

TANZANIA / JUDGMENT

## 20100614 TZCA Tabora2

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IN THE COURT OF APPEAL OF TANZANIA (CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.) CRIMINAL APPEAL NOs. 465 & 467 OF 2007

1. MAGWISHA MZEEL\_ i
2. SHIJA PAULO \_J ..... ;..... APPELLANTS VERSUS THE  
REPUBLIC ..... ~..... RESPONDENT ' (Appeal from the Judgment  
of the High Court of Tanzania at Tabora) ' (M:dray, J.) I Dated the 4 th day of April, 2007 in  
Criminal Appeal No. 138 cf. 139 of 2004 ' JUDGMENT OF THE COURT 11 & 15 JUNE, 2010  
RUTAKANGWA, J.A.: I This is a second appeal. In Criminal Case No. 282 of 2003 in I the  
District Court of Nzega District, the two appellants were charged with two counts. These  
were Burglary and Armed Robbery, contrary to sections 294(1) and 285 and 286 respectively  
of the Penal Code, Cap. 16. They were convicted on both counts and sentenced to I  
concurrent jail terms of five and thirty years respectively. I I I I Aggrieved by the  
convictions and sentences, the appellants lodged separate appeals to the High Court at  
Tabora. The two th . appeals were consolidated and heard together .. On 4 April, 2007, the  
High Court (Mziray, J.) dismissed their appeal in its entirety. Undaunted, the appellants have  
appealed to this .Court. Each appellant lodged his own appeal, but the two have been  
consolidated. The appellants, for ease of reference in this judgment, shall be referred to as  
1st appellant in respect of Magwisha Mzee and 2nd appellant in respect of Shija Paulo. · The  
memorandum of appeal of the 1st appellant lists five grounds of appeal. These are:- One, he  
was wrongly convicted because the people to whom the victim of the alleged offences  
mentioned his name did not testify. Two, the complainant could not have identified him by  
aid of light from a coloured tubelight. Three, the conditions at the scene of the crime were  
unfavourable for an unmistakable visual identification. Four, the complainant did not give 2  
any description of his attire at the scene of the crime or any special marks on his body. Five,  
he was not found in possession of any property stolen as a result of the robbery. On his part,  
the 2nd appellant has come to us with three grievances. One, the case against him was not  
proved beyond reasonable doubt. Two, the complainant ought not to have been believed as  
she never gave his description to any person in authority at the earliest opportunity, and if  
she did, such people ought to have testified at his trial. Three, the visual identification  
evidence connecting him with the two offences lacked cogency. Before canvassing these  
grounds of appeal and the respondent 1 Republic s to them, it will be refreshing to state

briefly the facts upon which the prosecution and convictions of the appellants were premised. The victim of the undisputed burglary and armed robbery was one Ashura Kajagu who testified as PW1 at the trial of the appellants. PW1 Ashura is a married mother. One of her children is Angelina Kajagu, who testified as PW2. PW2 Kajagu is married but her residence is close to that of PW1 Ashura. On 18 December, 2003, PW1 Ashura's husband was on safari. Before she and her children went to bed on the night of 18/12 December, 2003, she had left the house's outside electric security lights on. At around 02.00hrs on 18 December, 2003, PW3 Ashura was rudely awakened from her sleep by bandits who had gained entry into the house by breaking open the rear door with a big stone. She switched on the electric lights in the bedroom and corridor and then raised an alarm. No sooner had she done so than two bandits burst into the room. One of them hit and injured her on the head with a panga. The two bandits then took a Panasonic Radio cassette, a 'TV Deel', a sewing machine head, a 10-band radio cassette and cash; Tsh.15,000/= and disappeared. The total value of the stolen properties was Tsh520,000/=. 4 After the departure of the bandits many people gathered at PW1 Ashura's residence. PW2 Angelina and one Joseph were among them. PW1 Ashura informed the gathering that she had managed to recognize the two bandits. She named the appellants, who were her neighbours, as the bandits. The appellants were subsequently arrested and charged. The two appellants denied committing the two offences. They both claimed to have been arrested on different dates for reasons not disclosed to them, and arraigned for the two offences which they were eventually convicted of. In his judgment, the learned trial Senior District Magistrate, correctly found himself being faced with only one issue to resolve, the burglary and robbery incident having not been disputed by the appellants. The issue was the identities of the bandits. He easily resolved the issue by holding that PW1 Ashura had positively identified the two appellants as the robbers. He found support for PW1 Ashura's evidence from PW2 Angelina who had also testified to have seen them when she peeped through the window of their house. Before upholding the decision of the trial court the learned first appellate judge, after correctly directing himself on the principle of law governing visual identification evidence, said:- "... the issue is whether the conditions were favourable for a correct identification ... From the impeccable evidence of PW1 and PW2 on that day there was bright moonlight, lights inside and security lights of the house were on. Both witnesses had seen the two appellants before the two being their neighbours. PW1 observed the two appellants at a close distance while the two were looting items from the house. Also PW1 and PW2 mentioned immediately the names of the two appellants to the people who gathered in response of the alarm. Such conditions in my view were favourable for a position 6 •• identification and it expelled all possibilities of mistaken identity." [Emphasis is ours]. On the strength of this reasoning, the learned first appellate dismissed the appellants' appeal. Before us, the appellants appeared in person and were unrepresented. They adopted their respective grounds of appeal and said nothing in elaboration thereof. For the respondent Republic, Mr. Prudens Rweyongeza, learned Senior State Attorney, appeared. - He supported the appellants' appeal and urged us to quash their convictions and sentences and set them aside. Arguing in support of the appeal, Mr. Rweyongeza was of the firm view that the prosecution case rested on an unfirm

ground, that is the bare assertions of PW1 Ashura and PW2 Angelina that they recognized the two appellants at the scene of the crime. He was of the opinion, that if these two witnesses had actually identified the appellants, who are admittedly their neighbours and mentioned them to the people who responded to the alarm, it would not have taken a week to arrest the 1st appellant and about one and a half months to arrest the 2nd respondent. To buttress this argument he stressed that no evidence was given to show that efforts were made to look for the appellants at their houses that night or subsequently. No evidence was led to prove that the appellants took to flight after this incident, he stressed. As no explanation was given to account for the inordinate delay in arresting the appellants, and it is not known why they were arrested and who arrested them, then it can be safely assumed that they were never suspects in the first instance, he concluded. He referred us to the decision of this Court in the case of JUMA SHABANI @ JUMA v. R, Criminal Appeal No. 168 of 2004 (unreported) to support his arguments. As already shown above, the learned first appellate judge dismissed the appellants' appeal because he found the visual identification evidence of Ashura (PW1) and Angelina (PW2) to be "impeccable." He predicated this finding on these three basic facts:-

- (a) The scene of the crime was illuminated by electric lights and moonlight;
- (b) The appellants were known to the two witnesses prior to the incident, and (c) PW1 mentioned the appellants to the people who responded to the alarm. The pertinent question which has greatly taxed our minds is whether these factors alone lent assurance to an unmitigated identification, leave alone eliminating the possibility of giving false evidence. Our considered answer to this question, is respectfully in the negative. These are our reasons. Both Ashura (PW1) and Angelina (PW2) claimed to have identified the appellants at the scene of the crime. We have found it difficult to accept the identification evidence of Angelina at its face value. This is because she was not physically present at the scene of the crime. She was in another house. The distance between the two houses is not disclosed in the evidence. All that she told the trial court is that she saw the two appellants outside their house while peeping through the window as there was bright moonlight and electric light. She did not indicate for how long she so peeped. Was it a fleeting glimpse or a sustained one? Angelina (PW2) testified that she saw the 1st appellant and he "was holding a torch and a weapon." The nagging questions are: if there was bright moonlight outside, why did the appellants have to carry a torch with them? If the area was well illuminated, why did she not recognize the type of 'weapon' the 1st appellant was carrying? From her evidence it is clear that, she and her family were not under any threat from the bandits. Why did she not raise an alarm to alert other people. These unanswered pertinent questions which were not considered by two courts below whittled away the cogency of PW2 Angelina's evidence. Coming to PW1 Ashura, we are of the settled view that her evidence amounts to bare assertions. This Court has consistently held that when it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. Bare assertions that 'there was light', as

was in this case, would not suffice. See, for example, KULWA s/o MAKWAJAPE & TWO OTHERS, v. R, Criminal Appeal No. 35 of 2005, SAIDI CHALLY SCANIA v. R, Criminal appeal No. 69 of 2005, ISSA MGARA @ SHUKA v. R, Criminal Appeal No. 37 of 2005, LUBELEJE MAVINA AND ANOTHER v. R, Criminal Appeal No. 172 of 2000 (all unreported). In KULWA s/o MAKWAJAPE (supra) this Court said:- "... the intensity and illumination of the lamp is important so that a clear picture is given of the condition in which the appellants were identified." In the case of ISSA s/o MGARA@ SHUKA (supra), we said: 11 "We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows as was the case here, mistakes in recognition of close relatives and friends are often made." In the case under scrutiny, PW1 was rudely awakened from her sleep. She had hardly put on the lights in her bedroom, before armed bandits burst into her room, cut her with a panga and made away with properties. These were undeniably unfavourable circumstances. Furthermore, the evidence of PW1 Ashura is starkly silent on the length of time she had the bandits under observation and the size and set up of her bedroom. Under the circumstances the evidence of PW1 Ashura ought to have been approached with great circumspection. . ! 12 It was claimed by PW1 Ashura and she was believed on this by the two courts below, that many people responded to her alarm. She even went further and mentioned one Joseph who allegedly gave chase to the bandits. As we have already shown, apart from her daughter (PW2) no other independent witness testified in the case. To us, this is a cause for genuine concern and suspicion. Who were these many people who were not even mentioned by name or titles by PW1 and PW2, except for "Joseph"? Why, then, did this Joseph not testify? If the two witnesses had indeed recognised the two appellants among the six bandits, as PW2 put the number, and had named them immediately, the appellants would have been traced and arrested immediately. But this was not the case. In the case of ISSA MGARA @ SHUKA (supra) the appellant was arrested four days after the robbery. There was no evidence to indicate that the appellant had escaped or was hiding himself. The Court held that those facts went to cast grave doubts on the credibility of the identifying witnesses. The Court referred to a 13 - number of earlier decided cases on this issue .. One such case was 1: , : , JUMA SHABAN @ JUMA (supra) cited to us by Mr. Rweyongeza. 1: It is trite law that evidence of visual identification is of the I: 1: •! I weakest character and most unreliable which should be acted upon cautiously when the court is satisfied that the evidence is watertight I . II 1, and that all possibilities of mistake!n identity or even fabrication are eliminated. See, for instance, w4z1RI AMANI V R. [1980] T.L.R. 11 . 250, NHEMBO NDALU V R., Criminal Appeal No. 33 of 2005 I . (unreported). It is equally settled law that in a case depending for its !, determination essentially on identification, be of a single witness or more than one witness, that evidence must be watertight, even if it is evidence of recognition, as was the case here. See, HASSAN JUMA I 11 KANENYERA v. R (1992) T.L.R. and MENGI PAULO SAMWELI ; !1 LUHANGA & ANOTHER v. R, Criminal Appeal No. 222 of 2006 I (unreported). ' !' i Ii 1! 11 We are alive to the fact that:: the duty to prove the accused's

- ! guilt in cases of this nature lies always on the prosecution. Applying
- . I 14 the above settled principles of law to the facts of this case, we are settled in our minds that in spite of the failure by the 1st appellant to cross-examine PW1, the identification evidence of PW1 Ashura and PW~ Angelina left much to be desired. It was not watertight. We accordingly allow this appeal by quashing and setting aside the convictions of the appellants and the prison sentences imposed on them. We order the immediate release from prison of the appellants unless they are otherwise lawfully held. DATED at TABORA this 14th day of June, 2010. E.M.K. RUTAKANGWA JUSTICE OF APPEAL M.S. MBAROUK JUSTICE OF APPEAL S.A. MASSATI JUSTICE OF APPEAL I certify that this is a true copy of the original. ~ ; \ " M.A. ~11'--.\_ DEPUTY REGI TRA~ ~ COURT OF APPEAL I ~ 15

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