his shop. A lady he identified by one name Lumla, came over to inform PW3 that PW1 had been attacked and was seriously injured. He went to the scene and found PW1 lying down unconscious, after sustaining serious head injuries. It was PW3 who stopped a taxi cab that transported PW1 first to the police station and thereafter to Iringa Regional Hospital. At the regional hospital PW1 was received by Dr. Andrew Samwel Mwanyika (PW4). PW1 was still unconscious when he was referred to Muhimbili National Hospital for further treatment.

In their respective defences during their trial, appellants denied the offence.

At the hearing of this appeal on 27th July, 2016, learned State Attorney, Mr Alex Mwita who appeared for the respondent Republic, drew our attention to a notice of preliminary objection which had been filed on 26th July, 2016. He prayed for our leave withdraw it, which we granted. The three appellants who appeared in person to argue their respective grounds of appeal, preferred to let the learned State Attorney respond to their grounds of appeal first.

From the totality of evidence and the grounds of appeal, Mr Mwita took a position that only one issue calls for determination by this Court. According to the learned State Attorney, that single issue is whether the evidence of visual identification ties up the three appellants to the offence of armed robbery on 11th March, 2011. Placing reliance in the decision of the Court in **Waziri Amani v Republic** [1980] TLR 250, he submitted his support of the appeal of Daudi s/o Lugusi (the 1st appellant). He however, expressed his outright opposition to the appeal by Khalid s/o Dombi (the 2nd appellant) and that of Shomari s/o Mhepela (the 3rd appellant).

Mr Mwita next referred us to the evidence of PW1 featuring on pages 11-14 of the record. He submitted that PW1, who is a key prosecution witness, positively identified the 2nd and 3rd appellants as his assailants. There was sufficient light sourced from the tube lights located in PW3's house, he added. The 3rd appellant was PW1's neighbour at Mwembetogwa area. He stated that he had known the 2nd appellant because in the past during school vacations he had visited the 2nd appellant's house to see the latter's younger brother (Aideri Ally) with whom PW1 attended same class with. Moreover, the learned State Attorney submitted, PW1 specifically addressed the 3rd appellant (Mhepela) as a person well known to him when he asked why he had stolen his handset and why the group was holding him up. And it was at that moment when the 2nd appellant hit him with an iron bar.

Mr Mwita was not in any doubt that the source of lights was sufficient to facilitate positive identification of the 2nd and 3rd appellants. He referred us to the evidence of the shop keeper (PW3), who kept alight two security electric lights. PW3 described the source of lights as illuminating as far a

distance as up to fifteen paces from the source. And that the incident of armed robbery occurred within ten paces from the source of lights.

Reiterating his stand that the appeal of the 2nd and 3rd appellants should be dismissed because they were properly identified, the learned State Attorney cited to us the decision of the Court in **John Bedford Nombo vs. R.**, Criminal Appeal No. 273 of 2014 (unreported), and used it as his basis for asserting that after a careful scrutiny of the identification evidence and removing any possibility of mistaken identity; the two courts below were correct to regard PW1 as a credible witness.

Expounding his position why he supported the 1st appellant's appeal; Mr Mwita referred us back to the evidence of PW1. The learned State Attorney submitted that apart from generalized statements that "I identified all the 3 accused persons," PW1 neither stated how he particularly identified the 1st appellant, nor did he indicate how he had known him before the incident. PW1 merely stated that he "used to see the 1st accused person in the street".

When his chance to reply came, the 1st appellant had nothing but to express his agreement with the submissions of the learned State Attorney.

In his response, the 2nd appellant urged us to cast doubt on the assertion that the two tube lights lighting outside the house could have sufficient light to facilitate positive identification. He in addition wondered why the prosecution failed to summon his brother to verify if indeed had attended same school and shared classrooms with PW1. He protested that the trial magistrate largely ignored to record what he was saying in court hence his conviction.

The 3rd appellant faulted the two courts below for failing to take into account his defence of alibi. He maintained on the day he was supposed to have committed the offence of armed robbery, he was in police custody facing Criminal Case No. 56 of 2010 in the District Court of Iringa. It is appropriate to note that in his rejoinder to this complaint, Mr Mwita referred us to the judgment of the trial court on page 59 where the magistrate dealt and discounted this alibi.

From submissions of the appellants and those made by the learned State Attorney, in this appeal, the trial and first appellate courts are on common ground that the 2nd and 3rd appellants were not only identified at

the scene of crime, but they also committed the offence of armed robbery for which they were convicted and sentenced.

The law is settled that the Court sitting on a second appeal is required to concern itself mainly with the issues of law but not on matters of fact unless if there has been misapprehension of evidence and other recognized factors occasioning injustice. This position was well stated in **Wankuru Mwita vs. R.**, Criminal Appeal No. 219 of 2012 (unreported) where the Court said:

"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellant Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice"

In our reckoning, the main the issue of law in the instant appeal is the identification evidence, specifically whether the two courts below have properly evaluated the evidence in relation to the principles and safeguards

articulated in the defining case of **Waziri Amani v Republic** (supra) and other elaborating decisions of the Court. It seems to us that the trial magistrate properly evaluated the evidence in light of the ingredients of the offence of armed robbery before he reached the conclusion that the offence of armed robbery had been committed.

With regard to the 2nd and 3rd appellants before us, the learned Senior Resident Magistrate who sat on first appeal on extended jurisdiction correctly agreed with the trial magistrate that the 2nd and 3rd appellants attacked PW1 in pursuance of the offence of armed robbery. For example, the trial magistrate harboured no doubts that the 2nd appellant (Khalid s/o Dombi) committed the offence of armed robbery when he stated:

"...However, it was the evidence of PW1 that one Aideri Ally who is the young brother of the 2nd accused person was his school-mate and that they used both to go to the 2nd accused's home where they saw him. This evidence shows that the 2nd accused person was not stranger to the identifying witness (PW1). So the identification of the 2nd accused was proper...."

With regard to the 3rd appellant's defence of alibi, we agree with the learned State Attorney that the trial magistrate took time to first to deal and dispense with this defence. In this defence it was suggested that on 11th March, 2011, i.e. the day he was alleged to have participated in the armed robbery, he was locked up in the police station following his acquittal by the District Court of Iringa in Criminal Case No. 56/2010. The trial court found the defence of alibi to be devoid of merit:

"...However after going through the record in Criminal Case No. 56/2010 I came to observe that the accused person was Majaliwa Nyavili and not Shomari Mhepela and Siku William as narrated by the 3rd accused person. In CC No. 56/2010 the accused person Majaliwa Nyavili was acquitted on 16.06.2010 before Hon. Luambano-RM and not on 10.03.2011 as stated by the 3rd accused person. Therefore it is my opinion that the 3rd accused person was not at police station on 11.03.2011 when this offence was committed."

The trial magistrate then gave four reasons, to support his conclusion that the 3rd appellant was not only at the scene of crime but actively committed the crime:

"...1.-At the scene there was electricity light for proper identification.

2.-The third accused person was not a stranger to PW1.

3.-PW1 mentioned the name of the 3^d accused person to police hence his arrest.

4.-The 3^d accused person and PW1 were living within the same street."

Like the learned State Attorney, we see no cause for interference with the concurrent finding of fact that the 2nd and 3rd appellants committed the offence of armed robbery as charged and were properly convicted. We similarly agree with the learned State Attorney that the way PW1 identified the 1st appellant in a generalized way cannot meet the criteria for unmistakable identification under difficult circumstances as set down in the case of **Waziri Amani vs. R** (supra). Even when the 1st appellant subjected PW1 to cross examination, this identifying witness did not offer sufficient descriptions of the 1st appellant beyond stating that: *"...the first accused person was not [a] stranger to me. I saw him at the scene....."*

In the upshot, the appeals by the 2nd appellant (Khalid s/o Dombi) and that of the 3rd appellant (Shomari s/o Mhepela) are devoid of merit and

are hereby dismissed. On the other hand, the conviction of the 1st appellant (Daudi s/o Lugusi) is quashed and set aside and his appeal is allowed. The 1st appellant shall be set free forthwith unless he is being held for any lawful cause.

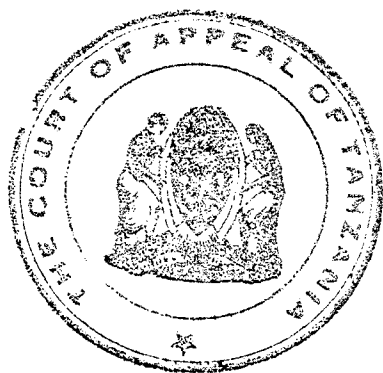
DATED at **IRINGA** this 28th day of July, 2016.

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

S.E.A.MUGASHA
JUSTICE OF APPEAL

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



A handwritten signature in black ink, appearing to read "B.R. Nyaki".

B.R.NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL