# IN THE HIGH COURT OF TANZANIA
# AT MWANZA
# HC CRIMINAL APPEAL NO 29 OF 2007
# C/F CR. APPEAL 30/2007

*(Original criminal case no. 388/2003 of the District Court Of Musoma*

*Before: G V Dudu* – RM)

**MARWA S/O MARANYA & DEUS RYOBA.....APPELANTs**

**Versus**

**THE REPUBLIC.....RESPONDENT**

**26/3/07 & 28/5/2008**

## JUDGMENT

**RWEYEMAMU, J:**

This judgment consolidates Cr. Appeal 29 and 30 of 2007 by **Marwa Maranya** and **Deus Ryoba** respectively. The two were charged, tried and convicted of armed robbery in Musoma District Court (DC) Cr. Case 338/2003. They were sentenced to 30 yrs imprisonment. Dissatisfied they appealed to this court.

In their Memorandum of Appeal (MA), the two basically challenged the evidence of identification submitting that the court

erred in relying on witness's testimony of identification which was not credible. That the witnesses failed to disclose the identity of the accused immediately to the people who came in response to the alarm or to the police. Further that key witnesses were from the same family and for that reason not credible.

Mr Mkemwa state attorney who represented the republic on appeal declined to support conviction and gave a number of reasons in support of his position: First that one witness Pw[3] testified, although he was not listed as a witness at the PH stage and the prosecution had not made the necessary application as per section 239 (1) of CPA. Two, that the testimony of that witness was inadequate because she testified to have made voice identification of the accused/appellants. Three, that no police investigator or any of the persons who answered the alarm raised by the victims testified. Last, that, although the judgment indicates that there were three witnesses, only two are indicated in the proceedings.

I should begin by considering the anomaly pointed out by Mr. Mkemwa regarding the number of witnesses who testified. On checking the original record, I noted that **Pw[1]** Mugosi Manyangi testified on 12/3/2004, **Pw[2]** Mwikabe d/o Manyanka on 6/5/2004,

and **Pw**[3] Robi d/o Mugosi on 16/9/2004, all before **Kamalamo DM.** On 23/3/2005, the accused successfully prayed that the trial magistrate who had been transferred should not proceed with the defense for fear that their case would be delayed. There was therefore three witnesses at trial.

The defense proceeded before a different magistrate **G V Dudu RM,** who also signed the certified proceedings. Obviously the typed proceedings were not a true copy of the original and I believe the importance of verifying proceedings against the original is well understood and need not be emphasized. Because of the anomaly, the appeal could not be effectively prosecuted or defended because parties had only the typed proceedings to work with. Such a situation is unfortunate for the cause of justice and should in future be avoided.

I have also checked the submission that a witness not listed at the PH testified without notice as per requirements of section 293 of the CPA, he probably meant 192 the section dealing with "*accelerated trial and disposal of cases*". It is true **Pw**[3] **Robi d/o Mugosi** was not listed as a prosecution witness. The testimony of that witness was considered by the trial court in arriving at the guilty

finding as such, the element of surprise can not be considered not to have been prejudicial to the accused/appellants.

After going through the evidence on record and considering the submission of both parties, I find the appeals merited. Apart from the shortcomings pointed out above, there is also an important aspect pointed out by both parties:- failure by the witness to reveal identity of the appellants at the earliest opportunity, casts doubt on the reliability of their evidence of identification.

As observed by the CA in **Swale Kahonga in Cr. App 46/2002 MZA registry (unreported) citing Marwa Wangiti Mwita , Boniface Matiku Mgendi v. R,** Cr App. No.6 /1995, MZA Registry (unreported) *"The ability of witness to name a suspect at the earliest opportunity is an all – important assurance of his reliability, in the same way as un-explained delay or complete failure to do so should put a prudent court to inquiry"* That is more so when that fact is coupled with absence of the investigator's testimony, evidence which is "*vital in providing a link between commission of the offence and the accused*". I for that reason agree with the appellants that the evidence of identification against them was not watertight.

In view of all the above reasons, I find the appeal merited although for slightly different reasons from those stated; quash both appellants' conviction and order that they be set free forthwith unless otherwise lawfully held. It is so ordered.

**R M Rweyemamu**
**Judge**
**28/5/2008**

**Order:** Case file and Judgment forwarded to the District Registrar Mwanza HC, for delivery of the judgment to the parties and execution of subsequent orders.

**R M Rweyemamu**
**Judge**
**Mtwara HC**
**29/5/2008**