

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CRIMINAL APPEAL NO 34 OF 2010.

*(Originating From Iramba Distric Court, Criminal Case No
71/2008).*

1. **MOSES MICHAEL** }
2. **MADUNDO JOSEPH** } **APPELLANTS**

VERSUS

THE REPUBLIC **RESPONDENT**

JUDGMENT

10/8/2011 & 14/9/2011

KWARIKO, J.

Briefly, the facts of she case at the trial from the prosecution can be recapitulated as follows: One **BAKARI HUSSEIN, PW1** and **MWAJUMA JUMA, PW3** were watchman and bar attendant respectively at London Guest House at Shelui village in Iramba District. On 20/10/2008 the two were on duty when at 23.00 hours five armed bandits invaded the Guest House, way laid PW1 and forced him to take them to room No. 8 where PW3 was sleeping. When the thugs got there two of them entered the room while one kept guard at the door and two of them were armed with gun and machete near the window. The

thugs who entered room No. 8 ambushed PW3, covered her mouth and took Tshs. 170,000/= from under the pillow which was that day's sales.

The facts further reveal that one No. **E 9937 PC JUMA** who had gone to the Guest House to buy some items was ambushed by the thugs outside but since he laid down in pretence he was left alone and the thugs went away. PW1 identified the two appellants through electric light while PW2 identified the 2nd appellant who had no any mask and PW3 identified the 1st appellant who was taller than the rest. Also PW1 and PW3 identified the appellants at Police Station on an identification parade.

Also, upon arrest the 2nd appellant confessed the allegations and his caution statement was written by **No. E 9023 Sgt WAZIRI** and the same was admitted in court as exhibit P1.

Armed with the foregoing the appellants and four others were arrested and charged with four counts of Armed Robbery c/s 287A of the Penal Code Cap. 16 R.E. 2002 as amended by Act No. 4 of 2004. It was alleged by the prosecution that on the 20th day of October, 2008 at about 23.00 hours at London Guest House in Shelui Village within Iramba District in Singida Region the appellants and four others jointly and together did steal a total of Tshs. 2,289,000/= and two mobile phones valued at Tshs. 260,000/= properties of ATHUMAN SALEHE, ROBERT BRYSON, MWAJUMA JUMA and MUSSA AJUBI and threatened these people with bush knife in order to obtain and retain the said properties.

The appellants and others then, 1st, 2nd, 3rd, and 5th accused persons denied the charge and their defence said they were arrested at their respective homes at different days on allegations of firearms possession. The 1st appellant said was identified at an identification parade but there was no any witness to that effect.

At the end of the trial the court found that the appellants herein were sufficiently identified at the scene by PW1, PW2 and PW3 as there was electricity. That, also the two were identified by the same witnesses during an identification parade. That the appellants' alibis were not proved. The two were thus found guilty, convicted and sentenced to thirty (30) years imprisonment with corporal punishment of twelve (12) strokes of a cane each. The rest accused persons were acquitted.

Having been aggrieved by the trial court's decision the two appellants brought this appeal each with his grounds of appeal. The appellants' grounds of appeal mainly challenge the prosecution evidence in relation to their identification as being weak.

During the hearing of the appeal the appellants did not have much to say but only implored this court to allow their appeal. On the other hand Mr. Nchimbi learned State Attorney argued this appeal on behalf of the respondent, Republic and he did not oppose the same. The reasons Mr. Nchimbi gave did not differ materially with the appellants' complaints. I will soon refer to these submissions.

This court agrees with both parties that the main issue for consideration at the trial and before this court is identification of the appellants at the scene. As rightly submitted by Mr. Nchimbi learned State Attorney, the three witnesses PW1, PW2, and PW3 only said that they identified the appellants through electric light at the scene. The witnesses did not state if they knew the appellants before which could have been easy for identification. Also, they did not mention the distance between them and the thugs, the duration of time taken to observe the thugs and the intensity of light. It is not uncommon to find electric tubes with deam light in Bars hence the witnesses ought to have explained the kind of light emitted from the tube lights. Thus, the guidelines for proper visual identification as enunciated in the Court of Appeal of Tanzania case of *WAZIRI AMANI VR [1980] TLR 250* were not met in this case.


Further, there is no evidence to show that the witnesses ever mentioned the appellants before the relevant authorities soon after the alleged identification. They even did not describe the appearance of not only the appellants but the others whom they did not identify. For the foregoing and for identification I subscribe myself to the decision of the Court of Appeal of Tanzania in the case Mr. Nchimbi had cited of *DEO AMOS VR, Criminal Appeal No. 286 of 2007 at Arusha, [Unreported]*.

Also, the witnesses, PW1 and PW3 testified that they identified the appellants at an identification parade but no evidence was tendered by the police to show that there were ever such exercise at the station. Identification parade register was not tended in court to prove this exercise (see *RV MWANGO [1963], 3 E.A.C.A 29*).

Further, the trial court erred in law when it admitted the 2nd appellant's caution statement in evidence without making any inquiry of its admissibility because the appellant had objected the same. Thus, this statement was not good evidence and it is hereby expunged from the record. Finally, the prosecution also did not bring in court the persons alleged to have been robbed money and mobile phones.

Consequently, this court finds that the prosecution evidence against the appellants was not proved to the standard required in law. i.e. proof beyond reasonable doubts. I therefore allow the appellants' appeal, quash their conviction and set aside the sentence.

The appellants are to be set free henceforth unless otherwise lawfully held. Order accordingly.



(M.A. KWARIKO)

JUDGE

14/9/2011