IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) Criminal Appeal No. 31 of 2009

(Originating From Criminal Case No. 184 of 2006 of Dodoma District Court at Dodoma)

MALUGU GEORGE.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

17/02/2010 & 08/04/2010.

KWARIKO,J.:

The facts of the case which led to this appeal can briefly be summarised as follows. In the early hours about 00.05 of 20/04/2006, one Kisanza Chilosa PW 1 at the trial and the complainant in this case was sleeping in his house at Msembeta village within Dodoma municipality. PW1 was in the house together with his younger brother Yona Chilosa PW2, his wife Mariam Zacharia, PW4 and two others. While these family members were asleep their house was broken into by several thugs who had intended to rob cattle from the homestead. Upon entering the house the thugs who were holding torches ordered the house occupants to sit

down and when they complied they were tied up around their hands, blindfolded them and were sent to a nearby bush where they were ordered to remain until the thugs had finished to steal the cattle. They were left under the guard of one unidentified thug. However, when the thugs had left PW1 managed to escape and raised alarms where village mates including PW3, Michael Chilosa convened at the scene to see what the matter was.

It was further revealed that during this invasion the thugs managed to steal clothes which belonged to PW1 and his family members. Also PW1 and PW4 managed to identify the appellant herein among unidentified number of thugs who had invaded them. The appellant was known to these witnesses before since he had previously stayed in their home. That the appellant was identified through torches the thugs were holding and moonlight. Therefore, when the village mates and militiamen had gathered the appellant was mentioned and they traced him at his home and was accordingly arrested.

That upon arrest the appellant admitted the allegations and mentioned his accomplices to be his four co-accused at the trial. These four were also traced and arrested in varying days thereafter and also confessed to the allegations where the then 3rd accused showed the muzzle gun they used in the robbery. They were then sent to the police station where upon interrogation by PW5 no. E 6530 D/SSGT Maulid the 4th accused confessed to the allegations.

Armed with the aforegoing evidence the appellant jointly and together with his co-accused were charged with one count of Armed Robbery contrary to section 285 and 287 A of the Penal Code Cap.16 Vol.1 of the Laws, R.E. 2002 as amended by Act no.4 of 2004. It was alleged that the five accused persons jointly and together did on the 20th day of April, 2006 at about 00.05 hours at Msembeta village within the Municipality and Region of Dodoma steal cash tshs.5000/=,one pair of shoes valued at tshs.6000/= and different clothes valued at tshs.80000/=,all total valued at tshs.91000/=the property of Kisanza Chilosa and immediately before and during the time of such stealing did threaten him with panga (machete) in order to obtain and retain the said property.

The accused had denied the charge and in his defence the appellant testified that he was arrested on 20/4/2006 and when his house was searched nothing was found. At the end of the day it was the appellant only who was convicted and sentenced to thirty (30) years imprisonment.

The appellant was not satisfied with his conviction and sentence hence this appeal where he raised about six grounds of the same. However, reading through the grounds of appeal i find only four essential ones which can conveniently be summarised as follows: firstly, the prosecution evidence in relation to his identification was not watertight; secondly, the prosecution witnesses were family members hence they had interest to serve; thirdly, that since the witnesses did not know the

appellant before then identification parade was essential; fourthly, the trial court magistrate erred in law by contravening section 312 (2) of the Criminal Procedure Act Cap. 20 Vol. 1 of the Laws, R. E. 2002.

However, when this appeal came before me for hearing the appellant amplified the first ground of appeal only and implored the court to consider the rest and allow his appeal. He submitted that the prosecution evidence in relation to his identification was not watertight since PW 1 did not explain how he identified him at the scene. That he did not explain how he was able to identify him by torch the thugs were allegedly holding.

In this appeal the respondent Republic was represented by Mr. Mayeye learned State Attorney who did not support the trial court's conviction and sentence against the appellant. Mr Mayeye dealt with the first ground of appeal which relates on the appellant's identification at the scene, he submitted that the evidence did not prove that the appellant was sufficiently identified at the scene. And thus if that was the case then an identification parade was imperative.

This court agrees with the parties that the appellant's identification did not meet the standard required in law. I have seen that PW1 and PW4 testified that they identified the appellant by torches the thugs were holding, but since torch light inhibits visibility once showered onto

one's face the alleged identification could not have been watertight. Also, if these witnesses were able to identify the appellant they did not give reasons why they failed to describe the other thugs' appearances. Further, since these witnesses testified that the thugs had blindfolded them before they were led into the bush and kept guarded, i don't see how they could have possibly identified any thug. PW4 testified that at one time the cloth she was covered with in the face was loosened hence assisted her to see the appellant but she did not say what was the extent of the loosening and at which point did that happen since they said they were sent into the bush where probably was in darkness. If there was any moonlight its strength was not explained.

Further, the witnesses did not state the duration of time they had the thugs under observation that enabled them to identify the appellant out of the group. Therefore, the conditions for proper identification in this case did not meet the criterion enunciated in the celebrated Court of Appeal of Tanzania case of ***WAZIRI AMANI VS R [1980] TLR 250.***

Also, i found PW1's evidence to be not reliable since he firstly testified that he had identified the appellant and the then 2nd accused but during re-examination he turned around and said he identified the appellant only. This change of heart could only mean that he was not certain with what he was telling or he was not telling the truth.

The foregoing brings me to the appellant's complaint that an identification parade was imperative. It is my assertion that an identification parade could not be conducted in this case since the witnesses had testified that they knew the appellant before. They must have informed the police as they testified in court that the appellant was known to them before since they had hosted him in their home earlier. Identification parade is usually conducted if a witness is not sure with the identity of the suspect. This ground thus fails.

As for the complaint that the prosecution witnesses were family members hence had interest to serve, i agree with the appellant that since the complainants said that their neighbours answered the alarms but it is surprising that no one came to testify and prove that the appellant was mentioned immediately as the identified suspect. Only family members testified in this respect and since the evidence in relation to identification has been held to be suspect, i find that independent evidence ought to have corroborated the same. This ground thus succeeds.

The last complaint by the appellant says that the trial court magistrate's decision contravened the mandatory provision of the law under section 312(2) of the Criminal Procedure Act Cap.20 R.E. 2002. I have gone through the trial court's decision and i found that the same complied with the cited provision of the law. The decision analysed the evidence on record, highlighted the points for determination and reached

its decision after it considered those points. Therefore this complaint is non- meritous and it fails.

Consequently, I find that the prosecution case against the appellant was not proved beyond reasonable doubts and thus i hereby allow his appeal, quash the conviction and set aside the sentence of thirty years imprisonment. It is hereby ordered that the appellant be set at liberty unless he is held for other lawful cause.

It is so held.

(M.A.KWARIKO)

JUDGE

08/04/2010

Date: 8.4.2010
Coram: Hon. M. A. Kwariko, J.
Appellant - Present.
Respondent - Mrs Mohamed State Attorney
C/C: Ms. Komba.

ORDER: Judgment delivered in Court today in the presence of the appellant and Mrs Mohamed learned State Attorney. Ms Komba Court Clerk present.

(M.A.KWARIKO)

JUDGE

08/04/2010