IN THE HIGH COURT OF TANZANIA

AT TABORA.

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 9 OF 2007

ORIGINAL CRIMINAL CASE NO. 18 OF 1999

OF THE DISTRICT COURT OF MASWA DISTRICT

AT MASWA.

BEFORE: R. MASIGE,Esq; DISTRICT MAGISTRATE

JILANGI s/o SALU ..... APPELLANT

(Original Accused)

Versus

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

JUDGMENT

18th July, 07 & 25th July, 07

MUJULIZI, J.

The Appellant was convicted of Robbery with violence c/ss 285 and 286 of the Penal Code - (Cap.16 R.E. 2002). He was sentenced to serve a 30 years jail term, on 08/04/1999.

The Appeal is against both conviction and sentence.

It was alleged before the District trial court that the Appellant had on the 1st day of February, 1999 at Malita village within Maswa District Shinyanga Region stolen cash Tshs. 79,900/= the property of one Shishi s/o Kulwa and that immediately before the theft had used violence in order to obtain or retain the said property.

The Appellant who had wished not to be present, was nevertheless present at the hearing, whereby he adopted his seven grounds of appeal. However, by reason of the stance taken by the Respondent Republic, I will not dwell into the details and merits of those grounds.

The Respondent Republic was ably represented by Mr. Manyanda learned State Attorney, who for good reasons argued before me, did not support the conviction.

I believe he is correct.

The Appellant, as raised in his grounds of appeal, and supported by the learned State Attorney was convicted mainly on the evidence of identification.

According to the testimony of both P.W.1 and P.W.2, husband and wife, victims of the assault, they did not identify the bandits as they first entered the house at 1.00 pm on 01/2/1999 (page 4 typed proceedings;

The testimony of P.W.2 at page 5 of the typed proceedings is to the effect that she did not identify the bandits as they entered, but that three of them entered the bedroom and one of them had a torch.

At page 6, she says that she identified the Appellant through the torch-light he (accused) was flashing. However, she does not explain how that would have been possible since it was the assailant who was flashing the torch in her direction.

But surprisingly she adds that there was also another source of light, to wit a lantern lump. However, it is not explained how and when this lantern was lit, given the late hours of the night.

On cross examination she added that there was also moonlight getting into the room through a window. Apart from the fact that it is not clear as to when was such window opened, one thing is clear. Ordinarily moonlight would not

percolate through a window to spread through a room, and where there is lantern light the weak rays of moonlight would disappear.

These circumstances and improvisation by this witness as correctly submitted by the learned State Attorney raise serious doubts on the credibility of this witness.

In JAMES CHILONJI V.R. Cr. Appeal No. 101 of 2003 (Unreported) the Court of Appeal of Tanzania had opportunity to consider evidence of identification in circumstances of alleged multiple sources of light. At page 6 of the judgment their Lordships concluded as follows;

> "There would have been no point for the bandits to use a torch if there was sufficient moonlight. The inference is that the moonlight was poor and the torch was needed."

Earlier on in the same judgment-(page 5) the Court had observed that a torch would help the holder not the person on whom it is flashed.

In the circumstances of the scene as painted by P.W.2 the only witness who claimed to have made positive identification of the Appellant, it was not possible to afford

positive identification so as to render a conviction solely based on such evidence safe.

P.W.2 attempted to confirm her identification on the basis that she knew the appellant from before, as he was her relative. But as correctly argued by the learned State Attorney the conditions precedent to favour positive identification in order to convict on such evidence as set out in the celebrated case of AMANI WAZIRI V.R. (1980) TLR 250 were not met.

These conditions have since been restated in Cr. Appeal No. 69 of 2005 -SAID CHALY SCANIA V. THE REPUBLIC (Unreported) to be that; the source and intensity of the light, the length of time taken by the witness to observe the assailant, the proximity- i.e. how close the identifying witness was from the assailant, and finally if that person was familiar or a stranger.

None of the tests put up was satisfied by the testimony of P.W.2 in relation to the Appellant.

It was therefore unsafe to rely on the identification evidence of P.W.2

P.W.3 says they traced the tyre marks, which ended at the village of the Appellant. But this was neither here nor there, for the trial Court was not told as to what was so peculiar about the tyre marks, and how they connected to the accused, and as to when they were left in the sand track. The Court ought to have asked the question, as raised by the Appellant, was he the only owner of a bicycle in the entire village?

How about his alibi?

These questions create reasonable doubt. The Prosecution failed to discharge its duty, to prove the case against the appellant beyond a grain of reasonable doubt.

It is for these reasons that I granted the Appeal after hearing on 18/7/2007, when I quashed the conviction and acquitted the Appellant, ordering for his immediate release.

A.K. MUJULIZI

JUDGE

25/7/2007