

IN THE HIGH COURT OF TANZANIA
AT IRINGA

APPELLATE JURISDICTION
(Iringa Registry)

(DC) CRIMINAL APPEAL NO. 13 OF 2012
(Originating from Criminal Case No. 509 of 2009
of the District Court of Iringa District
at Iringa
Before C.P. Singano – R.M.)

ISMAIL MAYESE APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Date of last Order 17.7.2012
Date of Judgement 25.9.2012)

JUDGMENT

KIHIO, J.

The appellant, Ismail Mayese was charged with and convicted of Robbery with violence contrary to Sections 285 and 286 of the Penal Code, Cap. 16 R.E. 2002 in the District Court of Iringa. He was sentenced to fifteen (15) years imprisonment. He was further ordered to compensate the complainant a sum of T.Shs.500,000/=.

Dissatisfied with the conviction and sentence imposed on him, the appellant lodged this appeal.

It was alleged in the trial court that the appellant on 26th November, 2009 at about 20.00 hours at Kiwele village within Iringa Rural district and region of Iringa did steal cash money T.Shs.1,173,000/= and one radio make Rising 4 band valued at T.Shs.35,000/=, all valued at T.Shs.1,208,000/= the property of one Gwerino s/o Kimena and immediately before or after such stealing did use actual violence to the said Gwerino s/o Kimena by using hands and stones to obtain the said properties.

Gwerino Kimena (PW.1) gave testimony in the trial court that on 26.11.2009 at 20.00 hours his house was invaded by robbers who had firearm and fired a gun outside his (PW.1's) house. He further gave testimony that the robbers who were many broke the window of one of the rooms in his house and he and the robbers struggled on the firearm they (robbers) were holding but he did not identify any of the robbers. He told the trial court that the robbers managed to steal his radio - Rising 4 band type and cash T.Shs.1,173,000/=. He further told the trial court that the appellant came at his (PW.1's) house at 19.30 hours to collect his (appellant's) maize he had bought from him (PW.1) two weeks ago but he (appellant) did not take them on that day. He said that PW.2 told him (PW.1) that he (PW.2) identified the appellant among the gang of

seven people at the Scene of crime.

Hillary Kibabala (PW.2) told the trial court that on 26.11.2009 when he went to fetch water he saw robbers behind PW.1's house and the said robbers who were armed with firearm invaded PW.1's house. He further told the trial court that he identified the appellant among the robbers at the Scene of crime because he had seen him in the afternoon drinking beer. He further told the trial court that the appellant beat him with a club and he managed to identify him with the aid of moonlight and there was a short distance between him (PW.2) and the appellant.

Upendo Ngala (PW.3), PW.1's wife, told the trial court that on 26.11.2009 the appellant came at their house to collect his (appellant's) maize he had bought from them (PW.3 and PW.1) two weeks before that date. She further told the trial court that she left her husband, houseboy and the appellant at her home when she went to their neighbour whose house was at a distance of 400 metres to take a local brew sieve commonly known as "*Kung'uto*". She explained that when she returned home she found that their Rising type radio and cash T.Shs. 1,323,000/= had been stolen. She further explained that on 26.11.2009 the appellant told them that he would take his maize on the following day and his (appellant's) wives came at their house on the following day to take the maize.

The appellant denied any involvement in the commission of robbery with violence. He told the trial court that he went to PW.1's house at 18.00 hours because he had bought maize at the said house and PW.1 told him (appellant) that he (appellant) should go to collect the maize on the following day. He further told the trial court that he left PW.1's house for home at around 19.00 hours. He explained that he went to PW.1's house on the following day for his (appellant's) maize and PW.1 informed him that he (PW.1) had been attacked during night.

The trial court found that the guilt of the appellant was proved beyond reasonable doubt.

The appellant filed a Petition of Appeal containing three grounds of appeal. The three grounds of appeal are:-

1. That the District Court erred in law and facts by convicting and sentencing him while there was no evidence of visual identification during the commission of crime.
2. That the District Court erred in law and facts when it relied on evidence which was purely suspicious.
3. That the District Court erred in law and facts by

convicting him while the whole matter was not investigated and if investigated it was poor investigation.

The appellant is represented by Mr. Mmbando, learned Counsel while the respondent, Republic is represented by Mr. Maganda, learned State Attorney.

Mr. Mmbando decided to consolidate and argue the grounds of appeal together. He submitted that PW.2 did not give sufficient evidence of identification of the appellant. He further submitted that PW.2 told the trial court that he (PW.2) and the appellant were at a short distance when he (PW.2) identified him (appellant) at the Scene of crime but he (PW.2) did not tell the trial court the distance between him (PW.2) and the appellant. He contended that there are a lot of authorities which held that correct identification is very important in visual identification and he referred this court to the cases of **Raymond Francis V. Republic** (1994) T.L.R. 103 and **Waziri Amani V. Republic** (1980) T.L.R. 250. He further contended that the evidence against the appellant was doubtful and so PW.2's evidence of identification against the appellant was not correct. He argued that the appellant was arrested eleven days after the robbery with violence incident, that is on 7.12.2009. He further argued that the appellant went to PW.1's house on 28.11.2009 to collect maize and so if the appellant was identified at the Scene of crime he would

have been arrested before 28.11.2009. He was of the view that the guilt of the appellant was not proved beyond reasonable doubt and he was convicted on suspicion.

Mr. Maganda does not support the conviction and sentence. He submitted that the evidence in the trial court raises doubt on the appellant's conviction. He further submitted that PW.2 did not give evidence to show the distance between him and the appellant when the appellant hit him (PW.2) with a club and so there is doubt if the appellant was correctly identified by PW.2 at the Scene of crime. He referred this court to the case of **Cosmas Alfonsi V. Republic** – C.A.T. Criminal Appeal No. 241 of 2007, Arusha registry (unreported). He contended that there was no evidence in the trial court that the appellant fled the village and so there was no justification as to why the appellant was not arrested before 28.11.2009. He further contended that the Prosecution side's evidence in the trial court was not sufficient to fetch a conviction against the appellant.

The crucial issue for determination in this appeal is whether the appellant was correctly identified at the Scene of crime or not.

On the prosecution side's evidence, the robbery incident took place in the night at 20.00 hours. Thus, the circumstances were not favourable for correct identification.

In the case of **Waziri Amani V. Republic** (1980) T.L.R. 250 referred to this court by Mr. Mmbando, the Court of Appeal held that:-

“It is now a principle that evidence of visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely water tight.”

Mr. Maganda referred this court to the case of **Cosmas Alfonsi V. Republic** – C.A.T. Criminal Appeal No. 241 of 2007, Arusha registry (unreported) where the Court of Appeal of Tanzania held that:-

“It is trite law that where a witness is testifying about identifying another person in unfavourable 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 unmistakable identification like proximity to the person being identified, the source of light, its intensity etc.”

Also see the case of **Saidi Chaly Scania V. Republic**, C.A.T. Criminal Appeal No. 69 of 2005 (unreported).

In the present case, Mr. Mmbando rightly submitted and supported by Mr. Maganda, learned State attorney that PW.2, the identifying witness, did not give evidence to show the distance between him (PW.2) and the appellant at the Scene of crime when he (PW.2) allegedly identified him (appellant).

As the distance between PW.2, the identifying witness and the appellant at the Scene of crime was not established the evidence against the appellant was doubtful and so PW.2's identification evidence against the appellant was not correct. I, therefore, agree with the submission of both Mr. Mmbando and Mr. Maganda in this regard.

The Charge Sheet in the trial court alleged that the appellant did use actual violence to Gwerino s/o Kimena (PW.1) by using hands and stones to obtain the said properties whereas the evidence of PW.1 in the trial court showed that the appellant and the other robbers had a firearm and fired a gun at the Scene of crime before they stole his (PW.1's) properties. Surely, the contradictions between the Charge Sheet and the evidence of PW.1 create doubt on the prosecution case.

Mr. Mmbando correctly submitted that the appellant's guilt was not proved beyond reasonable doubt.

From the foregoing reasons, I allow the appeal, quash the

conviction and set aside the sentence imposed on the appellant.

I order that the appellant be released from jail forthwith unless he is held there on other lawful cause.


S.S.S. KIHIO

JUDGE

25.9.2012

Judgement delivered in the presence of the appellant and Miss Ngilangwa, learned State Attorney.


S.S.S. KIHIO

JUDGE

25.9.2012