IN THE HIGH COURT OF TANZANIA

AT DODOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 65 OF 2009

(Original Criminal Case No. 13 of 2007 of Mpwapwa District Court at Mpwapwa)

ELISHA MSUMARI & 2 OTHERS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

09/2/2010 & 01/3/2010.

KWARIKO, J.

The appellant herein were jointly and together with three others arraigned at the trial Court for the offence of Armed Robbery contrary to section 286 and 287 A of the Penal Code Cap. 16 Vol. 1 of the Laws Revised 2002 as amended by Act No. 4 of 2004. It was alleged by the Prosecution that on the 12th day of January, 2007 at about 00.15 hours at Chang'ombe Ikuyu Village within Mpwapwa

District in Dodoma Region the six stole cash Tshs. 80,500/= one shotgun valued at Tshs. 500,000/= one gulf box receiver valued at Tshs. 120,000/= one bag of clothes valued at Tshs. 71,500/=, one Electric Stabilizer valued at Tshs. 35,000/= and one pair of shoes valued at Tshs. 18,000/=. All total value being Tshs. 825,000/= the property of one Frank s/o Mdaki and immediately before such stealing they threatened by firing a muzzle gun "***GOBORE***" in order to obtain the said property.

All the appellants and three others had denied the charge and at the end of the trial the three appellants were found guilty and accordingly convicted while the rest were acquitted. The appellants were each sentenced to thirty (30) years imprisonment and corporal punishment of three (3) strokes of a cane each.

Having been dissatisfied with the trial Court's decision, the appellants filed this appeal each with own grounds of appeal which were heard together. However, before I embark to decide the grounds of appeal let me recapitulate the facts of the case at the trial.

On the material night about midnight of 12/1/2007 the complainant FRANK MDAKI, PW1 was sleeping inside his

house with his wife FLORA SAMBUARA, PW2. While they were asleep someone called PW1's name from outside and asked to be let in and be given a place to sleep but PW1 refused. Then PW1 peeped through the window where he saw two people standing outside and one of them was holding something like a gun. PW1 identified those people to be one Osward, the then first accused who was acquitted and the 3rd appellant herein.

That, the thugs threatened to break the window if they did not open the door. PW1 argued PW2 and the Children to raise alarms and he went to a nearby house to seek help. When PW1 left the house the thugs pursued PW2 and demanded to be given money and they fired gun in the air. The thugs got hold of PW2 and when she resisted to give money they threatened to kill her baby, hence she gave them shs. 80,500/=. They also stole the things mentioned earlier.

During the robbery PW2 managed to identify the three appellants through lamp light. PW1 also managed to identify the 3rd appellant and the then 1st accused through their voice and moonlight since they had stood three feet from him.

When the neighbours heard gun shots, alarms and saw torch light at PW1's home they went to see what was the matter. These were DANFORD CHILOWEWA, PW3; STELLA CHISWAGALA, PW4 and HONORI MSUMARI, PW5. When these neighbours approached PW1's home, the thugs run away but they heard them utter insults where PW5 identified the voice of the then 4th accused person SYLIVANO S/O ALUDO. The neighbours followed footprints which led and ended in the house of the then 1st accused OSWALD S/O CHITUMILE where they found some gun powder and a knife nearby. PW1 was summoned so that he could mention if he had identified any thug but he did not mention any that night. PW1 mentioned the then 4th accused the following morning.

The 1st appellant who was among the neighbours who had answered the alarms was said to have informed his colleagues that previously one person had inquired from him whether PW1 was owning a gun and a mobile phone, thus he was accordingly arrested as one of the suspects. The 2nd appellant was also arrested and so as the rest.

In his defence the 1st and 2nd appellants denied the allegations and said they did not know PW1 and they were home the whole night of the material date. That, upon arrest

their respective homes were searched but clothing was found. As for the third appellant, he testified that he knew PW1 but on the material night he was at Pwaga Village where he had gone on 8/1/2007 to look for a paid labour until on 29/1/2007 when he was arrested in connection with these allegations which he denied. His evidence was corroborated by one KANDIDO S/O MSAULILA, DW11.

In their respective Petitions of appeal the appellant raised several grounds of appeal which essentially zero on one complaint, that, the trial Court erred in law and fact when it believed the unsatisfactory identification evidence against them.

During the hearing of the appeal all appellants did not add anything valuable but implored this Court to consider their grounds of appeal and allow the same. On the other hand Mr Nchimbi learned State Attorney appeared and argued the appeal on behalf of the respondent, Republic. Mr Nchimbi did not support the trial Court's conviction and sentence in respect of the three appellants. He gave reasons for the same. This Court agrees with both parties that the prosecution case at the trial was not prove beyond

reasonable doubts against the appellants and the following are the reasons for this assertion.

As conceded by both parties the crucial evidence against the appellants at the trial was that of their identification at the scene of crime. This was the evidence in relation to visual identification of the appellants by the prosecution witnesses, PW1 and PW2. In this respect, let me start with the evidence of PW1. He testified that after he heard there were thugs outside he peeped through the window and saw two people whom he identified to be the third appellant and the then 1st accused person who was acquitted by the trial Court. PW1 also testified when he was cross-examined that he identified these two since they were about three feet away and that there was moonlight. But this witness testified during examination-in-chief that he did not identify the thugs through moonlight. Now, even if PW1 identified the thugs through moonlight, he did not explain what was its intensity.

PW1 could not have been three feet away from the thugs since he only said he identified them through the window while he was still inside and when he alerted the children to raise alarms he run away. He did not state which way he passed when he escaped from his house and

therefore this connotes that he definitely did not meet the thugs. Also, if PW1 purportedly identified two thugs through moonlight or any other source of light he could have been sure what kind of "thing" the thugs were holding since he said that the first accused was holding something long like a gun. Definitely he did not identify "that long thing" and it follows then that he did not identify any thug at the scene. He further did not explain what duration of time he used to observe the thugs. PW1 said the thugs were not village mates hence could not have easily identified them.

I wonder why the trial Court Magistrate decided to believe PW1's evidence in respect of the third appellant while it disregarded it in relation to the 1st accused who was then acquitted.

Another evidence in respect of the visual identification is that of PW2. Like PW1's evidence, PW2 did not state what kind of lamp that its light assisted her to identify the appellants. She did not state where was the position of the lamp and its intensity that enabled her to identify the appellants. She did not also state if she knew the appellants before. Although PW2 testified that the incident took about one hour but in the absence of proper source of light she could not have properly identified the thugs. Also, while PW2

said she identified four thugs she only mentioned the appellants herein. She did not explain why she failed to mention the fourth person and why she did not identify the rest if she was able to identify the appellants whom she did not say she knew them before.

I agree with Mr Nchimbi that the conditions for proper visual identification did not meet the criterion enunciated in the famous case of **WAZIRI AMANI VR [1980] TLR 250** which was quoted with approval in the case he cited of **ISSA MGARA @ SHUKA VR, Criminal Appeal No. 37 of 2005, Court of Appeal of Tanzania at Mwanza, Unreported**. In Shuka's case (Supra) their Lordships had this to say in relation to light at the scene of crime;

> ***"In our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a***

pressure lamp or fluorescent tube. Hence the overriding need to give in sufficient details of the intensity of the light and the size of the area illuminated".

The quoted passage speak all in relation to the insufficient evidence in relation to the source of light PW1 and PW2 purportedly used to identify the appellants at the scene. Apparently, the 1st appellant was suspected since there is evidence from PW4 and PW5 which said that when he (the 1st appellant) answered the alarms like any other neighbour he said that someone had previously inquired from him if PW1 owned a gun and a mobile phone. He was thus arrested for the crime. There is no any other evidence against him.

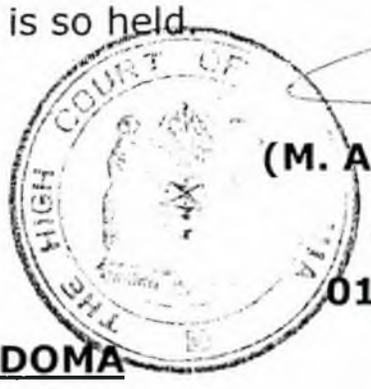
Finally, I find that PW1's evidence more suspect since he did not immediately mention the names of the assailants when he was asked to do so. PW3 testified that after the thugs had left PW1 was looked after but he did not mention anyone as a suspect and it was until morning hours when he mentioned the 1st and 2nd appellants and the then 4th accused person. Apparently, PW1's evidence in relation to identification of the two appellants was an afterthought

because he ought to have mentioned them immediately to the people he firstly met after the incident.

For the foregoing consequently, I find that the prosecution case at the trial was not proved beyond reasonable doubts and the appellants did not deserve to be convicted. I therefore allow the appeal, quash the conviction and set aside the sentence of thirty years imprisonment each appellant has been serving plus three strokes of a cane.

The appellants are forthwith ordered to be released from custody unless they are otherwise lawfully held.

It is so held.



(M. A. KWARIKO)

JUDGE

01/3/2010

AT DODOMA

01/3/2010

Appellant: All Present.

For Respondent: Mr Nchimbi State Attorney.

C/c: Ms E. Komba.