IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL APPEAL NUMBER 41 of 2003

(Originating from Criminal Case 1348/1999 in the Resident Magistrate's Court at Kisutu- Kibona-PDM)

1. SHABANI NASSORO @ TEJA... 1ST APPELLANT
2. KHALIFA ISSA MLOWELA... 2ND APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 28-07-2011
Date of Judgment: 07-09-2011

JUMA, J.:

As fourth and eleventh accused the Appellants SHABANI NASSORO @ TEJA and KHALIFA ISSA MLOWELA were jointly and together with nine (9) others charged with of robbery with violence contrary to sections 285 and 286 of the **Penal Code, Cap. 16 R.E. 2002**. While the rest of their co-accused persons were acquitted, the two appellants were both convicted on 29th March 2000 and each was sentenced to serve prison term of 30 years.

Briefly, the facts leading to the conviction of the appellant were that on 12 October 1999 at 03.30 hours at Mwananyamala in Kinondoni Municipality they together with others stole one television set valued at TZS 350,000/=, five pairs of shoes valued at TZS 30,000/=, two mobile phones valued at TZS 150,000/= and TZS 410,000/= cash money, all property of Fauz Majaliwa. It was further alleged that immediately before the stealing; they used actual violence to Fauz Majaliwa by using Panga in order to obtain the stolen property. The trial court found that only the two appellants were identified by the complainant to be the assailants who had broken the complainant's door by using a stone known in criminal circles as "Fatuma" and committed the offence of robbery with violence.

Being aggrieved by the decision of the Principal District Magistrate (Kibona-PDM), the appellants on 30 March 2000 applied for copy of the judgment of the trial court. It was almost three years later on 11th March 2003 when appellants received a copy of the judgment and they filed this appeal on 11th April 2003 challenging the conviction and the resulting 30 year prison sentence. The appeal, which was drawn and filed by the appellants without any assistance of learned counsel, is a

combination of grounds of grievance together with submissions. I was able to discern the following grounds of dissatisfaction with the decision of the trial court–

1. That the trial magistrate erred in laws and fact by relying on evidence of visual identification by PW1.
2. That the trial magistrate erred in law and fact for failing to observe the failure of the complainant to report the appellants to police immediately after the commission of the alleged offence; if it was true as claimed by the complainant that, the 1st appellant was complainant's neighbour.
3. The trial magistrate erred in law by relying on evidence of PW1 that 2nd appellant incurred the scar on the left hand as a result of injury he sustained while escaping from the scene of crime.
4. That the trial magistrate erred in law and fact to rely on evidence of a single witness (PW1) to prove the guilt of the appellants.
5. That the trial magistrate erred in law and fact by failing to call for the statement which PW1 made at the time of reporting the incident at the police.

6. That the trial magistrate erred in law and fact by failing to take into account the serious doubt which appellants had raised in their evidence.
7. That offence against the appellants was not proved.

At the hearing of the appeal on 28th July 2011, both appellants appeared in person to argue their own appeal. The two appellants basically invited this court to rely on the contents of their Memorandum of Appeal. Respondent Republic was represented by Mr. Mangowi the learned State Attorney who was assisted by Ms Katiga, a State Attorney Trainee.

In his submission, Mr. Mangowi opposed the appeal and supported the conviction of the two appellants and the sentence which was imposed by the trial court. The learned State Attorney refers to the portion of the evidence of the complainant PW1 who according to the learned State Attorney was able with the assistance of a tube light to see how the appellants arrived at his house, broke into it, beat him up and stole his property. Mr. Mangowi further referred to the evidence of the complainant who testified how the 2nd appellant injured his hand while escaping from the scene of crime. Mr. Mangowi

strongly believes that evidence of a single witness (PW1) was so strong that it was sufficient to sustain the conviction of the two appellants.

Apart from the evidence of PW1, Mr. Mangowi submitted that the evidence of PW3 was also available before the trial court. The learned State Attorney referred this Court to the evidence of Detective Constable Venance who testified for the prosecution as PW3 and told the trial court that Khalifa Issa Mlowela (2nd appellant) had confessed to him about his involvement and how the stolen items were sold. Reacting to the complaint by the appellants that the trial court should not have relied on evidence regarding the identification of the second appellant injury and resultant scar on his left hand, Mr. Mangowi pointed out that the trial magistrate did not rely on this evidence in his judgment. The learned State Attorney on similar vein submitted that the trial court did not use the Confession of the 2nd appellant which was admitted as exhibit P-1.

I have considered the submissions made by the two appellants and also by the learned State Attorney in light of both the

grounds of appeal and evidence on record of proceedings of the trial court.

From evidence on record and also from the applicable provisions of the law governing the offence of robbery with violence, prosecution had to prove not only the issue of visual identification but also the essential ingredients of the offence for which the appellants were charged with and convicted. Essential ingredients of the offence under sections 285 and 286 of the **Penal Code, Cap 16**, for which the prosecution was required the prosecution to prove beyond reasonable doubt were basically two. First, the prosecution had to prove that appellant stole one Television set valued at TZS 350,000/=, five pairs of shoes valued at TZS 30,000/=, two mobile phones valued at TZS 150,000/= and TZS 450,000/= in cash. Secondly, prosecution had to show that immediately before such stealing; appellants used actual violence on Fauz Majaliwa when they used a bush knife (panga) to obtain the stolen item.

There is no doubt in my mind that the record shows that that the trial magistrate relied on the evidence of visual identification to convict the two appellants. For purposes of this appeal the central issue calling for my very initial determination is whether

in the special circumstances of the time when the crime was allegedly committed, the 1st and 2nd appellants were properly identified to have been the members of the armed gang of bandits that on 12 October 1999 at 03.30 hours broke into the house of Fauz Majaliwa, beat him up and stole his property.

Testifying as PW1, the complainant stated that it was around 02.30 p.m. invaders came to his home and broke one of his tube lights. The complainant lit another tube light and managed to identify Shabani Nassoro @ Teja and Khalifa Issa Mlowela to be amongst the people who broke his house, beat him up and stole his property. PW1 and neighbours chased the invaders and were about to apprehend Khalifa Issa Mlowela (the 2nd appellant). The 2nd appellant jumped away but was hurt in his left hand leaving a scar. At the trial court, the 2nd appellant was made to show his left which indeed had the scar. According to Detective Sergeant Cyprian who testified as PW2, it was the complainant who later on 30 October 1999 the brought the 1st appellant to the police and identified him to have been amongst the people who broke into his house earlier on 12th October 1999.

With due respect, the trial magistrate did not adequately evaluate the evidence on visual identification. It was not enough to mention that a second tube-light was lit immediately after the first one had been destroyed by the invading assailants. There should have been more evidence on the adequacy, intensity and the positioning of the second tube light to facilitate proper visual identification at night, and how the tube-light provided sufficient light to enable the proper identification of the appellants. In the case of **Said Chaly Scania v R, Criminal Appeal No. 69 of 2005**, Court of Appeal of Tanzania was very clear that visual identification at night is by any standard an unfavourable circumstances requiring evidence which leaves no doubt that identification is correct and reliable. The Court of Appeal held:

> "We think that where a witness is testifying identifying another person in unfavorable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was

within view and also whether the person is familiar or a stranger.

There is evidence by the complainant (PW1) who testified how he and others chased the invaders and were about to arrest the 2nd appellant but 2nd appellant jumped and escaped, injuring his left hand in the process. It is not clear whether the chase also assisted the complainant to identify the appellants further and it is also not clear who assisted the complainant when he gave chase. In his evidence in chief the complainant said nothing about the question whether the subsequent arrest of the 2nd appellant was a result of his earlier visual identification when he was attacked and robbed of his property. Again, although PW2 D/Sgt Majaliwa testified that it was the complainant who on 30th October 1999 brought the 1st appellant to the police one wonders why the complainant himself could not testify on the circumstances of 1st appellant's arrest. If the complainant identified the 1st appellant because the appellant was complainant's neighbour, why neither Detective Sergeant Cyprian (PW2) nor Detective Constable Venance (PW3) testified anything about police looking for the 1st appellant immediately after the incident.

From the foregoing, I hereby find and hold that the identification evidence by the complainant fell far short of the requirements laid down by the Court of Appeal of Tanzania in **Waziri Amani V R (1980) TLR 250** in respect of identification. Apart from mentioning the source of light (second tube light), the complainant offered no evidence as to the intensity of tube light, the length of time the person being identified was within view of the complainant and whether the two appellants were familiar to the complainant because they were neighbours or they were strangers after all. Sufficiency of lighting could not be determined where the position of the second tube light was not even provided. Nowhere in his judgment does the trial magistrate warn himself of the dangers of visual identification at night.

I will not in my judgment address the ingredients constituting the offence robbery with violence for which the appellants were charged and convicted, as I have found that the evidence of visual identification of the appellants was both incorrect and unreliable. Consequently, and with due respect to the trial magistrate, I find that the conviction is unsafe and cannot be sustained.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that appellants be set at liberty unless they are held for another lawful purpose.

I.H. Juma,
JUDGE
07-09-2011

Delivered in presence of Shabani Nassoro @ Teja (1st Appellant), Khalifa Issa Mlowela (2nd Appellant) and Mr. Mangowi (State Attorney) for the Respondent.

I.H. Juma,
JUDGE
07-09-2011