

IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 33 OF 2013
(Appeal from the decision of the District Court of Mpanda in
Original Criminal Case No. 151 of 2012)

EXAUD NYALI ZAKAYO ANGOUFON	} APPELLANTS
Versus		
THE REPUBLIC	RESPONDENT

9th & 16th January, 2014

JUDGMENT

MWAMBEGELE, J.:

The appellants Exaud Nyali and Zakayo Angoufon were jointly charged in the District Court of Mpanda with a charge of armed robbery c/s 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. This provision was added in the Penal Code by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2004 - Act No. 4 of 2004. They were convicted of a lesser offence of attempted armed robbery and sentenced to a fifteen year jail term each. Aggrieved, they lodged a joint appeal in this court with three grounds of complaints.

complaint that the identification of the appellants was not watertight to sustain a conviction and Ms Lugongo, learned State Attorney for the respondent Republic argued the three grounds as such. She submitted that the evidence of identification in respect of the appellants was watertight to found the convictions of the appellants in that there was enough light illuminated by a Chinese lamp by which the appellants who were known to the identifying witnesses were adequately identified. To buttress her argument, she cited and relied on **Waziri Amani Vs R** [1980] TLR 250; an oft-cited decision of the Court of Appeal on visual identification.

However, in respect of the second appellant; Zakayo Angoufon, Ms. Lugongo was of the view that his trial was a nullity in that the charge was not read over to him and a plea taken. What actually happened is that the second appellant was arrested and joined with the first appellant after the hearing of the case against the first appellant had commenced and Vincent Kasoma PW1, who had already testified before the second appellant was arrested, had to be recalled to testify after he was joined. After being joined, the trial proceeded against both without a Preliminary Hearing (PH) being conducted in respect of the second appellant. Neither was the charge read over to him and a plea taken. Ms Lugongo took the view that failure to take the second appellant's plea was a fatal irregularity which vitiated the whole trial and the consequent judgment and sentence against him. On this argument, she cited and supplied **Daudi Mapumba and**

Joel Silomba Vs R Consolidated Criminal Appeals No. 119 and 120 of 2000
(CAT Mbeya Unreported).

Indeed, this appeal stands or falls on, mainly, the evidence of visual identification. The offence was committed deep in the night and the identifying witnesses – Vincent Kasoma PW1 and his wife Salome Bryson PW2 – claimed to have identified the culprits with the help of the light in the room which was illuminated by a three battery Chinese lamp. In his well written judgment, the learned trial resident magistrate, quite correctly, directed himself to pertinent questions in this case and concluded that the appellants were properly identified. Respectfully, I agree with both the learned State Attorney and the learned trial resident magistrate in his findings that the complainants – Vincent Kasoma PW1 and his wife Salome Bryson PW2 – were able to see the faces of those robbers pretty well. According to them, the struggle between them and the appellants took about ten good minutes and the house was well illuminated by a three battery Chinese lamp. I hold the view that the circumstances prevailing at the time of the robbery were favourable for a positive and correct identification of those robbers by the complainants.

And as if that is not enough, the complainants mentioned their names during the commotion. PW1 is recorded to have said “Exaud why are you killing me?” while PW2 is recorded as saying “Zakayo why are you doing this to us?” and on top of it all, the appellants mentioned their names between themselves.