IN THE HIGH COURT OF TANZANIA

AT TANGA

(DC) CRIMINAL APPEAL NO.60 OF 2006

(Originating from Criminal Case 197/2005 Muheza D/C)

HEMEDI SAAD
ABDALLAH HAMISI.} .....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

12/6/08 & 25/7/08

JUDGEMENT

Shayo, J.

On 12th June, 2008 I allowed the appeal, quashed the appellants conviction and set aside the sentence. I further ordered that the two appellants be released from prison forthwith unless they were otherwise lawfully held. I reserved my reasons for doing so, which I now give in this judgement.

The two appellants, namely, Hemedi Saad and Abdallah Hamisi, hereinafter to be referred to as the first and second appellant respectively, were jointly charged and convicted of armed robbery c/s 285 and 286 of the Penal Code. They were sentenced to 15 years imprisonment each. Aggrieved by both their conviction and sentence, they now appeal to this court.

The case for prosecution can be stated briefly as follows. On 8/6/2005 at about 8.45 p.m. PW.1 Bakari Mnyika was attending to his shop. PW.2 Haji Mwanike his watchman and PW.3 Omari Shemsanga a coffee hawker at the shop were at the shop premises. They were ambushed by a group of thugs, among them were the two appellants. The 2nd appellant according to PW.1 was holding a panga which he threw it intending to cut him but missed. There was "Karabai" lamp which was put off by the second appellant who then flashed his torch to PW.1. The other thugs joined in and invaded into the shop. PW.1 went in hiding under a table and meanwhile the bandits took away his various properties, cash Tshs.1,250,000/= and 2 packets of cigarettes. They then fired in the air to scare

out people before they vanished. PW.1 identified the 2nd appellant by his rastar hair and a cap he was putting on. PW.2's version is that the first appellant took his arrow and was then ordered to sit down. Others went to PW.1 and put off the lamp and meanwhile the first appellant who had an iron bar held up PW.2. PW.2 then heard a gunshot at the area and everybody including the thieves ran away.

PW.3's narration of the incident was that the 2nd appellant had raster hair and was putting on a blue cap. He asked him why he was closing his coffee business so early. Then 1st appellant came up and took PW.2's arrow while 2nd appellant took a panga from his trousers and put off the Karabai and remained Koroboi light. PW.3 claimed to have identified the two appellants at the scene as there was light from "Karabai" before it was put off. Reports were taken to Maramba police station. On 11/6/2005 PW.1 reported to PW.6 PC Otto to have seen his robber on a bicycle going to Maramba town. PW.6 made follow up and arrested the 2nd appellant who upon questioning denied to have committed the crime. On 12/6/2005 PW.4 Bakari Ngembe and PW.5 Abdallah Musa arrested the 1st appellant and was taken to police station with a iron bar claimed to have been used at the scene of crime. The two appellants were finally charged.

In his defence the 1st appellant denied to have committed the offence. He seemed to have raised defence of alibi that on 7/6/2005 he went to Kibaoni village on his way to Kigwasi village to collect money for his sister's dowry. He stayed there till 12/6/2005 when he started his journey to Lushoto after receiving the dowry Tshs.68,000/=. While at Kibaoni village bus stand he was arrested and taken to police station.

The 2nd appellant also denied any involvement in the crime claiming that he was just arrested on 11/6/2005 on his way to Amboni village and taken to police station and finally charged.

In their joint memo of appeal the two appellants protested their innocence, and impugned the trial court's decision on the grounds that evidence

of identification was weak and that the charge was not supported by reliable evidence. They thus urged this court to allow their appeal.

Ms. Makondo, learned State Attorney, did not wish to support the conviction and sentence mainly on the grounds that the prosecution evidence could not prove the charge beyond reasonable doubt as the charge was not bone out of the evidence. That while the particulars of the offence indicated the property alleged stolen wasTshs.1,250,000/= and two packets of cigarettes. Further that identification of the appellants by PW.1, PW.2 and PW.3 was not watertight as the conditions were not favourable. That neither of the three witnesses could give a description of the manner they identified the appellants, citing the case of **Justin Maulid Kipata & 2 others V. Rep. (1987) T.L.R. 183** as an authority.

I have carefully considered the recorded evidence in this case and the arguments advanced by the two appellants and the learned State Attorney in support of their respective stances. The major issue for determination is whether or not the appellant's conviction was based on sufficient and strong evidence.

It is a well settled principle of law that no court of law should act on evidence of visual identification unless all the possibilities of mistaken identity one eliminated and the court is fully satisfied that the evidence before it is absolutely watertight (see: **Abdallah Bin Wendo V.R. (1953) 20 E.A.C.A. 166** and **Waziri Amani V.R. (1980) T.L.R. 250**. It is further necessary that where the accused person is identified, the fact of description and terms of such description must be given by the person purporting to identify the accused person (see: **Mohamed Allui V.R. (1942) 9 E.A.C.A. 72** and **Justin Maulid Kipata & 2 others V.R. (1987) T.L.R. 183** (supra).

In the instant case there was no evidence to eliminate the possibility of mistaken identity of the two appellants by PW.1, PW.2 and PW.3 nor was there evidence of description of the appellants apart from rastar hair and blue cap on the 2nd appellant. But then, going by the evidence of the three witnesses it would appear it being dark night the atmosphere was so charged as lantern and lamp

lights were put off, followed by gun shot that made everybody at the vicinity to run into hiding including PW.1, PW.2 and PW.3. It was not possible for neither of them to have a correct identity of the two appellants in the circumstances.

On basis of the foregoing, I am respectively in agreement with the learned State Attorney and in fact the appellants that the evidence of identification against the appellants was not absolutely water tight. It is absurd that the trial court realied on such unsatisfactory prosecution evidence to convict the appellants. It was indeed not safe for the trial court to act on such weak evidence to convict. The trial court's conviction cannot therefore be sustained.

In the final result, the appeal had to be allowed, conviction quashed and sentence set aside. It was further ordered that the appellants be released forthwith unless they were otherwise lawfully held.

A.A.M. SHAYO, J.
16/7/2008

Delivered at Tanga this 25th day of July, 2008.

A.A.M. SHAYO, J.
25/7/2008

For Appellant:- Absent.

For Respondent/Republic:- Mr. Oswald – (S/A).