

**IN THE HIGH COURT OF TANZANIA  
AT TABORA.**

**APPELLATE JURISDICTION  
(Tabora Registry)**

**DC. CRIMINAL APPEAL NO. 105 CF, 106 OF 2006  
ORIGINAL CRIMINAL CASE NO. 152 OF 2004  
OF THE DISTRICT COURT OF TABORA DISTRICT  
AT TABORA.**

**Before: C. KISONGO, Esq.; RESIDENT MAGISTRATE**

**JOHN s/o MGAYA @ TOWASHI & ANOTHER ..... APPELLANT  
(Original Accused)**

**Versus**

**THE REPUBLIC.....RESPONDENT  
(Original Prosecutor)**

**JUDGMENT**

**24<sup>th</sup> Jan. 07 & 9<sup>th</sup> May, 07**

**MUJULIZI, J.**

The Appellants were charged with the offence of Armed Robbery c/ss 285 and 286 of the Penal Code (Cap.16 R.E. 2002), before the District Court of Tabora. They were convicted and sentenced to serve 30 years imprisonment each on 04/5/2006.

The Appeal is against both conviction and sentence. The Appellants appeared at the hearing of this appeal and adopted their respective Petitions.

The republic ably represented by Mr. Zacharia learned State Attorney, does not support the conviction.

I believe the Republic is right in its position. Before the trial Court it was alleged that the Appellants together with 4 others, had on the 6<sup>th</sup> day of September, 2004 at about 20.45 hrs at Rufita Street within the Municipality, District and Region of Tabora, stolen one traveling bag, two Trousers, two T-shirts, and two shirts, all items valued at Tshs.26,000/= property of Bakari s/o Hamisi. It was alleged further, that immediately before such stealing they had used Sub Machine Gun against the complainant in order to obtain the items.

At the trial the Prosecution called a total of 4 witnesses. However, the conviction was based on the evidence of identification of the Appellants by the victim of the robbery, PW.1 Bakari Hamisi. After cautioning itself on the necessity to establish whether the circumstances prevailing at the scene and time of the crime were favourable for proper identification, the trial Magistrate held that there was light of a tube light at distance of 4 feet which enabled PW.1 to identify the robbers who were near to him.

This finding is attacked by both the appellants and the Republic.

In his reasoning, the trial Magistrate, distinguishing Omary Issa V.R., CAT, Criminal Appeal o. 11 of 1989 (unreported), in the case before him PW1 had identified the accused by their shapes and voices and what they were in possession of, thus, relying on K. MRANGE V.R. (1983) TLR 158, where it was held that “when there is enough light to enable the accused to be identified, an identification parade was not necessary.” In Omary Issa’s case the Court of Appeal had set up a rule that where the witness before the incidence can identity the culprits of the crime only by appearance and not by names, the proper thing to do is for the police to conduct an identification parade where the witness can identify the culprits.

The Republic however, faults the finding of the trial Magistrate. It was argued that the identification by PW.1 was not conclusive. His evidence left gaps. At page 10 of the typed record for instance PW.1 says;

*“ .... I was now at gun point. We had begun some confrontation. I told them money was in the bag at the rear seat*

*of the taxi. The one holding tightly on my neck left me after my words took the bag from the vehicle and they left. It took about five minutes to have the exercise completed. There was a tube light which is 4 feet at the premises providing enough light I only identified two people I identified two people I identified two by their voices and shapes. Although they had covered their faces, but some parts i.e. eyes and nose were not covered. They were used to come my home. I know their names. These are Mudi and Mngaya. I identified the 3<sup>rd</sup> and 5<sup>th</sup> accused persons respectively...”*

It is argued by the learned State Attorney, to which argument I do subscribe that in such a brief time of heightened confrontation it is impossible that the conditions were favourable for positive identification.

I should add here that with respect, the learned trial magistrate seems to have misconstrued the witness's testimony. It is clear to me that PW.1, in relation to the “4 feet tube light” he was referring to the physical dimensions lengthwise of the tube light, but not “four feet from the scene of the crime to where it (the tube light) was fixed on the house as the learned trial magistrate seems to have understood.

In the circumstances of a physical manhandling, surprise and threats, it can not be said that conditions for positive identification were favourable, to identify people behind masks.

But PW.1 contradicts his own testimony when departing from the quoted statement above, he said in cross examination “*I came to know your name after investigations. I identified you at the police.*”

The trial magistrate however, rules that there was no need for an identification parade. If so then to what and under what circumstances did PW.1 refer to when he said that he identified 2<sup>nd</sup> Appellant at the police?

In DORIKI KAGUSA V.R. CAT MZA – Criminal Appeal No. 174/2004 ,(unreported) the Court of Appeal of Tanzania, held that it is trite law that in a case depending for its determination essentially on identification be it of a single witness or more than one witness, such evidence must be watertight even if it is the evidence of recognition. And where such evidence, (as in the case before me,) is by a single witness

made under unfavourable conditions, such evidence as a matter of practice only, requires corroboration.

In this case the trial Court did not even bother to find corroboration from other evidence. It is my finding that the veracity of PW.1 was wanting as established by the contradiction pointed out in his testimony. It was therefore not safe to base conviction of his testimony alone.

The Appeal is allowed. The convictions are quashed. The Appellants are acquitted of the charge of Armed Robbery c/ss. 285 and 286 of the Penal Code (cap.16 R.E. 2002). The sentence were also set aside.

The Appellants should be released forthwith unless they are held for other lawful custodial orders.

  
A.K. MUJULIZI

**JUDGE**

**9/5/2007**

Judgment delivered in the presence of the parties, this 9<sup>th</sup> day May, 2007.

  
A.K. MUJULIZI

**JUDGE**

**9/5/2007**