**IN THE HIGH COURT OF TANZANIA**

**AT TABORA**

**APPELLATE JURISDICTION**

**(Tabora Registry)**

(DC) CRIMINAL APPEAL NO. 7 OF 2010
ORIGINAL CRIMINAL CASE NO. 140 OF 2009
OF THE DISTRICT COURT OF KASULU
AT KASULU
Before: E.G. MRANGU Esq., RESIDENT MAGISTRATE

**TUMAINI S/O GENDANYA ..... APPELLANT**
**(Original Accused)**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**
**(Original Prosecutor)**

Date of last order – 15/9/2010

Date of Judgment – 18/10/2010

**J U D G M E N T**

**WAMBALI, J.**

The District Court of Kasulu at Kasulu in Kigoma Region convicted the appellant Tumaini Gendanya with the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 R.E. 2002 and sentenced him to a term of

imprisonment for thirty (30) years without corporal punishment. As the appellant was not satisfied with both conviction and sentence he has come to this court to challenge the trial court's findings. The main complaints in his petition of appeal concern insufficiency of evidence; credibility of witnesses and improper identification at the scene of the crime by witnesses. The appellant appeared in person during the hearing and adopted what he had stated in his petition and prayed that his appeal be allowed.

Mr. Juma Masanja, learned State Attorney who appeared for the respondent did not support conviction and sentence of the appellant by the trial court as the issue of identification was not fully resolved. Mr. Masanja submitted that the evidence of PW1 and PW2 on identification was contradictory. He argued that there was no evidence that PW1 and PW2 told anybody who responded to the alarm after the incidence that they had identified the appellant. If the witnesses (PW1 and PW2) had told anybody about identification the other alleged bandit who was killed could not have sent the police to the

house of the appellant who was well known to them. On the contrary it was the said bandit who mentioned the appellant to have participated in the robbery, Mr. Masanja submitted.

The learned State Attorney stated that the conditions of identification laid down by the Court of Appeal in ***Waziri Amani V. R.*** (1980) TLR 250 was not met and thus the trial magistrate wrongly applied it to convict the appellant in the circumstances of the case before him. Mr. Masanja stated that the evidence of PW1 and PW2 were not corroborated by any other witnesses on how the appellant was identified. He concluded that as the issue of identification was crucial in the case against the appellant and the same was not fully resolved, the trial court could not have come to a conclusion that the prosecution proved the case of armed robbery beyond reasonable doubt while the evidence of witnesses differed. He thus prayed that the appeal be allowed, conviction quashed and sentence set aside.

After the submission of the learned State Attorney for the respondent, the appellant had nothing useful to add as he insisted that there were no evidence to convict him.

Briefly, the facts that led to the conviction of the appellant by the District Court were that on 25th June, 2009 at about 21.30 hours at Murubona – Murusi area within Kasulu District, Kigoma Region the appellant invaded the shop of Fredrick Juma and stole therefrom various items and cash valued T.shs. 580,000/= and that after stealing he fired on the air to retain the properties of the victim. The appellant denied the charge. Prosecution summoned four witnesses in support of the case. The appellant defended himself. The major issue before the trial court was whether the appellant was properly identified by victims on the day of the incidence. The trial magistrate found that the appellant was properly identified by PW1 and PW2 and the evidence of PW3 and PW4 corroborated the same. The trial magistrate also agreed with PW1 and PW2 that the appellant was mentioned to have participated in the robbery by one among the bandits who later died.

The evidence on record as far as PW1 and PW2 are concerned is that they both properly identified the appellant who was well known to them before the incidence. PW1 and PW2 also insisted that the appellant was also mentioned by one of the bandit who was arrested immediately after the incidence but died the following day. The major issue for decision in this appeal is still whether the appellant was properly identified at the scene of the crime. In view of the evidence on record tendered by the prosecution at the trial, I am of the considered view that there may be no dispute that the appellant was well known to the victims (PW1 and PW2) before the alleged incidence of robbery that occurred on 25/06/2009 at their premises. There may also be no dispute that as the victims' premise had light from generator, the conditions for identification could have been favourable. The issue however is whether PW1 and PW2 identified the appellant at the scene. I am of the considered opinion that the evidence of PW1 and PW2 differed. Firstly, while PW1 testified that the robbery occurred at 09.30 p.m, PW2 stated that the incidence occurred at 11.30 p.m. Moreover, both witnesses

who were at the scene did not say how long the incidence took before the bandits ran away. Unfortunately, even PW3 a neighbour and relative who responded to the alarm and the police officer (PW4) who came later did not say when they arrived at the scene after the incidence. PW4 did not tell the court the time when he went to the shop and home of the appellant where he was sent by the bandit who was arrested and died later. That also applied to PW1 who testified that he also went to the shop and house of the appellant who did not state the time. Indeed, the testimony of PW1 that he went to the house of the appellant was not supported by PW2 who was at the scene and PW3 who responded to the alarm and PW4 who went to trace appellant. Furthermore, both PW1 and PW2 did not tell the court whether they informed those who responded to the alarm that they had identified the appellant. Among those who responded to the alarm and testified in court were PW3 and PW4. They did not say that they were told by PW1 and PW2 that they had identified the appellant. These witnesses only insisted that the appellant was mentioned by the bandits who died the following day.

Unfortunately, throughout the record the alleged bandit who died was not mentioned by his name apart from the fact that he allegedly spent a considerable time with the victims and PW4 and went to show them the shop and house of the appellant.

On the other hand, while PW1 stated that the appellant was one feet outside the shop, PW2 testified that he was three feet outside the shop. All these matter complicated the issue whether the appellant was properly identified at the scene of the crime. Indeed, although PW1 and PW2 claimed to have known well the appellant before the incidence, it was not clear whether they knew where he resided as it was the alleged bandit who was arrested who sent the police and others to his shop and home as stated before.

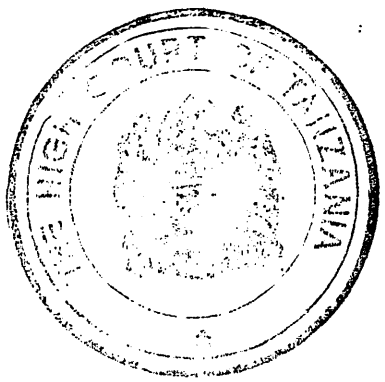
Secondly, both PW1 and PW2 testified that the appellant had a gun and fired on the air before he ran away. PW4 tendered in court the remnant of ammunition (Exhibit P1) that was found at the scene of the incidence and stated that the

same was fired from SMG. Unfortunately although PW4 went to the shop and home of the appellant he did not tell the trial court whether they searched the premises if they had information that the appellant had a gun at the scene. The record is silent on whether there were any effort to trace the gun which was allegedly used by appellant. In my considered view the issue of the gun had to be investigated immediately in view of the evidence that the police went to the appellant's shop and home later.

Thirdly, it was not clear whether the appellant was arrested by the police on the following day after the incidence. According to the prosecution evidence, PW4 testified that they arrested the appellant. He did not however say when the appellant was arrested and whether he was together with his fellow police officer. PW4 evidence suggested that after they got information they went to scene of the crime and later to the appellant's home. PW4 did not tell the court who informed them about the incidence. The record of the court indicates that during preliminary hearing a police officer who was

mentioned as witness was E. 7227 D/C Magambo who however did not testify. The prosecution requested the court to allow PW4 to testify and the prayer was granted. It is therefore not clear who were the police officers who went to scene and the house of the appellant. That was due to the fact that in his defence, the appellant testified that he went to the police himself after his wife informed him that police were looking for him on 26/6/2009 in the morning. His testimony on this matter was not challenged on cross-examination by the prosecution. Unfortunately his defence was not properly considered by the learned trial Magistrate in his judgment. In my view the matter contributed to the doubt on whether the appellant was properly identified at the scene. Based on what I have stated above, it can not be said with certainty that PW1 and PW2 proved the identification of the appellant at the scene and that their evidence was corroborated by PW3 and PW4 as observed in the judgment by the learned trial resident magistrate. With such doubts unresolved, I am with respect in agreement with the learned State Attorney for the respondent that the prosecution did not prove the case against

the appellant to the required standard. Accordingly the appeal is allowed, conviction quashed and sentence of imprisonment set aside. It is further ordered that the appellant be released from custody forthwith unless otherwise lawfully held.

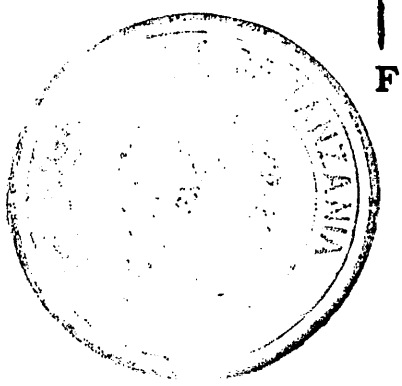


**F.L.K. WAMBALI**

**JUDGE**

**18/10/2010**

Judgment delivered today 18/10/2010 in the presence of the appellant in person and Miss. Maryasinta Lazaro learned State Attorney for the respondent.



**F.L.K. WAMBALI**

**JUDGE**

**18/10/2010**