IN THE HIGH COURT OF TANZANIA
AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 139 OF 2003

(Original Criminal Case No. 300 of 2002 of the District Court of Tabora District at Tabora)

Before: P.M. NKOMBE Esq., DISTRICT MAGISTRATE

MIRAJI S/O ALLY @ PUNDUMU ..... APPELLANT
(Original Accused)

Versus

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

JUDGMENT

25/7/07 & 24/8/07

CHINGUWILE, J.

The appellant one Miraji s/o Ally @ Pundumu, jointly and together with Thabit Hamis Kisiwa, Ramadhani Kwambuka, Samson Sanch, Hamis Selemani, Masoud Mustapha, Ramadhani Mohamed, Hassan Mabrouk and Hussein Ally Pundumu were charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code Cap 16.

The appellant was found guilty and upon conviction was sentenced to serve a term of thirty years imprisonment. The other eight accused persons were acquitted. The appellant is now appealing against both conviction and sentence.

The appellant has filed seven grounds of appeal challenging the evidence of visual identification adduced by prosecution witnesses, identification parade and contradictory testimony. Mr. Rweyongeza who appeared on behalf of the Republic did not support conviction in this appeal. The Republic is submitting that the identification of the appellant was very poor. It also states that there is no explanation as to why there was a delay in effecting the arrest of the appellant.

The evidence is support of the charge is that on 6th August, 2002 around 2.00 a.m. bandits who were armed with iron bars and bush knives broke into the house of one Mkejina d/o Moshi (PW1) situated at Kijiweni Mwanza Road area. They stole two radio cassettes make Panasonic valued at shillings 84,000/=, one watch make Ajanta valued at shillings 5,000/=, three boxes containing clothes valued at shillings 280,000/= and shillings 20,000/= the property of the said Mkejina d/o Moshi. It is further stated that upon entering into the house the bandits demanded money from PW1. It is also alleged that the bandits injured PW1, her brother one Mwita and PW2 one Mohamed Juma in order to obtain the properties. They also slapped PW3 one Mariam Ramadhani. PW1 and PW3 alleges that they identified the appellant. PW1 states that she identified one of

the bandits who had injured her and that that person wore a small red jacket. She claims that she identified the appellant with the aid of the light. PW2 supported the testimony of PW1 regarding the identity of the appellant. According to his evidence he went to the complainant's house after hearing voices which demanded money from his neighbour. However, upon reaching there, he was also attacked hence he decided to take refuge into the room of PW1. He states that on entering the room he was cut with a bush knife by the appellant and that the lights were on inside the room. He claims that he identified the appellant because the appellant faced him while he was cutting him with a knife. According to him the appellant was very close and he also mentioned that he was putting on a red jacket. Both witnesses claims that they mentioned the appellant to the police.

With regard to PW3, she also claims that she identified the appellant. She also asserted that she was familiar with him as he was a friend of her son one Mtibuka and on that day he was wearing a red jacket. She claimed that the appellant used to visit her house. However she also stated that, she heard one bandit called him by his name that is Miraji. That in a nutshell is the evidence against the appellant.

The appellant denied to have committed the offence.

I will start with the issue of visual identification – whether the appellant was identified. In this respect, the case for the prosecution depended on the evidence of PW1, PW2 and PW3. They all claimed

that they identified the appellant because the lights were on. Unfortunately we are not told the type of lights which illuminated the rooms. The prosecution witnesses should have explained the type of the lights which illuminated the room and the quality of such light in order to eliminate a case of mistaken identity. In this I am guided by the decision in the case of ***Said Chaly Scania Versus Republic (Court of Appeal) Criminal Appeal No. 69 of 2005*** which stated that; a witness who testifies about an accused in unfavourable circumstances should also state the source of light and its intensity. Witnesses in the instant case failed to state the source of light and its intensity. This casts doubt as to whether PW1, PW2 and PW3 really identified the appellant.

It is also worthy noting that PW1 and PW2 stated that the appellant had a red jacket during cross examination and not during their examination in chief. I would expect this important fact to come out during their examination in chief. PW1 alleges further that she had mentioned the appellant to the police. Did she mention the appellant by name? Was she familiar with the appellant? These are some of the unanswered questions which casts doubt to their stories.

With regard to PW3, she also mentioned the red jacket which was worn by the appellant. She further states that she was familiar with the appellant because he was a friend of his son one Mtibuka. During her examination in chief, this witness mentioned the appellants name as Miraji. However during cross examination, she stated that at the scene of the incident, one bandit called him by his

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With regard to PW3, she also mentioned the red jacket which was worn by the appellant. She further states that she was familiar with the appellant because he was a friend of his son one Mtibuka. During her examination in chief, this witness mentioned the appellants name as Miraji. However during cross examination, she stated that at the scene of the incident, one bandit called him by his

name which is Miraji. In my view these two statements are contradictory therefore casting doubts as to whether she identified the appellant.

I now revert to his second challenge that is whether the identification parade was properly conducted. I have gone through the entire proceedings but I have failed to see the evidence of a person who had conducted the identification parade. What is in the record is the testimony of the investigator purporting to testify on the conduct of the identification parade. The parade was conducted by one A/Inspector PHILLIP who did not testify. In the absence of such testimony, I doubt whether it was conducted. Apart from PW4 no other prosecution witness gave evidence regarding the identification parade. This also casts more doubt to the evidence of identification.

The appellant is also submitting that, the court erred in relying upon contradictory evidence. I will not dwell much in this because, evidence shows that a group of bandits entered into the house. They were ransacking different rooms looking for properties so it is possible that they stole money from different rooms.

Having analysed the evidence I can say that the evidence against the appellant entirely rested on visual identification. After hearing the submissions of both parties, I agree that the court relied upon weak visual identification evidence. As rightly pointed out by the learned State Attorney, no explanation was given as to the type of light which illuminated the room. It is the position of the law that in a

criminal charge proper identification of the accused person is vital. In the instant case the evidence of PW1, PW2 and PW3 raises doubt that they identified the appellant during the incident. The absence of the testimony of the person who conducted the identification parade further weakens the case for the prosecution. The prosecution evidence has raised doubts which should benefit the appellant.

Another important issue which was raised by the learned State Attorney is the delay in effecting the arrest of the appellant. The incident occurred on 6/8/2002 but the appellant was arrested on 11/11/2002 five months and five days later. As rightly submitted by Mr. Rweyongeza, no evidence was adduced as to why he was not arrested soon after the incident. There is a possibility that he was just picked up and therefore he was not identified. I am fortified in my reasoning by many decided cases among them the case of ***Ibrahim Shabani and Shabani Ally Kalulu Versus Republic Criminal Appeal No. 110/2002 (unreported)*** where the Court of Appeal addressed the issue of delay in effecting the arrest it therefore held that:

> ***"It is our opinion that slackness in arresting the appellants was not due to inefficiency but to lack of information as to who they were to arrest."***

I think given the circumstances of the instant case, this also caused the delay in effecting the arrest of the appellant.

All in all I am satisfied that this appeal has merit. I therefore allow the appeal, quash his conviction and set aside his sentence. He should be set free unless he is held for some other lawful cause.

A.F. CHINGUWILE

JUDGE

24/8/2007

Judgment delivered in the presence of the appellant and Mr. Zacharia State Attorney.

A.F. CHINGUWILE

JUDGE

24/8/2007