

**IN THE HIGH COURT OF TANZANIA**  
**AT DODOMA**

**APPELLATE JURISDICTION**

**DC CRIMINAL APPEAL NO. 71 OF 2007**  
***(ORIGINAL KONGWA DISTRICT COURT AT KONGWA***  
***CRIMINAL CASE NO. 83 OF 2006 BEFORE -***  
***E.E.M.MWAMTEMI, SENIOR DISTRICT MAGISTRATE)***

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**STANLEY S/O MASI ..... APPELLANT**

**Versus**

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

**19/10/2009 & 18/12/2009**

**REASONS FOR THE JUDGMENT**

**HON. MADAM, SHANGALI, J.**

On 19<sup>th</sup> October, 2009 this appeal was set for hearing. The appellant **STANLEY MASI** appeared in person while respondent /Republic was represented by Mr., KATULI Learned State Attorney. In the course of hearing the appeal the appellant had nothing much to offer, save for requesting the court to consider his grounds of appeal, protesting his innocence and complaining that the case was fabricated against him. In his submission, Mr. Katuli, Learned State Attorney supported the appeal on the ground that there was no

sufficient prosecution evidence to base conviction against the applicant.

Upon hearing all sides and having gone through the record of proceedings of the trial District Court, together with grounds of appeal filed by the appellant, I immediately allowed the appeal, quashed conviction against the appellant and set aside the sentence of 30 years imprisonment imposed against him. Consequently I also ordered for the appellant immediate release from prison unless he was held on another separate lawful reason. I also reserved my reasons for such immediate order, which I am now ready to announce.

Before the District Court of Kongwa the appellant was charged with the offence of armed robbery contrary to section 285 and 286 of the penal Code as amended. At the end of the trial the appellant was convicted and sentenced to serve thirty years of imprisonment. He was dissatisfied with that decision hence preferred this appeal.

A brief background of the matter from the prosecution point of view is that in the night of 12/09/2006 at about 4.00 hours, PW1 Maswaga Malongo and his wife PW2 Pauline Malongo were asleep in their house at Kibati village, within Kongwa District. Suddenly they were awoken by a big bang on their main door which broke the door and left it open. PW1 claimed that in no time and while on bed two

bandits faced him with their torches demanding for money. PW1 stated that immediately he identified one of the bandits to be the appellant who was also beating him with a stick on his head. PW1 claimed that he confronted the bandits and fought them by using his club.<sup>15</sup> Then the bandits retreated out of the house. Then PW1 who remained in the house heard one of the bandits ordering others to kill him (PW1). Suddenly, he (PW1) heard a shot at the door which separated the door shutters from the frame. PW1 claimed that he managed to run out of the house by jumping through the window while shouting for help. PW1 claimed that the bandits were able to steal his TShs.300,000/= which he obtained after selling his two head of cattle. He stated that several people including his neighbour PW3 responded and rushed him to hospital. His PF3 was admitted as exhibit P1.

In her testimony PW2 stated that they were awoken in that night by two big bangs and realized that their main door had been broken by a bullet. Then, two bandits entered in the house and demanded money from PW1. She claimed that in the fracas PW1 was injured but managed to escape through the window. She claimed that the appellant slapped her and ordered her to show the money. PW2 succumbed and directed them to collect the money from PW1's trouser pockets. She stated that she was able to identify the appellant because he is the son of PW1's relatives.

PW3, Yared Kudeli, the neighbour of PW1 stated that when he heard an alarm, he rushed to the scene. Then on his way he saw three people at the PW1's house. Then the three people vanished but he was able to identify the appellant through the moon light.

PW4 was Detective Coplo Henerico who investigated the case. He stated that the appellant was arrested by village leaders. He claimed that the main door was broken by a bullet from a muzzle gun.

In his sworn defence the appellant categorically denied to have committed the offence. In his "*alibi*" defence he gave a long story revealing his movements from 11/09/2006 to 16/09/2006. At all this period he was out of Kibati village where the offence was committed. He claimed that on 11/09/2006 he went to Laitili village, Kiteto to harvest his maize. Later he brought his maize to Kibaigwa and sold them. Then he travelled to Chunyu village to attend his sick sister and eventually arrested on 16/09/2006 when he reached at Chalinze village. The appellant denied to have been in any blood relationship with the PW1 and PW2.

In his memorandum of appeal the appellant raised several grounds of appeal which may be condensed too only three grounds of appeal, namely: **One**, that the appellant was not properly identified as one of the bandits because there was no conducive

atmosphere condition for proper identification, **Two**, that the trial court wrongly accepted the prosecution evidence (PW1 and PW2) that the appellant is the son of PW1's brother-in-law without any evidence to prove such relationship; and **Three**, that the prosecution evidence was very weak and unreliable to base conviction.

During the hearing of this appeal the appellant contested his innocence and prayed the court to consider his grounds of appeal.

In his submission, Mr. Katuli, Learned State Attorney refused to support the conviction and sentence. He submitted that the most crucial matter in this appeal is the issue of visual identification. He stated that the offence was committed in the middle of the night but there is no sufficient evidence to show how PW1 and PW2 managed to identify the appellant. He insisted that they failed to explain the type of the alleged torches which were being used by the bandits and how they were able to use them and identify the appellant. Mr. Katuli cited several cases to support his position and even castigated PW3's claims that he managed to identify the appellant by the moon light. He stated that there was no explanation whatsoever to disclose the type of moonlight, its veracity nor the distance between PW3 and the appellant.

I agree with the Learned State Attorney. The type of the torches and the light intensity was not explained. There is no

evidence to show that there was a time when the torch light was directed to the appellant. The prosecution evidence shows that the bandits directed their torch beams to PW1 and PW2, meaning that they dazzled and impair their vision.

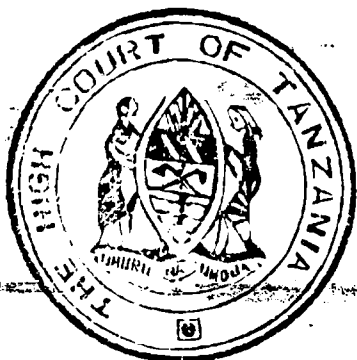
The position of the law is that the evidence of visual identification is of the weakest kind and most unreliable which should only be acted upon cautiously when the court is satisfied that the evidence is watertight and that all possibilities of mistaken identity are eliminated. See the cases of:

- 1. Waziri Amani Vs. Rep. (1980) TLR.**
- 2. Mohamed Musero Vs. Rep (1993) TLR 290.**
- 3. Shiku Salehe Vs. Rep. (1987) TLR 193.**
- 4. Raymond Francis Vs. Rep. (1994) TLR 100.**

I am also in agreement with the appellants complaints that the trial District magistrate was wrong to base his decision on identification by recognition without sufficient evidence. Apart from the allegation from PW1 and PW2 that the appellant is the son of PW1's brother in law, there is no other evidence to support that fact which has been categorically denied by the appellant. In general, the prosecution evidence was weak and contradictory (PW1 and PW2) hence unreliable to base a conviction.

It was on the basis of the foregoing that I found it extremely unsafe to uphold the decision of the trial District Magistrate. I agree with both the learned State Attorney and the appellant that the conviction and sentence were wrongly grounded against the appellant. The case was not proved beyond all reasonable doubt.

For these reasons this court allowed the appeal and set free the appellant on 19<sup>th</sup> October, 2009.

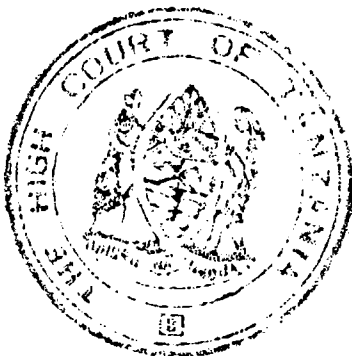


  
**M.S. SHANGALI**

**JUDGE**

**18/12/2009**

Reason for the judgment delivered in the presence of Mr. Wambali Learned State Attorney for the respondent/Republic and the appellant in person.



  
**M.S. SHANGALI**

**JUDGE**

**18/12/2009**