

IN THE HIGH COURT OF TANZANIA
AT TABORA.
APPELLATE JURISDICTION
(Tabora Registry)
(HC) CRIMINAL APPEAL NO.17 OF 2004
ORIGINAL CRIMINAL CASE NO.373 OF 2002
OF THE DISTRICT COURT OF TABORA DISTRICT
AT TABORA.

Before: J.J. MACHUMU Esq., DISTRICT MAGISTRATE
OMARY SHABANI @ KATABAYA

J U D G M E N T

20TH NOVEMBER, 2007 & 11TH DECEMBER, 2007

KIHIO, J.

The appellant, Omary s/o Shabani, along with another person were jointly charged with Armed robbery contrary to sections 285 and 286 of the Penal Code, Cap.16 Vol. 1 of the Laws as read together with Written Laws (Miscellaneous amendment) Act No.6 of 1994 in which that other person was acquitted. He (appellant) was convicted of Armed robbery and sentenced to thirty years imprisonment.

Dissatisfied the appellant is now appealing to this court against both conviction and sentence.

The Prosecution alleged at the trial court that the appellant and Ngulungudu s/o Makofi on 19/9/2002 at 02.30 hours at Kinamagi Village within Uyui district, Tabora region, did steal one bicycle make Phoenix valued at Tshs.54,000/=, 10 pieces of Cushion valued at Tshs.45,000/= one Radio Cassette make Sonny valued at Tshs.100,000/= and cash money Tshs.150,000/=, all total valued at Tshs.350,000/= the property of one Michael s/o Raphael and immediately before such Stealing did use a gun and Panga to cut Michael Raphael on his head in order to obtain the said properties.

Steven Ulaya (PW1), told the trial court that on 19/9/2002 at 2.30 a.m. when he and his family were at home asleep he heard people talking outside and suddenly he heard a gun fire. He (PW1) further told the trial court that the door of his house was hit using a big stone but it did not open as he put logs at that door. He (PW1) stated at the trial court that after he opened the door bullet was fired at the Locker of the window and he saw Salumu Shaban @ Salumu Soler @ Shaban Katabaya who is the appellant. He (PW1) further stated that he appellant wore a coat and white cap. He (PW1) added that there was full moon light outside and that he knew the

11/7/2002. He (PW1) informed the trial court that the appellant and the other bandits cut him with pangas on his head, legs etc. He (PW1) further informed the trial court that the VEO and his (PW1's) son reported the matter at the Police station and that he (PW1) named the appellant to the militiamen. He (PW1) finally said that the appellant and his co-bandits took a sewing machine, 2 bags of Women clothes, six watches, 2 sets of cushions, 1 Camera, 4 sponge mattresses, 2 radio Panasonic 5 Band and Phillips. In cross-examination by the appellant, he informed the trial court that the window was broken and he managed to see him (appellant) through the open space at the window.

Rajabu Juma (PW2), Village Executive Officer (V.E.O) told the trial court that on 19/2/2002 at 2.00 a.m. when he was asleep he heard gun fire. He (PW2) further told the trial court that he raised an alarm and after 30 minutes he went to the Scene. He (PW2) stated at the trial court that he saw PW1 who by then sat on the floor at his (PW1) house bleeding and he (PW1) informed him (PW2) that he (PW1) saw the appellant, Omary Shaban @ Salum Shaban.

Elizabeth Bonifasi (PW3), PW1's wife, told the trial court that on 19/9/2002 at around 2.30 a.m. when she was asleep at her home he (PW3) heard a gun fire. She (PW3) further told the

trial court that there was moonlight and that the window at her (PW3's) house was broken and she identified the appellant. She (PW3) stated at the trial court that they reported the incident at the Police station on the following day. She (PW3) stated, in cross-examination by the court, that she (PW3) knew the appellant for many days as he (appellant) was born at Kinamagi Village.

B 7543 – Sergeant Charles (PW4) told the trial court that the appellant was arrested on 12.10.2002 at Kiloleni Ghana area at 2.00 a.m. and that he was led to the house where he ~~(appellant) stayed by an informer. He further told the trial court that in his (Complainant's) Statement, he identified the appellant as he (appellant) was a resident of that area. He (PW4) added that short gun bullet cover was recovered at the Scene of Crime.~~

The appellant told the trial court that he was arrested on 12/10/2002 in the room he rented at one Scola's house at Kiloleni and taken to Central Police where he was interrogated. He further told the trial court that his (appellant's) mother, a tenant and his (appellant's) family were staying in the house he built for his (appellant's) mother at Kinamagi. He (appellant) said at the trial court that Steven Ulaya wanted to rent a room at the house he (appellant) built for his mother but

he (appellant) objected because there was no space as he (appellant) had a big family.

Hamis Shaban Chenda (2nd accused) told the trial court that on 29.11.2002 at around 7.00 a.m. he left Inamagi for Ukondamoyo where he went to buy an axe from one Fundi. He (2nd accused person) further told the trial court that he met the said Fundi who told him that he should come on the following day. He (2nd accused person) was arrested and taken to the Police Station where he was locked from 30/11/2002 to 3/12/2002.

The appellant raised eight grounds of appeal in his Memorandum appeal. Basically he is challenging the identification evidence in which the Learned trial Magistrate based the conviction.

The appellant is unrepresented while the respondent is represented by Mr. Rweyongeza, Learned State Attorney.

The appellant has nothing material to submit.

Mr. Rweyongeza did not seek to support the conviction and sentence imposed on the appellant. He submitted that the circumstances under which the identification took place at the

Scene of Crime were not favourable for proper identification. He further submitted that moonlight can not light in the house for proper identification. He contended that PW1 adduced evidence that the identified bandit wore a coat and a cap so the identification evidence available is not sufficient for proper identification. He further contended that the appellant was arrested almost twenty one days after the commission of the alleged offence and there is no evidence adduced on the grounds which led the Police to arrest the appellant after twenty one days have elapsed. He argued that if the appellant was identified at the Scene of Crime how could PW4 be led by an informer

It is quite apparent that the appellant's conviction is based on the identification evidence.

The crucial issue here is whether there was sufficient identification on the appellant or not.

The Court of Appeal of Tanzania in the case of Philip Rukaiza V Republic Criminal Appeal No.215 of 1994 – Mwanza registry (unreported) held, that,

"The evidence in every case where Visual identification is what is relied on must be subjected to careful scrutiny; due regard being paid to all the

prevailing conditions to see if in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness."

In the case of Waziri Amani V R (1980) T.L.R 252 the Court of Appeal of Tanzania enunciated the principle that "***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 watertight.***"

The evidence of PW1 and PW3 at the trial court is to the effect that the window of their house was broken by a gun bullet fired by the bandits and they managed to identify the appellant, whom they know before, through the open space at the window as there was full moon light outside the house. The evidence of PW1 further shows that the bullet which was fired at the locker of the window came from ten (10) meters and he saw the appellant who wore a coat and white cap. His (PW1's) evidence at the trial court evidences that the appellant had a gun. His (PW1's) evidence at the trial court evidences further that he named the appellant to the militiamen.

I do not think that it is possible to identify a person who is at a distance of ten (10) meters and who wore a coat and a cap through a space of a broken window sufficiently and without possibility of mistaken identity even with the aid of moon light.

Unfortunately, the alleged militiamen to whom the appellant was named by PW1 were not called to testify at the trial court.

As rightly submitted by Mr. Rweyongeza if the appellant was identified at the Scene of Crime how could PW4 be led by an informer.

I am satisfied that the prosecution evidence at the trial court raises a lot of doubts as to the correct identity of the appellant as one of bandits who committed the Armed robbery as charge. From the evidence adduced at the trial court it is my considered view that all possibilities of mistaken identity on the appellant are not eliminated and the evidence is not absolutely water tight. I agree with Mr. Rweyongeza that the evidence available is not sufficient for proper identification.

The Learned Principal District Magistrate ought to have found that the guilt of the appellant has not been proved beyond reasonable doubt and acquitted him.

For the foregoing reasons, the appeal is allowed. The conviction is quashed and the sentence imposed on the appellant is set aside.

The appellant be released from prison immediately unless he is lawfully held there.



JUDGE

11.12.2007

COURT: Judgment delivered in the presence of the appellant and Miss Wakuru, Learned State Attorney.



S.S.S. KIHIO

JUDGE

11/12/2007